



Monterey County

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Board Report

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Receive a report clarifying the reimbursement requirement of the Department of Water Resources Grant relating to the Inter-Lake Tunnel and Spillway Modification Project

RECOMMENDATION:

It is recommended that the Board of Supervisors of the Monterey County Water Resources Agency:

Receive a report clarifying the reimbursement requirement of the Department of Water Resources Grant relating to the Inter-Lake Tunnel and Spillway Modification Project.

SUMMARY:

At the April 2018 Agency Finance Committee meeting, the question arose as to whether the Agency would be required to repay any or all of funds reimbursed to the Agency under the \$10 million Department of Water Resources state grant (State Grant) if a Prop 218 vote on the Tunnel Project was unsuccessful. The County Counsel's Office was requested to clarify the provisions of the State Grant Agreement on this point. In brief, Agency would not be required to repay any State Grant reimbursements merely because the Tunnel Project did not receive sufficient votes in a Prop 218 vote. The Agency might be required to repay State Grant funds if the Agency abandoned the Tunnel Project without complying with the conditions precedent in the DWR Grant Agreement. The Agency might also be required to repay State Grant funds if the Agency defaults or breaches any material condition of the Grant Agreement.

DISCUSSION:

In February 2017, the Agency and DWR entered into the Grant Agreement. The Grant Agreement provides that the DWR will reimburse the Agency for certain eligible Project costs up to a maximum of \$10 million. Section 9, Grant Agreement. (See Attachment A, DWR Grant Agreement.) In general, Agency Tunnel Project costs are reimbursable up to the point of a Proposition 218 vote. In other words, the Agency and DWR intended that the \$10 million would assist the Agency in developing the engineering, acquisition, environmental and related costs anticipated to bring the Project to a Prop 218 vote.

In return for the state grant funds, the Agency agreed to perform the work on the schedules attached to the Grant Agreement. In doing so, the Agency is required to observe the conditions in the Grant Agreement. If the Agency fails to do so, or to cure any failure to comply with a condition after notice to cure from DWR, then the Agency risks DWR's withholding of grant funds and the obligation to repay, with interest, costs previously reimbursed by DWR. Sections 11 and 12, Grant Agreement. If the Agency should breach the Grant Agreement, it would also be liable to pay DWR's reasonable attorneys' fees, legal expenses, and costs.

The Grant Agreement does envision that the Agency might not be able to complete all the work anticipated in the Grant Agreement. Section 14 provides:

14. EARLY TERMINATION WITH CAUSE BY GRANTEE. The Grantee shall notify the State, in writing, if the Grantee has determined that the proposed Project will be suspended or terminated for substantial reasons including, but not limited to, the following:

- a. If the Grantee has determined long-term funding is not sufficiently secured to fund the Project in its entirety;
- b. If the Grantee has determined, based upon an analysis and/or Project evaluation, that the proposed Project is not feasible or economically viable.

Grantee shall provide the State a minimum notice of 60 days for Early Termination with Cause, and follow the termination requirements in accordance with Paragraph D.42, Exhibit D. Early Termination with Cause by Grantee will not be considered Default as defined in Paragraph 12, and not subject to reimbursement by Grantee to State for funds disbursed to Grantee on eligible approved work, provided that the abandonment of the Project does not create an environmental or public safety hazard, or cause a condition of nuisance.

In other words, the Agency may not simply abandon the Project without risking the obligation to reimburse the grant funds. However, the Agency may conduct an analysis or Project evaluation and determine that the Project is either not feasible or economically viable. It may then notify DWR of its determination with notice of at least 60 days, in accordance with the Grant Agreement. In such a case, the Agency “will not be considered Default as defined in Paragraph 12, and not subject to reimbursement . . . for funds disbursed to [Agency] on eligible work, provided the Project does not create an environmental or public safety hazard, or cause a condition of nuisance.” *Ibid*.

OTHER AGENCY INVOLVEMENT:

None.

FINANCING:

Not addressed.

Prepared by: Jesse J. Avila, Deputy County Counsel

Approved by: _____
David E. Chardavoyne, General Manager, (831) 755-4860

Attachments:

1. Grant Agreement Between the State of California (Department of Water Resources) and Monterey County Water Resources Agency, Agreement Number 4600011748

