

AMENDED IN ASSEMBLY APRIL 26, 2016

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 2316

**Introduced by Assembly Member O'Donnell
(Coauthor: Assembly Member Mullin)**

February 18, 2016

An act to amend ~~Section 17406~~ *Sections 17400 and 17406* of the Education Code, relating to school facilities.

LEGISLATIVE COUNSEL'S DIGEST

AB 2316, as amended, O'Donnell. School facilities: leasing property.

Existing law requires the governing board of a school district to adopt a resolution that, among other things: (1) declares its intention to enter into a lease or agreement relating to school property, (2) includes specified information about the property, and (3) fixes a time for a public meeting of the governing board at which sealed proposals to enter a lease or agreement with the school district will be received from any person, firm, or corporation, and considered by the governing board, as specified.

Existing law, notwithstanding the provision described above, also authorizes the governing board of a school district, without advertising for bids, to lease real property for a minimum rental of \$1 per year if the instrument by which this property is leased requires the lessee to construct, or provide for the construction of, a building to be used by the school district and provides that the title to the building shall vest in the school district at the end of the lease.

This bill ~~would~~ *would, among other things*, delete the language that provides that a school district governing board is not required to advertise for bids pursuant to this ~~provision~~. *provision and would specify*

that only a person, firm, or corporation that is a licensed contractor, as specified, is eligible to be the lessee. The bill would require an instrument created pursuant to these provisions to be awarded based on a competitive solicitation process to the proposer providing the best value to the school district, taking into consideration the proposer's demonstrated competence and professional qualifications necessary for the satisfactory performance of the services required. Before awarding such an instrument, the bill would require the governing board of the school district to adopt and publish required procedures and guidelines for evaluating the qualifications of proposers to ensure that the best value selections by the school district are conducted in a fair and impartial manner, as provided. Notwithstanding certain laws, the bill would authorize a school district to enter into such an instrument before written approval by the Department of General Services' Division of the State Architect (DSA) if the instrument provides that no work for which a contractor is required to be licensed and for which DSA approval is required shall be performed before receipt of the required DSA approval. The bill would also provide that when a project for the construction, alteration, repair, or improvement of any structure, building, or other improvement of any kind that was leased through such an instrument before July 1, 2015, and that instrument is later determined to be invalid, the contractor who entered into the contract with the school district shall be entitled to be paid the reasonable cost of the labor, equipment, materials, and services furnished by the contractor before the date of the determination, subject to specified conditions. The bill would provide that the changes made by its provisions, except the deletion of the school district governing board's authority to not advertise for bids, shall remain in effect only until July 1, 2022.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 *SECTION 1. Section 17400 of the Education Code is amended*
- 2 *to read:*
- 3 17400. (a) Any school district may enter into leases and
- 4 agreements relating to real property and buildings to be used by
- 5 the *school* district pursuant to this article.

1 (b) As used in this article, ~~“building”~~ *the following terms have*
2 *the following meanings:*

3 (1) *“Best value” means a competitive procurement process*
4 *whereby the selected proposer is selected on the basis of objective*
5 *criteria for evaluating the qualifications of proposers with the*
6 *resulting selection representing the best combination of price and*
7 *qualifications.*

8 (2) *“Best value score” means the total score awarded to a*
9 *proposer for all scored evaluation factors.*

10 (3) *“Building” includes each of the following:*

11 ~~(1)~~

12 (A) *One or more buildings located or to be located on one or*
13 *more sites.*

14 ~~(2)~~

15 (B) *The remodeling of any building located on a site to be leased*
16 *pursuant to this article.*

17 ~~(3)~~

18 (C) *Onsite and offsite facilities, ~~utilities~~ utilities, or*
19 *improvements ~~which~~ that the governing board determines are*
20 *necessary for the proper operation or function of the school*
21 *facilities to be leased.*

22 ~~(4)~~

23 (D) *The permanent improvement of school grounds.*

24 (4) *“Preconstruction services” means advice during the design*
25 *phase including, but not limited to, scheduling, pricing, and*
26 *phasing to assist the school district to design a more constructible*
27 *project.*

28 ~~(e) As used in this article, “site”~~

29 (5) *“Site” includes one or more sites, and also may include any*
30 *building or buildings located or to be located on a site.*

31 **SECTION 1.**

32 *SEC. 2.* Section 17406 of the Education Code, as amended by
33 Section 1 of Chapter 214 of the Statutes of 2015, is amended to
34 read:

35 17406. (a) (1) Notwithstanding Section 17417, the governing
36 board of a school district may let, for a minimum rental of one
37 dollar (\$1) a year, to a person, firm, or ~~corporation~~ *corporation,*
38 *licensed pursuant to Article 5 (commencing with Section 7065) of*
39 *Chapter 9 of Division 3 of the Business and Professions Code, real*
40 *property that belongs to the school district if the instrument by*

1 which this property is let requires the lessee therein to construct
2 on the demised premises, or provide for the construction thereon
3 of, a building or buildings for the use of the school district during
4 the term of the lease, and provides that title to that building shall
5 vest in the school district at the expiration of that term. The
6 instrument may provide for the means or methods by which that
7 title shall vest in the school district before the expiration of that
8 term, and shall contain other terms and conditions as the governing
9 board of the school district may deem to be in the best interest of
10 the school district.

11 ~~(2) For a public project, as defined in subdivision (c) of Section~~
12 ~~22002 of the Public Contract Code, regardless of its funding source,~~
13 ~~an instrument created pursuant to paragraph (1) shall also require~~
14 ~~that a person, firm, or corporation that constructs the building,~~
15 ~~including, but not limited to, the prime contractor and, if used,~~
16 ~~electrical, mechanical, and plumbing subcontractor, shall be subject~~
17 ~~to the same prequalification requirements for prospective bidders~~
18 ~~described in subdivisions (b) to (m), inclusive, of Section 20111.6~~
19 ~~of the Public Contract Code, including the requirement for the~~
20 ~~completion and submission of a standardized prequalification~~
21 ~~questionnaire and financial statement that is verified under oath~~
22 ~~and is not a public record.~~

23 *(2) An instrument created pursuant to paragraph (1) shall be*
24 *awarded based on a competitive solicitation process to the*
25 *proposer providing the best value to the school district, taking into*
26 *consideration the proposer's demonstrated competence and*
27 *professional qualifications necessary for the satisfactory*
28 *performance of the services required. Before awarding an*
29 *instrument pursuant to this section, the governing board of the*
30 *school district shall adopt and publish required procedures and*
31 *guidelines for evaluating the qualifications of proposers that ensure*
32 *the best value selections by the school district are conducted in a*
33 *fair and impartial manner. These procedures and guidelines shall*
34 *be mandatory for the school district when awarding an instrument*
35 *pursuant to this section. The required procedures shall include,*
36 *at a minimum, the following:*

37 *(A) The school district shall prepare a request for sealed*
38 *proposals from qualified proposers. The school district shall*
39 *include in the request for sealed proposals an estimate of price of*
40 *the project, a clear, precise description of any preconstruction*

1 *services that may be required and the facilities to be constructed,*
2 *the key elements of the instrument to be awarded, a description of*
3 *the format that proposals shall follow and the elements they shall*
4 *contain, the standards the school district will use in evaluating*
5 *proposals, the date on which proposals are due, the timetable the*
6 *school district will follow in reviewing and evaluating proposals,*
7 *and the process to be used by the successful proposer for the award*
8 *of subcontracts.*

9 (B) *The school district shall give notice of the request for sealed*
10 *proposals in the manner of notice provided in Section 20112 of*
11 *the Public Contract Code, with the latest notice published at least*
12 *10 days before the date for receipt of the proposals.*

13 (C) *A proposer must be prequalified in accordance with*
14 *subdivisions (b) to (m), inclusive, of Section 20111.6 of the Public*
15 *Contract Code, in order to submit a proposal. If used, electrical,*
16 *mechanical, and plumbing subcontractors shall be subject to the*
17 *same prequalification requirements for prospective bidders*
18 *described in subdivisions (b) to (m), inclusive, of Section 20111.6*
19 *of the Public Contract Code, including the requirement for the*
20 *completion and submission of a standardized prequalification*
21 *questionnaire and financial statement that is verified under oath*
22 *and is not a public record. These prequalification requirements*
23 *shall be included in an instrument created pursuant to paragraph*
24 *(1).*

25 (D) *The request for sealed proposals shall identify all criteria*
26 *that the school district will consider in evaluating the proposals*
27 *and qualifications of the proposers, including relevant experience,*
28 *safety record, price proposal, and other factors specified by the*
29 *school district. The price proposal shall include, at the school*
30 *district's discretion, either a lump-sum price for the instrument to*
31 *be awarded or the proposer's proposed fee to perform the services*
32 *requested, including the proposer's proposed fee to perform*
33 *preconstruction services or any other work related to the facilities*
34 *to be constructed, as requested by the school district. The request*
35 *for proposals shall specify whether each criterion will be evaluated*
36 *pass-fail or will be scored as part of the best value score, and*
37 *whether proposers must achieve any minimum qualification score*
38 *for award of the instrument under this section.*

39 (E) *For each scored criterion, the school district shall identify*
40 *the methodology and rating or weighting system that will be used*

1 by the school district in evaluating the criterion, including the
2 weight assigned to the criterion and any minimum acceptable
3 score.

4 (F) Proposals shall be evaluated and the instrument awarded
5 under this section in the following manner:

6 (i) All proposals received shall be reviewed to determine those
7 that meet the format requirements and the standards specified in
8 the request for sealed proposals.

9 (ii) The school district shall evaluate the qualifications of the
10 proposers based solely upon the criteria and evaluation
11 methodology set forth in the request for sealed proposals, and
12 shall assign a best value score to each proposal. Once the
13 evaluation is complete, all responsive proposers shall be ranked
14 from the most advantageous to the least advantageous to the school
15 district.

16 (iii) The award of the instrument shall be made by the governing
17 board of the school district to the responsive proposer whose
18 proposal is determined, in writing by the governing board of the
19 school district, to be the best value to the school district.

20 (iv) If the selected proposer refuses or fails to execute the
21 tendered instrument, the governing board of the school district
22 may award the instrument to the proposer with the second highest
23 best value score if the governing board of the school district deems
24 it to be for the best interest of the school district. If the second
25 selected proposer refuses or fails to execute the tendered
26 instrument, the governing board of the school district may award
27 the instrument to the proposer with the third highest best value
28 score if the governing board of the school district deems it to be
29 for the best interest of the school district.

30 (v) Notwithstanding any other law, upon issuance of a contract
31 award, the school district shall publicly announce its award,
32 identifying the entity to which the award is made, along with a
33 statement regarding the basis of the award. The statement
34 regarding the school district's contract award and the contract
35 file shall provide sufficient information to satisfy an external audit.

36 (G) The governing board of the school district, at its discretion,
37 may reject all proposals and request new proposals.

38 (3) Following the award of an instrument created pursuant to
39 paragraph (1), and if the price proposal is a not a lump sum for
40 the instrument awarded, the successful proposer shall provide the

1 school district with objectively verifiable information of its costs
2 to perform the services requested under the instrument and shall
3 select subcontractors using a competitive selection process that
4 is set forth in the request for sealed proposals. Once any
5 preconstruction services are completed and subcontractors are
6 selected, the successful proposer and the school district shall
7 finalize the price for the services to be provided under the
8 instrument that is consistent with the price estimate in the request
9 for proposal. The contract file shall include documentation
10 sufficient to support the final price determination.

11 (4) Nothing in paragraph (2) shall preclude a school district
12 from segregating the request for proposals into a request for
13 qualifications, followed by a request for proposals with price
14 information from the proposers deemed most qualified by the
15 school district, provided that the procedures specified in
16 paragraphs (2) and (3) are otherwise followed.

17 (b) Notwithstanding Sections 17297 and 17402, a school district
18 may enter into an instrument created pursuant to paragraph (1)
19 of subdivision (a) before written approval by the Department of
20 General Services' Division of the State Architect if the instrument
21 provides that no work for which a contractor is required to be
22 licensed in accordance with Article 5 (commencing with Section
23 7065) of Chapter 9 of Division 3 of the Business and Professions
24 Code and for which Division of the State Architect approval is
25 required shall be performed before receipt of the required Division
26 of the State Architect approval.

27 ~~(b)~~

28 (c) A rental of property that complies with subdivision (a) as it
29 reads on the day that the lease is entered into shall be deemed to
30 have thereby required the payment of adequate consideration for
31 purposes of Section 6 of Article XVI of the California Constitution.

32 (d) (1) This subdivision shall apply retroactively to a project
33 for the construction, alteration, repair, or improvement of any
34 structure, building, or other improvement of any kind that was
35 leased through an instrument pursuant to this section before July
36 1, 2015. If at any time the instrument is determined to be invalid
37 by a court of competent jurisdiction, the contractor who entered
38 into the instrument with the school district shall be entitled to be
39 paid the reasonable cost of the labor, equipment, materials, and
40 services furnished by the contractor before the date of the

1 *determination that the instrument is invalid if all of the following*
 2 *conditions are met:*

3 *(A) The contractor proceeded with construction, alteration,*
 4 *repair, or improvement based upon a good faith belief that the*
 5 *instrument was valid.*

6 *(B) The school district has reasonably determined that the work*
 7 *performed is satisfactory.*

8 *(C) Contractor fraud did not occur in the obtaining or*
 9 *performance of the instrument.*

10 *(D) The instrument does not otherwise violate state law related*
 11 *to the construction or leasing of public works of improvement.*

12 *(2) In no event shall payment to the contractor pursuant to this*
 13 *section exceed either of the following:*

14 *(A) The contractor’s costs as included in the instrument plus*
 15 *the cost of any approved change orders.*

16 *(B) The lease payments made, less profit, at the point in time*
 17 *the instrument is determined to be invalid by a court of competent*
 18 *jurisdiction.*

19 *(3) Notwithstanding paragraph (1), this subdivision shall not*
 20 *affect any protest and legal proceedings, whether contractual,*
 21 *administrative, or judicial, to challenge the award of the public*
 22 *works contract, nor affect any rights under Section 337.1 or 337.15*
 23 *of the Code of Civil Procedure.*

24 ~~(e)~~
 25 *(e) This section shall remain in effect only until January 1, 2019,*
 26 *and as of that date July 1, 2022, and as of January 1, 2023, is*
 27 *repealed, unless a later enacted statute, that is enacted before*
 28 *January 1, 2019, 2023, deletes or extends that date.*

29 ~~SEC. 2.~~

30 *SEC. 3. Section 17406 of the Education Code, as added by*
 31 *Section 2 of Chapter 408 of the Statutes of 2014, is amended to*
 32 *read:*

33 *17406. (a) Notwithstanding Section 17417, the governing*
 34 *board of a school district may let, for a minimum rental of one*
 35 *dollar (\$1) a year, to any person, firm, or corporation any real*
 36 *property that belongs to the school district if the instrument by*
 37 *which this property is let requires the lessee to construct on the*
 38 *demised premises, or provide for the construction thereon of, a*
 39 *building or buildings for the use of the school district during the*
 40 *term of the lease, and provides that title to that building shall vest*

1 in the school district at the expiration of that term. The instrument
2 may provide for the means or methods by which that title shall
3 vest in the school district before the expiration of that term, and
4 shall contain other terms and conditions as the governing board
5 of the school district may deem to be in the best interest of the
6 school district.

7 (b) Any rental of property that complies with subdivision (a)
8 shall be deemed to have thereby required the payment of adequate
9 consideration for purposes of Section 6 of Article XVI of the
10 California Constitution.

11 (c) This section shall become operative on ~~January 1, 2019~~. *July*
12 *1, 2022*.

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