

## BUSINESS & FACILITIES UPDATE

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### **Challenges to Lease-Leaseback Agreements Continue in the Courts of Appeal – Latest Decision Affirms Exemption from Competitive Bidding Requirements.**

In the latest of a line of cases challenging the legality of lease-leaseback arrangements, the First District Court of Appeal has affirmed school districts' use of lease-leaseback agreements in contracting for construction or improvement of school facilities. The Mount Diablo Unified School District entered into a lease-leaseback agreement with Taber Construction for the modernization of five of its elementary schools and three of its middle schools. The agreement included: (1) a master site lease (leasing portions of the eight school sites from the District to Taber) and (2) a master facilities lease (leasing the property from Taber back to the District). Under the agreement, Taber would lease the property from the District for \$1 and then Taber would lease the property back to the District. Payment of the leaseback fee cover the cost of the construction project and title to the property vests in the District at the end of the lease term.

An advocacy group, California Taxpayers Action Network ("CTPA"), filed an action to invalidate the lease-leaseback agreement. CTPA argued, among other things, that the agreement was a "sham lease" and that a public bidding process is required for school construction projects. The District and Taber argued that lease-leaseback agreements are exempt from the competitive bidding process under Education Code section 17406. Education Code section 17406 ("Section 17406") states that school districts may enter into a lease-leaseback arrangement "without advertising for bids."

The trial court agreed with the District and Taber and dismissed the lawsuit. CTPA appealed the trial court's decision. The Court of Appeal, however, determined that the trial court properly dismissed CTPA's claim that competitive bidding was required to enter into the lease-leaseback agreement. The Court agreed that the "plain language" of Section 17406 excludes lease-leaseback transactions from competitive bidding requirements. In doing so, the Court rejected the analysis in *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261. In *Davis*, the Fifth District Court of Appeal held that only "genuine" leases qualify for exemption from the competitive bid process under Section 17406. According to *Davis*, a "genuine" lease includes contractor-financing components and requires the school district to actually use the premises as a tenant during the term of the lease.

As its sister Courts of Appeal did in *McGee v. Balfour Beatty Construction, LLC* (2016) 247 Cal.App.4th 235 and *Los Alamitos Unified School District v. Howard Contracting, Inc.* (2014)

229 Cal.App.4th 1222, the First District also declined to adopt the *Davis* analysis. “We decline to follow *Davis*, which went far beyond the language of section 17406 in adopting ill-defined additional factors to determine whether the lease-leaseback portion of a lease-leaseback agreement is a ‘true’ lease and imposing a requirement that the contractor provide financing for the project.”

*California Taxpayers Action Network v. Taber Construction, Inc.* (2017) \_\_Cal.App.5th \_\_

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