

Date of Hearing: June 23, 2015

ASSEMBLY COMMITTEE ON JOBS, ECONOMIC DEVELOPMENT, AND THE ECONOMY

Eduardo Garcia, Chair

SB 159 (Nielsen) – As Amended March 23, 2015

SENATE VOTE: 38-0

SUBJECT: California Disabled Veteran Business Enterprise Program: goal achievement.

SUMMARY: Clarifies the metrics to be used when calculating the 3% procurement participation goal for disabled veteran business enterprises (DVBEs). The bill includes legislative findings that these changes are declaratory of existing law.

EXISTING LAW:

- 1) Establishes the California Disabled Veteran Business Enterprise Program (DVBE Program), administered by DGS, for the purpose of addressing the special needs of disabled veterans seeking rehabilitation and training through entrepreneurship, and to recognize the sacrifices California's disabled veterans made during their military service. Contracts for professional bond services are administered through the State Treasurer's Office.
- 2) Applies the 3% DVBE participation goal on each awarding state agency, department, officer, and any other state entity that enters into a contract using state funds for construction, professional services, materials, supplies, equipment, alteration, repair, or improvement. Contracts with a DVBE for equipment rentals do not count toward the goal.
- 3) Defines the following terms:
 - a) A DVBE contractor, subcontractor, or supplier is any person or entity that has been certified by the administering agency and that performs a commercially useful function, as defined.
 - b) A disabled veteran is a veteran of the military, naval, or air service of the U.S. who has a service-connected disability of at least 10% and who is domiciled in the state.
 - c) A DVBE is a business certified by the administering agency as meeting all of the following requirements:
 - i) The legal structure of the business is a:
 - (1) Sole proprietorship with at least 51% owned by one or more disabled veterans;
 - (2) Publicly owned business with at least 51% of its stock unconditionally owned by one or more disabled veterans;
 - (3) Subsidiary that is wholly owned by a parent corporation, but only if at least 51% of the voting stock of the parent corporation is unconditionally owned by one or more disabled veterans; or
 - (4) Joint venture in which at least 51% of the joint venture's management, control, and earnings are held by one or more disabled veterans.
 - ii) The management and control of the daily business operations are by one or more disabled veterans. The disabled veterans who exercise management and control are not required to be the same disabled veterans as the owners of the business.

- iii) It has a home office located in the United States, which is not a branch or subsidiary of a foreign corporation, foreign firm, or other foreign-based business.
- 4) Requires DGS to collect information from awarding state departments on the level of DVBE procurement participation by contract value awarded and a statistical summary detailing each awarding department and the state's progress in achieving the 3% procurement participation goal for DVBEs.
- 5) Requires an awarding state department to require a prime contractor who has committed to using a DVBE subcontractor to certify upon completion of the contract:
 - a) The total amount the prime contractor received under the contract.
 - b) The name and address of the DVBE that participated in the performance of the contract.
 - c) The amount each DVBE subcontractor received from the prime contractor.
 - d) That all required payments under the state contract have been made to the DVBE subcontractor.
- 6) Provides that a person or entity that knowingly provides false information on the DVBE subcontractor certification shall be subject to a civil penalty for each violation in the minimum amount of \$2,500 and the maximum amount of \$25,000.

FISCAL EFFECT: None

POLICY ISSUE FRAME:

The DVBE Program was established in 1989 for the purpose of facilitating state contracting opportunities among businesses owned by disabled veterans. Since 2000, the 3% procurement participation goal has been met only five times. All five of those years have been during the most recent report periods. While this should be an indication of more effective program implementation, there have also been growing concerns over the accuracy of state agency reporting. Most recently, the California State Auditor issued a report which found significant reporting and management deficiencies in the manner state agencies were implementing the DVBE Program. Among other issues, was the inconsistent manner in which state agencies calculated and reported DVBE participation data to DGS for inclusion in the state consolidated report on procurement.

This bill clarifies that the 3% goal is to be based on the total amount of dollars actually expended by each agency and received by the DVBE during the fiscal year.

The Comment section of the analysis includes additional background on the Small Business Procurement and Contract Act, current DVBE Program activity, previous legislative efforts to improve program accountability, recommendations from the 2014 State Audit, and related legislation.

COMMENTS:

- 1) **Author's Purpose:** According to the author's statement, "In 1989, the Senate enacted Senate Bill 1517, which established the Disabled Veteran Business Enterprise program and installed the Department of General Services (DGS) as the central administering agency.

From its inception, the program contained a statutory requirement for DGS to report on how well awarding departments, individually and in statewide aggregate, were doing in achieving the program's

3% participation goals. And those goals are clearly defined in terms of being measured in dollars actually expended under contracts.

But DGS serves as administering agency for several other contracting programs in addition to the DVBE program. Each program is located in different parts of the state codes, and each had its own reporting requirement.

In 2005, the Legislature enacted a bill that pulled the reporting sections away from their statutory locations and co-located them in a new section. This created a consolidated contracting report in which DGS could report on all the programs in one document at one time.

But when the Legislature consolidated the report requirements, it forgot to include statutory references to that pointed back to the original code areas from where the reporting sections originated and draw their meaning and legislative intent.

This has contributed to considerable confusion with DGS' annual report on DVBE goal achievement. DGS has stated the reporting statute is vague and ambiguous and, therefore, has regularly reported DVBE participation using dollars awarded, which is a much broader and less accurate metric.

SB 159 merely adds the proper references to existing law to clarify that the program reporting metric has always been intended to be the same metric used for measuring actual program participation.

The bill does not change the law. It merely clarifies it ."

- 2) **Small Business Procurement and Contract Act:** The Small Business Procurement and Contract Act, administered through DGS, was implemented more than 30 years ago to establish a small business preference within the state's procurement process that would increase the number of contracts between the state and small businesses. A DBVE component was added in 1989.

The Small Business Procurement and Contract Act states that it is the policy of the State of California to aid the interests of small businesses in order to preserve free competitive enterprise and to ensure that a fair portion of the total purchases and contracts of the state be placed with these enterprises. The statute further states that DVBE participation is strongly encouraged to address the special needs of disabled veterans seeking rehabilitation and training through entrepreneurship, and to recognize the sacrifices of California's disabled military veterans. Statute sets an annual 3% DVBE participation goal and a 25% participation goal for small businesses and microbusinesses was set in 2006 through executive order.

- 3) **The DVBE Program:** The 3% DVBE procurement participation goal is applied to the state agency or department's overall contracting activities in the given fiscal year and may be achieved by awarding state contracts to DVBEs as prime contractors or when DVBEs are used as a subcontractor.

Awarding departments have an option of including DVBE participation in every contract or making alternative arrangements, as long as the 3% objective is met at the end of the fiscal year. Each agency and department is required to designate a small business and DVBE contracting liaison to facilitate it in meeting the 3% DVBE goal and the 25% small business and microbusiness goal. Approximately 90% of DVBEs also hold a small business or microbusiness certification.

Departments also have the option of offering a 1% to 5% DVBE contracting incentive to assist bidders in helping to meet the state DVBE goal. Although not currently being utilized, bidders that are unable or unwilling to include a DVBE in a contract also have the option of submitting a DGS approved utilization plan that commits the businesses to using DVBEs in the future. DGS is authorized to audit businesses that submit utilization plans to ensure compliance.

State departments that fail to meet the annual 3% goal can have their delegated contracting authority removed, although DGS has never removed program authority solely based on an agency or department's failure to meet its DVBE contracting goal.

DGS has a range of responsibilities relating to the implementation of the DVBE Program including:

- Certification of DVBEs (1,537 DVBEs certified in 2013-14).
- Certification of small businesses and microbusinesses (1,289 small businesses and microbusinesses certified in 2013-14).
- Outreach to the potential bidders and the veteran community (150 events in FY 2013-14).
- Marketing of the DVBE program to state agencies.
- Consulting with the California Procurement Contracting Academy on the DVBE training of state contracting staff.
- Preparation of an annual consolidated report on DVBE, small business, and microbusiness participation within state contracting activities.
- Program oversight to identify abuses by bidders and failures to preform by state agencies.

Below are charts displaying three years of DVBE participation rates. The charts include information on mandatory reporting entities and all reporting entities. Under both reporting metrics, it appears that the state consistently me its DVBE procurement participation goals for the report years.

DVBE Three-Year Contracting Activity – Mandated Agencies				
Fiscal Year	Total Contract Dollars	Total DVBE Dollars	Total DVBE Percent	Total DVBE Contracts
2013-14	\$6,566,406,979	\$241,002,566	3.67%	12,777
2012-13	\$7,151,257,013	\$216,903,765	3.03%	14,907
2011-12	\$7,173,594,329	\$340,156,464	4.74%	16,246
Average	\$6,963,752,774	\$266,020,932	3.82%	14,643

2013-14 DGS Consolidated Report

DVBE Three-Year Contracting Activity – All Reporting Agencies				
Fiscal Year	Total Contract Dollars	Total DVBE Dollars	Total DVBE Percent	Total DVBE Contracts
2013-14	\$8,233,113,660	\$299,683,794	3.64%	14,305
2012-13	\$8,573,498,623	\$267,285,324	3.12%	16,776
2011-12	\$8,508,477,596	\$373,936,941	4.39%	17,835
Average	\$8,438,363,293	\$313,635,353	3.7%	16,305

2013-14 DGS Consolidated Report

While the year-to-year percentages are useful to review, it is also important to note that consistency among which agencies report varies. As an example, in 2011-12, 86% of the mandatory reporting

entities reported their contracting activity to DGS. In 2012-13, 79% reported their contracting activity and in 2013-14, 80% reported.

Further challenges were identified in a 2014 State Audit [2013-115], which reported significant inconsistencies in the reporting protocols among different state agencies. Some agencies reported only contracts where the DVBE served as the prime contractor and other departments reported both DVBE prime and subcontracts. Some awarding departments only reported DVBE participation based on the initial contract bid, while others more accurately reported the actual amount paid to the DVBE.

SB 159 clarifies one of the central issues of the 2014 State Audit by cross-referencing the 3% goal provisions with the reporting requirements.

- 4) **2014 Audit of the DVBE Program:** The DVBE Program is unique in that it is intended as both a reward for their significant sacrifices on behalf of the nation, and as a means to assist disabled veterans establish and grow their own businesses. Over the last decade, the DVBE community has often been critical of the state's oversight of the various contracting departments implementation of the program. Concerns have been raised about poor and inconsistent reporting of data, a lack of effective enforcement tools, and the seemingly limited number of DVBEs that have successfully obtained prime or major subcontracts.

Responding to these and other issues, Senator Hueso, then Chair of the Senate Committee on Veterans Affairs, and former Senator Ron Calderon, requested a comprehensive review of the DVBE program by the California State Auditor. The completed audit was released in February 2014 and it reported the following findings:

- The objective of the program "to increase DVBE participation in state procurement," is not appropriately being measured through the current reporting system. The system measures the award value and not the actual amount DVBEs' receive.
- Only a small percentage of certified DVBEs serve as prime contractors. As an example, only 19% of certified DVBEs served as primes and, of those, 30 firms received 83% funding.
- There is inadequate documentation by state contracting agencies on DVBE participation.
- Reporting methodologies differ by state agencies on DVBE participation.
- DGS has inadequate control over the state's procurement vendor, Bidsync.
- CalVet needs to take a more active role in working with state agencies and tracking outreach activities.

Based on these findings, the Auditor recommended key actions for the Legislature, DGS, and CalVet. These recommendations focused on better and more consistent reporting including: verification of DVBE status before finalizing the contract, increasing the number of DVBEs that participate in state contracting, better management by the state vendor, and a heightened role and accountability for CalVet. Implementing legislation, SB 839 (Correa) and AB 1735 (Jones-Sawyer), failed to pass fiscal committees in 2014. In January 2015, the State Auditor again highlighted the deficiencies in the DVBE Program and encouraged the Legislature to take action.

SB 159 clarifies that the state must report on the actual amount of proceeds received by DVBEs through state contracts. AB 1218 (Weber), which passed this committee in April 2015, also addresses the 3% calculation discrepancy, as well as:

- Improving documentation and administrative review requirements;
- Incentivizing the selection of DVBE that haven't previously participated in state contracts and DVBEs with 51% or more veteran workers;
- Setting an accountability standard for DVBE outreach efforts;
- Requiring reporting of both DVBEs that serve as prime contractors and subcontractors; and
- Requiring DGS to establish reporting requirements for multi-year contracts.

AB 1218 is scheduled to be heard in the Senate Committee on Veteran Affairs on June 23, 2015.

- 5) **DGS Response to the Audit:** Effective July 2014, DGS updated its forms to specifically require state awarding agencies to report on the total amount of DVBE participation proposed in the bid package and ultimately paid to the DVBE. In addition, DGS developed a PowerPoint and other educational materials to inform state agency contracting staff of the revised forms.

While it may appear that the data discrepancy issue has been addressed, without clarifying statutory changes and greater specificity in administrative areas that have consistently been found lacking, similar program challenges will likely arise in the future. Without the proper data, the Legislature may be unable to successfully carryout its oversight responsibilities.

- 6) **Amendments:** The author has submitted language to the Committee and received approval from the Assembly Committee on Rules to add an urgency clause to the bill.
- 7) **Related Legislation:** Below is a list of related measures including those from the current session and prior sessions.
- a) Bills introduced in the 2015-16 Legislative Session:
- i) **AB 413 (Chavez) Transfer of DVBE Status:** This bill authorizes a spouse or child to enter into additional state contracts during the three years currently permitted for the continued operation of a disabled veteran-owned business enterprise (DVBE) following the death or permanent disability of an owner of a certified DVBE. Existing law limits the business' activities to the completion of existing contracts. Status: Scheduled to be heard in the Senate Committee on Veterans Affairs on June 23, 2015.
 - ii) **AB 1218 (Weber) DVBE Program Reform:** This bill increases the maximum financial value of an individual small business bid preference and the aggregate value that may be applied to a bid package that includes more than one preference. The bill also modifies the base of that calculation from being the lowest responsible bidder to the lowest responsible non-small business bidder. Status: Scheduled to be heard in the Senate Committee on Veterans Affairs on June 23, 2015.
- b) Bills introduced in a prior legislative sessions:
- i) **AB 31 (Price) Public Contracts: Small Business Procurement and Contract Act:** This bill increased the maximum contract threshold amount for awards to small business (SME),

including microbusiness, and DVBEs under the state's streamlined procurement process, from \$100,000 to \$250,000, as specified. The bill also requires contractors to report to the awarding department the actual contract amount paid to the SME and/or DVBE. Status: The bill was signed by the Governor, Chapter 212, Statutes of 2009.

- ii) **AB 177 (Ruskin and V. Manuel Pérez) Enforcement of Small Business Act:** This bill increases and conforms penalties for persons who falsely engage in activities relating to the Small Business Procurement and Contract Act, including small businesses, microbusinesses, and disabled veteran-owned business enterprises. Status: The bill was signed by the Governor, Chapter 342, Statutes of 2010.
- iii) **AB 669 (Cohn) Commercially Useful Function:** This bill requires DVBE's and small businesses to perform a commercially useful function, as defined, in relation to any contract those businesses are awarded a specified preference or incentive. Status: Signed by the Governor, Chapter 623, Statutes of 2003.
- iv) **AB 1734 (Jones-Sawyer) Public contracts: Small Business Participation: Disabled Veterans:** This bill would have required each state agency to establish and achieve a 25% small business participation goal and increased the annual procurement participation goal for disabled veteran business enterprise from 3% to 5% of the value of state contracts. In addition the bill required greater reporting and accountability of DVBE program information. Status: Held on the Suspense File in the Assembly Committee on Appropriations, 2014.
- v) **AB 2249 (Ruskin) DVBE Documentation:** This bill requires applicants for small business or DVBE certification to submit a written declaration, under penalty of perjury, that the information submitted to DGS is true and correct. The bill also authorizes DGS, if it determines that just cause exists, to require the owner of a DVBE or small business to submit the Internal Revenue Service Form 4506-T which would allow DGS to obtain a copy of their tax return. Finally, the bill requires that at least 51% of the stock or voting stock of a disabled veteran business enterprise be unconditionally owned by disabled veterans. Status: Signed by the Governor, Chapter 383, Statutes of 2010.
- vi) **AB 2682 (Wagner) Responsible Small Business and DVBE Contractors:** This bill would have required a state agency that solicits offers, awards a contract, or consents to subcontracts, under the Small Business Procurement and Contract Act, to do so only with responsible and reliable parties. Prohibits a state agency from allowing a party to participate in any procurement activity if the party has been suspended, debarred, or otherwise excluded from participation in a state contract. Status: Died in the Assembly Committee on Accountability and Administrative Review, 2014.
- vii) **SB 733 (Block) Disabled Veteran Business Enterprise Participation Goals:** This bill deletes provisions of law allowing an awarding department to accept submission of a disabled veteran business enterprise utilization plan to meet the 3% statewide participation goal for awarded contracts. The bill authorizes, instead, a new review process for demonstrating a business's long-term commitment to using veteran-owned businesses. Status: Died in the Assembly Committee on Jobs, Economic Development, and the Economy, 2014.
- viii) **SB 719 (Correa) FI\$CAL Reporting of DVBE Contracting Activity:** This bill would have required awarding departments that sued the Financial Information System for California (FI\$CAL) to report statewide participation goals for the DVBE Program in the amount expended to the DVBE. Status: Held on Suspense in the Assembly Appropriations Committee, 2013.

- ix) ***SB 839 (Correa) Contracting with Veterans***: This bill would have modified reporting requirements for state departments with respect to DVBEs including contracts where the DVBE acted as the prime and as a subcontractor. Status: Held on the Suspense File in the Senate Committee on Appropriations, 2014.
 - x) ***SB 941 (Flores) DVBE Advocates***: This bill requires the Department of Veteran's Affairs and awarding departments to appoint DVBE advocates to assist in meeting DVBE procurement participation goals. Status: Signed by the Governor, Chapter 666, Statutes of 2002.
 - xi) ***AB 1008 (Machado) DVBE Certification Sanctions***: This bill strengthened sanctions that could be levied against businesses that fraudulently misrepresent their eligibility for DVBE certification. Status: Signed by the Governor. Chapter 632, Statutes of 2003.
 - xii) ***SB 1510 (Wright) Commercial Useful Purpose***: This bill tightens the bidder requirements for demonstrating that a small business, microbusiness, or DVBE will serve a commercially useful function (CUF) in carrying out a state contract. The purpose of the CUF requirement is to prevent a bidder from using a business as a "pass through" or "front" for another business that would otherwise not qualify for the small business, microbusiness or DVBE bid preference. By meeting the CUF requirements, a bidder may claim a bid preference on competitive state contracts for goods, services, informational technology, and public works. Status: The bill was signed by the Governor, Chapter 421, Statutes of 2012.
- 8) **Double Referral**: The Assembly Rules Committee has referred this measure the Assembly Committee on Jobs, Economic Development and the Economy and to the Assembly Committee on Veterans Affairs (VA). Should this measure pass the committee, it will be referred to VA for further policy consideration.

REGISTERED SUPPORT / OPPOSITION:

Support

The American Legion
 AMVETS, Department of California
 California Association of County Veterans Service Offices
 California State Commanders Veterans Council
 Disabled Veteran Business Alliance
 Military Officers Association of America-California Council
 Veterans of Foreign Wars - Department of California
 Vietnam Veterans of America - California State Council

Opposition

None received

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