



TOWN OF DISCOVERY BAY

A COMMUNITY SERVICES DISTRICT



President – Bob Leete • Vice-President – Kevin Graves • Director – Bill Mayer • Director – Bill Pease • Director – Chris Steele

January 31, 2017

Mr. Charles Helfrick
66 Beaver Court
Discovery Bay, CA 94505

Sent as an email attachment.

Dr. Mr. Helfrick:

The District has received a number of emails and a public records request from you over the past several days, related to the Water Meter Completion Project. The emails and public records request are dated:

- January 19th email,
- January 20th (5:02 p.m.) email,
- January 20th (5:15 p.m.) email,
- January 20th (6:32 p.m.) email,
- January 21st (5:07 p.m.) email,
- January 24th (7:09 p.m.) email, and
- January 23rd Public Records Request

With the assistance of staff, although we do not have documents responsive to your request, we formulated the responses below to your questions in an attempt to efficiently address your inquiries. In a few cases, I have referred your question to legal counsel. For your ease of reference, your questions have been summarized as well.

A. January 19th and January 20th (5:15 p.m.)

These two emails raise several questions related to the Water Meter Completion Project charge and request that a discussion of these items be placed on the Board's agenda for February 1, 2017.

The primary issue raised is application of Prop 218 and whether Proposition 218 prohibits the District from averaging some costs that will vary among the sites. The District's legal counsel responded to your questions on January 24, 2017, and stated that Proposition 218 does not apply to the water meter fees. Please see that email for further information.

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The following response is from District's legal counsel concerning Proportional Cost Recovery:

A "regulatory fee" has been defined in case law as an imposition that funds a regulatory program or that distributes the collective cost of a regulation and is "enacted for purposes broader than the privilege to use a service or to obtain a permit. . . The regulatory program is for the protection of the health and safety of the public."

California Water Code section 527 requires all municipal and industrial service connections located within Discovery Bay to have meters installed by January 1, 2025. The state Legislature is regulating statewide water use to "ensure water in this state is put to beneficial use to the fullest extent and to prevent waste and unreasonable use." The Legislature authorized urban water suppliers, like Discovery Bay, to recover the cost of services related to the purchase, installation, and operation of the water meters from rates, fees, or charges.

A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to the individual payers. The question of proportionality is not measured on an individual basis. Rather it is measured collectively, considering all rate payers. Therefore, permissible regulatory fees or charges must be related to the overall cost to Discovery Bay for complying with the governmental regulation provided that the fee or charge does not generate a surplus used for general revenue collection.

In the case of Discovery Bay, the contractor identified different types of Meter Service, each with a different identified unit cost. Since proportionality is measured collectively across all rate payers receiving a meter, allocating total costs of installation is permissible given the current case law. It would also be permissible for Discovery Bay to implement a "Tiered" schedule based on the meter types and unit costs identified. Since there are different "types" of meters involved, it is also equitable and defensible to charge different flat fees which correlate to the various meter types.

1. How can the District include contingency within the cost of the water meter installation when you don't know whether the contingency will be used or not?

You are correct that it is premature to know whether a contingency portion of the project base budget will be utilized or not. The budget that was developed for the Board's November 29, 2016 workshop appropriately included contingency within the proposed base budget. The "base budget" refers to the portion of project costs that will be subject to a charge back to residents receiving the water meters. Although the expectation is that the final cost will be very close (and hopefully lower) than the project estimate, the final cost cannot be known at this time.

It appears that you may have the understanding that the \$906.25 listed in the report for the January 4, 2017 meeting was the amount that will be charged back to residents receiving the water meters. That number is an estimate and, as the staff report noted, reflects a project amount that is modestly higher than the base budget. In addition, it includes the assumption that the base budget is the final cost, which cannot be known until the project is concluded. Specifically, the two contingency portions of the budget equal \$176,149.00 which is 5.66% of the project base budget. Depending upon how much of the contingency is utilized, the total project cost could be lowered by up to \$50.00 per installation.

B. January 20th (6:32 p.m.)

The District's Finance Manager responded to your previous inquiries on the cost of the products necessary for the Water Meter Project. In this correspondence you explain that you took those responses and then calculated product cost for the project and believe that there is a \$146,259.28 difference between the District's product cost in the budget and your calculations.

I should emphasize that the budget is the District's estimate of costs at the time of preparation. You have asked for the amount of the "actual product cost." With respect to the product costs, you will note that there are different sizes of water meters and boxes each with slightly different costs. The size utilized at a particular site will be determined on a case-by-case basis. As such, the final project costs cannot be known at this time. The product estimate will continue to be refined as the project moves forward.

With respect to your spread sheet, we have identified several potential reasons for the variations:

- The District's purchase is subject to sales tax which would add \$98,609.35;
- The product has shipping charges which are estimated at \$30,000;
- The District utilized \$208.00 for each of the meters rather than using the 50/50 split that you assumed in your calculations (\$28,256);
The District rounded to 3500 the number of product needed which would result in a variance from your spreadsheet of -\$10,606.72.

C. January 20th (5:02 p.m.)

This correspondence is a follow-up inquiry to information the District's Finance Manager provided to you in response to your January 19th email, and contains a number of additional questions. Again, for ease of reference, I have summarized your questions and then provided a response.

1. Why has the District added the construction contingency to the budget?

It is customary at the outset of a construction project to include a contingency allowance. It has been my experience that construction contingency allowances range up to 20% depending upon the type of project. For this project, a 10% (actual 9.4%) construction contingency allowance (\$131,149.00) has been included within the project base budget. The contingency allowance is controlled by the District and has not been included within the construction contract.

2. Does the District expect cost overruns of \$131,149.00 and what type of overrun would be expected?

It is not known at this time whether the project contingency allowances will be utilized. Construction contingency is for unforeseen circumstances. This project has over 3500 field sites, which would lead one to normally expect a higher utilization of construction contingency. Of course, we would be pleased if the contingency is not utilized and the final project costs are lower than the base budget.

3. When will the public know if the construction contingency has been used and how much of an explanation will they receive?

The District staff will be providing routine updates to the Board on the progress of the project and the costs incurred. Detailed project financial reports will be provided to the Board on a bi-monthly basis. These reports will identify the utilization of the contingency as well.

In addition, all invoices paid for by the District are included in a report that is listed on each Board agenda. The "Register of District Invoices" may be found on the Consent Calendar. This includes all payments for costs related to the Water Meter project.

4. Does the District expect to spend the \$40,000 for Public Field Services/Outreach and has this been spent yet?

Yes, the District expects that the \$40,000 will be utilized. Approximately \$4600.00 has been spent to date.

5. Has the \$30,000 for the Public Field Services/Field been spent and does the District expect to spend this amount?

Yes; at this time, the District expects that this amount will be necessary. However, as of this date, no costs for this item have been incurred.

6. Is the \$185,000 contract for LSCE a "not to exceed" contract?

Yes; the \$185,000 is a maximum amount for the contract. If the District wishes to add to this cost, a request must be approved by the Town Board of Directors.

7. What is the inspection process, and since \$50,000 of this contract is for inspection services, will the public receive an inspection report for their property?

The project inspector(s) are responsible for assuring the quality of the workmanship throughout the project implementation as well as assisting with the inventory controls. Although there will be documentation of inspection activities, there will not be separate reports developed for each of the over 3500 separate sites. The installations will be occurring within the public right-of-way. They will not be installed on private property.

If you are interested in receiving any documents that the District develops related to the installation of the meter in the public right-of-way in front of your property, we can certainly provide that to you. Based on the address listed in your correspondence, your neighborhood is in the last project phase.

8. Will the public be kept informed regarding how many hours and dollars are expended every two weeks at CSD meetings?

The District staff will be updating the Board on a monthly basis and plans to provide a bi-monthly project financial report which will identify all expenditures. As noted in the response to Question #C3 above, all District expenditures may be identified by reviewing the "Register of District Invoices" which is found on the Consent Calendar of each agenda. The bi-monthly report, however, is designed to provide the information in one place along with any explanations so that those that are interested may follow the progress of the project.

9. Does the District expect that the full amount of the LSCE contract to be spent?

Yes. The District included the expected staffing needs from LSCE within the contract, and expects that the project will utilize the amount provided. If there is a need for additional services, a separate approval from the Town Board of Directors would be required.

10. Are there any specific worries that the CSD has to set up the \$45,000 contingency?

Yes. This project is comprised of over 3500 separate installations. Although they are not located on private property, they are located within an area that is commonly landscaped by property owners who may believe the site to be within their lot. We do expect that homeowners will have questions, particularly those homeowners who have obstructions to the meter box area that must be addressed. The District staff will continue to strive to address issues raised by individual homeowners as the project moves to their neighborhood.

11. Will the public be kept informed of how the \$45,000 contingency is expended – dollars and hours?

Yes; please see the response to question #C3 and #C8 above.

12. What is the number of each type of meter being purchased?

It is not possible at this point in the project to definitively know which size of meter will be appropriate for each site. That can only be determined when the area is exposed.

13. How did the District estimate the number of meters to be installed?

The District utilized tax records to determine the number of occupied parcels located within the project area. This number was adjusted to account for both a condominium complex that will have fewer installations than the number of dwelling units, as well as for an assumption of the number of vacant lots with water service connections and residences with multiple water connections. The final number may vary slightly from the project estimates. For example, a vacant lot may have a water meter box yet no service connection. In those cases, a meter will not be installed.

14. Will the District be purchasing one reader, one box, one box lid and 4 bricks for each of the individual locations?

All sites will require a meter and the reader. As the question relates to the boxes, lids and bricks, the decision is "yes" for most sites. However, based on field conditions, the District may choose to utilize the existing box. We expect that the increase in labor costs associated with using the existing meter box will be offset by the elimination of the cost for the box. A determination as to whether the existing box should be utilized or replaced with a larger box will be on a case-by-case basis. Please see the response to #C15 below.

15. Does the District have an estimate of how many locations will not need a meter box and lid?

The decision of whether it is both possible and cost effective to work within the existing meter box will be based on field conditions. We expect that working within the existing meter box will require additional labor costs. The decision to work within the existing meter box may be done in those cases where the overall cost of the project will not be increased.

16. Why is there a \$15,000 item for one site?

The District requested a specific bid for a single property in Discovery Bay with a unique set of circumstances. The high cost reflects the possibility that a new water service may need to be installed. This excess cost, if incurred, would be paid for by the property owner and not by residents of the Town.

D. January 21st (5:07 p.m. email correspondence)

1. Does the Town of Discovery Bay deem the cost for the water meter installation to be an assessment or a fee?

It appears that you are questioning whether, for the purposes of Proposition 218, the charge of the project costs back to residents would be considered an "assessment" or a "fee." As stated above, the District's general counsel responded to your questions on January 24, 2017, and stated that Proposition 218 does not apply to the water meter fees. Please see that email for further information.

E. January 24th (7:09 p.m. email correspondence)

1. Is the cost of the 4th wastewater treatment project also not subject to the provisions Prop 218?

The following response is from District's general counsel: Assuming Mr. Helfrick is referring to the filtration project which is currently under way; the wastewater filtration project is being paid for through the issuance of the bonds which were approved at the January 18, 2017 meeting. If bonds are being used to fund a capital improvement project, the issuance of those bonds does not need to be considered under Proposition 218. However, the debt service on the bonds will be paid for by the wastewater users and the debt service was contemplated in the wastewater rate study prepared last year in accordance with the provisions of Prop 218.

Additional rehabilitation and improvement of the wastewater plant was undertaken in 2012 which was also funded through the issuance of bonds. Again, the debt service on the bonds was contemplated in the previous wastewater rate study.

It is proper to include the debt service of the bonds in the wastewater rates as the debt service is part of Discovery Bay's cost of providing wastewater service. Discovery Bay held a properly noticed hearing on July 20, 2016, there was no majority protest, and the Board voted to adopt the rates set forth in the rate study. Again, the debt service was contemplated and included as part of the rate study adopted by the Board in accordance with Proposition 218. The 2016 Waste Water Rate Study is available on Discovery Bay's website.

F. January 23rd Public Records Request

1. Request for records concerning reconsideration of past Agenda item.

The following response is from District's general counsel: We do not have any documents responsive to this request. However, based on our research our response is as follows:

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TODB Board Policy 004 – Section II. Power of the Board states that Rosenberg’s Rules of Order (“RRO”) will be used for the parliamentary procedure for all meetings. RRO describes the policy behind motions to reconsider and when they may be made. (see Rosenberg’s Rules of Order as provided in the Ca League of Cities https://www.cacities.org/Resources/Open-Government/RosenbergText_2011.aspx, pg. 6.)

Specifically, RRO provides “A tenet of parliamentary procedure is finality. After vigorous discussion, debate and a vote, there must be some closure to the issue. And so, after a vote is taken, the matter is deemed closed, subject only to reopening if a proper motion to consider is made and passed.”

Under RRO, a motion to reconsider can only be made when two special rules apply:

1. A motion to reconsider **must be made at the meeting where the item was first voted upon**. A motion to reconsider made at a later time is untimely.
2. A motion to reconsider may be **made only by a member who voted in the majority on the original motion**. If such a member has a change of heart, he or she may make the motion to reconsider. If a member who voted in the minority seeks to make the motion to reconsider, it must be ruled out of order.

In this instance, the Board unanimously voted to enter into a contract to install the water meters on November 2, 2016, any motion to reconsider would have had to be made at that meeting. A motion to reconsider, with respect to reconsideration of Meter Installation, that is made now would no longer be timely. This was the basis for Mr. Attebery’s statement that the time to reconsider had passed. Updates on the project and further deliberation of reimbursement and process are appropriate agenda items.

We hope that this detailed response provides answers to each of the questions you raised.

Sincerely,



Michael R. Davies
General Manager