



County of Fresno

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Legislation Text

File #: 19-0948, **Version:** 1

DATE: August 20, 2019

TO: Board of Supervisors

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

SUBJECT: Agreements with Little Bear Solar Nos. 1, 3, 4, and 5 for Approved Photovoltaic Facility

RECOMMENDED ACTION(S):

- 1. Approve and authorize the Chairman to execute a Reclamation Agreement with Little Bear 1, LLC, the project applicant, to implement a condition of approval of Unclassified Conditional Use Permit (UCUP) No. 3550 for a portion of the solar photovoltaic electricity generating facility (Solar Facility) near the city of Mendota, effective August 20, 2019 (\$1,216,380).**
- 2. Approve and authorize the Chairman to execute a Reclamation Agreement with Little Bear 3, LLC, the project applicant, to implement a condition of approval of Unclassified CUP No. 3551 for a portion of the solar photovoltaic electricity generating facility (Solar Facility) near the city of Mendota, effective August 20, 2019 to August 19, 2049 (\$608,190).**
- 3. Approve and authorize the Chairman to execute a Reclamation Agreement with Little Bear 4, LLC, the project applicant, to implement a condition of approval of UCUP No. 3552 for a portion of the solar photovoltaic electricity generating facility (Solar Facility) near the city of Mendota, effective August 20, 2019 to August 19, 2049 (\$1,520,475).**
- 4. Approve and authorize the Chairman to execute two Reclamation Agreements with Little Bear 5, LLC, the project applicant, to implement a condition of approval of UCUP Nos. 3553 and 3577 for a portion of the solar photovoltaic electricity generating facility (Solar Facility) near the city of Mendota, effective August 20, 2019 to August 19, 2049 (\$1,520,475).**
- 5. Approve and authorize the Chairman to execute a Road Repair Agreement with Little Bear 1, LLC; Little Bear 3, LLC; Little Bear 4, LLC; and Little Bear 5, LLC, effective August 20, 2019 to August 19, 2049 (\$100,000).**
- 6. Approve and authorize the Chairman to execute an Owner Reimbursement Agreement with Little Bear 1, LLC; Little Bear 3, LLC; Little Bear 4, LLC; and Little Bear 5, LLC to implement conditions of approval of UCUP Nos. 3550, 3551, 3552, 3553, and 3577, effective August 20, 2019 until the Director of the Department of Public Works and Planning issues written acknowledgement the Owner has satisfied its obligations under the agreement (\$166,550).**
- 7. Make a finding that it is in the best interest of the County to waive the competitive bidding process consistent with Administrative Policy No. 34 for unusual or extraordinary circumstances for the solicitation of monitoring of and reporting on compliance with the Mitigation Monitoring and Reporting Programs associated with the County's approval of UCUP**

Nos. 3550, 3551, 3552, 3553, and 3577.

- 8. Approve and authorize the Chairman to execute a sole source Third Party Administrator Agreement with Rincon Consultants, Inc. to monitor and report on Applicants' compliance with the Mitigation Monitoring and Reporting Programs associated with the County's approval of UCUP Nos. 3550, 3551, 3552, 3553, and 3577, effective September 24, 2019 until the consultant has satisfied its obligations under the agreement (\$166,550).**
- 9. Approve and authorize the Chairman to execute an Indemnification Agreement with Little Bear 1, LLC; Little Bear 3, LLC; Little Bear 4, LLC; and Little Bear 5, LLC, effective on the date the agreement is signed by the parties.**
- 10. Authorize the Director of the Department of Public Works and Planning to accept deposits of funds required by Recommended Action Nos. 1-6. And return any funds that are correctly requested as specified in the individual agreements.**
- 11. Accept Grants of five Limited Access Easements from Little Bear 1, LLC; Little Bear 3, LLC; Little Bear 4, LLC; and Little Bear 5, LLC, the respective owners of the properties upon which the Solar Facility is to be situated.**

The Board approved the Little Bear Solar Project 4 to 0 (one seat vacant) on February 26, 2019 (BAI #11). Your Board's approval of the Recommended Actions would implement conditions of approval placed on Unclassified Conditional Use Permit (UCUP) Nos. 3550, 3551, 3552, 3553, and 3577, and thereby enable the County to issue a building permit for the Solar Facility to start construction. The Recommended Actions contractually require the Applicant to pay for costs associated with: reclamation of the solar facility, monitoring by the Third Party Administrator, and actual County costs in reviewing submissions made by the Third Party Administrator.

The Board's approval of Recommended Actions, taken together, would (1) authorize the County to enter into four Reclamation Agreements with the respective Applicants; (2) authorize the Department to accept a combined deposit of \$2,560,800 as security for the Reclamation Agreements; (3) authorize the deposit of annual cash deposits equal to 3% of the initial cash deposit of security or current Consumer Price Index (CPI) as required by each Reclamation Agreement; (4) authorize the County to enter into a Road Repair Agreement with the Applicants, which is a condition of approval for the project; (5) authorize the County to enter into an Owner Reimbursement Agreement with the Applicants, which is a condition of approval of the project; (6) approve a suspension of competition; (7) authorize the Chairman to execute a Third Party Administrator Agreement with Rincon Consultants, Inc. to monitor and report on Applicants' compliance with the Mitigation Monitoring and Reporting Programs associated with approval of this Solar Facility; (8) authorize the County to enter into an Indemnification Agreement with the Applicants, which is a condition of approval of the project; (9) authorize the Director of the Department of Public Works and Planning (Director) to accept deposits of the required funds; and (10) authorize the County to accept a grant of limited access easements from the owners of the properties upon which the Solar Facility are to be situated; when UCUP Nos. 3550, 3551, 3552, 3553, and 3577 expire or the Solar Facilities are abandoned, the easements would give the County the legal right needed to access the project facilities to carry out the reclamation of the properties to their current use, should the Applicants fail to complete the reclamation of the property, and the County elects to undertake such reclamation.

ALTERNATIVE ACTION(S):

No viable options have been identified.

SUSPENSION OF COMPETITION/SOLE SOURCE CONTRACT:

Approve waiver of County Administrative Policy No. 34 (Competitive Bids and Requests for Proposals) and authorize Chairman to sign a Third Party Mitigation Monitoring Agreement for the Little Bear Solar Project and authorizing Little Bear Solar, LLC to select and retain an Administrator for the purpose of implementing and administering the Mitigation Monitoring and/or Reporting Program and Condition Compliance Matrix for the project. The process of allowing the Applicants to select a consultant from the County's Environmental Consultant List was approved by the Board on February 24, 2015 (BAI #24). The Agreement is associated with UCUP Nos. 3550, 3551, 3552, 3553, and 3577 approved to construct, operate, maintain, and decommission photovoltaic electricity generating facilities and associated infrastructure which would generate a total of up to approximately 180-megawatts.

Approval of the recommended actions will implement Conditions of Approval and allow for the retention of an Administrator to oversee the implementation of Mitigation Measures that must be satisfied during operations associated with UCUP Nos. 3550, 3551, 3552, 3553, and 3577 and Environmental Impact Report (EIR) No. 7225 approved and certified by the Board of Supervisors on February 26, 2019 for biological environmental monitoring for the approved Little Bear Photovoltaic Solar Project.

Department staff do not possess the specific expertise and staffing to successfully complete biological monitoring as part of project site development. Risks of take, harm, or molestation of sensitive or listed species or habitat could put the project developer at risk and raise liability concerns for the County. Rincon Consultants, Inc. has trained staff with the necessary expertise to monitor the project.

Rincon Consultants, Inc. will provide supportive environmental services to Department staff to augment mitigation monitoring of the approved projects with specific expertise in the area of biological and paleontological monitoring. They are in good standing on the County's Environmental Consultant List.

FISCAL IMPACT:

There is no Net County Cost associated with the recommended actions. The recommended Reclamation Agreements require the Applicants to reimburse the County for costs associated with reclamation of the project sites through cash security on deposit with the County. Specifically, Recommended Action Item Nos. 1 through 4 will be reimbursed through respective cash deposits for each individual Reclamation Agreement. Recommended Action Item No. 8 (Third Party Administrator Agreement) will be reimbursed through a cash deposit associated with Recommended Action Item No. 6 (Owner Reimbursement Agreement).

The Applicants will be required to deposit an initial base fee of \$2,560,800 combined for the Reclamation Agreements, which will be deposited with the County in a non-interest bearing status. This base fee will be required to increase by annual scheduled amounts (3% of the base fee or the current CPI). If the Applicants operate the Solar Facilities for the approved period of 30 years, as stated below (and without any default under the Reclamation Agreements), the required amount of the cash security could be as much as \$4,865,520. The Board of Supervisors approved the amount, and escalation rate, as part of its conditional approval related to the Solar Facilities on February 26, 2019 (BAI #11). At the end of the 30-year project life, if the remaining project materials are removed and the sites are generally returned to pre-project conditions as determined by the Department, the deposit will be returned to the entity that assumed financial responsibility for the sites.

Recommended Action No. 5 relates to the Road Repair Agreement and provides mechanisms for the County to receive \$100,000 from the Applicants for the estimated cost of repairing any damage to County roads and the provision of County inspection services. This money will be received and placed on deposit in the Road Fund.

Recommended Action No. 6 relates to the Owner Reimbursement Agreement and provides mechanisms for

the County to receive deposits from the Applicants to fund the \$83,275 for the Third Party Monitoring Agreement, plus an additional \$28,800 to be held by the County as a reserve for any additional third party monitoring services not covered by the initial deposit and as deemed necessary by the County to complete mitigation monitoring work. The Owner Reimbursement Agreement also provides for \$50,000 related to estimated costs to fund staff time in reviewing the consultant's work.

The Third Party Monitoring Agreement, which is addressed in Recommended Action Nos. 7 and 8, will be funded through the aforementioned Owner Reimbursement Agreement and will provide for reimbursement to Rincon Consultants, Inc. to provide necessary mitigation monitoring through the completion of project construction.

The security and owners reimbursement amounts, which relate to Recommended Action Item Nos. 1 through 4 and Recommended Action Item No. 8, will be deposited into a special revenue fund. Further, for Recommended Action Item No. 8, cash will be transferred to offset expenditures as they are incurred. The security received for the Road Repair Agreement will be deposited in the Road Fund, Org 4510 Account 4895 Fund 0010. The total funds to be received and placed on deposit for each Reclamation Agreement will be monitored independently of each other, as specified in the respective agreements.

DISCUSSION:

On February 26, 2019, the Board of Supervisors approved UCUP Nos. 3550, 3551, 3552, 3553, and 3577 and certified EIR No. 7225 (State Clearinghouse No. 2016011008) to construct, operate, maintain, and ultimately decommission five photovoltaic electricity generating facilities (each a Solar Facility) and their associated infrastructure. The combined projects could generate up to a total of 180 megawatts (MW) of electricity with 20 MW of storage on approximately 1,288 acres in western unincorporated Fresno County, near the city of Mendota.

The Applicants have informed Department staff that Little Bear 5, LLC will be developing the sites known as Little Bear 5 and Little Bear 6 (UCUP Nos. 3553 and 3577, respectively). The agreements listed under Recommended Actions relate to the entirety of the project, which will develop all five UCUPs concurrently over a 12-14 month period.

The Board of Supervisors placed conditions on its approval of UCUP Nos. 3550, 3551, 3552, 3553, and 3577. Condition of Approval No. 13 requires the project owner to adhere to the Reclamation Plan submitted to the County and approved by the Board of Supervisors. This condition also requires the Applicants to provide financial assurances and easements to ensure restoration of the property on which the project is situated to agricultural uses when the UCUPs expire or the Project is abandoned.

The condition, as approved, reads as follows:

“The Applicant shall enter into a Reclamation Agreement and shall have the property owner execute a limited easement for the County’s benefit.”

Condition of Approval No. 7 also relates to the Reclamation Plan. It reads as follows:

“The Reclamation Plan shall be revised to provide for an annual increase in costs at 3% or tied to the Consumer Price Index (CPI), or other mechanism acceptable to the Fresno County Department of Public Works and Planning.”

Language as provided in the Reclamation Agreement and signed by the Applicant clarifies that annual increase in costs will be limited to 3% or tied to the CPI.

The Board of Supervisors also placed a condition of project approval, which requires that the Applicants defend and indemnify the County against any legal challenge filed against the County related to the projects. Entering into the Indemnification Agreement recommended for approval by this item will satisfy the indemnification condition of approval.

Recommend Action Nos. 1, 2, 3, 4, and 10

The primary purposes of a reclamation agreement are: to give the County and the Applicants an agreed-upon process and terms for the Applicants to complete the reclamation of the affected properties under the Reclamation Plan; for the Applicants to establish and maintain financial assurances to the County for the performance of the Applicants' obligations; and for the County to draw upon the financial security if the Applicants do not perform their obligations. The agreements authorize the Director to make determinations regarding site reclamation and to take any action on behalf of the County required by the reclamation agreements.

The Board's approval of Recommended Action Nos. 1, 2, 3, and 4 would authorize the approval and execution of the recommended Reclamation Agreements, which would require the Applicants to comply with the Reclamation Plan for UCUP Nos. 3550, 3551, 3552, 3553, and 3577, and to secure this obligation by depositing \$2,560,800 with the County. Recommended Action No. 10 would authorize the Director to accept a deposit of this amount on behalf of the County.

The recommended Reclamation Agreements also require that the Applicants supplement the amount of cash security by making annual cash deposits equal to 3% of the initial cash deposit of security. Alternatively, the Applicants may provide its annual increase based on the current CPI. Recommended Action No. 10 would authorize the Director to accept such annual deposits on behalf of the County.

Recommended Actions Nos. 5 and 10

Mitigation Measure No. 3.18-1a, in part, requires the Applicants to enter into a secured agreement with the County to "ensure that any county roads that are demonstrably damaged by project-related activities are promptly repaired, and if necessary, paved, slurry-sealed, or reconstructed as per requirements of the state and/or Fresno County". These obligations would be secured by a deposit with the County of \$100,000, which the County could use to make the repairs if the Applicants fail to complete them. The Applicants would be required to deposit additional money with the County should the funds set forth above be insufficient. Any funds deposited by not used by the County to repair or replace the roads would be refunded by the County to the Applicants.

Recommended Actions Nos. 6 and 10

Condition of Approval No. 9 requires the Applicants to enter into an agreement with the County to provide funding to compensate for County staff's time in reviewing and administering any materials related to Mitigation Monitoring and/or Reporting, including those prepared by the third party administrator.

The recommended Owner Reimbursement Agreement would require the Applicants to advance (1) a total of \$83,275 with the County to pay for the fees, costs, and expenses incurred by the County retaining a third party administrator to monitor the execution of the Conditions of Approval and Mitigation Measures listed in the Monitoring Plan; (2) a total of \$20,800 with the County to be held by the County as a reserve to fund any additional Third Party Administrator services determined by the Director to be appropriate; and (3) \$50,000 to provide funding to the County to compensate Department staff to review and administer any materials related to the Monitoring Plan. The Applicants would be required to deposit additional money with the County should the funds set forth above be insufficient. Any funds deposited but not used by the County to administer the

Mitigation Monitoring and Reporting Program would be refunded by the County to the Applicants.

Recommended Actions Nos. 7 and 8

The EIR prepared for UCUP Nos. 3550, 3551, 3552, 3553, and 3577 was certified and approved by the Board of Supervisors on February 26, 2019, to construct, operation, maintain, and ultimately decommission photovoltaic electricity generating facilities and associated infrastructure to generate a total of 180 MW with 20 MW of storage on approximately 1,288 acres near the city of Mendota. Due to the volume of Mitigation Measures and Conditions of Approval, Department staff identified the need for a third party to monitor the Applicants' compliance with the Project's Mitigation Measures and Conditions of Approval as provided in the Monitoring Program.

Condition of Approval No. 9 for UCUP Nos. 3550, 3551, 3552, 3553, and 3577 requires the Applicants' consultant to enter into an agreement with the County to implement and fund a third party administrator for services related to the implementation of the project's mitigation measures and conditions of approval. Department staff will review the work of the Administrator. This action will more effectively ensure compliance with the certified EIR. As adopted by the Board of Supervisors, the condition reads:

"The County of Fresno shall enter into an agreement with a Consultant to act as a Third Party Monitor and implement the Mitigation Monitoring and/or Reporting Program and Conditions Compliance Matrix in accordance with Section 21081.6 of the California Public Resources Code and Section 15097 of Title 14, Chapter 3 of the California Code of Regulations. This agreement shall cover monitoring the Project's Mitigation Measures and Conditions of Approval as provided in the Mitigation Monitoring and/or Reporting Program and Conditions Compliance Matrix, and the Applicant shall pay all costs associated with the Consultant costs and Mitigation Monitoring."

County Administrative Policy No. 34 provides exception to the requirement that competitive bids or request for proposals shall be secured for all contracts for goods or services acquired by the County. Included in the exceptions is the situation when in unusual or extraordinary circumstances, the Board of Supervisors finds that the best interest of the County would be served by not securing competitive bids or issue a request for proposal. The Suspension of Competition Acquisition Request form has been reviewed and approved by Purchasing.

The recommended agreement is for UCUP Nos. 3550, 3551, 3552, 3553, and 3577 and the Applicants will be responsible for the entirety of the project.

Recommended Action No. 9

Condition of Approval No. 12 for UCUP Nos. 3550, 3551, 3552, 3553, and 3577 requires the Applicants to enter into an agreement indemnifying the County for legal costs associated with its approval of the UCUPs. Approval of Recommended Action 9 would authorize the Chairman to execute an Indemnification Agreement, which follows the standard form used by the County for such agreements and would satisfy Condition of Approval No. 12.

Recommended Action No. 11

The Board's approval of Recommended Action No. 11 would accept the Grants of Limited Access Easements from the owners of the real property on which the Solar Facilities are being constructed and operated. The Easements will allow the County, including its contractors and representatives, a nonexclusive access easement over, under, on, and across the property for the purpose of carrying out the reclamation of the property in substantial conformity with the Reclamation Plans, should the Applicants fail to complete reclamation of the property to its current use, and the County elects to undertake such reclamation.

REFERENCE MATERIAL:

BAI #11 - February 26, 2019

ATTACHMENTS INCLUDED AND/OR ON FILE:

Location Map

Suspension of Competition Acquisition Request

On file with Clerk - Reclamation Agreement with Little Bear Solar 1, LLC

On file with Clerk - Reclamation Agreement with Little Bear Solar 3, LLC

On file with Clerk - Reclamation Agreement with Little Bear Solar 4, LLC

On file with Clerk - Reclamation Agreement with Little Bear Solar 5, LLC

On file with Clerk - Road Repair Agreement with Little Bear Solar 1, 3, 4, and 5, LLCs,

On file with Clerk - TPA Agreement with Rincon Consultants, Inc.

On file with Clerk - Owners Reimbursement with Little Bear Solar 1, 3, 4, and 5, LLCs

On file with Clerk - Indemnification Agreement with Little Bear Solar 1, 3, 4, and 5, LLCs

On file with Clerk - Grant of Limited Access Easement

CAO ANALYST:

Sonia M. De La Rosa