SB 81 Local Youthful Offender Rehabilitative Facilities Construction Program
Contractual Agreements Workshop January 27, 2011
Frequently Asked Questions

Q1. Can counties use SB 81 lease-revenue bond financing to renovate existing buildings?

R. Buildings that are being renovated will be included in the financing and thus need to be adequate for financing. For instance, these buildings must be included in the footprint of the project and will be subject to the same due diligence review as would new construction. The State will also need information about the existing building's construction type to evaluate whether it is in good condition and seismically sound.

Q2. In reference to the $68 million remaining in SB 81, will the second request for proposals (RFP) potentially allow for the funding of design costs that have already incurred in light of the fact that the language in SB 81 allows for that expense?

R. At the time of this workshop, the Corrections Standards Authority (CSA) Board had not discussed the RFP process for the remaining $67.8 million. If the Board directs CSA staff to reconvene another Executive Steering Committee (ESC), it will be up to the ESC, in a public meeting, to determine the criteria for the second RFP. If the ESC decides to include acquisition and design as an eligible reimbursement cost, that recommendation will be forwarded to the CSA Board and could be a component of the second RFP. However, any changes to this second RFP will have no effect on those 14 counties that have been already conditionally awarded. If a currently conditionally awarded county wished to take advantage of a change of criteria in the second RFP, the county would need to forfeit their award and compete in the second RFP process. In any case, no costs incurred prior to a project's establishment at the State Public Works Board can be eligible for reimbursement.

Q3. Can a county modify their submitted proposal to change the budget to reflect updated costs for design or construction costs?

R. Each county may fine tune their match dollar amounts in the various categories to reflect current budgets. However, the conditional award is the maximum amount of State participation in the project regardless of actual project costs.

Q4. It's my understanding that the project itself is going to supply the security for the bonds. How are the bonds actually going to be paid? Where is the revenue stream coming from?

R. The California Department of Corrections and Rehabilitation (CDCR) pays the rent to the State Public Works Board for the facility pursuant to its lease arrangement with the Board, just as it does for CDCR facilities that were financed with lease-revenue bonds. Funds to cover the rent are appropriated in CDCR's budget each year. The Board pays the debt service on the bonds with the rental income it receives from CDCR. In this program, CDCR subleases the facility to the county, but the county pays no rent.

Q5. How is deferred maintenance for the new facility addressed?

R. The county is responsible for operation and maintenance costs of the financed facility.

Q6. Will the State award the grant amount given us or will the State award funding based on the competitive bid amount?

R. The conditional award is the maximum amount of the State's share of the project. If the construction contract comes in lower, savings will first accrue to the county and then will be shared between the county and the State. In every case, the county will need to meet its minimum matching obligations set forth in the RFP.

Q7. What happens if the bids are greater? There is an assumption that the bids will come in lower than the project estimate. What if the conditional award is $10 million but the project comes in at $10.7 million? Will the CSA award be based on the competitive bid or will the county be responsible for the difference?

R. The conditional award that you were given is the maximum State contribution for the project. The county is responsible for any increases in cost.

Q8. The landlord (the State) pays the rent, but if funds aren't appropriated and if CDCR discontinues the payment, would the county to be obligated to make those payments? If not, who would be making those payments?

R. The Legislature has never failed to make appropriations for rent on lease-revenue financed projects. If for some reason there was an oversight, then there is a provision to adjust the CDCR's appropriation to include that rent.

Q9. If it was the county's obligation to make those payments, the provisions of the agreement seems to indicate that the State could take over the building and sublet it to a third party. The county is out of the land and the building. Is that the case?

R. If CDCR were to default on its obligation to pay rent, the sublease requires that the State give the county the first right to become the primary tenant and pay rent. If the county declines that option, the Board could let the facility to a third party. If there wasn't an appropriation made for the lease-revenue rental, then CDCR would be obligated to pay the rental from the first legally available funds it has.

Q10. How are construction or change order contingencies handled with regards to a county's award amount?

R. The project budget includes a contingency up to 10% of the construction contract amount.

Q11. If there are State dollars remaining at the end of a project, is that considered a savings?

R. The conditional award is the maximum amount for the State's share of the project. If the construction contract comes in lower, savings will first accrue to the county and then will be shared between the county and the State. In every case, the county will need to meet its minimum matching obligations set forth in the RFP.

Q12. If the county's project comes in higher than the architect's/engineer's estimate and the county cannot cover the costs, and the county has not received any funding, can the county terminate this construction process – even though some of the agreements have been signed between the State and the county?

R. Yes, there is the option to terminate prior to any financing. This language is in the Project Delivery and Construction Agreement (PDCA) [(Article 2, Section 2.2 (b)] and in the CSA Agreement [(Article 1, Section C)].

Q13. When does the California Environmental Quality Act (CEQA) process need to be completed?

R. CEQA must be completed before preliminary plans are brought to the State Public Works Board for approval. CEQA does not have to be completed for the first State Public Works Board meeting (the establishment of the project).

Q14. As a county, we are always looking for mutual indemnification agreements. The Welfare and Institutions Code indicates that the State is required to have indemnification provisions, but it doesn't seem to prohibit a mutual indemnification provision. Is there room for some negotiating to allow for mutual indemnification?

R. Each county will have an opportunity to review and discuss the agreements as they pertain to their specific project and situation. The indemnification provisions in the agreements have been subject to much scrutiny. They were developed in concert with outside counsel and have been determined to meet the minimum requirements for this financing program.

Q15. On a particular project, the State dollars could potentially cover all of the contractor's expenses (depending on the individual project budget). Is that until all of the county's in-kind or cash match funds are expended? Does the county put forth the entire match at the beginning?

R. The county will need to document match as the project proceeds through construction, always maintaining at least the minimum match percentage required. The county will start the construction phase with a larger percentage of match than required because of fees previously paid for architectural services, etc. The percentage of State-to-match dollars will shift as the project progresses and the State dollars are being expended for construction costs. For the duration of the construction phase we will insure the match minimum is met.

Q16. There was a brief mention of an escrow account possibility. Could you elaborate on that and identify where that may be provided for?

R. In the county's construction contract, the county is required by the Public Contract Code to have a certain amount of contractor retention. These are funds paid to a bank that is holding it for future purposes, rather than an account within the county's fund structure. CSA bulletin 10-LYORF 02, dated December 8, 2010, speaks to the issue of the retention the county would put in an escrow account. Retention payments can be counted as a liquidated obligation and invoiced to the State for reimbursement or match claim. That bulletin is on CSA's website (http://www.cdcr.ca.gov/CSA/CFC/SB_81_FAQ.html).

Q17. Can the full value of the appraisal be counted towards the in-kind match?

R. Yes.

Q18. How long does it take for the project to go through the final audit and before the county receives the 5% retention from the CSA?

R. The county is responsible for the final audit, so the county controls the timing of the audit. The county is required to complete the audit within 90 days of construction completion. When the audit is received and accepted by CSA, the reimbursement request for the 5% retention will be processed. The State's processing time for payments takes approximately 30 to 60 days.

Q19. In the Ground Lease, Section 4(b), it states that an easement agreement is necessary if site access and utilities are provided by other real property. If our county doesn't have site access and utilities provided by other real property, then we can delete Section 4(b) and the easement agreement (Exhibits C)?

R. The Form of Ground Lease attached to the PDCA will not be changed. However, if it is determined that an easement is not needed, the final Ground Lease that is executed would not include this section. We would not execute an easement agreement if it is not necessary for the project. The determination whether an easement is needed or not is done on a case-by-case basis during the due diligence process.

Q20. Is the Ground Lease for a 50-year term?

R. Since the January 27, 2011 workshop, the language describing the term of the ground lease has been modified to clarify the term of the lease ends when bonds have been repaid. The term of bonds are typically 25 years. The new language no longer has the 50-year term.

Q21. Is it going to be the county's responsibility to get the State approved as another holder for that easement? We have a situation where there is a private lane going to our property; the County has the easement going over that lane to access the property. Would we be required to work with that property owner to get the State added on to that easement?

R. Most likely not. Generally speaking, that easement would be captured as part of the description of the lease hold. Each easement will be examined during the due diligence process on a case-by-case basis to determine whether they need to be moved or modified in any way.

Q22. So if there are no restrictions on that easement, just straight egress/ingress, more than likely it would be acceptable?

R. Generally speaking there should not be an issue, but there is a lot of variability in easements and each will be examined during the due diligence process.

Q23. Who actually gives the authorization to commence construction? Is it the county's Board of Supervisors that gives the go ahead or is it the State Public Works Board who gives the go ahead. Who actually is the signatory on those contract agreements that gives the notice to proceed?

R. In a design-bid-build process, the contract is between the county and the construction company. The notice to proceed would come from the county to the construction company, but the permission for the county to send that notice to proceed will come from the State. Once the contract award is approved by the State Department of Finance, CDCR will notify the county it has been approved to award the contract. Counties utilizing a design-build construction delivery method will be using a slightly different process.

Q24. In the Form of Facility Sublease, Section 10(f), bottom of page 9, when I first read that paragraph, "…County waives any and all claims for damages caused by the Department in re-entering and taking possession of the Facility…", my first thought was, there's no way we could agree to that. But looking at it, I think it pertains to the unlikely situation where the county gets kicked out because the Department didn't pay the rent, for instance, and the State gets a third party in there to pay the rent, effectively kicking us out and re-letting the facility.

R. Yes. Also, if the county abandoned the facility, the State could come in and operate the facility. However, these are both unlikely scenarios.

Q25. I know it would require the approval of the State, but does the State normally allow expansions or improvements of the property if it is security for the bond? If, in the future, it was determined that the county needed to expand, make improvements or build additions to the current structure, what would the process involve?

R. The State would be examining the county's plans to determine whether it would have any adverse impact on the State's interests in the project. First, we would want to ensure that the expansion did not cause an abatement event—an event that causes the facility to be in a condition it cannot be used. We would also examine such issues on whether the footprint of the leasehold would need to be changed and any effects on the functionality of the facility.

Q26. Other than involvement in describing matching funds and the 12-month cash flow projections, do county treasures' have any other responsibilities regarding the financing of these projects?

R. CDCR will work with each county regarding the financial information needed for the project.

Q27. Have there been any changes to the design-build scenario as outlined in the Guidelines?

R. The most updated information is in the updated AB 900 and SB 81 Local County Projects, Capital Outlay and State Public Works Guidelines that was put on the CSA's website (http://www.cdcr.ca.gov/CSA/CFC/SB_81_FAQ.html) in December 2011.

Q28. We understand that landscaping is an allowable cost now. When will information be available?

R. That information is now available on our website. Pursuant to Bulletin 11-LYORF 04, dated March 2, 2011, the CSA will, subject to its exercise of reasonable discretion, accept costs for permanent and sustainable landscaping as eligible construction costs.

Q29. Do we get to keep the interest on the escrow account?

R. By the Public Contracts Code, interest in the escrow account goes to the contractor.

Q30. Is there any prohibition against the use of project labor agreements on these projects?

R. Project labor agreements are not specifically prohibited under California law or SB 81.