



# Board Agenda Item 10

DATE: November 14, 2017

TO: Board of Supervisors

SUBMITTED BY: Steven E. White, Director  
Department of Public Works and Planning

Margaret Mims, Sheriff-Coroner

Jean M. Rousseau, County Administrative Officer

SUBJECT: Contract No. 16-S-04, West Annex Jail

RECOMMENDED ACTION(S):

1. Hear and consider, and take appropriate action, on:
  - (a) Protest by apparent second-lowest responsible bidder, USS Cal Builders, Inc. (USS), 8051 Main Street, Stanton, CA, regarding the proposed “Conditional Award” of Contract No. 16-S-04, West Annex Jail, for the construction of the West Annex Jail in downtown Fresno, to the apparent lowest responsible bidder, Bernards Bros., Inc. (Bernards), 555 First Street, San Fernando, CA; and
  - (b) USS’s request that the “Conditional Award” of Contract No. 16-S-04, West Annex Jail, instead be made to USS (whose bid is in the total amount of \$82,975,000, including the base bid, all additive bids, and the allowance).
2. Find that Bernards is the lowest responsible bidder for Contract No. 16-S-04, West Annex Jail, and that the deviations in Bernards’s bid from strict bidding requirements are immaterial and are hereby waived, in the discretion of the Board and in furtherance of the best interests of the County.
3. Award Contract No. 16-S-04, West Annex Jail, to the lowest responsible bidder, Bernards, in the total amount of \$81,756,000, including the base bid, all additive bids, and the allowance, subject to and conditioned upon the approval of the contract award to Bernards, including Bernards’s bid proposal, by the State of California Department of Finance (DOF) (collectively, the Conditional Award).
4. Authorize the Director of Public Works and Planning (Director), following the DOF’s approval of the Conditional Award to Bernards, to (a) provide notice, and any related documents, pursuant to the County’s instructions to bidders, to the Chairman and Bernards of the County’s receipt of the DOF’s approval of the Conditional Award to Bernards, and that such receipt of approval by the DOF satisfies the condition of the Conditional Award to Bernards, and (b) do any and all things and take any and all actions and execute any and all notices, certificates, and other documents which he may deem necessary or advisable in

order to consummate the award of Contract No. 16-S-04, West Annex Jail, to Bernards, and the related construction contract.

5. Authorize the Chairman, (a) following receipt of such notice from the Director, to provide the execution-ready Contract No. 16-S-04, West Annex Jail, and notice, pursuant to the County's instructions to bidders, to Bernards of the County's acceptance of Bernards's bid and of the County's award of the Contract No. 16-S-04, West Annex Jail, to Bernards for such construction contract, and that before the County executes the construction contract, Bernards's must first provide the related documents as required by the County's instructions to bidders, and (b) following receipt from Bernards of the executed Contract No. 16-S-04, West Annex Jail, and the related documents as required by the County's instruction to bidders, to execute such construction contract on behalf of the County, and (c) to do any and all things and take any and all actions and execute any and all notices, certificates, and other documents which he may deem necessary or advisable in order to consummate the award of Contract No. 16-S-04, West Annex Jail, to Bernards and the related construction contract.
6. Authorize the Director, or his designee, to execute Contract Change Orders up to \$210,000, which is approximately 0.26% of Bernards's total construction contract cost.
7. Adopt Budget Resolution increasing the FY 2017-18 appropriations in the Interest and Miscellaneous Org 2540 in the amount of \$7,309,742 (4/5 vote).
8. Adopt Budget Resolution increasing the FY 2017-18 appropriations and estimated revenues in the State Senate Bill 1022 (West Annex Jail) Org 8845 in the amount of \$74,511,353 (4/5 vote).
9. Adopt Budget Resolution increasing the FY 2017-18 appropriations and estimated revenues, including \$3,220,266 of Committed Fund Balance, \$4,255,489 of Proposition 172 revenues, \$32,013 of 2002 tobacco securitization bond proceeds, and \$2,177,556 of 2006 tobacco securitization bond proceeds, in the Leasehold Improvements (West Annex Jail) Org 8846 in the amount of \$9,685,324 (4/5 vote).
10. Adopt Budget Resolution increasing the FY 2017-18 appropriations and estimated revenues in the Central Plant/Tunnel (West Annex Jail) Org 8847 in the amount of \$2,908,476 (4/5 vote).
11. Adopt Budget Resolution increasing the FY 2017-18 appropriations and estimated revenues in the Intangibles (West Annex Jail) Org 8848 in the amount of \$1,181,000 (4/5 vote).

The first recommended action would provide for a hearing to consider and take appropriate action on the bid protest submitted by USS, the apparent second-lowest responsible bidder, alleging irregularities in the apparent low bid submitted by Bernards, and USS's request to instead be conditionally awarded the construction contract.

The second recommended action would find that Bernards is the lowest responsible bidder and would waive, in the exercise of the Board's discretion, and in furtherance of the best interests of the County, the minor irregularity in the bid submitted by Bernards, which the Department of Public Works and Planning (the Department) identified (*i.e.*, missing Page 00 43 13-1, "Bid Security Form"), as an immaterial deviation from the strict bidding requirements listed in the County's project specifications. As discussed below, the Department determined that the omission of that page did not provide Bernards with any sort of competitive advantage, and clearly did not affect the amount of its bid.

The third recommended action would authorize the award of a capital improvement project, the West Annex Jail (WAJ), to Bernards as the bidder having submitted the lowest responsive bid, subject to and conditioned upon the approval of the State Department of Finance (DOF). Bernards's bid is \$4,809,608 higher than the architect's estimate of \$76,946,392.

The fourth and fifth recommended actions would authorize the Director and the Chairman, respectively, pursuant to the County's instruction to bidders, to carry out the County's Conditional Award to Bernards, assuming the DOF's approval of the Conditional Award to Bernards for Contract No. 16-S-04, West Annex Jail.

The sixth recommended action would authorize the Director, or his designee, to execute change orders for the construction contract up to the statutory limit of \$210,000.

The seventh through eleventh recommended actions are budget resolutions, which would provide for the budgeting of the WAJ project, and would increase appropriations and estimated revenues in FY 2017-18 to fund the remaining cost for construction of the WAJ project; but as discussed below, the State's financing for its share of costs is on a reimbursement basis.

#### ALTERNATIVE ACTION(S):

After holding the protest hearing, the Board could choose not to approve the second recommended action, which is to waive the minor irregularity in Bernards's bid as an "immaterial" deviation from strict bidding requirements. But such a decision would necessarily preclude the Board's approval of the third recommended action to conditionally award the construction contract to Bernards, the apparent lowest responsible bidder. In the event of such a decision, the Department would recommend conditionally awarding the construction contract to the apparent second-lowest responsible bidder, USS, in the amount of \$82,975,000, including the base bid, all additive bids, and the allowance, which is \$1,219,000 higher than Bernards's bid and \$6,028,608 higher than the architect's estimate of \$76,946,392. But if the Board were to conditionally award the construction contract to USS, the Board would need to appropriate an additional funding source (in addition to this agenda item's recommended budget resolutions) to cover the \$1,219,000 added cost.

If the sixth recommended action is not approved, the Director's, or his designee's, authority to approve contract change orders will be limited to \$100,000.

If any of the seventh through eleventh recommended budgetary actions are not approved, an alternative funding source(s) would need to be pursued and secured.

#### FISCAL IMPACT:

A. Overview: The anticipated contract construction cost of the project, based on Bernards's bid, as the lowest responsible bidder, including the base bid, all additive bids, and the allowance (\$81,756,000), and including a 5% allowance for contingencies (\$4,087,800) is \$85,843,800. Based on this contract construction cost, the total project budget is estimated at \$101,767,800 (as shown in Attachment B); if the second through eleventh recommended actions are approved by the Board, that total estimate would be comprised of \$79,194,000 of Senate Bill (SB) 1022 financing and \$22,573,800 of County funds (the County's funds include the required County 10% match).

B. SB 1022 Financing: SB 1022 (Adult Local Criminal Justice Facilities Construction Financing Program) State-reimbursed funding is expected to provide \$79,194,000 of State financing for the project, which shall be on a 30 - 60 day reimbursement basis of eligible costs (*i.e.*, reasonable and necessary project costs actually incurred in construction of the project, and allowed under the County's jail construction agreement for this project with the California Board of State and Community Corrections (BSCC)).

While the West Annex Jail project is being constructed, the State will provide interim financing for the State's share in the maximum amount of \$79,194,000. Then, upon the completion of the project, the State Public Works Board (SPWB) is expected to issue long-term tax-exempt lease revenue bonds to repay the State's interim financing.

The County is obligated to complete the project for any amounts in excess of the State's share of SB 1022 funds.

C. Managing County Cash Flows in Anticipation of State SB 1022 Revenue: The County's advances for the portion of the project costs to be reimbursed by the State would be first paid by County advances from its General Fund; depending on the County's county-wide cash flow needs, those County expenditures may be indirectly financed annually through the County's issuance of Tax and Revenue Anticipation Notes (TRAN) for cash flow borrowing. That form of short-term financing, spread over affected successive fiscal years, is not a long-term capital project financing; rather it would be part of the County's annual financing of its operations for the first half of each affected fiscal year.

If the County were to issue a TRAN, the size of each of the County's affected TRAN borrowing would depend on each fiscal year's "accumulated cash flow deficit" in each first half of such fiscal year, taking into account the timing of other cash flow deficits, if any, and lags between the County's advance payments to its contractors (*i.e.*, expenditures) for this project, and State reimbursements (*i.e.*, revenues) to the County of such County advances during such period.

D. Funding Sources: Previously, the Board approved the following funding sources totaling \$17,199,000 for the project:

**West Annex Jail  
County's 10% Match and Additional Funds Required**

	<u>County's 10% Match</u>	<u>Additional Funds</u>	<u>Total County Funds Required</u>
<b><u>Funding Previously Approved</u></b>			
Prior Jail Needs Assessments:	\$251,000.00	\$ -	\$251,000.00
Land Value Jail Site (in kind)	\$437,000.00	\$ -	\$437,000.00
2006 Tobacco Securitization Bond Proceeds	\$4,641,808.27	\$2,177,556.13	\$6,819,364.40
Former Mendota Landfill Disposition Proceeds	\$1,200,323.28	\$ -	\$1,200,323.28
2002 Tobacco Securitization Bond Proceeds	\$2,268,868.45	\$32,012.87	\$2,300,881.32
<u>General Fund</u>	\$ -	<u>\$6,190,431.00</u>	<u>\$6,190,431.00</u>
<b>Total Previously Approved:</b>	<b>\$8,799,000.00</b>	<b>\$8,400,000.00</b>	<b>\$17,199,000.00</b>
<b><u>Additional Funding Required</u></b>			
Proposition 172	\$ -	\$4,255,489.00	\$4,255,489.00
<u>FY 2015-16 Post-Budget Mitigation</u>	<u>\$ -</u>	<u>\$1,119,311.00</u>	<u>\$1,119,311.00</u>
<b>Total Additional Funding:</b>	<b>\$ -</b>	<b><u>\$5,374,800.00</u></b>	<b><u>\$5,374,800.00</u></b>
<b>Total County Funding Required</b>	<b>\$8,799,000.00</b>	<b>\$13,774,800.00</b>	<b>\$22,573,800.00</b>

As stated above, a total of \$22,573,800 of County funding is required based on Bernards's bid, as the lowest responsible bidder. To date, the Board has approved \$17,199,000, as shown above. Therefore, the recommended actions include \$5,374,800 in additional funding to meet the total project budget of \$101,767,800.

The recommended additional funds of available Proposition 172 and Post-Budget Mitigation are as outlined above. The Proposition 172 revenues are in the Local Public Safety Trust fund and are available, upon appropriation by the Board, for the County's provision of public safety services, including but not limited to the Sheriff's provision of public safety services, which also includes but is not limited to the operation of the County's jail. The West Annex Jail will be necessary for the operation of the County's jail. If appropriated by the Board, these Proposition 172 revenues will be used only for Project-related expenditures.

Attachment A to this Agenda Item summarizes prior Board appropriations and recommended Board appropriations in this agenda item to illustrate the multiple funding sources for this project. A total of \$12,793,647 has been appropriated for this project (excluding \$1,028,130 of appropriated contingency funding and \$688,000 related to the Needs Assessments and in-kind Land Value for the Jail site). Therefore, \$88,286,153 in appropriations and revenues is required to fully fund the anticipated contract construction cost of the project.

E. Budget Resolutions: The seventh through eleventh recommended actions are budgetary resolutions that would address budgetary issues.

Approval of the seventh recommended action will increase the FY 2017-18 appropriations in the Interest and Miscellaneous Org 2540 in the amount of \$7,309,742 funded by Committed Fund Balance, as approved by the Board on September 27, 2016, in the amount of \$6,190,431, and FY 2015-16 Post Budget Mitigation in the amount of \$1,119,311, established by your Board on December 8, 2015.

Approval of the eighth recommended action will increase the FY 2017-18 appropriations and estimated State revenues in the State SB 1022 (WAJ) Org 8845 in the amount of \$74,511,353. The total expected funds to be received from the State is \$79,194,000, of which \$4,682,647 has already been appropriated by the Board. The eighth recommended action is presented to the Board at this time because that action recognizes anticipated remaining State revenues necessary for the project. Although that prior \$4,682,647 appropriation has already been made, and this agenda item seeks appropriations of anticipated \$74,511,353 of State funds, none of those State funds have been received so far because, as discussed above, the State provides its funds on a reimbursement basis of eligible costs. That \$4,682,647 will be first reimbursed by the State upon the occurrence of Conditional Award approval by Department of Finance, which is expected to happen on or about December 15, 2017.

Approval of the ninth recommended action will increase the FY 2017-18 appropriations and estimated revenues in the Leasehold Improvements (WAJ) Org 8846 in the amount of \$9,685,324. This is funded by the following multiple sources:

An Operating Transfer In from Interest and Miscellaneous Org 2540 (as part of the \$7,309,742 in Committed Fund Balance, referenced above)	\$3,220,266
Local Public Safety Trust Fund, known as Proposition 172 revenues for public safety services	\$4,255,489
2002 Tobacco Securitization Bond proceeds	\$32,013
2006 Tobacco Securitization Bond proceeds	\$2,177,556
Total	\$9,685,324

Approval of the tenth recommended action will increase the FY 2017-18 appropriations and estimated revenues in the Central Plant/Tunnel (WAJ) Org 8847 in the amount of \$2,908,476. This is funded by an Operating Transfer In from Interest and Miscellaneous Org 2540 in the amount of \$2,908,476 (also, as part of the \$7,309,742 in Committed Fund Balance, referenced above).

Approval of the eleventh recommended action will increase the FY 2017-18 appropriations and estimated revenues in the Intangibles (WAJ) Org 8848 in the amount of \$1,181,000. This is funded by an Operating Transfer In from Interest and Miscellaneous Org 2540 in the amount of \$1,181,000 (also, as part of the \$7,309,742 in Committed Fund Balance, referenced above).

DISCUSSION:

A. The Project: The West Annex Jail project involves the construction of a new three-story building that will include two housing floors with mezzanines plus a full basement. The approximately 119,000 square foot building will be located adjacent to the existing Jail buildings on approximately 0.8 acres of County-owned land on the corner of Merced and L Streets in downtown Fresno (See Location Map, attached). The new building will link to the existing North Annex Jail via a new underground tunnel connection. The new building will house approximately 300 medium and maximum security beds plus space for programs providing behavioral health services, medical treatment, day reporting and visitation areas, interview rooms, and exercise areas; the basement will provide laundry, warehouse, administrative and support staff space.

The West Annex Jail will have new generation pods to allow greater observation and supervision of inmates than the aging South Annex Jail, which has linear cells. As discussed below, upon its completion, the West Annex Jail will replace the South Annex Jail for inmate housing.

The new building will receive utility services from the existing Central Plant. As part of the project, the Central Plant infrastructure will be upgraded, using \$7,500,000 of County match funds, to accommodate the additional capacity required to serve the new building. Central Plant upgrades will include electrical, plumbing, mechanical, security, and fire protection systems. On November 15, 2016, the Board made findings pursuant to Public Contract Code, section 3400(b)(2), allowing the use of specific brand names or trade names and the County's Administrative Policy No. 34, concerning exceptions from County bidding requirements to help integrate the new facility with the existing Central Plant systems.

B. Bids Received: On October 20, 2017, the Department received two bids for this project. The lowest bid for the base bid, all additives, and the allowance was \$81,756,000. This amount is \$4,809,608, or approximately 6%, higher than the architect's estimate of \$76,946,392.

The bidders and their respective bid amounts are shown below:

<u>Bidder</u>	<u>Base Bid + All Additives + Allowance (Basis of Award)</u>
Bernards Bros., Inc.	\$81,756,000
USS Cal Builders, Inc.	\$82,975,000
Difference:	<u>\$1,219,000</u>

C. Issues Relating to Bid Discrepancies.

1. Department-Identified Issue: The Department brings to the Board's attention the following for the Board's requested action in the second recommended action.

While the bid submitted by Bernards did not comply strictly with all bidding requirements, the discrepancy can be fairly characterized as "immaterial" and therefore, in furtherance of the best interests of the County, may be waived in the discretion of the Board. The bid specifications required that the bidders include a

signed Bid Security Form with their bid submittal. Although this form was not submitted with Bernards's bid, a bid bond in the amount of 10% of the total bid was submitted as evidence of bid security, and Bernards did execute all other documents to be signed and submitted with its bid, including the Noncollusion Affidavit, Guaranty, and Hazardous Materials Certification.

Because information to be listed on the Bid Security Form was expressly identified as "optional" (licensure), or was either provided elsewhere in the bid documents or readily available online (address and business entity type), the omission of that page did not provide Bernards with any sort of competitive advantage, and clearly did not affect the amount of its bid. Accordingly, after consultation with County Counsel, the Department determined that Bernards's bid substantially complied with bidding requirements, and that its omission of the Bid Security Form could be waived as inconsequential.

2. Protest Letter from USS Cal Builders, Inc.: Each bidder was required by statute to submit with its bid a list of those subcontractors who would perform work on the project in excess of 0.5% of the total amount of the contractor's bid.

On October 25, 2017, a bid protest letter was submitted to the Department by USS contending that Bernards's bid did not specifically list subcontractors for the communications or roofing work and that Bernards's does not possess the specialty licenses to self-perform those items of work. USS further alleged that Bernards's electrical subcontractor, Sebastian Corp., could not perform the electrical work, install conduits for the communications scope, and perform the electronic and safety security scope for the amount indicated in its bid. This assertion was based on USS' comparison of its own bid to Bernards's bid for the electrical work, and the comparison of Sebastian Corp.'s quote to USS to Sebastian's bid price included in Bernards's bid.

On October 30, 2017, Bernards submitted a written response to the protest letter. Bernards indicated that one of its subcontractors, CML Security, included the communications together with the security electronics and safety security scopes in its bid, including all conduit and wire, which was why a separate communications subcontractor had not been listed. Bernards's response further explained that Sebastian's quote only includes Division 26 electrical work, which represents 4.832% of Bernards's total bid amount. CML Security's quote includes the communications, security electronics and safety security scopes of work, which comprises 20.313% of Bernards's total bid amount. Bernards indicates it was not required to list its intended roofing subcontractor because that subcontractor's quote is less than 0.5% of the total amount of the bid.

Moreover, while Bernards has sufficiently explained the alleged omission of subcontractors, its bid would not have been rendered nonresponsive if it had failed to have done so, based on the provisions of Public Contract Code (PCC) Section 4106. That section provides that when a contractor fails to specify a subcontractor, or specifies more than one subcontractor for the same portion of work, it is deemed a representation by the contractor that it is fully qualified to self-perform that work, and that it intends to do so. If, after award of the contract, the prime contractor subcontracts that work, then the contractor is subject to a penalty of up to 10% of the amount of that subcontract. The County historically has relied upon Section 4106 in accepting that statutorily implied representation when awarding public construction contracts.

Subsequent to the foregoing letters, additional letters were submitted by or on behalf of the bidders; a substantial amount of the discussion in those letters reiterated the foregoing points, or raised other issues that do not alter the Department's recommendation.

Copies of all correspondence submitted by or on behalf of the bidders is attached collectively as Attachment D.

D. Director's Authority for Change Orders: PCC Section 20142 limits the extent to which the Director may be authorized to execute Contract Change Orders to \$210,000. However, the Board's policy, last updated in 1991, limits the Director's authority to \$100,000.

The DOF and BSCC require a 5% contingency, approximately \$4,088,000, as part of the SB 1022 financing for the project. The Board's authorization for the Director, or his designee, to approve Contract Change Orders up to the PCC limit would extend the time for the Department's initial return to the Board to approve change orders in excess of the Board's policy limit. Such approval additionally will reduce the time required to process changes, reduce paperwork, help keep cost down, and reduce potential claims for additional cost and time due to administrative delays early in the project. This Contract Change Order authorization would not apply to, nor allow changes to the scope of the work.

E. Conditional Award and Award of the Construction Contract: Award of the construction contract remains conditional pending the County's receipt of notification from the DOF of its approval of conditional award, including the lowest responsible bidder's proposal.

The DOF serves as staff to the State Public Works Board (SPWB), which will provide the State SB 1022 financing for the State's share of the West Annex Jail project costs. Any actions that the DOF takes on behalf of the State might be on behalf of the DOF and/or the SPWB in furtherance of the West Annex Jail project. And any action that the SPWB takes, might be upon recommendation of the DOF.

The County's notice to bidders informs bidders that the County has no authority or control over, and the County does not assume any responsibility for, the DOF's decision-making. If the DOF provides a notice of approval to the County, the Director would promptly provide written notice to both the Chairman and the lowest responsible bidder of such DOF approval, and that the award condition has been satisfied.

Following such notice by the Director, the award of the construction contract would be made as follows: the Chairman would notify the lowest responsible bidder by letter that (a) its bid has been accepted and that it has been awarded the contract, and (b) before the Chairman executes the construction contract on behalf of the County, the successful bidder must first comply with certain requirements, such as execution of the construction contract, and provide bonds and proof of minimum insurance coverages, as required by the County's notice to bidders.

F. Construction Schedule: Plans and Specifications were prepared by the Department's consultant, DLR Group. Kitchell CEM will provide Construction Management services.

Assuming that the Board approves or undertakes the recommended actions in this agenda item, and the DOF timely approves the Conditional Award, it is anticipated that construction will begin in late January 2018 and be completed in early/mid-September 2020 (See Attachment C, Project Milestone Schedule); upon completion of the project, the Director will issue the Notice of Completion and accept the project on behalf of the County.

G. State SB 1022 Financing Program.

1. Overview: The main source of funds, the SB 1022 program, is not a grant program. The State imposes long-term conditions upon County, under certain required SB 1022 agreements, referenced below, in order for the County to receive the State lease revenue bond funding. As discussed above, the State will only reimburse County costs, up to the State's maximum funding of \$79,194,000, attributable to identified eligible State project costs, and only after approval of the Award of Construction Contract by the State Department of Finance.

The SB 1022 financing mechanism requires the SPWB to hold a leasehold interest of the County's facility during the term of the SPWB's lease revenue bonds, discussed below (presently expected to be approximately 15 years after SPWB bonds are sold; those bonds would be sold after project completion). Once the SPWB bonds are repaid by the BSCC, fee title to the West Annex Jail shall vest in the County and become the property of the County without further action of any Party (*i.e.*, no need for a deed from the State to the County).



2. SB 1022 Requirements for the Construction Contractor. The County's notice to bidders informs them of the following:

- A partial source of financing for the construction contract is State SB 1022 financing; and
- The successful bidder, as the construction contractor, shall be responsible for:
  - Performing all of the County's and/or construction contractor's construction-related obligations, and complying with all of the County's and/or construction contractor's construction-related requirements, under and pursuant to two of the County's SB 1022 agreements, below (*i.e.*, the Project Delivery and Construction Agreement [or PDCA], and the BSCC Construction Agreement); and
  - Cooperating with the County to enable the County to perform under and comply with these two SB 1022 agreements.

3. SB 1022 Financing Structure; federal income tax issues. Under the SB 1022 financing mechanism, the County has leased the West Annex Jail site to the BSCC, under the Ground Lease, referenced below, and has granted an easement to the BSCC for the Central Plant, under the Easement Agreement, referenced below.

While the West Annex Jail project is being constructed, the SPWB will provide interim financing for the State's share in the maximum amount of \$79,194,000. Then, upon the completion of the project, the SPWB is expected to issue long-term tax-exempt lease revenue bonds to repay the State's interim financing.

For the SPWB's future bond issuance, and during the life of those bonds, (1) the BSCC will lease the completed facility and site to the SPWB; (2) the SPWB will lease the facility back to BSCC, which will in turn pay rent to the SPWB (*i.e.*, for the BSCC's debt service on the SPWB's bonds; those State agency transactions together are a "lease-lease-back"), and (3) the BSCC will sublease the facility to the County for its use and operation in the care of inmates.

According to the State SB 1022 agreements that the County has entered into so far (identified below), and the sample forms of State documents that the State has provided to the County for its future execution in connection with the SPWB's future bond issuance, the County will not be responsible for debt service on the SPWB's bonds.

But, as discussed below, the County is contractually required to undertake certain responsibilities in connection with federal income tax issues related to the SPWB's tax-exempt bonds and the proceeds of tax-exempt bonds that the County is using for the project.

So far, the County has entered into the following SB 1022 agreements with the State to accomplish the State's SB 1022 financing of the West Annex Jail project:

- Project Delivery and Construction Agreement, SB 1022 Adult Local Criminal Justice Facilities Financing Program, dated May 31, 2016 (also known as the PDCA; Parties: SPWB; BSCC; and County).
  - Purpose: Provides the framework of the State's SB 1022 agreements (1) in order for the State to provide interim financing, and for the SPWB to issue and sell lease revenue bonds in the future, for the maximum amount approved by the BSCC (*i.e.*, \$79,194,000), to finance the State's share of the project's construction, and (2) for the County's duties to provide its 10% match and construct the project.
- BSCC Jail Construction Agreement for Fresno County, Adult Local Criminal Justice Facility, dated

August 16, 2017 (also called the BSCC Construction Agreement; Parties: BSCC and County).

- Purpose: Sets forth the roles, responsibilities and performance expectations of the parties for the County's construction of the project, and the procedures for reimbursement by the State of the County costs eligible for reimbursement of State funds under the SB 1022 program; as discussed below, the County agrees under this agreement to staff, maintain, and operate the West Annex Jail.
- Ground Lease, dated August 25, 2017 (Parties: BSCC and County).
  - Purpose: To place BSCC in possession and control of the West Annex Jail site upon which the facility will be constructed; the Ground Lease enables the BSCC to lease the West Annex Jail site to the SPWB for purposes of the SPWB's future issuance of its lease revenue bonds; the Ground lease is to remain in effect for the life of the SPWB's lease revenue bonds.
  - Central Plant not included: The Ground Lease does not encumber the Central Plant, since the area outside of the West Annex Jail site will not be improved with SB 1022 funds; the Central Plant upgrades will be financed with County match funds.
- Easement for Grants of Access, Utilities, and Repair, dated August 25, 2017 (also called the Easement; Parties: BSCC and County).
  - Purpose: a non-exclusive easement in favor of the BSCC for access to the Central Plant for various purposes including maintenance, repair and operation.
- Right of Entry for Construction and Operation, dated August 25, 2017 (Parties: BSCC and County).
  - Purpose: non-exclusive license that authorizes County and its contractors to use the West Annex Jail site that has been leased to BSCC under the Ground Lease, referenced above, and to operate the project upon its substantial completion until termination of the PDCA referenced above.
- Cooperation Agreement, dated August 4, 2017 (Parties: SPWB and County).
  - Purpose: the SPWB requires the County to enter into this agreement, to help ensure the SPWB will be able to issue the SPWB's tax-exempt lease revenue bonds in its normal and customary manner.
    - Tax-exempt bonds are governed by federal income tax laws, which strictly limit the amount of "private business uses" of projects that they finance, measured by gross bond proceeds used. Generally, not more than 10% of the proceeds of a tax-exempt bond issue may be used for a "private business use" that is related to the bond issuer's (here, the SPWB) governmental operations of the bond financed property. That limitation is reduced to 5% for "private business use" that is unrelated (or "disproportionate") to the bond issuer's governmental operations.
    - Typically, "private business uses" occur when the bond issuer, or a user of the bond financed property (here, the County or BSCC), grants a special legal entitlement to "nongovernmental" entities to lease, own, or in some cases, manage tax-exempt bond-financed properties. A "nongovernmental" entity generally is a business, a nonprofit entity, or the federal government.

- Generally, the County agrees (a) not to undertake any action that adversely affects the tax-exempt status of either parties' tax exempt bonds used for financing the project (e.g., not to exceed the "private business use" limitation, measured both under the law and under project-specific restrictions); and (b) to undertake certain activities to protect the tax-exempt status of the SPWB's tax-exempt bonds and such County-sponsored bonds (e.g., actively monitor "private business uses" of the project, recordkeeping, and consulting with the SPWB).
- Shortly before the SPWB issues its tax-exempt bonds, it will prepare, and require the County to adopt a resolution, and execute and abide by certain SPWB bond documents to protect the tax exempt status of the SPWB's tax-exempt bonds (e.g., a certificate of County assurances and covenants obligating the County regarding the detailed "Tax Certificates" for the SPWB's bonds and County-sponsored tax-exempt bonds, and other certifications that may be reasonably required by the SPWB regarding the proceeds of those County-sponsored bonds); the SPWB provided the County a sample of most of those documents from a recent SPWB jail financing.
- The Cooperation Agreement's restrictions on the County are similar to, but stricter than, the federal income tax law restrictions that apply to the County-sponsored tax-exempt bonds.
  - For example, the County agrees, at the time of the SPWB's future bond issuance, to represent that the County will not expect that more than 15 beds in the West Annex Jail will be occupied by federal detainees at any one time, pursuant to the County's agreement with the US Marshals Service for housing federal detainees, and that the West Annex Jail is not being sized for the purposes of accommodating that federal agreement.
  - On April 25, 2017, the Board authorized the County to enter into a new Detention Services Intergovernmental Agreement (IGA) with the US Marshals Service, for housing federal detainees, which would satisfy the foregoing Cooperation Agreement requirement. And, on July 1, 2017, the County entered into that new IGA, upon such terms, which also provided for US Marshals Service transportation of federal detainees to and from the local federal courthouse, and at a newly negotiated rate.

Lastly, in connection with the SPWB's issuance of its SB 1022 bonds, the County will be expected to undertake a detailed "due diligence" investigation and report of expected uses of the West Annex Jail (e.g., investigating, reviewing and reporting on all of the County's jail service provider agreements, and the US Marshals IGA, and completing a questionnaire), at the request of the SPWB's bond counsel, and to enter into a Facility Sublease with the BSCC (a sample form of that Facility Sublease has been made available to the County as part of the PDCA).

- Purpose: BSCC subleases the facility to the County for its use, operation and maintenance, for the duration of the SPWB's SB 1022 tax-exempt lease revenue bonds.
  - The County, as a user of the State's bond financed property, promises, among other things, not to use or permit the use of the facility in any manner which would cause the SPWB's tax exempt bonds to exceed the "private business use" limitations, similarly referenced above.
  - The County's right to use and occupy the West Annex Jail during the life of the SPWB's tax-exempt bonds is subordinate and subject to the BSCC's lease from the SPWB, including the BSCC's timely payment of its debt service on the SPWB's bonds.

#### H. Final Completion and Operation: SB 1022 Restriction on Housing Capacity.

The BSCC Construction Agreement, referenced above, requires the County to maintain the West Annex Jail upon final completion and staff and operate the West Annex Jail no later than 90 days after final

completion. The County further represents and certifies to the BSCC under that agreement that the County's project proposal to the BSCC for SB 1022 financing does not request to use the State's SB 1022 financing program to "add"—i.e., to result in a net increase in housing capacity to County. If that project proposal were to result in a net increase in housing capacity to the County, the County agrees under that agreement not to "lease" any housing capacity constructed, using the financing authority of the SB 1022 financing program, of the West Annex Jail to any other public or private entity for a period of 10 years beyond the date of the final completion of the West Annex Jail project (that SB 1022 state-law restriction is different than and separate from the 15-bed limitation on federal detainees in the Cooperation Agreement, stated above, which is based on federal income tax laws). That SB 1022 representation and certification lasts for 10 years, and terminates automatically at the end of that 10 year period.

Once the West Annex Jail is completed, and the Sheriff subsequently completes the transition of inmates from the South Annex Jail to the West Annex Jail (which will be done in 90 days or less), the South Annex Jail will no longer be used for housing inmates. The County will continue to use the underground tunnel beneath the South Annex Jail for movement of inmates to the Superior Court. Staff anticipates that the County may use classroom and recreational space in the South Annex Jail for programming/education and/or recreational purposes for inmates, but not for housing inmates.

Consequently, once the South Annex Jail will no longer be used for housing inmates, the County will be able to demonstrate to the BSCC that the West Annex Jail does not result in a net increase in housing capacity to County.

#### I. CEQA Compliance.

On December 11, 2014, the Planning Commission considered the approval of a Negative Declaration based on Initial Study Application No. 6786, prepared in accordance with the requirements of the California Environmental Quality Act (CEQA). The Initial Study analyzed the environmental effects of Unclassified Conditional Use Permit Application (the UCUP) No. 3436 and Variance Application (the VA) No. 3962, which described a two-phase project to construct the West Annex Jail. The Negative Declaration concluded that the West Annex Jail project would not cause any significant environmental effects.

Following receipt of staff's presentation and public comment, the Planning Commission adopted the Negative Declaration based on Initial Study Application No. 6786, and approved UCUP No. 3436 and VA No. 3962.

Section 15162(a) of the CEQA Guidelines provides that once a negative declaration has been adopted for a project, no subsequent environmental impact report (EIR) or negative declaration shall be prepared unless certain subsequent circumstances have occurred which indicate that one or more significant environmental effects may occur as a result of the project. Circumstances which trigger the requirement of a subsequent EIR or negative declaration are (1) substantial changes are proposed to the project, (2) substantial changes occur with respect to the circumstances under which the project is undertaken, or (3) new information of substantial importance is presented which was not known and could not have been known at the time the previous negative declaration was adopted.

Recommended Actions 1-11, together, in this Agenda Item would authorize construction of the West Annex Jail in conformity with UCUP No. 3436 and VA No. 3962. The Department has determined that none of the circumstances described in Section 15162(a) have occurred with respect to the West Annex Jail project. Therefore, no additional environmental analysis is required prior to the Board taking action on Recommended Actions 1-11.

#### OTHER REVIEWING AGENCIES:

California Board of State and Community Corrections  
California State Fire Marshal  
State of California Public Works Board

California Board of State and Community Corrections  
California State Fire Marshal  
State of California Public Works Board  
State of California Department of Finance  
State of California Department of General Services  
City of Fresno Planning Department (for traffic control  
and street closures) City of Fresno Fire Department  
San Joaquin Valley Air Pollution Control District

REFERENCE MATERIAL:

BAI # 31.1, April 25, 2017  
BAI #23.1, April 4, 2017  
BAI #51, November 15, 2016  
BAI #8, September 27, 2016  
BAI #27, December 8, 2015  
BAI #29, May 19, 2015  
BAI #39, May 5, 2015  
BAI #29, April 7, 2015  
BAI #11, February 24, 2015  
BAI #31, December 16, 2014  
BAI #48, December 16, 2014  
BAI #24 & #40, November 4, 2014  
BAI #36, October 28, 2014  
BAI #34, September 16, 2014  
BAI Addendum G, June 17, 2014  
BAI #21, January 7, 2014  
BAI #6, October 29, 2013  
BAI #4 & Addendum A, October 22, 2013

ATTACHMENTS INCLUDED AND/OR ON FILE:

Location Map  
Attachment A – Budget Resolutions Summary  
Attachment B – Budget Summary Table  
Attachment C – Project Milestone Schedule  
Attachment D – Bid Protest Correspondence  
On file with the Clerk – Budget Resolutions (Orgs 2540, 8845, 8846, 8847, 8848)

CAO ANALYST:

John Hays