

**MINUTES  
SPECIAL WORKSHOP OF THE  
GOVERNING BOARD OF THE  
SOLEDAD UNIFIED SCHOOL DISTRICT  
DISTRICT OFFICE BOARD ROOM  
1261 METZ ROAD, SOLEDAD, CA 93960  
THURSDAY, OCTOBER 29, 2015**

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I. **OPEN BUSINESS – 4:15 PM**

A. Roll Call

Mrs. Marie Berlanga, President  
Mrs. Gloria Ledesma, Vice-President - ABSENT  
Mrs. Jodi Massa, Clerk  
Mr. Fabian M. Barrera, Trustee  
Mr. Jaime Fernandez, Trustee - ABSENT  
Dr. Rupi Boyd, Secretary to the Board

B. Pledge of Allegiance

C. Report of action taken in closed session

D. Approval of Board Agenda

**MOTION TO APPROVE AGENDA BY: Jodi Massa SECONDED BY: Fabian Barrera  
AYES: Mr. Barrera, Mrs. Berlanga, Mrs. Massa NAYS: None ABSENT: Mr.  
Fernandez, Mrs. Ledesma**

II. **COMMUNICATIONS**

A. Oral Communications

1. Audience

No comments were made by members of the audience.

B. Main Street Middle School Construction Workshop

The following presentation by made by Mr. Samuel Santana, Legal Counsel for the District from Dannis, Woliver, Kelley:

Lease-Leaseback Update:

California School Procurement Generally

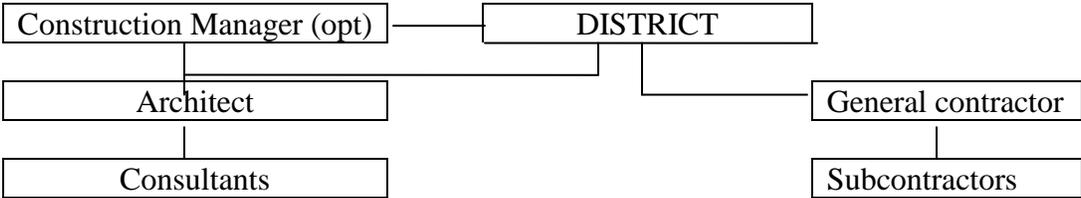
- **Bid Limits.** California school districts must formally and publicly bid contracts for construction projects over \$15,000 (Public Contract Code § 20111), unless there is an exception.
- Lease-leaseback (“LLB”) is an exception to bidding (Education Code § 17406 (a)):

- “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.”

Project Delivery Methods:

- Design-Bid-Build
- Lease-leaseback

Design-Bid-Build



**Structure**

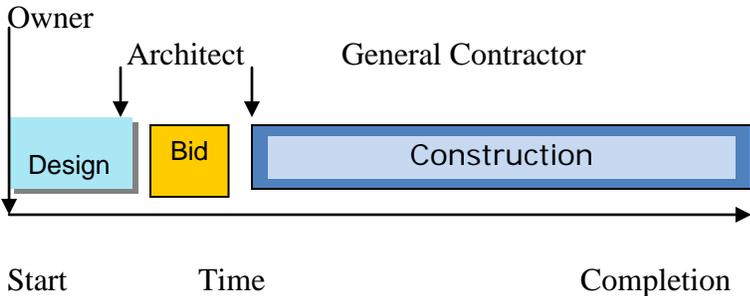
Public bidding:

- Open to all competitors.
  - Responsible bidders; experience, capacity – financial, personnel, equipment.
  - Responsive bidders; meets bid conditions, time, forms.
- Lowest responsible, responsive bidder is awarded contract.
- Contractor then builds from the Construction Documents

California school districts must formally publicly bid all contracts unless there is an exception.

Design-Bid-Build (Traditional)

Timeline



- General Contractor is responsible for delivery of project.
- Selection: lowest responsive, responsible bidder.
- Checks: Architect reviews submittals, RFIs, and pay applications; Project Inspector monitors compliance with DSA-approved plans.
- PM/CM are optional checks.

Disadvantages

- The District needs to protect itself from unqualified/litigious bidders.
- More likely to lead to claims and cost overruns than some other methods.
  - Which may or may not eliminate the cost advantage of getting bids instead of negotiated contracts.
- May increase time to complete.
- Owner manages disputes between architect and contractor.

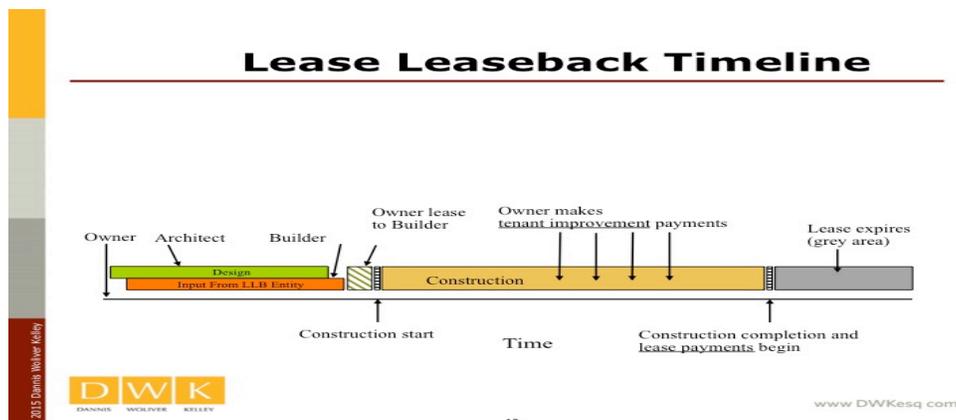
Recommendations if using Design/Bid/Build:

- Strong prequalification
- Staff and/or Construction Management must closely monitor performance and concerns
- Use strong contract forms

Lease-Leaseback: How it Works

- District competitively selects Architect to design project.
- District selects Builder.
- Builder works with District and Architect during project design.
- Architect completes design and gets DSA approval.
- Builder lines up trade contractors and develops Guaranteed Maximum Price.

Lease-Leaseback Timeline:



The Three Contracts:

- Preliminary Services Agreement:
  - Builder acts as a pre-construction consultant.
- Site Lease:
  - District leases the site to Builder.
  - Terminates when Facilities Lease terminates.
- Facilities Lease:
  - Builder constructs facility per Plans and Specs.
  - Builder leases the facility back to the District.
  - Once the final payment has been made, the lease is terminated.

Advantages

- Select Builder by qualifications, not low bid.
- Generally, very few claims and disputes because Builder has had early involvement in design.
- Guaranteed maximum price and schedule control.

Disadvantages

- Must effectively negotiate the guaranteed maximum price.
- Legal issues – The Davis case.
- New labor requirements for 2016.

*Davis v. Fresno USD – Factual Allegations*

- 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. The complaint alleged the following:
  - Project should have been competitively bid
  - Contractor had a conflict of interest
  - Undisputed facts:
    - ✓ That the term of the lease was from the date of the lease signing to the date of completion
      - That the District did not occupy the school facility until the lease was terminated
      - No financing of project by developer.

Davis – Court of Appeal Holding – Financing

- The Court of Appeal ruled:
  - For the Facilities Lease to fall within the statutory exception to competitive bidding, it must be a “true“ lease which includes:
    - ✓ a financing component; and

- ✓ a lease term during which the district occupies the constructed improvement
- The subject Facilities Lease did not include either of these requirements - more like a traditional construction contract than an actual lease
- The opinion does not specify:
  - what would be acceptable financing terms, or
  - what would be an acceptable lease term
- The court also found that a district does not need to demonstrate a need to finance.

Davis – Court of Appeal – Holding – Conflict of Interest

- Gov. Code sec. 1090 prohibits public officials and employees from making contracts in which they are financially interested.
  - Demands officials exercise “absolute loyalty and undivided allegiance to the best interests of the [public entity]”
  - “A person cannot effectively serve two masters at the same time”
- 3 Components:
  - Public official/employee
  - Making contract in their official capacity
  - Financially interested
  - Davis only touched on the first component
  - Held individual and corporate consultants *may be* considered public employees
    - Fact specific inquiry

LLB Recommendations:

- LLB is still permissible, provided the Davis court guidelines are followed.
  - ✓ The facilities lease must contain:
    - a “leaseback” during which:
      - the district occupies the completed constructed improvement; and
      - re-pays the developer the portion of the construction it financed
  - ✓ To avoid conflict of interest exposure, the developer should have no public nexus to the district.
    - No principals with prior history as district employee
    - No prior experience where principals were responsible for the management of district funds, i.e., service as bond program manager.

Will “Validation” Help After Davis v. Fresno

- The *Davis* Court stated that the district could have avoided “uncertainty and risk” by filing a validation action – a pre-emptive lawsuit under Code of Civil Procedure (CCP) § 860, et seq., that a school district can file in certain situations that requires a superior court to rule on the validity of a school district’s contract.
- Under CCP § 863, even in situations where a school district does not file a validation action, a plaintiff only has 60 days to file its own “reverse” validation action. This is what happened in the *Davis* case: The plaintiff filed suit within 60 days of Fresno Unified’s approval of the LLB documents.
- **Recommendation.** Most Districts are becoming increasingly uncomfortable with the reverse/passive validation option. To have as defensible a position as possible, we now lean more on active validation.

**LLB Recommendations**

- LLB is still the best method for challenging projects like the Middle School.
  - Developer input during design reduces the potential for delays during construction.
  - May help to control cost escalation by locking in prices.

Comments:

- ✓ Mr. Bourke, Teacher asked if the district was looking into active validation because of the Davis case. Mr. Santana said no, as a general practice, his firm always recommends active validation to have certainty in moving forward with the construction project.
- ✓ Mr. Bourke asked if with the LLB, leasing out the school to the contractor and the district occupying it while making payments, can we have studnets in the building or is there liability since it will be under Blach’s control. Mr. Santana said that he has seen no issues with this. The District has liability insurance anyway.
- ✓ Mr. Bourke asked if at the time the building is given back to the district, will the punch list also be completed when construction is complete. The answer was yes. Dr. Boyd said the advantage of LLB is that we can still have the contractor come back to fix the items that we see when the students are in the building.

Measure C – 2012 Voter Approved \$40 M Bond

Mr. Fernando Nieto, Project Manager, gave the following overview of the Measure C Bond

to build the new middle school

#### Assembling Main Street Middle School Design Team

- July – August 2014 Review qualifications for four potential Developers.
- September 2014 visit projects for Dilbeck & Sons / Blach
- October 8, 2014 two developers gave presentations to the board. Dilbeck & Sons / Blach Construction.
- Negotiations began for preliminary services with Blach Construction.

Dr. Boyd clarified that prior to awarding the RFQ, a committee of union representatives, city representatives, and community interviewed all the applicants put four penitential contracts for recommendation to the Board. So it was a long process.

#### Series A & B Bonds

- \$5M in Bonds funds received on June 5, 2013 for Series A.
- Deadline for expenditure of Series A is on June 5, 2016.
- \$22M in Bonds funds received on August 14, 2014 for Series B.
- Deadline for expenditure of Series A is on August 14, 2017.

#### Comments:

- ✓ Dr. Boyd said that the special workshop was being held to give one more opportunity to the Board and community to ask any questions. There is nothing hidden here nor any conflict of interest. Mr. Nieto does not have any family in this area and neither does she. We are in a time crunch and need to start building. The plans are to start in December or January. She opened it up for questions.
  - ✓ Mr. Bourke asked what the district was going to be doing with the money left from the bond, had the district decided yet. Dr. Boyd said that the Board has not discussed what to do with any left over money.
  - ✓ Dr. Boyd said that the bond money is collecting interest but the district needs to show what the interest is being used to.
  - ✓ Mr. Puga, Oversight Committee member, asked Mr. Nieto about breaking ground this fall. Per their meetings with the oversight committee. Mr. Nieto said he misspoke and the plans were to do it in December 2015. Mr. Nieto said we were until on schedule and the projected construction timeline for the new middle school is 18 months. To be completed August 2017. If we push it back three weeks, there will be questions/concerns.
  - ✓ Mr. Nieto said that the longer we take to approve contract, they cannot start.
  - ✓ Dr. Boyd said she wanted to put out any myths and misinformation to rest to

move on with the construction and said they would like to start in December when the students go out for break.

- ✓ Mr. Bourke asked if the district had made allowances for El Nino and the bad weather that is expected. Mr. Nieto said that Blach Construction is considering all that.
- ✓ Mr. Nieto reiterated that from the money we have received from the Bond, we have made approximately \$47,000 in interest, which is sitting in the in bank.
- ✓ Trustee Massa asked for clarification to put to rest concerns that the money had been spent elsewhere and asked Mr. Nieto to let everyone know where the money is at. Mr. Nieto said the funds are sitting in the County Treasury, all of it. They have spent approximately \$600,000 and the majority paid to the architects. The funds are shown in Fund 21.
- ✓ Mrs. Maria Vidal, parent said that at one point the district said we don't have all the money yet, was this right. The answer was yes, we still need to collect between \$11-12 million.
- ✓ Trustee Barrera asked about the length of the lease and he said personally, he would like to see 6 months to a year lease negotiated with the contractor.
- ✓ Mr. Santana said that was a typical lease term.
- ✓ Mr. Bourke said that maybe some of the money be reinvested back to MSMS
- ✓ Dr. Boyd said that part of funds will be kept there. Depending on what happens, the Board might want to form a committee to decide what the next facility priority will be for the district.
- ✓ Trustee Barrera asked Mr. Puga if the oversight committee had considered coming up with list. Mr. Puga said it had not been discussed.
- ✓ Trustee Barrera said when Mr. Dale Scott wrote the bond language he included most of the schools in the district.
- ✓ Dr. Boyd said the district can pull out money in phases.
- ✓ Mr. Puga recommended Mr. Nieto come up with the list of next priority list. Trustee Barrera said that about 5 years ago a Facilities Master Plan was developed by an architect, maybe it needs to be revisited.

**Next steps:**

- ✓ Negotiating a contract with Blach for LLB and exploring all details; includes lease component, interest, insurance, etc. Most important the financial and guaranteed maximum price (GMP)

III. **NEW ITEMS OF BUSINESS**

Trustee Barrera said that during football games, the lights at the far end of the parking lot by Rose Ferrero School were out and it gets pretty dark. Mr. Nieto said those lights were going to be fixed with Prop 39 funds. But he was going to follow-up and come out with another plan for tomorrow's home game.

Next Board meeting will be held on Thursday, November 12, 2015 due to the Holiday on November 11<sup>th</sup>.

IV. **ADJOURNMENT**

Meeting adjourned at 5:26 p.m.

Board approved November 12, 2015