

CLIENT NEWS BRIEF

Appeals Court Says Bidding Not Required for Lease-Leaseback Contract

Another California appellate court has ruled that a lease-leaseback (LLB) contract made without competitive bidding is legally enforceable.

In *California Taxpayers Action Network v. Taber Construction, Inc. et al.* (May 2, 2017, No. A145078) [nonpub. opn.] (*Taber*), the First District Court of Appeal agreed with *McGee v. Balfour Beatty Construction, LLC* (2016) 247 Cal.App.4th 235, finding that competitive bidding is not required for an LLB contract. Although the appellate court elected not to publish its decision, meaning that it cannot be cited by other courts as legal precedent, it represents the second appellate court ruling that has specifically rejected the lease-leaseback holding of *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, which found that competitive bidding is required for an LLB contract unless additional non-statutory contract terms are included. Lozano Smith filed a brief with the *Taber* court on behalf of the California Association of School Business Officials (CASBO).

As in both *Davis* and *McGee*, the plaintiffs in *Taber* alleged that the LLB contract documents were not genuine leases, but instead were a “sham lease” designed to avoid competitive bidding. Noting that similar arguments had been addressed in both *Davis* and *McGee*, the *Taber* court declined to follow *Davis*, which had gone “far beyond the language of [Education Code] section 17406 in adopting ill-defined additional factors to determine whether the leaseback portion of a [LLB] agreement is a ‘true-lease’ and imposing a requirement that the contractor provide financing for the project.” The *Taber* court agreed with *McGee* instead, finding that the plain language of the statute only requires three things: (1) the real property belongs to the school district; (2) the lease is for the purposes of construction; and (3) title shall vest in the district at the end of the lease term. The *Taber* court declined to “read additional requirements into section 17406” and “rewrite the statute.”

Taber also addressed allegations that a conflict of interest under Government Code section 1090 existed, an issue that was analyzed in both *Davis* and *McGee*. Finding *Davis* and *McGee* to be controlling, the *Taber* court similarly held that an individual taxpayer does have standing to bring a cause of action under section 1090, and further, section 1090 “encompasses consultants hired by the local government.” The *Taber* court also held that plaintiff’s allegations that the LLB contractor acted as an officer or employee of the school district when performing pre-construction services were sufficient to let just that issue proceed to trial.

Because the *Taber* court elected not to publish the decision, it cannot be cited by other courts as legal precedent. This means that *Davis* remains the law in the Fifth District, and *McGee* remains the law in the Second District, and all appellate districts outside those districts have the option of applying either *Davis* or *McGee*. (For further discussion of the *Davis* and *McGee* decisions, see [2015 Client News Brief No. 30](#), [2016 Client News Brief No. 25](#) and [2016 Client News Brief No. 29](#).) One or more parties may also request

May 2017
Number 23



Harold M. Freiman
Partner
Walnut Creek Office
hfreiman@lozanosmith.com



Travis E. Cochran
Associate
Monterey Office
tcochran@lozanosmith.com



As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

CLIENT NEWS BRIEF

May 2017
Number 23

reconsideration, publication or Supreme Court review of the *Taber* decision, which may also affect its significance.

In 2016, the Legislature amended the LLB statute to require school districts to use a comprehensive “best value” selection process for selecting an LLB contractor, which limits a school district’s discretion in selecting the LLB contractor. Section 17406 now expressly permits a school district to award a single LLB contract that includes preconstruction services, thus limiting conflict of interest issues under *Davis* and *McGee* resulting from the award of multiple contracts to the same contractor. It also provides protection for contractors that entered into an LLB contract prior to July 1, 2015, and allows for recovery of project costs if a court declares the contract award invalid due to a lack of competitive bidding. (See [2016 Client News Brief No. 63](#).)

If you have any questions about the legality of LLB and which appellate court decision may apply to your project, or about the new LLB contractor selection procedures in general, please contact the authors of this Client News Brief or an attorney at one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.