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August 4, 2015

The Honorable Tani Gorre Cantil-Sakauye, Chief Justice
The Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Stephen K. Davis v. Fresno Unified School District*;
Fifth District Court of Appeal, Case No. F068477
Amicus Curiae Letter of Associated General Contractors

Dear Chief Justice Cantil-Sakauye and Associate Justices:

I write on behalf of the Associated General Contractors of California and the Associated General Contractors of America, San Diego Chapter (collectively "AGC").[1] AGC respectfully submits this amicus curiae letter pursuant to Rule 8.500(g), California Rules of Court, to request that the Court grant review in this case, in order to secure uniformity of decision and to settle important questions of law.

I.
THE INTERESTS OF AGC

AGC represents more than 1,500 individuals and companies throughout California. AGC members are general contractors, specialty contractors, and material suppliers who perform billions of dollars of construction work for public entities and private owners throughout California. AGC members also include associate or affiliate members that provide legal, accounting, insurance, bonding, and safety services to construction industry clients. AGC monitors and advocates on behalf of its members with respect to significant legislation and other legal issues relevant to the construction business. In California, AGC is known as "***the voice of the construction industry***."

AGC has long supported fair and honest competition in the letting of public works contracts, without fraud, favoritism, or corruption. At the same time, AGC has been at

[1] This letter has been approved by the necessary officers of both AGC of California and AGC of San Diego. It was prepared by a team of AGC member lawyers, including me; Eileen M. Diepenbrock of Diepenbrock Elkin LLP, Sacramento; P. Randolph Finch Jr. of Finch, Thornton & Baird LLP, San Diego; William K. Hurley of Miller, Morton, Caillat & Nevis LLP, San Jose; and Arthur G. Woodward of Reynolds Maddux Woodward LLP, Auburn.

the forefront of making new project delivery methods available to public agencies, such as design-build and best value contracting. AGC and the California Legislature have recognized that just because a project is not competitively bid does not mean that the delivery method utilized is illegal or that the delivery method chosen is not in the best interests of the public agency and its constituent taxpayers.

As discussed below, the *Davis* opinion addresses the lease-leaseback ("LLB") project delivery method for construction of school facilities under Education Code section 17406.

However, because of the uncertainty discussed below, many such projects have been put on hold following the *Davis* decision. Because such projects typically are performed during the summer recess, this has caused a significant impact on the construction or renovation of the facilities public school students need, deserve, and, in many cases, are mandated by class-size reduction legislation.

AGC submits this amicus letter because the petitions for review in this case raise issues of tremendous importance to our members:

(1) Whether an independent contractor is an "employee" of a public agency under Government Code section 1090 when the only allegation is that the contractor previously was awarded a contract for pre-construction services in connection with the same public works project that the contractor is awarded a subsequent contract to construct?

(2) What are the requirements of Education Code section 17406 with respect to lease agreements that are entered into between a school district and a contractor for the construction or renovation of school district facilities?

There is a split of authority between the Courts of Appeal on these issues. One court has interpreted Government Code section 1090 to hold that an independent contractor is not an "employee" under the statute. Two others have found an independent contractor could be deemed an "employee" under section 1090. The *Davis* opinion sides with this interpretation. Whether the exact same statutory language can be interpreted differently in different cases, when the Legislature has expressed no such intent, is a question this Court must resolve.

In addition, by interpreting Education Code section 17406 in a way that requires "financing" of the project and "occupancy" during the lease term, the *Davis* court imposed requirements that have not been present on the vast majority of projects built using the LLB method because these requirements are not set forth in the statute.

However, the *Davis* court did not specify what type of financing would be acceptable. The *Davis* court also did not provide any guidance as to what term of occupancy would meet its newly-stated criteria. Other Courts of Appeal have approved LLB arrangements that did not include these financing and occupancy requirements.

Thus, under Rule 8.500(b)(1), review by the Supreme Court is necessary to secure uniformity of decision and to settle important questions of law. This Court should grant review and settle these questions, so that contractors and school districts may move forward with confidence on their pending construction projects.

II.
THE REASONS THAT AGC SUPPORTS REVIEW

A. The *Davis* court misinterpreted Government Code section 1090.

On many LLB and other types of contracts, school districts and public agencies often will retain the services of a construction manager, architect, engineer, or other consultant before awarding a contract for the construction of a public works project. This is particularly true when taxpayer-backed bonds are used to pay the costs of construction, as is the case on a very high percentage of school construction projects. Without adequate knowledge about the expected cost of a particular project, a school district risks budget shortfalls.

The use of pre-construction contractors and consultants is even more prevalent on school projects because of the need for approval of all drawings by the Division of the State Architect before the contract for construction of the project may be executed. This process takes considerable time, and school districts benefit by having a person knowledgeable about design and construction assist them through it. This is true regardless of whether the proposed project delivery method is competitive bidding or LLB.

For the most part, school districts and other public agencies that hire contractors and consultants to provide pre-construction services utilize a selection process permitted by statute, such as Government Code section 4525, *et seq*. Most districts utilize a request for proposal process to select contractors and consultants to perform pre-construction services. This process is not limited to only one bidder. Rather than basing its selection on the lowest bid price, the district selects the contractor or consultant that will provide the best value to the district. This is all perfectly legal under various statutes. (*See, e.g.*, Government Code section 4525, *et seq.*; Public Contract Code section 6700, *et seq.*)

Pursuant to Government Code section 1090, no employee or elected official of a public agency is permitted to accept a contract in which it has any financial interest. Section 1090 provides that any such contract is void.

In *Davis*, the plaintiff alleged that because the contractor (Harris Construction Co.) had a pre-construction services agreement with the Fresno Unified School District, Harris was ineligible to be awarded the LLB contract for construction of the project. The Court of Appeal agreed, holding, "in civil actions, the term 'employees' in Government Code section 1090 encompasses consultants hired by the local government." (Op. 39-40.)

This holding by the *Davis* court is in conflict with *People v. Christiansen* (2013) 216 Cal.App.4th 1181. Moreover, despite the *Davis* court's statement that the decisions of two other Courts of Appeal support its holding, neither of those other cases dealt with a situation similar to the arrangement in *Davis*. To the contrary, in both *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114 ("*Hub City*"), and *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007) 148 Cal.App.4th 682 ("*Hanover*"), the courts held that the individual, as opposed to corporate, consultants retained by a government agency were barred by section 1090 from benefitting financially from subsequent contracts entered into by the agency.

Neither the *Hub City* nor *Hanover* case arises in the context of construction of a public works construction project. In *Hanover*, the alleged employee served as outside counsel to the public agency. The *Hanover* court did not follow this Court's decision in *Reynolds v. Bement* (2005) 36 Cal.4th 1075, in which the Court said, "'In this circumstance – a statute referring to employees without defining the term – courts have generally applied the common law test of employment.'" (*See*, *Reynolds*, *supra*, 36 Cal.4th at 1087, citing *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 500.) Instead, the *Hanover* court ruled, "we conclude that an attorney whose official capacity carries the potential to exert 'considerable' influence over the contracting decisions of a public agency is an 'employee' under section 1090, regardless of whether he or she would be considered an independent contractor under common-law tort principles." Because section 1090 does not define the term "employee," the *Hanover* decision is contrary to this Court's ruling in *Reynolds*.

In *Hub City*, the alleged employee was the City's in-house waste management director, who urged the City to enter into a contract with a corporation that was his alter ego. The *Hub City* court followed the decision in *Hanover*, stating that the evidence presented at trial was sufficient to establish that the alleged employee had negotiated

contracts, supervised city staff, and purchased equipment and real estate on behalf of the City. Therefore, section 1090 was applicable to this employee.

Unlike the fact patterns in *Hanover* and *Hub City*, the *Christiansen* case does deal with a construction project. There, the Court of Appeal held that the term "employee" in section 1090 did not encompass an independent contractor.[2] The Christiansen court distinguished *Hanover* and *Hub City*, both because they were civil cases and because they had failed to follow this Court's opinion in *Reynolds*. The *Christiansen* court also pointed out that none of the cases cited in *Hanover* and *Hub City* supported the expansion of the term "employee" to independent contractors under section 1090.

As the foregoing discussion demonstrates, there is a clear difference in authority with respect to the interpretation of section 1090. That difference cannot be explained away just because one case is criminal while the others are civil. Basic principles of statutory construction require that statutes be read consistently, no matter the type of case.

Moreover, the *Davis* court's holding that consultants are employees under section 1090 creates a direct conflict with Public Contract Code section 10365.5. That section, which is part of the State Contract Act, provides:

> (a) No person, firm, or subsidiary thereof who has been awarded a consulting services contract may submit a bid for, nor be awarded a contract for, the provision of services, procurement of goods or supplies, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract.
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> (b) Subdivision (a) does not apply to any person, firm, or subsidiary thereof who is awarded a subcontract of a consulting services contract which amounts to no more than 10 percent of the total monetary value of the consulting services contract.

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[2] It is not surprising that the public agency involved in *Christiansen* does not want this Court to review *Davis*. The Beverly Hills Unified School District, having failed in its attempt to have Ms. Christiansen convicted of a criminal violation of section 1090, would love to have a different definition of "employee" apply to civil cases, so that it can avoid payment of what BHUSD claims is a $20 million judgment against it. BHUSD's amicus letter in opposition to review in this case merely highlights the split of authority on this question.

(c) Subdivisions (a) and (b) do not apply to consulting services contracts subject to Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

Government Code section 4525, subdivision (a), defines a "firm" as "any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the profession of architecture, landscape architecture, engineering, environmental services, land surveying, or construction project management."

Under these statutes, if the contract is with a state agency, the types of entities listed in section 4525, subdivision (a), may be hired as consultants and then be hired later to perform the resulting construction contract. But, the same entity would be barred from doing so under the *Davis* court's interpretation of section 1090, which applies to all public contracts. In short, what is permitted by the Public Contract Code is prohibited by the *Davis* court's interpretation of section 1090. The only way that section 1090 and section 10365.5 of the Public Contract Code can be harmonized is if the term "employee" in section 1090 does not include consultants hired to perform pre-construction services.

The ramifications of the holding in *Davis* are huge. As discussed above, public agencies and school districts routinely enter into pre-construction services agreements with contractors and consultants. Often, those same entities are involved in some way in the actual construction of the project. If the term "employee" in section 1090 includes these entities, then there are thousands of public works contracts throughout the state that are void. These contracts are not limited to LLB contracts with school districts, but include any public works project, under any project delivery method.

Because the *Davis* decision conflicts with other Court of Appeal and Supreme Court decisions and with other statutes, this Court should grant review and make clear that the term "employee" in section 1090 does not include independent contractors and consultants retained to provide pre-construction services to public agencies.

B. Clarity is needed with respect to Education Code section 17406.

LLB projects have resulted in billions of dollars of school facilities being successfully built in California. For the most part, the LLB contracts used on those projects have components very similar to the one struck down by the Court of Appeal in *Davis*. In particular, most LLB contracts do not require any financing of the project cost

by the contractor, and most LLB contracts prior to January 1, 2015[3] did not require that the term of the lease extend beyond the completion of construction. The *Davis* court imposed both of these requirements.

Other Court of Appeal decisions have upheld LLB arrangements very similar to the one struck down in this case. *See, e.g., Los Alamitos Unified School District* v. *Howard Contracting* (2014) 229 Cal.App.4th 1222.

In addition to imposing requirements that are not typically included in LLB contracts and that are not expressly required by section 17406, the *Davis* court did not provide any guidance as to how those requirements may be satisfied. There is no clarity in *Davis* as to the amount or duration of the financing requirement. There is no clarity in *Davis* as to the length of any lease term required after the completion of construction.

Given the prevalence of the LLB project delivery method and the possibility that LLB contracts that do not meet the requirements stated in *Davis* may be declared void, there is a very real risk that contractors performing or that have completed such contracts may be forced to disgorge amounts paid to them. (*See, e.g., Miller v. McKinnon* (1942) 20 Cal.2d 83.) This is the exact remedy sought by the plaintiff in *Davis*.

On behalf of the construction industry, AGC requests this Court grant review and provide guidance on whether the requirements imposed by the *Davis* court are correct, and if so, what the parameters of those requirements are. If contractor financing is required, how much and for how long? If occupancy during the term of the lease is required, for how long? Only if these questions are answered by this Court will contractors and school districts be able to comply with the law and move forward with the critical school construction projects they wish to complete using the LLB delivery method authorized by the Legislature.

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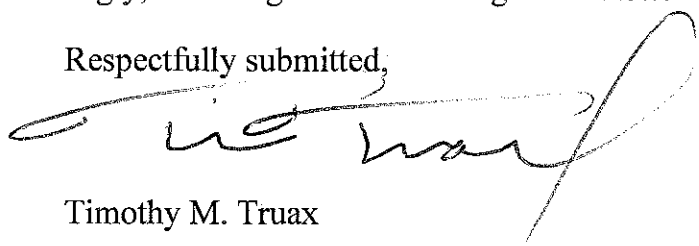
[3] Effective January 1, 2015, section 17406 was amended to require use by the school district of the constructed facilities during the lease term. This demonstrates that the Legislature knows how to impose those requirements it deems applicable to the use of the LLB delivery method.

III.
CONCLUSION

The issues raised by the *Davis* case are extremely important to contractors and school districts throughout this state. Accordingly, AGC urges the Court to grant review.

Respectfully submitted,



Timothy M. Truax

PROOF OF SERVICE BY U.S. MAIL

I am over 18 years of age and not a party to this action. My firm is located in the County of Los Angeles, where the following mailing took place. My business address is 222 North Sepulveda Boulevard, Suite 2000, El Segundo, CA 90245.

On August 4, 2015, I served the following document by first-class mail: **Amicus Curiae Letter of Associated General Contractors.**

The document was served by enclosing it in sealed envelopes and placing them for collection and mailing following ordinary business practices. I am readily familiar with my firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

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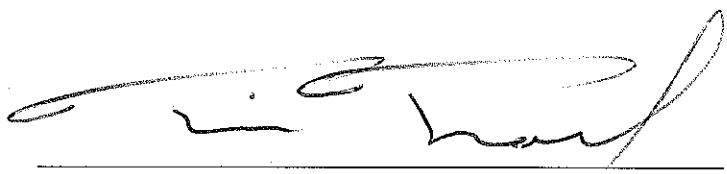
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: August 4, 2015



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