

**TOWN OF  
APPLE VALLEY, CALIFORNIA**

**AGENDA MATTER**

**Subject Item:**

**LOCAL PREFERENCE**

**BACKGROUND**

The Town Council previously authorized the Assistant Town Manager for Municipal Services to issue a Request For Proposals (RFP) for an update to the Town's Sewer Master Plan. A Review Panel was established and the Panel reviewed all responses to the RFP and made a recommendation to the Town Council as to which company it had recommended for Town Council selection. After hearing the staff report, the Council conducted a discussion regarding local preference and continued the matter until it could receive a report on Local Preference and determine a proper course of action.

At another meeting regarding the RFP for an update to the Town's Consolidated Plan, members of the public requested the Town Council establish a local preference program in light of economic conditions and the need to boost the local economy.

**Summary Statement:**

Staff has completed its research on this issue and the following are the preliminary findings:

1. The Town Procurement Policy, set forth in Chapter 3.12 of the Municipal Code, currently provides a credit for locally collected sales and use taxes in the calculation of bid totals. This means that the bid of a vendor located in Apple Valley can be reduced by the amount of sales/use tax the Town anticipates receiving from the transaction. Under certain circumstances, this can have the effect of making a bid qualifying under Section 3.12 the "lowest responsible bid" as otherwise required by Town policy;
2. Based upon staff's and the Town Attorney's review of OMB Circular A-102, "Grants and Cooperative Agreements with State and Local Governments", the Town may not adopt a local preference for any procurement funded in whole or in part by a Federal grant;
3. With regard to the procurement of goods and services for public works projects that exceed \$5,000, the Town cannot grant a local preference because state law preempts such a preference (Pub. Contract Code, Section 20162);

(Continued)

**Recommendation:**

That the Town Council receive and file this staff report regarding local preference and provide direction to staff, as appropriate.

Proposed by: Assistant Town Manager, Economic & Community Development Item Number \_\_\_\_\_

Town Manager Approval: \_\_\_\_\_ Budgeted Item  Yes  No  N/A

Council Meeting Date: 09/27/11

There are, of course, instances where local preference can be included in procurements administered by municipalities. The following is a quote from a memorandum staff received from Assistant Town Attorney, Kevin Wang, conducting research on this issue (Mr. Wang is BBK's in-house authority on such issues):

Application of Local Preference Program Based Upon Type of Solicitation

There are two situations where the Town can consider adopting a local preference program.

*(1) Price is not a determinative factor (not subject to competitive bidding)*

Contracts where price is not a determinative factor may include any contract for the procurement of supplies, equipment and services not involving public works projects of more than \$5,000. The Town has the option of granting a local preference of up to 5% for contracts that are not subject to competitive bidding. In support of its position, the Town could cite to increased costs of local business, sales and use tax revenue and/or economic development. The Town should note that there is no absolute way to prevent a challenge. However, this approach is structured to incorporate local preference programs that have been upheld by case law and other legal authority.

*(2) Price is a determinative factor*

Contracts where price is a determinative factor include public works projects of more than \$5,000 because state law requires those contracts to be awarded to the lowest responsive bidder. Some cities, including the Town, have implemented a local sales tax credit of 1% for contracts where price is the determinative factor. This preference scheme has not been challenged in a court, which may explain why some cities grant such a preference. However, it should be noted that the absence of a challenge does not confer validity on the practice despite the practice's longstanding history. Accordingly, the Town should be aware that, if challenged, a court could find a local preference based upon sales and use tax revenue to be invalid.

From staff's review of local preference programs implemented by other municipalities, it is noted that none of these programs accorded more than five percent (5%) of the total possible score to a vendor, contractor, supplier or consultant qualifying under established local preference rules. There are a number of related issues Council may want to take up when considering this matter but, assuming Council wants to move forward with a local preference program over and above what is already in place, it would be appropriate for Council to define the term "local" as a point of departure for more detailed discussions on this topic.

Based upon the foregoing, staff recommends adoption of the form motion.