

Date of Hearing: July 7, 2009

ASSEMBLY COMMITTEE ON JOBS, ECONOMIC DEVELOPMENT AND THE
ECONOMY

V. Manuel Perez, Chair
SB 548 (Huff) – As Amended: May 18, 2009

SENATE VOTE: 39-0

SUBJECT: California Disabled Veteran Business Enterprise Program

SUMMARY: Requires prime contractors who have stipulated that they would use a Disabled Veteran-Owned Business Enterprise (DVBE) as a subcontractor, to certify at the conclusion of the contract that all previously represented payments to the DVBE have been made. Specifically, this bill:

- 1) Requires the awarding department of a state contract, which was approved based on the contractor's commitment to use a DVBE in the performance of the contract, to require certification at the completion of the contract that all related payments have been made to the DVBE.
- 2) Requires the awarding department to retain the certification on file.
- 3) Specifies that any person or entity that knowingly provides false information pursuant to this bill is subject to a civil penalty for each violation in the minimum amount of \$2,500 and the maximum amount of \$25,000. Actions may be brought by any public prosecutor in the name of the people of the State of California and the penalty imposed shall be enforceable as a civil judgment.

EXISTING LAW

- 1) Provides that, the Department of General Services (DGS), except for contracts for certain professional bond services, is the administering agency of the California DVBE Program.
- 2) Sets an annual DVBE contract participation goal of 3% for each state department which awards contracts, including school districts when expending certain state moneys for goods and services.
- 3) Requires DGS to adopt written policies and guidelines for establishing a uniform process for state contracting that provides a DVBE bid incentive. These policies and guidelines are required to include a tracking system to monitor compliance with the 3% contract participation goal.
- 4) Requires departments, when awarding contracts to the lowest responsible bidder, to meet the 3% DVBE goal or to ensure that the contractor has made a good faith effort to meet these goals. A bidder is considered to have made a good faith effort, at the time the bid is submitted, if the bid package contains evidence that the following actions were taken:

- a) The bidder contacted the awarding department to identify a DVBE contractor who may be interested in subcontracting;
 - b) The bidder contacted other state and federal agencies, and local DVBE organizations to identify DVBE contractors who may be interested in subcontracting;
 - c) The bidder has sent invitations to bid to potential DVBE contractors;
 - d) The bidder considered the available DVBE contractors; and
 - e) The bidder advertised in trade papers and papers focusing on DVBEs. If the time limits imposed by the awarding department are insufficient to reasonably purchase advertisement, this requirement can be waived.
- 5) Requires an awarding department to include in their bid submittal conditions a requirement that the bid include the specific name and type of work to be provided by each DVBE subcontractor, if any, who will be participating in the completion of the contract.
- 6) Provides that it is unlawful for any person to knowingly and with intent to defraud, to represent DVBE participation in order to obtain or retain a bid preference or a contract. Violations of this law may be charged as follows:
- a) A misdemeanor punishable by imprisonment in a county jail not to exceed 6 months or by a fine not to exceed \$1,000, or both.
 - b) A civil penalty of not less than \$10,000 nor more than \$30,000 for the first violation and not less than \$30,000 nor more than \$50,000 for each additional or subsequent violation. A person found guilty of the specified fraudulent behavior is also required to pay all court costs and attorney's fees incurred by a plaintiff in a civil action.
- DGS is also required to suspend a person found guilty of this offense from bidding on, or participating as a contractor, subcontractor or supplier in any state contract for a period of three years. If the guilty party is a certified DVBE, certification is also revoked, as specified.
- 7) Defines "Disabled veteran owned business enterprise" as a business certified by the administering agency as meeting all of the following requirements:
- a) It is a sole proprietorship at least 51 percent owned by one or more disabled veterans or, in the case of a publicly owned business, at least 51 percent of its stock is owned by one or more disabled veterans; a subsidiary that is wholly owned by a parent corporation, but only if at least 51 percent of the voting stock of the parent corporation is owned by one or more disabled veterans; or a joint venture in which at least 51 percent of the joint venture's management, control, and earnings are held by one or more disabled veterans.
 - b) The management and control of the daily business operations are run by one or more disabled veteran. The disabled veterans who exercise management and control are not required to be the same disabled veterans as the owners of the business.

- c) It is a sole proprietorship, corporation, or partnership with its 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.

FISCAL EFFECT: According to the Senate Appropriations Committee analysis, implementation of this bill could result in one-time costs of \$40 to develop regulations, and to develop bid language that requires the primary contractor who makes a commitment to use a DVBE to either a) certify that all payments have been made to the DVBE subcontractor, or b) document why there was no subcontract with the DVBE.

COMMENTS:

- 1) Purpose of the bill: The DVBE Program provides opportunities for disabled veterans businesses and stimulates California's economy by offering disabled veterans a specified level of contractual work. As stipulated by current law, DVBE subcontractors are written into state contracts by prime contractors who commit to using the DVBE for 3% or more of the work on a project. Unfortunately, in all too many cases, contractors exploit the very veterans this program was intended to help states the author. Many times, according to the author, once a veteran has been worked into a contract, contractors do not award the agreed-upon jobs, operations and payments. The author believes that there is currently no practical enforcement mechanism that ensures the DVBE subcontractor receives 3% of the work.

The author has introduced SB 548 as a means to protect DVBE contractors from fraud by requiring the prime contractor to certify that all payments originally offered to a veteran for work have been fulfilled. The author states that this certification will allow awarding departments to more easily demonstrate that a DVBE was intentionally exploited and ensure disabled veterans enterprises receive the agreed-upon work and pay.

- 2) The DVBE Program: The DVBE Program was established in 1989 to address the special needs of disabled veterans seeking rehabilitation and training through entrepreneurship, and to recognize the sacrifices of Californians disabled during military service. Under the provisions of the program, each state agency is encouraged, in awarding contracts, to honor California's disabled veterans by taking all practical actions necessary to meet or exceed a 3% DVBE participation goal.

In implementing the 3% contracting goal, a number of activities are dictated by existing statute. Two major activities include the streamlined procurement process for small-size contracts and a compulsory DVBE participation clause in larger state contracts. For contracts under \$100,000, awarding departments are authorized to enter into a limited competitive bid contract after receiving bids from at least three small business and/or DVBE contractors.

For larger contracts existing law generally requires solicitation for contracts to be more broadly advertised. In these circumstances, awarding departments are required to implement the compulsory DVBE participation clause in each contract unless the department has already met its 3% goal. When the compulsory DVBE participation clause is included in the solicitation, a prospective contractor has three compliance options:

- a) Identify and commit to subcontracting with a certified DVBE for at least 3% of the work;

- b) Demonstrate a credible effort to obtain DVBE participation, sometimes referred to as making a "good faith effort"; or
- c) Reference a DGS-approved DVBE Business Utilization Plan.

However, even with these DVBE participation options, success in meeting the 3% goal has been elusive. Even in 2007, when the state exceeded its 25% small business participation goal, the state only awarded 2.8% of its total contract dollars, \$186 million, to contracts involving DVBE contractors and subcontractors.

The DVBE contracting report covering contracts in 2008 is due in the next few months. DVBE participation is expected to be higher than in previous years, based on the potential impact of legislation implemented in late 2006. SB 115 (Florez), Chapter 451, Statutes of 2005, called on DGS to establish a specific DVBE bidding preference similar to that already authorized for small businesses. The new DGS contracting provisions provide state departments with a framework in which to give a one to five percent advantage to DVBE contractors or to prime contractors who proposed to use a DVBE subcontractor.

In addition to the challenges faced by DVBEs trying to be included in state contracts, a growing number of DVBEs are also concerned that they do not always receive the subcontract work being represented in the initial bid package. With the new DVBE incentive, these concerns have increased as a prime contractor may be receiving a competitive advantage for claiming to be using DVBE subcontracts without fulfilling that commitment. In letters presented to the committee, DVBE subcontracts provided specific examples of these irregularities.

- 3) Enforcing DVBE Commitments: Existing law places certain penalties on a person who try to defraud the state of California when making a bid for a state contract. In order to prosecute, it must be shown that the misrepresentation in the bid package was included with the specific intent to defraud the government. Penalties include both criminal and civil, including time in jail, fines, and debarment from future contracts with the state.

While reasonably severe penalties can be awarded, prosecuting these types of crimes is difficult because of the requirement to prove intent. SB 548 addresses this issue by creating a different test for illegal activity. This bill requires a prime contractor that committed to using a DVBE subcontractor, to certify at the completion of the contract that the DVBE did indeed receive the payments which were represented in their bid package. Rather than having to prove intent to defraud, this bill states that the contractor would only have had to knowingly misrepresented the information in the certification.

Penalties in this bill are also less than those for civil fines under the intent to defraud requirement, \$2,500 to 25,000 for each violation, verses \$10,000 to \$30,000 for the first violation.

- 4) Conflicting Codes: Laws that relate to state contracting appear in several state codes including the Public Contract, Government, and Military and Veterans Codes. This broad distribution of statute related to contracting has sometimes led to conflicting and potentially

inefficient contracting activities. As an example, the concept of "good faith effort" appears in the Public Contract Code, but does not appear in the Military and Veterans Code. Another example, AB 31 (Price), which passed this committee in March 2009, amends the Public Contract Code to do something very similar to this bill. AB 31 requires contractors that made contract commitments to include DVBE participation in the performance of the contract to report (not certify) at the conclusion of the contract on the actual percent of the contract amount that was paid to the DVBE(s). AB 31 also does not include a penalty for reporting improperly.

The Committee may wish to harmonize these provisions by recommending that each author take similar language to avoid conflicts later. Potential amendments to achieve this harmonization in SB 548 could include the following:

- a) Replace the requirement for certification with a report to DGS that is signed under penalty of perjury; and
 - b) Expand the contractor reporting requirements to include the total amount the prime contractor received under the state contract, an identification of each DVBE that actually participated in the performance of the contract, and the amount each of these DVBEs received in undertaking activities related to the contract.
- 6) Inconsistent Provisions between Small Businesses and DVBEs: In addition to the conflicting provisions discussed above, there are also inconsistencies between statutes relating to contracts with small businesses versus DVBEs. Some of these differences are related to policy, while others are more process orientated.

As an example, a prime contractor who submits a bid package identifying a small business subcontractor may, with the approval of DGS, substitute another certified small business subcontractor. This provision is often used in the cases where the performance of the contract is actually undertaken months after the bid package has been submitted. Sometimes a small business that may have initially agreed to help in the performance of the contract, finds, due to the extended time between applying and implementing, that it is no longer available to complete the work. Prime contractors subcontracting with a DVBE do not have a similar statutory option. A question arises as to whether this inconsistency and inflexibility in the application of the law has led to some prime contractors avoiding DVBE subcontractors.

Members may wish to address this inconsistency by authorizing prime contractors to replace, with the approval of DGS, one certified DVBE with another certified DVBE.

- 5) Related from current session: Below is a status report on related legislation from this session.
- a) AB 31 (Price): This bill increases the maximum contract threshold amount for awards to small business, including microbusiness and DVBEs under the streamlined procurement process, from \$100,000 to \$250,000, as specified. Further, the bill requires contractors that made contract commitments to include small business or DVBE participation to report at the conclusion of the contract on the actual percent of the contract amount that was paid to those entities. Status: Pending in the Senate Committee on Appropriations

- b) AB 309 (Price): This bill requires the establishment of a 25% small business participation goal for all state entities and directs the DGS to monitor each agency's progress in meeting this goal. Status: Held under submission in the Assembly Committee on Appropriations
 - c) SB 642 (Denham): This bill increases the maximum contract threshold amount for awards to small business, including microbusiness and DVBEs under the streamlined procurement process, from \$100,000 to \$250,000, as specified. Further, the bill requires contractors that made contract commitments to include small business or DVBE participation to report at the conclusion of the contract on the actual percent of the contract amount that was paid to those entities. Status: Held under submission in the Senate Committee on Appropriations
- 6) Related from prior sessions legislation: Below is a list of related legislation from prior sessions:
- a) AB 761 (Coto): This bill required each state agency awarding contracts that are financed with proceeds from the infrastructure bonds approved by voters in November 2006 to establish a 25% small business participation goal for state infrastructure construction contracts and to provide specified assistance to small businesses bidding on state infrastructure bond-related contracts. Status: Signed by the Governor, Chapter 611, Statutes of 2007
 - b) AB 1492 (Ruskin): Increases and conforms penalties for persons who engage in fraudulent activities relating to the Small Business Procurement and Contract Act including small businesses, microbusinesses, and disabled veteran-owned business enterprises. Status: Vetoed by the Governor, October 2008
 - c) AB 2773 (Price): This bill increased the maximum contract threshold amount for awards to small business, including microbusiness and DVBEs under the streamlined procurement process, from \$100,000 to \$250,000, as specified. Further, the bill required contractors that made contract commitments to include small business or DVBE participation to report at the conclusion of the contract on the actual percent of the contract amount that was paid to those entities. Status: Held under submission in Senate Appropriations Committee in the 2007-08 legislative session
 - d) SB 115 (Florez): This bill made various changes to the DVBE Program, including requiring DGS to establish a state agency-wide mandatory DVBE incentive program. This bill also required the DGS Small Business Advocate to provide specified services to small businesses and certified DVBEs. Additionally, this bill required DGS to adopt a streamlined reporting procedure for state agencies to use in reporting their DVBE participation to the Department of Veterans Affairs. Status: Signed by the Governor - Chapter 451, Statutes of 2005

REGISTERED SUPPORT / OPPOSITION:

Support

American Legion, Department of California
AMVETS, Department of California
California Disabled Veteran Business Alliance
Compliance News
Gennis and Associates, Engineers
Katin Engineering Consulting
Legion of Valor of the United States of America

Opposition

None received

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