

Assembly Bill No. 2316

CHAPTER 521

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

[Approved by Governor September 23, 2016. Filed with
Secretary of State September 23, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2316, 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 of the school district 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 of the school district, 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 delete the language that provides that the governing board of a school district is not required to advertise for bids pursuant to this provision. 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, as defined, to the school district. 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, as provided. The bill would authorize a school district, for purposes of utilizing preconstruction services, to enter into an instrument before written approval is obtained from the Department of General Services' Division of the State Architect (DSA) only if the instrument provides that no work for which a contractor is required to be licensed and for which DSA approval is required can be performed before receipt of the required DSA approval.

The bill would provide, for certain projects leased through an instrument before July 1, 2015, if at any time the instrument is determined to be invalid by a court of competent jurisdiction because it fails to fall within the former competitive bidding exception, that the contractor who entered into the

contract with the school district may be paid the reasonable cost, specifically excluding profit, of the labor, equipment, materials, and services furnished by the contractor before the date of the determination, if certain conditions, as determined by the court, are met. The bill would authorize a school district to identify specific types of subcontractors required to be included in a proposal, and would impose specified other procedural requirements on awarding construction subcontracts of a certain value. The bill would provide that the changes made by its provisions, except the deletion of the governing board of a school district's authority to not advertise for bids, shall become inoperative on July 1, 2022.

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

SECTION 1. Section 17400 of the Education Code is amended to read:

17400. (a) Any school district may enter into leases and agreements relating to real property and buildings to be used by the school district pursuant to this article.

(b) As used in this article, the following terms have the following meanings:

(1) "Best value" means a competitive procurement process whereby the selected proposer is selected on the basis of objective criteria for evaluating the qualifications of proposers with the resulting selection representing the best combination of price and qualifications.

(2) "Best value score" means the total score awarded to a proposer for all scored evaluation factors.

(3) "Building" includes each of the following:

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

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

(C) Onsite and offsite facilities, utilities, or improvements that the governing board of the school district determines are necessary for the proper operation or function of the school facilities to be leased.

(D) The permanent improvement of school grounds.

(4) "Preconstruction services" means advice during the design phase including, but not limited to, scheduling, pricing, and phasing to assist the school district to design a more constructible project.

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

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

17406. (a) (1) Notwithstanding Section 17417, the governing board of a school district may let, for a minimum rental of one dollar (\$1) a year, to a person, firm, or corporation real property that belongs to the school district if the instrument by which this property is let requires the lessee therein to construct on the demised premises, or provide for the construction thereon of, a building or buildings for the use of the school district during the term

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

(2) An instrument created pursuant to paragraph (1) shall 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 an instrument pursuant to this section, the governing board of the school district shall adopt and publish required procedures and guidelines for evaluating the qualifications of proposers that ensure the best value selections by the school district are conducted in a fair and impartial manner. These procedures and guidelines shall be mandatory for the school district when awarding an instrument pursuant to this section. The required procedures shall include, at a minimum, the following:

(A) The school district shall prepare a request for sealed proposals from qualified proposers. The school district shall include in the request for sealed proposals an estimate of price of the project, a clear, precise description of any preconstruction services that may be required and the facilities to be constructed, the key elements of the instrument to be awarded, a description of the format that proposals shall follow and the elements they shall contain, the standards the school district will use in evaluating proposals, the date on which proposals are due, and the timetable the school district will follow in reviewing and evaluating proposals.

(B) The school district shall give notice of the request for sealed proposals in the manner of notice provided in Section 20112 of the Public Contract Code and in a trade paper of general circulation published in the county where the project is located, with the latest notice published at least 10 days before the date for receipt of the proposals.

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

(D) The request for sealed proposals shall identify all criteria that the school district will consider in evaluating the proposals and qualifications of the proposers, including relevant experience, safety record, price proposal, and other factors specified by the school district. The price proposal shall include, at the school district's discretion, either a lump-sum price for the

instrument to be awarded or the proposer's proposed fee to perform the services requested, including the proposer's proposed fee to perform preconstruction services or any other work related to the facilities to be constructed, as requested by the school district. The request for proposals shall specify whether each criterion will be evaluated pass-fail or will be scored as part of the best value score, and whether proposers must achieve any minimum qualification score for award of the instrument under this section.

(E) For each scored criterion, the school district shall identify the methodology and rating or weighting system that will be used by the school district in evaluating the criterion, including the weight assigned to the criterion and any minimum acceptable score.

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

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

(ii) The school district shall evaluate the qualifications of the proposers based solely upon the criteria and evaluation methodology set forth in the request for sealed proposals, and shall assign a best value score to each proposal. Once the evaluation is complete, all responsive proposals shall be ranked from the highest best value to the lowest best value to the school district.

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

(iv) If the selected proposer refuses or fails to execute the tendered instrument, the governing board of the school district may award the instrument to the proposer with the second highest best value score if the governing board of the school district deems it to be for the best interest of the school district. If the second selected proposer refuses or fails to execute the tendered instrument, the governing board of the school district may award the instrument to the proposer with the third highest best value score if the governing board of the school district deems it to be for the best interest of the school district.

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

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

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

verifiable information of its costs to perform the services requested under the instrument and shall select subcontractors as set forth in paragraph (4). Once any preconstruction services are completed and subcontractors are selected, and upon approval of the plans and specifications for work on the site by the Department of General Services' Division of the State Architect, if required, the successful proposer and the school district shall finalize the price for the services to be provided under the instrument. The successful proposer shall provide the school district with written rationale for the price, and the school district shall approve or reject the final price at a public meeting before the successful proposer may proceed with any further work under the instrument. The contract file shall include documentation sufficient to support the final price determination.

(4) (A) The school district, in the request for sealed proposals, may identify specific types of subcontractors that must be included in the proposal. All subcontractors that are identified in the proposal shall be afforded the protections of the Subletting and Subcontracting Fair Practices Act (Chapter 4 (commencing with Section 4100) of Part 1 of Division 2 of the Public Contract Code).

(B) Following the award of an instrument created pursuant to paragraph (1) and for subcontractors not identified in the proposal, the successful proposer shall proceed as follows in awarding construction subcontracts with a value exceeding one-half of 1 percent of the price allocable to construction work:

(i) Provide public notice of availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the school district, including a fixed date and time on which qualifications statements, bids, or proposals will be due.

(ii) Establish reasonable qualification criteria and standards.

(iii) Award the subcontract either on a best value basis or to the lowest responsible bidder. The process may include prequalification or short-listing. The process shall not apply to subcontractors listed in the original proposal. Subcontractors awarded construction subcontracts under this subdivision shall be afforded all the protections of the Subletting and Subcontracting Fair Practices Act (Chapter 4 (commencing with Section 4100) of Part 1 of Division 2 of the Public Contract Code).

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

(b) (1) Notwithstanding Sections 17297 and 17402, for purposes of utilizing preconstruction services, a school district may enter into an instrument created pursuant to paragraph (1) of subdivision (a) before written approval by the Department of General Services' Division of the State Architect only if the instrument provides that no work for which a contractor is required to be licensed in accordance with Article 5 (commencing with Section 7065) of Chapter 9 of Division 3 of the Business and Professions

Code and for which Division of the State Architect approval is required can be performed before receipt of the required Division of the State Architect approval.

(2) Nothing in this subdivision waives the requirements of Section 17072.30 or Section 17074.16, or any other applicable requirements of Chapter 12.5 (commencing with Section 17070.10) of Part 10.

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

(d) (1) This subdivision shall apply to a project for the construction, alteration, repair, or improvement of any structure, building, or other improvement of any kind that was leased through an instrument pursuant to this section before July 1, 2015. If at any time the instrument is determined to be invalid by a court of competent jurisdiction because it fails to fall within the competitive bidding exception pursuant to paragraph (1) of subdivision (a), as it read on December 31, 2016, the contractor who entered into the instrument with the school district may be paid the reasonable cost, specifically excluding profit, of the labor, equipment, materials, and services furnished by the contractor before the date of the determination that the instrument is invalid if all of the following conditions, as determined by the court, are met:

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

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

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

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

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

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

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

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

(e) This section shall become inoperative on July 1, 2022, and, as of January 1, 2023, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2023, deletes or extends the dates on which it becomes inoperative and is repealed.

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

17406. (a) Notwithstanding Section 17417, the governing board of a school district may let, for a minimum rental of one dollar (\$1) a year, to any person, firm, or corporation any real property that belongs to the school district if the instrument by which this property is let requires the lessee to construct on the demised premises, or provide for the construction thereon of, a building or buildings for the use of the school district during the term of the lease, and provides that title to that building shall vest in the school district at the expiration of that term. The instrument may provide for the means or methods by which that title shall vest in the school district before the expiration of that term, and shall contain other terms and conditions as the governing board of the school district may deem to be in the best interest of the school district.

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

(c) This section shall become operative on July 1, 2022.