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January 24, 2017

Via Facsimile to (760) 941-4409
& Via Email to Justin.Cunningham@bonsallusd.com

Bonsall Unified School District
c/o Mr. Justin Cunningham, Superintendent
31505 Old River Road
Bonsall, CA 92003

**Re: Request for Rescission of Leaseback Contract Entered into on December 8, 2016
for New Bonsall High School Project on Gird Road**

Dear Mr. Cunningham:

This office has been retained by the California Taxpayers Action Network (“CalTAN”) on behalf of state and local taxpayers/residents to remedy Bonsall Unified School District (“District”) illegally entering into a lease and leaseback construction contract (worth approximately \$20,459,251) with Erickson-Hall Construction Company for the construction of the new Bonsall High School Project on Gird Road (“Project”). As discussed below this construction contract is illegal and void because, inter alia, it was entered into prior to Division of State Architect approval of the plans and specifications as required by the Education Code and/or it appears District is proceeding forward with the Project without properly complying with the California Environmental Quality Act and its implementing regulations. Because this contract is illegal and void all monies paid thereunder must be repaid to the District.

Please schedule a special Board of Education meeting on or before February 2, 2017, so the Board can vote to rescind this illegal contract and recover all payments made thereunder. Thereafter, please provide written confirmation of the foregoing.

In the event District does not provide confirmation of the foregoing to this office by February 3, 2017, CalTAN will have no choice but to file a lawsuit in the Superior Court for an injunction and judgment that this contract is invalid and void based on District’s failure to comply with California Education Code §17402 and 17406 as those statutes existed on December 8, 2016 and January 1, 2017, respectively.

Specifically, at the time it entered into this contract on December 8, 2016, District failed to comply with Education Code §17402 which mandated:

Before the governing board of a school district enters into a lease or agreement pursuant to this article, 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.

The approvals “pursuant to Sections 17280 to 17316” required by Education Code §17402 includes the approval required by Education Code §17297 which mandates:

....[B]efore letting any contract for any construction or alteration of any school building, the written approval of the plans, as to safety of design and construction, by the Department of General Services, shall be first had and obtained.

The approvals “pursuant to Sections 17280 to 17316” required by Education Code §17402 includes the approval required by Education Code §17307 which mandates:

No contract for the construction or alteration of any school building, made or executed by the governing board of any school district or other public board, body, or officer otherwise vested with authority to make or execute a contract, is valid, and no public money shall be paid for any work done under a contract or for any labor or materials furnished in constructing or altering any building, unless the plans, specifications, and estimates comply in every particular with the provisions of this article and the requirements prescribed by the Department of General Services and unless the approval thereof in writing has first been had and obtained from the Department of General Services.

Education Code §17312 mandates:

Any person who violates any of the provisions of this article or makes any false statement in any verified report or affidavit required pursuant to this article is guilty of a felony.

Unless District properly entered into the contract prior to January 1, 2017, (which it did not) District would be required to comply with the new taxpayer protections of Education Code §17406 as amended January 1, 2017 as a result of Assembly Bill 2316 passed in 2016. For the reasons stated above, District did not properly enter into the contract prior to January 1, 2017.

CalTAN contends District prematurely and improperly entered into this contract on December 8, 2016, (without complying with Education Code §17402's DSA approval requirements) to avoid complying with the following new taxpayer protections of amended Education Code §17406:

First, relative to the contract District has not complied with any of the requirements of Education Code §17406(a)(2), which as of January 1, 2017, mandates:

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.

Additionally, as of January 1, 2017, Education Code §17406(a)(3) requires District:

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.

Further, as of January 1, 2017, Education Code §17406(a)(4) requires District:

(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).

Because District did not want to not comply with Education Code §17406's new transparency and fair bidding requirements as of January 1, 2017, District entered into approximately \$20 million worth of construction contracts on December 8, 2016, without first complying with the Division of State Architect approval requirements of Education Code §17402 applicable on that date.

Please rescind the illegal construction contract entered into by District on December 8, 2016, at a Board of Education meeting on or before February 2, 2017, and recover all payments made thereunder. If you have any questions or concerns relative to the foregoing, please do not hesitate to contact me.

Sincerely,

CARLIN LAW GROUP, A.P.C.



Kevin R. Carlin

cc: Bonsall USD Board of Education via email addresses on next page

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