

# Lease-Leaseback Construction

Citizens Oversight Committee  
September 17, 2013

Eileen Diepenbrock, Attorney at Law

# Construction Project Delivery Methods

- Traditional
  - Design-Bid-Build
- Alternatives:
  - Lease/Leaseback
  - Construction Manager at Risk
  - Design-Build
  - Developer Built

# Lease-Leaseback

- ❑ EC 17406
- ❑ Construction
- ❑ Financing
- ❑ Negotiated Contract
- ❑ Guaranteed Maximum Price (Total Base Rent)
  - Contingencies for DSA, Owner initiatives
- ❑ Similar to private industry

# Philosophy

- ❑ Collaborative and negotiated process
- ❑ Contractor participates in the design process
- ❑ Goals:
  - Reasonable and reliable budgets
  - Reliable timelines
  - Best possible quality
  - Open communication and continuous improvement throughout project
  - Reduction of risk for change orders and claims

# School District Authority

- Education Code section 17406(a):
  - “. . . the governing board of a school district, without advertising for bids, may let, for a minimum rental of one dollar (\$1) a year, to any person, firm, or corporation any real property that belongs to the district if the instrument by which such property is let requires the lessee therein to construct on the demised premises, or provide for the construction thereon of, a building or buildings for the use of the school district during the term thereof, and provides that title to that building shall vest in the school district at the expiration of that term. . . .”

# Features of Lease-Leaseback

- ❑ School district enters into a ground lease for a nominal amount with a private party (“Entity”)
- ❑ Entity enters into a facilities lease with the school district, agreeing to construct certain improvements and lease the property and improvements back to the district for specified regular lease payments
- ❑ Allows school districts the greatest flexibility to act like a private entity

# Lease Must Not be a Subterfuge

- ❑ Lease must not be an installment sales contract or disguised construction contract
- ❑ Lease must not permit an immediate and present indebtedness or liability for the aggregate amount of lease payments
- ❑ Must be thoughtful about how closely the lease payments are to a traditional construction contract

# Setting Lease Payments Is Critical

- ❑ Lease payments are set in the Facilities Lease
- ❑ Lease payments should not be directly tied to percentage completion, unlike a traditional construction contract
- ❑ The public entity should not withhold retention
- ❑ Lease–Leaseback Entity should not have guaranteed right to receive all lease payments



# Setting the Lease Term

- ❑ Lease terms may be short, tied to the completion of the construction of improvements
- ❑ Lease terms may be as long as 40 years
- ❑ A longer lease period effectively results in the corporation providing financing for the construction of the facilities

# Payment and Performance Bonds

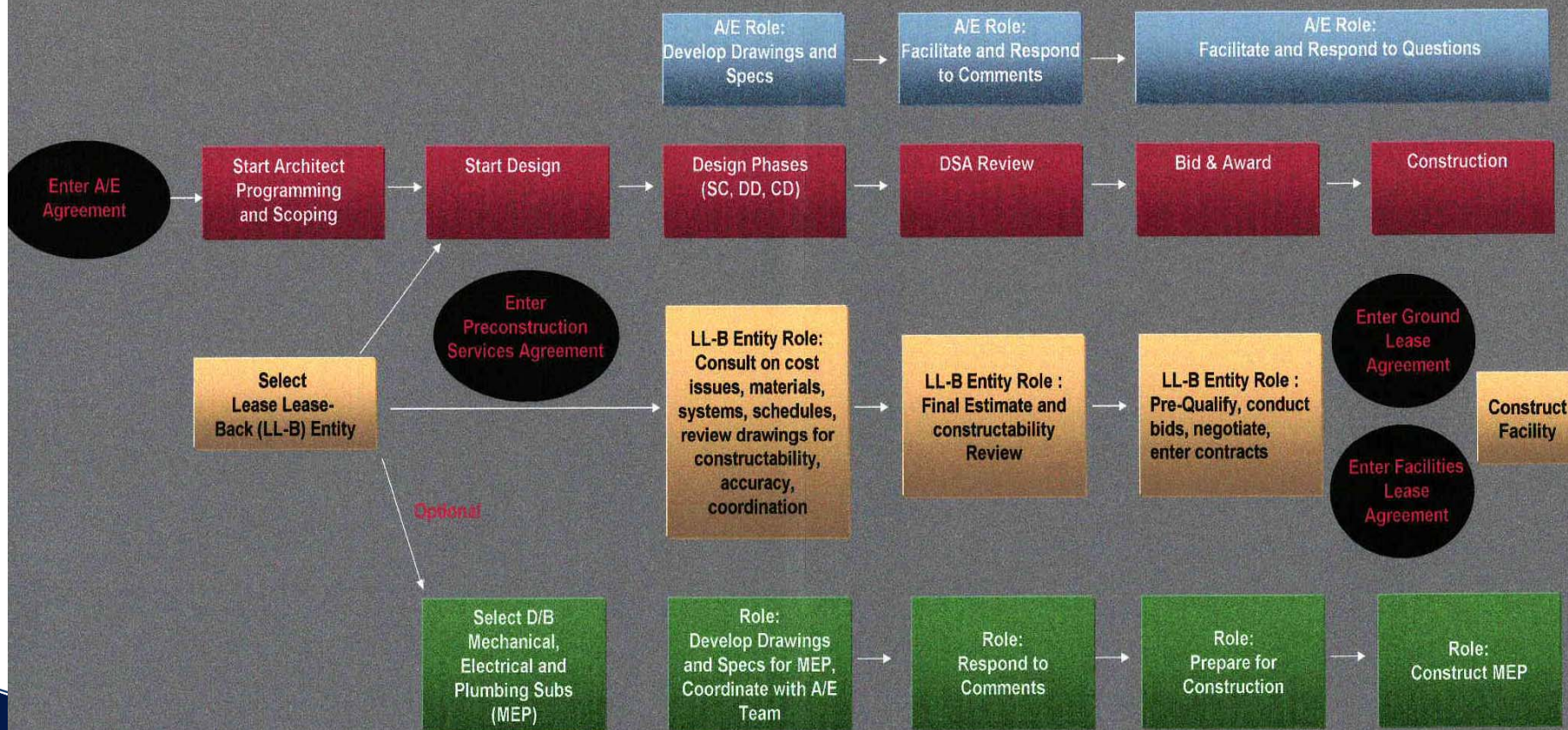
- Payment and Performance Bonds should still be required

# Process

- ❑ Select Architect
- ❑ Select LLB Entity via RFQ/RFP
- ❑ Preconstruction Services Agreement
- ❑ Prepare/complete design
- ❑ Establish Guaranteed Maximum Price/Total Base Rent
- ❑ Sign Site and Facility Leases
- ❑ Construction
- ❑ Complete lease term payments and close lease



# LEASE LEASE-BACK PROTOCOL PROCESS



# Advantages

- ❑ LLB Entity participates in design
- ❑ Flexibility
- ❑ Financing
- ❑ District may participate in selection of sub-contractors
- ❑ Guaranteed Maximum Price (Total Base Rent)
- ❑ LLB Entity may perform work in-house
- ❑ Early purchase of materials and equipment
- ❑ Ability to fast-track construction







# CONCERNS

- Historically not as well known and understood by traditional design-bid-build method
  - Response: This is changing as LLB has become more widely used
  
- Limiting Competition
  - Response: Though not required, recommended to use RFQ/RFP process for selection of LLB Entity and bid trade work



# CONCERNS

- ❑ Getting the best price
  - ❑ Responses:
    - ❑ RFQ/RFP process requiring bidding of general conditions
    - ❑ Require bidding of trade work
    - ❑ Require full disclosure of costs during negotiation of Total Base Rent
    - ❑ Open book policy for all cost records, including bids
    - ❑ Right to audit

# Summary

- ❑ Alternative construction delivery method
- ❑ Guaranteed maximum price established at start of construction
- ❑ Fast Track construction
- ❑ High Quality and reduced claims