Board Agenda Item 7

DATE: November 19, 2019

TO: Board of Supervisors

SUBMITTED BY: Robert W. Bash, Director, Internal Services/Chief Information Officer

SUBJECT: Resolution and Solar Photovoltaic Energy Services Agreement with FFP, BTM Solar, LLC

RECOMMENDED ACTION(S):

1. **Conduct a public hearing in accordance with California Government Code § 4217.12 for the Board to determine that the terms of each of the proposed energy services agreements with FFP BTM SOLAR, LLC (ForeFront Power) (in items #3 and #4, below) are in the best interests of the County, and to find that the anticipated costs to the County for electrical energy or conservation services to be provided by the solar photovoltaic (PV) energy system (in item #3 below) and the energy storage system (in item #4 below) under each of those agreements, respectively, will be less than the County's anticipated marginal costs for the purchase of such energy and conservation services in the absence of each such agreement, respectively.**
2. **Adopt and authorize the Chairman to execute Resolution making the determinations and findings as described in item #1 (Gov. Code, sec. 4217.12).**
3. **Approve and authorize the Chairman to execute Energy Services Agreement-Solar, Fresno County-Juvenile Justice Campus, including General Terms And Conditions Of Energy Services Agreement, with ForeFront Power to finance, design, construct, install, operate, and maintain an approximately 27-acre, 3,585 kW (DC) (estimated) solar PV energy system (including solar panels) at the Juvenile Justice Campus, located at 3333 E. American Avenue, Fresno, CA, 93725 (the JJC), for the County to purchase energy at specified rates, for a possible twenty-five (25) year term, with an option to purchase the solar PV energy system after the 5th anniversary of commercial operation of the solar PV energy system.**
4. **Approve and authorize the Chairman to execute Energy Services Agreement-Energy Storage, Fresno County-Juvenile Justice Campus, including General Terms and Conditions Of Energy Services Agreement, with ForeFront Power to finance, design, construct, install, operate, and maintain a 2,000 kW (AC/ 3,946 kWh DC) (estimated) energy storage system at the JJC, for the County to obtain energy conservation services, for a possible 10-year term, with annual extensions so long as the Agreement for the solar PV energy system (item #3, above) stays in effect.**
5. **Authorize the Director of Internal Services/Chief Information Officer (CIO) to approve and execute any further documents, instruments, estoppel and acknowledgement certificates, memoranda of agreements, all subject to the approval of the County Counsel as to legal form and Auditor-Controller/Treasurer-Tax Collector as to accounting form, necessary to finalize the recommended Agreements, including any financing that ForeFront Power might later obtain in relation to such Agreements.**
6. **Authorize the Director of Internal Services/Chief Information Officer (CIO) to approve any change in energy storage system size, and amend the Energy Services Agreement - Storage**

solely for updating the energy storage system size, subject to the approval of the County Counsel as to legal form and Auditor-Controller/Treasurer-Tax Collector as to accounting form.

7. **Approve and ratify the Rule 21 Generator Interconnection Agreement with Pacific Gas & Electric Company (PG&E), dated June 25, 2018, previously executed by the County Purchasing Manager.**

The Internal Services Department (ISD) has been researching energy conservation measures to identify possible energy savings projects. ISD has identified Energy Services Agreements as financially viable mechanisms for the procurement of solar power and energy storage without requiring the County's significant capital expenditures.

Your Board's approval of the recommended actions will allow the County to enter into Energy Services Agreements with ForeFront Power for the design, construction, installation, operation, and maintenance of the following energy systems: (1) an estimated 27-acre, 3,585 kW (DC) solar photovoltaic system (System) to significantly reduce the County's electricity expenses at the Juvenile Justice Campus (JJC) through the possible 25-year term of the recommended Agreement; after the fifth anniversary of Commercial Operation of the System, the County has the option to purchase the System; and (2) a 2,000 kW (AC / 3,946 kWh DC) (estimated) energy storage system at the JJC through the possible 10-year term of the recommended Agreement; after the initial 10-year term, the Agreement may renew annually, so long as the Agreement for the System remains in effect. There is time sensitivity to this item, since ForeFront Power will receive up to 30% of Internal Revenue Service (IRS) tax credits if this Agreement is executed prior to the end of 2019. Savings realized from IRS tax credits are passed onto the County through a lower Power Purchase Agreement (PPA) rate. This item is countywide.

ALTERNATIVE ACTION(S):

Your Board could choose to approve only those actions relating to the solar photovoltaic system; alternatively, your Board could choose not to approve all of the recommended actions. In either such case, the County will continue to purchase energy from the local utility company at current rates. This will result in lost savings until an alternative energy savings project can be identified and funded.

As well, the County could go out to bid for these same energy conservation services, but it is the opinion of staff that the County will not get comparably favorable rates on the open market as it is able to access through the SPURR contract, as discussed below.

FISCAL IMPACT:

There is no Net County Cost associated with the recommended actions. By design, the proposed Energy Services Agreement (ESA) for the solar PV system is cashflow positive year one, since the purchase price per kilowatt hour generated is less than the County is currently paying for energy from Pacific Gas and Electric Company (PG&E). As a result, the County is expected to realize savings in all years of the ESA term, as discussed below under the heading "The Recommended Resolution." The anticipated cumulative savings for each recommended ESA including the Photovoltaic System and the Energy Storage System is $14,311,501 over the initial term of the Agreement.

DISCUSSION:

Introduction - Enabling Laws

The Legislature has declared its intent (in Public Resources Code § 25008) for the State to promote all feasible means of energy and water conservation and all feasible uses of alternative energy and water supply sources. To help implement that policy and extend it to local government facilities, California

Government Code § 4217.10 allows public agencies, such as the County, to develop energy conservation, and alternate energy supply sources at their facilities in accordance with § 4217.10 through and including § 4217.18. Government Code § 4217.12 expressly allows a public agency, such as the County, notwithstanding any other provision of the law, to enter into an energy services agreement on terms that its governing body determines are in the best interests of the public agency, if the determination is made at a regularly scheduled public hearing, public notice of which is given at least two weeks in advance, and if the governing body makes certain findings, discussed below.

The recommended Agreements are proposed under California Government Code § 4217.12. As required by Government Code § 4217.12, public notice of this hearing was given, at least two weeks in advance, on November 4, 2019. Specifically, the County posted notice of today's hearing in the same places as notices are given for Board meeting, as well as on the County's website under the heading "Announcements," and at the JJC Administration Buildings, where members of the public frequently visit.

Background

ISD has been researching energy conservation measures to identify possible energy savings projects.

The County currently has an agreement with Utility Cost Management, LLC (UCM), originally dated April 29, 2016, which was amended on June 15, 2017, and on April 3, 2018, pursuant to which UCM agreed to provide utility bill auditing services and utility cost reduction services to the County. As part of that Agreement UCM assisted the County in finding SPURR REAP Program, described below, as well as ForeFront Power, and the County will pay to UCM 20% of its "Future Project Savings" as a result of this project for a period of three years from the date the County begins to save on its utility bills as a result of this project. County staff anticipates that it will pay UCM $267,000 over the three-year savings period.

In December of 2017, UCM informed ISD staff of a joint powers authority, the School Project for Utility Rate Reduction (SPURR), which operates cooperative procurement programs for natural gas, electricity, renewable energy and energy storage, energy demand response, LED lights and controls, telecommunications and networking, and utilities data management and conservation.

On July 19, 2017, SPURR issued a Request for Proposal (RFP) seeking responsive proposals for solar energy and energy storage services. SPURR received eight responses to the RFP. SPURR awarded the bid to ForeFront Power, LLC, a wholly-owned subsidiary of Mitsui & Co. The entity the County is contracting with, FFP BTM SOLAR, LLC is a wholly owned subsidiary of ForeFront Power, LLC. The pricing and terms accepted by SPURR have been confirmed in the REAP Master Contract dated October 26, 2017 (the RMC). One of SPURR's programs, the Renewable Energy Aggregated Procurement (REAP), allows member agencies to piggyback on SPURR's competitively-bid RFP to procure solar energy.

Along with the proposed procurement of solar energy services through the REAP program, ISD staff contacted seven additional vendors and requested rates for a rate-check comparison. These vendors included Air Con Energy, CE Solutions, Engie Services, Noresco, Schneider-Electric, Sun Power, and Trane. Of these vendors, Engie Services was the only vendor to respond; however, its rates were still higher than ForeFront's pricing under the SPURR REAP Master Contract. As a result, Staff pursued negotiations with Forefront for a solar energy system. During negotiations with the County, ForeFront increased the SPURR rate by $0.005 per KWH, to account for ForeFront's acceptance of a non-appropriations clause that complies with the County's debt limitation - i.e., if the County Board of Supervisors does not appropriate funds for the recommended Agreement in any given fiscal year, that action is without penalty; however, staff believes that this rate is still more favorable than rates the County could obtain on the open market.

Concurrently, a comprehensive facility energy audit by UCM identified several locations as suitable candidates for solar energy projects. The JJC, located at 3333 E. American Avenue, Fresno, CA. was determined to have the most suitable space for building a solar photovoltaic system. Exhibit A shows the approximate proposed location of the System at the JJC. Although the particular space at the JJC is currently leased to the Schmall family for agricultural purposes, that lease is a month-to-month lease. Staff has discussed termination with the lessee, and they are amenable to termination of that lease, and staff intends to terminate that lease as soon as possible.

There is time-sensitivity to this item since ForeFront Power will receive up to 30% of Internal Revenue Service (IRS) tax credits if this Agreement is executed prior to the end of 2019. Savings realized from IRS tax credits are passed onto the County through a lower Power Purchase Agreement (PPA) rate.

The Interconnection Agreement

On October 26, 2017, the California Public Utility Commission changed the electric time-of-use (TOU) rate structure. The TOU defines the “peak demand” time period when energy costs are higher.

In December of 2017, through the REAP Program, ISD staff learned of an opportunity to grandfather-in the current TOU rates through 2027, increasing the value of the solar infrastructure through an Interconnection Agreement (IA) between Pacific Gas and Electric, the utility company and the County. Due to the time sensitivity, the Purchasing Manager, with ForeFront Power’s assistance, acted and submitted an application to PG&E for the IA. The IA governs the terms and conditions of the PV Generation System.

On June 25, 2018, the Purchasing Manager received from PG&E, approved and executed the IA in order to retro-actively lock in the current TOU rates before those rates changed, which occurred on January 1, 2018.

Under the IA, the interconnection customer (the County) agrees to design, install, maintain and operate its distributed generation facility so as to minimize the likelihood of causing an adverse system impact on the electric distribution system. The IA ensures the System is operating in parallel to the utility grid.

The Recommended Resolution

Under the recommended Resolution that is necessary for your Board to approve the recommended Agreements, your Board is requested to determine and find the following for each of the recommended Energy Services Agreements, under Government Code § 4217.12:

- That the anticipated costs to the County for electrical energy or conservation services provided by the solar photovoltaic system under the recommended agreement will be less than the anticipated marginal costs to the County of thermal, electrical, or other energy that would have been consumed by the County in the absence of those purchases.
    - Attachment A to the Resolution demonstrates this expected energy savings.
- That the anticipated costs to the County for electrical energy or conservation services provided by the energy storage system under the recommended agreement will be less than the anticipated marginal costs to the County of thermal, electrical, or other energy that would have been consumed by the County in the absence of those purchases.
    - Attachment A to the Resolution demonstrates this expected energy savings.

Energy Services Agreement Terms

The recommended Energy Services Agreements with ForeFront consist of the following documents:

For the solar photovoltaic system:

- Energy Services Agreement--Solar, Fresno County--Juvenile Justice Campus (which are the

"Special Conditions"); and

- General Terms and Conditions of Energy Services Agreement (which are the "General Conditions")

  (Together, the Special Conditions and the General Conditions are the recommended Energy Services Agreement for the photovoltaic system.)

For the energy storage system:

- Energy Services Agreement-Energy Storage, Fresno County--Juvenile Justice Campus (which are the "Special Conditions"); and

- General Terms and Conditions of Energy Services Agreement (the same General Conditions above, which are the "General Conditions" for this recommended Agreement as well)

  (Together, the Special Conditions and the General Conditions are the recommended Energy Services Agreement for the energy storage system.)

Energy Services Agreement--Solar

Under the recommended Energy Service Agreement - Solar, ForeFront would finance, design, construct, implement, operate, and maintain the System, from which the County receives and purchases energy from ForeFront at specified, pre-negotiated rates ("Energy Services").

Under the recommended Agreement, PG&E will continue to provide Energy Services to the site for any consumption that is not covered by the System. The recommended Energy Services Agreement-Solar defines the terms of the recommended Agreement in regard to the System.

The recommended Agreement contains a provision guaranteeing that the minimum output of the System shall be no less than 95% of the estimated annual production of the System. If the System fails to produce at least this amount of power, then ForeFront will credit the County for its lost savings, up to a certain amount.

The recommended Agreement has a possible term of twenty-five years, with one twenty-year initial term, and one five-year renewal, with the option to purchase the System after the 5th anniversary of the Commercial Operation Date. The County will make payments for Energy Services monthly, in arrears, for energy produced the prior month.

The purchase price for the System, which may be purchased after the 5th anniversary of the commercial operation date, shall be the greater of fair market value, or the price set out in the Energy Services Agreement - Solar, which purchase price decreases each year of the recommended Agreement.

Energy Services Agreement - Storage

The recommended Energy Services Agreement - Storage, describes an energy storage system (battery system) that will reduce the County's peak electrical energy demand from PG&E and charge the system during off-peak hours and dispatch stored electric energy to Purchaser during peak hours.

This recommended Agreement has an initial term of ten (10) years, which may be renewed for additional annual terms, as long as the agreement for the solar photovoltaic system, above, remains in effect. The purchase price for the storage system shall be the greater of fair market value or a pre-set amount, until the 10th anniversary of the Commercial Operation date, after which the purchase price shall be fair market value.

<u>General Terms and Conditions</u>

Both of the recommended agreements share the same General Terms and Conditions, including the following key provisions:

Construction will start no later than 270 days following the execution of the recommended Agreements, and the guaranteed commencement of operations date will be no later than 240 days following the construction start date ("Commercial Operation Date").

The recommended Agreements each contain a schedule of Early Termination Fees, if the County terminates that Agreement, upon at least 60 days' notice, before the end of the initial term, which is attached to this report as Exhibit B. However, if the County defaults, each recommended Agreement contains a provision that limits the Early Termination Fee that ForeFront may collect to the Early Termination Fee allocable to the then-fiscal year.

The recommended Agreement contains a non-standard non-appropriations clause, which provides the following:

- The County represents that it is the present intention and expectation of the County, as of the Effective Date of the Agreement, that the Board, within the limits of the County's available funds and revenues, will make an appropriation of a sufficient amount to fund the County's obligations under the Agreement during each County fiscal year of the term of the Agreement.

- The County agrees that it will use reasonable, good faith efforts to ensure that the County Administrative Officer ("CAO") will take such action as necessary to include in its annual operating budget funds sufficient to purchase the Energy Services under the Agreement.

- However, if the CAO proposes, as part of the annual budget to be presented to the Board, that the Board not appropriate funds for the Agreement, the County will give ForeFront thirty (30) days' notice of such proposal prior to the Board's annual budget hearing.

- Notwithstanding anything to the contrary in the Agreement, to the extent that the Board, in its discretion, does not budget funds for the Agreement, the County shall, within thirty (30) days' of any such non-appropriations event, give notice to Forefront of any such event.

- Following a County notice of a non-appropriations event to Forefront, ForeFront has the option to either (a) continue to operate the System and provide Energy Services to the County without payment by the County, (b) continue to operate the System and deliver the Energy Services to a third party or a local electric utility, or (c) terminate the Agreement and remove the System, in which case County will not be required to pay the Early Termination Fee. If ForeFront chooses either Option (a) or (b), the procedures above will apply to each subsequent year the System is still operating during the term of the Agreement.

The recommended Agreement contains a mutual indemnification and defense clause, as well as a limitation on liability clause, which provides:

- Except as expressly provided in the Agreement, neither Party shall be liable to the other Party or its Indemnified Persons for any punitive, exemplary, indirect, or consequential damages, losses or damages for lost revenue or lost profits, whether foreseeable or not, arising out of, or in connection with the Agreement.

- A Party's maximum liability to the other Party under the Agreement shall be limited to the aggregate

Estimated Remaining Payments as of the date of the events giving rise to such liability, provided, the limits of liability shall not apply with respect to (i) indemnity obligations hereunder in respect of personal injury, property loss or damage, or environmental claims, (ii) any obligation of Purchaser to pay Energy Service Payments, the Early Termination Fee or the Option Price, and (iii) any obligation of ForeFront Power to pay for Lost Savings in accordance with the Special Conditions, if applicable.

The recommended Agreement also contains a limitation on publicity. It requires that the parties coordinate and cooperate with each other when making public announcements related to the System prior to its Commercial Operation date. It also requires that no publicity releases shall be made by either party without the prior written consent of the other party. But the recommended Agreement provides that it shall be subject to public disclosure under the Brown Act and the Public Records Act, and all other applicable laws pertaining to disclosure by public entities.

Other documents and instruments:

Recommended action #5, above, requests your Board to authorize the Director of Internal Services/ISD to approve and execute any further documents, instruments, estoppel and acknowledgement certificates, memoranda of agreements, as stated above.

During contract negotiations, ForeFront informed the County's team that ForeFront's financing party may need to require the County, under each recommended Agreement, to provide estoppel and acknowledgement certificates to ForeFront's financing party, and memoranda of agreements (i.e., providing public notice of ForeFront's license to operate at the JJC) to be recorded against the premises for the project. ForeFront has not yet received a commitment from a financing party for the recommended Agreements, due to the length of time remaining until the project Commercial Operation date. Although the County's team has negotiated the terms of a form of each of those documents with ForeFront's team, the documents are subject to change and possible further negotiation.

Federal Income Tax Issues - JJC Land

The County purchased about 221 acres of land and 3 houses in 2003 for the Juvenile Justice Campus (JJC) site mostly with 2002 tobacco bond funds. The County has been leasing portions of the JJC site to the Schmall family, a prior owner of some of that site, to farm and reside on the land, as it has not been needed for County purposes. The proposed license would be for 27 acres of a forty (40) acre lease to the Schmalls. The 2002 tobacco bonds are tax-exempt. Therefore, the bonds are governed by federal income tax laws, which strictly limit the amount of "private business use" of the projects they finance. Typically, "private business uses" occur when the County grants a special legal entitlement to non-governmental entities to lease, own, or, in some cases, manage bond-financed properties.

During the life of the 2002 tobacco bonds, the County is limited to using 2002 tobacco bond funds for only up to 5% of the bond's proceeds for "private business uses" that are unrelated or "disproportionate" to the County's operations at the JJC site (*i.e.*, 5% of the $90,985,756 issue price of these bonds is $4,549,288). For "private business uses" that are related to County operations at the JJC site, that limitation is 10%. The County has used up an estimated 2.5% of the "private business use" of the 2002 tobacco bonds for leases of the subject County properties and other uses. By entering into the proposed Agreements, the County would continue the "private business use" of the 2002 tobacco bond proceeds which is somewhat reduced from the current estimated amount, since the acreage of the proposed license is a portion of the currently-leased land.

"Private business uses" are measured cumulatively, on a case-by-case basis, for each prior, current, and future "private business use" of bond-financed properties at the JJC site. Those cumulative uses count against the single "private business use" limitation for each affected bond issuance during the life of those bonds (*i.e.*, 10% or reduced to 5%, as stated above). If the County needs to privatize any part of the County's current or future operations at the JJC site, private use of the JJC site could impede the County's ability to do that. Generally, if the County violates the "private business use" limitation, the County would be liable to the IRS for the amount of the federal income tax that bondholders would be required to include in their income tax liability.

Schedule - Next Steps

The recommended agreements provide that construction will start no later than 270 days following the execution of the recommended Agreement, and the guaranteed Commercial Operation Date will be no later than 240 days following the construction start date. Therefore, assuming that your Board approves the recommended Agreements on November 19, 2019:

- Construction Start Date: August 1, 2020; and
- Commercial Operation Date: March 29, 2021.

CEQA

Staff from the Department of Public Works & Planning have evaluated the projects (i.e., the projects for the two Agreements) in compliance with the California Environmental Quality Act (CEQA), Sections 21000 et seq. guidelines, and have issued a categorical exemption of such projects based on those guidelines. If your Board approves the recommended Agreements, a notice of exemption will be filed by staff with the County Clerk upon approval of the Agreements that your Board may approve.

ATTACHMENTS INCLUDED AND/OR ON FILE:

Exhibit A - Location of the System
Exhibit B - Early Termination Fees

On file with Clerk
ESA - Solar
ESA - Storage
General Terms and Conditions of Energy Services Agreement
PG&E Rule 21 Interconnection Agreement
Resolution

CAO ANALYST:

Yussel Zalapa

Exhibit A – Location of the System

Exhibit B – Early Termination Fees

Photovoltaic Solar System

Early Termination Occurs in Year:	Column 1a Early Termination Fee where Purchaser does not take Title to the System ($/Wdc including costs of removal)	Column 1b Expected Termination Fee based on System Size**
1*	$2.82	$10,123,489
2	$2.36	$8,444,860
3	$2.22	$7,968,972
4	$2.09	$7,492,102
5	$1.96	$7,015,291
6	$1.82	$6,536,357
7	$1.80	$6,469,805
8	$1.79	$6,402,008
9	$1.77	$6,333,931
10	$1.75	$6,263,487
11	$1.73	$6,191,553
12	$1.71	$6,118,033
13	$1.69	$6,043,803
14	$1.66	$5,966,876
15	$1.64	$5,888,040
16	$1.62	$5,807,171
17	$1.60	$5,725,041
18	$1.57	$5,639,766
19	$1.55	$5,552,031
20	$1.52	$5,461,672

Purchase Date Occurs on the 91st day following: (Each "Anniversary" below shall refer to the anniversary of the Commercial Operation Date)	Column 2a Early Termination Fee where Purchaser takes Title to the System ($/Wdc, does not include costs of removal)	Column 2b Expected Termination Fee based on System Size**
5th Anniversary	$1.32	$4,743,517
6th Anniversary	$1.30	$4,676,965
7th Anniversary	$1.29	$4,609,168
8th Anniversary	$1.27	$4,541,091
9th Anniversary	$1.25	$4,470,647
10th Anniversary	$1.23	$4,398,713
11th Anniversary	$1.21	$4,325,193
12th Anniversary	$1.19	$4,250,963
13th Anniversary	$1.16	$4,174,036
14th Anniversary	$1.14	$4,095,200
15th Anniversary	$1.12	$4,014,331
16th Anniversary	$1.10	$3,932,201
17th Anniversary	$1.07	$3,846,926
18th Anniversary	$1.05	$3,759,191
19th Anniversary	$1.02	$3,668,832

At Expiration (the end of the Initial Term), the amount in Column 1 shall be deemed to be zero (0).
*Includes Early Termination prior to the Commercial Operation Date.
**Based on System Size as of the Effective Date. System Size (and therefore Columns 1b and 2b will change upon System Size change).

Exhibit B – Early Termination Fees

Energy Storage System

Early Termination Occurs in Year:	**Column 1a** **Early Termination Fee where Purchaser does not take Title to the System ($/Wac including costs of removal)**	**Column 1b** **Expected Termination Fee based on System Size****
1*	$1.75	$3,500,000
2	$1.24	$2,480,000
3	$1.09	$2,180,000
4	$0.93	$1,860,000
5	$0.75	$1,500,000
6	$0.57	$1,140,000
7	$0.46	$920,000
8	$0.45	$900,000
9	$0.44	$880,000
10	-	-

Purchase Date Occurs on the 1st day following: **(Each "Anniversary" below shall refer to the anniversary of the Commercial Operation Date)**	**Column 2a** **Early Termination Fee where Purchaser takes Title to the System** **($/Wac, does not include costs of removal)**	**Column 2b** **Expected Termination Fee based on System Size****
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5th Anniversary	$1.25	$2,500,000
6th Anniversary	$1.07	$2,140,000
7th Anniversary	$0.96	$1,920,000
8th Anniversary	$0.95	$1,900,000
9th Anniversary	$0.94	$1,880,000
Thereafter	Fair Market Value	Fair Market Value

At Expiration (the end of the Initial Term), the amount in Column 1 shall be deemed to be zero (0).
*Includes Early Termination prior to the Commercial Operation Date.
**Based on System Size as of the Effective Date. System Size (and therefore Columns 1b and 2b will change upon System Size change).