

 Valley Water	<b>SMALL BUSINESS ENTERPRISE OUTREACH PROGRAM POLICY</b>	PROCESS OWNER: <b>CONTRUCTION CONTRACTS UNIT MANAGER</b> DOCUMENT NO.: Q-740-036 REVISION: A EFFECTIVE DATE: <b>05/02/2024</b> Page 1 of 9
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## 1. POLICY STATEMENT

The purpose of this policy is to implement a Small Business Enterprise (SBE) Outreach Program to provide an equal opportunity for all small business firms to participate in the procurement process and the performance of Santa Clara Valley Water District (Valley Water) construction contracts.

## 2. PURPOSE

To establish an SBE Outreach Program in compliance with California Public Contract Code 2002 to ensure that SBEs that meet the State of California definition of a small or micro business, as defined in California Government Code §14837, are afforded every opportunity to participate in Valley Water's construction contracting program.

The objectives of the SBE Program include:

- A. To ensure consistency in the award and administration of contracts to construction financed by state and local funds;
- B. To create a level playing field on which SBEs can compete fairly on contracts financed by local funds;
- C. To ensure that only firms that fully meet SBE certification eligibility standards as defined by the California Department of General Services (DGS) are permitted to participate as SBEs;
- D. To help remove barriers to the participation of SBEs in contracts financed by state and local funds; and
- E. To assist the development of firms that can compete successfully in the marketplace outside the SBE Outreach Program.

## 3. DEFINITIONS

- A. **Contractor:** The individual, partnership, co-partnership, joint venture, firm, corporation, or entity with whom the contract is made by Valley Water. A contractor may be a construction contractor, a supplier, a trucker, or a service provider.
- B. **Subcontractor:** The individual, co-partnership, partnership, joint venture, firm, corporation, or entity in direct contract with the Contractor or with any other Subcontractor for the purpose of furnishing materials, equipment, and/or performing a part of the contract work.
- C. **Supplier:** A manufacturer, fabricator, distributor, or any person or organization who supplies materials or equipment for the contract work, including that fabricated to a special design, but who does not ordinarily perform labor at the jobsite.

## 4. SCOPE, ASSUMPTIONS & EXCEPTIONS

- A. **Eligible Entities** – Eligibility for a “small business” includes entities meeting the requirements of an SBE certification pursuant to Article 1 (commencing with §14835) of Chapter 6.5 of Part 5.5 of Division 3 of Title 2 of the Government Code.



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1. To be eligible for the award of a contract, each bidder must:
  - a. Comply with Valley Water's SBE Outreach Program Policy requirements;
  - b. Be a responsible bidder; and
  - c. Submit a responsive bid.
2. The eligible entity for each preference category being utilized by Valley Water is defined as follows:
  - a. **Micro Business (MB):** A sub-set of Small Business certification that is automatically designated as a micro business if the average gross annual receipts are five million dollars (\$5,000,000) or less over the previous three years; or the small business is a manufacturer with 25 or fewer employees.
  - b. **Small Business (SB):** An independently owned and operated business that is not dominant in its field of operation, the principal office of which is located in California, the owner(s) and/or officer(s) reside in California, and which, together with affiliates, has 100 or fewer employees, and average annual gross receipts of fifteen million dollars (\$15,000,000) or less over the previous three years, or is a manufacturer, as defined in Government Code §14837 subdivision (c), with 100 or fewer employees.
  - c. **Public Works (PW):** For the purposes of public works contracts, as defined in §1101 and §21161 of the Public Contract Code, for public works projects, awarded through competitive bids or otherwise, "small business" means an independently owned and operated business that is not dominant in its field of operation, the principal office of which is located in California, the officers of which resides in California, and which, together with affiliates, has 200 or fewer employees, and average annual gross receipts of thirty-six million dollars (\$36,000,000) or less over the previous three years.

B. **Small Business Preference** – Valley Water has established the percentage and maximum financial value of a single preference:

1. The maximum percentage of a preference shall be maintained at 5% of the lowest responsible bidder meeting specifications on purchasing and construction contracts.
2. The maximum financial value shall be \$150,000 for any bid on contracts if the percentage applied to the participation of SBE subcontractors exceeds the maximum financial value.
3. Non-small business bidders that subcontract with certified small businesses for a minimum of 30% of the contract will be eligible to receive the bid preference as follows:
  - a. When the initial lowest bid total received is up to \$3,000,000, the preference will be calculated as a percentage of the lowest initial bid.

CATEGORY OF BIDDER	PREFERENCE
<b>Bidder is an SBE</b>	5%
<b>Bidder is not an SBE and has:</b> <ol style="list-style-type: none"><li>a. Subcontracted 50% to 100% of work to SBE firms</li><li>b. Subcontracted 40% to 49% of work to SBE firms</li></ol>	<b>5%</b> 4%



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c. Subcontracted 30% to 39% of work to SBE firms

3%

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

CATEGORY OF BIDDER	PREFERENCE
<b>Bidder is an SBE</b>	\$150,000
<b>Bidder is not an SBE and has:</b>	
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

4. Non-small business bidders that do not comply with outreach requirements will be considered non-responsive.

5. For purposes of calculating the Small Business preference, only the apparent low Base Bid amount (which excludes Supplemental and Additive/Deductive Bid Items) will be used. The preference is calculated by subtracting the appropriate percent (3%, 4%, or 5%) of the low Base Bid from the qualifying firm's Total Bid. The maximum dollar value of a preference is \$150,000.00.

a. *Example* – Apparent Low Bidder is not a Small Business:

Bidder 1 (non-SBE bidder)	Bidder 2 (SBE bidder)
\$600,000 (Apparent low bid)	\$615,000

b. Preference calculation for Bidder 2 will be based on the lowest initial bid total from Bidder 1 above.

Apparent low bid	X	Small Business Preference	=	Preference Total
\$600,000		5%		\$28,000

c. The Preference Total will be deducted from the bid total for Bidder 2. Their adjusted bid total is \$587,000.

6. In the event of a precise tie between the adjusted bid total of a Bidder meeting the specifications of a Microbusiness, and the adjusted bid total of a Bidder meeting the specifications of a Small Business, the contract shall be awarded to the Microbusiness.

7. The value of the awarded contract will be the original bid total submitted by the Bidder and not the adjusted bid total used to determine the lowest responsible bid.

C. **Commercially Useful Function** – A preference can only be awarded to a small business that performs a commercially useful function (CUF). A certified small business contractor, subcontractor, or supplier of goods and/or services that contributes to the fulfillment of the contract requirements, shall perform a CUF for each contract.

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A small business contractor, subcontractor, or a supplier of goods and/or services is deemed to perform a CUF if the business does all of the following:

1. Is responsible for the execution of a distinct element of the work of the contract.
2. Carries out its obligation by actually performing, managing, or supervising the work involved.
3. Performs work that is normal for its business services and functions.
4. Is responsible, with respect to products, inventories, materials, and supplies required for the contract, for negotiating price, determining quality and quantity, ordering, installing, if applicable, and making payment.
5. Is not further subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practices.

Each certified small business used to qualify a bid for a preference is required to perform a CUF when bidding and/or participating in any construction contract as a contractor, subcontractor, or supplier of goods and/or services, regardless of the procurement type or payment method.

A contractor, subcontractor, or supplier will not be considered to perform a CUF if the contractor's, subcontractor's, or supplier's role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of small business.

Being certified as a SBE by the DGS Office of Small Business and Disabled Veteran Business Enterprise Services (OSDS) does not automatically mean that a firm performs a CUF.

**D. Fraudulent Behavior** – Valley Water will conduct oversight and investigate potential fraudulent behavior on the part of a contractor, subcontractor, or individual for the purpose of qualifying as a small business and being awarded a preference.

Fraudulent intent and activity as defined under Government Code (GC) §§ 14842(a) and 14842.5(a)(1-9) are considered Small Business Certification Program violations. Sanctions and penalties are found in GC §§ 14842(a-g) and 14842.5 (b-e).

The District reserves the right to investigate and/or report fraudulent behavior or violations of SBE firms. For additional information regarding sanctions and penalties, refer to the DGS webpage entitled “Small Business (SB)/Disabled Veteran Business Enterprise (DVBE) Program Violations and Sanctions.”

Penalties are applicable to any person who violates the provisions of Government Code (GC) §14842.5, including SBEs, large noncertified businesses and their principals and business affiliates. Specifically, GC §14842.5(a)(6) makes it unlawful to fraudulently represent CUF in order to obtain a contract.

**E. Good Faith Efforts** – To determine whether a bidder that has failed to meet the SBE participation goal may be awarded the subject contract, Valley Water will decide whether the bidder made adequate “good faith efforts”, where applicable to meet the goal.

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“Good faith efforts” means all necessary and reasonable steps to achieve the SBE participation goal which by their scope, intensity, and appropriateness, could reasonably be expected to fulfill the goal. Only those efforts made prior to Bid Opening will be considered in evaluating good faith efforts. Mere *pro forma* efforts are not sufficient good faith efforts to meet the SBE contract requirements.

Bidders are expected to be directly responsible for performing the good faith efforts requirements of the contract solicitation. Bidder’s use of third parties to support its good faith efforts is at Bidder’s own risk and does not relieve the Bidder from being responsible for meeting the good faith efforts requirements.

The criteria listed below are reflective of good faith efforts undertaken by a Bidder actively and aggressively seeking to meet the goal:

1. **Pre-Bid Meeting.** Bidder attended any pre-solicitation or pre-bid meetings that were scheduled by Valley Water to inform Bidders of the Small Business Outreach Program requirements for this contract. The District may waive this requirement if it determines from the documentation submitted that Bidder is informed as to those program requirements.
2. **Identification of SBE Participation Opportunities.** Bidder identified and selected specific items of the Work to be performed by SBE firms to provide genuine opportunities for participation by SBE firms. Bidder shall provide documentation showing the items that were identified and selected and shall describe how such items were utilized by Bidder to solicit SBE participation. Where appropriate, Bidder should be able to show that Bidder broke out Contract work to facilitate SBE participation, even when Bidder preferred to perform these portions of the Work with its own forces.
3. **Advertisements.** At least ten calendar days before the Bid Opening, Bidder solicited sub-bids from SBE firms for specified categories of work or materials or supplies for the contract through advertisements (not simply the listing of plan holders) placed in one or more daily or weekly general circulation media, trade association publications, minority or trade oriented publications, trade journals, or minority/women focused media, soliciting bids from subcontractors/suppliers/vendors for participation in the project.
4. **Written Notice.** At least ten calendar days before the Bid Opening, Bidder provided written notice to a sufficient number of SBE certified firms in each subcontracting work category, and to such firms in each category of materials or supplies for the project. Written notice to a minimum of ten (10) firms shall constitute a sufficient number of firms to be notified if the approved databases contain at least 10 firms for that category. Written notice shall be sent first to “local firms”, then, where none are available or remain, to out-of-area firms. “Local” shall mean Santa Clara County and its contiguous counties.
5. **Follow-up of Initial Solicitations.** Bidder followed up initial solicitations of interest by contacting the SBE firms to determine with certainty whether the firms were interested in bidding on the project. Such follow-up activity shall be documented with telephone and or fax logs or other written documentation that shall be submitted to Valley Water and that shall set forth, at a minimum, the following information:
  - a. The type of contact (i.e., telephone, meeting, letter, fax, or email);

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- b. The name of the SBE firm contacted;
- c. The date and time the SBE firm was contacted;
- d. The full name, title, telephone or fax number, and e-mail address of the person at the SBE firm contacted by Bidder;
- e. The responses of each of the SBE firms contacted about its interest in submitting a sub-bid; and
- f. For each SBE firm contacted that declined to bid, the reason(s) provided by the SBE firm for declining to bid.

**F. Qualifying Subcontractor Substitution** – Construction subcontractors that served to qualify the bid package for a preference shall be replaced only with a subcontractor that meets the State of California definition of a small or micro business as defined in California Government Code §14837.

**G. Subcontractor Substitution** – The contractor may request to substitute or replace any subcontractor, including truckers, and suppliers, listed on Bid Form No. 4 – Small/ Micro Business Subcontractor List. Such requests shall be in writing, clearly state the reasons for the substitution or replacement, and provide supporting evidence or documentation as appropriate. No substitution or replacement shall occur without the prior written authorization of Valley Water in accordance with the Subletting and Subcontracting Fair Practices Act (Public Contract Code §4100 et. seq).

Prior to approval of the Contractor's request for the substitution, Valley Water shall give notice in writing to the listed subcontractor of the prime contractor's request to substitute and of the reasons for the request. The notice shall be served by certified or registered mail to the last known address of the subcontractor. The listed subcontractor who has been so notified shall have five working days within which to submit written objections to the substitution to the awarding authority. Failure to file these written objections shall constitute the listed subcontractor's consent to the substitution.

If written objections are filed, Valley Water shall give notice in writing of at least five working (business) days to the listed subcontractor of a hearing by the awarding authority on the prime contractor's request for substitution.

1. The contractor whose bid is accepted may not:
  - a. Permit a subcontract to be voluntarily assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed on Bid Form No. 4, without the consent of Valley Water.
  - b. Other than in the performance of "change orders" causing changes or deviations from the original contract, sublet or subcontract any portion of the work in excess of one-half of one percent of the prime contractor's total bid as to which his or her original bid did not designate a subcontractor.

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2. If a subcontractor is replaced, the contractor shall make Good Faith Outreach Efforts as set forth in Section E of this policy when replacing the original or listed subcontractor with another Valley Water-approved firm. The contractor shall not be entitled to any payment for such work or material unless it is performed or supplied by the listed subcontractor or by other forces (including those of the contractor) pursuant to prior written authorization of Valley Water.
3. Authorization to utilize another subcontractor may be requested for the following reasons:
  - a. When the subcontractor listed in the bid after having had a reasonable opportunity to do so fails or refuses to execute a written contract for the scope of work specified in the subcontractor's bid and at the price specified in the subcontractor's bid, when that written contract, based upon the general terms, conditions, plans and specifications for the project involved or the terms of such subcontractor's written bid, is presented to the subcontractor by the Contractor; or
  - b. When the listed subcontractor becomes insolvent or the subject of an order for relief in bankruptcy; or
  - c. When the listed subcontractor fails or refuses to perform his or her subcontract; or
  - d. When the listed subcontractor fails or refuses to meet the bond requirements of the Contractor as set forth in § 4108 of the Public Contract Code; or
  - e. When the Contractor demonstrates to Valley Water, subject to the further provisions set forth in § 4107.5 of the Public Contract Code, that the name of the subcontractor was listed as the result of an inadvertent clerical error; or
  - f. When the listed subcontractor is not licensed pursuant to the Contractor's License Law; or
  - g. When Valley Water determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work; or
  - h. When the listed subcontractor is ineligible to work on a public works project pursuant to § 1777.1 or 1777.7 of the Labor Code; or
  - i. When Valley Water determines that the listed subcontractor is not a responsible contractor.
4. The substitution request must include at least the following:
  - a. An explanation of the reason for the substitution.
  - b. The contractor must substitute a small business with another small business meeting the eligibility requirements of California Public Contract Code §2002(b).

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- c. A description of the work to be performed, identified both as a task(s) and as a dollar amount or percentage of the overall contract that the substituted business will perform. The substituted business(es), if approved, shall be required to perform a commercially useful function in the contract as defined in 2 California Code of Regulations ("CCR") §1896.15.
  - (1) The request for substitution of a small business and the awarding department's approval or disapproval cannot be used as an excuse for noncompliance with any other provision of law, including but not limited to, the Subletting and Subcontracting Fair Practices Act or any other contract requirements relating to substitution of subcontractors.
  - (2) If a contractor requests substitution of its subcontractor(s)/supplier(s) by providing a written request to the awarding agency in accordance with Section 2 CCR Section 1896.10, the awarding agency may consent to the substitution in any of the situations set forth in § 4107 of the Subletting and Subcontracting Fair Practices Act.
  - (3) Failure of the contractor to subcontract with the small businesses listed on its bid to the state or follow these substitution rules may be grounds for Valley Water to apply such sanctions as Government Code §§ 14842 and 14842.5 and the subsequent provisions of Title 2. Administration, Division 2. Financial Operations, Chapter 3. Department of General Services, Subchapter 8. Office of Small Business Procurement and Contracts permit. In the event such sanctions are imposed, the contractor shall be notified in writing and entitled to a hearing pursuant to 2 CCR §§ 1896.18 and 1896.20.

**H. Subletting and Subcontracting Fair Practices Act** – All construction subcontractors awarded construction subcontracts, shall be afforded all the protections of the Subletting and Subcontracting Fair Practices Act.

In accordance with 2 CCR § 1896.10, Substitution of a Small Business Subcontractor, after a contract has been awarded based in part on the application of the non-small business subcontracting preference, the contractor must use the small business subcontractor(s) and/or supplier(s) specifically proposed in the bid to Valley Water unless, in accordance with the provisions of the Subletting and Subcontracting Fair Practices Act (§ 4100 et seq., Public Contract Code), a substitution is requested in writing to the awarding agency and the awarding agency approves the substitution in writing prior to the commencement of any work by the substituted small business.

**5. ROLES AND RESPONSIBILITIES**

Construction Contracts and Support Unit staff will be responsible for administering the SBE Outreach Program. This includes bid evaluation and review of good faith effort criteria. Staff will also collect and review monthly SBE Utilization Reports that are completed by contractors that include details on payments made to SBE subcontractors.

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## 6. AUTHORITY

Authority and references for the District's SBE Outreach Program are derived from, but not limited to, the following:

- A. Government Code §§ 14835-14843 (Small Business Procurement and Contract Act); and
- B. California Public Contract Code §2002.

## 7. CHANGE HISTORY

Document the revision date, description of revision, and rationale for change, including any superseded documents.

DATE	REVISION	COMMENTS
<b>05/02/2024</b>	<b>A</b>	<b>INITIAL RELEASE; PROCESS OWNER: CONSTRUCTION CONTRACTS UNIT MANAGER (AMANDEEP SAINI)</b>