



# Santa Clara Valley Water District

## CONFORMED COPY

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OBTAIN THE DOCUSIGN SIGNATURE CERTIFICATE OF COMPLETION

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File No.: 23-0657

Agenda Date: 9/26/2023

Item No.: 3.4.

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### BOARD AGENDA MEMORANDUM

Government Code § 84308 Applies: Yes ☐ No ☒  
(If "YES" Complete Attachment A - Gov. Code § 84308)

#### SUBJECT:

Adopt Ordinances Directing the Establishment of Procedures for the Small Business Enterprise Outreach Program Policy for the Contracting of Construction, and, Rescinding and Replacing Ordinance 04-01 And Directing the Establishment of Procedures for the Contracting of Professional Consultant Services.

#### RECOMMENDATION:

- A. Adopt the Ordinance DIRECTING THE ESTABLISHMENT OF PROCEDURES FOR THE SMALL BUSINESS ENTERPRISE OUTREACH PROGRAM POLICY FOR THE CONTRACTING OF CONSTRUCTION, that provides an evaluation preference for Small Business Enterprise (SBE) bidders and non-SBE bidders that fulfill an established 30% small business subcontracting goal, relevant policy updates, and delegates authority to the Chief Executive Officer (CEO) to administratively implement statutorily mandated changes to the Small Business Enterprise Outreach Program Policy; and
- B. Adopt the Ordinance RESCINDING AND REPLACING ORDINANCE 04-01 AND DIRECTING THE ESTABLISHMENT OF PROCEDURES FOR THE CONTRACTING OF PROFESSIONAL CONSULTANT SERVICES, that provides an evaluation preference for Small Business Enterprise (SBE) bidders and non-SBE bidders and non-SBE bidders that fulfill an established 30% small business subcontracting goal, relevant policy updates, and delegates authority to the CEO to administratively implement statutorily mandated changes to the Small Business Enterprise Outreach Program Policy for Professional Consultant Services.

#### SUMMARY:

##### **A. PROPOSED POLICIES FOR CONTRACTING FOR CONSTRUCTION**

Public Contract Code (PCC) §2002, enacted in 2001, authorized local agencies to provide a small business preference to facilitate contract awards to small businesses. Since that time, the small business subcontracting participation goal and preference has been applied to individual construction contracts at the Board's discretion when approving the advertisement of bids for capital improvement projects.

Effective January 1, 2019, AB 2762 amended PCC §2002 to establish additional requirements for local agencies to provide a small business preference. The amendments allow Santa Clara Valley Water District's (Valley Water) Board of Directors to set the percent and financial value of an evaluation preference up to 7% but not to exceed \$150,000. Staff recommendation is to establish up to a 5% evaluation preference for construction contracts, to stay in line with the evaluation preference limits adopted by the Board in Ordinance No. 04-01. Further details of staff recommendations for the application of an evaluation preference and financial value are included in the tables below.

1. When an apparent low bid is \$3,000,000 or less, the preference will be calculated as a percentage of the apparent low bid as follows:

CATEGORY OF BIDDER	PREFERENCE
Bidder is an SBE	5%
Bidder is not an SBE and has: a. Subcontracted 50% to 100% of work to SBE firms b. Subcontracted 40% to 49% of work to SBE firms c. Subcontracted 30% to 39% of work to SBE firms	5%    4%    3%

2. When the initial lowest bid total received is above \$3,000,000, the preference will be applied as an exact dollar value as follows:

CATEGORY OF BIDDER	PREFERENCE
Bidder is an SBE	\$150,000
Bidder is not an SBE and has: a. Subcontracted 50% to 100% of work to SBE firms b. Subcontracted 40% to 49% of work to SBE firms c. Subcontracted 30% to 39% of work to SBE firms	\$150,000 \$120,000 \$90,000

Non-small business bidders that do not achieve small business subcontracting goals are required to demonstrate good faith efforts to be considered responsive.

District policies must address PCC §2002 requirements related to Good Faith Efforts, commercially useful functions, SBE subcontractor substitution, and oversight of potentially fraudulent behavior. Staff recommends the Board direct implementation of procedures that include the following measures:

1. Require criteria consistent with PCC §2000 to establish Good Faith Efforts (GFE) and develop a process for determining when GFE is achieved.
2. Utilize the definition of a commercially useful function provided in PCC 2002 (d) to determine whether an SBE's participation can be considered for a preference.
3. Require that the policy describe how a prime contractor may substitute a subcontractor in accord with PCC §2002(c)(6). The policy shall specify that an SBE subcontractor that served

to qualify for a preference only be substituted by another SBE subcontractor per PCC §2002 (c)(6)(a)(C).

4. Fraudulent intent and activity as defined under Government Code (GC) §§ 14842(a) and 14842.5(a)(1-9) must be reported to the California Department of General Services.

By enacting the SBE Outreach Program Ordinance for construction contracts, Valley Water establishes a Small Business Outreach Program Policy that complies with PCC §2002 that can be amended in response to future statutory changes.

## **B. PROPOSED POLICIES FOR CONTRACTING FOR PROFESSIONAL SERVICES**

On June 15, 2004, the Board adopted Ordinance 04-01, which provided small business preference for contracting professional consultant services based on Government Code §4526 and preference criteria from Public Contract Code §2002. Ordinance 04-01 established a 5 percentage point preference for certified small businesses and a minimum of 3 percentage points and up to 5 percentage points for non-small businesses meeting small business subcontracting participation goals of at least 30 percent. The policy established by Ordinance 04-01 that is described above will be incorporated into the proposed new ordinance as shown in the table below.

CATEGORY OF PROPOSER	PREFERENCE
Proposer is an SBE	5%
Proposer is not an SBE and has: a. Subcontracted 50% to 100% of work to SBE firms b. Subcontracted 40% to 49% of work to SBE firms c. Subcontracted 30% to 39% of work to SBE firms	a. 5% b. 4% c. 3%

In the updated policy for this evaluation preference, non-small business proposers that do not achieve small business subcontracting goals are now required to demonstrate good faith efforts to be considered responsive.

The amendments to PCC 2002 require that any local agency offering preferences must establish a comprehensive procurement policy beforehand. Staff recommends the Board adopt a new ordinance that directs staff to add key policies and procedures to align with PCC 2002, including:

1. clear definitions for eligibility within each preference category;
2. a requirement that preferences will solely be granted to small businesses that actively fulfill a commercially useful function on the project;
3. the need for oversight to prevent fraudulent activities, outlining measures to detect and deter consultants, subconsultants, or individuals attempting to illegitimately qualify as small businesses to gain preferences;
4. a requirement that non-small business proposers that do not achieve small business subcontracting goals demonstrate Good Faith Efforts (GFE) to be considered responsive. Staff will require criteria consistent with PCC §2000 to establish GFE and develop a process for determining when GFE is achieved;

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5. provisions for prime consultants to substitute subconsultants. The substitution policies applicable to professional consultant services agreements shall differ from those applicable to construction contractors.

C. By implementing these provisions, the ordinance aims to ensure that small businesses benefiting from preferences are genuinely contributing to the project's success and growth, rather than just receiving preferential treatment without adding value and would align Valley Water with policy requirements of PCC §2002, fostering greater inclusion and participation of Small Business Enterprise firms in professional consultant service contracts.

#### **ENVIRONMENTAL JUSTICE IMPACT:**

The goal of the Policy is to assist small businesses that often face barriers to participate in government contract opportunities. SBEs represent a diverse cross-section of the population Valley Water serves. Potential local economic benefits of increased SBE participation in Valley Water contracting opportunities include job creation and wage growth.

#### **FINANCIAL IMPACT:**

Implementation of an SBE preference for construction contracts may result in added cost to Valley Water construction contracts and would be limited to a maximum of \$150,000 per contract awarded. The actual amount of the impact to Valley Water cannot be accurately estimated at this time as it will be dependent upon the number of contracts awarded and the price differential between the actual contract amount as a result of the small business preference allotted over the actual low bid amount. It is anticipated however that the reinvestment of Valley Water resources into small business enterprises will provide overall economic benefits to the local economy that outweigh any minor cost differentials.

Implementation of an SBE preference for consultant contracts is not projected to have additional cost impact to Valley Water since the assessment of consultant qualifications for services is not primarily influenced by cost considerations.

#### **CEQA:**

The recommended action does not constitute a project under CEQA because it does not have the potential for resulting in a direct or foreseeable indirect physical change in the environment.

#### **ATTACHMENTS:**

Attachment 1: Ordinance, Construction  
Attachment 2: Ordinance, Consultant Services  
Attachment 3: PowerPoint

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**UNCLASSIFIED MANAGER:**  
Tony Ndah, 408-630-2208

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**BOARD OF DIRECTORS  
SANTA CLARA VALLEY WATER DISTRICT**

**ORDINANCE NO. 23-03**

**DIRECTING THE ESTABLISHMENT OF PROCEDURES FOR THE SMALL  
BUSINESS ENTERPRISE OUTREACH PROGRAM POLICY  
FOR THE CONTRACTING OF CONSTRUCTION**

WHEREAS, Santa Clara Valley Water District (Valley Water) is a local government agency that may adopt methods and procedures for facilitating contract awards to small businesses for construction in accordance with Public Contract Code Section 2002; and

WHEREAS, Valley Water encourages and promotes the use of small businesses in the contracting of construction in accordance with the Board of Director's (Board) governance policies and executive limitations that promote values that support equal opportunity, fairness, diversity, and reinvestment of Valley Water resources in its service and benefit to the community; and

WHEREAS, the Board received and considered proposed SBE policy updates at its regularly scheduled meeting on September 26, 2023 that included an agenda memo and proposed ordinances presented by Valley Water's staff; and

WHEREAS, Santa Clara Valley Water District now desires to establish a Small Business Outreach Program Policy which includes a small business preference to ensure maximum participation of small business firms in the contracting of construction.

NOW, THEREFORE BE IT RESOLVED that the Board of Directors of the Santa Clara Valley Water District does hereby ordain as follows:

Section 1: That the policies contained in the agenda memo presented to and considered by the Board are adopted by the Board, and the Board directs that said policies shall be incorporated into a Small Business Enterprise Outreach Program Policy guidelines and all other relevant administrative policies and procedures to ensure maximum participation of Small Business Enterprise firms in the competitive bidding process for construction contracts.

Section 2: The Chief Executive Officer is authorized to administratively implement statutorily mandated changes to the Small Business Enterprise Outreach Program Policy.

Section 3: This ordinance is adopted pursuant to the authority of Public Contract Code Section 2002 and is not intended to carry the criminal penalties associated with ordinances adopted pursuant to Section 9 of the District Act.

Directing the Establishment of Procedures for the Small Business Enterprise Outreach Program  
Policy for the Contracting of Construction Ordinance No. 23-03

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PASSED AND ADOPTED by the Board of Directors of the Santa Clara Valley Water District by the following vote on September 26, 2023:

AYES: Directors: Estremera, Santos, Beall, Eisenberg, Hsueh, Keegan, Varela

NOES: Directors: None

ABSENT: Directors: None

ABSTAIN: Directors: None

SANTA CLARA VALLEY WATER DISTRICT

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JOHN L. VARELA  
Chair, Board of Directors

ATTEST: MICHELE L. KING, CMC

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Clerk, Board of Directors



**BOARD OF DIRECTORS  
SANTA CLARA VALLEY WATER DISTRICT**

**ORDINANCE NO. 23-04**

**RESCINDING AND REPLACING ORDINANCE 04-01 AND DIRECTING THE  
ESTABLISHMENT OF PROCEDURES FOR THE CONTRACTING OF  
PROFESSIONAL CONSULTANT SERVICES**

WHEREAS, on June 15, 2004, the Board of Directors (Board) of Santa Clara Valley Water District (Valley Water) adopted Ordinance 04-01 to provide small business preference for contracting professional consultant services based on Government Code §4526 and incorporated preference criteria from Public Contract Code §2002; and

WHEREAS, Ordinance 04-01 established a preference of 5 percentage points for certified small businesses and a minimum of 3 percentage points up to 5 percentage points for non-small businesses who meet small business subcontracting participation goals of at least 30 percent; and

WHEREAS, in 2018, Assembly Bill 2762 amended Public Contract Code §2002 to establish policy requirements effective January 2019 for a local agency that offers a small business preference; and

WHEREAS, the Board received and considered proposed SBE policy updates at its regularly scheduled meeting on September 26, 2023 that included an agenda memo and proposed ordinances presented by Valley Water staff; and

WHEREAS, Valley Water now desires to establish a Small Business Outreach Program Policy that includes a small business preference and relevant policy updates to ensure maximum participation of small business firms in the selection and award of professional consultant services agreements.

NOW, THEREFORE BE IT RESOLVED that the Board of Directors of the Santa Clara Valley Water District does hereby ordain as follows:

Section 1: This Ordinance rescinds and replaces Ordinance 04-01 to address policy updates and amendments to Public Contract Code §2002.

Section 2: That the policies contained in the agenda memo presented to and considered by the Board are adopted by the Board, and the Board directs that said policies shall be incorporated into a Small Business Enterprise Outreach Program Policy For Professional Consultant Services guidelines and all other relevant administrative policies and procedures to ensure maximum participation of Small Business Enterprise firms in the contracting for professional consultant services.

Section 3: The Chief Executive Officer is authorized to administratively implement statutorily mandated changes to the Small Business Enterprise Outreach Program Policy for Professional Consultant Services.

Section 4: This ordinance is adopted pursuant to the authority of Public Contract Code §2002 and Government Code §4526 and is not intended to carry the criminal penalties associated with ordinances adopted pursuant to Section 9 of the District Act.

Rescinding and Replacing Ordinance 04-01 And Directing The Establishment Of Procedures  
For The Contracting Of Professional Consultant Services Ordinance No. 23-04

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PASSED AND ADOPTED by the Board of Directors of the Santa Clara Valley Water District by  
the following vote on September 26, 2023:

AYES: Directors: Estremera, Santos, Beall, Eisenberg, Hsueh, Keegan, Varela

NOES: Directors: None

ABSENT: Directors: None

ABSTAIN: Directors: None

SANTA CLARA VALLEY WATER DISTRICT

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JOHN L. VARELA  
Chair, Board of Directors

ATTEST: MICHELE L. KING, CMC

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Clerk, Board of Directors



# SMALL BUSINESS ENTERPRISE OUTREACH PROGRAM

Presented by  
Tony Ndah, Deputy Administrative Officer - General Services

September 26, 2023

# BACKGROUND

## 2001 ○ PUBLIC CONTRACT CODE SECTION 2002

- Provide a small business preference, up to 5%
- Establish a subcontracting participation goal for small businesses, grant preference based on participation
- Require bidders to make good faith efforts to meet subcontracting participation goals

## VALLEY WATER ORDINANCE 04-01

- ## 2004 ○
- Implemented a small business preference of 5% for Professional Consultant Services
  - Subcontracting participation goal of at least 30% qualify to receive a minimum of 3%, up to 5%
  - Preference was applied to individual public works construction contracts at the Board's discretion

## STATE ASSEMBLY BILL 2762 (2019)

- ## 2019 ○
- Set the percentage and maximum financial value of a single preference
  - Increased maximum preference from 5% to 7%
  - Limits the value of preference to a maximum of \$150,000

## 2023 ○ INTRODUCE NEW ORDINANCE FOR CONSTRUCTION CONTRACTS AND RESCIND AND REPLACE ORDINANCE FOR VALLEY WATER ORDINANCE 04-01

# SBE OUTREACH PROGRAM UPDATE

- Establishes eligibility standards for preference application
- Establishes a small business subcontracting participation goal of 30%
- Implements a preference of 5% for small business bidders, sets the maximum value of a preference to \$150,000 for construction contracts
- Requires non-small businesses that do not achieve small business subcontracting goals to make Good Faith Efforts to be considered responsive
- Establishes a process of substituting small business subcontractors and guidance regarding oversight and potentially fraudulent behavior for the purpose of qualifying as a small business and being awarded a preference
- Requires small business bidders and subcontractors to perform a commercially useful function to qualify for a preference

# CONSTRUCTION SBE PREFERENCE APPLICATION

## Lowest initial bid total is below \$3M.

Bidder is an SBE	5%
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Bidder is not an SBE and has:

- |   |    |
|---|----|
| a. Subcontracted 50% to 100% of work to SBE firms | 5% |
| b. Subcontracted 40% to 49% of work to SBE firms  | 4% |
| c. Subcontracted 30% to 39% of work to SBE firms  | 3% |

## Lowest initial bid total is \$3M and above.

Bidder is an SBE	\$150,000
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Bidder is not an SBE and has:

- |   |           |
|---|-----------|
| a. Subcontracted 50% to 100% of work to SBE firms | \$150,000 |
| b. Subcontracted 40% to 49% of work to SBE firms  | \$120,000 |
| c. Subcontracted 30% to 39% of work to SBE firms  | \$90,000  |

# PROFESSIONAL CONSULTANT SERVICES SBE PREFERENCE APPLICATION

## Key Policy Additions:

1. Adds definition of an eligible entity for each preference category.
2. Adds the requirement that a preference only be awarded to a small business that performs a commercially useful function.
3. Adds requirement for oversight to avoid potential fraudulent behavior for the purpose of qualifying as a small business and being awarded a preference.
4. Adds requirement for how a prime consultant may substitute subconsultants and replace subconsultants used to qualify for a preference.



# PROFESSIONAL CONSULTANT SERVICES SBE PREFERENCE APPLICATION

Percentage of a single preference.

Bidder is an SBE	5%
Bidder is not an SBE and has:	
a. Subcontracted 50% to 100% of work to SBE firms	5%
b. Subcontracted 40% to 49% of work to SBE firms	4%
c. Subcontracted 30% to 39% of work to SBE firms	3%



# COMPLIANCE

- Construction Contracts and Support Unit (CCSU) staff will evaluate and apply the preference during the bid evaluation process for construction contracts
- Consultant Contracts Unit (CCU) staff will evaluate and apply the preference during the bid evaluation process for professional consultant services
- CCSU staff will collect small business contractor payment reports and maintain records

# QUESTIONS





# Valley Water

Clean Water • Healthy Environment • Flood Protection

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