

# Memorandum



**Date:** October 10, 2014

**To:** Chair Lavagnino and Board of Supervisors

**From:** Mona Miyasato, County Executive Officer  
Matt Pontes, General Services Director  
Scott McGolpin, Public Works Director

**Subject:** Northern Branch Jail – Pilot Project Stabilization Agreement (Item #5 on 10/14/14 Agenda)

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On October 7, your Board took the following actions:

- A. Received report on status of negotiations for the development of a Pilot Project Stabilization Agreement (“PSA”) for the AB 900 component of the Northern Branch Jail Project (“Project”).
- B. Received evidence that a PSA furthers the legitimate governmental interest consistent with competitive bidding.
- C. Provided conceptual approval of the PSA, as drafted and presented.
- D. Found that the proposed action does not constitute a “Project” within the meaning of the California Environmental Quality Act (CEQA), pursuant to 14 CCR 15378(b)(5), in that it is a government administrative activity that will not result in direct or indirect physical changes in the environment.
- E. Continued the item to October 14 for final action, with direction that staff provide options to adopt a PSA if signed by either: 100% of all trades and crafts; or less than 100% of all trades and crafts.

On October 14, staff recommends your Board take the following actions:

- A. Receive report on status of signatures to draft PSA document;
- B. If 100% of the signatures are obtained , and your Board wishes to pursue a Pilot PSA for the Northern Branch Jail Project, AB 900 Phase II, then
  - 1) Make findings (Attachment A) that a Pilot PSA furthers a legitimate governmental interest consistent with competitive bidding law by preventing costly Project delays, assuring contractors access to skilled labor, and avoiding the potential for labor strife during the life of the project; if finding made, then
  - 2) Approve a revision to the draft PSA (Article 20) that allowed for resignatures of the affiliates after the October 1 deadline (Attachment C);

3) Approve and authorize the Chair to sign the Pilot Project Stabilization Agreement for the Northern Branch Jail AB 900 Phase II Project; OR

C. Alternatively, if less than 100% of the signatures are obtained, and your Board wishes to pursue a Pilot PSA for the Northern Branch Jail AB 900 Phase II Project, then

- 1) Make findings (Attachment B) that a Pilot PSA furthers a legitimate governmental interest consistent with competitive bidding law by preventing costly Project delays, assuring contractors access to skilled labor, and reducing the potential for labor strife during the life of the project; if finding made, then
- 2) Approve a revision to the draft PSA (Article 20) that allowed for resignatures of the affiliates after the October 1 deadline (Attachment C);
- 3) Approve and authorize the Chair to sign the Pilot Project Stabilization Agreement for the Northern Branch Jail AB 900 Phase II Project; OR

If your Board wishes not to move forward with a Pilot PSA at this time for the Northern Branch Jail AB 900 Phase II Project, then

D. Direct staff to move forward utilizing the Board's previously approved Joint Labor Compliance Program in lieu of the Pilot PSA; OR

E. Direct staff to move forward utilizing the Board's previously approved Joint Labor Compliance Program in lieu of the Pilot PSA and begin work to present the Board with a draft Pilot PSA for the SB1022 component of the Northern Branch Jail Project, or other future project.

F. Find that the proposed action does not constitute a "Project" within the meaning of the California Environmental Quality Act (CEQA), pursuant to 14 CCR 15378(b)(5), in that it is a government administrative activity that will not result in direct or indirect physical changes in the environment.

**The CEO and staff recommend that if not all signatures are obtained, given the uncertainty on how the agreement would be implemented, your Board not pursue a PSA at this time, and instead direct staff to take October 14, 2014 actions D or E, and F above.**

### **Summary**

In July 2014, the Board directed staff to pursue a Pilot Project Stabilization Agreement by negotiating with the TCBT, who warranted that the trades and affiliates included on the signature pages to the PSA have jurisdiction in Santa Barbara County, are eligible to refer labor to the Project, and are affiliated with or represented by TCBT.

After three months and 11 meetings with TCBT and its affiliated trades, as well as meetings with local stakeholders, an agreement was approved by TCBT and all but one of its affiliated trade unions eligible to refer labor to the Project (Operating Engineers, or "OEs"). The deadline was October 1, 2014. At the Board meeting of October 7, TCBT was given until October 13 at noon to deliver all signatures.

### **Update Since October 7, 2014 Board Meeting**

Since the Board meeting of October 7, staff has taken the following actions:

- 1) Article 20.2 of the draft PSA was changed to amend the effective provision of the agreement to delete the October 1<sup>st</sup> deadline and to provide that the agreement is effective when signed by the Chair of the Board. Staff recirculated this change and a revised signature page to TCBT for its distribution to its affiliated trades who are eligible to refer labor to the Project. This change is included as Attachment C. Your Board gave TCBT until noon on Monday, October 13, 2014 to obtain all signatures.
- 2) In the event that 100% of the signatures could not be obtained, staff further discussed the feasibility of implementing an incomplete PSA with the County's Construction Manager, Kitchell Associates.

### **Difficulty of Implementation of PSAs with less than 100% trades' participation**

On October 7, staff indicated the Board *could* adopt a PSA that did not have 100% of the signatures warranted by TCBT. Staff conferred with Kitchell, which has successfully administered hundreds of public projects governed by PSAs throughout the state and country. They report that of these, all have required 100% participation by the affiliated trade unions.

It is currently unclear how an agreement with less than 100% signatures, and omitting the Operating Engineers, would be implemented and managed during construction. Kitchell reports, given the OEs work applies to multiple trades scopes throughout construction, there is potential for jurisdictional disputes and conflicts on the jobsite if not all trades are bound by the same agreement.

As a practical matter, questions and concerns have been identified by staff and Kitchell that would require time and further discussion and negotiation with TCBT and its affiliated trades to resolve. For example, if the OEs are not signatory, what is the impact on non-union contractors? If non-union contractors are multi-trade contractors, which is common, how would this work and would they be bound by the contract for all trades but not for OE work? Would all contractors still be required to sign the Letter of Assent, which binds them to the terms of the PSA? Etc. Unfortunately, the Project's schedule cannot accommodate additional time to address these issues to maintain the County's proposed construction schedule.

Because the PSA was created assuming 100% participation of TCBT's affiliates eligible to refer work to the Project, provisions were not discussed or assumed to address less than 100% participation. PSAs exist that only include certain trades and not a trades council; however, that was not the approach taken for this PSA.

### **Other Concerns Previously Raised Regarding Risk, Timing and Cost**

Staff outlined in the previous Board letter and memo other risks, timing and potential cost impacts. These include the following:

- Weakened strike protection;

- Increased uncertainty for bidders, particularly non-union contractors, potentially resulting in fewer bids and higher project bids;
- Possible conflict on the jobsite, resulting in delays and increased costs during construction
- Delay in schedule to clarify or amend draft PSA, delaying prequalification package preparation, bid process and the overall Project timeline.

Attachments:

Attachment A: Findings (original for PSA with 100% signatures)

Attachment B: Findings (alternate for PSA with less than 100% signatures)

Attachment C: Revision to draft Pilot PSA (Article 20)

**Attachment A**  
**Finding to enter into a Project Stabilization Agreement**  
**[Original]**

1.0 *The Pilot Project Stabilization Agreement for the Northern Branch Jail AB900 Phase II furthers a legitimate governmental interest consistent with competitive bidding law by preventing costly project delays, assuring contractors access to skilled labor, and avoiding the potential for labor strife during the life of the Project.*

The County of Santa Barbara received an \$80 million conditional award from the State to design and construct a 376-bed adult detention facility near Santa Maria, California in accordance with Phase II of the AB900 Jail Construction Financing Program (the Northern Branch Jail AB900 Phase II or the Project). Agreements between the State and the County for the Northern Branch Jail AB900 Phase II set a Project timeline and date for completion of construction. Consequences for failing to meet the Project schedule, in addition to the normal overrun costs, include the additional risks related to AB900 Phase II funding for this Project. Accordingly, failure to timely construct this Project may:

- Stop further reimbursement, from the State to the County, of any amount remaining in the State’s maximum \$80 million conditional award to the County (BSCC Jail Construction Agreement Art. 6.B.3; BSCC Jail Construction Agreement Exhibit A, Art. 8.A.1;) and
- Require the County to refund to the State “all State financing previously disbursed” by the State to the County of that maximum \$80 million conditional award. (BSCC Jail Construction Agreement, Art. 1.C.3.)

Therefore, the Board finds that utilization of a Project Stabilization Agreement prohibiting any work stoppages, strikes, sympathy strikes or lockouts and ensuring contractors a steady and reliable source of skilled labor for the Project, would limit the increased financial risks to the County from a construction schedule overrun. Accordingly, a Project Stabilization Agreement furthers a legitimate government interest consistent with the competitive bidding laws.

- A. **Project Budget.** The current budget for the Northern Branch Jail AB900 Phase II is approximately \$96 million. The Project budget includes the entire conditional award of \$80 million of State fund, the required County match of approximately \$8.9 million, and additional expenses to be funded by the County of approximately \$7.1 million. State funding represents over 80% of the current project budget.
- B. **Project Schedule.** Construction on the Project is anticipated to span over 2 years, commencing in November 2015 with completion in February 2018.

C. **Agreements for AB900 Phase II Funding.** Pursuant to Phase II of the AB900 Jail Construction Financing Program, the State and the County entered into a Project Delivery and Construction Agreement and a Board of State and Community Corrections Jail Construction Agreement. (Approved by the Santa Barbara County Board of Supervisors on May 14, 2013, <https://santabarbara.legistar.com/LegislationDetail.aspx?ID=1423511&GUID=172D07E4-7F0E-44DC-AB0C-5CC1AD6D1659>.)

1. **Project Delivery and Construction Agreement (PDCA).** The PDCA sets the Project scope, cost and schedule, including Project completion by February 2018 and the maximum amount of state reimbursement of \$80 million. (PDCA, Art. 1.2 c, 3.1 a, and Exhibit A.) In addition, the PDCA provides for termination of the agreement by the State based on a series of events including unapproved substantive alterations to the Project scope, cost or schedule. (PDCA, Art. 2.2 a.)
2. **Board of State and Community Corrections (BSCC) Jail Construction Agreement.** The BSCC Jail Construction Agreement includes the following terms:
  - “In the event of termination provided in Article 1(C)(1) [includes County’s breach of material term], and unless the Parties agree in writing otherwise, Participating County shall, upon notification, refund to the BSCC an amount equal to all State Financing previously disbursed to the Participating County. Any State Financing so remitted to the BSCC may be subject to interest equal to the rate earned by the State Pooled Money Investment Account.” (BSCC Jail Construction Agreement, Art. 1.C.3 (emphasis added).)
  - “Participating County agrees to proceed expeditiously with, and complete, the Project in accordance with the Project Documents and Plans as approved by the BSCC and the Agencies and/or as incorporated in all provision of this Agreement. Participating County acknowledges and understands that failure to meet application assurances, construction timelines and any other milestones or timelines as set forth in the Project Documents or Plans as approved by the Agencies and/or as incorporated in all provisions of this Agreement, may result at any time in award adjustments of Agreement termination by the BSCC.” (BSCC Jail Construction Agreement, Art. 4.I.)
  - “State shall reimburse the Participating County for Eligible State Costs provided Participating County’s performance of the Project is consistent

with the Project Documents, including the Construction Schedule, and Participating County is not in breach of any term or condition of this Agreement, any Project Document or any Applicable Law.” (BSCC Jail Construction Agreement, Art. 6.B.3.)

- “BSCC may withhold all or any portion of State Financing provided for by this Agreement in the event that ... the County has materially and substantially breached the terms and conditions of this Agreement or any other Project Document.” (BSCC Jail Construction Agreement, Exhibit A, Art. 8.A.1.)

**D. California Code of Regulations.** In addition, the California Code of Regulations, title 15, section 1772(c) provides, “Any state reimbursements determined to have been inappropriately or erroneously made, including those resulting from noncompliance as well as overpayments resulting from county plan modifications or other causes, shall, upon written notification, be repaid to the state....” (Emphasis added.)

Based on the agreements between the State and the County and the California Code of Regulations, complying with the Project schedule and timely completing Project construction is an essential component of receiving and retaining the State’s \$80 million of funds for the Project. Failure to timely construct the Project may trigger termination of the agreements with the State, requiring the County to refund \$80 million to the State. The Project Stabilization Agreement would help protect from construction time overruns based on labor unrest or unavailability, thus reducing the County’s financial risks related to the State funding.

**Attachment B**  
**Finding to enter into a Project Stabilization Agreement**  
**[Alternate]**

1.0 *The Pilot Project Stabilization Agreement for the Northern Branch Jail AB900 Phase II furthers a legitimate governmental interest consistent with competitive bidding law by preventing costly project delays, assuring contractors access to skilled labor, and reducing the potential for labor strife during the life of the Project.*

The County of Santa Barbara received an \$80 million conditional award from the State to design and construct a 376-bed adult detention facility near Santa Maria, California in accordance with Phase II of the AB900 Jail Construction Financing Program (the Northern Branch Jail AB900 Phase II or the Project). Agreements between the State and the County for the Northern Branch Jail AB900 Phase II set a Project timeline and date for completion of construction. Consequences for failing to meet the Project schedule, in addition to the normal overrun costs, include the additional risks related to AB900 Phase II funding for this Project. Accordingly, failure to timely construct the Project may:

- Stop further reimbursement, from the State to the County, of any amount remaining in the State’s maximum \$80 million conditional award to the County (BSCC Jail Construction Agreement Art. 6.B.3; BSCC Jail Construction Agreement Exhibit A, Art. 8.A.1;) and
- Require the County to refund to the State “all State financing previously disbursed” by the State to the County of that maximum \$80 million conditional award. (BSCC Jail Construction Agreement, Art. 1.C.3.)

Therefore, the Board finds that utilization of a Project Stabilization Agreement prohibiting any work stoppages, strikes, sympathy strikes or lockouts by signatory unions and councils, requiring arbitration of disputes; and ensuring contractors a steady and reliable source of skilled labor for the Project, would limit the increased financial risks to the County from a construction schedule overrun. Accordingly, a Project Stabilization Agreement furthers a legitimate government interest consistent with the competitive bidding laws.

- A. **Project Budget.** The current budget for the Northern Branch Jail AB900 Phase II is approximately \$96 million. The Project budget includes the entire conditional award of \$80 million of State fund, the required County match of approximately \$8.9 million, and additional expenses to be funded by the County of approximately \$7.1 million. State funding represents over 80% of the current project budget.



B. **Project Schedule.** Construction on the Project is anticipated to span over 2 years, commencing in November 2015 with completion in February 2018.

C. **Agreements for AB900 Phase II Funding.** Pursuant to Phase II of the AB900 Jail Construction Financing Program, the State and the County entered into a Project Delivery and Construction Agreement and a Board of State and Community Corrections Jail Construction Agreement. (Approved by the Santa Barbara County Board of Supervisors on May 14, 2013, <https://santabarbara.legistar.com/LegislationDetail.aspx?ID=1423511&GUID=172D07E4-7F0E-44DC-AB0C-5CC1AD6D1659>)

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2. **Board of State and Community Corrections (BSCC) Jail Construction Agreement.** The BSCC Jail Construction Agreement includes the following terms:

- “In the event of termination provided in Article 1(C)(1) [includes County’s breach of material term], and unless the Parties agree in writing otherwise, Participating County shall, upon notification, refund to the BSCC an amount equal to all State Financing previously disbursed to the Participating County. Any State Financing so remitted to the BSCC may be subject to interest equal to the rate earned by the State Pooled Money Investment Account.” (BSCC Jail Construction Agreement, Art. 1.C.3 (emphasis added).)
- “Participating County agrees to proceed expeditiously with, and complete, the Project in accordance with the Project Documents and Plans as approved by the BSCC and the Agencies and/or as incorporated in all provision of this Agreement. Participating County acknowledges and understands that failure to meet application assurances, construction timelines and any other milestones or timelines as set forth in the Project Documents or Plans as approved by the Agencies and/or as incorporated in all provisions of this Agreement, may result at any time in award adjustments of Agreement termination by the BSCC.” (BSCC Jail Construction Agreement, Art. 4.I.)

- “State shall reimburse the Participating County for Eligible State Costs provided Participating County’s performance of the Project is consistent with the Project Documents, including the Construction Schedule, and Participating County is not in breach of any term or condition of this Agreement, any Project Document or any Applicable Law.” (BSCC Jail Construction Agreement, Art. 6.B.3.)
- “BSCC may withhold all or any portion of State Financing provided for by this Agreement in the event that ... the County has materially and substantially breached the terms and conditions of this Agreement or any other Project Document.” (BSCC Jail Construction Agreement, Exhibit A, Art. 8.A.1.)

**D. California Code of Regulations.** In addition, the California Code of Regulations, title 15, section 1772(c) provides, “Any state reimbursements determined to have been inappropriately or erroneously made, including those resulting from noncompliance as well as overpayments resulting from county plan modifications or other causes, shall, upon written notification, be repaid to the state....” (Emphasis added.)

Based on the agreements between the State and the County and the California Code of Regulations, complying with the Project schedule and timely completing Project construction is an essential component of receiving and retaining the State’s \$80 million of funds for the Project. Failure to timely construct the Project may trigger termination of the agreements with the State, requiring the County to refund \$80 million to the State. The Project Stabilization Agreement would help protect from construction time overruns based on labor unrest or unavailability, considering that this Project covers multiple construction crafts and trades and is anticipated to take over 2 years to construct, thus reducing the County’s financial risks related to the State funding.

In addition, a Project Stabilization Agreement requiring the use and referral of labor from apprenticeship programs will support the County’s short term interest in accessing and utilizing skilled labor on the Project and the County’s long term interest in facilitating the training of skilled workers to meet the County’s future construction needs.

**Attachment C**  
**Project Stabilization Agreement, revised Article 20**

**ARTICLE 20**  
**ENTIRE AGREEMENT**

20.1 The parties agree that in the negotiation of this Agreement, they have had the opportunity to bargain over all lawful subjects covered by this Agreement and knowingly and willfully enter this Agreement upon all terms set forth herein.

20.2 Any amendment or modification to this Agreement shall be valid only if made in writing and signed by all parties to the Agreement.

By signing this Agreement, the Council warrants and represents that the unions and councils on pages 22-24 are trades and affiliates which have jurisdiction in Santa Barbara County, are eligible to refer labor to the Project, and which are affiliated with or represented by the Council. This Agreement shall become effective upon being signed by the Chair of the Santa Barbara County Board of Supervisors.

The Union officials signing this Agreement warrant and represent that they are authorized to collectively bargain on behalf of the organizations whom they represent and the members of such organizations. This Agreement may be executed in any number of counterparts and each of such counterparts shall for all purposes be deemed to be an original; and all such counterparts shall together constitute one and the same instrument.

IN WITNESS whereof the parties have caused this County of Santa Barbara Project Stabilization Agreement to be executed as of the dates written under each Party's signature below.