

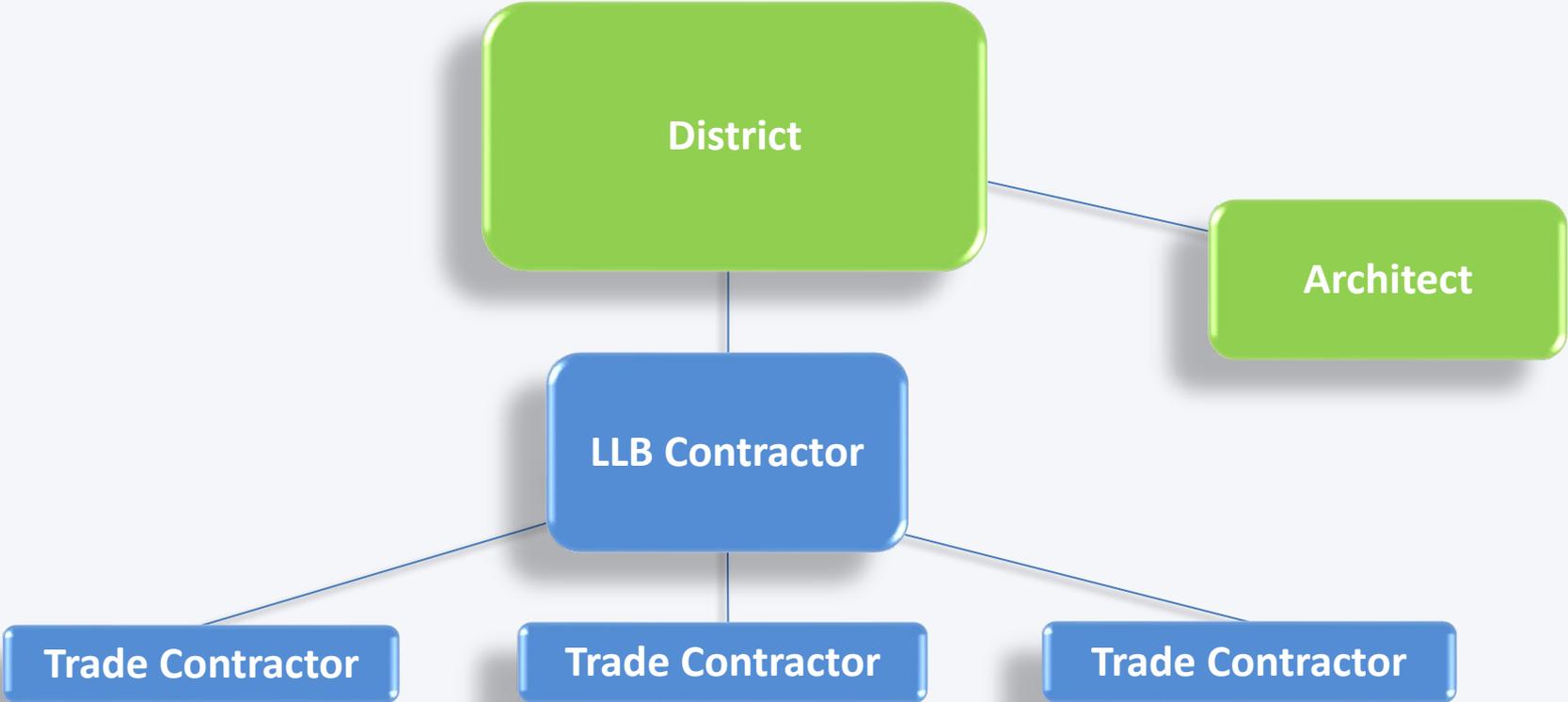
Morgan Hill Unified School District

March 2, 2021

Lease-Leaseback Process

Phil Henderson
Orbach Huff Suarez & Henderson LLP
phenderson@ohshlaw.com
510.379.4091

Lease-Leaseback Structure



Lease-Leaseback (LLB)

Statutory Authority & Challenges

- LLB was enacted at a time when there was a shortage of money for school construction (prior Education Code § 17406 (a)):

“Notwithstanding Section 17417... a school district, without advertising for bids, may let ... real property that belongs to the district if the [lease] requires the lessee ... to construct ... a building or buildings for the use of the school district.”

- A couple of years ago, multiple LLB contracts were challenged, principally by one attorney.
 - Most cases (include against Torrance USD, Mt. Diablo USD) ruled in favor of the school districts.
 - Many districts shied away from LLB

LLB and Legal Challenges

- *Davis v. Fresno USD (“Davis I”)*, 237 Cal.App.4th 261 (2015)
 - Challenger sought to disgorge more than \$37 million from the LLB contractor.
 - Demurrer sustained without leave to amend; **reversed on appeal.**
 - **Court of Appeal found that LLB required a genuine lease and financing**
- (*“Davis II”*), 57 Cal.App.5th 911 (2020)
 - In July 2019, on motion for judgment on the pleadings, Superior Court granted that motion and dismissed the case on grounds that the case is moot; **reversed on appeal.**
 - **Court of Appeal found that a taxpayer waste action was not moot and that validation actions do not apply to LLB contracts.**
- Petition to Supreme Court to resolve contradictory rulings from *Davis* and other appellate court rulings.

LLB and Legal Challenges

- All decisions from the six “districts” of the California Courts of Appeal are binding on all 56 county Superior Courts in the State, regardless of which appellate district you’re in.
- Even so, a county Superior Court in a particular appellate district may be more inclined to follow the decision of “its” appellate court.
- Even so, **don’t be the test case!**
 - Include some level of financing
 - Ensure you have a genuine lease

Statutory Requirements for LLB

In 2017, the Legislature substantively changed Educ. Sec. 17406

- LLBs must now be advertised in newspaper and in a trade paper.
- District can require a “lump sum” or a proposed fee for preconstruction and for the construction.
- The LLB contract can include “preconstruction services” even if plans not DSA-approved.
- Contractors, and MEP subcontractors, must be prequalified.
- All Contractors must commit to utilize a “skilled and trained workforce” (More on that later).
- **Did not address what a “lease” needs to include or any mention of “financing.**

Statutory Requirements for LLB

- **Competitive Selection.** Contract shall be awarded based on “competitive solicitation process” to contractor providing the best value based on RFQ & RFP. (Ed. Code § 17406 (a)(2).)
 - District’s Board must adopt and publish the procedures and guidelines for evaluating the best value.
 - District can either do one RFQ/P or separate RFQ and then an RFP.
- **Subcontractors.** If it is not a lump sum (where the subs are prequalified too), the contractor must select subcontractors, *“in accordance with the publication requirements applicable to the competitive bidding process of the school district.”* (Ed. Code § 17406 (a)(4)(B)(i).)
 - **That means the contractor must advertise in the newspaper for subcontractors**

Suggested Process for LLB Procurement

- **Board Action.** District Board adopts the procedures and guidelines regarding criteria for best value evaluation. (Ed. Code § 17406(a)(2).)
- **RFQ/RFP.** District issues a request for qualifications and request for proposals to solicit contractors based on the Board-adopted criteria.
- **Advertisement.** District publishes notice of RFQ/RFP in newspaper and in trade paper.
- **Prequalification.** RFQ/RFP includes a prequalification requirement.
- **Contract.** RFQ/RFP includes the form of LLB contract.

Suggested Process for LLB Procurement

- **Evaluation of RFQ/RFP.** The District evaluates the RFQ/RFP responses based on the evaluation criteria and form that was part of the RFQ/RFP.
- **Award.** The District awards the contract to the contractor with the best value.
- **IMPORTANT**
 - The above process is only one option of many that are permitted under the new statute. District should consider various options and confer with its consultants and legal counsel prior to initiating one process.

Skilled and Trained Workforce:

Some Basics

- Applies to lease-leaseback projects (Education Code §17407.5) and design-build projects (Education Code §17250.20(c)(1))
- Those sections incorporate Public Contract Code (PCC) §2600, et seq., which requires:

All projects must have a “skilled and trained workforce”

Skilled and Trained Workforce: What is It?

- All projects must have a “skilled and trained workforce” of
 - “Registered apprentices” or
 - “Skilled journeypersons”
 - Workers with sufficient “on-the-job experience”
 - Workers that “Graduated from an apprenticeship program”
 - **Must be 60% of all skilled journeypersons**
 - Apprentices do **NOT** count in calculating percentages
 - Workers with “on-the-job experience” do **NOT** count in calculating percentages

“Skilled and Trained Workforce”



Skilled and Trained Workforce, cont'd.

- Some trades are locked in at 30% (*“acoustical installer, bricklayer, carpenter, cement mason, drywall installer or lather, marble mason, finisher, or setter, modular furniture or systems installer, operating engineer, pile driver, plasterer, roofer or waterproofer, stone mason, surveyor, teamster, terrazzo worker or finisher, and tile layer, setter, or finisher.”* (PCC §2601(d)(2)(C).)
- Some trades are hard to find in high percentages.
- Some trades are hard to find in certain areas of the state.

Skilled and Trained Workforce, cont'd.

- Contractors must submit reports (really an amalgamation of all subcontractor reports) demonstrating compliance with the 60% percentage requirement.
- **If a report “does not demonstrate compliance” the District must withhold further payments until the contractor provides a “plan to achieve substantial compliance ... prior to completion of the contract or project.” (PCC §2602(c)(1).)**
 - Not 100% of the payment due.
 - **District must also send a copy of that report and the plan to the Labor Commissioner “for issuance of a civil wage and penalty assessment in accordance with Section 2603.” (PCC §2602(c)(2) & (3).)**

Morgan Hill Unified School District

March 2, 2021

Lease-Leaseback Process

Phil Henderson
Orbach Huff Suarez & Henderson LLP
phenderson@ohshlaw.com
510.379.4091