

REPORT OF THE EXECUTIVE OFFICER
State Allocation Board Meeting, January 28, 2004

LEASE LEASE-BACK AGREEMENTS (EDUCATION CODE SECTION 17406)

PURPOSE OF REPORT

To discuss the use of lease lease-back agreements for project delivery of facilities funded through the School Facility Program (SFP).

SUMMARY

The use of Education Code (EC) Section 17406 as a project delivery method for public school construction projects is growing. Increasingly, districts are interpreting this code section to allow the award of a public works project without competitive bid. Some districts do institute a competitive selection process voluntarily, but many do not. Districts maintain that this alternative is often superior to the standard low-bid procedure generally required by the Public Contracts Code (PCC).

The contractual arrangements by which projects are constructed using state bond funding is governed by law and is not generally subject to State Allocation Board (SAB) regulation or oversight. However, the integrity of the use of general obligation bonds allocated by the SAB must be above reproach. An interpretation of law that would potentially allow billions of dollars of public works projects funded with state bonds to be contracted through a 'sole-source' mechanism should be closely examined. That is the primary purpose of this report.

BACKGROUND

EC Sections 17400 through 17425 provide a method for financing school construction. Within that financing method, EC Section 17406 provides a mechanism whereby a district may let district real property to a development entity without competitive bidding if the developer will construct a school facility on the property for the use of the school district. An increasing number of districts are using this approach to construct new facilities and modernize existing facilities without competitive bid. Generally, the districts then request State funding for the purpose of buying out the lease and acquiring the facility.

To date, neither the SAB nor Office of Public School Construction (OPSC) has taken a position on when the use of lease arrangements under EC Section 17406 is appropriate or when the exemption from competitive bidding is valid. The OPSC has not dictated the method of the delivery of projects and has taken the position that the obligation to determine the appropriate and legitimate use of any contract delivery method permitted in law rests with the school district. The OPSC has focused instead on providing guidance to those districts that elect to use lease-lease back agreements to insure that there is no conflict with SFP law and regulations or with statutes relating to the use of the state general obligation bonds.

DESCRIPTION

Over a period of several years, the OPSC responded to a few individual school district questions on issues related to the use of EC 17406. These responses guided districts on how to structure their agreements to avoid conflicts with SFP laws and regulations. The responses were widely disseminated among school districts and their legal advisors as the OPSC "policy" on lease lease-back project delivery methods. As a result of a rapidly

DESCRIPTION (cont.)

increasing number of inquires regarding EC Section 17406, the OPSC became aware that the use of lease lease-back agreements was growing. For the first time, the OPSC also became aware that such agreements were now in common use on modernization projects, something that had never been previously discussed with the office. Although staff continued to take the position that it was the district's responsibility to determine when it was appropriate and legal to use EC Section 17406 as a project delivery method, staff also became concerned that there was no official SAB position or regulation on any aspect of the issue. To address that, staff began discussions on the use of EC Section 17406 at the Board's Implementation Committee. The discussions were designed as a fact-finding effort to learn about the use of lease lease-back agreements and to develop regulations to solidify the policy statements made over several years of correspondence.

Following four separate Implementation Committee meetings, the OPSC presented proposed changes to the SAB's regulations concerning the interface of lease lease-back agreements and the SFP. Again, the regulations focused on largely technical issues and not on when the use of EC 17406 was appropriate. However, the presentation, made in September 2003, did include a report to the SAB regarding the use of lease lease-back agreements as a delivery method for projects funded under the SFP. It was apparent that this delivery method was being used or considered by a significant number of districts. The OPSC wished to inform the SAB that information about project delivery methods is not requested prior to approval, and, therefore, it was possible that projects using the lease lease-back method were being presented for funding on consent calendars.

When the item was presented to the SAB, some members expressed concerns about the effect that widespread use of EC Section 17406 might have on the PCC competitive bidding requirements. The SAB declined to take action on the recommended regulation changes and asked that staff prepare further information, including the number of projects using the lease lease-back method, for consideration at a future meeting.

Three subsequent discussions were held at the Implementation Committee. The content of this report was presented and discussed. There was no consensus among the Committee members regarding the content or conclusions of this report or what actions the SAB should take, if any.

THE CURRENT USE OF EC SECTION 17406

In broad terms there are currently two types of lease lease-back arrangements being used to construct state funded projects:

1. The project is financed by the developer/contractor team and the district pays a yearly lease to use the facility. The district makes no other payments to the developer, who carries the outstanding cost of the project. The lease, by law, may be up to 40 years in length. It may include an agreement to terminate the lease at any time.
2. The project is paid in full by the district with state or local funds, or a combination of both. In this case a "lease agreement" may exist, but it is designed to be terminated at the end of the construction. The lease payments, if any, are made during the course of construction and at the completion of the project. They are essentially progress payments as would be found on a traditional construction contract in that they constitute the entire cost of the construction project.

THE CURRENT USE OF EC SECTION 17406 (cont.)

Staff believes that agreements structured as in situation number one when competitively bid, constitute the intended use of Article 2 and of EC 17406 in particular.

However, staff believes that the vast majority of projects, which received or will receive SFP funding, were done under the second scenario. These projects are not financed by the developer/contractor team even for a short period. The projects are paid in full by the district using State and local funds. Since there is no legitimate lease, staff does not believe that Article 2 has any relevance. Please see further discussion in this report.

THE GROWING USE OF LEASE LEASE-BACK AGREEMENTS

As mentioned in the Description section of this report, the SAB asked Staff to quantify the number of projects which have used lease lease-back agreements as a delivery method. Staff has not been able to accomplish this request since the information is not reported to OPSC as a part of the application or funding process. Although it may be a matter of discussion in the closeout audit of an individual project, it is not captured and recorded in a way that would allow a count of the projects. For future reference, the Board may wish to capture this information by modifying the fund release certification received from applicant districts.

The San Diego County Office of Education did survey districts within that county, and as a courtesy, provided Staff with the results. They found that in the last six years, 35 to 40 projects were done with lease lease-back. The County estimates that approximately 25 percent were modernization projects. The County comprises about 10 percent of the K-12 population.

ARGUMENTS IN FAVOR OF THE LEASE LEASE-BACK DELIVERY METHOD

School districts which have used the lease lease-back project delivery method cite the following as reasons for selecting it over the traditional design, bid, and build approach:

- ❑ **Guaranteed price**
The district is able to negotiate a fixed price for the lease and, if necessary, the purchase price of the project. Unanticipated costs are the responsibility of the developer/contractor, not the school district.
- ❑ **Team approach**
Districts have expressed the opinion that lease lease-back allows a team approach to the construction of school facilities. The district, developer and contractor all have an interest in a project completed on time and in budget.
- ❑ **Known contractor**
Contractors can be selected on the basis of their record of success, recommendations from previous clients and financial strength.
- ❑ **No experienced staff at district**
Many districts do not have experience with large construction projects. The responsibility for coordination of the project, obtaining required approvals, and project scheduling become the developer/contractors, who have demonstrated experience in similar school construction projects.
- ❑ **Value engineering opportunities**

ARGUMENTS IN FAVOR OF THE LEASE LEASE-BACK DELIVERY METHOD (cont.)

- Contractors and subcontractors come from other industries
Contractors not normally interested in participating in the 'low bid' process may be willing to participate in negotiated contracts as permitted in the lease lease-back process. This brings new and highly qualified contractors into the school construction arena.

All of the benefits ascribed to the lease lease-back process are contingent on one thing -- avoiding competitive bidding. Many, perhaps most, school district administrators and facility managers consider the competitive bidding process as required under the PCC to be problematic. They assert that the process leaves them with little control over the selection of the contractor for the project and places them in financial jeopardy if the contractor selected is unwilling or unable to perform the construction as planned. The lease lease-back process allows the district to select the developer/contractor based on criteria other than cost.

CONCERNS ABOUT THE USE OF THE LEASE LEASE-BACK DELIVERY METHOD

While advocates of the use of EC Section 17406 argue that it is less cumbersome than the competitive bidding process and that it allows a team approach to the development of the project, it is important to keep in mind the reasons that competitive bid requirements were added to the PCC. The intent was not to make it harder to complete public works projects, but to ensure that State funds were being used in an efficient and cost-effective manner. The goal of the Legislature in enacting the code was¹:

1. To ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds, and;
2. To provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices, and;
3. To eliminate favoritism, fraud, and corruption in the awarding of public contracts.

The interpretation and growing use of EC Section 17406 means that significant numbers of projects and significant sums of public funding are not being subjected to the checks and balances of the competitive bid process. Recent interpretations made by some interested in furthering the use of EC Section 17406 are so broad as to make the public contract competitive bid requirements moot, effectively eliminating competitive bidding requirements on all new construction and modernization public school projects whether funded locally or in conjunction with the State program.

In addition to the lack of checks and balances on the selection of contractors, there may be other reasons to proceed cautiously when using lease lease-back arrangements which do not provide a long term financing mechanism for the project. Primary among these is summarized in the Supreme Court majority opinion in *The City of Los Angeles v. Offner* where the following was stated:

"It has been held generally in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary,

(Continued on Page Five)

¹ Public Contracts Code, Section 100

CONCERNS ABOUT THE USE OF THE LEASE LEASE-BACK DELIVERY METHOD (cont.)

confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year, no violence is done to the constitutional provision. If, however, the instrument creates a full and complete liability upon its execution, or if its designation as a 'lease' is a subterfuge and is actually a sales contract in which the 'rentals' are installment payments on the purchase price for the aggregate of which and immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void." (underlining added)

It appears to the OSPC that some of the following circumstances do not exist in all lease lease-back contracts presented for SFP funding and therefore may be in violation of the principle set forth in Offner.

- ❑ The lease must be entered into in 'good faith.' Presumably that means that both parties to the agreement intend that a lease arrangement will exist and will be implemented.
- ❑ The lease arrangement may not be a subterfuge. Many districts openly admit that they are using lease lease-back contracts for the perceived benefits listed earlier which are only available if there is no competitive bid requirement.
- ❑ The agreement may not create an immediate indebtedness beyond each yearly installment. Some agreements require 'pre-lease' or 'rental' in one form or another which amount to the full cost of the facility. It appears that an immediate indebtedness has been created by the agreement.
- ❑ The District must own the site on which the project will be constructed. Under EC 17402, the district owns the site if it holds title, has an option to purchase, or is acquiring the site through eminent domain. An arrangement whereby the option to purchase the site is with the developing entity could be construed as a subterfuge to avoid EC 17407. That section allows lease lease-back on property owned by others, but specifically requires competitive bidding of the agreement.

It is possible then that the school construction contract, using a lease agreement that does not meet the standard of the Offner decision, may be invalid, raising the question of the appropriateness of the State funding apportionment.

THE PURPOSE OF EC SECTION 17406

Education Code Section 17406 reads in part as follows:

17406. (a) 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 such 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 thereof, 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 prior to the expiration of that term, and shall contain such other terms and conditions as the governing board may deem to be in the best interest of the school district.

(The entire section may be seen in the Attachment.)

Advocates of the use of lease lease-back agreements argue that the only requirement in EC Section 17406 is that the district owns the property to be developed and that the property be 'let' to the developer for at least one

THE PURPOSE OF EC SECTION 17406 (cont.)

dollar per year. Under this circumstance the district is then relieved from the normal PCC competitive bid requirement for the entire construction project. At this point some advocates maintain that a lease lease-back arrangement is required for the actual buildings, while others believe a simple construction contract is all that is required.

It is the opinion of staff and SAB counsel that either interpretation expands the meaning of EC 17406 beyond its simple intent and ignores other requirements in the same article regarding competitive bid requirements for leases (EC 17417). There is no disagreement that EC 17406 is clear in allowing districts to lease a district- owned site to a person, firm or corporation when the lessee agrees to construct buildings for the use of the school district. However, the exemption from public bidding allowed in this section applies only to the property lease from the district to the developer. It does not address how the contract for the construction of the buildings is procured nor does it provide an exemption to competitive bidding for that contract.

If the building to be constructed on the property let to the developer using EC 17406 is to be leased to the district, Staff believes the provisions of EC 17417 *Resolution of governing board declaring intention to enter into lease or agreement; opening and accepting bids*, must be followed. That section specifies that the governing board of a school district ...

"...shall adopt a resolution declaring its intention to enter into a lease or agreement pursuant to this article...The resolution shall fix a time ... 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...At the time and place fixed in the resolution for the meeting of the governing body, all sealed proposals which have been received shall, in public session, be opened, examined, and declared by the board. Of the proposals submitted which conform to all terms and conditions specified in the resolution of intention to enter a lease or agreement and which are made by responsible bidders, the proposal which calls for the lowest rental shall be finally accepted, or the board shall reject all bids." (underline added.) (The entire section may be found in the Attachment.)

Nothing in EC 17406 provides an exemption from this requirement or, when applicable, from the PCC requirements. Instead, EC 17406 provides exactly what it states: a simple manner to transfer district property without competitive bid to a developer who has been previously selected by competitive bid to construct a building for the use of the district.

USING EC SECTION 17400 ET AL. AS A FINANCING MECHANISM

EC Sections 17400 et al., including EC 17406, make up Article 2 of Chapter 4 of Part 10.5 of the EC, entitled Leasing Property. It describes the requirements imposed on school districts considering the acquisition of school facilities through lease agreements. As confirmed by the Appeals Court ruling in Morgan Hill USD v. Amaroso, the article is about financing. In that case the court stated that, "The Education Code creates the following method for financing school construction." The court then went on to describe EC Sections 39300 through 39325, which are now renumbered as 17400 through 17425. Thus EC 17400 through 17425 is a method of financing school construction in which EC 17406 addresses the mechanism by which the school district can let the property where the construction will take place.

USING EC SECTION 17400 ET AL. AS A FINANCING MECHANISM (cont.)

Staff believes that virtually none of the projects currently using lease lease-back arrangements actually have financing provided by the developer. If a "lease agreement" other than the site lease exists at all, it serves no significant purpose other than as a construction contract. The full cost of the project is borne by the district using the normal funds it has available for capital projects. Normal progress payments are made to the contractor through the course of construction, and the project is completely paid for by the district at the project completion. The projects are in every regard typical public works projects, except that they have not been competitively bid.

Since no financing exists in the lease lease-back agreement (or there is no lease agreement at all), the use of Article 2 appears to be inappropriate.

COMPETITIVE SELECTION PROCESSES

As noted elsewhere in this Report, current interpretations of EC 17406 hold that competitive bidding is not required. However, some districts do use a competitive selection process. Although not a 'low bid' selection, the competitive mechanism may include open participation and consideration of cost among other factors.

There are several reasons to have a selection process, even when the district believes that it is not specifically required.

- ❑ Helps ensure a competitive cost for the project.
- ❑ Allows the district to select the most qualified firm to design and construct the project, based on experience, financial capability, and other factors.
- ❑ Provides a public process open to review.
- ❑ Allows open participation.

While Staff believes that a low bid requirement already exists for leases, it is clear that school districts do not agree in every case. The legislature may wish to consider the option of requiring a competitive selection process rather than a competitive bid process. To that end, selection processes already in use by the Los Angeles Unified School District, the Building Industry Association, and recommendations developed by Best, Best and Krieger, LLP for the use of their clients have been submitted to the OPSC and are available to the Board as examples. None of the processes have been reviewed by the OPSC.

Additionally, legislation governing the use of design build processes (EC Section 17250.25(c)) provides two options for selection of the design/build team: lowest responsible bid or 'best value' selection of prequalified candidates based on a weighted scoring method. The best value method gives the school district flexibility in awarding a project based on factors other than price. The required selection criteria are price, technical expertise, life cycle costs, skilled labor force, and safety record. In addition, the district may consider design approach, project approach, project features, schedule, value engineering and warranty. This process can be time-consuming and, in the opinion of some, is fraught with protest opportunities; however, it does provide an open process which assists the district in finding a qualified construction team at a competitive price while also keeping public safeguards in place.

LEASE LEASE-BACK ARRANGEMENTS IN SFP PROJECTS

Regardless of debates about the appropriate use of EC Section 17406 or about whether competitive selection processes should be used, districts are currently using lease lease-back agreements to construct SFP new construction and modernization projects. Amendments to the Board's regulations are needed to advise on several issues as follows:

- ❑ The District must have title to the site on which the project will be constructed at the time that the apportionment is approved by the SAB.
- ❑ The lease agreement must contain the following provisions or information:
 - The value of the lease.
 - A provision that the title to the improvements on the site shall vest with the District upon completion of the project.
 - A provision that the lease agreement shall terminate within 180 days of the filing of a notice of completion or occupancy of the project by the District, whichever occurs first.
- ❑ State bond funds may not be used to make lease or rental payments (EC 17070.71 (c)).

These requirements were put into proposed regulations and presented to the SAB at the September 2003 meeting.

CONCLUSION

Increasingly, projects funded with State bond dollars are not being competitively bid. Some districts have instituted alternative selection processes, but those in use are not uniform and may or may not be effective in protecting the expenditure of public funds. Therefore, Members of the State Allocation Board may wish to consider some or all of the following:

1. Whether new construction projects which will utilize or have utilized an exemption from public bidding based on an interpretation of EC Section 17406 should continue to be presented for funding. If so, direct Staff to prepare a proposed regulation regarding requirements applicable to those projects as discussed in the section entitled "Lease Lease-Back Arrangements in SFP Projects" in this report.
2. Whether modernization projects which will utilize or have utilized an exemption from public bidding based on an interpretation of EC Section 17406 should continue to be presented for funding.
3. Whether State policy makers should investigate the claims by school districts that public agencies need better tools to deliver quality public facilities on time and in budget while also maintaining protections on the use of public funds.
4. Whether legislation is necessary to clarify the appropriate use of EC Section 17406 and to clarify, if necessary, the relationship of that section to the entire article on leases in EC Section 17400 through 17425.
5. Whether legislation is necessary to require competitive selection processes on public works projects that do not use the lowest responsible bid as a result of an interpretation of EC section 17406.

BOARD ACTION

The Board did not accept the report. The Legislative Board members expressed interest in pursuing proposed legislation to address this issue. The Board directed Staff to:

- Capture information on how many projects are using lease lease-back agreements.
- Provide written notification to school districts to proceed with caution when using lease lease-back agreements and interpreting the law (Education Code Section 17406).
- Report at a future SAB meeting recommendations for changes to Regulations, after discussion at the Implementation Committee meeting.

ATTACHMENT

CALIFORNIA CODES EDUCATION CODE Section 17070.71

17070.71. (a) Notwithstanding subdivision (a) of Section 17070.70, new construction or modernization funded pursuant to this chapter may be upon real property leased to the applicant school district if all of the following conditions are met:

(1) The property is leased from another governmental entity.

(2) The term of the lease is for at least 40 years after approval of the project under this chapter, or the school district has a lease for at least 25 years on federal property. The board may authorize a lesser term, of not less than 30 years only if the board finds that granting an exception to this requirement would be in the state's best interest.

(b) The applicant school district, and the facility on leased land, if any, shall comply with all laws pertaining to the construction, reconstruction, or alteration of, or addition to, school sites and school buildings.

(c) Lease costs are not eligible project or site acquisition costs under this chapter.

17072.35. A grant for new construction may be used for any and all costs necessary to adequately house new pupils in any approved project, and those costs may only include the cost of design, engineering, testing, inspection, plan checking, construction management, site acquisition and development, evaluation and response action costs relating to hazardous substances at a new or existing schoolsite, demolition, construction, acquisition and installation of portable classrooms, landscaping, necessary utility costs, utility connections and other fees, equipment including telecommunication equipment to increase school security, furnishings, and the upgrading of electrical systems or the wiring or cabling of classrooms in order to accommodate educational technology. A grant for new construction may also be used to acquire an existing government or privately owned building, or a privately financed school building, and for the necessary costs of converting the government or privately owned building for public school use.

CALIFORNIA CODES EDUCATION CODE Part 10.5, Chapter 4, Article 2 SECTION 17400-17429

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

(b) As used in this article, "building" includes each of the following:

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

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

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

(4) The permanent improvement of school grounds.

(c) As used in this article, "site" includes one or more sites, and also may include any building or buildings located or to be located on a site.

17401. As used in this article "lease or agreement" shall include a lease-purchase agreement.

17402. Before the governing board of a school district enters into a lease or agreement pursuant to this article, it shall have available a site upon which a building to be used by the district may be constructed and shall have complied with the provisions of law relating to the selection and approval of sites, and it shall have prepared and shall have adopted plans and specifications for the building that have been approved pursuant to Sections 17280 to 17316, inclusive. A district has a site available for the purposes of this section under any of the following conditions:

(a) If it owns a site or if it has an option on a site that allows the school district or the designee of the district to purchase the site. Any school district may acquire and pay for an option containing such a provision.

(b) If it is acquiring a site by eminent domain proceedings and pursuant to Chapter 6 (commencing with Section 1255.010) of Title 7 of Part 3 of the Code of Civil Procedure, the district has obtained an order for possession of the site, and the entire amount deposited with the court as the probable amount of compensation for the taking has been withdrawn.

(c) In the case of a district qualifying under Section 17410, if it is leasing a site from a governmental agency pursuant to a lease having an original term of 35 years or more or having an option to renew that, if exercised, would extend the term to at least 35 years.

17403. The term of any lease or agreement entered into by a school district pursuant to this article shall not exceed 40 years.

17404. Sections 17455 to 17480, inclusive, shall not apply to leases made pursuant to this article.

17405. Any lease or agreement shall be subject to the following requirements:

(a) A building or structure that is to be used for school purposes shall be subject to the provisions of Article 3 commencing with Section 17280) and Article 6 (commencing with Section 17365). A building or facility used by a school district under a lease or lease-purchase agreement into which neither pupils nor teachers are required to enter or that would be excluded from the definition of "school building," as contained in Section 17368, shall not be considered to be a "school building" within the meaning of Section 17283.

(b) Subdivision (a) shall not apply to trailer coaches used for classrooms or laboratories if the trailer coaches conform to the requirements of Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code, and the rules and regulations promulgated thereunder concerning mobilehomes, are not expanded or fitted together with other sections to form one unit greater than 24 feet in width, are used for special educational purposes, and are used by not more than 12 pupils at a time, except that the trailer coaches may be used by not more than 20 pupils at a time for driver training purposes.

(c) The site on which a leased relocatable structure is located shall be owned by the school district, or shall be under the control of the school district pursuant to a lease or a permit. "Relocatable structure" is any structure that is designed to be relocated.

(d) For purposes of interconnection of fire alarms, buildings leased for 24 months or less shall be subject to Section 809 of the Uniform Building Code until applicable regulations proposed by the State Fire Marshal are adopted as part of Title 24 of the California Code of Regulations.

(e) Notwithstanding any other provision of law, this section shall become operative on September 30, 1997.

17406. (a) 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 such 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 thereof, 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 prior to the expiration of that term, and shall contain such other terms and conditions as the governing board 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.

17407. The governing board of any school district may enter into an agreement with any person, firm, or corporation under which that person, firm, or corporation shall construct, or provide for the construction of, a building to be used by the district upon a designated site and lease the building and site to the district. The instrument shall provide that the title to the building and site shall vest in the district at the expiration of the lease, and may provide the means or method by which the title to the building and site shall vest in the district prior to the expiration of the lease, and shall contain such other terms and conditions as the governing board of the district deems to be in the best interest of the district.

The agreement entered into shall be with the lowest responsible bidder who shall give the security that any board requires. The board may reject all bids. For the purpose of securing bids the board shall publish at least once a week for two weeks in some newspaper of general circulation published in the district, or if there is no paper, then in some paper of general circulation circulated in the county, a notice calling for bids, stating the proposed terms of the agreement and the time and place where bids will be opened.

17408. The governing board of a school district shall call and hold an election, pursuant to Section 17409 or 17412, before or after entering a lease or agreement, as the case may be, except that if the lease or agreement does not

effect an increase in the existing applicable maximum tax rate of the district, the election requirements of this section shall not apply.

17409. Before entering into a lease or agreement pursuant to this article, the governing board of the district shall call, hold, and conduct an election in the manner provided in Section 42202, except that the ballot used in the election shall contain substantially the words: "Shall the governing board of the ____ District purchase (a site, sites) prepare plans and specifications, (the reference to the site or sites and plans and specifications shall not be included if, prior to calling the election, the governing board of the district has acquired a site or sites or proposes to lease a site or sites and has prepared plans and specifications) and lease (a site and, sites and) (a building, buildings) to be constructed for use by the school district (designating the location of the site or sites on which the building or buildings will be constructed and generally describing the building or buildings), and, for such purposes, shall the maximum tax rate of the district be increased by not to exceed ____, such increase to be in effect in the ____ District for the years 19_ to __, be authorized and the amount of such increase used solely and exclusively for such purposes?"

17410. (a) If, at an election held pursuant to Section 17409, or the predecessor to that section, a majority of the electors voting on the proposition voted "Yes," the governing board may call an election pursuant to this section.

Before entering into one or more leases or agreements pursuant to this section and this article, the governing board of the district shall call, hold, and conduct an election in the manner provided in Section 42202 of the Education Code, as it existed on December 31, 1979, except that the ballot used in the election shall contain substantially the words: "Shall the governing board of the ____ District purchase (a site, sites) prepare plans and specifications (the reference to the site or sites and plans and specifications shall not be included if, prior to calling the election, the governing board of the district has acquired a site or sites or proposes to lease a site or sites or has prepared plans and specifications) and lease (a site, sites) and (a building, buildings) to be constructed for use by the school district (designating the location of the site or sites on which the building or buildings will be constructed and generally describing the building or buildings) and for those purposes, shall the tax rate increase authorized on (the date of the original election), be used solely and exclusively for those purposes in addition to those approved by the majority of electors at the election held pursuant to Section 17409, or the predecessor to that section, on (the date of the original election)?"

If, at the election held pursuant to this section, a majority of the electors voting on the proposition vote "Yes," the governing board may proceed pursuant to this article to use that previously authorized tax increase for the purpose or purposes authorized under that election.

(b) It is the intent of the Legislature, in enacting this section, to permit the levy of a tax to the extent authorized at an election held pursuant to Section 17409, or the predecessor to that section, as modified to permit the proceeds of that tax to be expended for the purposes authorized at the election held pursuant to subdivision(a).

17411. The governing board of the district, if the district proposes at an election held pursuant to Section 17409 to lease more than one building, may include in the ballot measure used in the election a statement that the district reserves the right to lease less than all of the proposed buildings designated in the ballot measure. If such a statement is included in the ballot measure, the governing board may at any time thereafter determine to not lease one or more of the buildings included in the ballot measure, and such determination shall not breach any obligation of the district to the voters of the district.

17412. An election held pursuant to Section 17409 or Section 17413 shall be held in conjunction with either a statewide primary or general election, or an election date specified in Section 2500 of the Elections Code.

17413. In lieu of calling an election pursuant to Section 17409, the governing board of a school district may call an election pursuant to this section. Within 10 days after the governing board has opened the proposals pursuant to Section 17417 or has adopted a resolution pursuant to Section 17418 it may accept a proposal, if proceeding under Section 17417, and execute the lease or agreement, and immediately thereafter call an election pursuant to this section.

The governing board of the district shall call, hold, and conduct an election in the manner provided in Section 42202, except that the ballot used in the election shall contain substantially the words: "Shall the governing board of the ____ District lease (a site (sites) and) a building (buildings) to be constructed for use by the school district (designating the location of the site or sites on which the building or buildings will be constructed, and generally describing the building or buildings and the cost thereof), and, for such purposes, shall the maximum tax rate of the

district be increased by not to exceed _____, such increase to be in effect in the _____ District for the years 19__ to _____, be authorized and the amount of such increase used solely and exclusively for such purposes?"

17414. If, at the election held pursuant to Section 17409 or Section 17413, a majority of the electors voting on the proposition vote "Yes," the governing board may proceed pursuant to this article.

17415. Whenever the electors of a school district, at an election held pursuant to Section 17409 or 17413, have approved an increase in the maximum tax rate of the district for the purpose of enabling the district to enter into a lease or agreement for a site or building, or both, and before the lease or agreement is entered into, or during the term of the lease or agreement, territory is taken from the district and annexed to or included in another district by any means, the acquiring district shall automatically assume and shall pay to the district from which the territory is transferred a proportionate share of any remaining payments due under the lease or agreement, as the payments become due, for so long as the lease or agreement runs.

The acquiring district's proportionate share shall be in the ratio which the total assessed valuation of taxable property in the transferred territory bore to the total assessed valuation of taxable property in the whole district from which the territory is transferred for the year immediately preceding the date on which the transfer became effective for all purposes. This section shall be applicable only with respect to transfers of school district territory which become effective for all purposes after the effective date of enactment of this section, and shall be applicable whether the election under Section 17409 or 17413 occurred prior to or after the effective date of this section.

17416. (a) Unless the time allowed for the governing board to enter into the lease agreement is extended pursuant to subdivision (b), if the governing board of the district fails to enter into a lease pursuant to this article within three years after an election, held pursuant to Section 17409, at which a majority of the votes cast favors the proposition submitted, the authorization for an increase in the maximum tax rate shall become void.

(b) If litigation is filed challenging in any way the election held pursuant to Section 17409 or the competitive bidding proceedings or contract for the construction of the building to be used by the district; compliance with the California Environmental Quality Act; or the validity of or the proceedings for the issuance of any bonds, notes, warrants, or other evidences of indebtedness of a nonprofit corporation to be sold to finance construction of the building, the authorization for an increase in the maximum tax rate shall not become void because of the failure of the governing board to enter into a lease pursuant to this article until three years after the date upon which this subdivision becomes effective. This subdivision shall apply only to school districts which had an average daily attendance of 65,000 or more in the 1975-76 fiscal year.

17417. After the governing board of a school district has complied with Section 17402, it shall, in a regular open meeting, adopt a resolution declaring its intention to enter into a lease or agreement pursuant to this article. The resolution shall describe, in any manner to identify it, the available site upon which the building to be used by the district shall be constructed, shall generally describe the building to be constructed and state that the building shall be constructed pursuant to the plans and specifications adopted by the governing board therefore, shall, if that is the case, state the minimum yearly rental at which the governing board will lease real property belonging to the district upon which the building is to be constructed, and shall state the maximum number of years for which the school district will lease the building or site and building, as the case may be, and shall state that the proposals submitted therefore shall designate the amount of rental, which shall be annual, semiannual, or monthly, to be paid by the school district for the use of the building, or building and site, as the case may be. The resolution shall fix a time, not less than three weeks thereafter for a public meeting of the governing board to be held at its regular place of meeting, 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. Notice thereof shall be given in the manner provided in Section 17469. At the time and place fixed in the resolution for the meeting of the governing body, all sealed proposals which have been received shall, in public session, be opened, examined, and declared by the board. Of the proposals submitted which conform to all terms and conditions specified in the resolution of intention to enter a lease or agreement and which are made by responsible bidders, the proposal which calls for the lowest rental shall be finally accepted, or the board shall reject all bids. The board is not required to accept a proposal, or else reject all bids, on the same day as that in which the proposals are opened.

17418. (a) As an alternative to obtaining sealed proposals as required by Sections 17407 and 17417, the governing board may, in a public meeting, adopt a resolution declaring its intention to enter into a lease or agreement pursuant to this article with a nonprofit public benefit corporation organized under the Nonprofit Public Benefit Corporation Law (Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code) if the articles of incorporation or bylaws of the nonprofit public benefit corporation provide both of the following:

(1) That no person shall be eligible to serve as a member or director of the corporation except a person initially approved by resolution of the governing board of the school district.

(2) That no part of the net earnings of the corporation shall inure to the benefit of any member, private shareholder, individual, person, firm or corporation excepting only the school district.

(b) The resolution adopted by the governing board shall do all of the following:

(1) Describe, in a manner to identify it, the available site upon which the building to be used by the district shall be constructed.

(2) Generally describe the building to be constructed and state that the building shall be constructed pursuant to the plans and specifications adopted by the governing board therefore.

(3) If that is the case, state the minimum yearly rental at which the governing board will lease real property belonging to the district upon which the building is to be constructed.

(4) State the maximum number of years for which the school district will lease the building, or building and site, as the case may be.

(c) Any building constructed by a nonprofit public benefit corporation pursuant to a lease or agreement entered into pursuant to this section shall be constructed under a contract awarded to the lowest responsible bidder pursuant to Article 42 (commencing with Section 20670) of Part 3 of Division 2 of the Public Contract Code.

Section 17424 applies to the contract.

17419. Any bonds, notes, warrants, or other evidences of indebtedness to be issued by a nonprofit corporation to finance the construction of a building pursuant to a lease or agreement entered into pursuant to Section 17418 shall be sold pursuant to Chapter 10 (commencing with Section 5800) of Division 6 of Title 1 of the Government Code.

17420. All bonds, notes, warrants or other evidences of indebtedness referred to in Section 17419 and the interest thereon, and all bonds, notes, warrants, or other evidences of indebtedness issued to refinance any bonds, notes, warrants, or other evidences of indebtedness referred to in Section 17419 and the interest thereon, are exempt from all taxation in the state other than inheritance, gift and franchise taxes.

17421. Any building constructed for the use of a school district pursuant to this article is subject to Sections 17280 to 17313, inclusive.

17422. For the purposes of Sections 15102 and 15106 and Chapter 6 (commencing with Section 16000) of Part 10, 50 percent of any remaining payments for use of the building or site and building which would become due from the district under any leases and agreements entered into by the district pursuant to this article, if the leases and agreements were to run their full term, shall be considered outstanding bonded indebtedness.

17423. No district shall enter into any lease or agreement pursuant to this article if at the time 50 percent of any remaining rental payments for use of the building or site and building which would become due from the district pursuant to this article, including the lease or agreement to be entered into, if the leases and agreements were to run their full term, plus the total amount of district bonded indebtedness outstanding at the time, shall exceed 7.5 percent for elementary school districts and high school districts and 12.5 percent for unified school districts of the taxable property of the district as shown by the last equalized assessment of the county or counties in which the district is located. For the purpose of this section, the taxable property of the district shall be determined upon the basis that the district's assessed value has not been reduced by the exemption of the assessed value of business inventories in the district or reduced by the homeowners' property tax exemption.

17424. The governing board of the school district shall obtain the general prevailing rate of per diem wages from the Director of the Department of Industrial Relations for each craft, classification or type of workman needed for the construction of the building and shall specify in the resolution and in the notice, required by Section 17417, or in the resolution required by Section 17418 and in the lease or agreement made pursuant to this article, what the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality is for each craft, classification or type of workmen needed for the construction of the building. The holidays upon which such rate shall be paid need not be specified by the governing board, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workmen employed on the project.

Any agreement or lease entered into pursuant to this article shall require that such general prevailing rates will be paid. It shall also require that work performed by any workman employed upon the project in excess of eight hours

during any one calendar day shall be permitted only upon compensation for all hours worked in excess of eight hours per day at not less than 1 1/2 times the basic rate of pay. There may also be included in leases or agreements entered into pursuant to this article any other requirements with respect to matters related to the subject of this section which the governing board deems necessary or desirable.

17425. The provisions of this article prevail over any provisions of law which conflict therewith.

17426. All acts and proceedings taken prior to the effective date of the enactment of this section, by or on behalf of any district under this article, or under color of this article, for the authorization of an increase in the maximum tax rate of the district and for the leasing of a building or buildings for the purposes of the district are hereby confirmed, ratified, validated, and declared legally effective. This shall include all acts and proceedings of the governing board of the district and of any person, public officer, board, or agency, heretofore done or taken upon the question of the authorization of the tax rate increase or the leasing. Whenever an election has been called and held prior to the effective date of the enactment of this section, for the purpose of submitting to the voters of any district the question of an increase in the maximum tax rate of the district and for the leasing of a building or buildings for the purposes of the district, the election and all proceedings attendant thereon are hereby confirmed, ratified, validated, and declared to be legally effective for all purposes, and the tax rate increase, if authorized by the required vote and in accordance with the proceedings heretofore taken, shall be a legal and valid authorization, in accordance with its terms, and any tax heretofore or hereafter levied pursuant to that authorization shall be legal and valid. The foregoing provisions of this section shall operate to supply any legislative authorization that may be necessary to validate the acts and proceedings heretofore taken which the Legislature could have supplied or provided for in this article. The foregoing provisions of this section shall be limited to the validation of acts and proceedings to the extent to which the same can be effectuated under the California and United States Constitutions. The foregoing provisions of this section shall not operate to confirm, ratify, validate, or legalize any act, proceeding, or other matter the legality of which is being contested or inquired into in any legal proceeding now pending and undetermined or which may be pending and undetermined during the period of 30 days from and after the effective date of this section, and shall not operate to confirm, ratify, validate, or legalize any act, proceeding, or other matter which has heretofore been determined in any legal proceeding to be illegal, void, or ineffective. In any school district in which an election was called and held prior to the effective date of this section in which the voters of the district authorized an increase in the maximum tax rate of the district and the leasing of a building or buildings for the purposes of the district, the law in effect at the date of the school district election shall govern the terms of the lease, the terms of the sale of related bonds, notes, and warrants, and the school district's maximum bonded indebtedness, and Section 17423 shall not be applicable to the school district's entry into any lease or agreement authorized at an election called and held prior to the effective date of this section.

17427. The State Allocation Board shall consider community school pupils housed in leased facilities that do not conform to the requirements of Part 2 (commencing with Section 2-101), Part 3 (commencing with Section 3-089-1), Part 4 (commencing with Section 4-403), and Part 5 (commencing with Section 5-102), of Title 24 of the California Code of Regulations as unhoused for the purposes of determining priority for the leasing of portable classrooms pursuant to Chapter 14 (commencing with Section 17085) of Part 10.

17428. The governing board of a school district may lease property in an adjoining school district for garage, warehouse, or other utility purposes or may purchase property in an adjoining school district for those purposes and may dispose of the property in the same manner as property within the boundary of the district is purchased and disposed of. The power of eminent domain shall not be applicable and the acquisitions by purchase shall be subject to the approval of the governing board of the school district in which the property is located.

17429. (a) This section shall apply only to a school district in which the electorate authorizes an increase in the maximum tax rate of the district pursuant to this article for the lease of one or more schools, and there exists at the time of the election on a site owned by the district a school facility not owned by the district meeting all of the requirements of Article 3 (commencing with Section 17280) of this chapter, which site and school facility are designated and described in the ballot proposition approved by the voters.

(b) Notwithstanding any other law, a school district may lease from a California nonprofit corporation an existing school and may pay rentals therefore from funds derived from the increase in the maximum tax rate approved by the voters at an election. The purchase price of the school paid by the nonprofit corporation to the owners of the school shall not exceed the actual audited cost of construction thereof including actual interest paid on money borrowed to

finance such construction. Prior to the purchase of the school by the nonprofit corporation, an independent certified public accountant shall be retained by the school district to verify the actual cost of construction and any interest paid to finance the construction, and the nonprofit corporation may conclusively rely upon any certificate or opinion setting forth the actual cost of construction and the interest prepared by the independent certified public accountant.

(c) A school district, the electorate of which, prior to the effective date of this section, authorized an increase in the maximum tax rate in the manner, for the purposes, and under the circumstances specified in subdivision (a), may avail itself of the authority afforded by subdivision (b).