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Agenda Date: 6/18/2019
Agenda Placement: 10C

NAPA COUNTY BOARD OF SUPERVISORS
Board Agenda Letter

TO:	Board of Supervisors
FROM:	Steven Lederer - Director of Public Works Public Works
REPORT BY:	Juan Arias, Deputy Director of Public Works - Engineering - 259-8374
SUBJECT:	Re-Entry Facility - Approval of Takeover Agreement

RECOMMENDATION

Director of Public Works requests the Board related to the Napa County Re-entry Facility Project, PW 17-100:

1. Receive an update regarding Napa County Re-entry Facility Project, PW 17-100; and
2. Delegate authority to the Chair to formally terminate Vila Construction Company for cause and execute a Takeover Agreement with Liberty Mutual Insurance Company should final terms acceptable to the Director of Public Works and the Office of County Counsel be negotiated with the Surety.

EXECUTIVE SUMMARY

On May 17, 2017, the County and Vila Construction Co. of Richmond, California ("Contractor") entered into Napa County Agreement No. 170827 (the "Contract") for the Napa Re-entry Facility Project (the "Project"). In connection with executing the Contract, the Contractor and Surety provided the County a Performance Bond and a Labor and Material Bond, each in the initial penal sum of $16,084,824 (collectively, the "Bonds"). After significant delays in completing the Project, the Contractor notified the County it would be unable to complete the Project and that it was turning to the Surety for assistance.

The Bonds make the Surety financially responsible for completion of the Project and payment of subcontractors and material providers. Over the past few months staff have been negotiating a Takeover Agreement that sets forth the terms under which the Surety (through a separate general contractor) would complete the Project. While the final language of the Takeover Agreement has not been agreed to with the Surety, staff wants to move the Project forward should terms be reached before the Board meets again in July. Accordingly, staff is requesting that the Board delegate the necessary authority to the Chair to execute a Takeover Agreement with the Surety once final terms acceptable to the Director of Public Works and Office of County Counsel are finalized.

FISCAL IMPACT

Is there a Fiscal Impact?	Yes
Is it currently budgeted?	Yes
Where is it budgeted?	CIP Budget - Fund 3000 Subdivision 30005-05 Programs 13025 and 14021 It is anticipated that any Takeover Agreement would dedicate the remaining contract balance to the completion of the Project, subject to the County's rights to withhold funds related to stop notices and deduct liquidated damages from the amounts that become due. Original Contract Price: $16,084,824 Approved Change Orders: $1,483,653 Current Contract Amount: $17,568,477 Less Amounts Paid to Date: ($14,837,179) Contract Balance*: $2,731,298** Less Liquidated Damages (through 6/18/19): ($855,000) * As defined in the Takeover Agreement. **This amount includes retention in the amount of $784,852.
Is it Mandatory or Discretionary?	Discretionary
Discretionary Justification:	While the County has the right under the contract and bonds to complete the work itself, the process of defining the scope of work and bidding that remaining work, among other steps, is likely to cause significant delays to completing the project and may impact warranties as well as create other costs. Through the Takeover Agreement, the Surety can contract to complete the work without the extensive bidding procurement process. In addition, most of the remaining work can be done by subcontractors of the Contractor, and the Surety has represented it has already ratified those existing subcontractor agreements to enable the cost effective and efficient completion of the Project.
Is the general fund affected?	No
Future fiscal impact:	There is no identified future fiscal impact past the current year; however, staff believes executing the Takeover Agreement is the most efficient way to complete the project.
Consequences if not approved:	Opening of the Napa County Re-entry Project may be further delayed and state funding may be jeopardized.
Additional Information:	

ENVIRONMENTAL IMPACT

ENVIRONMENTAL DETERMINATION: A Final EIR was prepared and certified by the Board of Supervisors on February 11, 2014 for the Napa County Jail Project (SCH#2013012072). The Final EIR analyzed the potential impacts resulting from the General Plan Amendment and was prepared in accordance with CEQA, the State CEQA Guidelines and the County's Local Procedures for Implementing CEQA. No further environmental review is necessary.

BACKGROUND AND DISCUSSION

On March 13, 2014, the Board of State and Community Corrections (BSCC) granted Napa County a conditional award of $13,474,000 for the Napa County Re-entry Facility. After completing design, the Board of Supervisors approved the plans and specifications for the "Napa County Re-entry Facility Project," PW 17-100 ("Project") and subsequently awarded the construction contract on April 4, 2017, to Vila Construction Co. of Richmond, California ("Contractor"). On May 17, 2017, the Contractor and County entered into Napa County Agreement No. 170827 (the "Contract") for all work associated with the Project. In connection with executing that Contract, Contractor and Surety provided the County a Performance Bond and a Labor and Material Bond, each with a penal sum equal to the original contract amount of $16,084,824 (collectively, the "Bonds"). A notice to proceed was subsequently issued on May 22, 2017.

Despite significant delays resulting from the Contractor's failure to timely perform, the Project was over 95% complete on March 18, 2019 when the County received a letter from the Surety that included a Voluntary Notice of Default previously executed by the Contractor. In the Voluntary Notice of Default, Contractor irrevocably acknowledged its default and waived any further right to notice under the Contract. (The Contractor had previously irrevocably directed all payments to the Surety.) Subsequently, on March 22, 2019, the Contractor informed the County that it would not be able to finish the Project and would no longer be involved. (The Surety has informed staff that the Project is one of 16 private and public projects that the Contractor defaulted on and the Surety had been financing the Contractor's work for at least a few months prior.)

While having a contractor default and unable to complete a project inherently creates further delay, the Bonds financially obligate the Surety to make sure the Project is completed in accordance with the original contracts terms and to pay any unpaid subcontractors, material provides, and laborers. Under the Contract, the County has the express right to bid out the remaining work and bill the Surety for any costs incurred over the Contract amount as amended; however, that option is fraught with risk and likely even more extensive delays. Here, the Surety has proposed arranging for the completion of the remaining work under the Contract subject to a full and continuing reservation of all rights, claims, damages, and defenses available. Staff believes this process is more efficient since it avoids delays that would be created by having to bid the remaining work and will also facilitate the original subcontractors completing the work, which will help secure warranties and or reduce the potential for disputes in the future. Accordingly, County Counsel and Public Works have been negotiating a Takeover Agreement with the Surety. Assuming final terms can be agreed to, the Takeover Agreement would set forth the terms under which the Surety (through a separate general contractor) would complete the Project. At this time, the Surety has represented that it plans to hire The Vertex Companies ("Vertex") as the completion contractor and, given the scope of the remaining work, has been executing ratification agreements with the Contractor's original subcontractors.

Takeover Agreement

Staff believes it is appropriate to structure the Takeover Agreement in a way that prioritizes the immediate completion of the remaining work and defers any claims that the parties may have against one another to a subsequent arbitration or other legal proceeding. The key terms of the Takeover Agreement staff is negotiating are summarized below.

- The Surety agrees to hire a replacement contractor to complete all remaining work, including the correction and repair of all remedial or defective work.
- The County has a remaining Contract Balance of approximately $2.7 Million. Subject to its rights to deduct liquidated damages, the County will pay any remaining funds in the Contract Balance to the Surety based on its completion of work and satisfaction of stop notice payment claims by various subcontractors and material providers.
- The Surety will commence work within 7 days of the execution of the Takeover Agreement and provide the

County with a new completion date within 30 days of the execution of the Takeover Agreement.

- The Surety's total Payment Bond liability under the Agreement is capped at the amount of the bond. (Note this includes completion work as well as any warranty claim arising after occupancy.)

Completion Schedule

Based on preliminary discussions with the Surety, the Surety is not currently able to provide a precise time estimate as there may be substantial corrective work needed to address the inspections of the work performed by the County's representatives. Within 30 days of execution of the Takeover Agreement, the County will receive a completion schedule that will address any corrective work that may be needed. An important element of the current draft of the Takeover Agreement is that it confirms the County's contractual rights to deduct liquidated damages, which will ensure the Surety remains motivated to timely complete the work. Under the Contract, the County has been assessing Liquidated Damages (penalty for not completing work on time) of $3,000 per calendar day. Liquidated damages through 6/19/19 equates to the amount of $855,000.

SUPPORTING DOCUMENTS

A . Correction Memorandum (Added after meeting)

CEO Recommendation: Approve

Reviewed By: Leigh Sharp