

NOTICE OF PROPOSED RULEMAKING
DEPARTMENT OF GENERAL SERVICES
PROCUREMENT DIVISION
OFFICE OF SMALL BUSINESS & DISABLED VETERAN
BUSINESS ENTERPRISE SERVICES (OSDS)

NOTICE IS HEREBY GIVEN that the director of the Department of General Services (DGS) proposes to take the rulemaking action described below after considering all comments, objections, and recommendations to the proposed action.

PUBLIC HEARING

In support of social distancing, the public hearing will not be held in person at this time. DGS will hold a public hearing from 9:30 a.m. to 11:30 a.m. on **October 17, 2022**, online via Zoom. To attend the Public Hearing please register at this link:

https://us06web.zoom.us/webinar/register/WN_07wNI1xLRRWW2Sokly7z6A

Once registered, a link to the Public Hearing we be sent to the email address entered on the registration page. At the hearing, any person attending may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest/Policy Statement Overview section below. DGS requests but does not require that persons who offer oral comments at the hearing also submit a written copy of their testimony at the hearing.

PUBLIC COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to DGS. Comments may also be submitted by facsimile at (916) 375-4950 or by email to SBDVBERegulations@dgs.ca.gov. The written comment period is September 2, 2022, through October 17, 2022. The comment period closes at 5:00 p.m. on **October 17, 2022**. DGS will consider only comments received by that time or comments received at the public hearing.

Written comments may also be submitted to the following address:

Anda Draghici, Branch Chief
Department of General Services, Procurement Division
Office of Small Business and DVBE Services
ATTN: SBDVBE Rule Changes
707 Third Street, 1st Floor, Room 400
West Sacramento, CA 95605

AUTHORITY AND REFERENCE

Rulemaking authority is granted to DGS by Government Code (Gov. Code) Sections 14600, 14615, 14837(d), 14839, 14839.1 and 14843, about the Small Business Procurement and Contract Act (Act), effecting regulations found in California Code of

Regulations (CCR), Title 2, Division 2, Chapter 3, Subchapter 8, Sections 1896 – 1896.22. Additional authority granted by Military and Veterans Code (MVC) Section 999.5, about California Disabled Veteran Business Enterprise Program, Article 6 of Chapter 6, Division 4, Military and Veterans Code, commencing with Section 999, effecting regulations for the Disabled Veteran Business Enterprise (DVBE) Program found in California Code of Regulations (CCR), Title 2, Division 2, Chapter 3, Subchapters 10.5 and 10.6, Sections 1896.60 – 1896.97 and 1896.99.100 – 1896.99.120.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The proposed amendments and additions effectuate improvements to the Small Business (SB) program and include notable changes in the adoption of California Code of Regulations, Title 2, Sections 1896.5, to allow state departments to set contract-specific SB participation goals pursuant to Government Code Sections 14836 and 14838. In addition, amendments were made to California Code of Regulations, Title 2, Section 1896.14 with the Request for Small Business, Small Business for the Purpose of Public Works, and/or Disabled Veteran Business Enterprise Certification (Application) (Revised 09-2019), which is incorporated by reference, and California Code of Regulations, Title 2, Sections 1896.15 regarding commercially useful function and 1896.18 on enforcement, all in accordance with Administrative Procedure Act (APA) necessity, clarity, consistency and nonduplication principles.

The purpose of this action is to amend the existing Disabled Veteran Business Enterprises (DVBE) regulations to incorporate the following chaptered legislation in Assembly Bills 230 (Stats. 2019, Ch. 676), 1365 (Stats. 2019, Ch. 689) and 1574 (Stats. 2021, Ch. 756), and Senate Bill 588 (Stats. 2020, Ch. 80). These laws necessitated adjustments in the existing DVBE rules, specifically in California Code of Regulations, Title 2, Sections 1896.73, 1896.71, 1896.77 and 1896.78. The Prime Contractor's Certification – DVBE Subcontractor Report (STD 817) (Rev. 10/2021 incorporated by reference in Section 1896.78.).

The aforementioned legislation enacted new laws and amended existing ones to strengthen DVBE participation requirements for prime contractors and awarding departments. The notable changes in statute include: (1) adding a new law, Public Contract Code Section 10230, prescribing that every contract with DVBE participation include a provision requiring the prime contractor to comply with all rules, regulations, statutes and ordinances that apply to the DVBE program; (2) amending Military and Veterans Code Section 999.5(c), to require awarding departments to verify that a DVBE is certified at the time of award; (3) amending Military and Veterans Code Section 999.5(d), to require prime contractors to certify to the actual percentage of work committed and all payments made to DVBE subcontractors, and, upon request, to provide proof of payment(s) made; (4) amending Military and Veterans Code Section 999.5(f), to require written requests and approvals of DVBE substitutions prior to commencement of work; (5) adding a new law, Military and Veterans Code Section 999.55, requiring awarding departments to maintain all DVBE subcontractor

information and to establish record review procedures for awarded amounts and payments made; (6) adding a new law, Military and Veterans Code Section 999.7, requiring awarding departments to withhold and permanently deduct \$10,000 from the final payment on contracts with DVBE subcontractor participation when prime contractors refuse to comply with DVBE certification requirements of Military Veterans Code Section 999.5(d) after ample notice from awarding departments; (7) amending Military and Veterans Code Section 999.9, to allow any city attorney, county attorney or county counsel, or district attorney to bring a civil action for the alleged violations against Military and Veterans Code Section 999.9(a)(6) and, in the event that both DGS and the Attorney General (or a local prosecutor) take enforcement action for the same violation, the new law provides that the civil penalty is applied only once; (8) amending Military and Veterans Code Section 999.10, requiring that, as a general conditions of bids, the bidder submit the California DVBE certification number, contact information, and a certification signed under penalty of perjury that the work performed by each DVBE subcontractor serves a commercially useful function; (9) amending Government Code Section 14838(f), to require state departments and agencies to make continuous efforts to expand the number of small businesses and microbusinesses in state contracting by seeking out and identifying those businesses that have not previously done business with the state or are not regularly used in state contracting, and this includes those businesses in state solicitations; and lastly, (10) amending Government Code Section 14842.5 to require awarding departments to report all alleged violations of Government Code Section 14842.5 to DGS, and in the event that both DGS and the attorney general (or a local prosecutor) take enforcement action for the same violation, the civil penalty be applied only once.

With the exception of the four DVBE-related bills mentioned above, all other changes are non-substantial. They withdraw previous rules, ensure the SB and DVBE rules remain current and consistent with each other, repeal provisions that are inconsistent with statute, reflect new program expectations recently set forth in law, adjust authority and reference citations, and correct syntax, cross-references, grammar, and punctuation to improve clarity. Rule additions, in this instance, are as specifically allowed by program officials, so long as they “implement, interpret or make specific” the provisions according to the APA. In some instances, the amended regulations duplicate California statute where the statute is cited as “authority” or “reference” for the proposed regulation and where the duplication or overlap is necessary to satisfy the “clarity” standard.

Anticipated Benefits and Objectives of the Proposed Regulation:

The general nonmonetary benefits anticipated by the proposed adoption include:

- A promotion of the requirements of the small business program to a wider audience, in accordance with legislative intent.
- A reduction in ambiguity of stakeholder interpretations of existing rules, through improvements in clarification of existing language and strengthened rule content.

This proposed regulation is necessary and essential for the continued administrative success of the SB and DVBE programs, as legislatively mandated. Revisions incorporate chaptered legislation and make necessary amendments in order to clarify SB and DVBE requirements and afford stakeholders and the affected public regulatory consistency and transparency in business and government.

Determination of Inconsistency/Incompatibility with Existing Regulations: As these are the only regulations included in Title 2 of the California Code of Regulations (CCR) governing the Small Business and Disabled Veteran Business Enterprise program, inconsistencies or incompatibilities with regulations adopted by other state agencies are not likely to exist. As federal rules affecting veterans and small business in Titles 13 and 38 of the Code of Federal Regulations (CFR) and in the Federal Acquisition Regulations (FAR) apply exclusively to the federal government, and inasmuch the Small Business and Disabled Veteran Business Enterprise regulations are applicable only to California-specific programs, unsupported by federal funding, CFR/FAR and CCR inconsistencies or incompatibilities do not exist.

Documents Incorporated By Reference

1. Request for Small Business, Small Business for the Purpose of Public Works, and/or Disabled Veteran Business Enterprise Certification (Application) (Rev. 09-2019)
2. Prime Contractor's Certification – DVBE Subcontractor Report (STD 817) (Rev. 10/2021)

RESULTS OF THE ECONOMIC IMPACT ANALYSIS-ASSESSMENT:

- ***The Creation or Elimination of Jobs within the State of California:*** There will be no creation or elimination of jobs.
- ***The Creation of New Businesses or the Elimination of Existing Businesses within the State of California:*** There will be no creation of new businesses or elimination of existing businesses.
- ***The Expansion of Businesses Currently Doing Business within the State of California:*** A wide variety of jobs and occupations integral to the services and products that may be secured or acquired under public sector contracts stand to benefit from the continuation and strengthening of these programs.
- ***Benefits of the Regulations to the Health and Welfare of California Residents, Worker Safety, and the State's Environment:*** While it may promote transparency and reduce legal interpretations, these changes will have no apparent benefit on the health and welfare of California residents and worker safety.

SIGNIFICANT, STATEWIDE ADVERSE ECONOMIC IMPACT ON BUSINESS:

The department finds that the proposed regulations will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states (Gov. Code § 11346.5(a)(8)).

EFFECT ON SMALL BUSINESS:

For the purposes of conducting the economic impact assessment during the rulemaking process, the definition of small businesses is set forth in Government Code Section 11346.3(b)(4)(B). In general, the SB program regulations are applicable only to certified small businesses with average gross annual receipts up to \$15 million, as defined in the Small Business Procurement and Contract Act (Gov. Code, §§ 14835-14837).

Specifically, the proposed changes to the regulations may affect only the certified small businesses contracting with the state that commit to use DVBE certified subcontractors but do not comply with the new laws. Only DVBEs that employ fewer than 100 employees can be small businesses under the law. The statutes impact only those DVBEs that are also certified as SBs.

While changes will have a statewide applicability, they are not “major regulations with significant statewide economic impact” as they do not cross the threshold of \$50 million in a single year. Overall, the changes will bring positive improvement in the welfare of all those small businesses seeking contracting opportunities with the state and other local governmental entities. The department has initially determined, subject to further public comment, that the proposed rule changes will not have a significant adverse economic impact on small businesses.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS:

The range of direct or ongoing costs that a representative private person or business will necessarily incur in reasonable compliance are negligible and wholly consistent with those normally associated with usual and ordinary business activity and, more importantly, are consistent with the voluntary nature of the SB and DVBE programs in question. Prime contractors that do business with the state and are not compliant with the new DVBE related rules will not receive the total contract amount.

MISCELLANEOUS DISCLOSURES REGARDING THE PROPOSED ACTION:

Cost to any local agency or school district that must be reimbursed in accordance with Gov. Code Sections 17500 - 17630: None.

Nondiscretionary cost or savings imposed upon local agencies: None.

Significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states: None - see analysis above.

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None.

Cost or savings in federal funding to the state: None.

Significant effect on housing costs: None.

CONSIDERATION OF ALTERNATIVES

Pursuant to Government Code Section 11346.5(a)(13), the DGS initially determined, subject to further public comment, that no reasonable alternative it considers or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

CONTACT PERSONS

Inquiries concerning the subject matter of the proposed SB and DVBE rulemaking revision may be directed to the following staff member with regulation adoption expertise and responsibility for coordinating this action:

Demeshia Swanson, SB/DVBE Regulations Adoption Coordinator
Department of General Services, Procurement Division
Office of Small Business and DVBE Services (OSDS)
707 Third Street, 1st Floor, Room 400
West Sacramento, CA 95605
Direct line: (279) 946-7992
Email: Demeshia.Swanson@dgs.ca.gov

The alternate contact person for inquiries is:

Norma Curiel, SB/DVBE Certification Manager
Department of General Services, Procurement Division
Office of Small Business and DVBE Services
707 Third Street, 1st Floor, Room 400
West Sacramento, CA 95605
Direct line: (279) 946-8267
Email: Norma.Curiel@dgs.ca.gov

Please direct requests for copies of the Notice of Rulemaking, the Initial Statement of Reasons, and the proposed text of the DVBE regulations, or other information upon which the rulemaking is based, to SBDVBERegulations@dgs.ca.gov

AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE

The Department of General Services has prepared an Initial Statement of Reasons (ISOR) for the proposed action, has available all the information upon which its proposal is based, and has available the express terms of the proposed action, with additions in underline and deletions in strikeout format (text of proposed regulations). DGS will have the rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published, the current rulemaking initiative consists of the items listed below, and copies may be obtained by contacting the OSDS Regulations Adoption Coordinator at the address, email or telephone number(s) listed under "Contact Persons":

- Notice of Proposed Rulemaking
- Proposed Text of SB and DVBE Regulations
- Initial Statement of Reasons

AVAILABILITY OF THE CHANGED OR MODIFIED TEXT

After holding the public hearing and considering all timely and relevant comments received, DGS may adopt the proposed regulations substantially as described in this notice. If DGS makes modifications that are sufficiently related to the original proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before DGS takes action to adopt the regulations as revised. Please send requests for copies of any modified regulations to the address or email indicated under “Contact Persons” (attention: RE SBDVBE Rule Changes).

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting any of the individuals identified under “Contact Persons.” It shall also be posted on the internet at the site listed below.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

DGS is making available copies of the Notice of Proposed Rulemaking, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout by visiting: <https://www.dgs.ca.gov/PD/Resources/Page-Content/Procurement-Division-Resources-List-Folder/Notice-of-Rulemaking-Regulations-for-SB-DVBE?search=notice%20of%20rulemaking>