

The Metropolitan Water District of Southern California

Agenda

The mission of the Metropolitan Water District of Southern California is to provide its service area with adequate and reliable supplies of high-quality water to meet present and future needs in an environmentally and economically responsible way.

L&C Committee

N. Sutley, Chair
J. Garza, Vice Chair
M. Camacho
G. Cordero
L. D. Dick
C. Kurtz
T. McCoy
C. Miller
G. Peterson
M. Ramos
H. Repenning
K. Sekel

Legal and Claims Committee - Final

Meeting with Board of Directors *

March 13, 2023

12:00 p.m.

**Monday, March 13, 2023
Meeting Schedule**

**09:30 a.m. EOT
11:00 a.m. LRAC
11:30 a.m. Break
12:00 p.m. LC
12:30 p.m. FAIRP
02:00 p.m. EOP**

Agendas, live streaming, meeting schedules, and other board materials are available here: <https://mwdh2o.legistar.com/Calendar.aspx>. A listen only phone line is available at 1-877-853-5257; enter meeting ID: 862 4397 5848. Members of the public may present their comments to the Board or a Committee on matters within their jurisdiction as listed on the agenda via in-person or teleconference. To participate via teleconference (833) 548-0276 and enter meeting ID: 815 2066 4276.

MWD Headquarters Building - 700 N. Alameda Street - Los Angeles, CA 90012

* The Metropolitan Water District's meeting of this Committee is noticed as a joint committee meeting with the Board of Directors for the purpose of compliance with the Brown Act. Members of the Board who are not assigned to this Committee may participate as members of the Board, whether or not a quorum of the Board is present. In order to preserve the function of the committee as advisory to the Board, members of the Board who are not assigned to this Committee will not vote on matters before this Committee.

1. **Opportunity for members of the public to address the committee on matters within the committee's jurisdiction (As required by Gov. Code Section 54954.3(a))**
2. **Opportunity for Directors who are not members of the committee to address the committee on matters within the committee's jurisdiction**
3. **MANAGEMENT REPORTS**
 - a. General Counsel's report of monthly activities [21-2008](#)

Attachments: [03142023 LC 3a Report](#)

**** CONSENT CALENDAR ITEMS -- ACTION ****

4. **CONSENT CALENDAR OTHER ITEMS - ACTION**

- A. Approval of the Minutes of the Legal and Claims Committee for February 13, 2023 (Copies have been submitted to each Director, Any additions, corrections, or omissions) [21-2005](#)

Attachments: [03142023 LC \(LC 02132023\) minutes](#)

5. CONSENT CALENDAR ITEMS - ACTION

- 7-13 Authorize an increase in the maximum amount payable under contract with Burke, Williams & Sorensen, LLP for legal services related to general real estate and leasing law issues by \$100,000 to a maximum amount payable of \$200,000; the General Manager has determined that the proposed action is exempt or otherwise not subject to CEQA [21-1974](#)

Attachments: [03142023 LC 7-13 B-L](#)
[03132023 LC 7-13 Presentation](#)

- 7-14 Authorize increase of \$100,000, to a maximum amount payable of \$400,000, for existing General Counsel contract with Olson Remcho LLP to provide general government law advice related to the Political Reform Act, the Fair Political Practices Commission regulations, conflict of interest law and other legislative and ethics matters; the General Manager has determined the proposed action is exempt or otherwise not subject to CEQA [21-1975](#)

Attachments: [03142023 LC 7-14 B-L](#)
[03132023 LC 7-14 Presentation](#)

- 7-15 Approve amendments to the Metropolitan Water District Administrative Code to provide for the implementation of new legislation authorizing the use of alternative project delivery methods; adopt an organizational conflict-of-interest policy governing the solicitation of a design-build or progressive design-build project; and authorize an increase in the maximum amount payable under contract with Hanson Bridgett LLP, for legal services related to implementation of new legislation, by \$150,000 for an amount not to exceed \$250,000; the General Manager has determined the proposed action is exempt or otherwise not subject to CEQA [21-1976](#)

Attachments: [03142023 LC 7-15 B-L](#)
[03132023 LC 7-15 Presentation](#)

7-16 Report on litigation in Darren A. Reese v. Metropolitan Water District of Southern California, Riverside County Superior Court Case No. CVPS2204312; and authorize increase in maximum amount payable under contract for legal services with Seyfarth Shaw LLP in the amount of \$300,000 for a total amount not to exceed \$400,000; the General Manager has determined that the proposed action is exempt or otherwise not subject to CEQA. [Conference with legal counsel – existing litigation; to be heard in closed session pursuant to Gov. Code Section 54956.9(d)(2)]. [UPDATED SUBJECT]

[21-2026](#)

**** END OF CONSENT CALENDAR ITEMS ****

6. OTHER BOARD ITEMS - ACTION

NONE

7. BOARD INFORMATION ITEMS

NONE

8. COMMITTEE ITEMS

NONE

9. FOLLOW-UP ITEMS

NONE

10. FUTURE AGENDA ITEMS

11. ADJOURNMENT

NOTE: This committee reviews items and makes a recommendation for final action to the full Board of Directors. Final action will be taken by the Board of Directors. Agendas for the meeting of the Board of Directors may be obtained from the Board Executive Secretary. This committee will not take any final action that is binding on the Board, even when a quorum of the Board is present.

Writings relating to open session agenda items distributed to Directors less than 72 hours prior to a regular meeting are available for public inspection at Metropolitan's Headquarters Building and on Metropolitan's Web site <http://www.mwdh2o.com>.

Requests for a disability related modification or accommodation, including auxiliary aids or services, in order to attend or participate in a meeting should be made to the Board Executive Secretary in advance of the meeting to ensure availability of the requested service or accommodation.



Metropolitan Cases

Rick Faith v. Metropolitan, All Persons Interested, etc. (Los Angeles Superior Court)

On October 14, 2022, Rick Faith, an individual property owner from Orange County, filed a reverse validation action alleging Metropolitan’s ad valorem property taxes for fiscal year 2022/23 are invalid pursuant to the constitutional provisions added by Propositions 13, 26, and 218. Plaintiff alleges Metropolitan does not have authority to collect the taxes to pay the State Water Project expenses.

A validation or reverse validation action requires a validation summons be issued and published, as approved by the court. On November 17, plaintiff sought approval of its proposed validation summons for publication via an *ex parte* application; Metropolitan successfully opposed the issuance. Following plaintiff’s failure to amend his complaint to allege any causes of action other than a reverse validation, plaintiff agreed to dismiss the case.

On February 6, 2023, plaintiff filed a Request for Dismissal without prejudice, which the court must sign.

Matters Received

<u>Category</u>	<u>Received</u>	<u>Description</u>	
Government Code Claims	2	Claims relating to accidents involving MWD vehicles	
Subpoenas	1	Subpoena for employee deferred compensation records for a matter unrelated to MWD	
Requests Pursuant to the Public Records Act	12	<u>Requestor</u>	<u>Documents Requested</u>
		CivilGrid	Drawings of any MWD underground facilities near project in the city of Oxnard
		Deltek	Contact and bid tabulation for Request for Qualifications for Asset Management and Asset Reliability Services
		Jacobs Engineering Group	Information on location and depth of water line near Southern California Gas Company project along Bristol Street
		Oracle Consulting Services	Documents relating to the Request for Proposal for Peoplesoft HCM Modules Implementation Services



<u>Requestor</u>	<u>Documents Requested</u>
Pasadena Civility (3 requests)	(1) List of turf removal rebate applications submitted in Pasadena from January 2021-December 2022; (2) list of turf removal rebate applications submitted in Pasadena from January 2014-December 2020 for public agencies; HOA common areas, institutional, and or multiplex; and (3) copies of certain turf removal rebate applications for properties in Pasadena
Richard Brady & Associates	Contract documents for Mills and Jensen Water Treatment Plants Finished Water Reservoirs Rehabilitation Preliminary Design Services
SmartProcure	Purchase order data including purchase order number, purchase order date, line item details, line item quantity, line item price, vendor information from 11/18/2022 to current
University of California, Los Angeles - Student and Professor (2 requests)	(1) GIS files on member agency boundaries and LRP project sites, and (2) data on LRP projects awarded to member agencies
Varigard	Bid tabulation or other documents relating to evaluation of the bids submitted in response to the Request for Bids for Airpura UV600 Air Purifier



PLEASE NOTE

- ADDITIONS ONLY IN THE FOLLOWING TWO TABLES WILL BE SHOWN IN RED.
- ANY CHANGE TO THE *OUTSIDE COUNSEL AGREEMENTS* TABLE WILL BE SHOWN IN REDLINE FORM (I.E., ADDITIONS, REVISIONS, DELETIONS).



Bay-Delta and SWP Litigation

Consolidated DCP Revenue Bond Validation Action and CEQA Case

Sierra Club, et al. v. California Department of Water Resources (CEQA, designated as lead case)

DWR v. All Persons Interested (Validation)

Sacramento County Superior Ct.
 (Judge Kenneth C. Mennemeier)

- **Validation Action**

- Metropolitan, Mojave Water Agency, Coachella Valley Water District, and Santa Clarita Valley Water Agency have filed answers in support
- Kern County Water Agency, Tulare Lake Basin Water Storage District, Oak Flat Water District, County of Kings, Kern Member Units & Dudley Ridge Water District, and City of Yuba City filed answers in opposition
- North Coast Rivers Alliance et al., Howard Jarvis Taxpayers Association, Sierra Club et al., County of Sacramento & Sacramento County Water Agency, CWIN et al., Clarksburg Fire Protection District, Delta Legacy Communities, Inc, and South Delta Water Agency & Central Delta Water Agency have filed answers in opposition
- Case ordered consolidated with the DCP Revenue Bond CEQA Case for pre-trial and trial purposes and assigned to Judge Earl for all purposes
- DWR’s motions for summary judgment re CEQA affirmative defenses granted; cross-motions by opponents denied
- Dec. 9, 2022 DWR’s motion for summary adjudication of Delta Reform Act and public trust doctrine affirmative defenses granted; NCRA’s motion for summary judgment re same denied
- Trial on the merits set for May 15-18, 2023

- **CEQA Case**

- Sierra Club, Center for Biological Diversity, Planning and Conservation League, Restore the Delta, and Friends of Stone Lakes National Wildlife Refuge filed a standalone CEQA lawsuit challenging DWR’s adoption of the bond resolutions
- Alleges DWR violated CEQA by adopting bond resolutions before certifying a Final EIR for the Delta Conveyance Project
- Cases ordered consolidated for all purposes
- DWR’s motion for summary judgment granted; Sierra Club’s motion denied



Subject	Status
<p>SWP-CVP 2019 BiOp Cases</p> <p><i>Pacific Coast Fed'n of Fishermen's Ass'ns, et al. v. Raimondo, et al. (PCFFA)</i></p> <p><i>Calif. Natural Resources Agency, et al. v. Raimondo, et al. (CNRA)</i></p> <p>Federal District Court, Eastern Dist. of California, Fresno Division (Judge Thurston)</p>	<ul style="list-style-type: none"> • SWC intervened in both <i>PCFFA</i> and <i>CNRA</i> cases • Federal defendants reinitiated consultation on Oct 1, 2021 • <u>February 24, 2023 court approved the 2023 Interim Operations Plan proposed by federal defendants and state plaintiffs, denied all alternative proposed operations and extended the stay until December 31, 2023</u>
<p>CESA Incidental Take Permit Cases</p> <p>Coordinated Case Name <i>CDWR Water Operations Cases, JCCP 5117</i> (Coordination Trial Judge Gevercer)</p> <p><i>Metropolitan & Mojave Water Agency v. Calif. Dept. of Fish & Wildlife, et al. (CESA/CEQA/Breach of Contract)</i></p> <p><i>State Water Contractors & Kern County Water Agency v. Calif. Dept. of Fish & Wildlife, et al. (CESA/CEQA)</i></p> <p><i>Tehama-Colusa Canal Auth., et al. v. Calif. Dept. of Water Resources (CEQA)</i></p> <p><i>San Bernardino Valley Municipal Water Dist. v. Calif. Dept. of Water Resources, et al. (CEQA/CESA/ Breach of Contract/Takings)</i></p> <p><i>Sierra Club, et al. v. Calif. Dept. of Water Resources (CEQA/Delta Reform Act/Public Trust)</i></p> <p><i>North Coast Rivers Alliance, et al. v. Calif. Dept. of Water Resources (CEQA/Delta Reform Act/Public Trust)</i></p> <p><i>Central Delta Water Agency, et. al. v. Calif. Dept. of Water Resources (CEQA/Delta Reform Act/Public Trust/ Delta Protection Acts/Area of Origin)</i></p> <p><i>San Francisco Baykeeper, et al. v. Calif. Dept. of Water Resources, et al. (CEQA/CESA)</i></p>	<ul style="list-style-type: none"> • All 8 cases ordered coordinated in Sacramento County Superior Court • Stay on discovery issued until coordination trial judge orders otherwise • All four Fresno cases transferred to Sacramento to be heard with the four other coordinated cases • Certified administrative records lodged March 4, 2022 • State Water Contractors et al. granted leave to intervene in Sierra Club, North Coast Rivers Alliance, Central Delta Water Agency, and San Francisco Baykeeper cases by stipulation • SWC, et al. granted leave to intervene as respondents in <i>Tehama-Colusa Canal Auth., et al. v. Calif. Dept. of Water Resources</i> CEQA case • Feb. <u>24</u>, 2023 hearing on SWC's renewed motion to augment the administrative records



<p>CDWR Environmental Impact Cases Sacramento Superior Ct. Case No. JCCP 4942, 3d DCA Case No. C091771 (20 Coordinated Cases)</p> <p>Validation Action <i>DWR v. All Persons Interested</i></p> <p>CEQA 17 cases</p> <p>CESA/Incidental Take Permit 2 cases</p> <p>(Judge Arguelles)</p>	<ul style="list-style-type: none"> • Cases dismissed after DWR rescinded project approval, bond resolutions, decertified the EIR, and CDFW rescinded the CESA incidental take permit • January 10, 2020 – Nine motions for attorneys’ fees and costs denied in their entirety • Parties have appealed attorneys’ fees and costs rulings • May 11, 2022, court of appeal reversed the trial court’s denial of attorney fees and costs in an unpublished opinion • Opinion ordered published • Coordinated cases remitted to trial court for re-hearing of fee motions consistent with the court of appeal’s opinion • April 28, 2023 re-hearing on fee motions
<p>COA Addendum/ No-Harm Agreement</p> <p><i>North Coast Rivers Alliance v. DWR</i> Sacramento County Superior Ct. (Judge Gevercer)</p>	<ul style="list-style-type: none"> • Plaintiffs allege violations of CEQA, Delta Reform Act & public trust doctrine • USBR Statement of Non-Waiver of Sovereign Immunity filed September 2019 • Westlands Water District and North Delta Water Agency granted leave to intervene • Metropolitan & SWC monitoring • Deadline to prepare administrative record extended to Nov. 18, 2022
<p>Delta Plan Amendments and Program EIR 4 Consolidated Cases Sacramento County Superior Ct. (Judge Gevercer)</p> <p><i>North Coast Rivers Alliance, et al. v. Delta Stewardship Council</i> (lead case)</p> <p><i>Central Delta Water Agency, et al. v. Delta Stewardship Council</i></p> <p><i>Friends of the River, et al. v. Delta Stewardship Council</i></p> <p><i>California Water Impact Network, et al. v. Delta Stewardship Council</i></p>	<ul style="list-style-type: none"> • Cases challenge, among other things, the Delta Plan Updates recommending dual conveyance as the best means to update the SWP Delta conveyance infrastructure to further the coequal goals • Allegations relating to “Delta pool” water rights theory and public trust doctrine raise concerns for SWP and CVP water supplies • Cases consolidated for pre-trial and trial under <i>North Coast Rivers Alliance v. Delta Stewardship Council</i> • SWC granted leave to intervene • Metropolitan supports SWC • Nov. 7, 2022 court ruled in favor of Delta Stewardship Council on all claims • Orders denying all claims and final judgments entered Nov. 22, 2022 • Notice of appeal filed in <i>North Coast Rivers Alliance, et al. case</i>



	<ul style="list-style-type: none"> • <u>Parties in the other three cases settled with the Delta Stewardship Council</u>
<p>SWP Contract Extension Validation Action Court of Appeal for the Third App. Dist. Case No. C096316 <i>DWR v. All Persons Interested in the Matter, etc.</i></p>	<ul style="list-style-type: none"> • DWR seeks a judgment that the Contract Extension amendments to the State Water Contracts are lawful • Metropolitan and 7 other SWCs filed answers in support of validity to become parties • Jan. 5-7, 2022 Hearing on the merits held with CEQA cases, below • Final statement of decision in DWR’s favor filed March 9, 2022 • Final judgment entered and served • C-WIN et al., County of San Joaquin et al. and North Coast Rivers Alliance et al. filed notices of appeal • Validation and CEQA cases consolidated on appeal • Briefing schedule set by stipulation with estimated completion in April or May 2023
<p>SWP Contract Extension CEQA Cases Court of Appeal for the Third App. Dist. Case Nos. C096384 & C096304 <i>North Coast Rivers Alliance, et al. v. DWR</i> <i>Planning & Conservation League, et al. v. DWR</i></p>	<ul style="list-style-type: none"> • Petitions for writ of mandate alleging CEQA and Delta Reform Act violations filed on January 8 & 10, 2019 • Deemed related to DWR’s Contract Extension Validation Action and assigned to Judge Culhane • Administrative Record completed • DWR filed its answers on September 28, 2020 • Metropolitan, Kern County Water Agency and Coachella Valley Water District have intervened and filed answers in the two CEQA cases • Final statement of decision in DWR’s favor denying the writs of mandate filed March 9, 2022 • Final judgments entered and served • North Coast Rivers Alliance et al. and PCL et al. filed notices of appeal • Appeals consolidated with the validation action above



<p>Delta Conveyance Project Soil Exploration Cases</p> <p><i>Central Delta Water Agency, et al. v. DWR</i> Sacramento County Superior Ct. (Judge Chang)</p> <p><i>Central Delta Water Agency, et al. v. DWR (II)</i>, Sacramento County Super. Ct. (Judge Acquisto)</p>	<ul style="list-style-type: none"> • Original case filed August 10, 2020; new case challenging the second addendum to the CEQA document filed Aug. 1, 2022 • Plaintiffs Central Delta Water Agency, South Delta Water Agency and Local Agencies of the North Delta • One cause of action alleging that DWR's adoption of an Initial Study/Mitigated Negative Declaration (IS/MND) for soil explorations needed for the Delta Conveyance Project violates CEQA • March 24, 2021 Second Amended Petition filed to add allegation that DWR's addendum re changes in locations and depths of certain borings violates CEQA • DWR's petition to add the 2020 CEQA case to the <i>Department of Water Resources Cases</i>, JCCP 4594, San Joaquin County Superior Court denied • Hearing on the merits held Oct.13, 2022 • Dec. 2, 2022 ruling on the merits granting the petition with respect to two mitigation measures and denying on all other grounds • Dec. 23, 2022 court order directing DWR to address the two mitigation measures within 60 days while declining to order DWR to vacate the IS/MND • Jan. 25, 2023 DWR filed the return on the writ with the amended mitigation measures and moved to discharge the writ
<p>Water Management Tools Contract Amendment</p> <p><i>California Water Impact Network et al. v. DWR</i> Sacramento County Superior Ct. (Judge Aquisto)</p> <p><i>North Coast Rivers Alliance, et al. v. DWR</i> Sacramento County Super. Ct. (Judge Aquisto)</p>	<ul style="list-style-type: none"> • Filed September 28, 2020 • CWIN and Aqualliance allege one cause of action for violation of CEQA • NCRA et al. allege four causes of action for violations of CEQA, the Delta Reform Act, Public Trust Doctrine and seeking declaratory relief • SWC motion to intervene in both cases granted • Dec. 20, 2022 DWR filed notice of certification of the administrative record and filed answers in both cases



San Diego County Water Authority v. Metropolitan, et al.

Cases	Date	Status
2010, 2012	Aug. 13-14, 2020	Final judgment and writ issued. Transmitted to the Board on August 17.
	Sept. 11	Metropolitan filed notice of appeal of judgment and writ.
	Jan. 13, 2021	Court issued order finding SDCWA is the prevailing party on the Exchange Agreement, entitled to attorneys' fees and costs under the contract.
	Feb. 10	Court issued order awarding SDCWA statutory costs, granting SDCWA's and denying Metropolitan's related motions.
	Feb. 16	Per SDCWA's request, Metropolitan paid contract damages in 2010-2012 cases judgment and interest. Metropolitan made same payment in Feb. 2019, which SDCWA rejected.
	Feb. 25	Metropolitan filed notice of appeal of Jan. 13 (prevailing party on Exchange Agreement) and Feb. 10 (statutory costs) orders.
	Sept. 21	Court of Appeal issued opinion on Metropolitan's appeal regarding final judgment and writ, holding: (1) the court's 2017 decision invalidating allocation of Water Stewardship Rate costs to transportation in the Exchange Agreement price and wheeling rate applied not only to 2011-2014, but also 2015 forward; (2) no relief is required to cure the judgment's omission of the court's 2017 decision that allocation of State Water Project costs to transportation is lawful; and (3) the writ is proper and applies to 2015 forward.
	Mar. 17, 2022	Court of Appeal unpublished decision affirming orders determining SDCWA is the prevailing party in the Exchange Agreement and statutory costs.
	Mar. 21	Metropolitan paid SDCWA \$14,296,864.99 for attorneys' fees and \$352,247.79 for costs, including interest.
	July 27	Metropolitan paid SDCWA \$411,888.36 for attorneys' fees on appeals of post-remand orders.
2014, 2016	Aug. 28, 2020	SDCWA served first amended (2014) and second amended (2016) petitions/complaints.
	Sept. 28	Metropolitan filed demurrers and motions to strike portions of the amended petitions/complaints.



Cases	Date	Status
2014, 2016 (cont.)	Sept. 28-29	Member agencies City of Torrance, Eastern Municipal Water District, Foothill Municipal Water District, Las Virgenes Municipal Water District, Three Valleys Municipal Water District, Municipal Water District of Orange County, West Basin Municipal Water District, and Western Municipal Water District filed joinders to the demurrers and motions to strike.
	Feb. 16, 2021	Court issued order denying Metropolitan’s demurrers and motions to strike, allowing SDCWA to retain contested allegations in amended petitions/complaints.
	March 22	Metropolitan filed answers to the amended petitions/complaints and cross-complaints against SDCWA for declaratory relief and reformation, in the 2014, 2016 cases.
	March 22-23	Member agencies City of Torrance, Eastern Municipal Water District, Foothill Municipal Water District, Las Virgenes Municipal Water District, Three Valleys Municipal Water District, Municipal Water District of Orange County, West Basin Municipal Water District, and Western Municipal Water District filed answers to the amended petitions/complaints in the 2014, 2016 cases.
	April 23	SDCWA filed answers to Metropolitan’s cross-complaints.
	Sept. 30	Based on the Court of Appeal’s Sept. 21 opinion (described above), and the Board’s Sept. 28 authorization, Metropolitan paid \$35,871,153.70 to SDCWA for 2015-2017 Water Stewardship Rate charges under the Exchange Agreement and statutory interest.
2017	July 23, 2020	Dismissal without prejudice entered.
2018	July 28, 2020	Parties filed a stipulation and application to designate the case complex and related to the 2010-2017 cases, and to assign the case to Judge Massullo’s court.
	Nov. 13	Court ordered case complex and assigned to Judge Massullo’s court.
	April 21, 2021	SDCWA filed second amended petition/complaint.
	May 25	Metropolitan filed motion to strike portions of the second amended petition/complaint.
	May 25-26	Member agencies City of Torrance, Eastern Municipal Water District, Foothill Municipal Water District, Las Virgenes Municipal Water District, Three Valleys Municipal Water District, Municipal Water District of Orange County, West Basin Municipal Water District, and Western Municipal Water District filed joinders to the motion to strike.



Cases	Date	Status
2018 (cont.)	July 19	Court issued order denying Metropolitan’s motion to strike portions of the second amended petition/complaint.
	July 29	Metropolitan filed answer to the second amended petition/complaint and cross-complaint against SDCWA for declaratory relief and reformation.
	July 29	Member agencies City of Torrance, Eastern Municipal Water District, Foothill Municipal Water District, Las Virgenes Municipal Water District, Three Valleys Municipal Water District, Municipal Water District of Orange County, West Basin Municipal Water District, and Western Municipal Water District filed answers to the second amended petition/complaint.
	Aug. 31	SDCWA filed answer to Metropolitan’s cross-complaint.
	April 11, 2022	Court entered order of voluntary dismissal of parties’ WaterFix claims and cross-claims.
2014, 2016, 2018	June 11, 2021	Deposition of non-party witness.
	Aug. 25	Hearing on Metropolitan’s motion for further protective order regarding deposition of non-party witness.
	Aug. 25	Court issued order consolidating the 2014, 2016, and 2018 cases for all purposes, including trial.
	Aug. 30	Court issued order granting Metropolitan’s motion for a further protective order regarding deposition of non-party witness.
	Aug. 31	SDCWA filed consolidated answer to Metropolitan’s cross-complaints in the 2014, 2016, and 2018 cases.
	Oct. 27	Parties submitted to the court a joint stipulation and proposed order staying discovery through Dec. 8 and resetting pre-trial deadlines.
	Oct. 29	Court issued order staying discovery through Dec. 8 and resetting pre-trial deadlines, while the parties discuss the prospect of settling some or all remaining claims and crossclaims.
	Jan. 12, 2022	Case Management Conference. Court ordered a 35-day case stay to allow the parties to focus on settlement negotiations, with weekly written check-ins with the court; and directed the parties to meet and confer regarding discovery and deadlines.
	Feb. 22	Court issued order resetting pre-trial deadlines as proposed by the parties.
	Feb. 22	Metropolitan and SDCWA each filed motions for summary adjudication.



Cases	Date	Status
2014, 2016, 2018 (cont.)	April 13	Hearing on Metropolitan’s and SDCWA’s motions for summary adjudication.
	April 18	Parties filed supplemental briefs regarding their respective motions for summary adjudication, as directed by the court.
	April 18	Court issued order resetting pre-trial deadlines as proposed by the parties.
	April 29	Parties filed pre-trial briefs.
	April 29	Metropolitan filed motions in limine.
	May 4	Court issued order granting Metropolitan’s motion for summary adjudication on cross-claim for declaratory relief that the conveyance facility owner, Metropolitan, determines fair compensation, including any offsetting benefits; and denying its motion on certain other cross-claims and an affirmative defense.
	May 11	Court issued order granting SDCWA’s motion for summary adjudication on cross-claim for declaratory relief in the 2018 case regarding lawfulness of the Water Stewardship Rate’s inclusion in the wheeling rate and transportation rates in 2019-2020; certain cross-claims and affirmative defenses on the ground that Metropolitan has a duty to charge no more than fair compensation, which includes reasonable credit for any offsetting benefits, with the court also stating that whether that duty arose and whether Metropolitan breached that duty are issues to be resolved at trial; affirmative defenses that SDCWA’s claims are untimely and SDCWA has not satisfied claims presentation requirements; affirmative defense in the 2018 case that SDCWA has not satisfied contract dispute resolution requirements; claim, cross-claims, and affirmative defenses regarding applicability of Proposition 26, finding that Proposition 26 applies to Metropolitan’s rates and charges, with the court also stating that whether Metropolitan violated Proposition 26 is a separate issue; and cross-claims and affirmative defenses regarding applicability of Government Code section 54999.7, finding that section 54999.7 applies to Metropolitan’s rates. Court denied SDCWA’s motion on certain other cross-claims and affirmative defenses.
	May 13	Pre-trial conference; court denied Metropolitan’s motions in limine.
	May 16	Court issued order setting post-trial brief deadline and closing arguments.
	May 16-27	Trial occurred but did not conclude.
	May 23, June 21	SDCWA filed motions in limine.



Cases	Date	Status
2014, 2016, 2018 (cont.)	May 26, June 24	Court denied SDCWA's motions in limine.
	June 3, June 24, July 1	Trial continued, concluding on July 1.
	June 24	SDCWA filed motion for partial judgment.
	July 15	Metropolitan filed opposition to motion for partial judgment.
	Aug. 19	Post-trial briefs filed.
	Sept. 14	Court issued order granting in part and denying in part SDCWA's motion for partial judgment (granting motion as to Metropolitan's dispute resolution, waiver, and consent defenses; denying motion as to Metropolitan's reformation cross-claims and mistake of fact and law defenses; and deferring ruling on Metropolitan's cost causation cross-claim).
	Sept. 21	Metropolitan filed response to order granting in part and denying in part SDCWA's motion for partial judgment (requesting deletion of Background section portion relying on pleading allegations).
	Sept. 22	SDCWA filed objection to Metropolitan's response to order granting in part and denying in part SDCWA's motion for partial judgment.
	Sept. 27	Post-trial closing arguments.
	Oct. 20	Court issued order that it will rule on SDCWA's motion for partial judgment as to Metropolitan's cost causation cross-claim simultaneously with the trial statement of decision.
	Dec. 16	The parties' filed proposed trial statements of decision.
	Dec. 21	SDCWA filed the parties' stipulation and proposed order for judgment on Water Stewardship Rate claims for 2015-2020.
	Dec. 27	Court entered order for judgment on Water Stewardship Rate claims for 2015-2020 as proposed by the parties.
All Cases	April 15, 2021	Case Management Conference on 2010-2018 cases. Court set trial in 2014, 2016, and 2018 cases on May 16-27, 2022.
	April 27	SDCWA served notice of deposition of non-party witness.
	May 13-14	Metropolitan filed motions to quash and for protective order regarding deposition of non-party witness.
	June 4	Ruling on motions to quash and for protective order.



Outside Counsel Agreements				
Firm Name	Matter Name	Agreement No.	Effective Date	Contract Maximum
Andrade Gonzalez LLP	MWD v. DWR, CDFW and CDNR Incidental Take Permit (ITP) CESA/CEQA/Contract Litigation	185894	07/20	\$250,000
Aleshire & Wynder	Oil, Mineral and Gas Leasing	174613	08/18	\$50,000
Atkinson Andelson Loya Ruud & Romo	Employee Relations	59302	04/04	\$1,214,517
	Delta Conveyance Project Bond Validation-CEQA Litigation	185899	09/21	\$100,000 <u>\$250,000</u>
	MWD Drone and Airspace Issues	193452	08/20	\$50,000
	Equal Employee Opportunity Commission Charge	200462	03/21	\$20,000
	DFEH Charge (DFEH Number 202102-12621316)	201882	07/01/21	\$25,000
	AFSCME Local 1902 in Grievance No. 1906G020 (CSU Meal Period)	201883	07/12/21	\$30,000
	AFSCME Local 1902 v. MWD, PERB Case No. LA-CE-1438-M	201889	09/15/21	\$20,000
	MWD MOU Negotiations**	201893	10/05/21	\$100,000
	DFEH Charge (DFEH Number 202109-14694608)	203460	02/22	\$15,000
Best, Best & Krieger	Navajo Nation v. U.S. Department of the Interior, et al.	54332	05/03	\$185,000
	Bay-Delta Conservation Plan/Delta Conveyance Project (with SWCs)	170697	08/17	\$500,000
	Environmental Compliance Issues	185888	05/20	\$100,000
	Pure Water Southern California	207966	11/22	\$100,000
Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP	FCC and Communications Matters	110227	11/10	\$100,000
Brown White & Osborn LLP	HR Matter	203450	03/22	\$50,000



Firm Name	Matter Name	Agreement No.	Effective Date	Contract Maximum
Buchalter, a Professional Corp.	Union Pacific Industry Track Agreement	193464	12/07/20	\$50,000
Burke, Williams & Sorensen, LLP	Real Property – General	180192	01/19	\$100,000
	Labor and Employment Matters	180207	04/19	\$50,000
	General Real Estate Matters	180209	08/19	\$100,000
	Rancho Cucamonga Condemnation Actions (Grade Separation Project)	207970	05/22	\$100,000
Law Office of Alexis S.M. Chiu*	Bond Counsel	200468	07/21	N/A
Cislo & Thomas LLP	Intellectual Property	170703	08/17	\$75,000
Cummins & White, LLP	Board Advice	207941	05/22	\$10,000
Curis Bartling P.C.*	Bond Counsel	200470	07/21	N/A
Duane Morris LLP	SWRCB Curtailment Process	138005	09/14	\$615,422
Duncan, Weinberg, Genzer & Pembroke PC	Power Issues	6255	09/95	\$3,175,000
Ellison, Schneider, Harris & Donlan	Colorado River Issues	69374	09/05	\$175,000
	Issues re SWRCB	84457	06/07	\$200,000
Greines, Martin, Stein & Richland LLP	SDCWA v. MWD	207958	10/22	\$100,000
	Colorado River Matters	207965	11/22	\$100,000
Haden Law Office	Real Property Matters re Agricultural Land	180194	01/19	\$50,000



Firm Name	Matter Name	Agreement No.	Effective Date	Contract Maximum
Hanson Bridgett LLP	SDCWA v. MWD	124103	03/12	\$1,100,000
	Finance Advice	158024	12/16	\$100,000
	Deferred Compensation/HR	170706	10/17	\$500,000
	Tax Issues	180200	04/19	\$50,000
	Alternative Project Delivery (ADP)	207961	10/22	\$100,000
	Faith v. MWD	207963	10/22	\$100,000
Hausman & Sosa, LLP	MOU Hearing Officer Appeal	201892	09/21	\$95,000
	MOU Hearing Officer Appeal	207943	05/22	\$25,000
	MOU Hearing Officer Appeal	207949	07/22	\$25,000
Hawkins Delafield & Wood LLP*	Bond Counsel	193469	07/21	N/A
Horvitz & Levy	SDCWA v. MWD	124100	02/12	\$1,250,000
	General Appellate Advice	146616	12/15	\$100,000
	Colorado River	203464	04/22	\$100,000
<u>Innovative Legal Services, P.C.</u>	<u>Employment Matter</u>	<u>211915</u>	<u>01/19/23</u>	<u>\$100,000</u>
Internet Law Center	Cybersecurity and Privacy Advice and Representation	200478	04/13/21	\$100,000
	Systems Integrated, LLC v. MWD	201875	05/17/21	\$65,000
Amira Jackmon, Attorney at Law*	Bond Counsel	200464	07/21	N/A
Jackson Lewis P.C.	Employment: Department of Labor Office of Contract Compliance (OFCCP)	137992	02/14	\$45,000
Jones Hall, A Professional Law Corporation*	Bond Counsel	200465	07/21	N/A
Kegel, Tobin & Truce	Workers' Compensation	180206	06/19	\$250,000
Kutak Rock LLP	Delta Islands Land Management	207959	10/22	\$10,000

Date of Report: March 1, 2023



Firm Name	Matter Name	Agreement No.	Effective Date	Contract Maximum
Liebert Cassidy Whitmore	Labor and Employment	158032	02/17	\$201,444
	FLSA Audit	180199	02/19	\$50,000
Manatt, Phelps & Phillips	SDCWA v. MWD rate litigation	146627	06/16	\$4,400,000
	Raftelis - Subcontractor of Manatt, Phelps & Phillips Agreement No. 146627: Pursuant to 05/02/22 Engagement Letter between Manatt, Phelps & Phillips and Raftelis Financial Consultants, Inc., Metropolitan Water District paid Raftelis Financial Consultants, Inc.	Invoice No. 23949		\$56,376.64 for expert services and reimbursable expenses in SDCWA v. MWD
Meyers Nave Riback Silver & Wilson	OCWD v. Northrop Corporation	118445	07/11	\$2,300,000
	Pure Water Southern California	207967	11/22	\$100,000
	<u>PFAS Compliance Issues</u>	<u>207968</u>	<u>11/14/22</u>	<u>\$100,000</u>
Miller Barondess, LLP	SDCWA v. MWD	138006	12/14	\$600,000
Morgan, Lewis & Bockius	SDCWA v. MWD	110226	07/10	\$8,750,000
	Project Labor Agreements	200476	04/21	\$100,000
Musick, Peeler & Garrett LLP	Colorado River Aqueduct Electric Cables Repair/Contractor Claims	193461	11/20	\$900,000
	Arvin-Edison v. Dow Chemical	203452	01/22	-\$90,000 <u>\$100,000</u>
	Semitropic TCP Litigation	207954	09/22	\$75,000
Nixon Peabody LLP*	Bond Counsel	193473	07/21	N/A
Norton Rose Fulbright US LLP*	Bond Counsel	200466	07/21	N/A
Olson Remcho LLP	Government Law	131968	07/14	\$200,000
	Executive Committee/Ad Hoc Committees Advice	207947	08/22	\$60,000
	Public Records Act	207950	08/22	\$20,000 <u>\$45,000</u>



Firm Name	Matter Name	Agreement No.	Effective Date	Contract Maximum
Renne Public Law Group, LLP	ACE v. MWD (PERB Case No. LA-CE-1574-M)	203466	05/22	\$50,000
	MOU Hearing Officer Appeal	203948	07/22	\$100,000
	ACE v. MWD (PERB Case No. LA-CE-1611-M)	207962	10/22	\$50,000
Ryan & Associates	Leasing Issues	43714	06/01	\$200,000
Seyfarth Shaw LLP	HR Litigation	185863	12/19	\$250,000
	Claim (Contract #201897)	201897	11/04/21	\$200,000
	Claim (Contract #203436)	203436	11/15/21	\$350,000
	Claim (Contract #203454)	203454	01/22	\$160,000
	Claim (Contract #203455)	203455	10/21	\$175,000
Sheppard Mullin Richter & Hampton LLP	Rivers v. MWD	207946	07/22	\$100,000
Stradling Yocca Carlson & Rauth*	Bond Counsel	200471	07/21	N/A
Theodora Oringher PC	Construction Contracts - General Conditions Update	185896	07/20	\$100,000
Thompson Coburn LLP	FERC Representation re Colorado River Aqueduct Electrical Transmission System	122465	12/11	\$100,000
	NERC Energy Reliability Standards	193451	08/20	\$100,000
Van Ness Feldman, LLP	General Litigation	170704	07/18	\$50,000
	Colorado River MSHCP	180191	01/19	\$50,000
	Bay-Delta and State Water Project Environmental Compliance	193457	10/15/20	\$50,000
Western Water and Energy	California Independent System Operator-Related Matters	193463	11/20/20	\$100,000

*Expenditures paid by Bond Proceeds/Finance

**Expenditures paid by another group

Date of Report: March 1, 2023

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

MINUTES

LEGAL AND CLAIMS COMMITTEE

February 13, 2023

Chair Sutley called the hybrid teleconference meeting to order at 8:04 a.m.

Members present: Chair Sutley, Directors Camacho, Cordero, Dick, Kurtz, McCoy, Miller, Peterson, Ramos, and Repenning

Members absent: None

Other Directors present: Chairman Ortega, Directors Abdo, Ackerman, Alvarez, Armstrong, Atwater, De Jesus, Dennstedt, Faessel, Fellow, Fong-Sakai, Garza, Goldberg, Gray, Lefevre, Luna, Morris, Petersen, Pressman, Quinn, Seckel, and Smith

Committee Staff present: Beatty, Hagekhalil, Miyashiro, Scully, Torres, and Upadhyay

1. OPPORTUNITY FOR MEMBERS OF THE PUBLIC TO ADDRESS THE COMMITTEE ON MATTERS WITHIN THE COMMITTEE’S JURISDICTION

None

2. MANAGEMENT REPORTS

a. Subject: General Counsel’s report of monthly activities

General Counsel Scully had nothing to add to her written report.

CONSENT CALENDAR ITEMS – ACTION

3. CONSENT CALENDAR OTHER ITEMS – ACTION

None

Chair Sutley announced a reordering of the agenda items taking Committee Item 7a first.

7. COMMITTEE ITEMS

7a Subject Update on the current status of Colorado River Negotiations. [Conference with legal counsel – anticipated litigation; based on existing facts and circumstances, including that requiring significant water use reductions in relation to the Supplemental

Environmental Impact Statement for the 2007 Guidelines could lead to litigation among the United States and one or more Colorado River water users; there is a significant exposure to litigation against Metropolitan: unknown number of potential cases; to be heard in closed session pursuant to Gov. Code Section 54956.9(d)(2)].

Presented by: Bill Hasencamp, Meena Westford, Shanti Rosset, and Laura Lamdin

Staff gave a presentation in open session. No action was taken.

The following Directors asked questions or made comments:

1. Dick
2. Miller
3. Lefevre
4. Peterson
5. Smith
6. Petersen
7. Repenning
8. Gray (presence only)
9. Armstrong
10. Chair Ortega

Staff responded to the Directors' comments and questions.

Director Phan recused herself on Item 8-1 as the City of Torrance is a client of her employer Rutan and Tucker and would leave to room when that discussion takes place.

Director Smith recused the SDCWA delegation on Item 8-1.

4. CONSENT CALENDAR ITEMS – ACTION

- 7-4** Subject: Report on Baker Electric, Inc. v. Metropolitan Water District of Southern California, et al., (Los Angeles Superior Court Case No. 21STCV15612) regarding Metropolitan's CRA 6.9 kV Power Cables Replacement Project, Contract No. 1915; authorize an increase in the maximum amount payable under contract with Musick, Peeler & Garrett LLP, for legal services by \$800,000 to an amount not-to-exceed \$1,700,000; and authorize an increase in the maximum amount payable under contract with HKA Global, Inc., for consulting services by \$300,000 to an amount not-to-exceed \$400,000; the General Manager has determined the proposed action is exempt or otherwise not subject to CEQA [Conference with legal counsel - existing litigation; to be heard in closed session pursuant to Gov. Code Section 54956.9(d)(1)]

Presented by: No presentation was given.

- Motion: Authorize an increase in the maximum amount payable under contract with Musick, Peeler & Garrett LLP, for legal services by \$800,000 to an amount not to exceed \$1,700,000; and authorize an increase in the maximum payable under contract with HKA Global, Inc. for consultant services by \$300,000 to an amount not to exceed \$400,000.
- 7-5** Subject: Report on American Federation of State, County & Municipal Employees Local 1902 v. Metropolitan Water District of Southern California pending Administrative Hearing Officer Appeal and authorize an increase in the maximum amount payable under contract for legal services with Renne Public Law Group by \$100,000 to an amount not to exceed \$200,000; the General Manager has determined that the proposed action is exempt or otherwise not subject to CEQA [Conference with legal counsel—existing litigation; to be heard in closed session pursuant to Gov. Code Section 54956.9(d)(1)]
- Presented by: No presentation was given.
- Motion: Authorize the General Counsel to increase the maximum amount payable under a contract with Renne Public Law Group for legal services by \$100,000, to an amount not to exceed \$200,000.
- 7-6** Subject: Update on Sierra Club et al. v. California Department of Water 21-1916 Resources, Sacramento County Superior Court Case No. 34-2020-80003517 (consolidated with 34-2020-00283112) and request for authorization to increase maximum amount payable under a contract with Atkinson, Andelson, Loya, Ruud & Romo, PLC by \$150,000 to an amount not to exceed \$250,000; the General Manager has determined that the proposed action is exempt or otherwise not subject to CEQA [Conference with legal counsel – existing litigation; to be heard in closed session pursuant to Gov. Code Section 54956.9(d)(1)]
- Presented by: No presentation was given.
- Motion: Authorize the General Counsel to amend the agreement with Atkinson, Andelson, Loya, Ruud & Romo, PLC to increase the maximum amount payable by Metropolitan by \$150,000 to an amount not to exceed \$250,000.

END OF CONSENT CALENDAR ITEMS

5. OTHER BOARD ITEMS – ACTION

8-1 Subject: Report on litigation in San Diego County Water Authority v. 21-1933 Metropolitan Water District of Southern California, et al., San Francisco County Superior Court Case Nos. CPF-10-510830, CPF-12-512466, CPF-14-514004, CPF-16-515282 , CPF-16-515391, CGC-17-563350, and CPF-18-516389; the appeals of the 2010 and 2012 actions, Court of Appeal for the First Appellate District Case Nos. A146901, A148266, A161144, and A162168, and California Supreme Court Case No. S243500; the petition for extraordinary writ in the 2010 and 2012 actions, Court of Appeal for the First Appellate District Case No. A155310; the petition for extraordinary writ in the second 2016 action, Court of Appeal for the First Appellate District Case No. A154325 and California Supreme Court Case No. S251025; and the Metropolitan Water District of Southern California v. San Diego County Water Authority cross-complaints in the 2014, 2016, and 2018 actions; and consider San Diego County Water Authority’s proposal: (1) to stipulate to stay proceedings in the 2014, 2016, and 2018 actions; and (2) to engage in settlement negotiations prior to issuance of the court’s statement of decision in those actions; the General Manager has determined that the proposed action is exempt or otherwise not subject to CEQA [Conference with legal counsel - existing litigation; to be heard in closed session pursuant to Gov. Code Section 54956.9(d)(1)]

Presented by: General Counsel Marcia Scully and Barry Lee (Manatt, Phelps & Phillips)

General Counsel Marcia Scully and outside counsel Barry Lee gave a presentation in closed session. There were no reportable actions taken.

Director Phan recused herself on Item 7-6 as Atkinson, Andelson is a client of her employer Rutan and Tucker and she will leave to room during the vote.

In open session, Director Kurtz made a motion, seconded by Director Ramos, to approve the consent calendar consisting of items 7-4, 7-5 and 7-6:

The vote was:

Ayes: Chair Sutley, Directors Camacho, Cordero, Dick, Kurtz, McCoy, Peterson, Ramos, and Repenning
Noes: None
Abstentions: None
Absent: Director Miller

All items passed by a vote of 9 ayes, 0 noes, 0 recusals, 0 abstention, and 1 absent.

6. BOARD INFORMATION ITEMS

None

8. FOLLOW-UP ITEMS

None

9. FUTURE AGENDA ITEMS

None

Next meeting will be held on March 13, 2023.

Meeting adjourned at 10:42 a.m.

Nancy Sutley
Chair



**• Board of Directors
Legal and Claims Committee**

3/14/2023 Board Meeting

7-13

Subject

Authorize an increase in the maximum amount payable under contract with Burke, Williams & Sorensen, LLP for legal services related to general real estate and leasing law issues by \$100,000 to a maximum amount payable of \$200,000; the General Manager has determined that the proposed action is exempt or otherwise not subject to CEQA

Executive Summary

In August 2019, Burke Williams & Sorensen, LLP (Burke Williams) began providing Metropolitan with legal advice and support services for specialty real estate and right-of-way matters. The General Counsel’s Office authorized a not-to-exceed contract amount of \$100,000, but the need for general and specialized advice in real estate and leasing, telecommunications site licensing, and general permitting issues is ongoing and will require additional funds exceeding the General Counsel's authority. To continue support of these critical and ongoing efforts, staff requests Board authorization to increase the maximum amount payable under the existing contract to \$200,000.

Details

Background

The Burke Williams law firm has special expertise in general real estate and eminent domain matters. Such expertise is helpful in the acquisition, disposition, and management of Metropolitan rights of way, public works facilities, easements, and operational lands. Specialized commercial leasing and land management expertise is also needed in order to provide assistance in drafting leases and agreements to encourage water-efficient farming, water supply preservation, and water quality. The Burke Williams law firm also assists Metropolitan with the creation and implementation of protocols to deal with illegal encampments and encroachments on Metropolitan land and the siting and management of telecommunication sites and other secondary uses of Metropolitan property.

Policy

Metropolitan Water District Administrative Code Section 6431: Authority to Obtain Expert Assistance

Metropolitan Water District Administrative Code Section 11104: Delegation of Responsibilities

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA (Public Resources Code Section 21065, State CEQA Guidelines Section 15378) because the proposed action involves fiscal decisions that will not cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. Additionally, where it can be seen with certainty that there is no possibility that the proposed action in question may have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061(b)(3) of the State CEQA Guidelines).

CEQA determination for Option #2:

None required

Board Options

Option #1

Authorize an increase in the maximum amount payable under contract with Burke, Williams & Sorensen, LLP for general real estate legal services by \$100,000 to a maximum amount payable of \$200,000

Fiscal Impact: \$100,000, authorized legal services funded within the FY 2022/23 budget

Business Analysis: Expert special counsel will assist staff in general and specialized real estate transactions, right-of-way issues, licenses, leases, and other matters.

Option #2

Do not authorize the contract increase

Fiscal Impact: Unknown

Business Analysis: Without expert special counsel, the legal support of real property acquisitions, dispositions, and management could be more uncertain.

Staff Recommendation

Option #1



Marcia Scully
General Counsel

3/1/2023
Date

Ref# 12686369



Legal & Claims Committee

Request to Authorize Increase in Special Counsel Contract for General Real Estate and Leasing Law Support

March 13, 2023

Specialized Legal Support

- Complex Land Purchases and Sales
- Specialized Licensing, Leasing and Permitting Issues
- Property Management and Landowner Regulatory Compliance
- Condemnation and Eminent Domain Matters

Staff Recommendation

Option 1

Authorize the General Counsel to amend the agreement with Burke Williams & Sorensen to increase the maximum amount payable by Metropolitan by \$100,000 to an amount not to exceed \$200,000



Questions





● **Board of Directors**
Legal and Claims Committee

3/14/2023 Board Meeting

7-14

Subject

Authorize increase of \$100,000, to a maximum amount payable of \$400,000, for existing General Counsel contract with Olson Remcho LLP to provide general government law advice related to the Political Reform Act, the Fair Political Practices Commission regulations, conflict of interest law and other legislative and ethics matters; the General Manager has determined the proposed action is exempt or otherwise not subject to CEQA

Executive Summary

The General Counsel entered into a contract with the law firm of Olson Hagel & Fishburn LLP (Olson Hagel) on July 1, 2014, for \$50,000 to provide Metropolitan with general government law advice related to the Political Reform Act (PRA), the Fair Political Practices Commission (FPPC) regulations, conflict of interest law and other legislative and ethics matters. The firm focuses on election and political law, campaign reporting, conflicts of interest, ethics, lobbying and other public law matters. In 2020 the name of the firm was changed to Olson Remcho LLP. Lance Olson continues to perform most of the work under the contract.

Under this contract, the firm provides valuable advice and assistance to Legal on an as-requested basis. As part of the contract, the firm serves as Metropolitan's designated agent for the required electronic filing of Lobbyist Reports under the PRA, and regularly reviews and files these reports with the FPPC for Metropolitan. The firm also provides the General Counsel advice regarding the interpretation and requirements of the PRA and related laws applicable to public agencies and officials. The firm provided Brown Act training to the Board in January 2021 and assisted in responding to additional questions from the Board regarding the training and related matters.

The agreement was amended on November 1, 2016, to increase the maximum amount payable to \$100,000; in August 2018 by \$100,000 to a maximum amount payable of \$200,000; and in July 2021 by \$100,000 to a maximum amount payable of \$300,000. The expenditures are approaching the \$300,000 maximum. This letter requests an increase of \$100,000 to a maximum of \$400,000 so that Olson Remcho LLP can continue to provide these legal services for Metropolitan. This agreement remains in effect until terminated. While the rate of expenditure is subject to the number and nature of the matters requiring assistance from the firm, it is anticipated that the increase will be adequate for at least an additional year.

Policy

Metropolitan Water District Administrative Code Section 6430: General Counsel's employment of attorneys to render special counsel services

Metropolitan Water District Administrative Code Section 11104: Delegation of Responsibilities

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA (Public Resources Code Section 21065, State CEQA Guidelines Section 15378) because the proposed action will not cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment and involves continuing administrative activities, such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). In addition, the proposed action is not defined as a project under CEQA because it involves the creation of government funding mechanisms or other governmental fiscal activities which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment (Section 15378(b)(4) of the State CEQA Guidelines).

CEQA determination for Option #2:

None required

Board Options

Option #1

Authorize the General Counsel to increase the amount payable under its agreement with Olson Remcho LLP by \$100,000 to a maximum amount payable of \$400,000.

Fiscal Impact: The sum of \$100,000 is added to this agreement for the provision of the authorized legal services, funded within the FY 2022/23 budget

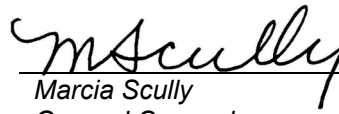
Option #2

Do not authorize an increase in the maximum amount payable under this agreement with Olson Remcho LLP, effectively terminating this contract when the current funds are exhausted.

Fiscal Impact: No known fiscal impact, but Metropolitan will not have access to the valuable expertise and assistance provided by this law firm

Staff Recommendation

Option #1



 Marcia Scully
 General Counsel

3/2/2023

 Date

Ref# I12689135



Legal & Claims Committee

Request to Authorize Increase in Special Counsel Contract for General Government Law Advice

March 13, 2023

Special Counsel

Request for Additional Funds for Special Counsel

- To increase existing contract with Olson Remcho LLP by \$100,000 to an amount not-to-exceed \$400,000
- First retained in 2014
- Increased contract maximum authorized in 2016, 2018 and 2021

Specialized Legal Support

- Political Reform Act (PRA)
- Fair Political Practices Commission (FPPC) Regulations
- Conflict of Interest Law
- Lobbying Reports
- Other Legislative and Ethics Matters

Board Options

- **Option #1**

Authorize the General Counsel to increase the amount payable under its agreement with Olson Remcho LLP by \$100,000 to a maximum amount payable of \$400,000.
- **Option #2**

Do not authorize an increase in the maximum amount payable under this agreement with Olson Remcho LLP, effectively terminating this contract when the current funds are exhausted.

Staff Recommendation

Option 1

Authorize the General Counsel to increase the amount payable under its agreement with Olson Remcho LLP by \$100,000 to a maximum amount payable of \$400,000



Questions





● **Board of Directors**
Legal and Claims Committee

3/14/2023 Board Meeting

7-15

Subject

Approve amendments to the Metropolitan Water District Administrative Code to provide for the implementation of new legislation authorizing the use of alternative project delivery methods; adopt an organizational conflict-of-interest policy governing the solicitation of a design-build or progressive design-build project; and authorize an increase in the maximum amount payable under contract with Hanson Bridgett LLP, for legal services related to implementation of new legislation, by \$150,000 for an amount not to exceed \$250,000; the General Manager has determined the proposed action is exempt or otherwise not subject to CEQA

Executive Summary

This board action would implement alternative project delivery (APD) methods authorized by recent legislation for Pure Water Southern California and other water infrastructure projects. In addition to amending the Metropolitan Administrative Code to authorize the APD methods of design-build (DB), progressive design-build (PDB), and construction manager/general contractor, the action would adopt an organizational conflict-of-interest policy for APD projects, as mandated by legislation, and provide additional funding for outside counsel to provide legal advice with respect to the APD solicitation process and contract documents.

Details

Background

In October of 2021, the Board authorized the General Manager to propose legislation that would enable Metropolitan to utilize APD methods to expedite the design and construction of Pure Water Southern California and drought-related projects. Metropolitan proposed such legislation, and it was introduced, via Assembly Bill (AB) 1845 (Calderon), in February of 2022. Following extensive negotiations with stakeholders and legislative staff, legislative hearings, and approval by the California Assembly and Senate, the Governor signed the legislation on September 13, 2022, and it became effective on January 1, 2023. The Governor also signed Senate Bill (SB) 991 (Newman), which provides local agencies, including Metropolitan, additional authority for PDB projects.

AB 1845 authorizes Metropolitan, upon approval of its governing body, to use the DB, PDB, and construction manager/general contractor (CM/GC) project delivery methods to construct up to 15 capital outlay projects prior to January 1, 2028. Authorized projects include a regional recycled water project and other water infrastructure projects undertaken to alleviate water supply shortages attributable to drought or climate change. The legislation also requires entities performing work on APD projects to commit to using a skilled and trained workforce, which can be achieved through a project labor agreement. In addition, the legislation mandates that Metropolitan perform construction inspection services for all APD projects and develop guidelines for an organizational conflict-of-interest policy to cover all DB and PDB projects.

In addition to drafting proposed Administrative Code amendments to implement AB 1845 and the required conflict-of-interest policy, Metropolitan staff have been developing conceptual design documents, a request for qualifications, and contract documents for the Sepulveda Feeder Pumping Stations project, which will utilize the PDB project delivery method. Staff have been assisted in this effort by Metropolitan's owner representative, Carollo Engineers, Inc. (Carollo), for whom the Board authorized an increase in an existing contract amount in

September of 2022, and Metropolitan's outside counsel, Hanson Bridgett LLP, who are currently performing work under a \$100,000 contract awarded under the General Counsel's authority.

Amendments to the Administrative Code

Currently, Metropolitan's Administrative Code only authorizes the solicitation and award of design-bid-build construction projects. As summarized below, the bulk of the amendments proposed in this action are necessary to codify and formalize the solicitation and contracting requirements for APD methods specified in AB 1845. The proposed amendments are set forth in **Attachment 1**, with overstrikes reflecting deletions and underlining reflecting additions. **Attachment 2** sets forth the sections as they will appear in the Code if the changes are approved.

- **Design-Build**—The DB method is distinct from PDB and CM/GC in that the selection process results in a contract with a fixed price for design, preconstruction, and construction services. In the simplest terms, it merges the design and construction components of a project, which are typically performed by unrelated entities under separate contracts. The procurement process involves Metropolitan's release of project-related information sufficient to enable a design-build entity (DBE) to respond to both a request for qualifications (RFQ), which results in a shortlist of prequalified DBEs and a request for proposals (RFP), which results in a fixed-price contract award. Metropolitan may select a DBE based on either low bid or best value.
- **Progressive Design-Build**—In contrast to the DB method, the PDB method facilitates a collaborative relationship between Metropolitan and the DBE. Metropolitan will select the DBE based on qualifications alone through an RFQ process and enter into a DB contract that prices design work with a not-to-exceed amount. Once the DBE has sufficiently completed design activities, it will propose a guaranteed maximum price (GMP). If the parties agree to a GMP, they will amend the DB contract to include this price, and the DBE will complete remaining design activities and construction. The DBE will be paid for neither the costs in excess of the GMP, nor the differential between actual costs and the GMP, absent an agreement to share these proceeds. If the parties cannot agree on a GMP, either
 - (1) Metropolitan will require the DBE to finish the design work and will bid out the construction work,
 - (2) Metropolitan will award a contract to another DBE to finish design and construction, or
 - (3) Metropolitan will complete some or all of the remaining work with its own forces.
- **Construction Manager/General Contractor**—The CM/GC method differs from DB and PDB in that it does not include design activities. Rather, it enables a general contractor to expedite project delivery by enabling the GC, serving as a construction manager, to perform preconstruction activities, such as early procurement, prior to commencement of the construction phase of the project. Selection of the CM/GC for contract award is qualifications-based through an RFQ process. Once preconstruction activities are completed, Metropolitan will attempt to negotiate a GMP or fixed price for construction activities. If the parties cannot agree to a GMP or fixed price, Metropolitan will either bid out the construction work or perform it with its own forces.

The remaining proposed amendments pertain largely to the early procurement of equipment or materials. Since a primary goal of APD is to expedite project completion, a number of proposed amendments are designed to facilitate the early procurement of equipment or materials, by either Metropolitan, a DBE, or a CM/GC. The proposed amendments to Section 8123(a) increase the General Manager's change order authority for public works purchasing contracts to the greater of \$250,000 or 5% of the contract amount. The proposed amendments to Sections 8140(1) and 8148(d)(1) would permit a DBE or CM/GC to procure equipment or materials prior to construction without further board approval, provided that the procured items are specified in the existing contract, within the authorized contract, and procured utilizing either low bid or best value.

Organizational Conflict-of-Interest Policy

AB 1845, as codified in Section 21568.1 of the California Public Contract Code, requires Metropolitan to develop guidelines for a standard organizational conflict-of-interest policy, consistent with applicable law, regarding the ability of an entity to submit a proposal to Metropolitan for a DB or PDB project. The proposed Metropolitan organizational conflict-of-interest policy provided in **Attachment 3**, developed in collaboration with the Ethics Office, is consistent with the policies of other California public agencies. The proposed policy contains the

following elements: (1) a description of the types of conflicts that prohibit a DBE from participating in a solicitation process or entering into a contract; (2) specific examples of conflicts on DB and PDB projects; (3) a description of conflict-related obligations for both proposers and entities awarded contracts; (4) a list of safeguards and other measures to mitigate conflicts; and (5) remedial measures.

Increase in Contract Amount for Outside Counsel

In July of 2022, the General Counsel issued an RFP seeking outside counsel to assist with the implementation of AB 1845 and legal issues associated with Pure Water California. The General Counsel received proposals on APD from 12 law firms, and the firms deemed most qualified were interviewed. Hanson Bridgett LLP was selected and awarded a contract in November of 2022 in an amount not to exceed \$100,000. The selection was based both on the firm's extensive experience working with other public agencies on APD solicitations and contracts and their demonstrated ability to work collaboratively with in-house counsel, consultants, and project staff.

Hanson Bridgett LLP has assisted the General Counsel's Office in drafting contract documents for the Sepulveda Feeder Pumping Stations project, which will serve as a template for future PDB contracts. The firm has also collaborated with the General Counsel's Office, Engineering staff, and Carollo on the development of the PDB solicitation process in compliance with AB 1845. The General Counsel is seeking a \$150,000 increase in Hanson Bridgett LLP's contract amount for a new not-to-exceed amount of \$250,000. This increase will enable the firm to continue assisting Metropolitan on the solicitation and contracting process for the Sepulveda Feeder Pumping Stations project after the release of the RFQ, as well as on upcoming projects utilizing PDB or other alternative delivery methods.

Policy

California Public Contract Code Article 121.1, Sections 21568 through 21568.11: Metropolitan Water District of Southern California-Alternative Project Delivery Program

Metropolitan Water District Administrative Code Section 6430: General Counsel's special counsel authority

Metropolitan Water District Administrative Code Section 8100: General Provisions, Definitions

Metropolitan Water District Administrative Code Section 8123: Authority to Contract

Metropolitan Water District Administrative Code Sections 8140, 8141, 8144, 8148 through 8151: Award of Contracts

Metropolitan Water District Administrative Code Section 11104: Delegation of Responsibilities

By Minute Item 52546, dated October 12, 2021, the Board authorized the General Manager to seek legislation for Metropolitan to utilize alternative project delivery methods for construction of the Regional Recycled Water Program and drought-related projects.

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA (Public Resources Code Section 21065, State CEQA Guidelines Section 15378) because the proposed action will not cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment and involves continuing administrative activities, such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). In addition, the proposed action is not defined as a project under CEQA because it involves government funding mechanisms or other government fiscal activities which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment (Section 15378(b)(4) of the State CEQA Guidelines).

CEQA determination for Option #2:

None required

Board Options

Option #1

- a. Approve amendments to the Metropolitan Water District Administrative Code, as shown in **Attachment 2**, to provide for the implementation of new legislation authorizing the use of alternative project delivery methods.
- b. Adopt an organizational conflict-of-interest policy, as shown in **Attachment 3**, governing the solicitation of a design-build or progressive design-build project.
- c. Authorize an increase in the maximum amount payable under contract with Hanson Bridgett LLP for legal services related to implementation of new legislation by \$150,000 to an amount not to exceed \$250,000.

Fiscal Impact: \$150,000 in CIP funds; Sepulveda Feeder Pump Stations Project, a CIP Project included in the budget for FYs 2022/23 and 2023/24

Business Analysis: Approval will permit Metropolitan to implement alternative project delivery legislation, comply with the legislation’s mandate to adopt an organizational conflict-of-interest policy, and enable the General Counsel and staff to utilize the assistance of outside counsel for upcoming design-build, progressive design-build, and construction manager/general contractor projects.

Option #2

Do not approve amendments to the Administrative Code, adopt an organizational conflict-of-interest policy, or approve a contract increase for outside counsel.

Fiscal Impact: None

Business Analysis: This option will limit Metropolitan’s project delivery alternatives to the design-bid-build option currently permitted by Metropolitan’s Administrative Code.

Staff Recommendation

Option #1



 Marcia Scully
 General Counsel

3/8/2023

 Date

Attachment 1 – The Administrative Code of The Metropolitan Water District of Southern California (with changes marked)

Attachment 2 – The Administrative Code of The Metropolitan Water District of Southern California (clean version)

Attachment 3 – Conflict-of-Interest Policy for Alternative Project Delivery of The Metropolitan Water District of Southern California

Article 1

GENERAL PROVISIONS

§ 8100. Definitions.

The definitions contained in this section govern the interpretation of this chapter:

(a) Best Value – “Best value” means a value determined by evaluation of objective criteria that relate to price, features, functions, life-cycle costs, experience, and past performance.

(b) Best Value Procurement – “Best value procurement” means a competitive procurement method where factors in addition to price are considered in order to award a contract that provides the best overall value to the District.

(bc) Change Order – “Change order” means an amendment modifying the terms of an existing contract.

(d) Construction Manager/General Contractor – “Construction manager/general contractor” means a project delivery method for a public works project in which a construction manager is procured to provide preconstruction services during the design phase of the project and construction services during the construction phase of the project.

(ee) Contract – “Contract” means any written agreement, including purchase orders, to which the District is a party.

(df) Construction – “Construction” includes erection, demolition, alteration, repair, and relocation.

(g) Design-Build – “Design-build” means a project delivery method for a public works project in which both the design and construction of a project are procured from a single entity selected through a process involving both a request for qualifications and a request for proposals at the earliest feasible stage of the project.

(h) Design-Build Entity – “Design-build entity” means a corporation, limited liability company, partnership, joint venture, or other legal entity that is able to provide appropriately licensed contracting, architectural, and engineering services as needed pursuant to a design-build contract.

(ei) Form of Agreement – “Form of agreement” is the document evidencing the contractual relationship of the District and the successful bidder.

(j) Guaranteed Maximum Price – “Guaranteed maximum price” means the maximum payment amount agreed upon by the District and the design-build entity or the construction manager/general contractor for the design-build entity or the construction manager/general

contractor to finish all remaining design, preconstruction, and/or construction activities to complete and close out the project.

(~~fk~~) Notice Inviting Bids. - "Notice inviting bids" means a notice inviting proposals for entering into a contract upon the terms of contract documents incorporated in said notice by reference.

(~~gl~~) Professional and Technical Services – “Professional and technical services” mean a specialized personal service rendered by an independent contractor who has specialized knowledge, skill and expertise in an area generally recognized to be practiced exclusively by such contractors.

(m) Progressive Design-Build – “Progressive design-build” means a project delivery method utilizing design-build for a public work project in which both the design and construction of a project are procured from a single design-build entity that is selected through a qualifications-based process at the earliest feasible stage of the project.

(~~hn~~) Proposal. – “Proposal” means the prospective contractor’s offer to enter into a contract upon the terms set forth therein or in the contract documents.

(~~io~~) Public Works – “Public works” mean contracting for the erection, construction, alteration, repair, or improvement, including demolition and installation work, of any public structure, building, road, or other public improvement of any kind. Public works does not include work done by the District’s force account, work not paid for out of public funds, or contracting for the purchase of finished products, materials, or supplies.

(~~jp~~) Purchase Order – “Purchase order” means an authorization under which the party designated therein as contractor is to provide materials or services for which the District agrees to pay pursuant to the terms contained thereon or in a separate contract.

(~~kq~~) Purchasing – “Purchasing” means the procurement of goods or services other than Professional and Technical Services.

(~~lr~~) Request for Proposals – “Request for proposals” means documents, whether attached or incorporated by reference, used for soliciting technical proposals.

(~~ms~~) Request for Qualifications – “Request for qualifications” means all documents, whether attached or incorporated by reference, used for soliciting qualifications statements for the purpose of evaluating and pre-qualifying prospective contractors for a proposed contract or specified kinds of work or, where appropriate, selecting the most qualified contractor for a particular contract.

Ords. 114 and 144; repealed by Ord. 146; Section 451.1, Section 451.6 and Section 451.4 added, as amended, by M.I. 32690 - April 10, 1979. Section 451.1 repealed and Section 8100 adopted, Section 451.6 repealed and Section 8100(d) adopted, Section 451.4 repealed and Section 8100(h) adopted by M.I. 36464 - January 13, 1987, effective April 1, 1987; New paragraphs (a), (b), (i) added, old paragraph (f) deleted, and remaining paragraphs renumbered and amended by M. I. 46371 - September 13, 2005; added new paragraph (k), renumbered and amended paragraph (l), and renumbered paragraph (m) by M.I. 51930 – March 10, 2020.

Article 2

AUTHORITY TO CONTRACT

§ 8123. Authority of the General Manager to Amend Contracts.

(a) The General Manager may authorize change orders for Public Works Contracts awarded pursuant to Section 8142 or Section 8148, or Purchasing Contracts associated with a Public Works Contract, without Board approval to increase the amount payable of the initial contract by the greater of (i) an aggregate amount of \$250,000 per contract or (ii) an aggregate amount not to exceed 5 percent of the initial amount of the contract.

(b) The General Manager may authorize change orders for Purchasing Contracts without Board approval to increase the amount payable of the initial contract by an aggregate amount of \$250,000 per contract.

(c) Change orders for Professional and Technical Services Contracts may not be executed by the General Manager in an amount that would increase the total payable amount under the initial contract to an amount exceeding \$250,000 without prior Board approval.

Former §8115(d) Change Orders – moved to new §8123 renumbered paragraphs (a) and (b) and amended by M.I. 46371 - September 13, 2005; paragraphs (a) and (b) amended by M. I. 46838 – October 10, 2006; deleted former paragraph (a), renumbered and amended paragraph (a), and added new paragraphs (b) and (c) by M.I. 51930 – March 10, 2020.

Article 3

AWARD OF CONTRACTS

§ 8140. Competitive Procurement

1. All Purchasing Contracts and Professional and Technical Services Contracts in the amount of \$75,000 or more shall be made upon a competitive procurement method of either competitive sealed bidding or best value procurement as provided in this Chapter, except:

(a) Contracts for miscellaneous services, such as telephone, telegraph, light, power and water, where rates or prices are fixed by legislation or by federal, state, county or municipal regulations.

(b) Contracts deemed to be for an emergency under the procedures set forth in §8122(b) and in accordance with Public Contract Code Section 21567.

(c) Contracts executed in lieu of bringing an action in eminent domain, to reimburse an owner for the owner's costs of relocating or protecting facilities affected by District construction projects.

(d) If competitive procurement could not produce an advantage, or it is impracticable to obtain what is required subject to the competitive procurement provisions because of the unique, exploratory, or experimental nature of the work. Prior to award of contract, the General Manager's designee proposing such contract shall certify that the contract is exempt from competitive procurement and shall set forth in the certificate reasons for that determination.

(e) If, within six months previous to the date of execution of a proposed contract, advertising or posting for identical articles, or articles of the same general character, has failed to secure responsive proposals and, in the opinion of the General Manager, further advertising or posting will not alter this result.

(f) If the purchase is of used equipment which, in the opinion of the General Manager, is satisfactory for the work of the District.

(g) If the contract is with any governmental agency.

(h) Contracts for insurance or for services of a professional, artistic, scientific, or technical character.

(i) Change orders.

(j) Contracts for the handling of District airline ticketing, lodging, automobile rental reservations, and miscellaneous travel-related services.

(k) Contracts to buy or sell non-firm power on an hour-to-hour basis and other contracts of durations up to one year to furnish power or transmission capability to the District or dispose of power or transmission capability available to the District.

(l) Transactions pursuant to contracts secured by other public corporations which, in the opinion of the General Counsel, substantially comply with the competitive procurement requirements of this Chapter.

~~(m)~~ Procurement of equipment or materials by a design-build entity or construction manager/general contractor pursuant to Section 8148(d)(1).

2. A designated product, material, thing, or service by a specific brand or trade name may be exclusively requested, either as a sole source or for competitive procurement, for any of the following purposes:

(a) If the articles wanted are patented, copyrighted, or otherwise unique.

(b) In order that a field test or experiment may be made to determine the designated product's suitability for future use.

(c) For replacement parts or for equipment where replacement parts or components from another supplier could compromise the safety or reliability of the product, or would void or invalidate a manufacturer's warranty or guarantee, as set forth in the certificate provided below.

(d) For replacement parts or components of equipment, where parts or components obtained from another supplier, if available, will not perform the same function in the equipment as the part or component to be replaced, as set forth in the certificate provided below.

(e) For upgrades, enhancement or additions to hardware or for enhancements or additions to software, where equipment or software from different manufacturers or developers will not be as compatible as equipment or software from the original manufacturer(s) or developer(s), as set forth in the certificate provided below.

When such an article is to be purchased, the General Manager's designee preparing the request for bids or proposals shall certify that the particular article will best serve the purpose of the District, and reasons for such conclusion shall be set forth.

[FORMER §8103 Competitive Bids] Ords. 29, 113, 114 and 144; repealed by Ord. 146; Section 451.9 added, as amended, by M.I. 32690 - April 10, 1979; paragraph (j) [formerly Section 451.9.10] amended by M.I. 33286 - June 10, 1980; paragraph (f) [formerly Section 451.9.6] amended by M.I. 34180 - April 13, 1982; paragraph (g) [formerly Section 451.9.7] amended by M.I. 34493 - December 7, 1982; paragraph (j) amended by M.I. 35350 - October 9, 1984; paragraph (k) [formerly Section 451.25] added by M.I. 34303 - July 13, 1982 and renumbered Section 451.24 - June 3, 1985; paragraph (b) [formerly Section 451.9.2] amended by M.I. 35992 - March 11, 1986. Sections 451.9 and 451.24 repealed and Section 8103 adopted by M.I. 36464 - January 13, 1987, effective April 1, 1987; paragraph (l) added by M.I. 36681 - June 9, 1987; paragraph (1) amended by M.I. 37096 - April 12, 1988; amended by M.I. 37575 - March 14, 1989.; paragraphs (b), (f), (g), and (k) amended and paragraph (m) added by M. I. 44582 – August 20, 2001.

Former §8103 renumbered and renamed §8140 Competitive Procurement, paragraphs (b) (d) (e) (k) and (m) amended by M.I. 46371 - September 13, 2005; Numbered the first introductory paragraph as 1, repealed paragraph (d), renumbered paragraphs (e) through (m), added paragraph 2 by M.I. 48877 – November 8, 2011; amended paragraph 1 by M.I. 50322 - December 8, 2015; amended paragraph 1 by M.I. 51930 – March 10, 2020.

§ 8141. Competitive Sealed Bidding.

(a) Except as otherwise provided in Sections 8140 and 8148, all contracts for public works estimated to cost \$25,000 or more shall be made upon competitive sealed bidding.

(b) For contracts other than public works contracts and for contracts estimated to cost less than \$75,000, the General Manager may prescribe the procedure for contracting, which may include competitive bidding as provided in this Article or as modified in the General Manager's discretion.

M.I. 46371 - September 13, 2005. Former §8110(c) Contracts Estimated to Cost Less Than \$25,000 renumbered (b) amended and moved to new §8141 by M. I. 46371 - September 13, 2005; amended paragraph (b) by M.I. 50322 - December 8, 2015.

§8144. Posting and Advertising for Competitive Sealed Bidding.

(a) General. - No notice inviting bids for any contract required to be let upon competitive bidding shall be posted or advertised unless there is first prepared a complete set of contract documents detailing the terms of the agreement and the work to be performed, which set shall be available to any interested party.

(b) Public Works Contracts Estimated to Cost \$25,000 or More. - Whenever a contract required to be let upon competitive bidding is estimated to cost \$25,000 or more, a notice inviting bids shall published no less than once within an online bidding platform designated by the General Manager at least five days, exclusive of Saturday, Sunday and holidays, before the time for opening bids; provided, however, that the foregoing requirement shall not apply when bids will be considered only from bidders determined to be pre-qualified or whose technical proposal is determined to be responsive to the District's specifications, as determined under the procedure set forth in Section 8142.

(c) Other Notices. - A notice requesting pre-qualification information or a notice inviting technical proposals pursuant to Section 8142 shall be posted and advertised in the manner required for the notice inviting bids for the proposed contract for which prospective bidders or prospective lower-tier contractors will be required to be pre-qualified or for which a technical proposal is requested; provided, however, that a notice inviting technical proposals need not be posted or advertised where bidding is restricted to bidders determined to be pre-qualified under the procedure set forth in Section 8142. Posting and advertising shall take place sufficiently in advance of the date of posting and advertising of the notice inviting bids to permit the General Manager to fully evaluate the information submitted in response thereto and to make a determination.

[FORMER §8110 Posting and Advertising] Ords. 23, 113, 114 and 144; repealed by Ord. 146; Section 451.10 added, as amended, by M.I. 32690 - April 10, 1979; paragraphs (b), (c) and (d) [formerly Sections 451.10.2 through 451.10.4] amended by M.I. 34619 - March 8, 1983. Section 451.10 repealed and Section 8110 adopted by M.I. 36464 - January 13, 1987, effective April 1, 1987; paragraph (b) and (d) amended, paragraphs (c)(1) and (c)(2) deleted, and paragraph (c)(3) renumbered and amended by M.I. 44582 - August 20, 2001.

Former §8110 renumbered and renamed §8144, paragraph (b) amended, paragraph (c) moved to §8141, and paragraph (d) renumbered (c) and amended by M.I. 46371 - September 13, 2005; amended paragraph (b) by M.I. 51930 – March 10, 2020.

§8148. Alternative Project Delivery

In lieu of the public works procurement process described in Section 8142, the District may utilize the following three alternative project delivery methods for a public works project: design-build, progressive design-build, or construction manager/general contractor.

(a) The design-build procurement process shall proceed as follows:

- (1) The District shall prepare documents setting forth the scope and estimated price of the project. The documents shall indicate the size, type, and desired design character of the project and the performance specifications covering the quality of project materials, equipment, workmanship, preliminary plans, or building layouts, along with other information deemed necessary to describe adequately the District's needs.
- (2) The District shall issue a request for qualifications containing, at a minimum, the following elements:
 - i. A thorough description of the project, including an expected cost range and the procurement process to be utilized;
 - ii. A listing of significant factors that the District will consider in evaluating qualifications, including technical design and construction expertise, as well as the relative importance or weight of each factor; and
 - iii. A template requiring respondents to demonstrate relevant experience, an acceptable safety record and program, and the necessary licenses, registrations, credentials, financial and bonding capacity, and insurance coverage to complete the project.
- (3) The District shall shortlist the respondents meeting the qualification standards established in the request for qualifications.
- (4) Based on the documents prepared pursuant to (a)(1) above, the District shall prepare a request for proposals that invites shortlisted entities to submit competitive sealed proposals in the manner prescribed by the District. The request for proposals shall identify the scope of the project and its estimated cost, whether the contract will be awarded on the basis of low bid or best value, significant factors that the District expects to consider in evaluating proposals, and the relative importance or weight assigned to each factor.
- (5) For those projects utilizing low bid, the competitive bidding process shall result

in lump-sum bids by shortlisted design-build entities, and contract award shall be made to the design-build entity that is the lowest responsible bidder. For those projects utilizing best value, the selection process shall proceed as follows:

- i. Competitive proposals shall be evaluated by the criteria specified in the request for proposals, including price, technical design, construction expertise, and life-cycle costs over 15 years or more.
- ii. The District may hold discussions or negotiations with respondents utilizing a process described in the request for proposals.
- iii. When the District's evaluation is complete, respondents shall be ranked based on a determination of value provided.
- iv. Contract award shall be made to the responsible design-build entity whose proposal is determined by the District to offer the best value to the public.

(b) The progressive design-build procurement process shall proceed as follows:

- (1) The District shall select a design-build entity based solely on qualifications following the issuance of a request for qualifications containing, at a minimum, the elements listed in subsection (a)(2).
- (2) The District may enter into a contract with the most-qualified design-build entity to begin design and preconstruction activities sufficient to establish a guaranteed maximum price for remaining project work.
- (3) If the District and the design-build entity agree on a guaranteed maximum price, the District may, at its sole discretion, amend the contract to permit the design-build entity to complete the remaining design, preconstruction, and construction activities necessary to complete the project.
- (4) If the costs for completing the remaining design, preconstruction, and construction activities exceed the guaranteed maximum price, the excess costs shall be the responsibility of the design-build entity. If the costs for these activities are less than the guaranteed maximum price, the design-build entity shall not be entitled to the differential between the costs and the guaranteed maximum price unless there is a prior written agreement concerning the sharing of these proceeds.
- (5) If the District and the design-build entity do not agree on a guaranteed maximum price, or the District otherwise elects not to amend the contract to complete the remaining work, the District may (i) select another design-build entity to complete all remaining work, (ii) complete the remaining design work utilizing District forces or a design consultant and award a construction contract

pursuant to Section 8142, (iii) require the original design-build entity to complete the remaining design work at a negotiated price and award a construction project pursuant to Section 8142, or (iv) complete all remaining work utilizing District forces.

(c) The construction manager/general contractor procurement process shall proceed as follows:

- (1) The District shall select a construction manager based solely on qualifications following the issuance of a request for qualifications containing, at a minimum, the elements listed in subsection (a)(2), and soliciting the following information:
 - i. Any prior serious or willful violations of the California Occupational Safety and Health Act of 1973 or the federal Occupational Safety and Health Act of 1970, settled against the construction manager or any of its member;
 - ii. Debarment, disqualification, or removal from a federal, state, or local government public works project, as well as any instance in which a construction manager, or any of its members, submitted a bid on a public works project and was found to be not responsive or not responsible by an awarding body;
 - iii. Any instance in which the construction manager, or any of its members, defaulted on a construction contract;
 - iv. Any violations of the Contractors State License Law, excluding alleged violations of federal or state laws including the payment of wages, benefits, apprenticeship requirements, or personal income tax withholding, or of the Federal Insurance Contributions Act withholding requirements against the construction manager, or any of its members;
 - v. Bankruptcy or receivership by the construction manager, or any of its members, including information concerning any work completed by a surety; and
 - vi. All settled adverse claims, disputes, or lawsuits between the owner of a public works project and the construction manager, or any of its members, during the five years preceding submission of a bid pursuant to this section, in which the claim, settlement, or judgment exceeds fifty thousand dollars (\$50,000).
- (2) The District shall enter into negotiations for a contract for preconstruction services with the highest qualified construction manager for each contract identified in the request for qualifications. If the District is unable to negotiate a satisfactory contract with the highest qualified construction manager, the District

shall terminate negotiations and undertake negotiations with the next most qualified construction manager in sequence until an agreement is reached or a determination is made to reject all construction managers.

- (3) A contract for construction services shall be awarded to the construction manager/general contractor after construction documents have been sufficiently developed and either a fixed price or a guaranteed maximum price has been successfully negotiated. In the event a fixed price or a guaranteed maximum price is not negotiated, the District shall not award the contract for construction services to the construction manager/general contractor and may either award a construction contract pursuant to Section 8142 or complete all remaining work utilizing District forces.

(d) For projects utilizing the progressive design-build or construction manager/general contractor method, the District may elect to do any or all of the following in order to expedite project delivery and/or facilitate contract negotiations:

- (1) Permit the design-build entity or construction manager/general contractor to procure equipment or materials prior to the establishment of a fixed price or guaranteed maximum price, provided that the equipment or materials are identified in an existing contract, their cost is within the contract amount, and the design-build entity or construction manager/general contractor utilizes a low bid or best value procurement process as provided in the contract.
- (2) Include terms and conditions in the initial contract that pertain to design, preconstruction, or construction activities not covered by the contract amount, provided that the District has the authority to terminate the contract prior to the initiation of such activities if the parties do not negotiate a fixed price or guaranteed maximum price covering the activities or the District elects to terminate the contract for other reasons.
- (3) Require the design-build entity or construction manager/general contractor to submit fee proposals for design, preconstruction, or construction activities in response to the request for qualifications, provided that such proposals are not factored into the selection process.

(e) For design-build and progressive design-build projects, the District may identify specific types of subcontractors that shall be listed in the design-build entity's statement of qualifications. Following the award of any contract pursuant to this section, except for those construction subcontractors previously listed in response to a request for qualifications, all construction subcontracts with a value exceeding one-half of one percent of the contract price allocable to construction work shall be awarded either on a best value basis or to the lowest responsible bidder, as determined by the District.

(f) In the event that the General Manager determines that a design-build entity or construction manager/general contractor (i) is not responsible or no longer responsible after

previously having been determined responsible, (ii) has submitted a statement of qualifications, proposal, or bid that is not responsive to the contract documents, or (iii) has failed to comply with a condition precedent, the General Manager shall set forth the determination in writing together with the reasons therefore and shall serve a copy of the determination and reasons on the design-build entity or construction manager/general contractor.

§81488149. Hearings on Substitution of Subcontractors.

(a) A prime contractor, design-build entity, or construction manager/general contractor may request that the General Manager consent to substitution of a subcontractor listed in the original bid or statement or qualifications or selected pursuant to Section 8148(e) if it believes that the subcontractor is not, or is no longer, a responsible contractor.

(b) Prior to giving consent for a substitution, the General Manager shall give written notice to the listed subcontractor of the prime contractor's, design-build entity's, or construction manager/general contractor's request.

(c) The listed subcontractor shall have five business days to object in writing to the requested substitution and request a hearing. If the subcontractor does not object to the substitution in a timely manner, the General Manager may consent to the requested substitution upon determining that one or more of the nine grounds for substitution listed in Public Contracts Code Section 4107(a) has been established.

(d) If the listed subcontractor objects to the substitution in a timely manner, the General Manager shall give notice of a hearing, conduct the hearing, and issue a decision in accordance with Public Contract Code Section 4107. The decision of the General Manager made pursuant to this section shall be final.

(e) Any power delegated to the General Manager pursuant to this section may be re- delegated by the General Manager to any officer or employee of the District.

[FORMER §8119 Delegation of Hearing Power.] Section 451.17 based on Res. 7656 - December 9, 1975; renumbered Section 451.17.1 through 451.17.3 by M.I. 32690 - April 10, 1979; paragraph (a) renumbered [formerly Sections 451.3.5 and 451.3.6, renumbered 451.17.1.1 and 451.17.1.2] and amended and paragraph (b) renumbered [formerly Sections 451.17.1 through 451.17.3, renumbered 451.17.2.1 through 451.17.2.3] by M.I. 36365 - November 18, 1986. Section 451.17 repealed and Section 8119 adopted by M.I. 36464 - January 13, 1987, effective April 1, 1987; paragraph (a)(2) amended by M.I. 39314 - November 19, 1991; paragraphs (a)(1) and (2) deleted and remainder of section renumbered by M.I. 40004 - January 12, 1993; paragraphs (a) and (b) amended by M.I. 41652 - November 14, 1995; Former §8119 renumbered §8148, and paragraph (c) amended by M.I. 46371 - September 13, 2005; Renamed section title, amended paragraphs (a) – (c), and added paragraphs (d) and (e) by M.I. 51930 – March 10, 2020.

§81498150. Best Value Procurement.

(a) Application – Whenever a contract other than a contract for public works is required to be competitively procured, but it is considered impractical or not advantageous to use the competitive sealed bidding method, a contract may be awarded by the best value method of procurement as provided in this Section. The Executive Officer or designee shall determine in writing that the best value method of procurement is practical or advantageous for a particular procurement prior to using this method.

(b) Posting and Advertising – Proposals shall be solicited through a request for proposals which shall be posted and advertised in a manner that provides adequate public notice of the request as determined by the Executive Officer.

(c) Evaluation Factors – The evaluation factors to be used in the determination of award and the numerical weighting for each factor shall be stated in the request for proposals.

(1) Contract cost must be a factor in the determination of the award.

(2) Evaluation factors may be defined to include, but are not limited to, the following:

- (i) Operational and other future costs and risks that the District would incur if the proposal is accepted;
- (ii) Quality and benefits of the product or service or its technical competency;
- (iii) Quality and effectiveness of management approach and controls;
- (iv) Qualifications of personnel and management team;
- (v) Financial stability of the prospective contractor;
- (vi) Past performance and past experience; and
- (vii) Furtherance of the District’s Business Outreach Program goals.

(d) Evaluation of Proposals

(1) Proposals shall be evaluated on the basis of the criteria stated in the request for proposals and by adhering to the weighting as assigned. Award will be made to the bidder whose proposal is determined to be the most advantageous to the District, except that the Executive Officer may reject all proposals received.

(2) Where the best value proposal is not the lowest price proposal from a responsive, responsible bidder, that selection shall be based on a written determination, applying the criteria provided in the request for proposals, by the Executive Officer or designee that the selected proposal is most advantageous to Metropolitan.

M.I. 46371 - September 13, 2005; amended paragraph (d)(2) by M.I. 51930 – March 10, 2020.

§81508151. Protests.

(a) Public Works Contracts. – Within five days after service of the General Manager’s determination under Section 8142(d) or 8148(f), or within five days of ~~the a~~ bid opening or a determination made pursuant to a request for qualification or request for proposals, a bidder or respondent may file a protest with the General Manager pursuant to procedures developed and administered by the Chief Engineer. If the General Manager denies the protest, in whole or in part, the bidder may file a notice of appeal of the protest

denial with the Board Executive Secretary within five days of such denial. A hearing on the appeal by the Engineering, Operations and Technology Committee shall be conducted in accordance with Section 2431(b).

(b) Purchasing and Professional and Technical Services Contracts – Within five days after the occurrence of an event subject to a protest under procedures developed and administered by the Contracting Services Manager, a respondent, or potential respondent, to a solicitation may file a protest with the General Manager pursuant to those procedures. Upon the General Manager's final determination on the protest, the respondent, or potential respondent, may file a notice of appeal of the determination with the Board Executive Secretary within five days of such determination. A hearing on the appeal by the Executive Committee shall be conducted in accordance with Section 2416(f)(3).

(c) Any hearing body that conducts a protest hearing pursuant to this section shall give proper notice thereof, receive evidence and rule upon its admissibility, prepare a record of the proceedings, submit a written decision setting forth the bases for the decision, and cause a copy of the decision to be served upon the appellant.

(d) In the event that a decision on a protest is made less than 20 days before the date set for bid opening or submittal of a proposal or statement of qualifications, such opening or submittal shall be postponed to a date not less than 20 days after the date of decision.

(e) There shall be no right to protest an approval or ratification of a contract by the Executive Committee pursuant to Section 2416(f)(1).

(f) Any power delegated to the General Manager pursuant to this section may be re- delegated by the General Manager to any officer or employee of the District.

M.I. 51930 – March 10, 2020; paragraph (a) amended by M.I. 53064 – December 13, 2022.

Article 1

GENERAL PROVISIONS

§ 8100. Definitions.

The definitions contained in this section govern the interpretation of this chapter:

(a) Best Value – “Best value” means a value determined by evaluation of objective criteria that relate to price, features, functions, life-cycle costs, experience, and past performance.

(b) Best Value Procurement – “Best value procurement” means a competitive procurement method where factors in addition to price are considered in order to award a contract that provides the best overall value to the District.

(c) Change Order – “Change order” means an amendment modifying the terms of an existing contract.

(d) Construction Manager/General Contractor – “Construction manager/general contractor” means a project delivery method for a public works project in which a construction manager is procured to provide preconstruction services during the design phase of the project and construction services during the construction phase of the project.

(e) Contract – “Contract” means any written agreement, including purchase orders, to which the District is a party.

(f) Construction – “Construction” includes erection, demolition, alteration, repair, and relocation.

(g) Design-Build – “Design-build” means a project delivery method for a public works project in which both the design and construction of a project are procured from a single entity selected through a process involving both a request for qualifications and a request for proposals at the earliest feasible stage of the project.

(h) Design-Build Entity – “Design-build entity” means a corporation, limited liability company, partnership, joint venture, or other legal entity that is able to provide appropriately licensed contracting, architectural, and engineering services as needed pursuant to a design-build contract.

(i) Form of Agreement – “Form of agreement” is the document evidencing the contractual relationship of the District and the successful bidder.

(j) Guaranteed Maximum Price – “Guaranteed maximum price” means the maximum payment amount agreed upon by the District and the design-build entity or the construction manager/general contractor for the design-build entity or the construction manager/general

contractor to finish all remaining design, preconstruction, and/or construction activities to complete and close out the project.

(k) Notice Inviting Bids. - "Notice inviting bids" means a notice inviting proposals for entering into a contract upon the terms of contract documents incorporated in said notice by reference.

(l) Professional and Technical Services – “Professional and technical services” mean a specialized personal service rendered by an independent contractor who has specialized knowledge, skill and expertise in an area generally recognized to be practiced exclusively by such contractors.

(m) Progressive Design-Build – “Progressive design-build” means a project delivery method utilizing design-build for a public work project in which both the design and construction of a project are procured from a single design-build entity that is selected through a qualifications-based process at the earliest feasible stage of the project.

(n) Proposal. – “Proposal” means the prospective contractor’s offer to enter into a contract upon the terms set forth therein or in the contract documents.

(o) Public Works – “Public works” mean contracting for the erection, construction, alteration, repair, or improvement, including demolition and installation work, of any public structure, building, road, or other public improvement of any kind. Public works does not include work done by the District’s force account, work not paid for out of public funds, or contracting for the purchase of finished products, materials, or supplies.

(p) Purchase Order – “Purchase order” means an authorization under which the party designated therein as contractor is to provide materials or services for which the District agrees to pay pursuant to the terms contained thereon or in a separate contract.

(q) Purchasing – “Purchasing” means the procurement of goods or services other than Professional and Technical Services.

(r) Request for Proposals – “Request for proposals” means documents, whether attached or incorporated by reference, used for soliciting technical proposals.

(s) Request for Qualifications – “Request for qualifications” means all documents, whether attached or incorporated by reference, used for soliciting qualifications statements for the purpose of evaluating and pre-qualifying prospective contractors for a proposed contract or specified kinds of work or, where appropriate, selecting the most qualified contractor for a particular contract.

Ords. 114 and 144; repealed by Ord. 146; Section 451.1, Section 451.6 and Section 451.4 added, as amended, by M.I. 32690 - April 10, 1979. Section 451.1 repealed and Section 8100 adopted, Section 451.6 repealed and Section 8100(d) adopted, Section 451.4 repealed and Section 8100(h) adopted by M.I. 36464 - January 13, 1987, effective April 1, 1987; New paragraphs (a), (b), (i) added, old paragraph (f) deleted, and remaining paragraphs renumbered and amended by M. I. 46371 - September 13, 2005; added new paragraph (k), renumbered and amended paragraph (l), and renumbered paragraph (m) by M.I. 51930 – March 10, 2020.

Article 2

AUTHORITY TO CONTRACT

§ 8123. Authority of the General Manager to Amend Contracts.

(a) The General Manager may authorize change orders for Public Works Contracts awarded pursuant to Section 8142 or Section 8148, or Purchasing Contracts associated with a Public Works Contract, without Board approval to increase the amount payable of the initial contract by the greater of (i) an aggregate amount of \$250,000 per contract or (ii) an aggregate amount not to exceed 5 percent of the initial amount of the contract.

(b) The General Manager may authorize change orders for Purchasing Contracts without Board approval to increase the amount payable of the initial contract by an aggregate amount of \$250,000 per contract.

(c) Change orders for Professional and Technical Services Contracts may not be executed by the General Manager in an amount that would increase the total payable amount under the initial contract to an amount exceeding \$250,000 without prior Board approval.

Former §8115(d) Change Orders – moved to new §8123 renumbered paragraphs (a) and (b) and amended by M.I. 46371 - September 13, 2005; paragraphs (a) and (b) amended by M. I. 46838 – October 10, 2006; deleted former paragraph (a), renumbered and amended paragraph (a), and added new paragraphs (b) and (c) by M.I. 51930 – March 10, 2020.

Article 3

AWARD OF CONTRACTS

§ 8140. Competitive Procurement

1. All Purchasing Contracts and Professional and Technical Services Contracts in the amount of \$75,000 or more shall be made upon a competitive procurement method of either competitive sealed bidding or best value procurement as provided in this Chapter, except:

(a) Contracts for miscellaneous services, such as telephone, telegraph, light, power and water, where rates or prices are fixed by legislation or by federal, state, county or municipal regulations.

(b) Contracts deemed to be for an emergency under the procedures set forth in §8122(b) and in accordance with Public Contract Code Section 21567.

(c) Contracts executed in lieu of bringing an action in eminent domain, to reimburse an owner for the owner's costs of relocating or protecting facilities affected by District construction projects.

(d) If competitive procurement could not produce an advantage, or it is impracticable to obtain what is required subject to the competitive procurement provisions because of the unique, exploratory, or experimental nature of the work. Prior to award of contract, the General Manager's designee proposing such contract shall certify that the contract is exempt from competitive procurement and shall set forth in the certificate reasons for that determination.

(e) If, within six months previous to the date of execution of a proposed contract, advertising or posting for identical articles, or articles of the same general character, has failed to secure responsive proposals and, in the opinion of the General Manager, further advertising or posting will not alter this result.

(f) If the purchase is of used equipment which, in the opinion of the General Manager, is satisfactory for the work of the District.

(g) If the contract is with any governmental agency.

(h) Contracts for insurance or for services of a professional, artistic, scientific, or technical character.

(i) Change orders.

(j) Contracts for the handling of District airline ticketing, lodging, automobile rental reservations, and miscellaneous travel-related services.

(k) Contracts to buy or sell non-firm power on an hour-to-hour basis and other contracts of durations up to one year to furnish power or transmission capability to the District or dispose of power or transmission capability available to the District.

(l) Transactions pursuant to contracts secured by other public corporations which, in the opinion of the General Counsel, substantially comply with the competitive procurement requirements of this Chapter.

(m) Procurement of equipment or materials by a design-build entity or construction manager/general contractor pursuant to Section 8148(d)(1).

2. A designated product, material, thing, or service by a specific brand or trade name may be exclusively requested, either as a sole source or for competitive procurement, for any of the following purposes:

(a) If the articles wanted are patented, copyrighted, or otherwise unique.

(b) In order that a field test or experiment may be made to determine the designated product's suitability for future use.

(c) For replacement parts or for equipment where replacement parts or components from another supplier could compromise the safety or reliability of the product, or would void or invalidate a manufacturer's warranty or guarantee, as set forth in the certificate provided below.

(d) For replacement parts or components of equipment, where parts or components obtained from another supplier, if available, will not perform the same function in the equipment as the part or component to be replaced, as set forth in the certificate provided below.

(e) For upgrades, enhancement or additions to hardware or for enhancements or additions to software, where equipment or software from different manufacturers or developers will not be as compatible as equipment or software from the original manufacturer(s) or developer(s), as set forth in the certificate provided below.

When such an article is to be purchased, the General Manager's designee preparing the request for bids or proposals shall certify that the particular article will best serve the purpose of the District, and reasons for such conclusion shall be set forth.

[FORMER §8103 Competitive Bids] Ords. 29, 113, 114 and 144; repealed by Ord. 146; Section 451.9 added, as amended, by M.I. 32690 - April 10, 1979; paragraph (j) [formerly Section 451.9.10] amended by M.I. 33286 - June 10, 1980; paragraph (f) [formerly Section 451.9.6] amended by M.I. 34180 - April 13, 1982; paragraph (g) [formerly Section 451.9.7] amended by M.I. 34493 - December 7, 1982; paragraph (j) amended by M.I. 35350 - October 9, 1984; paragraph (k) [formerly Section 451.25] added by M.I. 34303 - July 13, 1982 and renumbered Section 451.24 - June 3, 1985; paragraph (b) [formerly Section 451.9.2] amended by M.I. 35992 - March 11, 1986. Sections 451.9 and 451.24 repealed and Section 8103 adopted by M.I. 36464 - January 13, 1987, effective April 1, 1987; paragraph (l) added by M.I. 36681 - June 9, 1987; paragraph (1) amended by M.I. 37096 - April 12, 1988; amended by M.I. 37575 - March 14, 1989.; paragraphs (b), (f), (g), and (k) amended and paragraph (m) added by M. I. 44582 – August 20, 2001.

Former §8103 renumbered and renamed §8140 Competitive Procurement, paragraphs (b) (d) (e) (k) and (m) amended by M.I. 46371 - September 13, 2005; Numbered the first introductory paragraph as 1, repealed paragraph (d), renumbered paragraphs (e) through (m), added paragraph 2 by M.I. 48877 – November 8, 2011; amended paragraph 1 by M.I. 50322 - December 8, 2015; amended paragraph 1 by M.I. 51930 – March 10, 2020.

§ 8141. Competitive Sealed Bidding.

(a) Except as otherwise provided in Sections 8140 and 8148, all contracts for public works estimated to cost \$25,000 or more shall be made upon competitive sealed bidding.

(b) For contracts other than public works contracts and for contracts estimated to cost less than \$75,000, the General Manager may prescribe the procedure for contracting, which may include competitive bidding as provided in this Article or as modified in the General Manager's discretion.

M.I. 46371 - September 13, 2005. Former §8110(c) Contracts Estimated to Cost Less Than \$25,000 remembered (b) amended and moved to new §8141 by M. I. 46371 - September 13, 2005; amended paragraph (b) by M.I. 50322 - December 8, 2015.

§8144. Posting and Advertising for Competitive Sealed Bidding.

(a) General. - No notice inviting bids for any contract required to be let upon competitive bidding shall be posted or advertised unless there is first prepared a complete set of contract documents detailing the terms of the agreement and the work to be performed, which set shall be available to any interested party.

(b) Public Works Contracts Estimated to Cost \$25,000 or More. - Whenever a contract required to be let upon competitive bidding is estimated to cost \$25,000 or more, a notice inviting bids shall published no less than once within an online bidding platform designated by the General Manager at least five days, exclusive of Saturday, Sunday and holidays, before the time for opening bids; provided, however, that the foregoing requirement shall not apply when bids will be considered only from bidders determined to be pre-qualified or whose technical proposal is determined to be responsive to the District's specifications, as determined under the procedure set forth in Section 8142.

(c) Other Notices. - A notice requesting pre-qualification information or a notice inviting technical proposals pursuant to Section 8142 shall be posted and advertised in the manner required for the notice inviting bids for the proposed contract for which prospective bidders or prospective lower-tier contractors will be required to be pre-qualified or for which a technical proposal is requested; provided, however, that a notice inviting technical proposals need not be posted or advertised where bidding is restricted to bidders determined to be pre-qualified under the procedure set forth in Section 8142. Posting and advertising shall take place sufficiently in advance of the date of posting and advertising of the notice inviting bids to permit the General Manager to fully evaluate the information submitted in response thereto and to make a determination.

[FORMER §8110 Posting and Advertising] Ords. 23, 113, 114 and 144; repealed by Ord. 146; Section 451.10 added, as amended, by M.I. 32690 - April 10, 1979; paragraphs (b), (c) and (d) [formerly Sections 451.10.2 through 451.10.4] amended by M.I. 34619 - March 8, 1983. Section 451.10 repealed and Section 8110 adopted by M.I. 36464 - January 13, 1987, effective April 1, 1987; paragraph (b) and (d) amended, paragraphs (c)(1) and (c)(2) deleted, and paragraph (c)(3) renumbered and amended by M.I. 44582 - August 20, 2001.

Former §8110 renumbered and renamed §8144, paragraph (b) amended, paragraph (c) moved to §8141, and paragraph (d) renumbered (c) and amended by M.I. 46371 - September 13, 2005; amended paragraph (b) by M.I. 51930 - March 10, 2020.

§8148. Alternative Project Delivery

In lieu of the public works procurement process described in Section 8142, the District may utilize the following three alternative project delivery methods for a public works project: design-build, progressive design-build, or construction manager/general contractor.

- (a) The design-build procurement process shall proceed as follows:
- (1) The District shall prepare documents setting forth the scope and estimated price of the project. The documents shall indicate the size, type, and desired design character of the project and the performance specifications covering the quality of project materials, equipment, workmanship, preliminary plans, or building layouts, along with other information deemed necessary to describe adequately the District's needs.
 - (2) The District shall issue a request for qualifications containing, at a minimum, the following elements:

- i. A thorough description of the project, including an expected cost range and the procurement process to be utilized;
 - ii. A listing of significant factors that the District will consider in evaluating qualifications, including technical design and construction expertise, as well as the relative importance or weight of each factor; and
 - iii. A template requiring respondents to demonstrate relevant experience, an acceptable safety record and program, and the necessary licenses, registrations, credentials, financial and bonding capacity, and insurance coverage to complete the project.
- (3) The District shall shortlist the respondents meeting the qualification standards established in the request for qualifications.
- (4) Based on the documents prepared pursuant to (a)(1) above, the District shall prepare a request for proposals that invites shortlisted entities to submit competitive sealed proposals in the manner prescribed by the District. The request for proposals shall identify the scope of the project and its estimated cost, whether the contract will be awarded on the basis of low bid or best value, significant factors that the District expects to consider in evaluating proposals, and the relative importance or weight assigned to each factor.
- (5) For those projects utilizing low bid, the competitive bidding process shall result in lump-sum bids by shortlisted design-build entities, and contract award shall be made to the design-build entity that is the lowest responsible bidder. For those projects utilizing best value, the selection process shall proceed as follows:
- i. Competitive proposals shall be evaluated by the criteria specified in the request for proposals, including price, technical design, construction expertise, and life-cycle costs over 15 years or more.
 - ii. The District may hold discussions or negotiations with respondents utilizing a process described in the request for proposals.
 - iii. When the District's evaluation is complete, respondents shall be ranked based on a determination of value provided.
 - iv. Contract award shall be made to the responsible design-build entity whose proposal is determined by the District to offer the best value to the public.
- (b) The progressive design-build procurement process shall proceed as follows:
- (1) The District shall select a design-build entity based solely on qualifications following the issuance of a request for qualifications containing, at a minimum, the elements listed in subsection (a)(2).

- (2) The District may enter into a contract with the most-qualified design-build entity to begin design and preconstruction activities sufficient to establish a guaranteed maximum price for remaining project work.
 - (3) If the District and the design-build entity agree on a guaranteed maximum price, the District may, at its sole discretion, amend the contract to permit the design-build entity to complete the remaining design, preconstruction, and construction activities necessary to complete the project.
 - (4) If the costs for completing the remaining design, preconstruction, and construction activities exceed the guaranteed maximum price, the excess costs shall be the responsibility of the design-build entity. If the costs for these activities are less than the guaranteed maximum price, the design-build entity shall not be entitled to the differential between the costs and the guaranteed maximum price unless there is a prior written agreement concerning the sharing of these proceeds.
 - (5) If the District and the design-build entity do not agree on a guaranteed maximum price, or the District otherwise elects not to amend the contract to complete the remaining work, the District may (i) select another design-build entity to complete all remaining work, (ii) complete the remaining design work utilizing District forces or a design consultant and award a construction contract pursuant to Section 8142, (iii) require the original design-build entity to complete the remaining design work at a negotiated price and award a construction project pursuant to Section 8142, or (iv) complete all remaining work utilizing District forces.
- (c) The construction manager/general contractor procurement process shall proceed as follows:

- (1) The District shall select a construction manager based solely on qualifications following the issuance of a request for qualifications containing, at a minimum, the elements listed in subsection (a)(2), and soliciting the following information:
 - i. Any prior serious or willful violations of the California Occupational Safety and Health Act of 1973 or the federal Occupational Safety and Health Act of 1970, settled against the construction manager or any of its member;
 - ii. Debarment, disqualification, or removal from a federal, state, or local government public works project, as well as any instance in which a construction manager, or any of its members, submitted a bid on a public works project and was found to be not responsive or not responsible by an awarding body;

- iii. Any instance in which the construction manager, or any of its members, defaulted on a construction contract;
- iv. Any violations of the Contractors State License Law, excluding alleged violations of federal or state laws including the payment of wages, benefits, apprenticeship requirements, or personal income tax withholding, or of the Federal Insurance Contributions Act withholding requirements against the construction manager, or any of its members;
- v. Bankruptcy or receivership by the construction manager, or any of its members, including information concerning any work completed by a surety; and
- vi. All settled adverse claims, disputes, or lawsuits between the owner of a public works project and the construction manager, or any of its members, during the five years preceding submission of a bid pursuant to this section, in which the claim, settlement, or judgment exceeds fifty thousand dollars (\$50,000).

(2) The District shall enter into negotiations for a contract for preconstruction services with the highest qualified construction manager for each contract identified in the request for qualifications. If the District is unable to negotiate a satisfactory contract with the highest qualified construction manager, the District shall terminate negotiations and undertake negotiations with the next most qualified construction manager in sequence until an agreement is reached or a determination is made to reject all construction managers.

(3) A contract for construction services shall be awarded to the construction manager/general contractor after construction documents have been sufficiently developed and either a fixed price or a guaranteed maximum price has been successfully negotiated. In the event a fixed price or a guaranteed maximum price is not negotiated, the District shall not award the contract for construction services to the construction manager/general contractor and may either award a construction contract pursuant to Section 8142 or complete all remaining work utilizing District forces.

(d) For projects utilizing the progressive design-build or construction manager/general contractor method, the District may elect to do any or all of the following in order to expedite project delivery and/or facilitate contract negotiations:

(1) Permit the design-build entity or construction manager/general contractor to procure equipment or materials prior to the establishment of a fixed price or guaranteed maximum price, provided that the equipment or materials are identified in an existing contract, their cost is within the contract amount, and the design-build entity or construction manager/general contractor utilizes a low bid or best value procurement process as provided in the contract.

(2) Include terms and conditions in the initial contract that pertain to design, preconstruction, or construction activities not covered by the contract amount, provided that the District has the authority to terminate the contract prior to the initiation of such activities if the parties do not negotiate a fixed price or guaranteed maximum price covering the activities or the District elects to terminate the contract for other reasons.

(3) Require the design-build entity or construction manager/general contractor to submit fee proposals for design, preconstruction, or construction activities in response to the request for qualifications, provided that such proposals are not factored into the selection process.

(e) For design-build and progressive design-build projects, the District may identify specific types of subcontractors that shall be listed in the design-build entity's statement of qualifications. Following the award of any contract pursuant to this section, except for those construction subcontractors previously listed in response to a request for qualifications, all construction subcontracts with a value exceeding one-half of one percent of the contract price allocable to construction work shall be awarded either on a best value basis or to the lowest responsible bidder, as determined by the District.

(f) In the event that the General Manager determines that a design-build entity or construction manager/general contractor (i) is not responsible or no longer responsible after previously having been determined responsible, (ii) has submitted a statement of qualifications, proposal, or bid that is not responsive to the contract documents, or (iii) has failed to comply with a condition precedent, the General Manager shall set forth the determination in writing together with the reasons therefore and shall serve a copy of the determination and reasons on the design-build entity or construction manager/general contractor.

§8149. Hearings on Substitution of Subcontractors.

(a) A prime contractor, design-build entity, or construction manager/general contractor may request that the General Manager consent to substitution of a subcontractor listed in the original bid or statement of qualifications or selected pursuant to Section 8148(e) if it believes that the subcontractor is not, or is no longer, a responsible contractor.

(b) Prior to giving consent for a substitution, the General Manager shall give written notice to the listed subcontractor of the prime contractor's, design-build entity's, or construction manager/general contractor's request.

(c) The listed subcontractor shall have five business days to object in writing to the requested substitution and request a hearing. If the subcontractor does not object to the substitution in a timely manner, the General Manager may consent to the requested substitution upon determining that one or more of the nine grounds for substitution listed in Public Contracts Code Section 4107(a) has been established.

(d) If the listed subcontractor objects to the substitution in a timely manner, the General Manager shall give notice of a hearing, conduct the hearing, and issue a decision in accordance with Public Contract Code Section 4107. The decision of the General Manager made pursuant to this section shall be final.

(e) Any power delegated to the General Manager pursuant to this section may be re-delegated by the General Manager to any officer or employee of the District.

[FORMER §8119 Delegation of Hearing Power.] Section 451.17 based on Res. 7656 - December 9, 1975; renumbered Section 451.17.1 through 451.17.3 by M.I. 32690 - April 10, 1979; paragraph (a) renumbered [formerly Sections 451.3.5 and 451.3.6, renumbered 451.17.1.1 and 451.17.1.2] and amended and paragraph (b) renumbered [formerly Sections 451.17.1 through 451.17.3, renumbered 451.17.2.1 through 451.17.2.3] by M.I. 36365 - November 18, 1986. Section 451.17 repealed and Section 8119 adopted by M.I. 36464 - January 13, 1987, effective April 1, 1987; paragraph (a)(2) amended by M.I. 39314 - November 19, 1991; paragraphs (a)(1) and (2) deleted and remainder of section renumbered by M.I. 40004 - January 12, 1993; paragraphs (a) and (b) amended by M.I. 41652 - November 14, 1995; Former §8119 renumbered §8148, and paragraph (c) amended by M.I. 46371 - September 13, 2005; Renamed section title, amended paragraphs (a) - (c), and added paragraphs (d) and (e) by M.I. 51930 - March 10, 2020.

§8150. Best Value Procurement.

(a) Application – Whenever a contract other than a contract for public works is required to be competitively procured, but it is considered impractical or not advantageous to use the competitive sealed bidding method, a contract may be awarded by the best value method of procurement as provided in this Section. The Executive Officer or designee shall determine in writing that the best value method of procurement is practical or advantageous for a particular procurement prior to using this method.

(b) Posting and Advertising – Proposals shall be solicited through a request for proposals which shall be posted and advertised in a manner that provides adequate public notice of the request as determined by the Executive Officer.

(c) Evaluation Factors – The evaluation factors to be used in the determination of award and the numerical weighting for each factor shall be stated in the request for proposals.

(1) Contract cost must be a factor in the determination of the award.

(2) Evaluation factors may be defined to include, but are not limited to, the following:

- (i) Operational and other future costs and risks that the District would incur if the proposal is accepted;
- (ii) Quality and benefits of the product or service or its technical competency;
- (iii) Quality and effectiveness of management approach and controls;
- (iv) Qualifications of personnel and management team;
- (v) Financial stability of the prospective contractor;
- (vi) Past performance and past experience; and
- (vii) Furtherance of the District’s Business Outreach Program goals.

(d) Evaluation of Proposals

(1) Proposals shall be evaluated on the basis of the criteria stated in the request for proposals and by adhering to the weighting as assigned. Award will be made to the bidder whose proposal is determined to be the most advantageous to the District, except that the Executive Officer may reject all proposals received.

(2) Where the best value proposal is not the lowest price proposal from a responsive, responsible bidder, that selection shall be based on a written determination, applying the criteria provided in the request for proposals, by the Executive Officer or designee that the selected proposal is most advantageous to Metropolitan.

M.I. 46371 - September 13, 2005; amended paragraph (d)(2) by M.I. 51930 – March 10, 2020.

§8151. Protests.

(a) Public Works Contracts. – Within five days after service of the General Manager’s determination under Section 8142(d) or 8148(f), or within five days of a bid opening or a determination made pursuant to a request for qualification or request for proposals, a bidder or respondent may file a protest with the General Manager pursuant to procedures developed and administered by the Chief Engineer. If the General Manager denies the protest, in whole or in part, the bidder may file a notice of appeal of the protest denial with the Board Executive Secretary within five days of such denial. A hearing on the appeal by the Engineering, Operations and Technology Committee shall be conducted in accordance with Section 2431(b).

(b) Purchasing and Professional and Technical Services Contracts – Within five days after the occurrence of an event subject to a protest under procedures developed and administered by the Contracting Services Manager, a respondent, or potential respondent, to a solicitation may file a protest with the General Manager pursuant to those procedures. Upon the General Manager’s final determination on the protest, the respondent, or potential respondent, may file a notice of appeal of the determination with the Board Executive Secretary within five days of such determination. A hearing on the appeal by the Executive Committee shall be conducted in accordance with Section 2416(f)(3).

(c) Any hearing body that conducts a protest hearing pursuant to this section shall give proper notice thereof, receive evidence and rule upon its admissibility, prepare a record of the proceedings, submit a written decision setting forth the bases for the decision, and cause a copy of the decision to be served upon the appellant.

(d) In the event that a decision on a protest is made less than 20 days before the date set for bid opening or submittal of a proposal or statement of qualifications, such opening or submittal shall be postponed to a date not less than 20 days after the date of decision.

(e) There shall be no right to protest an approval or ratification of a contract by the Executive Committee pursuant to Section 2416(f)(1).

(f) Any power delegated to the General Manager pursuant to this section may be re- delegated by the General Manager to any officer or employee of the District.

M.I. 51930 – March 10, 2020; paragraph (a) amended by M.I. 53064 – December 13, 2022.

Metropolitan Water District of Southern California Organizational Conflict-of-Interest Policy for Alternative Project Delivery

(Adopted March 14, 2023)

I. Purpose

This policy establishes the organizational conflict-of-interest guidelines applicable to all design-build and progressive design-build contracts awarded by Metropolitan Water District of Southern California (Metropolitan) pursuant to Section 8148 of Metropolitan's Administrative Code.

II. Background

Assembly Bill (AB) 1845 (Calderon), codified at Sections 21565 to 21568.11 of the California Public Contract Code (PCC), was signed into law on September 13, 2022, permitting Metropolitan to utilize the alternative project delivery methods of design-build (DB), progressive design-build (PDB), and construction manager/general contractor (CM/GC) for up to 15 capital outlay projects.

A requirement of AB 1845, codified at PCC 21568.1(d), is that Metropolitan "shall develop guidelines for a standard organizational conflict-of-interest policy, consistent with applicable law, regarding the ability of a person or entity that performs services for the district relating to the solicitation of a design-build or progressive design-build project to submit a proposal as a design-build entity, or to join a design-build team." A design-build entity (DBE) is defined by the PCC and Metropolitan's Administrative Code as "a corporation, limited liability company, partnership, joint venture, or other legal entity that is able to provide appropriately licensed contracting, architectural, and engineering services as needed pursuant to a design-build contract."

This policy applies to DBEs that have entered into, or seek as proposers to enter into, contracts with Metropolitan to perform DB or PDB work, and the policy shall be incorporated by reference into all DB and PDB contracts executed by Metropolitan. An authorized representative of each DBE seeking to participate in a DB or PDB contract must attest, in a form prescribed by Metropolitan, that the representative has reviewed and accepted this policy. The policy is supplemental to any existing conflict-of-interest policies found in the Metropolitan Administrative Code or otherwise approved by the Metropolitan Board of Directors and is intended to supplement, and be consistent with, applicable conflict-of-interest laws.

III. Policy

No DBE with an organizational conflict of interest with respect to a Metropolitan DB or PDB project may perform work, or respond to a solicitation, related to that project unless it discloses the conflict to Metropolitan in writing and Metropolitan determines, in its sole discretion, that the conflict can be avoided or adequately mitigated.

Organizational conflicts of interest, which may be actual, potential, or perceived, are created by circumstances arising out of a DBE's existing or past activities, business or financial interests, familial relationships, contractual relationships, or organizational structure (e.g. parent entities and their subsidiaries and affiliates) that result in: (1) an unfair competitive advantage with respect to Metropolitan's procurement or contracting process or (2) the impairment or potential impairment of the DBE's ability to render impartial assistance or advice to Metropolitan.

Metropolitan, acting through authorized representatives of its Offices of the General Manager, the General Counsel, and Ethics, retains the sole discretion to determine, on a case-by-case basis, whether an actual, perceived, or potential conflict of interest exists with respect to a DBE's participation in any solicitation process or contract. While this policy neither purports to address every circumstance that may give rise to

a conflict nor mandates a particular determination by Metropolitan, an organizational conflict of interest may exist in the following situations:

- a. A DBE (Firm A) performs consulting work related to a DB or PDB project (Project X) prior to submitting a statement of qualifications or proposal with respect to Project X. However, a sub-consultant (Firm B) that has not yet performed work under Firm A's agreement may participate as a DBE in Project X if Firm B terminates its existing agreement with Firm A having performed no work under that agreement with respect to Project X.
- b. A DBE has assisted Metropolitan in the management of Project X prior to submitting a statement of qualifications or proposal with respect to Project X, including the preparation of a request for qualifications or proposals, evaluation criteria, or any other aspect of the procurement process.
- c. A DBE has conducted preliminary design services for Project X prior to submitting a statement of qualifications or proposal with respect to Project X.
- d. A DBE performed design work under a previous Metropolitan contract that specifically excludes that DBE from participating as a proposer or joining any DB or PDB team for Project X.
- e. A DBE performed design work related to Project X for other entities prior to submitting a statement of qualifications or proposal for Project X.
- f. A DBE is under contract with another entity to perform oversight of Project X.
- g. A DBE employs a former Metropolitan staffer or staffers, or an individual or individuals from another entity, who have knowledge, or access to information, that would give the DBE an unfair competitive advantage with respect to Project X.
- h. Any circumstances that would violate California Government Code Section 1090, et seq. relating to contractual conflicts of interest or any other law or regulation.

For any organizational conflicts of interest governed by California Government Code Section 1090, Metropolitan will defer to a determination in an advice letter or opinion issued by the California Fair Political Practices Commission (FPPC) regarding the participation of a DBE in the applicable solicitation or contract. In the absence of an FPPC letter, Metropolitan's Ethics Office will evaluate any potential Section 1090 conflict of interest and make a determination.

Consultants responsible for preparing documents under the California Environmental Quality Act are required to comply with all state laws and regulations applicable to such services, including requirements relating to organizational conflicts of interest. For federally-funded projects subject to the National Environmental Policy Act compliance, consultants involved in the preparation of an Environmental Impact Statement (EIS) must disclose whether or not they have a financial or other interest in the outcome of the project. A consultant involved in the preparation of an EIS may not propose on work connected with the project before the EIS is completed.

Metropolitan may be required to comply with requirements and regulations applicable to federally-funded projects. Nothing in this policy is intended to limit, modify, or otherwise alter the effect of other relevant federal or state regulations, statutes, or rules.

IV. DBE Obligations as Proposer

DBEs must make a written disclosure of any actual or potential conflict prior to responding to a solicitation for a DB or PDB project. The DBE may also submit proposed measures to avoid or mitigate the conflict. Metropolitan, in its sole discretion, shall determine whether an actual or potential organizational conflict of interest, or the appearance of any such organizational conflict of interest, exists, whether any measures proposed are sufficient to overcome the conflict, and whether the DBE may continue with the procurement process.

V. DBE Obligations after Contract Award

The DBE to whom a contract is awarded has an ongoing obligation to monitor and disclose actual or potential conflicts of interest. If an actual or potential organizational conflict of interest is discovered after the contract has been awarded, the DBE must make an immediate and full written disclosure to Metropolitan that includes a description of the action that the DBE has taken or proposes to take to avoid or mitigate the conflict.

VI. Safeguards and Mitigation Measures

If Metropolitan determines that a DBE can and should be permitted to participate in a procurement process or continue performing work pursuant to a contract notwithstanding an actual, potential, or perceived organizational conflict of interest, Metropolitan, in its sole discretion, may require the DBE to undertake safeguards to mitigate the conflict, including any or all of the following:

- a. Metropolitan may require that, in order to participate in a solicitation or project, a DBE establish ethical walls and related procedures, including the segregation of individuals and information within a DBE firm. Segregated information may include confidential information obtained from Metropolitan employees or as a result of the DBE's former contracts with Metropolitan.
- b. Metropolitan may require assurances or demonstration of the type and/or effectiveness of the ethical walls to be utilized.
- c. Metropolitan may require information, including in affidavit form, regarding when ethical walls will be instituted, how they will operate, and how their existence will be communicated within the organization.
- d. Metropolitan may audit, or direct others to audit on its behalf, to ensure compliance with ethical walls and related safeguards and procedures.
- e. Metropolitan may require other safeguards or mitigation measures that it deems appropriate to address any actual, potential, or perceived organizational conflict of interest.

This section notwithstanding, if an actual conflict of interest under the law exists, and no safeguard or mitigation effort fully cures the conflict, then the DBE will not be permitted to participate in a solicitation or contract under any circumstances.

VII. Remedial Measures

If Metropolitan determines that a DBE has failed to comply with this policy in any respect, either prior to award of a contract or during performance of contract work, Metropolitan may take any necessary action to remediate the conflict, including, but not limited to, the following:

- a. Preclude and/or disqualify a DBE and/or its affiliates from continued participation in a specific DB or PDB solicitation;
- b. Preclude and/or disqualify a DBE and/or its affiliates from participation in future DB or PDB solicitations;
- c. Require the DBE to institute safeguards and mitigation measures to the extent that safeguards and measures have not already been instituted; and/or
- d. Terminate or amend the contract under which the DBE is performing work for Metropolitan.



Legal & Claims Committee

Implementation of Alternative Project Delivery Methods

Item # 7-15
March 13, 2023

Actions
Needed to
Implement
Alternative
Project
Delivery

- Approve Administrative Code amendments to implement Alternative Project Delivery (APD)
- Adopt an organizational conflict-of-interest policy for APD
- Request for additional funds for contract with Hanson Bridgett LLP for specialized advice on APD contracting

APD Legislation Chronology

- Limitations of traditional design-bid-build
- Oct. 2021 Board action on APD legislation
- Feb. 2022 introduction of AB 1845 (Calderon)
- Legislative amendments and testimony
- Sept. 2022 Governor signing of AB 1845
- SB 991 progressive design-build legislation

Highlights of AB 1845

- **Authorizes MWD** to use design-build (DB), progressive DB, and construction manager/general contractor (CM/GC)
- 15 drought- or climate change-related capital projects, including **Pure Water Southern California**, between Jan. 1, 2023 and Dec. 1, 2026 (DB) or Dec. 1, 2028 (PDB, CM/GC)
- Requires “skilled and trained workforce,” which can be met with **Project Labor Agreement**

Highlights of AB 1845 (cont'd)

- Standard requirements for bonding, retention, and subcontractor protections
- **Conflict-of-interest** guidelines required for DB and PDB
- MWD forces must perform inspections
- Prohibition on **design-build-operate**

Highlights of SB 991

- Authorizes PDB for cities, counties, and special districts that produce, store, supply, treat, or distribute water from any source
- 15 projects in excess of \$5M between January 1, 2023 and January 1, 2029
- Like AB 1845, provisions regarding procurement process, skilled and trained workforce, and conflict-of-interest policy
- Unlike AB 1845, no owner inspection requirements or prohibition on design-build-operate

Public Works Project Delivery Methods

- Traditional Delivery Method for Local Agencies
- Alternative Delivery Methods
 - Design-Build
 - CM/GC
 - Progressive Design-Build

Proposed Administrative Code Amendments

- Codify solicitation and contracting requirements for alternative project delivery methods
- Specific Amendments
 - New APD definitions
 - New Section §8148 Alternative Project Delivery
 - Amend change order authority for public works purchasing contracts
 - Minor revisions to conform various sections to items listed above

Design Build Delivery Method

Design Build (DB)

- Contracting method where a single design-build entity (DBE) is hired to do both design and construction
- Selection through two-step RFQ/RFP process
- Fixed price award (low bid or best value)

CM/GC Delivery Method

Construction Manager/General Contractor (CM/GC)

- Contracting method where a single entity is hired to do CM and construction
- Design performed by Metropolitan
- Selection through qualification-based process
- Once design is complete, Metropolitan would negotiate construction activities as follows:
 - Guaranteed Maximum Price (GMP)
 - Fixed Price

Progressive Design Build

Progressive Design Build (PDB)

- Contracting method where a single entity is hired to do both design and construction
- Selection through qualification-based process
- Two Phase Process
 - Design phase – negotiated NTE price
 - Construction phase – negotiated GMP
- Streamlined and collaborative process

Sepulveda Feeder Pump Stations Project

Sepulveda Feeder Pump Stations

- Two new 30-cfs pump stations, conveyance pipelines, and associated supporting infrastructure
- Would allow reverse water flow to move water from the Central Pool to the Jensen Exclusive Area

Approximate value

- \$80-\$100M

Delivery method

- Progressive Design Build (PDB)

PBD Benefits
Sepulveda
Feeder
Project

- Potential for schedule advancement (earlier online date)
- Enhanced opportunities for:
 - Collaboration during project development phase
 - Risk identification & allocation
- Earlier cost certainty; possible cost savings
- Greater flexibility in selection process
- Increased opportunities for innovation

Public
Works
Purchases
Change
Order
Authority

Change Order Authority Amendment

- Amend public works purchasing change order authority to greater of \$250,000 or 5%
- Assists in expediting project completion
- Allows Metropolitan, DBE, or CM/GC greater flexibility for large scale materials and equipment purchases

Conflict- of-Interest Policy

- **Purpose** of conflict-of-interest (COI) policy for DB and PDB
- Coordination with **Ethics Office**
- **Elements**
 - Description of prohibited conflicts
 - Obligations of design-build entities
 - Mitigation of conflicts
 - Remedial measures
 - Attestation

Examples of Potential Conflicts

- Firm A advised Metropolitan on solicitation process for Project X before responding to RFQ for Project X.
- Firm B performed work for another entity related to Project X before responding to an MWD RFQ for Project X.
- Firm C employs former MWD employees with knowledge of Project X before responding to an RFQ for Project X.

Funding for Outside Counsel

- 14 law firms responded to General Counsel RFP for APD legal services
- Hanson Bridgett (HB) selection based on extensive public agency experience
- HB work to date: drafting of PDB contract, assistance with RFQ and COI policy
- HB future work: development of documents for DB and CM/GC, advice on APD issues

Board Options

Option #1

- a. Approve amendments to the Administrative Code authorizing the use of alternative project delivery methods.
- b. Adopt an organizational conflict-of-interest policy governing solicitation of design-build and progressive design-build projects.
- c. Authorize \$150,000 increase to Hanson Bridgett LLP contract, for new not-to-exceed amount of \$250,000, for legal services related to implementation of alternative project delivery.

Board Options (cont'd)

Option #2

Do not approve recommended amendments to the Administrative Code, adoption of organizational conflict-of-interest policy, or contract increase.

Staff Recommendation

Option #1

