



DANNIS WOLIVER KELLEY

Attorneys at Law

Lease-Leaseback Project Delivery

San Rafael City Schools

January 9, 2017

Presented By:

Mark W. Kelley

Deidree Sakai

Dannis Woliver Kelley

SAN FRANCISCO | LONG BEACH | SAN DIEGO | NOVATO | CHICO | SACRAMENTO | SAN LUIS OBISPO www.DWKesq.com

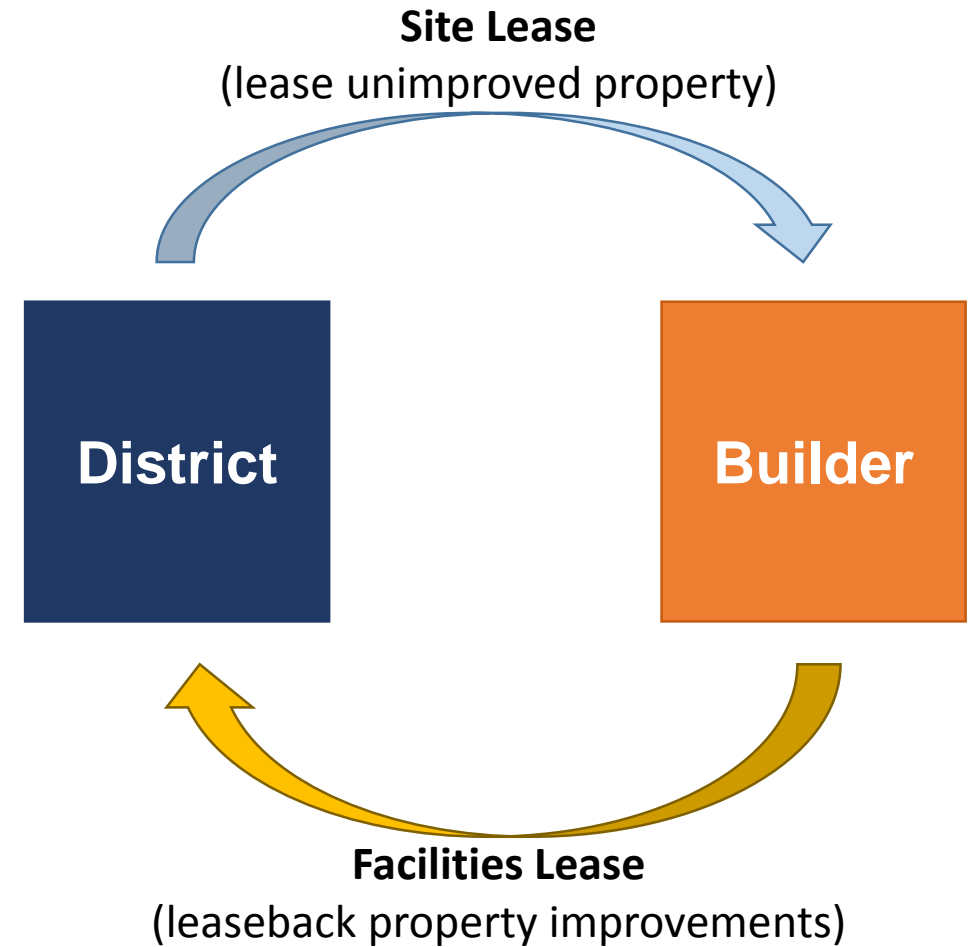
This training is provided for educational, compliance and loss-prevention purposes only, and absent the express prior agreement of DWK, does not create or establish an attorney-client relationship. The training is not itself intended to convey or constitute legal advice for particular issues or circumstances. Contact a DWK attorney for answers to specific questions.

Overview

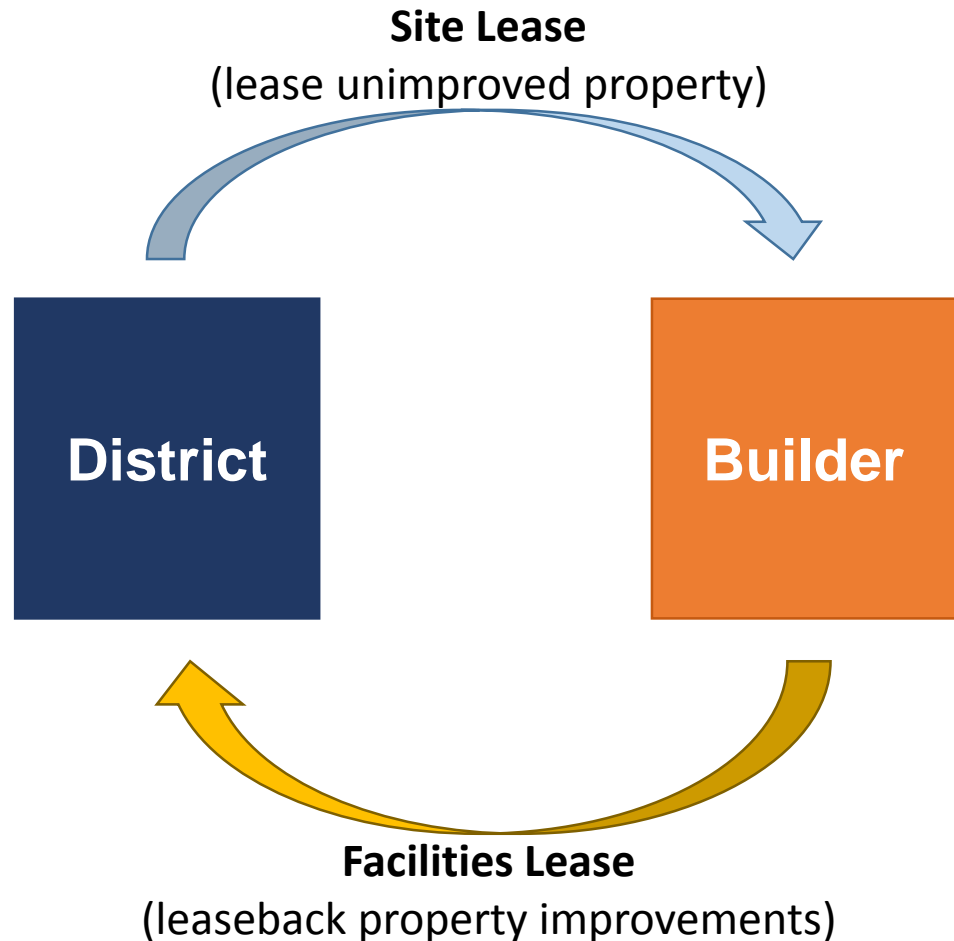
- What is Lease-Leaseback (LLB)?
- How does the LLB project delivery method work?
- Legal and legislative developments affecting LLB
- How does LLB compare to other project delivery methods?
- Additional considerations

What is Lease-Leaseback?

- District **“leases”** property to Builder
 - Site Lease
- Builder constructs tenant improvements to the property
- Builder **“leases back”** the completed improvements to the District
 - Facilities Lease

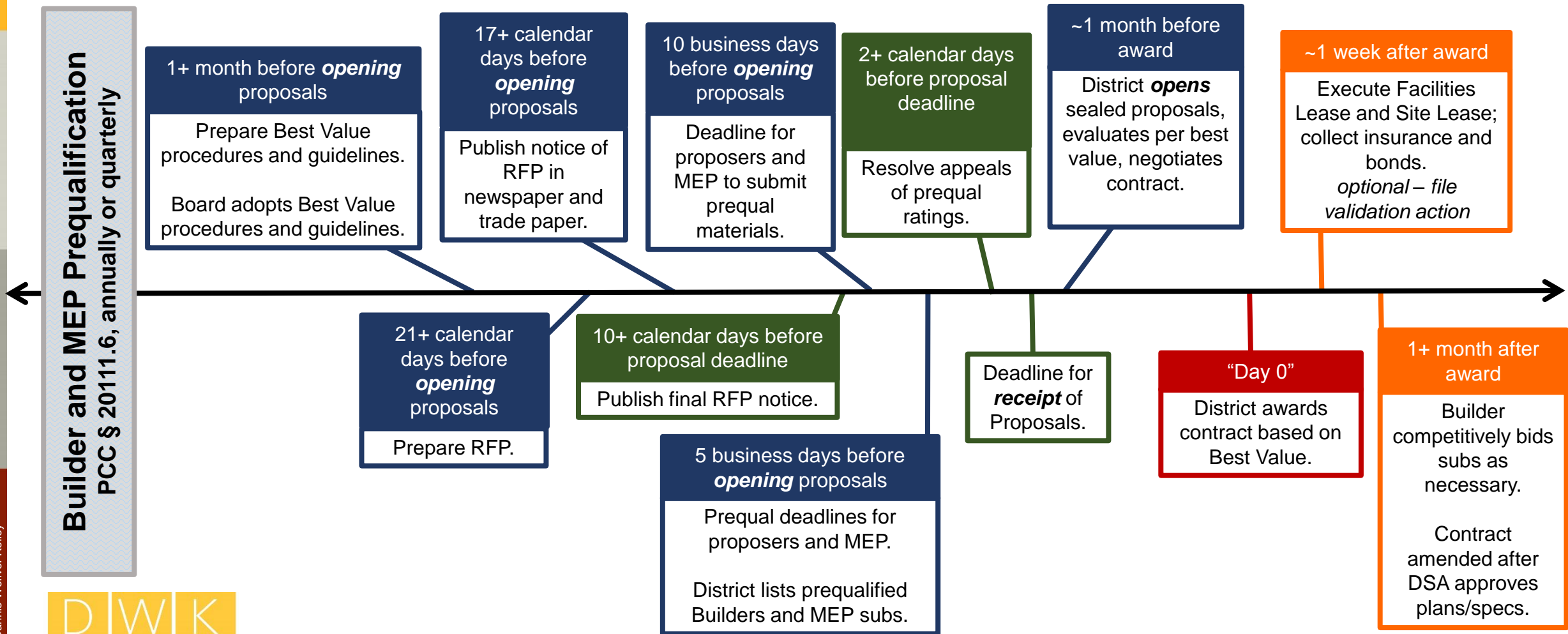


What is Lease-Leaseback: the Agreements

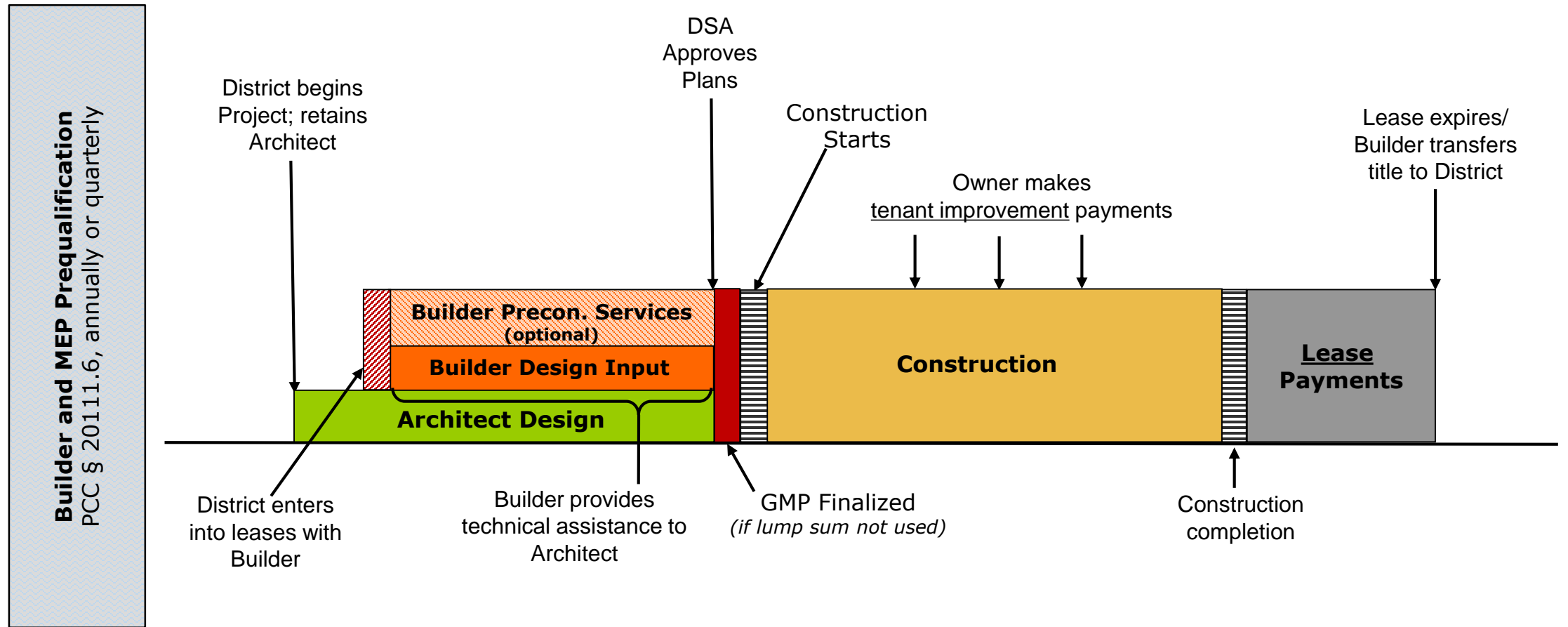


- **Site Lease:**
 - Terminates when Facilities Lease terminates
- **Facilities Lease:**
 - May include preconstruction services
 - District occupies completed facility and Builder leases the facility back to the District (financing component)
 - Once the final lease payment has been made, the lease is terminated

How Lease-Leaseback Works: Builder Procurement



How Lease-Leaseback Works: Project Timeline



Legal Developments: *Davis v. Fresno USD*

- 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
- Results:
 1. District must occupy the completed facility for a period of time before final payment
 2. Lease agreement must include financing component
 3. Consultants providing pre-construction services are subject to conflict of interest statutes

Legislative Developments: New Legislation

- **AB 2316** addresses some *Davis* concerns:
 - Requires competitive selection and advertising (as outlined above)
 - Allows for preconstruction services to be included in contract, eliminating conflict of interest concerns
- **SB 693** clarifies Skilled and Trained Workforce requirements
 - Allows Builder to “cure” violations
 - Sets back apprenticeship program graduation requirements and reduces requirement for new apprenticeship programs
 - Clarifies exception for Builders (and subcontractors) that agree to be bound by Project Labor Agreements

Addressing Remaining *Davis* Requisites

- Occupancy and financing are covered in the Lease Agreements
- Optional: Validation action
 - Lease Agreements self-validate as a matter of law 60 days after Board approval of the Contract

LLB Advantages (compared with Design-Bid-Build)

- Best Value selection
- Cost control
 - *If “fee for services” instead of lump sum*
- Schedule control
- Generally, less contentious relationship with Builder
 - Easier administration for District

LLB Challenges (compared with Design-Bid-Build)

- Meeting Skilled and Trained Workforce Requirements required for LLB
- Higher Upfront Costs (GMP may start out higher than low bid)
- Potential for more legal challenges
 - might be lessened by recent legislation

Projects Most Suited to LLB

- When experience is more important than lowest upfront cost
 - Difference in LLB GMP may be offset by avoiding costs and claims commonly associated with traditional design-bid-build projects
 - Builder's familiarity with the site can increase efficiency
- When the scheduled date for occupancy is critical
- When cost control, once the price is set, is critical
- When a less adversarial structure is preferred

Projects Less Suited to LLB

- When lowest cost is the critical factor
- Where there is not a large premium on schedule and predictability
- When potential conflicts of low bid contracting are not a deterrent (i.e., little history of conflict with contractors in bidding pool)
- Where time is available to do a good prequalification process to create an acceptable bidding pool

Thank You!

Mark W. Kelley

mkelley@DWKesq.com

415-543-4111

Deidree Y.M.K. Sakai

dsakai@DWKesq.com

415-543-4111