

# CLIENT NEWS BRIEF

## Legality of “Lease-Leaseback” Construction Delivery Method is Confirmed by Appellate Court

Addressing a long-simmering issue, a California appellate court decision has confirmed that a school district need not comply with competitive bidding when constructing facilities under a “lease-leaseback” arrangement. This ruling confirms that recent challenges to lease-leaseback agreements are without merit.

Lease-leaseback is a construction delivery method authorized by Education Code section 17406, which allows a school board “without advertising for bids” to lease “for a minimum rental of one dollar (\$1) a year, to any person, firm, or corporation any real property that belongs to the district” if the arrangement also provides that the party to the lease will build on that property, with title ultimately vesting in the district. Typically, the entity leasing the site from the school district then leases the building they are constructing back to the district, leading to the common name “lease-leaseback.” This method offers an alternative to competitive bidding, and provides school districts with flexibility. Although much depends on the particular arrangement and the contractor who is selected, lease-leaseback agreements can potentially allow for more of a coordinated and cooperative relationship between a school district and a contractor.

The California Attorney General had previously considered the legality of this type of arrangement based on the predecessor statute to Education Code section 17406, and over forty years ago concluded that the Legislature meant what it said: the law does not require competitive bidding if the appropriate steps are taken to enter into the lease-leaseback. Since the Attorney General issued his opinion in 1973, challenges have occasionally been raised to lease-leaseback agreements, including two failed attempts to repeal the law. In recent years, several lawsuits have been filed around the state challenging lease-leaseback agreements. The trial courts have consistently ruled in favor of the school districts and upheld lease-leaseback, including in at least one validation action brought by Lozano Smith for a school district client. Until now, however, there was no published appellate court decision that would be binding on the issue statewide.

In *Los Alamitos Unified School District v. Howard Contracting, Inc.* (September 17, 2014) \_\_ Cal.App.4th \_\_ 2014 WL 4638855, the school district filed an action in Superior Court to validate its lease-leaseback agreement for improvements to existing athletic facilities, which was entered into without competitive bidding. A contractor challenged the district’s position, but the district prevailed at the trial court level.

The contractor appealed the decision, and the appellate court found the lease-leaseback agreement in question to be lawful. The court rejected the contractor’s arguments that the lease-leaseback process was “unconstitutional, unconscionable, illegal, and a theft of public funds.” The court relied on the plain language of the statute, on the Attorney General’s 1973 opinion, and on the fact that prior legislative efforts to amend lease-leaseback to require competitive bidding had been vetoed. The court also rejected the contractor’s

September 2014  
Number 62



Harold M. Freiman  
Partner and Technology & Innovation  
Practice Group Co-Chair  
Walnut Creek Office  
hfreiman@lozanosmith.com



Arne B. Sandberg  
Senior Counsel  
Walnut Creek Office  
asandberg@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.*

contentions relying on Education Code section 17417, which requires a particular bidding process for leases in general. The court concluded that lease-leaseback agreements are excluded from the terms of Education Code section 17417.

The contractor also raised another favorite argument of those opposed to the use of lease-leaseback, arguing that while the lease for the site did not have to be bid, the construction of the facility itself was subject to competitive bidding. The court also rejected this argument as inconsistent with the statute.

If this decision is not reheard by the appellate court or reversed or depublished by the California Supreme Court, it will be binding precedent on trial courts across the state, and the lawsuits that have stubbornly persisted in recent years seeking to require competitive bidding for lease-leaseback construction projects will likely diminish.

If you have any questions regarding this case or lease-leaseback agreements in general, or would like assistance in the preparation of any such agreements, please contact one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).