Opinion: Contractor lobbyists seek relief from California Legislature

DAN WALTERS  JULY 9, 2015

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HIGHLIGHTS

- Appellate court ruled against leaseback school contract
- Dozens of school projects could be affected
- Construction industry wants Legislature to intervene
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“Gut-and-amend” has a harsh ring, which may be appropriate, since it refers to a rather harsh legislative maneuver.

A moribund bill is “gutted” – its contents are stripped away, leaving only a number – and “amended” with entirely new language.

It short-circuits the laborious legislative process that might make passage difficult – at best unseemly, and at worst sneaky.

That brings us to Assembly Bill 975, a minor change in school construction law, and another bill.

They are being fully amended, complete with new authors, at the behest of lobbyists for Associated General Contractors and the Coalition for Adequate School Housing to counteract a state appellate court declaration that a “lease-leaseback” contract to build a new school violates state competitive bidding and conflict-of-interest laws.

The decision (Davis v. Fresno Unified School District) involves a $36.7 million middle school and, as noted in this space earlier, could invalidate dozens of such contracts involving hundreds of millions of dollars throughout the
state – money that might have to be repaid by contractors.

Just a week after the June 1 decision, a lawyer for affected companies, P. Randolph Finch, outlined a plan “to mitigate our losses” by urging Fresno Unified to appeal to the state Supreme Court and seeking legislation “overruling the Davis case.” It would also exempt contractors that do pre-construction planning and then receive no-bid leaseback contracts from conflict-of-interest laws.

“We have clients with well over a half-billion dollars of current backlog,” Finch wrote, “and another billion in completed projects, at risk on the Davis case. Consequently, we need a devoted industry effort to press these legislative changes.”

The industry’s strategy is to assert that the court’s decision wrongly interpreted state law and has, in the preamble to one bill, “stopped shovel-ready construction projects that have been properly contracted for ...”

The bills target not only the Davis decision but numerous other lawsuits filed by taxpayer groups and contractors barred from bidding on school construction projects by leaseback deals. In fact, one soon-to-be-revised bill asserts that “some local governments have been threatened with predatory lawsuits based on the ruling ...”

Amendments had been prepared to Senate Bill 374 to enact Finch’s conflict-of-interest exemption but late Thursday, its author, Sen. Isadore Hall III, said it wouldn’t be used, so apparently another vehicle will be sought. AB
975, meanwhile, would compel school districts whose “good faith” leaseback contracts are invalidated by lawsuits to pay contractors anyway.

After being amended with new authors, the bills will face a deadline next week to get initial committee approval – not a certainty. Plaintiffs in the Fresno case and other pending suits, particularly contractors frozen out of the leaseback business, are mounting an opposition campaign.

One other fillip: A Fresno school trustee, Brooke Ashjian, said this week that the FBI had interviewed him about the contested leaseback contract. The feds are apparently interested in the conflict-of-interest aspect.

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There is a critically important point that must be recognized in the Davis v. Fresno Fifth Appellate Court decision - the main focus of the ruling was that the way Fresno USD contracted was *not* a legitimate lease-leaseback, but instead, a traditional construction contract that masqueraded as a lease to enable the district to take advantage of the avoidance of competitive bidding allowed under the lease-leaseback statute (CA Ed Code 17406). The Appellate Court
made it clear that legal use of "lease-leaseback" under the code occurs only when a builder finances the project and collects rent only *after* completion. The point is - "lease-leaseback" is *not* illegal but a valuable delivery option when a school district needs funding. Bidding laws pursuant to the Public Contract Code are violated only when there is an intentional subterfuge to create the appearance of a lease when in fact it is really just a traditional construction contract.

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Quite true, but the decision also involved conflict of interest when a company awarded the leaseback contract participated in the process before the fact. And it's that aspect that's most worrisome, legally, to leaseback contractors.