

**FINCH • THORNTON • BAIRD** <sup>LLP</sup>

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File 602.001

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VIA ELECTRONIC MAIL ONLY

Mr. Jim Ryan  
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VIA ELECTRONIC MAIL ONLY

Mr. David G. Ackerman  
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Re: Associated General Contractors Of America

Dear Jim and Dave:

As discussed over the last week, the Fifth Appellate District's June 1, 2015 decision in *Davis v. Fresno Unified School District* (F068477) has left the Education Code section 17406 project delivery industry in flux and without a clear path forward.

In order to mitigate losses, we are working with several clients, industry organizations, school district lawyers and lobbyists to: (1) encourage the Fresno Unified School District to take further action in the *Davis* case including seeking rehearing, decertification and Supreme Court review; (2) propose legislation amending Education Code section 17406 overruling the *Davis* case; (3) propose legislation adding a clear exception to the Government Code section 1090 (if it applies at all); and (4) propose amendments to lease-leaseback documents in client backlog to reduce the risks created by the *Davis* case.

As to the second and third items, enclosed are the proposed amendments to Education Code section 17406 and Government Code section 1091.5. The amendments address the *Davis* case as well as the prequalification issue the 17406 spot bill was placed to correct. All changes to the existing code sections are tracked. We have clients with well over a half billion dollars of current backlog, and another billion in completed projects, at risk based on the *Davis* case. Consequently, we need a devoted industry effort to press these legislative changes. Please contact us after review to discuss the next steps.

Very truly yours,



P. Randolph Finch Jr.,  
Partner

Enclosures

PRF:nlh/38D1350

cc: Atkinson, Andelson, Loya, Ruud & Romo – Cerritos  
Attn: Terry T. Tao, Esq. (via email only)  
Atkinson, Andelson, Loya, Ruud & Romo – San Diego  
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Attn: Tyree Dorward, Esq. (via email only)

§ 17406. Right of board to lease property under lease providing for construction of building thereon, and for building to vest in school district at expiration of term; public projects funded pursuant to Leroy F. Greene School Facilities Act of 1998

Currentness

(a)(1) Notwithstanding Section 17417, the governing board of a school district, without advertising for bids, 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 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. If the instrument is provided for the reasons or terms by which~~ that title shall vest in the school district prior to the expiration of that term, and shall contain other terms and conditions as the governing board may deem to be in the best interest of the school district. ~~There are no other requirements to the enforceability, effectiveness and validity of instruments entered under this section.~~

(2) If the instrument meets the criteria of subdivision (a) of Section 20111.6 of the Public Contract Code, the instrument shall also require that a person, firm, or corporation that constructs the building, ~~including i.e., but not limited to,~~ the prime contractor and, if used, electrical, mechanical, and plumbing subcontractor, shall be subject to the same prequalification requirements for prospective bidders described in Section 20111.6 of the Public Contract Code, ~~including the requirements for the completion and submission of a standardized prequalification questionnaire and financial statement that is filed electronically and not a public record. School districts may specify other trades for prequalification in their own discretion.~~

(3) The Legislature finds and declares the recent holding in Stephen K. Davis v. Fresno Unified School District et al., Fifth District Court of Appeal Case No. F068477 (June 1, 2015), is inconsistent with the Legislature's intent to enable school districts to enter instruments meeting the criteria of subdivision (a)(1) and (a)(2) on terms the governing board determines to be in the best interest of the school district. Instruments entered under this section do not require any person, firm or corporation to provide financing for construction of the building or buildings. Instruments entered under this section do not require the school district to use constructed building or buildings for any minimum period of time. For purposes of this section, "lease" is defined as the written instrument adopted by the governing board, deemed by the governing board to be in the best interest of the school district and meeting the requirements of subdivision (a)(1) and (a)(2). This amendment is a clarification of the existing legislative intent and is intended to be applied retroactively.

(b) Any 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.

(c) ~~This s~~Section (a)(2) shall remain in effect only until January 1, 2019, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2019, deletes or extends that date.

§ 1091.5. Interests not constituting an interest in a contract

Effective: ~~January 1, 2014~~ July 1, 2015

Currentness

(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

(1) The ownership of less than 3 percent of the shares of a corporation for profit, provided that the total annual income to him or her from dividends, including the value of stock dividends, from the corporation does not exceed 5 percent of his or her total annual income, and any other payments made to him or her by the corporation do not exceed 5 percent of his or her total annual income.

(2) That of an officer in being reimbursed for his or her actual and necessary ~~expenses incurred in the~~ performance of official duties.

(3) That of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board.

(4) That of a landlord or tenant of the contracting party if the contracting party is the federal government or any federal department or agency, this state or an adjoining state, any department or agency of this state or an adjoining state, any county or city of this state or an adjoining state, or any public corporation or special, judicial, or other public district of this state or an adjoining state unless the subject matter of the contract is the property in which the officer or employee has the interest as landlord or tenant in which event his or her interest shall be deemed a remote interest within the meaning of, and subject to, the provisions of Section 1091.

(5) That of a tenant in a public housing authority created pursuant to Part 2 (commencing with Section 34200) of Division 24 of the Health and Safety Code in which he or she serves as a member of the board of commissioners of the authority or of a community development commission created pursuant to Part 1.7 (commencing with Section 34100) of Division 24 of the Health and Safety Code.

(6) That of a spouse of an officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment.

(7) That of a nonsalaried member of a nonprofit corporation, provided that this interest is disclosed to the body or board at the time of the first consideration of the contract, and provided further that this interest is noted in its official records.

(8) That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.

For purposes of this paragraph, an officer is "noncompensated" even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing the duties of his or her office.

(9) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

(10) That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm which renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, ~~insurance firm, or real estate firm.~~

(11) Except as provided in subdivision (b), that of an officer or employee of, or a person having less than a 10-percent ownership interest in, a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower, depositor, debtor, or creditor.

(12) That of (A) a bona fide nonprofit, tax-exempt corporation having among its primary purposes the conservation, preservation, or restoration of park and natural lands or historical resources for public benefit, which corporation enters into an agreement with a public agency to provide services related to park and natural lands or historical resources and which services are ~~for the public agency or for the public interest~~ for the agreement or as part of the agreement, to be necessary to the public interest to plan for, acquire, protect, conserve, improve, or restore park and natural lands or historical resources for public purposes and (B) any officer, director, or employee acting pursuant to the agreement on behalf of the nonprofit corporation. For purposes of this paragraph, "agreement" includes contracts and grants, and "park," "natural lands," and "historical resources" shall have the meanings set forth in subdivisions (d), (g), and (i) of Section 5902 of the Public Resources Code. Services to be provided to the public agency may include those studies and related services, acquisitions of property and property interests, and any activities related to those studies and acquisitions necessary for the conservation, preservation, improvement, or restoration of park and natural lands or historical resources.

(13) That of an officer, employee, or member of the Board of Directors of the California Housing Finance Agency with respect to a loan product or programs if the officer, employee, or member participated in the planning, discussions, development, or approval of the loan product or program and both of the following two conditions exist:

(A) The loan product or program is or may be originated by any lender approved by the agency.

(B) The loan product or program is generally available to qualifying borrowers on terms and conditions ~~that~~ are substantially the same for all qualifying borrowers at the time the loan is made.

(14) That of a party to a contract for public services entered into by a special district that requires a person to be a landowner or a representative of a landowner to serve on the board of which the officer or employee is a member, on the same terms and conditions as if he or she were not a member of the body or board. For purposes of this paragraph, "public services" includes the powers and purposes generally provided pursuant to provisions of the Water Code relating to irrigation districts, California water districts, water storage districts, or reclamation districts.

(15) That of a party to a pre-construction, design-assist, construction management, program management or like agreement, if that party performs construction or construction management work on the same project for

which it performed such services. This amendment applies retroactively and is a statement of existing law.

(b) An officer or employee shall not be deemed to be interested in a contract made pursuant to competitive bidding under a procedure established by law if his or her sole interest is that of an officer, director, or employee of a bank or savings and loan association with which a party to the contract has the relationship of borrower or depositor, debtor or creditor.