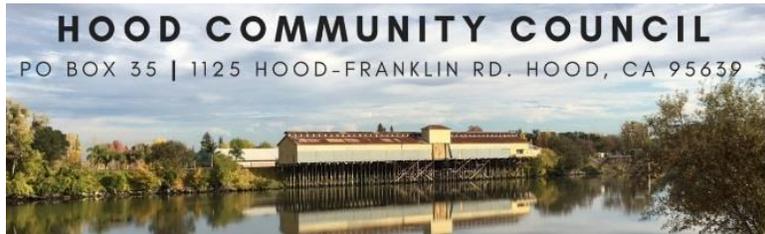




North Delta CARES Action Committee



**LOCKE
MANAGEMENT
ASSOCIATION**



June 19, 2019

Via email

Karla Nemeth
Director
California Department of Water Resources
1416 9th Street, Room 1115-1
Sacramento, CA 95814

Re: Comments on proposed Amendment 1 to the Joint Exercise of Powers Agreement

Dear Director Nemeth,

We thank you for Deputy Director Lippner's prompt response to our letter of May 12, 2019. We write to inform you that, after careful review with an attorney, we are very concerned that DWR's proposed Amendment 1 to the October 26, 2018 Amended and Restated Joint Exercise of Powers Agreement between the Department of Water Resources and the Delta Conveyance Design and Construction Authority ("Joint Exercise of Powers Agreement") does not appear to comply with applicable laws. We ask that you address these concerns before signing Amendment Number 1.

We are informed that the Joint Exercise of Powers Agreement, as a contract for design and construction of a state project, should follow the State Contract Act. The proposed Amendment Number 1 (“Amendment Number 1”) to the Joint Exercise of Powers Agreement arguably does not.

Amendment Number 1 appears to evade the requirements of the State Contract Act, which requires that any contract contain “full, complete, and accurate plans and specifications and estimates of cost” (PCC § 10120.)

Amendment Number 1 only states, “the NOP will identify a proposed project and request input on proposals to address climate change resiliency and protect the State Water Project Delta conveyance from earthquake risk, in consideration of a one tunnel conveyance facility, while meeting the underlying objectives of water supply reliability and ecosystem health.” This does not appear to be an adequate amended project description under PCC § 10120 for an agreement for design and construction of the Delta Conveyance project. We have been advised by attorneys that contracts in violation of the law are void.

Amendment Number 1 also has no description of the environmental planning work to be done under the agreement, only stating in term 2(a):

The Work is anticipated to include production of conceptual engineering report(s), development of conveyance alternatives, geotechnical surveys, development of mitigation measures, power supply design and related coordination, and other field work and technical support as requested in writing by DWR from time to time. Additional ancillary activities related to the Work may also be performed by Authority in coordination with DWR and include stakeholder engagement and facilitation, preliminary right of way services, scheduling and cost controls.

Term 2(a) of Amendment Number 1 does not actually specify the work to be done and appears to allow for arbitrary amendment of the scope of the Preliminary Planning phase of the Joint Exercise of Powers Agreement by the DCO. Further, DWR does not appear to have an agreement for the State Water Project Contractors to reimburse DWR for the work. Amendment Number 1 only states,

The actual amount of Initial DWR Contribution funds expended shall be recovered in full by DWR as soon as practicable but in any event not later than December 15, 2019, from funds authorized to be contributed to DWR by Authority member agencies and other State Water Project contractors for the purpose of funding the Work described herein (“Contractor Contributed Funds”).

As taxpayers, we protest Amendment Number 1 under Water Code section 11455 and other applicable laws.

We are even more concerned by term (5) of Amendment Number 1 which states,

Prior to undertaking preliminary right of way services to which Section 8 of the Agreement or Exhibits D or E would be applicable (“Subject ROW Work”), if any, DWR and Authority shall meet and confer regarding necessary or desirable revisions thereto and no Subject ROW Work will be conducted before revised Exhibits D and E are mutually agreed and approved by the Parties.

Section 8 of the Joint Exercise of Powers Agreement is entitled, “Property Acquisition.” Planning for acquisition of property by DWR and the DCA should not be undertaken until there is a project that has been formally approved by DWR with a Notice of Determination. Doing real estate acquisition activities during stakeholder engagement on project alternatives is predecisional and intimidating to our communities.

If DWR does plan to sign Amendment Number 1, we request that it be reviewed by the Department of General Services, Office of Legal Services prior to signing. Although the Department of General Services reviewed and approved the October 26, 2018 Joint Exercise of Powers Agreement, Amendment Number 1 is a significant change in the scope of that agreement.

DCA’s new purchasing and procurement policy

We are also concerned the DCA’s May 20, 2019 Purchasing and Procurement policy. This is a substantial amendment to the procurement of contracts under the Joint Exercise of Powers Agreement. The issues described in the June 13, 2019 letter by California Water Research have not been addressed.¹ We ask that you submit the May 20, 2019 Purchasing and Procurement policy to the Department of General Services, Office of Legal Services for review and approval as required Term 14 of the Joint Powers Agreement. This must be done prior to signing Amendment Number 1 to ensure that contracts under the Joint Exercise of Powers Agreement are procured in conformance with the State Contract Act (PCC § 10100 et seq), the Mini-Brooks Act (Govt Code § 4525 et seq) and other applicable laws. If you have previously approved the DCA’s May 20, 2019 Purchasing and Procurement policy, please provide us with a copy of that approval, and a copy of the approval from the Department of General Services, Office of Legal Services.

Contract with Jacobs Engineering to prepare EIR

Finally, we are alarmed by your approval of the DCA’s proposal that Jacobs Engineering will prepare an EIR as part of Jacob’s contract for Engineering Design Manager for the DCA’s design of the Delta conveyance. Term 2(b) of the Joint Exercise of Powers

¹ The May 20, 2019 DCA Purchasing and Procurement policy is available at <https://www.dcdca.org/pdf/2019-05-20DCAPurchasingPolicyVF.pdf>.

Agreement indicates that it is the DCA, not DWR, which is directing the engineering design work under the Joint Exercise of Powers Agreement. That term states:

From time to time, DWR may request the Authority make changes in the Specifications and/or incorporate additional features or elements into the Conveyance Project, and such changes, additional features or elements shall become a part of the Conveyance Project for purposes of this Agreement upon, but only upon, written acceptance of responsibility therefore by the Authority, which shall not be unreasonably withheld.

The suspended term 2(a) of the Joint Exercise of Powers Agreement also states that it is the DCA which has review of the 30%, 70%, and 100% design packages prepared by Jacobs, and that the DCA “at its discretion, may present” the design packages to DWR. It thus appears that under the Joint Exercise of Powers Agreement, that the DCA, not DWR, is designing the Delta conveyance project.

Term 2 of the Joint Exercise of Powers Agreement does not appear to be in conformance with section 10227 of the Public Contract Code, which states

Every contract shall provide that the department may make changes in the plans and specifications pursuant to this part.

Term 2 also appears to not be in conformance with the requirement in the Central Valley Project Act that DWR design any works that will be constructed under the Act. (Wat. Code § 11551.)

Given that the DCA, not DWR, is designing and constructing the Delta conveyance project in the Joint Exercise of Powers Agreement, there is a conflict between the engineering design work by Jacobs for the DCA and the preparation of an EIR with DWR as the lead agency. We believe it would be prejudicial to the CEQA process for the EIR to be prepared by a contractor with such a conflict of interest. We therefore request a full copy of the contract with Jacobs Engineering for review, together with proposed amendments, prior to execution of the amendment to the contract.

Thank you for your time in reviewing and responding to these comments.

Sincerely,

A handwritten signature in blue ink that reads "Barbara Daly". The signature is written in a cursive style.

Barbara Daly
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Kenneth Bogdan, Office of Chief Counsel, Department of Water Resources

Kathryn Mallon, Executive Director, Delta Conveyance Design and Construction Authority

The Honorable Wade Crowfoot, Secretary of Natural Resources

Thomas Gibson, Deputy Secretary and Special Counsel for Water, Natural Resources Agency

Delta Counties Coalition

City of Stockton

Central Delta Water Agency

South Delta Water Agency

Local Agencies of the North Delta

Save the California Delta Alliance