Attachment F - Summary Provisions of SB 863 Agreements

SB 863 Legislation and Legal Considerations of Subject Agreements

The legislation, through the subject agreements, includes the followings features and requirements highlighted below:

- The state finances project by sale of lease-revenue bonds, typically sold at about 90% construction complete, but determined by SPWB and California State Treasurer
- The state enters into financing with the State Pooled Moneys Investment Board in the interim
- The County cash match is 10%
- Construction, design and other consulting costs are billable against the $80 million
- County staff costs count toward the 10% cash match requirement
- After schematic design County and state enter into a ground lease and right-of-entry
- Near time of sale of bonds, County and state enter into a site and facility lease, and lease-back
- State makes first reimbursement to County after payment of first construction invoice
- County must complete construction within 3 years of construction start
- State allows 30 to 60 days for processing pay requests
- When state has paid out 95% of grant, it retains 5% until confirmation of safe operation

Project Delivery and Construction Agreement

The Project Delivery and Construction Agreement (PDCA) is the primary document "committing" the County to the terms of SB 863 in return for the $80 million grant award. The agreement provides framework; covenants; project scope, cost and schedule; and obligations of County and state which facilitate state's sale of bonds to finance the project. Important highlights of the PDCA include the following:

- Project is subject to approval and oversight by state
- County indemnifies and holds harmless the state for claims and losses out of breach by County
- State can terminate if it determines bond financing is not feasible or otherwise inappropriate
- County can terminate if construction bid results prevent County's ability to proceed
- Any savings in Project Budget go first to County if County has paid more than 10%, and beyond that, are shared between parties on a pro rata basis, but county never pays less than 10%

It should be noted that if the state were to withhold sale of bonds until 90% construction complete, the state, using its interim financing, would have given the County roughly $70 million by that point, and the County would have spent roughly $7 million (90% of $7.87 million). Should the state exercise its right to abandon the bond sale at that point, or even beyond, it is obligated to repay what it has borrowed and all associated costs; not the County; in accordance with terms of the PDCA. In that event, there is no site or facility lease between the parties and the facility ownership remains with the County, in accordance with the terms of the PDCA, and the state is not obligated to make any further payments to the County. If the project is not yet complete, the County could either finance its completion or abandon the project.

If, having advertised for construction bids, the County receives bids that are higher than the project can afford and terminates the PDCA under its provisions, County and state can mutually terminate the agreement within thirty days of notice. No party makes any payments to the other. The County at that point would have spent roughly $9 million on the project, most of which would otherwise have been reimbursable by the state.

Exhibit A – Project Scope, Cost and Schedule: This exhibit to the PDCA defines the scope, cost and schedule of the project.

Exhibit B – Ground Lease: The County will enter into a lease agreement with the state giving state possession of the real property upon which the facility is to be built, plus a reasonable buffer zone beyond it for access roads and security fencing. This real property is hereinafter referred to as the "facility footprint." County leases Site to DCR. State Public Works Board can re-let the Jail if default occurs under Facility Lease. County also promises DCR "quiet enjoyment" of site and "improvements" (the new Jail facility). Terminates on same date as Facility Lease, but not before all State indebtedness for Project repaid. County has limited right to terminate Ground Lease by properly terminating PDCA. (Executed concurrently with Right of Entry for Construction.) The ground lease is entered into after completion of schematic design, when the facility footprint is defined, and after other state certifications are completed. The lease terminates when the bonds are paid. Damages for default are limited to specific performance or money damages, but the lease cannot be terminated as long as bonds are outstanding, even in the event of default. The form of the lease is attached.

Exhibit C – Right of Entry for Construction and Operation: This is between CDCR and the County, and authorizes the County and our contractors to use the site that has been leased to the state. It further provides for the County to operate the facility if it is completed prior to the sale of bonds. It requires County to indemnify and hold harmless the state for any claims and loses arising out of the facility construction. It is entered into concurrently with the ground lease and terminates when bonds are paid.

Exhibit D – Facility Sublease: This is between CDCR and County, and subleases back to County the facility for its use, operation and maintenance. It is enter into when the state enters in the sale of the bonds, and terminates when the bonds are paid, but not longer than 35 years. The Sublease agreement requires County to maintain the facility, pay for utilities and taxes, pay commercial general liability insurance or acceptable self-insurance program, and promise it will not abandon the facility. It requires CDCR to pay rent, and insurance policies (see next paragraph).

Facility Lease – This is an additional form agreement listed in the SB 863 RFP compared to SB 1022. It does not appear to be incorporated into the PDCA at this time. According to the RFP it is an agreement agreement between the BSCC and the CDCR and participating county with the consent of the SPWB. The agreement relates to the same property referred to in Exhibit D above.

The state agency CDCR enters into a Site Lease and Facility Lease with the state agency SPWB at the time of bond issuance. These leases expire when bonds are paid. They transfer control and possession of the facility between CDCR to SPWB for purposes of allowing SPWB to issue the bonds. They require CDCR to maintain property casualty insurance and rental interruption insurance. The Facility Lease in no event lives longer than 35 years.

The timing of the bond issuance is determined by SPWB in consultation with California State Treasurer, and is largely driven by state's federal tax law considerations.

BSCC Construction Agreement

The Construction Agreement with the Board of State and Community Corrections (BSCC), referred to as the JCA, is the second of the two main agreements, and sets forth roles, responsibilities and performance expectations of the parties for construction of the facility. Important highlights of the PDCA include the following:

- County agrees to staff, maintain and operate the facility
- County agrees to be responsible for any cost overruns