

Date of Hearing: April 23, 2013

ASSEMBLY COMMITTEE ON JOBS, ECONOMIC DEVELOPMENT AND THE ECONOMY

Jose Medina, Chair

AB 366 (Holden) – As Amended: April 16, 2013

SUBJECT: Women, minority, and disabled veteran business enterprises

SUMMARY: Modifies the definitions for minority owned business, women owned business, and disabled veteran owned business enterprise (DVBE) to encourage contracting with publicly held companies. Specifically, this bill:

- 1) Removes the requirement that a "women-owned" publicly held company has 51% stock ownership by women and, instead, requires that 51% of the executive management and 51% of the board of directors be comprised of women for the past five years.
- 2) Modifies the requirement that a "women-owned" privately held company be at least 51% owned by one or more women, to also require management and daily business operations of the business be controlled by one or more women.
- 3) Makes similar changes to the definitions of a "DVBE" and "minority-owned" publicly held company.
- 4) Defines executive management team to include controlling officers, as defined in the articles of incorporation or bylaws of the publicly owned business.

EXISTING LAW:

- 1) Requires the Public Utilities Commission (PUC) to require each electrical, gas, water, wireless telecommunications service provider, and telephone corporation with gross annual revenues over \$25 million (including commission-regulated subsidiaries and affiliates) to submit annually a detailed and verifiable plan for increasing women- and minority-owned business and DVBE procurement in all categories.
- 2) Requires the PUC to adopt criteria for determining and verifying the eligibility of a women- and minority-owned business and DVBE procurement contracts and to establish guidelines for annual targeted procurement plans.
- 3) Encourages each electrical, gas, water, mobile telephony service provider, telephone corporation that is not required to submit a plan under existing law, and all cable television corporation and direct broadcast satellite providers, to voluntarily adopt a plan for increasing women- and minority-owned business and DVBE procurement in all categories.
- 4) Defines the following terms:
 - a) "Women business enterprise" means a business enterprise that is at least 51% owned by a woman or women; or, in the case of any publicly owned business, at least 51% of the stock of which is owned by one or more women; and whose management and daily business operations are controlled by one or more of those individuals.

- b) "Minority business enterprise" means a business enterprise that is at least 51% owned by a minority group or groups; or, in the case of any publicly owned business, at least 51% of the stock of which is owned by one or more minority groups, and whose management and daily business operations are controlled by one or more of those individuals. The contracting utility is directed to presume that minority includes Black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans.
 - c) "DVBE" means a sole proprietorship, corporation, or partnership whose management and control of the daily business operations is by one or more disabled veterans. If the enterprise is a sole proprietorship, then at least 51% is owned by one or more disabled veterans. A publicly owned business must have at least 51% of its stock unconditionally owned by one or more disabled veterans. A subsidiary that is wholly owned by a parent corporation is a DVBE if at least 51% of the voting stock of the parent corporation is unconditionally owned by one or more disabled veterans and a joint venture is a DVBE if at least 51% of the joint venture's management, control, and earnings are held by one or more disabled veterans.
 - d) "Control" means exercising the power to make policy decisions.
 - e) "Operate" means being actively involved in the day-to-day management and not merely officers or directors.
- 5) Establishes as a crime for false representation of a women, minority, or DVBE in the procurement of a contract, punishable by a fine of \$5,000, or by imprisonment in the county jail or state prison, not to exceed one year, or by both fine and imprisonment. In the case of a corporation, the fine or imprisonment shall be imposed on every director, officer, or agent for the false statements.

FISCAL EFFECT: Unknown

COMMENTS:

- 1) Author's Purpose: According to the author, "Assembly Bill 366 is designed to promote corporate diversity, consistent with the original intent of the supplier diversity program, by eliminating the stock ownership requirement and replacing it with a requirement that corporate boards of directors diversify their membership. Publicly traded corporations seeking to qualify for preferences under the supplier diversity program will be required to demonstrate that their executive level managers and board of directors is predominantly comprised of either minorities, women, or disabled veterans. The 51% stock requirement is being removed because it is technically impossible to monitor and query the gender, ethnicity, and disability status of shareholders in an environment where stock ownership changes hands on a daily basis and much stock is owned by institutional investors and mutual funds."
- 2) Framing the Policy Issue: This bill seeks to better define a publicly held company that is majority owned by women, minorities, and DVBE (WMDVBE). While currently authorized by law, publicly held companies are rarely reported by regulated utilities toward meeting their WMDVBE contacting goals.

In considering the need to make such a change, the Committee may wish to consider the shifting demographics of the state and the value of supporting full economic participation by all Californians. Concerns have, however, been raised that the purpose of the PUC contracting goal is to help California's smallest size businesses, many of which are WMDVBE, access contracts with PUC

regulated entities. Opponents believe that the bill may dilute one of primary goals of the targeted procurement program.

The analysis includes background on the PUC general order relating to diversity contracting, the impact of demographic shifts on the California economy, stakeholder concerns regarding the proposed changes, and amendments the author will be requesting at the hearing to address those concerns (Comment 6).

- 3) Statute and PUC General Order 156: Beginning in 1986, the Legislature enacted a series of statutes, and the PUC adopted General Order (GO) 156, for the purpose of encouraging greater WMDVBE participation in utility contracts. Currently regulated entities include electrical, gas, water, wireless telecommunications service providers, and telephone corporations with gross annual revenues over \$25 million including commission-regulated subsidiaries and affiliates.

Statute and GO 156 include rules and regulations for the utilities' compliance with the WMDVBE contracting program, and requires participating utilities to inform, recruit, and obtain at least 20% of their products and services purchased within a five-year period from women- and minority-owned businesses. The targets are 15% for minority-owned businesses, 5% for women-owned businesses, and 1.5% for DVBEs.

GO 156 further requires woman- and minority-owned business enterprises to be certified by the CPUC's Utility Diversity Supplier Program clearinghouse, and disabled veteran-owned businesses enterprises to be certified by the Department of General Services pursuant to DVBE certification established under the California Disabled Veteran Business Enterprise Program. There are currently 6,527 verified vendors in the clearinghouse database, of which 1,934 are minority-owned businesses, 2,239 are women-owned businesses, 1,090 are minority women-owned or woman and minority male-owned businesses, and 1,264 are disabled veteran enterprise businesses. Utilities subject to these diversity contracting requirements are assessed a charge based on intrastate revenues to support operation of the clearinghouse.

Regulated entities are required to annually submit a detailed and verifiable plan, with goals and timetables, for increasing WMDVBE participation in all categories of procurement, including technology, equipment, supplies, services, materials, and construction. Although there is no penalty for failure of a utility to meet its goals, each utility is required to report annually on its progress. The CPUC, in turn, is required to make an annual progress report to the Legislature.

The California Constitution prohibits the state from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. According to the CPUC, nothing in GO 156 authorizes or permits a utility to use set-asides, preferences, or quotas in administration of its WMDVBE program and utilities retain the authority to use legitimate business judgment to select a supplier for a particular contract.

- 4) Progress in Implementing GO 156: In 2011, the most current data available, covered utilities spent \$7.2 billion, which is a 39.26% increase from the \$5.17 billion reported in 2010. Between 2009 and 2011, contracting with WMDVDEs increased by more than 60%.

2011 WMDVBE Procurement from PUC Regulated Entities			
Category	Procurement Amount	Percentage Achieved	Goal
MBE	\$4.65 billion	19.33%	15.0%
WBE	\$2.25 billion	9.35%	5.0%
DVBE	\$0.305 billion	1.27%	1.5%
Total	\$7.20 billion	29.95%	21.5%

Source: 2011 PUC Annual Report on GO 156

The results show the utilities are meeting the 5% goal for women-owned businesses and the 15% goal for minority-owned business enterprises, but are not yet meeting the 1.5% goal for DVBEs. Overall, both the dollar value of all WMDVBE contacts and percentages of contracts have increased for the past two years. The number of utilities reporting was also up in 2011 with 34 utilities reporting as compared to 31 in 2010.

Even given some successes, the DVBE category and certain industry sectors remain underutilized. Section 8.11 of the GO 156 specifically highlights the need for increasing utilization in both the product and service categories where there has been low utilization. The 2011 report also highlights the continued need for progress in professional and technical categories, including legal and financial services. As proposed to be amended, AB 366 expands the contracting opportunities for WMDVBEs by making the publicly held company category more accessible in two of the previously identified low utilization categories.

- 5) Market Impacts of California's Demographic Shift: As unprecedented numbers of baby boomers prepare to retire from the market place, many corporate boards will be seeking new members to help shape their businesses for the future. This demographic trend reflects not only a generational shift in the U.S., but it also marks a shift in the race and ethnicity of the nation's working age population.

The California Budget Project estimates that by 2020, nearly 60% of the working age population in California will be comprised of Latinos, African Americans, and Asian-Americans. Similarly, the composition of the U.S. consumer-base is changing. Minority purchasing power in the U.S. is expected to triple from \$1.3 trillion in 2000 to over \$4 trillion by 2045. This represents over a 70% growth of total U.S. purchasing power during the same time period. Latino and African American purchasing power is already so significant in the U.S. that if it were compared to national GDPs, it would be greater than all but nine economies in the world.

Companies that want to remain competitive are designing new and adapting existing products and services to meet this expanding market. Corporate leadership, however, has not kept pace with the changing demographics, and there remains a gap in the ethnic and gender diversity on corporate boards. According to a 2008 report by Virtcom Consulting on the leadership of Fortune 100 companies, while women comprise slightly more than half the U.S. population, they hold only 17% of the positions on corporate boards of Fortune 100 companies. The same report states that research suggests that companies with more diverse boards have higher performance and other financial metrics such as return on equity, return on sales, and return on investment.

However, even given this type of empirical evidence for out-performance, there has been very little progress in bringing diversity to boardrooms. The above-referenced report states that Caucasian, non-Latinos, still hold a disproportionate share of board seats by occupying 84% of the 1,031 corporate board seats of Fortune 100 companies. African Americans held 10%, Asians 2%, and Latinos 4%. Another study conducted by the Alliance for Board Diversity examined growth in diversity from 2004

to 2006, revealing that only three net seats were gained by women and minorities. A more recent study in 2012 found that women on U.S. boards increased by only 0.5% in the period of 2009 to 2011.

Encouraging more diverse boards is an important public policy as it lessens income and equity gaps, generates higher tax revenues, and contributes the state's overall competitiveness. By modernizing the state's procurement policies to reflect new cultural, racial and gender business conditions, AB 366 could be an important policy change for the post-recession economy.

- 6) Concerns and Proposed Amendments: In opening up contracting opportunities to publicly held companies, this measure has raised concerns with Southern California Edison (Edison) and the Greenlining Institute. Edison, who opposes the measure, argues that publicly held companies are generally more established, larger size companies with more revenues and assets than traditional WMDVBE contractors. Edison is concerned that this bill shifts the focus of the program away from new and emerging businesses and the goals of GO 156.

The Greenlining Institute, who has taken an oppose unless amended position, shares some of these concerns and further states that supplier diversity is fundamentally about promoting ownership and asset building in communities of color. While they agree that increasing diversity in corporate leadership is important and significant, the organization suggests that the two diversity issues should not be merged in this way.

Staff understands that the author will be requesting the committee amend the bill to limit the definitional changes to only contracts for financial and legal services, two areas specifically identified as needing special emphasis in 2011 GO 156 report. Further, the author will ask to have the PUC separately report on contracting activities using the new definitions and to sunset the definitions after five years. Based on real world experience, the Legislature would then have an opportunity to review the bill's impact on contracting activities. At the time this analysis is being written, it is not known whether these changes impact Edison's position and is, therefore, a question the Committee may want address at the hearing.

- 7) Restrictive Five-Year Limitation: AB 366 requires publicly held companies to have 51% of the board of directors be DVBEs, women, or minorities for at least five years prior to certification. While this limitation will discourage the placement of board members and/or hiring of executive management for the exclusive purpose of gaining PUC contracts, it may also be too stringent of a pre-qualification and completely removes eligibility for newly incorporated businesses. Perhaps the committee should consider a two- or three-year pre-qualification. Fiduciary duty should then be sufficient to control hiring and selection of unqualified or unnecessary executive staff or board members.
- 8) Blended Boards: Existing law requires each electrical, gas, water, wireless telecommunications service provider, and telephone corporation with gross annual revenues over \$25 million to submit annually a detailed and verifiable plan for increasing WMDVBE procurement in all categories. This bill modifies the definitions of WMDVBEs without addressing how covered utilities would calculate, for the purposes of establishing the 51% WMDVBE criteria, a minority women who is also a DVBE vs. a board that includes women, male minorities, and DVBEs. If the author intends to have blended boards it may be appropriate to specifically direct the PUC to adopt guidelines for blended boards.
- 9) Related Legislation: Below is a list of related legislation.

- a) AB 873 (Davis) PUC Procurement Contracts with Water Companies: This bill requires each water corporation with 10,000 or more service connections to submit annual plans for increasing procurement from women- and minority-owned businesses and DVBEs to encourage each electrical, gas, water, and telephone corporation that is not required to submit a plan under current law to voluntarily adopt a plan for increasing women, minority, and DVBE procurement in all categories. Status: Signed by the Governor, Chapter 316, Status of 2008.
- b) AB 1255 (V. Manuel Pérez) Corporate Board Registries Notification: This bill, as it was heard in JEDE, would have enhanced access to information about the range of minority and/or women candidates qualified to serve on corporate boards by requiring that the Secretary of State provide corporations a listing of known registries of potential board candidates. Status: The bill was amended with different language in the Senate, 2012.
- c) AB 1918 (Davis) PUC Procurement Wireless Telecommunications: This bill requires the PUC to require specified wireless telecommunications service providers to annually report on their progress in increasing contracting with women- and minority-owned businesses and DVBEs. Status: Signed by the Governor, Chapter 456, Statutes of 2010.
- d) AB 2758 (Bradford) PUC Minority and Women Procurement Goal Reporting: This bill requires the PUC to include in their required report to the Legislature, the renewable energy, wireless telecommunications, broadband, smart grid and rail projects as categories for which utilities should increase procurement from women, minority and DVBEs, as specified. Status: Signed by the Governor. Chapter 475, Statutes of 2010.
- e) AB 3678 (Moore) PUC Procurement Goals: This bill codified the broader parameters of GO 156, and requires electrical, gas, and telephone corporations (with gross annual revenues exceeding \$25 million) to annually submit a detailed and verifiable plan for increasing women- and minority-owned business procurement in all categories that includes short- and long-term goals and timetables, and furnish an annual report. It also required the PUC to establish guidelines for the plans. Status: Signed by the Governor, Chapter 1259, Statutes of 1986.
- f) SB 2398 (Dills) PUC DVBE Procurement Goal: This bill included DVBEs in the classes of entities eligible under women- and minority-owned business programs. A subsequent PUC decision includes disabled veteran-owned business enterprises (D. 95-12-045) and establishes a 1.5-percent goal for disabled veteran-owned businesses. Status: Signed by the Governor, Chapter 516, Statutes of 1990.

REGISTERED SUPPORT / OPPOSITION:

Support

East West Bank

Opposition

Sothern California Edison

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