



● **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.

~~(h)(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.

§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.

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.