

OVERVIEW OF LEASE-LEASEBACK METHOD OF CONSTRUCTION

TEMPLE CITY UNIFIED SCHOOL DISTRICT
BOARD PRESENTATION ON JUNE 28, 2023

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Traditional Design-Bid-Build

- Currently used by Temple City Unified School District on all of its public projects
- Most common method of contracting for construction projects in public works
- District having elected to be subject to the California Uniform Public Construction Cost Accounting Act (“CUPCCAA”), is required to competitively bid and award public projects to the lowest responsible bidder pursuant to Public Contract Code §§ 22034 (informal bids) or 22038 (formal bids)
- Benefits: (a) best known; (b) no learning curve; (c) competitive pricing
- Limitations: (a) low bidder may not be best value; (b) change orders and delays common; (c) adversarial relationships; (d) possible slower delivery

What is Lease-Leaseback?

- Lease-Leaseback (“LLB”) is an alternative construction method to the traditional design-bid-build delivery method the District has historically used for its public works projects
- LLB delivery method may be used on any public project requiring the contractor to construct a building or buildings, for the use of the school district, even if the scope of project also includes non-building improvements, such as an outdoor stadium, pool, landscaping or playfields (Education Code § 17406(a)(1))
- Of the public works projects I have been involved with over the past 10 years involving the construction and/or modernization of a building, approximately 70-80% of the projects have been completed using the LLB delivery method.
- The LLB Documents include:
 - Site Lease (District leases property to contractor)
 - Construction Services Agreement (Contractor constructs facility improvements)
 - Sublease (Contractor subleases property and completed facilities back to District for specified period)
 - District owns facilities at conclusion of sublease term
- Project awarded following the completion of a Request For Proposals (“RFP”) consistent with:
 - Competitive solicitation process on the basis of best value to the District rather than lowest responsible bid
 - Consideration is given to proposer’s “demonstrated competence and professional qualifications necessary for the satisfactory performance of the service required” (Education Code § 17406)

Legal Challenges to Lease-Leaseback

- In 2012 and 2013, several legal challenges to lease-leaseback projects were filed throughout California claiming the failure to comply with statutory requirements, failure to seek competitive bids, breached fiduciary duty, and/or impermissible conflicts of interest arising from the preconstruction services agreement. All these arguments have been defeated in the courts and/or resolved with the passage of AB 2316, effective January 1, 2017, which added Education Code section 17406, with the exception of the 2012 case of *Davis v. Fresno Unified School District*
- After more than a decade of hearings and appeals, the California Supreme Court this year granted review and ruled in the *Davis* case that a lease-leaseback arrangement in which construction is financed through bond proceeds, rather than by or through the builder, is not a “contract” within the meaning of Government Code section 53511, which provides that, “a local agency may bring an action to determine the validity of bonds, warrants, contracts, obligations or evidences of indebtedness”. In the *Davis* case, payment for the project was not dependent on the lease-leaseback arrangement or on completion of the project, but solely on bond proceeds.
- School districts over the past few years have revised their lease-leaseback documents to address the aforementioned arguments, including providing that sublease payments to the contractor be made for use of completed facilities following completion of the project for a defined rental term during which the district is obligated to make sublease payments, including interest, that constitute a current expense of the district using non-local match contribution local funds.

Benefits of Lease-Leaseback Method

- ✓ Team approach in delivering the project to the District
- ✓ Preconstruction services performed by the contractor performing the work can minimize design-related issues during the project
- ✓ Flexibility to address project complexities up front
- ✓ Minimizes risks of change orders, claims and other course of construction issues
- ✓ Provides guaranteed maximum price and project schedule for successful delivery of the project to the District
- ✓ Given collaborative approach and best value selection process, change orders and associated delays less likely

Best Value Procurement through Preparation of Request for Proposals (RFP)

- To implement the LLB Construction Method, the Governing Board must “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.”
- Recommend adopting BP/AR 3311.5 to implement the LLB delivery process. Education Code section 17406(a)(2) requires prior to award, that the Board adopt and publish required procedures and guidelines for evaluating the qualifications of proposers to ensure the best value selection by the District.
- The RFP must be publicly advertised in the same way a notice to bidders is published for low bid contracts. (See Public Contract Code § 20112)
- The RFP must identify all criteria the District will consider in evaluating the qualifications – relevant experience, safety record, price proposal and other factors specified by the District

Prequalification Requirements

- **Prequalification of Contractors:** All contractors submitting proposals as well as electrical, mechanical, and/or plumbing subcontractors, if used, must be prequalified as a condition to submitting a proposal pursuant to the District's existing mandatory prequalification procedure set forth at AR 3311
- **Subcontractor Selection:** Designated subcontractors specified by the contractor must comply with the Subletting and Subcontracting Practices Act (Public Contract Code § 4100 et seq.)
- **Labor Requirements:** Contractor and designated subcontractors must comply with the Skilled and Trained Workforce Requirements (Education Code § 17407.5)

RFP Procurement Process

- Two Alternative Ways to Address Price in RFP:
 - If DSA approval has been received, the District issues to the pool of qualified LLB contractors a request for sealed proposals with the award based upon a lump sum guaranteed maximum price (GMP)
 - If DSA has not yet approved the design and plans, the District may issue a RFP requesting the proposer's fee for performing "preconstruction services" which do not require DSA approval and an estimated GMP for the project based upon the scope of services developed by the project architect.
 - If the award is based upon the proposer's fee, when DSA approval is obtained, the successful proposer provides District with a written rationale for the GMP, excluding the fee for the preconstruction services already awarded and completed
 - Governing Board approves or rejects the final GMP at a public meeting before the successful proposer may proceed with any further work
 - The sealed proposals shall be ranked highest to lowest and the project must be awarded to the highest ranked proposer
 - The District may reject all proposals

RFP LLB Event Timeline

DATE	MILESTONES
_____, 2023, 9:00 a.m.	Mandatory Pre-Submittal Conference
_____, 2023, 11:00 a.m.	Deadline to submit questions and requests for information
_____, 2023, 4:00 p.m.	RFP Responses Due
_____, 2023	District completes evaluation of Proposals and qualifications of Proposers pursuant to Submittal Evaluation Criteria and Methodology section of this RFP, and in keeping with BP 3311.5
_____, 2023	Interviews of short listed Contractors <i>(estimated)</i>
_____, 2023	Notice of Intent to award issued
Thursday, _____, 2023	Board awards Project to Contractor with highest Best Value Score and determined to be best value to District to perform Preconstruction Services, and approves form of LLB Documents
_____ 202_	Preconstruction Services Completion Deadline <i>(estimated)</i>
_____ 202_	DSA Plan Approval for Project <i>(estimated)</i>
_____ 202_	Final GMP Deadline for Construction Services <i>(estimated)</i>
_____, 202_	Board amends LLB Documents to reflect final GMP for construction of Project by Contractor <i>(estimated)</i>
_____ 202_	Construction Services Commencement Date for Project <i>(estimated)</i>
_____ 202_	Substantial Completion of Project
_____ 202_	Estimated Commencement Date of Sublease
_____ 202_	Estimated Expiration Date of Sublease

Board Member Questions or Comments?
