

**REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF SAN BERNARDINO COUNTY
AND RECORD OF ACTION**

June 28, 2022

FROM

**TERRY W. THOMPSON, Director, Real Estate Services Department
DANIEL MUNOZ, Deputy Executive Officer, Office of Emergency Services**

SUBJECT

Lease Agreement with PSIP EBS Francis, LLC, a Delaware Limited Liability Company, for Warehouse and Office Space for the Office of Emergency Services in Ontario

RECOMMENDATION(S)

1. Approve the Real Estate Services Department's use of an alternative procedure in lieu of a Formal Request for Proposals as allowed per County Policy 12-02 – Leasing Privately Owned Real Property for San Bernardino County Use, to lease a building with approximately 120,651 square feet of warehouse and office space located at 1925 South Grove Avenue in Ontario for the Office of Emergency Services, for five-years and two-months for the projected period of July 1, 2022 through August 31, 2027, subject to landlord's completion of certain landlord improvements.
2. Approve a lease **Agreement No. 22-584** with PSIP EBS Francis, LLC for a term of five-years and two-months for the projected period of July 1, 2022 through August 31, 2027, subject to landlord's completion of certain landlord improvements, for a building, commonly known as Building One, with approximately 120,651 square feet of warehouse and office space, inclusive of approximately 5,639 square feet of mezzanine deck and approximately 3,366 square feet of office space, located at 1925 South Grove Avenue in Ontario for the Office of Emergency Services in the amount of \$12,824,768 for base rent and an estimated amount of \$2,019,698 for operating expenses for a total minimum amount of \$14,844,466.
3. Approve Subordination, Nondisturbance and Attornment **Agreement No. 22-585** with PSIP EBS, Francis, LLC and City National Bank in connection with the lease in Recommendation No. 2.
4. Authorize the Chief Executive Officer or the Director of the Real Estate Services Department to execute amendments or ancillary documents required by the landlord's lender, subject to County Counsel review, provided that such amendments or documents do not modify the term of the lease, the economic terms, or any substantive terms.
5. Direct the Chief Executive Officer or the Director of the Real Estate Services Department to transmit copies of any executed amendments or ancillary documents required by the landlord's lender to the Clerk of the Board of Supervisors within 30 days after full execution.
(Presenter: Terry W. Thompson, Director, 387-5000)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Operate in a Fiscally-Responsible and Business-Like Manner.

Provide for the Safety, Health and Social Service Needs of County Residents.

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FINANCIAL IMPACT

The total estimated cost of this five-year and two-month lease agreement is approximately \$21 million. Of this amount, \$12.8 million is for base rent, \$2 million for estimated operating expenses and \$6.2 million in additional costs associated with this lease through August 31, 2027. The San Bernardino County’s (County) allocation of American Rescue Plan Act (ARPA) funding could provide reimbursement of up to \$18.4 million, contingent upon the use of the warehouse being eligible under ARPA guidelines. Based on the current ARPA guidelines, it is anticipated that this lease is eligible for funding. The \$2.7 million in costs not reimbursed through ARPA are anticipated to be funded through the use of Discretionary General Funding (Net County Cost). The deadline for expending APRA funding is December 31, 2026.

Estimated operating expenses include but are not limited to utilities, custodial, maintenance, repairs, certain taxes and insurance for the adjoining parking lot and surrounding industrial campus and will be reconciled annually against actual costs. Any discrepancy between estimate and actual will be either payable by or credited to the County, as the case may be. The additional costs associated with this lease, represent operating expenses that include but are not limited to the cost of utilities and maintenance paid directly by the County for the leased building.

Budget adjustments are not included with this item but will be presented for approval by the Board of Supervisors (Board) at a later date. Annual costs for this lease are as follows.

Lease Year (Based on Projected Commencement Date of July 1, 2022)	Annual Lease Cost (Base Rent & Estimated Operating Expenses)	Additional Annual Costs Associated with the Lease
July 1, 2022 – July 31, 2022	\$ 32,576	\$ 96,521
August 1, 2022 – June 30, 2023	\$ 2,521,606	\$ 1,061,729
July 1, 2023 – June 30, 2024	\$ 2,845,240	\$ 1,185,415
July 1, 2024 – June 30, 2025	\$ 2,943,413	\$ 1,205,043
July 1, 2025 – June 30, 2026	\$ 3,045,514	\$ 1,229,144
July 1, 2026 – June 30, 2027	\$ 3,151,697	\$ 1,253,727
July 1, 2027 – July 31, 2027	\$ 271,844	\$ 106,172
August 1, 2027 – August 31, 2027	\$ 32,576	\$ 106,172
Total Cost	\$ 14,844,466	\$ 6,243,923

BACKGROUND INFORMATION

Recommendation Nos. 1 and 2 will approve Real Estate Services Department (RES D)’s use of an alternative procedure in lieu of issuing a Formal Request for Proposals (RFP) as allowed under County Policy 12-02 – Leasing Privately Owned Real Property for County Use, to lease a building with approximately 120,651 square feet of warehouse and office space located at 1925 South Grove Avenue in Ontario and will approve a new five-year and two-month lease agreement with PSIP EBS Francis, LLC for a building, commonly known as Building One, with approximately 120,651 square feet of warehouse and office space, inclusive of approximately 5,639 square feet of mezzanine deck and approximately 3,366 square feet of office space, located at 1925 South Grove Avenue in Ontario (Ontario Warehouse) for OES to provide emergency services for the County and its communities. Recommendation No. 3 is seeking approval of a Subordination, Non-Disturbance and Attornment (SNDA) agreement with PSIP EBS Francis, LLC and City National Bank related to the recommended lease to ensure that the County’s rights under the Lease are not disturbed in the event of a lender foreclosure.

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Recommendations No. 4 and No. 5 will authorize the Chief Executive Officer (CEO) or the Director of RESD to execute amendments or ancillary documents required by the landlord's lender, provided that such amendments or documents do not modify the term of the lease, the economic terms, or any substantive terms.

OES is looking to lease additional warehouse and office space to stage and prepare for emergency response services to serve a growing emergency response preparedness need based on the recent pandemic for COVID-19. The warehouse space will store emergency response and support equipment that will be activated during times of emergencies impacting County communities.

Under the direction of the Director of Office of Emergency Services, the department provides prevention, protection, mitigation, preparation, emergency response and threat and hazard recovery services to the County and its communities.

OES currently occupies approximately 35,000 square foot of warehouse space at four different locations and multiple storage locations throughout the county. However, the current warehouses are at capacity and OES now utilizes alternate storage areas throughout the county. The current locations do not provide the necessary space required for the staging and efficient operation to coordinate an emergency response. Additionally, the current facilities do not have sufficient parking and clear paths of travel to coordinate logistics of emergency equipment. The lease for the Ontario Warehouse will assist OES in complying with emergency response guidelines to increase the County's infrastructure to protect, prevent, mitigate, prepare, and recover from threats and hazards that pose the greatest risk to the County and its communities.

In November 2021, on behalf of OES, RESD researched market availability for warehouse space between 100,000 to 130,000 square feet. Two properties in the City of Fontana and one in the City of Ontario were identified. Due to the current market conditions, RESD utilized an alternative procedure in lieu of a Formal RFP in accordance with County Policy 12-02. The two Fontana property owners decided to move forward with other prospective tenants. RESD continued to negotiate with the Ontario property owner for a lease of the Ontario Warehouse.

RESD negotiated a lease for the Ontario Warehouse for a term of five-years and two-months for the projected period of July 1, 2022 through August 31, 2027, subject to the landlord's completion of certain landlord improvements set forth in the lease. OES will receive a tenant improvement allowance of \$361,953 for desired OES improvements, which must be fully disbursed in accordance with the conditions in the lease within nine-months of the commencement date or else it is forfeited, and a supplemental tenant improvement allowance of \$603,255 (\$5 per square foot), which if needed, shall be amortized over the term of the lease at 8% per annum interest and payable along with monthly rent.

Staff has reviewed the recommended action pursuant to the California Environmental Quality Act (CEQA) and has determined that it does not constitute a project. Accordingly, no further action is required under CEQA.

Summary of Lease Terms

Lessor: PSIP EBS Francis, LLC, a Delaware Limited Liability Company
(Quinn Johnson, Managing Member)

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Location: 1925 South Grove Avenue in Ontario, CA

Size: Building One with approximately 120,651 square feet of warehouse space, inclusive of approximately 5,639 square feet of mezzanine deck and approximately 3,366 square feet of finished office space

Term: Five-years and two-months

Options: None

Rent: Cost per sq. ft. per month: \$1.63* modified gross
Monthly: \$196,661 (excludes estimated operating expenses)
*High-range for comparable facilities in the Ontario area per the competitive set analysis on file with RESD; any holdover by Lessee at the end of the term will be at 200% of rent cost

Annual Increases: 4%

Prepaid Rent & Security Deposit: Prepaid rent of \$229,237 (to be applied to the first month's rent) and security deposit of \$469,334 are each due upon lease execution

Improvement Costs: Certain landlord improvements to be provided by Lessor; Lessee will receive an allowance of \$361,953 for tenant improvements, which must be fully disbursed within nine-months of the commencement date or else it is forfeited, and a supplemental allowance of \$603,255 (\$5 per square foot), which, if needed, will be amortized over the term of the lease at 8% per annum interest and payable along with monthly rent

Custodial: Provided by Lessee

Maintenance: Certain maintenance provided by Lessor with the cost reimbursed by Lessee through operating expense payments; certain maintenance provided directly by Lessee at its sole cost

Utilities: Provided by Lessee

Insurance: The Certificate of Liability Insurance, as required by the lease, is on file with RESD

Right to Terminate: No right to terminate for convenience or for landlord default during the five-year and two-month term

Parking: Exclusive use of parking areas at premises, adequate for Lessee use

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The lease includes terms that differ from the standard County contract. The non-standard terms include the following:

1. Landlord will indemnify, defend, and hold the County harmless from claims due to the landlord's gross negligence and willful misconduct or any landlord default under the lease.
 - The County standard contract requires the contractor to indemnify, defend, and hold the County harmless from third party claims arising out of the acts, errors, or omissions of any person.
 - Potential Impact: Limiting the indemnification obligation to landlord's gross negligence or willful misconduct and default means that the County may incur costs that cannot be recovered from landlord even if caused by landlord. In addition, such claims would be subject to the limitation of liability in the lease.
2. The County will indemnify, defend, and hold the landlord harmless for claims due to the County's occupancy, the activities of the County and its guests, and any County default under the lease.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to indemnify the landlord, the County could be contractually waiving the protection of sovereign immunity. Claims that may otherwise be barred against the County, could be brought against the landlord and the County would be responsible to defend and reimburse the landlord for costs, expenses, and damages, which could exceed the total contract amount.
3. All unresolved disputes regarding the County's audit of the landlord's operating expenses must be settled by binding arbitration.
 - The County standard contract does not require arbitration.
 - Potential Impact: The lease requires binding arbitration for all unresolved disputes regarding the County's audit of the landlord's operating expenses. Disputes that might otherwise be settled in small claims court would incur arbitration costs that would exceed the costs of a small claims action. Arbitration decisions are not appealable.
4. The lease prohibits an assignee or a subtenant to be a governmental entity.
 - The County standard contract does not contain this restriction.
 - Potential Impact: The County will need to be aware of this restriction and note that any shared use of the space with governmental partners may be deemed a lease violation, which could subject the County to default, termination, and damages.
5. The prevailing party is entitled to recover attorneys' fees and costs.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: If either party institutes any legal proceedings related to the lease, the prevailing party will be entitled to recover reasonable attorneys' fees, which could exceed the total contract amount.
6. The County's remedies are limited in the lease in that the County does not have the right to terminate for convenience or terminate due to landlord default, cannot remedy outstanding landlord defaults, cannot offset against rents, contain statutory waivers related to the security deposit and self-help, and any actions must be filed within one

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year after the cause of action occurred. The County's sole remedy for landlord default is to sue for damages or file a lawsuit for injunctive relief or specific performance, which may be an inadequate remedy for time and costs reasons. Notwithstanding, the landlord's liability is limited to its interest in the building.

- The County standard contract does not include a limitation of liability or a limit on time to bring an action.
 - Potential Impact: The County's limited remedy to sue for damages or file a lawsuit for injunctive relief or specific performance may be inadequate due to time and costs that may be required to obtain a remedy. In addition, any recovery is limited to landlord's interest in the building, meaning that the County may not receive a full recovery. Furthermore, limiting the County's ability to bring a suit to one-year amounts to a waiver of the statute of limitations.
7. The landlord considers all lease related information to be confidential and requests that the County notify landlord prior to release of any such information in response to a public records request.
- The County standard contract does not require the County to maintain the confidentiality of a contractor's information.
 - Potential Impact: The County will need to be aware of prior landlord's requirements, including in response to a Public Records Act request. The County may incur liability from failing to disclose information pursuant to a California Public Records Act request or open public meetings requirements (Brown Act and County Sunshine Ordinance). In addition, the County could be deemed in breach of contract and incur liability to the landlord for disclosure of lease information, regardless of whether the disclosure is intentional or inadvertent, which could exceed the contract amount.
8. The landlord did not agree to include the County's standard Labor Code and prevailing wage language in relation to the improvements performed by landlord within the premises.
- The County standard contract includes language regarding compliance with the Labor Code and prevailing wage and an indemnity to the County in the event of any violations.
 - Potential Impact: In the event of a violation of the applicable laws, the County will not be able to recover against the landlord and could be subject to penalties from the State.

The SNDA contains one non-standard term:

The prevailing party is entitled to recover attorneys' fees and costs.

- The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
- Potential Impact: If either party institutes any legal proceedings related to the lease, the prevailing party will be entitled to recover reasonable attorneys' fees, which could exceed the total contract amount.

RESD and OES recommend approval of the lease and the SNDA for the Ontario Warehouse with PSIP EBS Francis, LLC, including the non-standard terms, because of the limited number of suitable properties and that Ontario Warehouse best meets the programmatic requirements of the department. Approval of the lease will allow OES to comply with emergency response guidelines to increase the County's infrastructure to protect, prevent, mitigate, prepare, and recover from threats and hazards that pose the greatest risk to the County and its communities.

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PROCUREMENT

RESD is requesting the Board approve the use of an alternative procedure in lieu of a Formal RFP as allowed per County Policy 12-02 to lease a building with approximately 120,651 square feet of warehouse and office space located at 1925 South Grove Avenue in Ontario for the Office of Emergency Services for five-years and two-months for the projected period of July 1, 2022 through August 31, 2027, subject to landlord's completion of certain landlord improvement. Policy 12-02 provides that the Board may approve the use of an alternative procedure to the use of a Formal RFP process whenever the Board determines that compliance with the Formal RFP requirements would unreasonably interfere with the financial or programmatic needs of the County or when the use of an alternative procedure would otherwise be in the best interest of the County. CIP request No. 22-082 was approved by the County Administrative Office (CAO). RESD, acting in its approved capacity as the CAO designee to review proposed real property leases under Policy 12-02, completed a competitive analysis of the market and found the proposed lease rate to be competitive and this building best meets the programmatic requirements of the department.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Agnes Cheng, Deputy County Counsel, and Miles Kowalski, Deputy County Counsel, 387-5455) on June 16, 2022; Office of Emergency Services (Daniel Munoz, Deputy Executive Officer) on June 14, 2022; Purchasing (Bruce Cole, Supervising Buyer, 387-2148) on June 14, 2022; Finance (Tom Forster, Administrative Analyst, 387-4635, and Carl Lofton, Administrative Analyst, 387-5404) on June 21, 2022; and County Finance and Administration (Diana Atkeson, Deputy Executive Officer, 387-4376) on June 22, 2022.

(LB: 453-5227)

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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Janice Rutherford Seconded: Col. Paul Cook (Ret.)
Ayes: Col. Paul Cook (Ret.), Janice Rutherford, Dawn Rowe, Joe Baca, Jr.
Absent: Curt Hagman

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: June 28, 2022



cc: RESD- Thompson w/agree
 Contractor- C/O RESD w/agree
 File- w/agree w/attach
LA 07/21/2022