

Proposed Decision of SB 1022 Appeals Hearing Panel to BSCC – Monterey County

Summary

The SB 1022 Appeals Hearing Panel recommends that the Board of State and Community Corrections (BSCC) deny the appeal from Monterey County. On a 3-0 vote at a hearing on March 11, 2014 the panel determined that Monterey County did not provide sufficient information about its funding set aside, real estate due diligence, or CEQA compliance. In addition, the panel was not persuaded that the Executive Steering Committee process was flawed based on the inclusion of raters from other medium-sized counties that had also applied for funding. Further information about the panel's decision appears below.

Background

On February 27, 2014 the County of Monterey appealed the BSCC's decision on the SB 1022 Construction Financing program pursuant to BSCC Regulation 1788. The appeal was based on the county's contention that it should have received all of the Preference Criteria points and that the Executive Steering Committee process was flawed. Monterey County suggested the following two remedies on appeal:

1. Reevaluate our compliance with the preference criteria requirements. Give us the preference criteria credits where we are deemed substantially and adequately in compliance, and
2. Recalculate our project score awarded by the Executive Steering Committee, and approved by the Board, after removing any scoring done by individuals from medium-sized counties with projects competing for the same funding pool.

Preference Criteria

The Department of Finance provided information to the panel with respect to requested remedy #1 above as follows:

All proposals for SB 1022 funding were submitted to the BSCC by October 25, 2013. The Department of Finance reviewed all requests for Funding Preference Criterion #1 compared to what was required in the Request for Proposal (RFP).

Page 16 of the RFP explains the requirements for Adequate County Contribution Funds as follows:

Adequate County Contribution Funds (mandatory criterion): All proposals seeking the funding preference must include all documentation necessary to evidence that the Board of Supervisors has authorized an adequate amount of available funds to fully satisfy the entire amount of the county's cash contribution (match) from a source or sources that are compatible with the state financing

authorized in this program. The adequacy of county contribution funds will be determined by the SPWB, in its sole discretion. Determination of adequacy will include whether the county has provided all necessary documentation, whether the amount of funds authorized and available satisfies the county cash contribution amount (as reflected in the Budget Summary Table in the Proposal Form), and whether the source of funds is deemed compatible with the SPWB's lease-revenue bond financing.

Commonly acceptable forms of county contribution funds are General Fund or special use funds. Special use funds require submission of documentation demonstrating the fund source is legally authorized and the proposed project is a lawful use of the funds. Any proposed debt financing will require review by the SPWB on a case-by-case basis because the terms of the potential methods of financing can vary greatly.

The documentation provided must include, but is not limited to, the following: The name of each specific fund source to be used, the amount of county cash contribution funds attributed to each source, documentation evidencing the Board of Supervisors has authorized the required amount of funds from each identified source specifically for the proposed project, (emphasis added) and documentation demonstrating the authorized funds are available for use solely on the proposed project. (emphasis added)

Citation of the legal authority for each identified fund source evidencing the fund source is legally available and the proposed use is a lawful use of the funds. Authorization from the Board of Supervisors to proceed with the proposed project in its entirety if a conditional award of state financing is received.

All county contribution funds documentation shall be submitted in duplicate, in a separate packet, accompanying the proposal submittal to BSCC. The Board of Supervisors' resolution that accompanies the proposal submittal must include the required language for this specific preference criterion, as outlined in the Board of Supervisors' Resolution section of the Proposal Form.

The county's submittal contained no specific accounting information on the \$800,000 cash match. There was neither a fund identified (must show required amount of funds from each identified source specifically for the proposed project) nor documentation to demonstrate the funds had been set aside for the proposed project (must show documentation demonstrating the authorized funds are available for use solely on the proposed project). For these reasons, there was no "technical review or clarification" requested from the county as there was no need to clarify.

Only recently, in County Administrative Officer Lew Bauman's letter of February 26, 2014, was it disclosed that the funding was from the county's General Fund. Even if this

information had been submitted timely, it would not have been adequate. The county needed to provide specific accounting evidence that the funding was set aside specifically for this purpose (must show documentation demonstrating the authorized funds are available for use solely on the proposed project). By showing only a fund balance it is unclear whether other commitments have been made against this balance.

Related to the Preference Criteria, Monterey County has requested the following remedy in its appeal:

“Reevaluate our compliance with the preference criteria requirements. Give us the preference criteria credits where we are deemed substantially and adequately in compliance . . . “

Monterey County did receive credit for the Preference Criteria on Authorization of Project Documents.

With respect to the Preference Criteria on Real Estate Due Diligence, the RFP required:

Each proposal seeking to satisfy this criterion must include all documents required in the initial county real estate due diligence submission package. Two separate and duplicative copies of this complete package must accompany the proposal submittal to BSCC. Incomplete packages will result in this preference criterion not being met.

Monterey County did not receive the point because there were no documents submitted showing the required real estate due diligence requirements noted above.

With respect to the Preference Criteria on CEQA, the RFP required:

Two separate and duplicative copies of the CEQA documentation package must accompany the proposal submittal. The package shall include either the final Notice of Determination (NOD) or final Notice of Exemption (NOE) stamped as received by the entity with which it was filed for public review; the stamp must include the date received. Related back-up information and CEQA documents filed previous to the final NOD or NOE are not requested and should not accompany this submittal, but must be retained by the county. The submittal shall also include a written certification by county counsel that states the final NOD or NOE was filed, the entity with which it was filed, when it was filed, and further certifies that all related statutes of limitation have expired without challenge.

Monterey County contends that they now meet the CEQA requirement, but because the County could not provide evidence of a final NOD or NOE at the time of the proposal, the DOF is not in a position to reconsider this preference criteria. Given that this is a

competitive funding process, the same consideration must be uniformly applied to all counties.

Regardless, all counties were required to receive Preference Criterion #1 (funding source) in order to receive any of the other preference criteria. Because the county did not satisfy that criterion, a finding that the county should have received the other preference criteria would not have changed the preference criteria result.

ESC Scoring Process

With respect to the requested remedy about the ESC scoring process, the BSCC provided the following analysis:

The BSCC is confident that the process is fair and impartial. For the panel’s information, the table below shows each of the nine (9) rater’s scores for Monterey County’s proposal; Rater 1 and Rater 7 were from medium-sized counties that also applied for funding. As the county requested, the BSCC staff has recalculated Monterey County’s score with the two ESC members from medium-sized counties removed. After recalculation, Monterey County’s average score increased by 2.2 percent but remained the lowest in the medium-sized category.

County	R-01	R-02	R-03	R-04	R-05	R-06	R-07	R-08	R-09	AVG
Monterey	500	681	735	601	564	681	735	615	915	669.7
Monterey	removed	681	735	601	564	681	removed	615	915	684.6

In addition, Monterey County noted other concerns about the ESC process in its appeal. Each issue is listed below followed by the written response provided to the county from BSCC.

1. “. . . we believe the Executive Steering Committee process used to rate our project was flawed, in that we believe at least one of the evaluators on the Committee rating our project was from a medium-sized county who had submitted a proposal in direct competition for the same funding we were seeking with our project. If true, even if this evaluator recused himself from rating his county’s project, he should not have been allowed to rate the proposals of competing counties. Since we were never provided with the specific details as to how these evaluators scored our project or who they were, this point is speculative.”

BSCC Response: Information about the raters’ scores is provided above. As noted above, two members of the ESC were from medium-sized counties that submitted proposals. However, an ESC member’s salary from a county that submitted a proposal does not, by itself, create a legally prohibited conflict of interest under Government Code section 1090.

Section 1090 generally prohibits a member of a public board from having a financial interest in a contract. Penal Code section 6025.1 specifically provides that any member of a BSCC-created committee (such as the ESC) does not have a financial interest in a contract made by the BSCC based upon his or her public office or employment.

To the extent the county has concerns about the ESC rating process itself, the Executive Steering Committee went through an extensive training on reviewing and rating RFPs. On November 6, 2013 the BSCC conducted a four-hour public training session, entitled “Proposal Evaluation Rater Training,” for the ESC on how to rate the RFPs. The training was noticed on the BSCC website and all counties were welcome to attend and make comments. At the end of the session, the ESC completed a practice exercise requiring the members to read and rate a mock proposal. The results were reviewed and discussed during the meeting. The BSCC has a long history of using a peer-review process to evaluate funding and grant proposals. In order to have a diverse and representative ESC, the BSCC believes it is important to have representation from small, medium, and large counties.

Attached for your reference is the Grant Proposal Evaluation Process (Attachment A) that explains the method for evaluating grant proposals by an Executive Steering Committee on behalf of the BSCC. This process was established to disburse funds on a competitive basis and was successfully used in the recent AB 900 (Phases I and II) Local Jail Construction Financing Program and the SB81 Local Youthful Offender Rehabilitative Facilities Construction.

With respect to “the specific details as to how these evaluators scored our project or who they were . . .” we note that the names of the ESC members were public and were listed in the RFP. When the counties made presentations to the ESC at a December 4-6 meeting, the scores of each rater were announced in public. At page 29 in the RFP, the proposal evaluation factors are listed as follows:

PROPOSAL EVALUATION FACTORS

The evaluation factors to be used and the maximum points that will be allocated to each factor are shown in the table below.

Rating Factors and Maximum Points

	RATING FACTOR	MAXIMUM POINTS
1	Project Need	250
2	Scope of Work	200
3	Offender Management and Programming	250
4	Administrative Work Plan	100
5	Budget Review	200
	Total	1000

2. “After submitting our application we worked closely with BSCC staff to insure we had met the critical preference criteria required for the project proposal to be successful. BSCC staff worked with us until they felt confident in telling us that, in their opinion, we had met at least three of the four preference criteria... Although additional documentation to support our position could have been provided at the time of application if we had been so directed, we were assured by BSCC staff that our documentation was sufficient.”

BSCC Response: At page 25 in the RFP, the BSCC’s technical review is described as follows:

TECHNICAL REQUIREMENTS REVIEW OF DRAFT PROPOSAL

It is anticipated that BSCC staff will be available to provide a limited technical review of the draft proposals anytime up to two weeks before the submittal deadline to determine if the draft proposal complies with the technical requirements. Draft proposal reviews are not required. Reviews are informal in nature, non-binding and limited to staff assessment of compliance with state requirements. Staff can make no judgment as to the merit of draft proposals or how proposals will be evaluated by reviewers. (Emphasis added.)

It was not the responsibility nor would it be appropriate for BSCC staff to provide an opinion on whether a county’s submission for preference criteria would be successful. In the event that a member of our staff shared an opinion, it is clear in the RFP that the staff is not responsible for evaluating either the preference criteria or the proposal itself.

Appeal Hearings Panel Consideration of Appeal

On March 11, 2014, the appeals hearing panel convened to hear the appeal of Stanislaus County. The appeals hearing panel members were Judge William Pounders (Ret.) of Los Angeles, Sheriff Dean Growdon of Lassen County and Secretary Jeff Beard of the California Department of

Corrections and Rehabilitation. Judge Pounders acted as the presiding officer for the proceedings.

Appearing at the appeals hearing on behalf of Monterey County were Sheriff Scott Miller and Mr. John Guerin, Executive Director, Administration, Monterey County Sheriff's Office. The county's representatives were provided with an opportunity to explain to the appeals panel the basis of its appeal on both the ESC scoring process and the Preference Criteria Rating process.

Statement of Decision

On a 3-0 vote, the appeals hearing panel recommends to the BSCC that the appeal from Monterey County be denied. The panel finds that the RFP instructions were sufficiently clear about the necessary accounting documentation that was required to receive credit for Preference Criterion #1. As noted in the response from the Department of Finance, the information provided by Monterey County for Preference Criterion #1 did not specify a funding source. Unlike the appeal from Humboldt, there was not enough information provided to allow the Department of Finance to provide technical review to request additional documentation. With respect to Preference Criteria #2 on real estate due diligence, Monterey County did not provide the required documents called for in the RFP. Monterey County requested reconsideration of its compliance with CEQA because the county attests that it now can show compliance, but the panel did not consider information that became available after the proposal was submitted. In general the county appears to have relied on the submission of the Board of Supervisors Resolution as sufficient support for the preference criteria, but the panel concluded that the supplemental documentation could have and should have been submitted to receive these preference points.

On the issues raised about the fairness of the ESC process, the panel noted that even with the scores from the two raters who were from medium-sized counties removed, Monterey did not move from last place in the rankings within their category. Further, while the panel noted as a potential issue for further consideration the inclusion of ESC members who represent counties that have also submitted proposals, the panel was not persuaded that the process was flawed.

Recommendation

The appeals hearing panel recommends that the Board deny the appeal of Monterey County for the reasons stated above.