

Best Management Practices & Requirements for the Lease- Leaseback Documents

Best Management Practices

- Overview
 - Section Process Best Practices
 - Legal Counsel Opinion
 - Board Policy and Resolution
 - Validation Actions

Selection Process Best Management Practices

- What Education Code section 17406 says in plain English:
 - A School District may lease any real property that belongs to the District to a “person, firm, or corporation” (the “Builder”) for \$1.00 per year
 - The agreement between the School District and the Builder must provide for the construction of the building on the district property
 - The School District may do this without advertising for bids

Selection Process Best Management Practices

- Request for Proposal (“RFP”) Process
 - Selection based on qualifications and other criteria

Selection Process Best Management Practices

- Selection based on qualifications and other criteria
 - Utilize procedures set forth in Government Code section 4525 et seq.
 - Selection based on demonstrated qualifications to satisfactorily provide the services requested
 - Utilize procedures developed by School District staff
 - Selection based on qualifications and additional factors identified in RFP

Selection Process Best Management Practices

- Advertisement of RFP
 - Advertise in the same manner as other District RFPs are advertised
 - Advertise in the same manner as projects bid pursuant to Public Contract Code section 20111
 - Once a week for two weeks in a newspaper of general circulation within the district. (PCC 20112.)

Selection Process Best Management Practices

- LAUSD Model for Selection Criteria and Award
 - General selection criteria includes:
 - Fee Structure for the Guaranteed Maximum Price
 - Schedule control system
 - Design review
 - Experience with the proposer
 - Qualification, experience, and financial capability
 - LBSE plan
 - Award contract after negotiation to proposer that provides the “best value” to the District.

Selection Process Best Management Practices

- Selection Panel Composition
 - 3-5 Reviewers
 - At least one reviewer should not work for the District. A colleague from a neighboring District can provide a valuable outside perspective
- It is essential to include the selection process and criteria in the RFP
- Include the District’s lease-leaseback contract documents as part of the RFP

Legal Counsel Opinion/ Board Policy and Resolution Best Management Practices

- Legal Counsel Opinion
 - OPSC “requirement”?
- Board Policy on Use of Lease-Leaseback
- Resolution Approving Use of Lease-Leaseback on Case-By-Case Basis

Validation Actions Best Management Practices

- Government Code section 53511
 - Provides that a local agency may bring an action to determine the validity of its bonds, warrants, contracts and evidence of indebtedness pursuant Section 860 of the Code of Civil Procedure.

Requirements for the Lease- Leaseback Documents

- Essential Provisions
- Length of the Lease
- Who Owns What

Requirements for the Lease- Leaseback Documents

- A Lease-Leaseback Project IS A
Construction Project / Public Works
Project
 - With few exceptions, ALL requirements for
construction/public works are applicable
 - Prevailing Wages/ Labor Compliance Program
 - Substitution of Subcontractors
 - Bonds, Insurance and Indemnification
 - Field Act Compliance if applicable

Requirements for the Lease- Leaseback Documents

- There are many variations
 - Typical Component Documents
 - Lease
 - Sublease
 - Construction Services Agreement

Requirements for the Lease- Leaseback Documents

- The Lease
 - The Lease is the instrument that leases the School District's property to the Builder:
 - The minimum rental rate is \$1.00 per year
 - The Lease terminates upon the following events
 - End of the term of the Lease
 - End of the term of the Sublease
 - Termination of the Construction Services Agreement

Requirements for the Lease- Leaseback Documents

- The Sublease
 - The Sublease is the instrument that leases the School District’s property from the Builder back to the School District. The Sublease provides for:
 - A monthly Sublease Payment to the Builder
 - The Sublease Payments are based on the Guaranteed Maximum Price (“GMP”) for the Project and the monthly fair market rental value of the property

Requirements for the Lease- Leaseback Documents

- Some Subleases provides for optional Sublease “Prepayments” to the Builder
- The Sublease terminates upon the following events:
 - End of the natural term of the Sublease.
 - End of the term of the Sublease as a result of the payment of Sublease “Prepayments.”
 - Termination of the Construction Services Agreement.

Requirements for the Lease- Leaseback Documents

- The Construction Services Agreement
 - The Construction Services Agreement is similar to a typical construction contract.
 - Requires the Builder to perform the construction of the project.
 - Contains the legal requirements pertaining to construction contracts.
 - As previously mentioned, all laws that are applicable to construction/public works apply

Requirements for the Lease- Leaseback Documents

- HOWEVER the Construction Services Agreement is different from a typical construction contract because:
 - The Builder's compensation for the Project is negotiated ("Guaranteed Maximum Price" or "GMP")
 - Exceptions to GMP "guarantee"
 - The Builder is paid for work completed pursuant to the provisions of the Sublease Agreement

Requirements for the Lease- Leaseback Documents

- Length of the Lease
 - Driven by the GMP and the fair market rental value of the property
 - Can be no longer than 40 years (Education Code section 17403.)

Requirements for the Lease- Leaseback Documents

- Who Owns What
 - The lease-leaseback documents must require that title to the improvements vests in the School District
 - No later than the end of the lease/sublease term
 - Or earlier as contracted by the parties