



DANNIS WOLIVER KELLEY

Attorneys at Law

Lease-Leaseback Project Delivery

Presented to:



TAMALPAIS UNION HIGH
SCHOOL DISTRICT

Board Meeting
October 25, 2022



This training is provided for educational, compliance and loss-prevention purposes only, and absent the express prior agreement of DWK, does not create or establish an attorney-client relationship. The training is not itself intended to convey or constitute legal advice for particular issues or circumstances. Contact a DWK attorney for answers to specific questions.

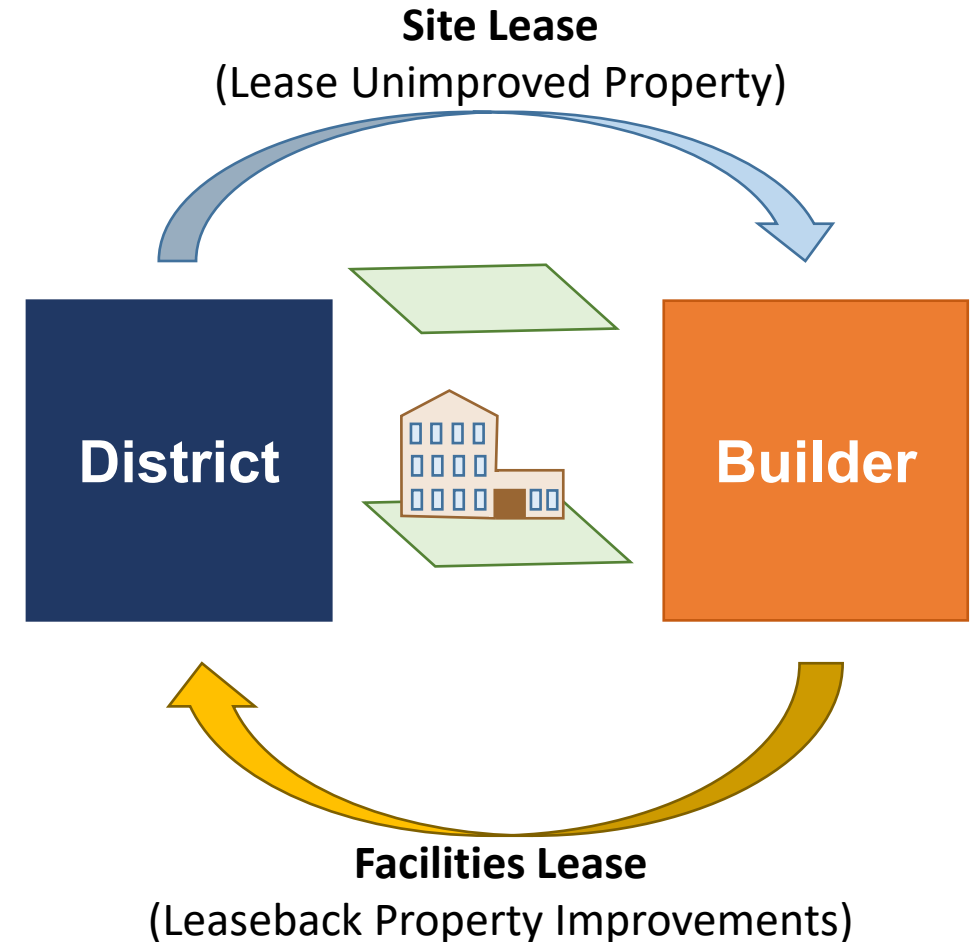
Overview

- I. What is Lease-Leaseback?
- II. Legal developments
- III. Procurement to Award of Contract
- IV. After Award of Contract through Guaranteed Maximum Price
- V. Changes during Construction
- VI. Project Close-out through Completion of Lease Payments

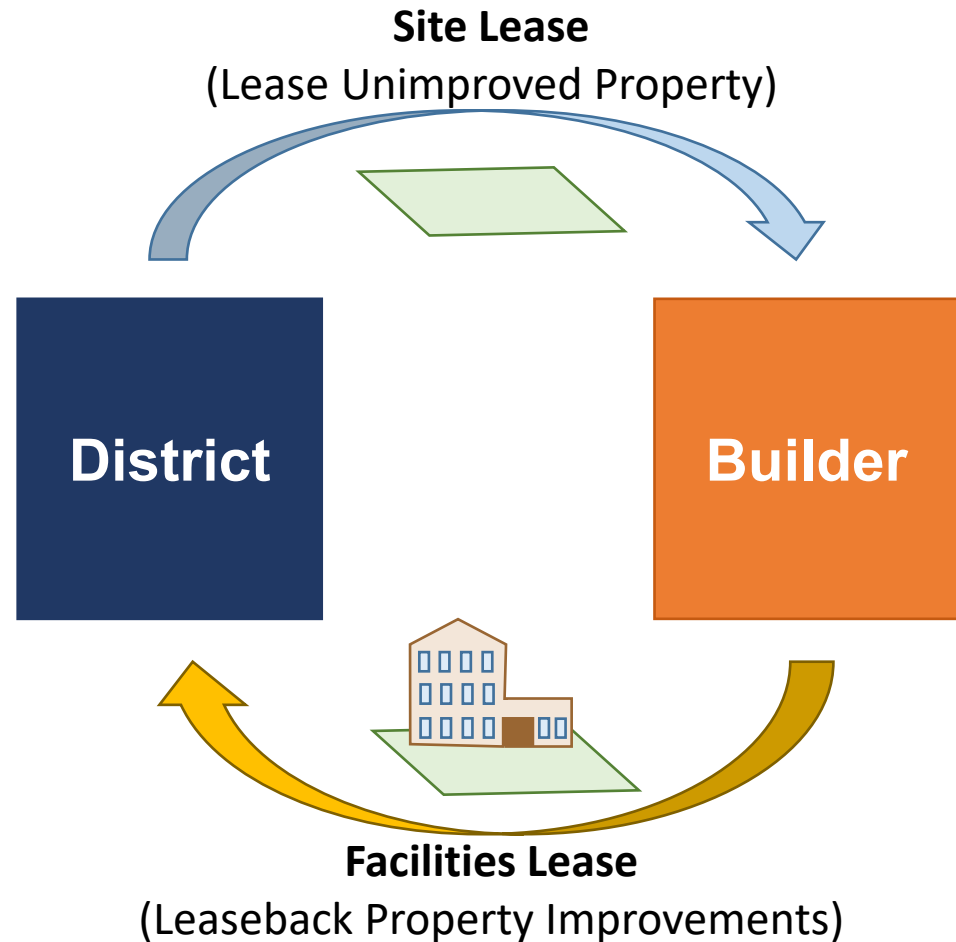


What is Lease-Leaseback?

- District “leases” property to Builder
 - Via Site Lease
- Builder constructs tenant improvements to the property
- Builder “leases back” the completed improvements to the District
 - Via Facilities Lease

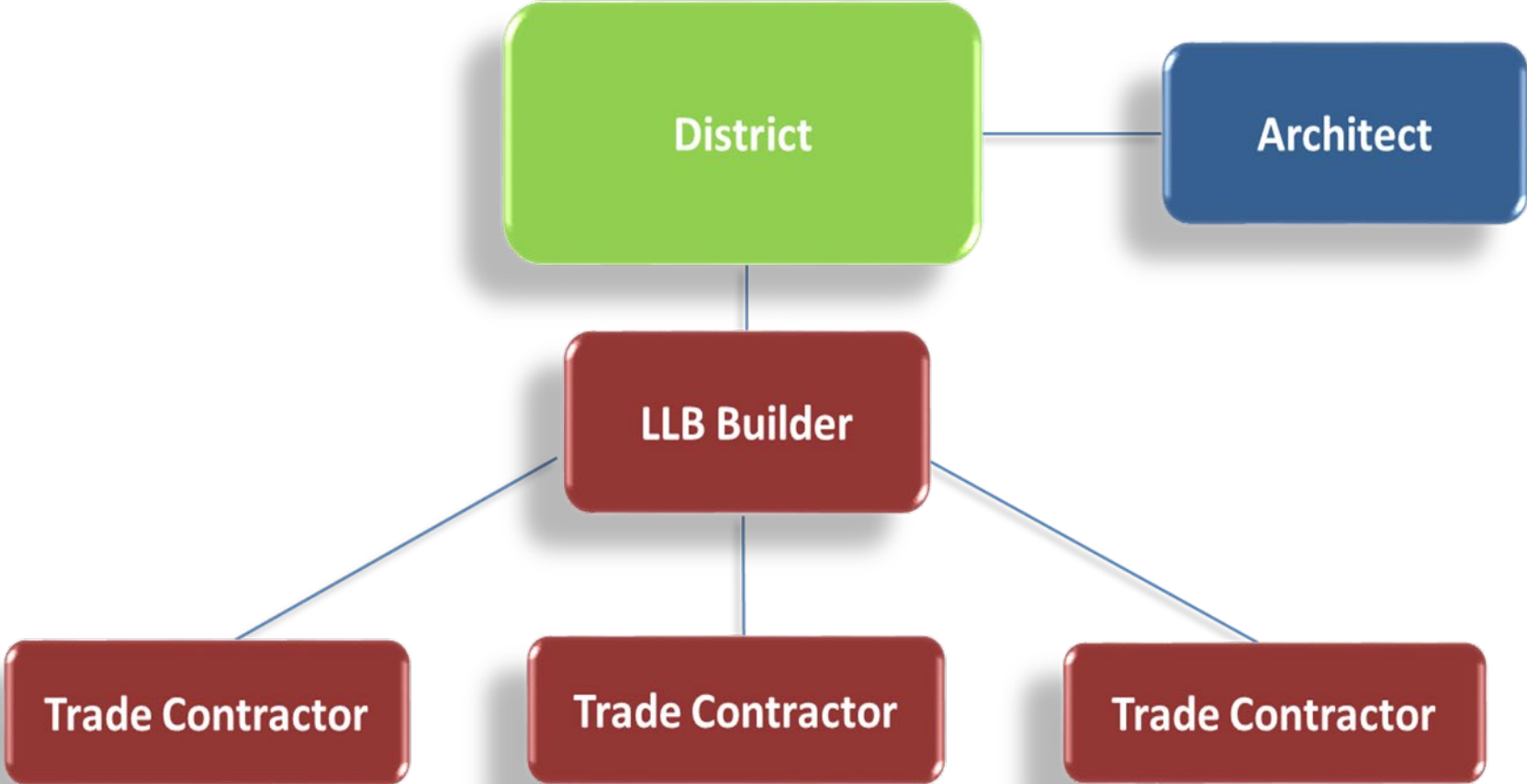


What is Lease-Leaseback: the Agreements



- **Site Lease:**
 - Terminates when Facilities Lease terminates
- **Facilities Lease:**
 - May include preconstruction services
 - District makes “Tenant Improvement Payments” (i.e., Progress Payments)
 - When District occupies completed facility, Builder leases the facility back to the District (Lease Payments = financing component)
 - Once the final lease payment has been made, the lease is terminated.

Lease-Leaseback Structure



Legal Developments: *Davis v. Fresno USD*

- Plaintiff Stephen Davis, a taxpayer, challenged a lease-leaseback agreement between Harris Construction and the Fresno Unified School District for the construction of a \$36.7 million middle school
- Results (June 1, 2015):
 - District must occupy the completed facility for a period of time before final payment
 - Lease agreement must include financing component
 - Consultants providing pre-construction services are subject to conflict-of-interest statutes

New Legislation – Educ. Code § 17406

- Education Code section 17406, as amended, effective January 1, 2017, addresses some *Davis* concerns:
 - Requires Request for Proposals and advertising, e.g., “competitive solicitation”
 - Requires Board to adopt and publish required procedures and guidelines to evaluate proposers and “best value” selection
 - Allows for preconstruction services to be included in the lease-leaseback contract, eliminating conflict of interest concerns



Elements of best Value Methodology

- Requests for Proposals
 - Advertise Notice for RFP
 - RFP must include
 - Description
 - Estimated price
 - Required preconstruction services
 - Key contract terms
 - Best value evaluation criteria and weight
- Prequalification Requirements
 - Prime Contractors
 - First-tier mechanical, electrical, plumbing (MEP) trades

Elements of best Value Methodology

- Criteria and rating system
 - Must consider price proposal, relevant experience, safety record
 - Can add criteria, adjust weight, have pass/fail criteria
- Score and rank proposals
 - Highest ranked = best value

Sample Best Value Resolution

Section 2. That it hereby determines that it is in the best interest of the school district to authorize lease-leaseback project procurement for the construction of District projects pursuant to Education Code Section 17406.

Section 3. That the Best Value Methodology is adopted and published pursuant to Education Code section 17406.

Section 4. That the District's Superintendent, or designee, is authorized to implement the Best Value Methodology when evaluating the qualifications of proposers when awarding contracts for its LLB Projects and to take any action which is necessary to carry out, give effect to, and comply with the terms and intent of this Resolution.

CRITERIA ITEM	DESCRIPTION	MAXIMUM POINTS
Price Points	Price and price points awarded.	100 points
Technical Expertise	Technical expertise and relevant experience with like-projects.	30 points
Subcontractors	Workforce and available skilled and qualified subcontractors.	35 points
Safety	Safety record.	20 points
Life Cycle	Life-cycle cost analysis.	10 points
Schedule	Project schedule.	20 points
Staffing	Management and staffing approach.	20 points
CHPS	Ability to meet/incorporate CHPS.	5 points
Energy Savings	Ability to meet energy savings goals.	5 points
Durability	Durability and warranty of building and building components and materials.	5 points
		MAXIMUM POINTS: 250

LLB Advantages (compared with Design-Bid-Build)

- Best Value selection not Lowest Bid
- Cost control
 - “Fee for services” instead of lump sum
 - Constructability Review/Value Engineering
- Schedule control
 - Mitigate need to stop for design review
- Generally, less contentious relationship with Builder
 - Easier administration for District
 - Less potential for litigation over construction claims

LLB Challenges (compared with Design-Bid-Build)

- Meeting Skilled and Trained Workforce Requirements required for lease-leaseback contracts
- Higher Upfront Costs (Guaranteed Maximum Price (GMP) may start out higher than low bid)
- Potential for more legal challenges to procurement
 - Might be lessened by recent legislation



DANNIS WOLIVER KELLEY

Attorneys at Law



Stephen Cali

Berkeley

510-345-6000

scali@dwkesq.com

SAN FRANCISCO

LONG BEACH

SAN DIEGO

SAN RAFAEL

CHICO

SACRAMENTO

SAN LUIS OBISPO

www.DWKesq.com