

INSTRUCTIONS FOR COMPLETING AND USING LOZANO SMITH LEASE-LEASEBACK CONSTRUCTION DOCUMENTS

(For use with RFP seeking Fee proposals)

Brief Overview of Key Steps

- Adopt a Resolution approving the procedures and guidelines for evaluating the qualifications and price proposals for lease-leaseback projects.
- Prequalify all contractors and mechanical, electrical, and plumbing subcontractors.
- Issue a Request For Proposals.
- Complete the qualifications and pricing portions of the best value analysis and rank contractors by their best value scores.
- Complete and execute lease-leaseback contract documents.

Board Resolution and Adoption of Lease-Leaseback Contractor Selection Procedures

Before the District can issue a Request for Proposals (RFP) for selection of a lease-leaseback contractor, the District's Board must adopt the procedures and guidelines that will be used by the District for evaluating the qualifications and price proposals of contractors that respond to the RFP. These procedures and guidelines are dictated by the new lease-leaseback statute, specifically, Education Code §17406, subsection (a)(2)(A)-(G). Lozano Smith has prepared a template resolution for the Board's use. The template resolution is included in the Lozano Smith documents. Alternatively, CSBA has a sample policy that may be used by the District.

Prequalification for Lease-Leaseback Projects

Prequalification of contractors and electrical, mechanical and plumbing ("MEP") subcontractors is required for all lease-leaseback projects (regardless of the size of the project or funding source) **if the District has an ADA of 2,500 or more**. Prior to actually prequalifying contractors and subcontractors, the District's Board must have approved the prequalification rating system that will be used to evaluate and prequalify contractors and subcontractors. If the District's Board has not adopted a prequalification rating system, Lozano Smith can assist you with this process, which must be completed before contractors can be prequalified (and before proposals may be submitted in response to a lease-leaseback RFP. If the prequalification rating system has already been approved (or once Board approval is obtained), the District may proceed to review applications and prequalify contractors and subcontractors. Any proposal submitted by a contractor that was not prequalified should be rejected. A proposal must also be rejected if subcontractors are required to be prequalified but the proposal submitted by the contractor lists subcontractors that are not prequalified. The District may prequalify contractors on a quarterly, annual, or per-project basis.

NOTE: If the District did not use Lozano Smith's template Prequalification packet for the purposes of prequalifying contractors and MEP subcontractors, please contact our office for assistance, as revisions to the RFP may be necessary.

Request for Sealed Fee Proposals and Qualifications

The new lease-leaseback statute requires the District to solicit qualifications and proposals from contractors through the issuance of an RFP. The Lozano Smith lease-leaseback contract documents include a template RFP for fee proposals and qualifications. To complete the RFP, the District will need to insert project-specific information into designated blanks. This information generally includes, but is not limited to: the project name and description, key dates (RFP issuance, prequalification application due date, proposal due date, contractor selection date, construction start and completion date), the architect's contact information, project cost estimate, preconstruction services to be provided by the successful contractor, not-to-exceed amount for proposed preconstruction services, and the point of contact at the District. At the District's option, the District may also designate, by trade, all subcontractors that must be identified by contractors in their responses to the RFP.

Notice to Contractors

As with a design-bid-build project, the new lease-leaseback statute requires the District to publish notice of the issuance of the RFP. Once the RFP is completed, a notice must be published in a newspaper of general circulation in the county where the project is located once a week for at least two weeks. In addition, the notice must be published in a trade paper of general circulation in the District's county, with the latest notice published at least ten days before the date for receipt of proposals. (See Education Code, § 17406, (a)(2)(B) & Public Contract Code, § 20112.) The Lozano Smith documents include a notice that can be used to meet this publication requirement.

Ranking of Best Value Scores

Sealed proposals submitted in response to an RFP must be ranked by their best value scores (determined by some combination of a contractor's qualifications and price proposal), and the Board must award the project to the contractor that submitted the proposal determined by the Board to be the "best value" to the District (i.e., the highest ranked proposal). The "Ranking of Best Value Scores", attached as **Exhibit A** to the RFP, should be used by the District for the purpose of determining "best value" and ranking proposals. The Ranking of Best Value Scores document is comprised of the following four Sections to be completed by the District:

Section 1

In Section 1, the District will list each proposing contractor and the total points received from the qualifications portion of the best value analysis. To streamline the qualifications portion of the best value analysis, the Lozano Smith lease-leaseback documents allow the District to use a proposing contractor's responses from the District's prequalification process for evaluating the same contractor's qualifications. Using the information provided in a contractor's completed Prequalification Application (as well as any updated/new information that may be provided pursuant to the Prequalification Certification), the District will complete the "Contractor Qualifications for Best Value Analysis Scoring Sheet" for each proposal received. Completing the Scoring Sheet will yield each contractor's overall score for the qualifications portion of the

best value analysis, which should then be listed next to the corresponding contractor in Section 1 of the Ranking of Best Value Scores.

NOTE: If the District did not use Lozano Smith's template Prequalification Application packet for the purposes of prequalifying contractors and MEP subcontractors, please contact our office for assistance, as revisions to the method in which contractors' qualifications are scored may be necessary.

Section 2

In Section 2, the District will list each proposing contractor and the contractor's price proposal in order from highest to lowest. This ranking will determine the points awarded to each contractor for the pricing portion of the best value analysis.

Section 3

In Section 3, the District will list each proposing contractor and the contractor's scores from the qualifications and pricing portions of the best value analysis (i.e., each contractor's points from Section 1 and Section 2). The District will also list each contractor's total combined score, which is the contractor's "best value score."

Section 4

In Section, the District will list each proposing contractor and their corresponding best value score in order from the highest best value score to the lowest best value score. This will determine each contractor's "best value" ranking.

Lease-Leaseback Agreement

Pre-Construction Services (Section 2)

The District should insert the date by which all pre-construction services must be completed. The District may also need to revise the pre-construction services to be provided by the successful contractor.

Date for Completion (Section 4)

The construction must be completed by the "Date for Completion," otherwise liquidated damages will accrue. As discussed below, the Date for Completion should be at least two to three months **earlier** than the end of the "Lease Term."

Lease Term (Section 7)

The Lease Term is the term of the Contract. The Lease Term should end at least two to three months later than the Date for Completion. Although there is no required length or amount of months the Lease Term must extend past the completion of construction, the longer (or more months) the Lease Term extends past completion the more likely it is that the lease-leaseback

contract will survive a *Davis* challenge in court. If the Lease Term extends only one month or less past completion, the chance of overcoming a *Davis* challenge is diminished because that type of term is very similar to the timing/scheduling of payments from the owner to a contractor in a typical construction contract.

On the other hand, including a Lease Term that extends beyond the Date of Completion by more than one month may improve the District's chances of overcoming a *Davis* challenge (although such a result cannot be guaranteed), since this arrangement may provide greater evidence of contractor financing, and more District use of the constructed facilities as a tenant. The District should be aware, however, that the longer the Lease Term extends past completion/the Date of Completion, the greater the Total Sublease Amount will likely become due to carrying charges.

Prequalification of Contractor and Certain Subcontractors (Section 8)

For districts with an ADA of 2,500 or more, all contractors, as well as all electrical, mechanical and plumbing contractors submitting proposals for a lease-leaseback project, must be prequalified pursuant to Education Code section 17406, subsection (a)(2)(C) and Public Contract Code section 20111.6, subsections (b) through (m).

The statute does not expressly require prequalification for districts with an **ADA of 2,500 or less**. However, the new best value contractor selection process requires all districts to evaluate each contractor's "qualifications" as part of its determination of the proposal that represents the best value to the District, which appears to be very similar to contractor prequalification. To streamline the qualifications analysis, and because the information required to be provided as part of prequalification is reasonably objective, the Lozano Smith template lease-leaseback documents use the same information provided as part of prequalification for evaluating a contractor's qualifications. Therefore, if your District has an **ADA of 2,500 or less**, we recommend you require optional prequalification pursuant to Public Contract Code section 20111.5. Lozano Smith's template lease-leaseback contract documents include an RFP which provides for optional prequalification under Section 20111.5 for those districts with an **ADA of 2,500 or less**.

Skilled and Trained Workforce Requirements (Section 13)

Additional labor requirements requiring contractors and subcontractors at every tier to employ a "skilled and trained workforce" went into effect on January 1, 2016, and were subsequently revised, effective January 1, 2017. Because these new labor requirements are set to change at the beginning of 2018 (and each calendar year thereafter), this Lease-Leaseback Agreement applies to projects that will be constructed **during the 2017 calendar year only**. If project construction will extend past 2017, please consult with counsel. If the District has a project labor agreement that applies to the project (or "PLA"), please contact our office for alternative language that may be necessary.

Sublease Agreement

Sublease Payments (Section 6(a))

A monthly installment (or “Sublease Payment”) will be made for each month of the Lease Term. The number of monthly installments, which is also listed in Exhibit A to the Sublease Agreement, should be included in Section 6(a).

NOTE: The carrying costs are likely to accrue proportionally with the length of the contract Lease Term. In other words, the longer the Lease Term (more months), the higher the carrying costs.

Changes in Sublease Payments Caused by Delay (Sections 6(b) & (c), Section 7)

As discussed in Sections 6(b), 6(c), and Section 7 of the Sublease, changes and/or delays to the project may increase and decrease the Total Sublease Amount and affect the Lease Term. If change orders increase or decrease the Total Sublease Amount, then such increases or decreases will be reflected in the remaining monthly Sublease Payments. For example, if there are five Sublease Payments left, and a change order increases the Total Sublease Amount by \$10,000, then each of the remaining Sublease Payments must be increased by \$2,000. If the completion of construction is delayed by a significant amount of time, then the Lease Term must be extended to maintain the same period of the District’s use of the constructed facilities as a tenant. (See discussion of Article 6 of the Lease-Leaseback Agreement, above.) However, if there is only a slight delay (e.g., two days), extension of the Lease Term would not be necessary.

These contract terms further provide that for every full month of delay in completion of construction, the Lease Term will be extended by one month and a Sublease Payment would be added for that month. If the delay in completion that caused a one-month extension of the Lease Term is the responsibility of the contractor, then the District would have the option to skip one Sublease Payment during construction. However, the District must be sure to extend the Lease Term when construction is delayed, otherwise the completion of construction may occur after the end of the Lease Term, thus eliminating any period of use of the constructed facilities by the District as tenant.

Schedule of Sublease Payments (Exhibit A)

An initial schedule of Sublease Payments (based on Section 6 of the Sublease and Section 4 of the Lease-Leaseback Agreement) is to be completed and added as Exhibit A to the Sublease Agreement. The dates, number, and amounts of payments may be adjusted during construction, but this schedule will provide clarity for the parties at the beginning of construction.

Exhibit A should be filled out prior to the Sublease being executed; however, Exhibit A should not be executed until the Total Sublease Amount has been approved by the District’s governing board.

General Conditions

Procedures for Sublease Payment (Section 9.3.1)

An invoice is not required for each monthly Sublease Payment. The District is to make monthly Sublease Payments on or before a specific day each month. This is similar to a rent payment under a lease, and less like the invoicing/progress payment process in a typical construction contract.

Withholding Sublease Payment (Section 9.5.1)

The District may withhold an amount from any Sublease Payment for any damages caused by the contractor. Because there is no retention, the District should pay careful attention to all grounds for withholding and make sure that the final Sublease Payment is sufficient to cover necessary withholdings. If the final Sublease Payment is not sufficient, then the District may withhold from earlier Sublease Payments.

Final Sublease Payment (Section 9.9.1)

The Final Sublease Payment should be made on or before the due date of the last Sublease Payment. The District, however, should not make the Final Sublease Payment unless and until certain conditions are satisfied by the contractor, including: providing a complete set of Record Drawings and Annotated Specifications to District (See Section 3.11.3.4), and submittal of final equipment manuals to the District (See Section 3.11.3.5).