

Date of Hearing: April 27, 2021

ASSEMBLY COMMITTEE ON JOBS, ECONOMIC DEVELOPMENT, AND THE ECONOMY

Sabrina Cervantes, Chair

AB 915 (Chiu and Holden) – As Introduced February 17, 2021

**SUBJECT:** Small and disadvantaged business enterprises

**POLICY ISSUE FRAME:** According to the authors, *“The state of California has enormous purchasing power, which can be used to assist small and diverse businesses that have been hit hard during COVID. This bill is an important step towards ensuring small businesses receive a fair share of state contracts*

*In 2006, Governor Schwarzenegger signed an executive order establishing a goal for all state agencies to ensure 25% of their contracts go to small and veteran owned businesses. Since then, agencies have largely ignored that order - of the 231 state agencies, departments, and commissions, only 12 have adopted a small/veteran business enterprise policy.*

*AB 915 codifies this 25% state procurement goal for small businesses, and takes steps to make state contracting more accessible to our entrepreneurs. Importantly, this bill also looks at small business revival through an equity lens by creating an “Economic Equity First” policy that is inclusive of small businesses, disabled veteran business enterprises, and diverse small businesses. Lastly, this bill eases the burden on small business owners to apply for highly advantageous small and diverse business certifications by creating a central point of contact with DGS. By establishing a clear process to ensure the state meets its 25% goal of small business contracting, and that disadvantaged businesses are included in this contracting goal, AB 915 will facilitate economic equity in state contracting.”*

The analysis includes information on the Small Business Procurement Act, challenges in meeting the 25% small business procurement goal, the impact of COVID-19 on state procurement, Proposition 209, the role of small businesses in the California economy. There is no known opposition to this bill. Suggested amendments are included in Comment 9.

**SUMMARY:** AB 915 codifies a 25% small business goal for state procurement and proposes a number of actions to enhance the ability and commitment of state agencies to include small businesses, disadvantaged business enterprises (DBEs), and disabled veteran business enterprises (DVBEs) in state contracting. Specifically, **this bill:**

- 1) **Legislative Findings:** Makes legislative finds and declarations:
  - a) The positive fiscal impact of small businesses and minority-owned businesses to the overall economic health and stability of California, the fifth largest economy in the world, cannot be underestimated or overlooked – where in fact the entire California economy is predicated on the continual success and growth of all small businesses.
  - b) Given that the size of the California budget the largest of all states in the entire country, the California budget contributes one-seventh of the country’s gross domestic product (GDP), and that, pre-COVID-19, small businesses totaled 3.9 million, or 99.8% of all California businesses, and 1.6 million were minority owned.
  - c) Small businesses not only contribute significantly to the tax base of the State of California but also account for approximately 7 million employees, or 48.8% of all employment in the state.

- d) It is therefore incumbent upon the State of California to ensure that a fair share of procurement spending be directed and dedicated to small and minority-owned small businesses.
  - e) The State of California must carefully consider and provide guidance to all state departments, agencies, bureaus, and other state entities as to reflect small and minority-owned businesses as a priority when determining procurement decisions.
  - f) As the economy pivots to recover and rebound post the COVID-19 economic collapse, it is imperative for the state to assert that procurement goals not only include small businesses (“SBs”), but also minority-owned businesses, also known as “disadvantaged business enterprises” (“DBEs”), as is referenced in federal procurement policies.
  - g) A means of economic recovery for the financial base of California would include codifying the previously expressed intent of the executive and legislative branches, respectively, of the state achieving a goal of procurement spending of 25 percent to SBs and DBEs.
  - h) It is the intent of the Legislature that California SBs and DBEs are prioritized and uplifted by means of economic equity as it pertains to a percentage of state procurement dollars going to these entities.
- 2) **Economic Equity First Action Plan:** Expands the duties of the small business liaison, who is tasked with working with small businesses on regulatory compliance to develop an “economic equity first” action plan and policy for their respective agency.
- a) Specifies that the “economic equity first” action plan and policy are intended to provide, among other things, direction, recommendations, and strategies as to how best ensure that disadvantaged business enterprises are effectively involved in, and benefiting from, the procurement process of the agency.
  - b) Specifies that the “economic equity first” action plan may include, but is not limited to, education and outreach, disadvantaged business enterprise stakeholder engagement, and intentional expansion of disadvantaged business enterprise suppliers for the agency.
  - c) Requires the economic equity first action plan and policy be submitted to the agency secretary, department director, or executive officer by January 1, 2023.
  - d) Requires the “economic equity first” action plan to be adopted by January 1, 2024.
- 3) **Annual Report of the Small Business Advocate:** Expands the content of the Small Business Advocate’s annual report to include details regarding the 25% procurement goal for small businesses, microbusinesses, disadvantaged business enterprises, and disabled veteran business enterprise participation, as well as compliance and implementation of relative “economic equity first” action plans and policies, as specified, by state agency liaisons and advocates.
- 4) **Content on the GO-Biz Homepage:** Requires information on how to receive assistance in certifying as a small business and identifying and participating in state procurement opportunities to be easily accessible from the homepage of the GO-Biz internet website. Existing law allows the information to be posted anywhere on either the GO-Biz website or website of the Office of the Small Business Advocate.
- 5) **Illustrating Small Business Ownership:** Declares that the Legislature recognizes women-owned, LGBTQ+, and “socially and economically disadvantaged individuals”, as specified, to be among the

groups of small business owners who the state should be assisting in fully participating in the free enterprise system.

- 6) **25% Small Business Goal:** Declares that it is the policy of the Legislature that at least 25% of state purchases and contracts, including subcontracts, be placed with small businesses, which include, but are not limited to women-owned, LGBTQ+, and socially disadvantaged individuals.
- 7) **Maximum Gross Receipt Limit for Small Businesses:** Requires the Department of General Services (DGS) to communicate and coordinate with the Small Business Advocate on the biennial review and possible adjustment of the average annual gross receipt levels. This review impacts eligibility of a small business and a microbusiness to participate in state contracting.
- 8) **New Definition:** Defines a “socially and economically disadvantaged individuals” under the Small Business Procurement Act to mean a “disadvantaged business enterprise,” as described in Section 26.67 of Title 49 of the Code of Federal Regulations and by Section 8(a) of the Small Business Act of 1953.
- 9) **Codified and Expanded Small Business Goal:** Requires contracting departments and agencies to establish a minimum small business procurement participation goal of 25% that includes small businesses, disadvantaged business enterprises, and DVBE. Further, the bill states the exact percentage to be set as is reasonable per scope of procurement need relative to free market availability to deliver the product, goods, or service by a small, disadvantaged, or disabled veteran business enterprise.
- 10) **25% Compliance Report:** Requires each agency, by January 1, 2027, to provide a compliance report, relative to the 25% small, disadvantaged, or disabled veteran business enterprise goal, to DGS. The report is required to include the percentage of small, disadvantaged, or DVBEs that participated per legislative district.
- 11) **Legislative Briefing:** Requires DGS to testify before the Legislature by December 31, 2027, on the effectiveness and outcomes of the statewide compliance of the minimum 25% goal of small, disadvantaged, or disabled veteran business enterprise procurement participation.
  - a) Requires DGS, following the initial testimony, to annually provide a written report to the Legislature on compliance with the 25% minimum goal of small, disadvantaged, or DVBE procurement participation.
  - b) Authorizes the Legislature to hold a hearing on the content of the report.
  - c) Sunsets the reporting requirement on January 1, 2032, as specified. pursuant to Section 10231.5.
- 12) **Audit on Noncompliant Agencies:** Requires DGS to conduct an audit and prescribed report to the Legislature of any agency that fails to meet the minimum goal of 25% by January 1, 2027.
  - a) Requires the report’s submission to the Legislature no later than January 1, 2028.
  - b) Specifies that the purpose of the audit is to review the reasons and the agency’s justifications for not meeting the goal.
  - c) Requires the report to the Legislature to, at minimum, include a written report, complete with DGS audit findings. The Legislature may hold a hearing related to this matter.
- 13) **New 5% Preference for Disadvantaged Businesses:** Authorizes preference for contracts that include a disadvantaged business enterprise of 5% of the highest responsible bidder’s total score.

- 14) **Special Consideration for Disadvantaged Businesses:** Requires department and agencies give special consideration to disadvantaged business enterprises by both reducing the experience required and reduction of the level of inventory normally required.
- 15) **Small Business/DVBE Option:** Authorizes the use of the Small Business/DVBE Option to a disadvantaged business enterprise. The Small Business/DVBE Option allows a contracting department to by-pass the competitive bid process for contracts between \$5,000 and \$250,000, and, instead, award a contract for the acquisition of goods, services, or information technology to a certified small business or DVBE, as long as the agency obtains price quotations from two or more certified small businesses, or from two or more disabled veterans business enterprises.
- 16) **Office of Small Business and DVBE Services:** Expands the duties of the Office of Small Business and Disabled Veteran Business Enterprise Services at DGS to include making recommendations to DGS and other state agencies for simplification of specifications and terms in order to increase the procurement opportunities for disadvantaged business enterprises.
- 17) **True and Correct Information from Disadvantaged Business Enterprises:** Requires DGS, in the process of certifying and determining the eligibility of a disadvantaged business enterprise, to require the applicant or certified firm to submit a written declaration, under penalty of perjury, that the information submitted to the department, as specified, is true and correct. If DGS determines that just cause exists, it may require the owner of a disadvantaged business enterprise to complete and submit a federal Form 4506-T from the IRS requesting a transcript of a tax return.
- 18) **Federal Documentation for State Certification:** Authorizes DGS to apply relevant federal certifications for documentation for state certification of a small business, DVBE, or disadvantaged business enterprise, including certifications from the federal Small Business Administration and federal Department of Transportation, as specified.
- 19) **Update Legislative Findings:** Deletes old and provides more current legislative findings, including both of the following:
  - a) The onset of COVID-19 and the subsequent economic downturn and recession has laid bare considerable social and economic inequities, and overall, nearly one-half of all small businesses face permanent closure, with disadvantaged business enterprises facing even higher foreclosure thresholds.
  - b) The current economic recession due to COVID-19 is causing an economic crisis in California, hitting our minority and disadvantaged communities the hardest.
- 20) Includes a crimes and infractions disclaimer.

## **EXISTING FEDERAL LAW**

- 1) Defines “socially and economically disadvantaged individuals,” as described in Section 26.67 of Title 49 of the Code of Federal Regulations and by Section 8(a) of the Small Business Act of 1953.
  - a) The disadvantaged individual must be a US citizen (or resident alien) and be a member of a socially and economically disadvantaged group. Presumptive groups include women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent

Asian-Americans, or any individual found to be socially and economically disadvantaged on a case-by-case basis.

- b) The disadvantaged individual applying must have a personal net worth (PNW) of less than \$1,320,000. Items excluded from personal net worth calculation include an individual's ownership interest in the applicant firm and his or her equity in their primary. Also, if an individual demonstrates that he/she is able to accumulate substantial wealth, the individual's claim of economic disadvantage may be denied, even though the individual's PNW is less than \$1.32 million.
  - c) A firm (including affiliates) must be a small business as defined by the US Small Business Administration. Depending on the primary business activity, a firm (including its affiliates) must not have average annual gross receipts over the firm's previous three fiscal years in excess of \$26,290,000 (\$56,420,000 for airport concessionaires in general with some exceptions). Lower size standards may apply depending on business activity determination.
  - d) The firm must be a for-profit small business where socially and economically disadvantaged DBE owner(s) own at least a 51% interest and have managerial and operational control of the business operations; the firm must not be tied to another firm in such a way as to compromise its independence and control.
  - e) The socially and economically DBE owner(s) must possess the power to direct or cause the direction to the management and policies of the firm and to make day-to-day, as well as long-term decisions on matters of management, policy and operations.
  - f) If state or local law requires the individual to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged individual who own and control a potential DBE firm of that type must possess the required license or credential.
- 2) Defines a "socially and economically disadvantaged individual" as the following:
- a) Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control.
  - b) There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans; and members of other groups designated from time to time by SBA, as specified. Being born in a country does not, by itself, suffice to make the birth country an individual's country of origin for purposes of being included within a designated group.
  - c) An individual who is not a member of one of the groups presumed to be socially disadvantaged in paragraph (b) must establish individual social disadvantage by a preponderance of the evidence. Evidence of individual social disadvantage must include the following elements:
    - i) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

- ii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries;
  - iii) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant; and
  - iv) The individual's social disadvantage must have negatively impacted on his or her entry into or advancement in the business world. Relevant evidence in assessing this element may include experiences relating to education and employment and business history.
- 3) Requires certain federal agencies with US Department of Transportation-assisted contracts to have a DBE program, including the US Highway Administration, Federal Transportation Administration, and Federal Aviation Administration.

**EXISTING STATE LAW:**

- 4) Designates DGS as the administrator of the state Small Business Procurement and Contract Act, which includes certifying and implementing targeted preference programs for certified small businesses, microbusinesses, and DVBEs.
- 5) Applies the 3% DVBE participation goal on each awarding state agency, department, and officer that enters into a contract for materials, supplies, equipment, alteration, repair, or improvement. This requirement can be waived on a specific contract with the approval of the department director or another designated person.
- 6) Authorizes a streamlined small business procurement option (Small Business/DVBE Option) for state contracts over \$50,000 and under \$250,000. Under this process, the contract is not put out to public bid, instead the contracting agency is allowed to award the contract to a certified small business after obtaining two price quotes from two certified small businesses. Similar provisions may be used for contracting with a DVBE and obtaining two price quotes from DVBEs.
- 7) Authorizes a 5% preference to the lowest responsible bidder or highest scoring responsible meeting specifications who provides for certified small business or microbusiness subcontractor participation; this applies to state contracts for goods, information technology, services, and construction, as specified.
- 8) Authorizes contracting departments to offer a DVBE incentive. The application of an incentive varies from that of the small business and Target Area Contract Preference Act (TACPA) both in when it is incorporated into competitive solicitations and in how the incentive percentages are determined and calculated. Unlike a preference in which there is a 5% standardized value included in determining competitive solicitations, discretion is left to a department to determine incentive percentages (between 1% and 5%) for a particular transaction based upon a business strategy to achieve that department's annual 3% DVBE procurement participation goal.
- 9) Defines a "DVBE" as a business certified as being a sole proprietorship, corporation, or partnership with its home office located in the U.S. which is not a branch or subsidiary of a foreign corporation, foreign firm, or other foreign-based business. In addition, a DVBE meets all of the following:
- a) The disabled veteran is a veteran of the military, naval, or air service of the US, including, but not limited to, the Philippine Commonwealth Army, Regular Scouts, "Old Scouts," Special Philippine

Scouts, “New Scouts,” and those who have at least a 10% service-connected disability and are domiciled in the state.

- b) 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.
  - c) The DVBE’s ownership of the business meets the following criteria:
    - i) If the DVBE is a sole proprietorship, it is at least 51% owned by one or more disabled veterans.
    - ii) If the DVBE is a publicly owned business, at least 51% of its stock is unconditionally owned by one or more disabled veterans.
    - iii) If the DVBE is a subsidiary, it 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.
    - iv) If the DVBE is a joint venture, it is an entity in which at least 51% of the joint venture’s management, control, and earnings are held by one or more disabled veterans.
- 10) Defines a “small business” as an independently owned and operated business that is not dominant in its field of operation; in addition, the principal office of which is located in California, the officers of which are domiciled in California, and which, together with affiliates, has 100 or fewer employees, with an average annual gross receipt of \$10 million or less over the previous three years.
- a) For a small business in the manufacturing sector, the limitation on an annual gross receipt is \$15 million.
  - b) For a small business bidding on a public works contract, as defined, the maximum number of jobs 200 or fewer employees, and the limitation on the average annual gross receipt is \$36 million.
  - c) A “microbusiness” is a small business with an average annual gross receipt limitation of \$5 million or is a manufacturer with 25 or fewer employees.

**FISCAL EFFECT:** Unknown

**COMMENTS & CONTEXT:**

- 1) **Small Business Procurement and Contract Act:** California has a 40-year history of utilizing state contracting to support business development within targeted business populations. Statute sets an annual 3% DVBE procurement participation goal, and a 2006 executive order sets a 25% small businesses and microbusinesses participation goal for state agencies, departments, boards, and commissions.

While encouraging small business participation furthers the state’s interest in having a robust small business sector, the Small Business Procurement and Contract Act also establishes the policy foundation for DVBE contract participation. The DVBE procurement program is intended to both recognize the sacrifices of California’s disabled military veterans, as well as address the specific needs of disabled veterans seeking rehabilitation and training through entrepreneurship.

To assist state agencies in reaching these targeted procurement participation goals, state law authorizes:

- A procurement preference of 5% for bids using a certified small business as a prime or subcontractor.
- A streamlined alternative procurement process for smaller size contracts (between \$5,000 and \$250,000), known as the Small Business/DVBE Option, whereby an awarding department can contract directly with a certified small business or DVBE after comparison of the bid against two other similar businesses.
- A DVBE incentive that allows an awarding department to set an incentive percentage between 1% and 5% for a particular transaction.

In the state’s experience, a majority of DVBEs are smaller size firms, with 86% having dual certifications, including 56.5% of all DVBE’s also holding microbusiness certificates, 25.6% having a small business certification, and 0.6% having a small business public works certification. The remaining 14% of DVBEs operate with only a single DVBE certification.

DGS has a range of responsibilities relating to the implementation of the Small Business and DVBE program, including:

- Certification of DVBEs (866 new and renewed DVBEs certified in 2019-20 which brings the total of certified DVBEs in 2019-20 to 1,795);
- Certification of small businesses and microbusinesses (8,278 new and renewed certifications bringing the total number of certified small businesses and microbusinesses in 2019-20 to 17,374);
- Outreach to the potential small business and DVBE bidders (142 events, including 114 events to the veteran community in 2019-20);
- Marketing of the DVBE program to state agencies;
- Partnering with CalVet on meetings with departments that are not meeting participation goals;
- Consulting with the California Procurement Contracting Academy on the DVBE training of state contracting staff;
- Preparation of an annual consolidated report on DVBEs, small businesses, and microbusinesses participation within state contracting activities; and
- Program oversight to identify abuses by bidders and failures to perform by state departments and agencies.

2) **Tracking Small Business and DVBE Procurement:** Given the importance of small businesses to California's economy, these procurement preferences play a key role in distributing state expenditures throughout the state and among a variety of business types. The charts below (*Charts 1 and 2*) display small business and DVBE procurement participation for the most recent four fiscal years for which data is available.

Chart 1– Small Business and Microbusiness Contracting Activity of Mandated Reporters (dollars in millions)				
Fiscal Year	Total Contract Dollars	Total Small Business and	Total Percent	Total Number of Contracts



		Microbusiness Contract Dollars		
2018-19	\$10,531	\$2,168	20.58%	96,345
2017-18	\$8,361	\$2,720	32.50%	110,864
2016-17	\$6,329	\$1,683	26.60%	117,624
2015-16	\$5,855	\$2,112	36.08%	116,169
2014-15	\$8,117	\$2,079	25.61%	482,707
2013-14	\$7,101	\$2,013	28.35%	90,784
2012-13	\$7,616	\$1,801	23.66%	105,617
2011-12	\$7,399	\$1,796	24.28%	165,523

Source: DGS Statewide Consolidated Annual Reports for the contracting periods

**Chart 2 – DVBE Five-Year Contracting Activity of Mandated Reporters (dollars in millions)**

Fiscal Year	Total Contract Dollars	Total DVBE Dollars	Total DVBE Percent	Total DVBE Contracts
2018-19	\$10,531	\$340	3.23%	23,782
2017-18	\$8,314	\$387	4.7%	19,174
2016-17	\$6,329	\$259	4.1%	19,823
2015-16	\$5,855	\$274	4.6%	18,638
2014-15	\$8,105	\$314	3.8%	16,192
2013-14	\$6,566	\$241	3.6%	12,777
2012-13	\$7,151	\$216	3.0%	14,907
2011-12	\$7,173	\$340	4.7%	16,246

Source: DGS Statewide Consolidated Annual Reports for the contracting periods

Based on the data displayed above, aside from 2018-19, the state appeared to generally meet its 25% small business target and 3% DVBE procurement participation goals. These official numbers are, however, only part of the program assessment. DGS prepares an extensive annual report on state procurement activities, the *California Consolidated Report*. In addition to reporting the amount of contracts with small businesses and DVBEs, these reports also provide information on outreach activities and other information to provide a framework for understanding the state’s targeted procurement activities.

Although DGS works diligently to gather and aggregate this information, the *California Consolidated Report* also highlights potential data irregularities, including the inconsistent reporting by state agencies and the failure of some state agencies to even make a report. As an example, in 2012-13, only 79% of the mandatory reporting entities reported their contracting activity to DGS.

The data also provides only a partial look at contracting activities, as it reflects the amount contracted for and not the amounts actually received by a small business or DVBE. A state audit of the DVBE Program, released in 2019, suggests that very few state agencies have implemented practices to monitor and report DVBE procurement participation violations for follow-up by DGS.

- 3) **COVID-19 Procurement Opportunities:** Procurement reporting for the period of COVID-19 pandemic is difficult to track. With the state government operating under a state of emergency, state agencies are authorized to use alternative contracting protocols. Many small business groups have expressed concern to the Assembly Jobs Committee over the lack of access to new procurement opportunities since April of 2020.

There is good evidence that small business and DVBE participation in 2019-20 and 2020-21 procurement periods, the official data for which has yet to be released, will not meet the 25% and

possibly the 3% goal. In its most recent *California Consolidated Report (2018-19)*, DGS states that the “primary reason departments gave for not meeting the Small Business or DVBE participation goals was the large number of emergency contracts related to the 2018 wildfires, such as the Camp Fire.”

To combat this trend, DGS reports that it’s Office of Small Business and DVBE Services has taken a number of steps to address the impact of large emergency/disaster related contracts on small businesses and DVBEs. A few highlights from their 2018-19 *California Consolidated Report* are provided below:

- ***New Register of Certified Firms for Emergency-related Contracts:*** Working with departments that make large disaster-related contracts, DGS identified approximately 32 activity/supplies categories for which small businesses and DVBEs will be able to register. Categories include but are not limited to: debris removal, energy generators, equipment rentals, rescue supplies, medical supplies, respiratory products, sanitation, food and fuel.
- ***Leveraged Procurement Agreements for Emergency Purchases:*** DGS finalized and expanded the Master Service Agreement (MSA) and California Multiple Award Schedule contracting opportunities for emergency procurement. This included the debris removal MSA related to recovery efforts from the fires.
- ***Targeted Outreach for Emergency Purchases:*** DGS is encouraging, and in some cases requiring, departments to reach out to DGS when conducting emergency procurements. DGS has committed to assisting awarding departments with identifying certified small businesses and DVBEs to meet their needs.

DGS believes that these changes will begin to show improvements in the 2021-22 contract activities. Implementation of AB 915 would enhance these activities by directing the California Small Business Advocate and the CalVet DVBE Program Advocate in working with awarding departments on certification of DVBEs and targeted DVBE outreach for upcoming disaster-related contracts.

- 4) **Small Business Public Works:** DGS recently implemented a new small business certification category - Small Business Certification for the Purpose of Public Works [SB 605, Chapter 673, Statute of 2017]. This new certification includes small businesses in the public works arena with three-year annual average gross receipts not exceeding \$36 million and fewer than 200 employees.

At the end of 2018-19, (six months after the bill took effect) 422 firms had applied and received the small business-public works certification. Of those 422, 292 were exclusively SB-PWs, while 130 others included it among multiple certifications. SB 605 also increased and codified the certification eligibility threshold for firms based on their three-year average of gross annual receipts. Microbusiness designation went up to \$5 million, and small business certifications were included to \$15 million. **Chart 3** displays data on the number of California certified small businesses and DVBEs for 2018-19.

<b>Chart 3 - Small Business and Micro Firms by Certification Type</b>	<b>Firm Count</b>	<b>Percent of Total</b>
Small Business	3,836	23.05%
Dual Certifies Small Business and DVBE	416	2.50%
Dual Certified Small Business and Small Business-Public Works	185	1.11%
Small Business Micro	10,762	64.66%
Dual Certified Small Business Micro and Small Business–Public Works	329	1.98%

Dual Certified Small Business Micro and DVBE	917	5.51%
Small Business–Public Works	139	0.84%
Dual Certified Small Business–Public Works and DVBE	10	0.06%
Triple Certified Small Business, DVBE, and Small Business–Public Works	20	0.12%
Triple Certified Small Business (Micro), Small Business–Public Works and DVBE	30	0.18%
<b>Total</b>	<b>16,644</b>	<b>100%</b>

AB 915 adds another new reporting category for businesses that are certified as a DBE, currently used in contracts involving federal transportation funding. The bill, as proposed to be amended, would require DGS to establish a fast-track small business certification for businesses that already have a DBE certification. Nothing in this bill sets a goal or requires a state agency to contract with a DBE.

- 5) **Equal Protection Clause and Prop 209:** In March of 1998, the Ninth Circuit Court of Appeals determined in *Monterey Mechanical Co. v. Wilson*, that the provisions of Public Contract Code Section 10115 et seq., which held that statutory requirements to achieve minority and women business enterprise procurement participation goals or related good faith efforts were unconstitutional and violate the Equal Protection Clause of the Fourteenth Amendment of the US Constitution.

Article 1 of the Fourteenth Amendment states, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The central issues being evaluated were whether the mandate to classify certain contractors differently according to their ethnicity and sex violated the equal protection clause or had the state constructed “a narrowly tailored remedy to account for past discrimination. The *Monterey Mechanical* case, the court stated, upon reviewing the legislative intent of the women and minority business contracting statute, that California had “made no attempt to justify the ethnic and sex discrimination it imposed”.

Prior to the *Monterey Mechanical* decision (1996), California voters had passed Proposition 209 (Prop 209), which more comprehensively blocked the state’s ability to operate women and minority procurement programs. Under Prop 209, which added Section 31 to Article 1 of the California Constitution, the “state is prohibited 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”.

As a result of these two cases, Governor Wilson issued Executive Order W-172-98, which stated, in part, that every state department was to cease any enforcement of the minority and women business enterprise participation goals or any related good faith effort requirements associated with Public Contract Code Section 10115 et seq. with respect to any non-federally funded state contracts or amendments on or after March 10, 1998.

In implementing the executive order, the California Department of Transportation (Caltrans) issued instructions that DBE would only be required in projects that were funded in part or in whole by federal Department of Transportation dollars and would be optional for projects funded by local or private entities. The Local Assistance Program Guidelines issued by Caltrans in April 1998 specifically retained the “DBE program requirements must be included if Caltrans awards and administers the construction contract.”

The Monterey Mechanical decision did not address, and therefore it is generally recognized that it does not apply to the DVBE provisions in state law. Further, Prop 209 specifically excludes the use of DBEs in contracts where their inclusion is necessary to draw-down federal funds. Subdivision (e) of Section 31 of Article 1 of the California Constitution states, “Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.”

As introduced, AB 915 authorized a range of activities that involve small businesses, DBEs, and DVBEs. The proposed amendments, which the author has told the committee he will be accepting, realign many of these provisions to preserve the hegemony of the small business classification. In addition, the Author’s office has stated that no cover letter was issued by the Office of the Legislative Counsel’s Office.

- 6) **Disadvantaged Business Enterprises:** Caltrans and nine other government agencies in California participate in the [DBE certification program](#) under the California Unified Certification Program, including Los Angeles County Metropolitan Transit Authority, San Diego County Regional Airport Authority, San Francisco Bay Area Rapid Transit District, San Francisco International Airport, San Francisco Municipal Transportation Agency, San Mateo County Transit District, Santa Clara Valley Transportation Authority, City of Los Angeles, and the City of Fresno.

As noted previously the federal government uses the DBE program to ensure that federally assisted contracts for highway, transit and aviation projects are made available for small business concerns owned and controlled by socially and economically disadvantaged individuals. In general, DBEs are larger than state certified Small Businesses, but smaller than state certified Small Business-Public Works. The DBE employment and revenue standards are based on business’ industry sector and are set through regulation by the federal Small Business Administration.

Chart 4 - Comparison of the State and Federal Designations				
	CA Certified	Located in California	Employee Limits	Revenue Limits
CA Microbusiness	X	Yes	25 or fewer	\$5 million
Small Business	X	Yes	100 or fewer	\$10 million
Small Manufacturers	X	Yes	100 or fewer	\$15 million
Small Business - Public Works	X	Yes	200 or fewer	\$36 million
DBE	CalTrans+	No	Various by industry	\$26.2 million
DVBE	X	Yes	None	None

While certified by Caltrans and local agencies, the DBE program is a national program and there is no requirement that the business is headquartered in California. Caltrans provides a fairly robust set of resources, including a [searchable database](#) for vendors looking for DBE subcontractors, as well as free training. DBEs are also included in the Caltrans SB 1 Small Business Outreach Plan and Implementation Report, which is applied to the state’s \$54 billion transportation infrastructure investment plan.

- 7) **Engagement Works:** In addition to the activities discussed in Comment 3, DGS also requires departments that do not meet their 25% and 3% targeted procurement goals to complete Improvement Plans. According to DGS, the Improvement Plan provides the department with an opportunity to explain the challenges it is experiencing in meeting the minimum small business and/or DVBE contracting participation goals and to propose specific strategies to improve their performance.

The DGS Office of Small Business and DVBE Services uses the Improvement Plans to help DGS address department-specific needs and recommend additional strategies to help the department meet their targeted procurement goals. In 2018-19, seven underperforming departments were selected for one-on-one counseling, based on their 2017-18 contract activity. The underperforming departments were provided with the best practices and identification of resources and tools geared to the specific issues they raised during those discussions. *Chart 3* tracks the impact of these targeted interventions by the DGS Office of Small Business and DVBE Services and the seven departments.

<b>Chart 3 - Tracking Impact of Targeted Engagement by DGS</b>				
<b>Department</b>	<b>2017-18 SB/Micro</b>	<b>2017-18 DVBE</b>	<b>2018-19 SB/Micro</b>	<b>2018-19 DVBE</b>
California Arts Council	1.05%	0.61%	52.62%	7.26%
California Department of Human Resources	7.43%	5.07%	12.82%	3.56%
California Horse Racing Board	10.37%	0.30%	1.94%	0.60%
Secure Choice Retirement Savings Investment Board	4.19%	0.36%	86.76%	2.07%
California Tax Credit Allocation Committee	18.51%	0.09%	73.42%	5.96%
Resources Recycling and Recovery (CalRecycle)	8.71%	0.87%	0.17%	0.08%
Environmental Protection Agency	4.41%	0.77%	9.45%	2.13%

Source: The DGS Consolidated Report for 2019-20

8) **The Role of Small Businesses within the California Economy:** California’s dominance in many economic areas is based, in part, on the significant role small businesses play in the state’s \$3.1 trillion economy. Two separate studies, one by the US Census Bureau and another by the Kaufman Foundation, found that net job growth was strongest among businesses with less than 20 employees. Among other advantages, small businesses are crucial in the state’s international competitiveness, and they are an important means for dispersing the economic positive impacts of trade within the California economy.

- In 2018 (most recent full set of data), of the 4.4 million firms in California, there were 3.4 million nonemployer firms as compared to 954,632 employer firms.
- Total revenues for nonemployer sole proprietorships, across all industry sectors, were \$189 billion in receipts in 2018.

Businesses with less than five employees are classified as microenterprises. In 2017, there were 473,641 microenterprises which had one or more employees. Microenterprises, including both nonemployer and up-to-5-employee businesses, comprise the single largest segment of the California business community, and they represent 89.1% (3.9 million) of all businesses in the state.

Microenterprises have many unique features and provide important benefits to local communities, according to a recent study from the Microenterprise Fund for Innovation, Effectiveness, Learning, and Dissemination (FIELD) at the Aspen Institute. These benefits include:

- Providing products and services tailored to meet local and neighborhood needs.
- Stimulating an inflow of revenues to and within local communities.
- Serving as catalysts for neighborhood reengagement.
- Revitalizing neighborhoods that may otherwise have vacant storefronts.

- Providing role models and support for future entrepreneurs.

Excluding sole proprietorships, businesses with less than 20 employees comprise over 88.6% of all businesses and employ approximately 17.4% of all workers. Businesses with less than 100 employees represent 97.3% of all businesses and employ 34.5% of the workforce.

The chart above displays 2017 data (*most recent full set of data*) on California employer businesses, including payrolls, employment, and number of firms, which may comprise of one or more establishments.

These non-employer and small employer firms create jobs, generate taxes, support important industry sectors, and revitalize communities. While their small size allows them to be more flexible in meeting niche foreign and domestic market needs, it also results in certain market challenges. These challenges include having difficulty in meeting the procedural requirements of the state's complex regulatory structure and the traditional credit and collateral requirements of mainstream financial institutions. Specialized technical assistance, access to credit enhancements, and targeting of state procurement activities help many small businesses overcome or at least minimize these difficulties.

- 9) **Proposed Amendments:** Below is a list of amendments the committee members may wish to review when considering the bill.
- a) Revise legislative intent to clarify the linkage between certified small businesses and the disadvantaged business enterprises (DBEs).
  - b) Modify the Economic Equity First provision to only apply to DBEs that could also qualify as a certified small business.
  - c) Exclude Caltrans from preparing an Economic Equity First plan, because they already prepare, pursuant to federal funding restrictions, a more comprehensive targeted procurement outreach plan that includes certified small businesses, certified DVBE, as well as certified DBEs
  - d) Remove DBEs and DVBEs from within the calculation of the 25% small business set aside.
  - e) Remove the requirement to prepare a specified procurement participation report, audit, and possible Legislative hearing.
  - f) Limit the 5% procurement preference for DBEs to public works contracts.
  - g) Delete the potentially new DBE certification process to, instead, require DGS to establish a "fast track" small business certification process for businesses that are already certified as a DBE.
  - h) Delete the special consideration provisions relating to DBE but retain the small business and microbusiness provision.
  - i) Delete the DBE Option for goods, services, and IT contracts and add a DBE Option for construction contract.
  - j) Require state agencies to begin reporting on dual certified small business and DBE contact activity.
  - k) Make other technical and conforming changes.

- 10) **Related Legislation:** Below is a list of bills from the current and prior sessions.

- a) **AB 31 (Price) Public Contracts: Small Business Procurement and Contract Act:** This bill increases the maximum contract threshold amount for awards to small businesses (SME), including microbusinesses, and DVBEs under the state's streamlined procurement process, from \$100,000 to \$250,000, as specified. This bill requires contractors to report the contract amount allocated to SMEs and DVBEs with which they made contract commitments. Status: Signed by the Governor, Chapter 212, Statutes of 2009.
- a) **AB 230 (Brough) DVBE Program Accountability:** This bill makes a number of changes to the DVBE procurement program, including, but not limited to, requiring a prime contractor to provide proof of DVBE payments, requiring the awarding agency to review DVBE procurement documents for completeness and accuracy, and requiring DVBE procurement participation commitments be identified in each state contract. Status: Signed by the Governor, Chapter 676, Statutes of 2019.
- b) **AB 309 (Price) Public Contracts: Small Business Participation:** This bill would have required the establishment of a 25% small business participation goal for all state entities and directed DGS to monitor each agency's progress in meeting this goal. The bill would have required that the Office of the Small Business Advocate receive the same progress report information as state entities and directed DGS and the Office of the Small Business Advocate to work collaboratively to assist state entities in meeting their goals. This goal is currently provided for in Executive Order (EO) D-37-01 and EO S-02-06. Status: Held on the Suspense File of the Assembly Committee on Appropriations, 2010.
- c) **AB 550 (Brown) State Procurement Procedures for Small Businesses:** This bill would have required the establishment of a 25% small business participation goal for all state entities and directed DGS to monitor each agency's progress in meeting this goal. The bill would have required that the Office of the Small Business Advocate receive the same progress report information as state entities and directed DGS and the Office of the Small Business Advocate to work collaboratively to assist state entities in meeting their goal. This goal is currently provided for in Executive Order (EO) D-37-01 and EO S-02-06. Status: Held on the Suspense File of the Assembly Committee on Appropriations, 2013.
- d) **AB 657 (Cunningham) State Government Small Business Liaisons:** This bill requires certain state agencies to prominently display the name and contact information of the small business liaison on the agencies' websites and to notify the Governor's Office of Business and Economic Development and the Department of General Services of liaison position vacancies, as specified. Status: Signed by the Governor, Chapter 81, Statutes of 2017.
- e) **AB 1365 (Quirk-Silva and Reyes) Small Business Procurement Goal:** This bill would have expressed the Legislature's intent that all California government agencies should have a 25% goal for small business participation in state procurement and contracting activities. Status: Held on the Suspense File of the Assembly Committee on Appropriations, 2018.
- f) **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.
- b) **AB 1554 (Reyes and Quirk-Silva) Reporting of Small Business and DVBE Procurement Participation:** As passed by this committee, the bill would have required a state department to

annually report small business and DVBE participation based on prime and subprime contracts beginning with the 2018-19 contract period. Status: Amended and used for a different policy purpose. Signed by the Governor, Chapter 380, Statutes of 2018.

- c) **AB 1635 (Quirk-Silva) Public Contracts and Small Business Participation:** This bill would have required specified state agencies to establish and achieve a 25% small business participation goal within their annual state contracting and permitting activities. The bill would have also required DGS and the state Small Business Advocate to take reasonable steps to assist state agencies in meeting this goal. The Assembly Committee on Jobs, Economic Development, and the Economy was the sponsor of this bill. Status: Died in the Assembly Committee on Appropriations, 2017.
- d) **AB 1809 (Cervantes) DVBE Accountability:** This bill would have modified the role of the Department of Veterans Affairs Small Business Advocate, by enhancing enforcement of commercially useful function violations, and tightens the existing monitoring and accountability requirements for state procurement activities related to the DVBE targeted procurement program. Status: Held in the Senate Committee on Appropriations, 2020.
- e) **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.
- f) **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. This bill would have prohibited a state agency from allowing a party to participate in any procurement activity if the party had been suspended, debarred, or otherwise excluded from participation in a state contract. Status: Died in the Assembly Committee on Accountability and Administrative Review, 2014.
- g) **AB 2905 (Assembly Jobs Committee) Small Business Procurement Goal:** This bill would have expressed the Legislature's intent that all California government agencies should have a 25% goal for small business participation in state procurement and contracting activities. To assist in furthering the state goal, the bill would have required each state department to disclose its small business participation goal when making its annual procurement report. Status: Held on the Suspense File of the Assembly Committee on Appropriations, 2016.
- h) **SB 67 (Price) Small Business Participation in Public Contracts:** This bill would have authorized DGS to direct all state entities to establish an annual goal of achieving no less than 25% small business participation in state procurement contracts, as specified. This goal is currently provided for in Executive Order (EO) D-37-01 and EO S-02-06. Status: Held on the Suspense File of the Assembly Committee on Appropriations, 2011.
- g) **SB 159 (Nielsen) Measuring Procurement Activity with Disabled Veteran Business Enterprises:** This bill would have clarified the metrics used when calculating the 3% procurement participation goal for disabled veteran business enterprises. The bill included legislative findings that these changes were declaratory of existing law. Status: Moved to the Assembly Inactive File without further action, 2016.



- h) ***SB 839 (Correa) Reporting on Procurement Activities with DVBEs***: 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 of the Senate Committee on Appropriations, 2014.
- i) ***SB 941 (Florez) DVBE Contracting Advocates***: This bill requires the Department of Veterans 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.
- j) ***SB 1179 (Newman) Suspension from Contracting***: This bill would have required a contracting agency to give a prime contractor that fails to certify that all DVBE subcontractors have been paid, as specified, a reasonable opportunity to comply. If the prime failed to comply, DGS would have been required to suspend the prime from participating in a state contract for five years for a first violation and permanently upon a second violation. Status: Died without further action in the Assembly Committee on Jobs, Economic Development, and the Economy, 2018.
- k) ***SB 1180 (Newman) DVBE Records***: This bill would have required an awarding state department to maintain all records of the information provided by the prime contractor relative to the payment of the DVBE that participated in the performance of the contract. The bill would have also required the awarding department to establish review procedures for those records to ensure the accuracy and completeness of the award amounts and paid amounts reported, including maintaining records in a manner that facilitates access and review by external auditors for a minimum of six years after collection. Status: Died without further action in the Assembly Committee on Jobs, Economic Development, and the Economy, 2018.

## REGISTERED SUPPORT / OPPOSITION:

### Support

Asian Business Association of Los Angeles  
Asian Business Association of San Diego  
Asian Pacific Islander American Public Affairs Association (APAPA)  
Association of Financial Development Corporations (FDCCS); the  
California African American Chamber of Commerce  
California Asian Pacific Chamber of Commerce (CAPCC)  
California Forward Action Fund  
California Hispanic Chambers of Commerce  
California Retailers Association  
California State Treasurer  
Cameo - California Association for Micro Enterprise Opportunity  
City of San Diego  
Coalition for Small and Disabled Veteran Businesses  
Golden Gate Business Association  
Greater Los Angeles African American Chamber of Commerce  
Greater Sacramento Economic Council  
National Association of Women Business Owners - California

Sacramento Area Council of Governments  
Sacramento Asian Pacific Chamber of Commerce  
Sacramento Metropolitan Chamber of Commerce  
San Francisco Chamber of Commerce  
Small Business California  
Small Business Majority  
Valley Vision

**Opposition**

None on File

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