

Facilities, Construction and Property Practice Group

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# AALRR Alert



## AB2316 Imposes a Competitive Procurement Process on All Lease-Leaseback Projects Awarded After January 1, 2017

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On September 23, 2016, Governor Brown signed AB2316 into law, which makes significant changes to the K-12 lease-leaseback statutes, Education Code section 17400 *et seq.*, effective as of January 1, 2017. The two most significant changes made by AB2316 are requiring a competitive process in selecting the lease-leaseback contractor, and expressly authorizing preconstruction services by the same lease-leaseback contractor. These new requirements shall remain operative until January 1, 2022, unless future legislation changes, or extends, the operative dates.

The most significant change imposed by AB2316 on the K-12 lease-leaseback procedures is the deletion of the phrase “without advertising for bids” from Education Code section 17406 and the requirement that the lease-leaseback agreement be awarded to the proposer based on a competitive solicitation process providing the best value to the school district. AB2316 requires that a school board adopt and publish the required procedures and guidelines

for evaluating the qualifications of the proposers to ensure that the best value is determined in a fair and impartial manner. AB2316 specifies that those procedures and guidelines include, at a minimum, the following:

- The school district shall request sealed proposals which include an estimate of the price, a clear and precise description of the preconstruction services to be provided and facilities to be constructed, the key elements of the contract to be awarded, a description of the format the proposals should follow and the required elements, the standards by which the proposals will be evaluated, the date the proposals are due, and a timetable for reviewing and evaluating the proposals.
- The notice for the sealed proposals shall be published in a newspaper of general circulation once a week for two weeks at least 10 days prior to the date the proposals are due, and the school district may also publish the notice on its website.

- Each proposer and if used, the mechanical, electrical, and plumbing subcontractors, must be prequalified in accordance with Public Contract Code section 20116.
- The request for sealed proposals shall identify the criteria to be considered in evaluating the proposals and the required qualifications of each proposer. The price may be, at the school district’s discretion, a lump sum price for the project, or the proposer’s fee to perform the services, including any fee to perform preconstruction services.
- The evaluation criteria may be pass-fail or scored as part of the best value score. The

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school district must identify the methodology and rating or weighing system that it will use in evaluating the criteria in the proposals.

- The award shall be to the responsive proposer that provides the best value to the school district. Upon award, the school board shall publicly announce the entity and provide a statement regarding the basis for award that contains sufficient information to satisfy an audit.

AB2316 also addresses the pricing of the lease-leaseback agreements based on fees. If the proposal is based on a fee, after award, the successful proposer shall provide verifiable information on its costs to perform the services, and the final price for the services will be negotiated after all preconstruction services are performed and the Division of the State Architect (“DSA”) has approved the plans and specifications. The successful proposer shall provide the school district with a written rationale for the final price which shall be approved or rejected by the school board at a public meeting before any work can begin.

Under AB2316, a school district may specify what types of subcontractors must be identified in the sealed proposals, and those identified subcontractors will now receive the protections afforded under the Subletting and Subcontracting Practices Act. For subcontractors

not identified in the sealed proposals and whose contracts exceed ½ of 1 percent of the hard construction costs, AB2316 specifies that they must be procured by advertising for bids in the same manner as a school district seeking competitive bids, with a specified date and time for bids or qualification statements. Districts must establish reasonable qualification, criteria and award to the subcontractor based on best value or low bid. These procedures do not apply to those subcontractors listed in the sealed proposals, but they will also receive the same protections under the Subletting and Subcontracting Fair Practices Act.

Finally, for any lease-leaseback agreement that was awarded prior to July 1, 2015, and has been found to be invalid because it failed to fall within the competitive bidding exception, the contractor may be paid the reasonable costs, without profit, if the contractor proceeded in good faith, the school district determined the work was satisfactory, the contractor did not obtain the lease-leaseback agreement by fraud, and the lease-leaseback agreement does not violate state law for construction or leasing of public works.

For school districts, the lease-leaseback delivery method continues to remain a viable delivery method for the construction of school facilities. However, AB566 with its labor requirements, and now AB2316 with its competitive proposal requirements, have made significant

changes to the lease-leaseback procurement procedures. We urge all parties who are considering utilizing the lease-leaseback delivery method to consult with their legal counsel concerning the requirements of AB2316 and the other continued challenges to this construction delivery method.