

## PROGRAM SUBSTITUTIONS and ABUSE

The following actions are designed to minimize the potential for DVBE program abuse, the subsequent request for an investigation of potential abuse and enforcement of penalties if applicable. Also included are the actions that may be taken if a DVBE or prime contractor reports potential DVBE abuse.

**1. At time of contract award, notify the prime contractor with a cc to the DVBE subcontractor that a copy of the written agreement with the DVBE subcontractor is required to be sent to the awarding department within a certain timeframe (30 calendar days). Follow up with the prime contractor if the written agreement is not received. The notice to the prime contractor should do all of the following:**

a. Explain that the DVBE participation stated on the Std. 840 is a commitment to use the DVBE pursuant to the California Code of Regulations, title 2, section 1896.62(c) (attach the DVBE regulations).

b. Confirm the specific element(s) of work that the Prime contractor committed to the awarding department would be performed by a DVBE. Also, confirm the dollar amount or contract percentage of the commitment.

Explain that substitution of a DVBE must be requested prior to completing the element(s) of the work that were committed to be performed by the DVBE, the substitution request must be completed in accordance with California Code of Regulations, title 2, section 1896.64(c), and the DVBE substitution request must be approved by the awarding department in accordance with California Code of Regulations, title 2, section 1896.64(d).

It really helps when you have confirmed up front with the prime and the DVBE exactly what the State requires. Then, they cannot claim later on that they did not know these things. If you send the above notice and receive the written agreement between the prime contractor and the DVBE, you are in a much better position to investigate any future allegation of DVBE program abuse or facilitate the resolution of any conflicts between the prime and the DVBE.

**2. Steps to complete when a DVBE reports that the prime contractor failed to use and pay the listed DVBE:**

a. Contact the contract manager to determine if the element(s) of the work to be performed by the DVBE have already been completed and if the prime contractor has invoiced and been paid for the work. Confirm if there have been any amendments or changes to the scope of the work of the contract. Advise the contract manager that you are sending a letter (see b. below), and if applicable, request that the contract manager not approve any invoices for the work to be performed by the DVBE until the prime contractor responds to your letter.

b. Send a letter certified mail/return receipt to the prime contractor with a cc to the DVBE subcontractor to:

- Confirm the specific element(s) of work that the Prime contractor committed to the awarding department would be performed by a DVBE. Also, confirm the dollar amount or contract percentage of the commitment. If possible, attach a copy of the Std. 840 submitted by the prime.
- Ask that they document their use of the DVBE either by providing copies of paid invoices to the DVBE, a written contract/agreement with the DVBE to perform the work identified on the Std. 840, or other documentation that the prime and the DVBE have reached an agreement as to exactly what work will be performed and the schedule to perform that work.
- Remind the prime that the DVBE participation stated on the Std. 840 is a commitment to use the DVBE pursuant to the California Code of Regulations, title 2, section 1896.62(c). Reference and attach a copy of the original notice to the prime at time of contract award.

- Remind the prime that substitution of a DVBE must be requested prior to completing the element(s) of the work that were committed to be performed by the DVBE, the substitution request must be completed in accordance with California Code of Regulations, title 2, section 1896.64(c), and the DVBE substitution request must be approved by the awarding department in accordance with California Code of Regulations, title 2, section 1896.64(d).
- Attach a copy of the DVBE regulations.
- **Require a written a response within 30 calendar days or less.**

It is hopeful that your letter to the prime contractor will result in the desired outcome, which is achievement of the participation by the DVBE. If after 30 calendar days, there is no response or prime indicates that they do not intend to honor their DVBE commitment, then you should contact your legal office to explore if there are any actions that may be taken under the contract.

### **3. Steps to complete when you receive a report of alleged program abuse or violation of the law, including that the prime contractor failed to use and pay the listed DVBE.**

- a. If at anytime, the awarding department receives a report of an alleged violation of Public Contract Code Section 10115.10 or Military & Veterans Code Section 999.9, either directly or from the Office of Small Business and DVBE Services (OSDS), the awarding department will prepare a written report of their findings in accordance with California Code of Regulations, title 2, section 1896.80.
- b. The written report will be a public document and will include a recommendation for action to be taken commensurate with the awarding department's findings. The written report will be due to the OSDS within 60 working days of the notification to the awarding department of the alleged violation. Any letters to the prime contractor and their responses become part of the investigation.
- c. Below are 3 of the violations that might apply if a prime contractor knowingly and with intent to defraud obtained a state contract and then did not comply with the commitment to use the DVBE or request substitution.

Public Contract Code section 10115.10(4) states: Knowingly and with intent to defraud, fraudulently obtain, attempt to obtain, or aid another person or firm in fraudulently obtaining or attempting to obtain, public moneys to which the person is not entitled under this article.

Military & Veterans Code section 999.9(4) states: Knowingly and with intent to defraud, fraudulently obtain, attempt to obtain, or aid another person in fraudulently obtaining or attempting to obtain, public moneys, contracts, or funds expended under a contract, that are awarded by any state agency, department, officer, or other state governmental agency, to which the person is not entitled under this article.

Military & Veterans Code section 999.9(5) states: Knowingly and with intent to defraud, fraudulently represent participation of a DVBE in order to obtain or retain a bid preference or a state contract.