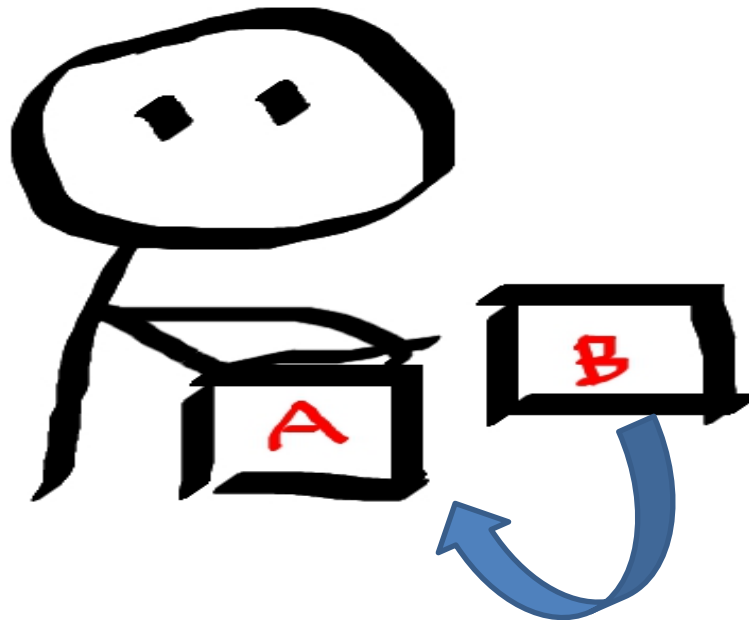


Subcontractor Substitution

Subletting and Subcontracting Fair Practices Act
Public Contract Code section 4100 et. seq



Subletting and
Subcontracting Fair
Practices Act



DV Subcontractor
Substitutions



SB Subcontractor
Substitutions

Subcontractor Substitution

Applicable Law:

Applicable Statutes:

Public Contract Code section 4100 et. seq

Military and Veterans Code section 999.5

Military and Veterans Code section 999.10

Applicable SB and DVBE Regulations:

California Code of Regulations, title 2, section 1896.10

California Code of Regulations, title 2, section 1896.73

Subcontractor Substitution

Legislative Intent

Intended to prevent post award bid shopping by contractors and post award bid peddling by subcontractors. (Public Contract Code section 4101.)

An additional intent according to caselaw was so as:
“to give the awarding authority the opportunity to investigate and approve the initial subcontractors and any replacements.” (*Synergy Project Management Inc. v. City and County of San Francisco* (2019) 33 Cal.App.5th 21; *E.F. Brady Co. v. M.H. Golden Co.* (1997) 58 Cal.App.4th 182.)

Subcontractor Substitution

Legislative Intent cont.

Bid Shopping is the use of one subcontractor's bid as leverage to pressure other subcontractors to perform work at a lower cost.

Bid Peddling occurs when one subcontractor undercuts a known bid made by another subcontractor.

Citation: Synergy Project Management, Inc. v. City and County of San Francisco, (2019) 33 Cal.App.5th 21, 32.

Subcontractor Substitution

General Rule:

Post contract award, the prime contractor must use the subcontractor specifically proposed in the bid.

Citations:

Public Contract Code section 4107

2 CCR section 1896.10

2 CCR section 1896.73



Subcontractor Substitution

Exception

The Awarding Agency, or its duly authorized officer, consented to the substitution of another person.

- Consent pursuant to the situations identified in Public Contract Code section 4107, subdivision (a)(1) through (a)(9), as follows:

Continued

Conditions for Substitution

The subcontractor:

- Fails or refuses to enter into a contract with the prime contractor;
- Becomes bankrupt or insolvent;
- Fails or refuses to perform;
- Refuses to meet bond requirements;
- Was listed as a result of inadvertent clerical error;
- Is not licensed;
- Has performed work that the department determined to be unsatisfactory;
- Is ineligible to work on a public works contract; or
- Has been determined to be non-responsible by the awarding authority.

Small Business Subcontractor Substitution

Contractor Responsibilities – (2 CCR § 1896.10)

Prime Contractor must submit a written substitution request (“Request”) to the Awarding Department. (Contractor must not substitute another contractor without department approval.)

The written request must include:

- **The reason for the substitution;**
- **A statement that it is a “like-for-like” substitution. (Small business subcontractor replaced by another small business subcontractor.)**

Continued

Small Business Subcontractor Substitution

If not a “like-for-like” substitution, the contractor must:

Include a written justification for a lack of like-for-like substitution.

Explain the steps taken to find small business subcontractors.

Explain how the subcontractor portion of the contract will be fulfilled.

Description of work to be performed

Include the specific tasks.

Include Dollar amount or percentage of work that the new subcontractor will perform.

Small Business Subcontractor Substitution

Awarding Department Responsibilities

Upon receipt of the Request, the Awarding Department, must:

Notify the subcontractor in writing of the substitution request and the reasons for the request.

Send the notice via certified or registered mail,

Send to the subcontractor's last known address.

Small Business Subcontractor Substitution

Awarding Department Responsibilities

If the listed subcontractor files written objections to the substitution.

Awarding Department shall conduct a hearing, AND

Issue a decision to grant or deny the substitution.

Small Business Subcontractor Substitution

Listed Subcontractor Responsibilities

Upon receipt of the notice of substitution, listed subcontractor:

Within five (5) working days after receipt of notice,

May submit written objections to the substitution, to the Awarding Department.

Note: The absence of written objections is consent to the substitution.

DVBE Subcontractor Substitution

**Military & Veterans Code section 999.5 subd. (e)
California Code of Regulations, Title 2, Section
1896.73**

General Rule:

Listed DVBE subcontractors shall be used.

Exception:

DGS – OSDS approves the substitution.

DVBE Subcontractor Substitution

Prime Contractor Responsibilities:

Contractor to “simultaneously” notify Awarding Department and DGS-OSDS of the intended substitution.

- In writing
- Via certified mail
- Include a Proof of service to listed Disabled Veteran (“DV”) subcontractor

DVBE Subcontractor Substitution

Prime Contractor Responsibilities:

Submit the following to the Awarding Department

- Written response by DV to the notice of substitution.
- If no written response, provide the returned and unopened certified mail.
- Name of the listed subcontractor or supplier and name of proposed DV replacement.
- Document a lack of DVs if contractor cannot replace a DV subcontractor with another DV subcontractor.
(if DV not replaced by another DV, the substitution will likely be denied.)

DVBE Subcontractor Substitution

Awarding Department Responsibilities:

- If a written opposition to the substitution is filed, the Awarding Department shall conduct a hearing.
- The notice of hearing shall be issued within 5 business days from the date of receipt of the written opposition.
- Issue a decision.
 - * If the Awarding Department grants the substitution, it shall submit to DGS – OSDS the following substitution request and related documents along with the decision.

DVBE Subcontractor Substitution

DGS/OSDS Responsibilities:

- There is no DGS/OSDS Involvement unless the Awarding Department approves the substitution.
- OSDS will review the Awarding Department's submission and
- Will approve or deny the substitution request within 3 business days after evaluating the criteria in California Code of Regulations Section 1896.73.

DVBE Subcontractor Substitution

Allowable Justification for DVBE Substitution

Consent to replacement of another DVBE subcontractor shall be in any of the following situations in harmony with, or conforming to the public works substitution provisions of Public Contract Code section 4107, as follows

DVBE Subcontractor Substitution

DVBE sub

- (1) after reasonable opportunity, fails or refuses to execute the contract within the scope and price specified;
- (2) Becomes insolvent;
- (3) Fails or refuses to perform as sub-contractually obligated;
- (4) Fails or refuses to meet bond requirements;
- (5) Clerical error
- (6) Not licensed by any state or CA regulatory authority
- (7) The awarding department, or its duly authorized officer, determines that the work performed is substantially unsatisfactory

Subcontractor Substitution

Caselaw:

Synergy Project Management v. City and County of San Francisco (2019) 33 Cal.App.5th 21.

Subcontractor Substitutions	Small Business	DVBE
Post contract award the Contractor must use the subcontractor proposed in the bid.	√	√
Exception: Awarding Department or its duly authorized officer consented to the Substitution	√	√
Basis for consent is Public Contract Code section 4107, subdivisions (a)(1) – (a)(9)	√	√
Contractor must submit a written substitution request to the Awarding Department	√	√
If Subcontractor opposes substitution, Awarding Department must conduct a hearing.	√	√
If Awarding Department grants the substitution request it shall submit all documents of substitution to DGS –OSDS	N/A	√

Subcontractor Substitutions	SB	DVBE
<u>Substitution Request to include:</u> <ol style="list-style-type: none"> 1. Reason for Substitution 2. Substituted with another SB/DV Subcontractor 3. Reasons why another SB/DV Subcontractor cannot be substituted 4. Describe the work to be performed 5. Include the dollar amount or percentage of work that the new subcontractor will perform 6. Subcontractor must perform CUF 7. Include Proof of service to listed subcontractor 	<p style="text-align: center;">√</p> <p style="text-align: center;">√</p> <p style="text-align: center;">√</p> <p style="text-align: center;">√</p> <p style="text-align: center;">√</p> <p style="text-align: center;">√</p> <p style="text-align: center;">√</p>	<p style="text-align: center;">√</p> <p style="text-align: center;">√</p> <p style="text-align: center;">√</p> <p style="text-align: center;">√</p> <p style="text-align: center;">√</p> <p style="text-align: center;">√</p> <p style="text-align: center;">√</p>
<u>Notice Requirements</u> <ol style="list-style-type: none"> 1. Notice via certified or registered mail 2. Send to subcontractor's last known address 	<p style="text-align: center;">√</p> <p style="text-align: center;">√</p>	<p style="text-align: center;">√</p> <p style="text-align: center;">√</p>

Requesting DVBE Substitution

Requests to replace a DVBE subcontractor must be documented to show that the replacement meets the criteria as specified in the CCR or the PCC.

Documentation should include, but is not limited to:

1. The Request
2. Confirmation of Receipt of the Request by DVBEs
3. The DVBE's Objection and Request for Hearing and the Final Statement of Decision.
4. The Amount and % of Original DVBE Commitment.
5. The Description of Work to be Done by Original DVBE.
6. The Amount and % of the Replacement DVBE Commitment.
7. The Description of Work to be Done by Replacement DVBE.

Requesting DVBE Substitution

STATE OF CALIFORNIA – DEPARTMENT OF GENERAL SERVICES

PROCUREMENT DIVISION

DISABLED VETERAN BUSINESS ENTERPRISE SUBSTITUTION REQUEST

DGS PD 07-06 (New 4/2015)

1. Awarding Department [REDACTED]		PD-OSDS USE ONLY
2. SB/DVBE Advocate Name [REDACTED]	5. Contracting Official Name [REDACTED]	
3. SB/DVBE Advocate E-mail [REDACTED]	6. Contracting Official E-mail [REDACTED]	
4. SB/DVBE Advocate Phone Number [REDACTED]	7. Contracting Official Phone Number [REDACTED]	

INSTRUCTIONS

- Awarding Department:** Name of the awarding department submitting the request to approve DVBE subcontractor substitution by another DVBE(s) or Small Business.
- SB/DVBE Advocate Name:** Enter the name of the Small Business/Disabled Veteran Business Enterprise (SB/DVBE) Advocate.
- SB/DVBE Advocate E-mail:** Enter the email address for the SB/DVBE Advocate.
- SB/DVBE Advocate Phone Number:** Enter the phone number for the SB/DVBE Advocate.
- Contracting Official Name:** Enter the name of the contracting official.
- Contracting Official E-mail:** Enter the email address for the contracting official.
- Contracting Official Phone Number:** Enter the phone number for the contracting official.

Requesting DVBE Substitution

8. Classification of Contract

9. Description of Contract

10. Contract Number

11. Contract Amount

12. Amount of DVBE Subcontractor
Commitment

13. Release Date of Solicitation

14. Contract Term







15. Date Contractor Requested DVBE
Subcontractor Substitution

- 8. Classification of Contract:** Enter IT-Good or Service, Non-IT Good, Non-IT Service, Public Works or Architectural & Engineering.
- 9. Description of Contract:** Describe goods or services sufficiently for Department of General Services (DGS) to describe what was needed on contract.
- 10. Contract Number:** Reference the contract number assigned to the awarded contract.
- 11. Contract Amount:** Enter the dollar amount on which the commitment of DVBE subcontractor participation is based.
- 12. Amount of DVBE Subcontractor Commitment:** Enter the dollar amount that the contractor listed as a commitment for DVBE subcontractor participation. Submit the documents that support the commitment amount (form submitted with the bid or offer, correspondence, DVBE subcontractor agreement, etc.).
- 13. Release Date of Solicitation:** Enter the date the solicitation was released to the public.
- 14. Contract Term:** Enter the start and end date of the contract.
- 15. Date Contractor Requested DVBE Subcontractor Substitution:** Identify the date contractor submitted DVBE substitution request to Department.

Requesting DVBE Substitution

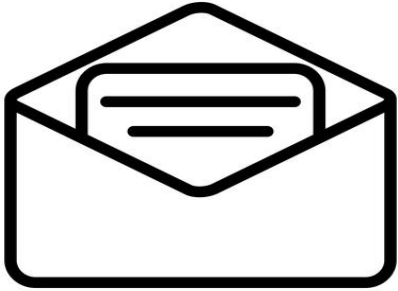
16. Justification for Substitution



<p>17. Date Contractor Sent Written Notice to DVBE Subcontractor(s)</p> 	<p>18. Date(s) Written Objections Were Received from DVBE(s), if any</p> 	<p>19. Date Department Sent Notice of Substitution Hearing Substitution Hearing (Required if objections received)</p> 	<p>20. Date of Substitution Hearing, if applicable</p> 
<p>21. SB/DVBE Advocate Signature</p> 			<p>Date Signed</p> 

- 16. Justification for Substitution:** Enter the authority that applies for the DVBE substitution request pursuant to 2 California Code of Regulations (CCR) Section 1896.73 or Public Contract Code Section 4107 (a)(1-9).
- 17. Date Contractor Sent Written Notice to DVBE Subcontractor(s):** Identify the date contractor sent written notification to the DVBE Subcontractor(s).
- 18. Date Written Objections Were Received from DVBE(s), if any:** Submit written objections and request for hearing submitted by DVBE(s), if any.
- 19. Date Department Sent Notice of Substitution Hearing (Required if objections received):** Submit copy of written notice to DVBE(s) of hearing, if applicable.
- 20. Date of Substitution Hearing, if applicable:** Enter the date of the DVBE Substitution Hearing held by the Department.

Requesting DVBE Substitution



Email completed form and supporting documents to

OSDSHelp@dgs.ca.gov

Reference

"DVBE Substitution Request"
in the Subject line.