

INITIAL STATEMENT OF REASONS (ISOR)

Problem Statement

The California Small Business (SB) certification program was statutorily established in 1973, with passage of Assembly Bill 1816 (Statutes of 1973, Chapter 1198), an enactment generally known as the “Small Business Procurement and Contract Act.” Explicit Legislative intent, with respect to the purpose of the program, is that the state will aid, counsel, assist and protect the interests of small business as well as insure that a fair proportion of the total purchases and state contracts are placed with such enterprises. Government Code (GC) Sections 14835 - 14843 codify the act and, consistent with subsequent amendments, set forth the contemporary scope and responsibilities of the Department of General Services (DGS) with respect to the promulgation of the program. The DGS Office of Small Business and Disabled Veterans Services (OSDS) is the administrative organization currently identified by law (GC 14839) with program administration and oversight duties.

The “California Disabled Veteran Business Enterprise (DVBE) Program,” is separately authorized and codified in Sections 999 – 999.13 of the Military and Veterans Code (MVC). The intent is to require every state procurement authority to meet or exceed an annual percentage target goal (sometimes set by executive order), for the award of procurement contracts to eligible disabled veterans. With the single exception of contracts for professional bond services, DGS is the designated administrative agency for DVBE Program promulgation, per MVC 999.5(a). Under current departmental structure OSDS is the DGS organizational subunit responsible for DVBE program administration and oversight, excluding the actual awarding of contracts.

In accordance with the regulatory adoption requirements of the Administrative Procedure Act (APA), rules promulgating both the SB and DVBE programs have been adopted and included in Subchapters 8 and 10.5 of Chapter 3, Division 2, Title 2, California Code of Regulations (CCR). Additions, revisions and deletion of pertinent provisions of these existing rules (and primarily 2 CCR §§1896 – 1896.22, as described), is the action initiated by OSDS and explained in this ISOR. Principally, the proposed amendments and additions effectuate program refinements originating with the Legislature in the form of chaptered bills codified over the past decade plus. This triggers adjustment in existing SB and (to a much lesser extent) DVBE program rules in accordance with APA necessity, clarity, consistency and nonduplication principles.

Rule adjustments made for purposes of consistency with changed statute are considered changes without regulatory effect. Additional OSDS initiated rule revisions are necessary for certification consistency, revise terms that have become obsolete or insufficient over time and supply additional content essential for rule clarity and proper program function. Rule additions, in this instance, are as specifically allowed by program officials, so long as they “implement, interpret or make specific” the provisions of the Act.

Public Review in 2015

Public comment was solicited in 2015 on these very same rules. Comments, suggestions and recommendations submitted at the time were considered. They included renumbering; rule reordering or relocation; revising structure, syntax, grammar and/or punctuation; as well as ensuring regulatory consistency with a recently changed California statute.

Another group of submitted comments (including those from other state agencies) were in the category of substantial but not sufficiently related, including:

- Insistence that the rules reflect applicability limitations (and about which there is ongoing disagreement);
- Requested wording which would eliminate desirable discretionary authority;

- Suggested regulatory language adjustments in what in reality is content made specific by statute;
- Requesting adjustments which would mandate OSDS actions beyond statutory scope;
- Requesting adjustments to provisions relating to “investigations” inconsistent with OSDS’ interpretations and understanding of matters such as reports, researching and findings by awarding departments;
- Adjusting dollar amounts specified for microbusiness eligibility contradicting those which have statutory preeminence and are determined by DGS;
- White papers were received absent recommendations for specific rule adjustments and therefore could not be incorporated as changes in the original proposal.

Comments that were deemed, at the time, substantial and sufficiently related as to consider making textual adjustments, included:

- Suggestions for refining the definition of subcontractor Improved wording of “gross annual receipt” text;
- Dropping certain phrases or terms such as “business concern” and including others such as “include documents”; Improved use of the “willful and knowingly” phrase;
- A deletion of “including but not limited” where unnecessary;
- Technical corrections in code citations; as well as
- Refinement in wording concerning “solicitation” with respect to the same being an “event” digitally.

Certain content specifics contained in the current proposal are built upon a foundation formed out of last year’s effort. Textual accommodations and refinements intended to be accepted in 2015 are in some cases integral to language moving forward this year. In certain instances they are directly reflected in the currently proposed revisions. The 2015 effort helped establish a viable platform for the 2016 package, and satisfied GC 11346.45 expectations respecting early outreach. For added measure, key stakeholder individuals and organizations have also been afforded a preview of the present text, prior to commencement of the public comment phase.

Evidence Supporting No Significant Adverse Economic Impact on Business/Economic Impact Analysis-Assessment

The Department has initially determined that the proposed rule changes will not have a significant adverse economic impact on business, although the regulations will affect small businesses. Participating state entities awarded a total of \$9.387 billion dollars in contracts in 2006-07, according to a California State University Sacramento study conducted in 2009. However, the net Gross State Product (GSP) creation due to contracts awarded by the state to SB and DVBES was about 45% of this total. So, the incremental value of the state’s awarding contracts to these categories is apparently positive, resulting (according to the 2009 study) in new job and GSP creation, net new labor income for California employees, and indirect business taxes. Therefore, to the extent that these rules further such business opportunities in the manner legislatively intended, they are far more likely to be beneficial than adverse.

These rules will impact directly and immediately only to about 5-10% (1,500 to 3000) of 27,000 plus existing certificated enterprises, and more so to that subset obligated to recertify in the upcoming year. On the other hand, these rules are integral to a program meant to encourage small business creation. Small business accounts for over 90% of all employer firms and drives the economic engine of the state according to the 2009 study. A wide variety of jobs and occupations integral to the services and products that may be secured or acquired under public sector contract could be affected by certification, but the impact on creation or elimination of

jobs in California is unclear. Whether the proposed regulations would have an impact on staffing levels depends on a variety of factors unrelated to their adoption. A 2009 estimate of jobs created by the SB program concluded that the number probably would exceed 25,000 in total over the entire life of its existence. The impact on business creation or elimination is also minimal. It is important to keep in mind that the regulations, both in original and revised form, affect only those businesses seeking certified status and has no direct bearing on whether a business establishes or continues its existence within the state. Analysis in 2009 suggested that the state creates new economic activity that is 50% more with SB and DVBE contracting than if awarding such contracts to large business alone.

- The Creation or Elimination of Jobs within the State of California: Potentially beneficial thanks to improved rule clarity. The estimated number of jobs created could exceed 25,000 in number, over the entire life of the program, according to a 2009 study. These rules are not expected to eliminate jobs.
- The Creation of New Businesses or the Elimination of Existing Businesses within the State of California: As historically documented, the value of the state's awarding such contracts is incrementally positive, resulting in net new job creation, new Gross State Product, net new labor income and indirect business taxes. New economic activity generated by the state through contracting with small businesses through gross output has also been determined overwhelming positive. As small businesses account for more than 90% of all employer firms some assert this sector drives the State's economic engine. These rules are not expected to eliminate existing California 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 contract stand to benefit from the continuation of this program. The state creates more value by awarding contracts to SBs and DVBEs over large businesses and on average produces new economic activity 50% more than if awarding the contracts to large businesses, according to the California State University, Sacramento 2009 study referenced above.
- Benefits of the Regulations to the Health and Welfare of California Residents, Worker Safety, and the State's Environment: The anticipated benefits of the rulemaking revise are that stakeholders have updated regulations regarding the certification program. It reduces subjective interpretation of law, promotes transparency and should reduce unnecessary costs associated with program administration. Overall, this amounts to positive improvement in the welfare of all those small businesses seeking contracting opportunities with the state and other local governmental entities. Therefore, these rules do and will continue to afford small businesses an important opportunity to participate in free enterprise, in satisfaction of Legislative intent.

Technical, Theoretical, and/or Empirical Study, Reports, or Documents

In proposing amendments, the Department has relied upon two technical studies. An escalation analysis (Appendix A) has been conducted in accordance with GC section 14837(d)(3), the outcome of which superseded the microbusiness dollar figure which appears in GC 14837(d)(2), as 2 CCR subsection 1896.4(p) now depicts. A separate analysis, also attached as an ISOR appendix, represents an eligibility adjustment performed in 2015 whereby it was determined that the annual gross receipt basis specified in (proposed) 1896.12(a)(5)(A) could be adjusted from fourteen to fifteen million dollars (Appendix B).

Alternatives Determination

The Department tentatively concludes, as GC 11346.5(a)(10) requires be stated, that there is no alternative which would be more effective in carrying out the purpose of this action, or would be as effective, and less burdensome to affected private persons or small businesses, than the action proposed. Additionally, no testimony or commentary in 2015 altered the same tentative conclusion in this regard. This is a repeatedly endorsed program created specifically for the benefit of small business and there is no evidence of legislative preference for a program alternative. Likewise, executive branch support has remained constant over time, from a budgetary standpoint. Savings in administration undoubtedly could accompany dramatic alternatives in the certification process or from eliminating the program altogether, but at the risk of diminishing long-standing benefits specific and readily available to California small businesses. Because of the established nature of the program, it affords some measure of economic equilibrium and stability in communities throughout the state.

The proposed changes, and the specific purpose of each, are as follows:

In the following, underline indicates “to be adopted” and ~~strikethrough~~, “to be deleted” rules. In some cases, numerical strikeouts are difficult to discern because they overlie horizontal lines in the number.

There are two changes which are found uniformly throughout. A comprehensive audit of all existing authority and reference citations was performed in conjunction with the preparation of this package. Consequently, strikethrough and underline in the attached text capture such corrections throughout subchapter 8 (and occasionally in subchapter 10.5). These are considered changes without regulatory effect, under the APA. As the SB rules were first adopted decades ago, and little more than (at best) incrementally revised in recent years, the necessity and desirability of extensive authority and reference adjustment, correction and/or revision is clearly warranted. Also, a designated subunit of the Department, namely the Office of Small Business and Disabled Veterans, has been statutorily delegated responsibilities under amendments to the Small Business Procurement and Contract Act (subsequently referred to simply as “act”). Therefore, proposed additions to implement, interpret and make specific the purpose of the statute identify OSDS, as an acronym, as the organizational entity charged administratively with carrying out subchapter requirements. Consequently, OSDS replaces less specific references to the “Department” or “DGS” throughout the rules. For purposes of brevity, further subsection by subsection mention of such changes is often dispensed with in the remainder of the ISOR.

Section 1896. Purpose of Subchapter:

Existing Section 1896 will be amended with existing content repositioned or reworded for improved clarity, in response to complaints that the original paragraph was difficult to understand. As adjusted, the intent of the subchapter is made more reader friendly. Also, what “preferential” means with respect to small businesses and non-small business contractors is more clearly described.

Section 1896.2. Authority.

Existing Subsection 1896.2 will be amended and selectively reworded to provide greater specificity, necessitated for improved clarity and consistency. Word additions, for greater statutory consistency, include “certifying,” “microbusiness” and OSDS. OSDS is named as having explicit responsibilities for regulatory and statutory responsibilities. Greater specificity in the “authority” and “reference” citations (provided in the manner mentioned immediately above), constitutes additional change without regulatory effect.

Section 1896. 4. Definitions:

Definitions, in general, afford explanations which more fully detail the SB certification program. Accordingly, definition refinements are further justifiable to the extent that obviously ineligible businesses (for example, those dominant in their field) can be deterred from submitting applications for certification and reductions in such will mean fewer certification denials, revocations and appeals, and thus a lessening of workload across the board. Arguably too, definitions promote wider understanding of certification requirements, the determination process, contract performance expectations and more effectively inform others as to what may be considered program abuse specifically. New terms and abbreviations also have to be added to clarify program enforcement and certification appeal rights. In addition, the principle of rule consistency in some cases necessitates correlation of DVBE with SB definitions, or in other instances variations in content must be made explicit as the two programs have somewhat separate statutory expectations.

Existing subsection 1896.4 will be amended, 16 entries are adjusted, 5 added, 5 deleted (or relocated) and 3 unchanged (including those merely renumbered). For more appropriate placement and organization and in order to accommodate new definitions, adjustments in enumeration are depicted throughout. Many existing definitions are no longer sufficient, or have become content leftovers (or 'orphans') over time. Accordingly, vague, outdated or difficult to understand terms are revised, or augmented. This is intended to eliminate interpretative variations and duplication of effort when attempting to uniformly communicate meaning, especially when key terms are being used

Subsection 1896.4(a) will be amended. Text insertion more properly links it to subsequent subchapter content, for clarity purposes.

Subsection 1896.4(b) will be amended. Text deletion and insertion clarifies and simplifies an existing term and more properly links it to statute, for clarity purposes.

Subsection 1896.4(c) will be amended. Text deletion eliminates dated content and adds OSDS specificity, for clarity purposes. The ISOR elsewhere explains the contemporary certification registration process and, consistent with modern "green" and digital practices, obsolescence of the hard copy form referenced in existing text.

Subsection 1896.4(d) will be amended. Text deletion and insertion reorganizes and more accurately captures the meaning of "assignment," for clarity improvement. Different placement of the word "property" and additions of the word "interest" accomplish this goal. However, fundamentally there is no change in the meaning of the term.

Subsection 1896.4(e) will be amended with minimal deletions. Institutions, hospitals and the California State University system are outside the scope of the Act, with respect to being an "awarding department" normally subject to the provisions of these rules. The existing retained phrase "any other entity" sufficiently encompasses any organizational unit not already specified in the definition in question.

Subsection 1896.4(f) will be unchanged.

Subsection 1896.4(g) will be amended with deleted content respecting the "non-profit" entity falling under the Prompt Payment Act relocated to 1896.12(g). As the word "individual" has the same meaning as sole proprietorship, the redundancy has been eliminated.

Subsection 1896.4(h) will be amended with the addition of a “contract” definition essential to implementing, interpreting and making specific the Act with promulgation of a new rule. This particular definition is an attempt to ensure other common meanings of “contract” will not apply in the context of the Act, a confusion that has posed problems in the past. The existing (h) definition of “commercially useful function” was superseded in 2012 with enrollment of SB 1510. The statutory definition is now incorporated in 1896.15.

Subsection 1896.4(i) will be added. This particular definition is needed to clarify that control is an integral element considered when assessing if an applicant is independently owned and operated. The addition parallels similar content contained in 1896.62(p), and accordingly upholds consistency principles.

Subsection 1896.4(j) is existing (i) redesignated, with no change otherwise.

Subsection 1896.4(k) is existing (j), redesignated with grammar, punctuation and reference changes and adjustments resulting in added clarity.

Subsection 1896.4(l) is existing subsection (k) redesignated and will be amended, with text additions and deletions which capture the title change of the Employment Development Department’s form used to verify employee count. Selective reordering of the word order of “individual” provides greater content clarity regarding employed individuals. On the other hand, co-employed individuals are encountered in the instance of professional employer organizations being retained by a business. Despite being contractual, historically they have been considered employees for purposes of the act, and this is being explicitly stated in the rules for the first time, as a result of past experiences demonstrating the necessity for such additional specificity.

Subsection 1896.4(m) will be amended with an entirely new definition added to the existing list. The consistency rulemaking principle necessitates addition of a “frivolous appeal” definition, in order to ensure that this portion of the SB rules correspond to those set forth in 2 CCR 1986.62(x), adopted in 2013 with respect to the DVBE program. In general, an appeal without merit is frivolous absent (1) a supporting legal argument, (2) an arguable basis (discerned from the evidence provided), or is posed (3) on a basis other than those specified in subsection 1896.18 of the SB rules. The existing (m) definition of “independently owned and operated” has been repositioned to 1896.12(d)(7) in accordance with rulemaking consistency and nonduplication principles.

Subsection 1896.4(n) is existing (l) redesignated and will be amended with existing content selectively reordered and new wording added with respect to gross receipts. As the term “gross annual receipts,” for the purpose of SB certification, has been used interchangeably with “annual gross receipts,” new text is added to reflect this practice for added clarity. Additionally, individual ownership percentages are not to be included in the calculation of gross annual business receipts, insofar as the SB program is concerned and consistent with current practice, which has not been previously stated as a rule. These changes satisfy the APA necessity standard. In addition, the definition “joint venture” (existing “(n)”), has been repositioned and is incorporated within 1896.12(c).

Existing subsection (o) will be unchanged with the exception of a capitalization adjustment.

Subsection 1896.4(p) is existing (q) redesignated and will be amended, with punctuation and word order adjustments and text added to clarify that the referenced adjustments occur biennially, in accordance with cited statute, satisfying the APA necessity standard. Moreover, a

stand-alone definition for “manufacturer” has been made unnecessary with rewording proposed for 1896.12(d)(3), and is accordingly deleted. Also, the determination criteria referenced in existing text is incorrect, in that GC defines what manufacturers are under the act, not the “criteria set forth in 1896.12,” as the rule to be deleted now states.

Subsection 1896.4(q) is existing (r) redesignated, with no change otherwise.

Existing subsection 1896.4(s) is deleted. Content respecting the “non-profit” entity falling under the Prompt Payment Act will appear instead in 1896.12(g).

Subsection 1896.4(r) is existing (t) redesignated, with minor changes simplifying existing verbiage.

Subsection 1896.4(s) is existing (u) redesignated and will be amended so as to clarify what is meant by “principal office” for purposes of SB certification. Additional verbiage referring to the “place” of where the business is headquartered and operational “direction,” are adopted to help prevent interpretations contrary to intent.

Subsection 1896.4(t) is existing (v) redesignated, with the further addition of “responsible bidder” cross-cited to State Contracting Manual, for added clarity.

Subsection 1896.4(u) is existing (w) redesignated, with no change other than minor punctuation revisions.

Subsection 1896.4(v) is existing subsection (x) redesignated, adjusted so that the phrase is consistent with the same term appearing in the State Contracting Manual.

Subsection (w) will be added with first time content pertaining to subcontractor, as tied to the statute concerning the definition of contractors. This addition is necessitated in order to clarify that “subcontractor” applies to any individual or business that performs an element of a contract, under the direction of a prime contractor.

Subsection (x) will be added with first time content pertaining to tax returns, in accordance with the APA necessity standard. Traditionally, OSDS has primarily relied upon the submission of federal tax returns in order to determine whether SB and DVBE applicants are eligible for certification. However, existing rule language, with respect to such matters, is sometimes overly restrictive. Consequently, “tax return” is being defined here broadly, keeping in mind that tax return submissions (both federal and state) are used to verify certification and can resolve eligibility questions in favor of the applicant.

The heading of Section 1896.6 will be amended to read: Application of the Small Business and Non-Small Business Subcontractor Preferences.

Existing heading text was misleading because it implies that certified small business and non-small businesses contractors both seek and/or receive preferences. Selective deletions afford simplification and helps alleviate this confusion.

Subsection 1896.6(a)(1) will be amended, with minimal content change in language and some formatting changes. Rewording and text additions more accurately characterize the process by which certification is presently initiated. These are all changes with no regulatory effect.

Subsection 1896.6(b) and clauses (b)(1) and (4) will be amended, with minimal content change in language. The additional wording and syntax change more accurately captures the process by which non-small businesses identify certified small business subcontractors when submitting bids. Lists of subcontractors will in the future include certification numbers, if applicable. This is a change with no regulatory effect.

The heading of Section 1896.8 will be amended to read: Computing the Small Business and the Non-Small Business Subcontractor Preferences.

See preceding explanation for the 1896.6 heading change.

Subsections 1896.6 (a), (b), (d), (e) and (f) will be amended, with selective syntax revisions, replacing numerical representation for a written number or written representation of selected numbers; and the substitution of DVBE as an abbreviation in place of the otherwise spelled out whole words. These are all changes with no regulatory effect.

Section 1896.10. Substitution of a Small Business Subcontractor: This subsection heading will not be changed.

Subsections 1896.10 (a), (b), (c) and (e) are amended, with just a few changes beyond punctuation and minor word order adjustments. Selective rewording of (a) and (c) ties existing content more clearly to the cited Subletting and Subcontracting Fair Practices Act. Proposed adjustment of (b) is merely a format substitution. Subsection (e) additions supply missing verbiage with respect to applicable statute and add specificity with respect to the applicability of the applicant's right to appeal. These are all changes without regulatory effect.

Article 3: Certification. The title of this article will be changed to read: **Small Business Eligibility, Certification Process and Responsibilities.**

Subsequent subsection headings will also be correspondingly amended as follows: Section 1896.14. Responsibilities of the Applicant Small Business; Section 1896.16. Certified Status; and Section 1896.17; Discontinued or Revoked Certification and the Imposition of Sanctions. All these heading refinements are long overdue. The existing duplicate "Certification" and "Responsibilities" designations by which these rules have been known up to now have simply endured over time, regardless of content flux. The proposed augmentations, content rearrangements and subsection additions much more accurately reflect contemporary content, and provide important guidance otherwise missing in order to satisfy the APA necessity standard.

Section 1896.12. Eligibility for Certification as a Small Business:

This subsection heading will not be changed. OSDS is responsible for the administration of the SB certification program and solely accountable for determining the eligibility of those seeking certification. This section communicates the requirements to attain certified status. While changes appear significant superficially, existing requirements, rights, responsibilities, and prescriptions are not being fundamentally changed, as the ISOR explains.

Subsection 1896.12(a) will be amended; (a)(2) and (3) language is altered with minor punctuation changes. The "officer" statutory requirement acquires additional clarification in (a)(3). Out-of state businesses have been known to designate individuals domiciled in-state as an officer, which is clearly not what the law intends. Accordingly, "partners in the case of a partnership" is being added to the existing listing of individuals which have to be California domiciled for purposes of certification eligibility. Revisions in (a)(5)(A) reflect an adjustment performed in February, 2015 which recommended revising the statutory stated ceiling of annual

gross receipts from fourteen to fifteen million dollars. Such adjustments in “standard” are expressly permitted the Department biennially (clarifying text incidentally added). A copy of the supporting analysis is attached as an ISOR appendix. Additions to existing subsections (a)(5)(A) and (b)(1) capture repetition of existing language already expressed as a rule and reflect a corresponding repositioning of text, from (d)(2) and (d)(3).

Subsection 1896.12(b) will be amended with revisions mirroring those incorporated in (a) above, or substitute one term for another, or represent necessary repositioning.

Subsection 1896.12(c) will be amended with content additions and deletions and the transposition of two existing sentences. Joint ventures have traditionally been afforded preference opportunities, and no change in current practice is anticipated. However, experience dictates clarifications. The first clarification being that joint venture participants may, as opposed to “must,” be certified. Secondly, the phrase “on a bid-by-bid basis” is being deleted from the rule, as too restrictive. Deletion of the word single, acknowledges that these associations can extend beyond a one-time occurrence. “Microbusiness” is added for improved clarity.

Subsection 1896.12(d) will be amended, and incorporates textual adjustments for improved clarity. Applicant submission of tax documents in addition to those filed with the IRS may be desirable in the determination process, and the addition of (d)(1) broadened language to this effect is accordingly proposed. Current practice, whereby documents deemed necessary for a determination are requested, in addition to federal tax returns is retained. These adjustments, together with the selective substitutions of OSDS for Department, inclusion of numerical symbols in addition to the written forms of same and minor text deletions, are all intended for improved clarity.

Existing (d)(2) text will be relocated to (a)(5)(A), and entirely new content substituted. The provision originates with passage of AB 2249 (Chapter 383, Statutes of 2010), and therefore is yet another change without substantive regulatory effect. Inasmuch as the “just cause” circumstances for requiring the form in question to be required are already specified in GC 14840(b), they are not being repeated, consistent with the regulatory non-duplication principle. If occasion warrants, OSDS staff will directly reference the code, as well as the rule in their written communications. The rule does add, for purposes of added clarity—not otherwise provided by statute—that the return information obtained from the transcript will be incorporated in the review, for the purpose of determining eligibility.

Similarly, existing (d)(3) content will be relocated to (b)(1), with minor rewording. Existing (d)(4) is redesignated (d)(3) and reworked for improved clarity and statutory consistency. A new introductory sentence was existing 1896.4(p), repositioned with rearranged wording for improved clarity. Paragraph (A) will be unchanged. Eliminated text in (B) was a direct reference to Code of Federal Regulations (CFR), duplicative of the immediately preceding textual content. While the content of (C) is retained, the letter designation is changed to (B), and a clarifying modifier added for improved sentence structure.

Existing (d)(5), concerning how domicile is determined, is redesignated (d)(4) with content adjustments. Domicile is a statutory certification requirement, whereby all “officers” of a business are required to be permanent residents of California. However, determining “domicile” has been a significant issue, historically. Problems include non-state residents claiming to be certification-eligible on the basis of California properties owned, but not occupied as a principal residence, as well as assertions that residency should be based solely on “intent” or affinity, as

opposed to concrete evidence of habitation. Accordingly, APA necessity expectations require greater specificity, for purpose of Act compliance and in order to meet legislative intent. The addition of OSDS, “partner” and “manager” are revisions addressing instances in which out-of-state principals of a firm are an issue. The deletion of “exemption” removes extraneous language. The (d)(4)(E) addition of tax returns and the (d)(4)(F) revision (“currently valid documentations” and “submissions” as opposed to “events,” as originally worded) are intended to irrefutably demonstrate that California residency is something other than temporary, should there be any doubt over the matter, as was possible despite existing regulatory language.

Selectively amended (d)(5) is existing (d)(6) redesignated. Similar to the case of domicile in the previous paragraph, principal office of business must be confirmed by OSDS staff in order to determine certification eligibility (prior omission of statutory basis of this requirement being corrected). Accordingly, the majority of adjustments posed for this segment link back to the amended definition in 1896.4(s) and consolidates content for purposes of improved clarity. The addition of the clause, “not limited to,” delivers additional flexibility with respect to what may be considered evidence of the principal place of business, which also has been a matter of some contention in the past. Adding a consolidated “management, direction and control” phrase permits deletion of the remainder of existing subsection verbiage.

Selectively amended (d)(6) is existing (d)(7) redesignated. Affiliation is a critical certification factor taken into account in determining small business and microbusiness eligibility (prior omission of statutory basis corrected). Accordingly, content is added to existing text, “such as” added to modify “existing ties with another business” language, providing added clarity. Likewise, tax returns and similar means of documentation are newly mentioned as acceptable “related matters” which can be relied on to definitely determine the presence or absence of business affiliation. (6)(A)2 will be similarly amended for improved clarity, as common ownership clearly could be an affiliation indicator. Clause (6)(C) adds new text (see also clause (c), this subsection). Past experience accounts for the deeming of joint ventures as certified small business affiliates, as is current program practice but not previously stated as a rule.

Selectively amended (d)(7) is existing (d)(8) redesignated. Independence of ownership and operation is another critical certification basis for eligibility. While existing rules are retained, moderate additions are intended to provide greater clarity. These include relocation of existing 1896.4(u) content, as rewritten, for purposes of an initial, introductory sentence. Likewise, other clarity changes include adding “alternative party” to replace the word “outside” and the minor grammatical adjustments of “who” and “have.” These changes are principally intended to reduce ambiguity.

Selectively amended (d)(8) is existing (d)(9) redesignated. As in the previous four subsection paragraphs, the intent of this rule is to ensure that governing statute provisions (prior omission of statutory importance corrected) are satisfied with respect to excluding businesses dominant in their respective “fields of operation.” The criteria used are unchanged, but the lead-in paragraph is reorganized for improved clarity. Deletions eliminate unnecessary words and add replacement language which is intended for improved meaning. Additionally, the word “may” replaces the prescriptively inaccurate “shall” in the middle of the lead sentence.

Existing (e) is selectively amended, for purposes of improved clarity. Word deletions and additions here retain the original intent of the rule to permit the consideration of information from a variety of sources in the certification process, but further allow OSDS the capacity to request and consider information from multiple sources, including the applicant. Addition of the clause

“except as limited by law” is intended to preserve applicant privacy and proprietary interests in accordance with existing law.

Existing (f) is nearly entirely replaced with new text incorporating AB-1783 (Chapter 114, Statutes of 2012), representing yet another change without substantive regulatory effect (deletions reflect repealed law). While not requiring local jurisdictions to recognize and use a certification directory maintained by OSDS, the law is intended to provide other governmental entities with the option of using it, alleviating staff workload at the local level by not requiring a repetitive certification process. Reference to a “core statewide certification” process also promulgates AB-348 (Chapter 185, Statutes of 2005), which directs the Department to develop, in cooperation with local governments, a uniform certification application. Accordingly, OSDS established a reciprocity program which helps achieve this objective.

Subsection 1896.12(g) will be added. Under GC 927(e) and MVC 999.51, two kinds of specialized non-profits are permitted small businesses certification. However, such “certifications” are entirely aside from the certifications under rule subsections (a), (b) and (c). Existing 1896.4(g) and (s) attempted to address these alternative “certifications” in the context of definitions. However, non-profit recognition has been confused with the certification process applicable exclusively to for-profit small business and DVBES. Nonprofit public benefit corporation registration with OSDS excludes eligibility for small business preferences and this particular “certification” is solely for the purpose of compliance with prompt payment requirements. Consequently, the APA necessity principle dictates the need for new rule content, making specific for the first time the more limited and specialized forms of non-profit certification. Because of the sufficiently self-executing nature of the criteria and purpose provisions of these other statutes, however, little rule content is required beyond that which identifies the kinds of non-profit and cites the applicable codes in question.

General Background: 1896.14 and 1896.16 changes and the addition of 1896.15:

While retaining existing processes, these rules are being reorganized and amended substantially in order to better reflect contemporary practice, move into digital, web-based and electronic record-keeping, supply important details which have not been previously articulated, and to include certain statutory content for additional emphasis, in accordance with the APA clarity standard. Existing 1896.14 and 1896.16 content is reshaped and an entirely new 1896.15 added specifically for the purpose of consolidating and updating the topic of Commercially Useful Function (CUF).

Section 1896.14. Responsibilities of the Applicant Small Business. Leading off, the 1896.14 subsection heading will be changed with addition of the word “applicant” to existing wording (See previous ISOR discussion for explanation of heading revisions).

Subsection 1896.14(a) is amended, and new text added to subparagraphs (1) through (3) to more clearly capture intent and program scope, consistent with the APA necessity standard. The word “register” adds process clarity, as the certification action in question extends beyond that of being “considered.” It also entails inclusion on the directory maintained by OSDS. Existing requirements regarding requesting certification, responding to requests for additional information, providing such details and meeting the eligibility requirements set forth in statute and rules are all being retained, with significant additions in text for improved clarity and to address issues past experience has revealed. Of course, statutory requirements for eligibility, which do not happen to be re-articulated as a rule (in accordance with the non-duplication principle), will also still have to be satisfied during the consideration process.

Subparagraph (1) changes conform to present reality whereby the vast majority of certification requests originate digitally on line through the Cal eprocure portal, as opposed to the submission of a paper “application,” in the classic manner. “Certification request” substitutes here and elsewhere for existing references to “application,” to better reflect contemporary practice. Rule detail guarantees that the information supplied meets certification eligibility in accordance with the requirements of the Act. Further, the translation from digital to paper questionnaire format results in a highly cumbersome nine-page instrument. Therefore, the practicability of publishing the certification request as a document incorporated by reference in CCR has become an important disincentive, insofar as doing so would unnecessarily contribute to rule complexity, contrary to legislative intent expressed in GC 11340(b).

Likewise, subparagraph (2) rephrases existing vague text with content detail, without altering existing program practices. The addition of subparagraph (4) anticipates a potential change in business operation or ownership during the certification process. If so, OSDS must be informed. Previously, the same rule was contained in subsection (b), but applied only during the “period” of certification, as opposed to the seeking certification phase. This change corrects a regulatory omission.

Subsection 1896.14(b) will be amended with content repositioned, slightly reworded, from 1896.16(e), for improved clarity. Existing practices remain unchanged. Deleted content is repositioned to 1896.16(c), also for improved clarity. The relocated subsection specifies that denial of certification occurs should an applicant not meet eligibility requirements or fail to respond to additional informational requests by the date and time specified in writing by OSDS.

Subsection 1896.14(c) will be amended. New language added is to clarify that a small business is responsible for maintaining the licenses, permits, and registrations which support certification status, in accordance with the APA consistency standard. Past OSDS experience respecting instances where certified small businesses or DVBEs have failed to maintain licensing and permits is the basis for such new rule specificity. Deleted (c) text is relocated to 1896.15(a), and updated.

Subsection 1896.14(d) content will be relocated. The existing letter (d) designation will be deleted. Maintenance of proper topical sequencing requires existing text to be moved, however, for clarity. The initial sentence of existing (d) is repositioned to 1896.16(e) and the second to 1896.17(a).

Subsection 1896.15 will be added with the heading: Definition and Determination of Commercially Useful Function (CUF). The latest statutory changes specific to certified small businesses performing commercially useful functions are contained in SB 1510 (Chapter 421, Statutes of 2012), AB 177, (Chapter 342, Statutes of 2010) and non-substantive adjustments contained in AB 383 (Chapter 76, Section 87, Statutes of 2013). These enactments supersede existing 1896.4(h), 1896.14(c) and 1896.16(g) (effecting DVBE rules 1896.62(l), 1896.71 and 1896.83 as well) and at the very least would have required word additions, renumbering and punctuation adjustments to ensure consistency with GC 14837(d)(4)(A) and (B). Such text changes will be accordingly made. However, there is identified need for additional rulemaking. Responsibilities with respect to determining whether there is an ability to perform CUF, and subsequently, whether these functions have been performed as promised aren’t clearly understood by awarding departments; and having no one assume CUF determination and assessment responsibilities must be avoided. Regulatory articulation of what otherwise would be obviously administrative (and therefore excused from rulemaking) must be adopted in order for there to be convincingly authoritative guidance on the matter. As the subject of determining

commercially useful function first appeared as rule DVBE 1896.71, the new small business rule posed at this time mirrors and establishes consistency with that other rule, which also is being concurrently revised. Moreover, additional administrative procedural guidance will be afforded awarding agencies in the State Contracting Manual and OSDS written aids.

Subsection 1896.15(a) is existing 1896.14(c) relocated, and reworded for improved clarity. In accordance with GC 14837(d)(4) authority granted OSDS, the phrase “supplier of goods and/or of services” is emphasized in the applied standards already contained in statutory text for added clarity.

Subsection 1896.15(b) is existing 1896.4(h)(1) – (3) with word additions, renumbering and punctuation adjustments to ensure consistency with GC 14837(d)(4)(A) and (B), representing change without regulatory effect.

Subsection 1896.15(c) is existing 1896.4(h)(4) with adjusted wording, which happens to be already largely consistent with GC 14837(d)(4)(A) and (B), and therefore also represents change without regulatory effect.

Subsections 1896.15(d)(1) and (2) supersede existing 1896.14(c) and 1896.16(g) and will clarify that contracting and/or procurement officials of awarding departments are expressly charged with evaluating and monitoring for CUF compliance and can specifically refer to the State Contracting Manual for guidance.

Subsection 1896.15(e) is existing 1896.71(d) with adjusted wording to match newly established subsection designations.

Subsection 1896.16 will be amended to read: Certified Status. The 1896.16 subsection heading will be changed. “Certification” becomes “Certified,” “by the Department” will be deleted, and the word “status” added to existing wording. What it means to be departmentally certified will still be set forth in this section of rules, satisfying the APA necessity standard. Nevertheless, repositioning and deletion of existing content reflects numerous adjustments, and the subsection length is being significantly shortened as reflected in the section’s heading simplification (see also previous ISOR discussion of Article 3 heading changes).

Subsection 1896.16(a) will be amended. In addition to minor grammatical adjustments, new language is added so as to reflect the fact that certification leads to inclusion of the statewide directory maintained by OSDS, as part of the Reciprocity program.

Subsection 1896.16(b) will be amended. The existing rule is retained. Certified small businesses meeting microbusiness eligibility are also designated a “microbusiness.” Aside from the addition of the word “certified,” and “is voided” the remaining change is elimination of operational wording, unnecessary from a regulatory perspective. “Automatically ceases” replaces “shall be removed” so as to not imply that invalidation of microbusiness designation depends on program action, inasmuch as the change in status is automatic whenever eligibility requirements are exceeded.

Subsection 1896.16(c) will be amended and existing provisions are repealed. Repealed content in strikethrough reflects enactment of AB-1783 (Chapter 114, Statutes of 2012). The deleted provision has been replaced with new content in 1896.12(f). Also, the original rule repeated existing 1896.12(f), and thereby ran afoul the APA nonduplication principle. Underlined text is relocated existing language appearing originally in existing subsection

1896.14(b), rewritten for improved clarity. Its reposition to 1896.16(c) is a placement improvement and affords greater topical consistency.

Subsection 1896.16(d) will be amended with minor formatting/grammatical language and word choice changes together with deletion of some unnecessary operational content. Internal program guidelines can provide sufficient operational guidance on deleted content, if deemed necessary. Initial certification approvals, extensions and the total period of certification remain unchanged. Recertification after five years continues to be possible, but requires another application, submitted no earlier than ninety days before expiration of the existing certified status, and is not contingent upon receipt of an expiration notice.

Subsection 1896.16(e) will be amended and existing content relocated. As the current rule states, once certified, small businesses are at any time subject to status verification conducted by OSDS. Maintenance of proper topical sequencing requires existing text to be relocated to 1896.14(b) and rewritten for improved clarity. Added text has been relocated from existing 1896.14(d) and also rewritten to improve clarity. The existing “re” preceding the word “verification” is dropped as a simple grammatical adjustment.

General Background to Subsection 1896.17:

Newly adopted 1896.17 combines content relocated from existing 1896.14 and 1896.16, significant revisions to and reordering of existing 1896.16 together with the addition of new content derived from GC 14842.5(a).

Both the SB and DVBE acts were significantly amended by the Legislature in 2010 (AB 177, Chapter 342, Statutes of 2010) and resulted in significant changes in the statutes codifying the Act. Therefore, existing regulations have to be changed to effectuate the purpose of this statute as original rule content now no longer correspond the provisions of GC 14842 and 14842.5 in particular. Consistent with APA non-duplication principles, emphasis is on those statutory changes actually affecting existing rules, as opposed to widespread adoption of new regulations. The Legislature has already established sufficiently detailed code so that awarding state agencies and OSDS have only to cite that statute when appropriate for Act enforcement and administration. Therefore, whenever possible, new regulations are kept to those absolutely needed for purposes of APA clarity, to minimize excessive rules. Also, statutory generalizations are employed, where possible, to avoid more ponderous rulemaking.

Although newly proposed and to be amended content reflects extensive revision of existing regulations, collectively this constitutes change with no regulatory effect, from an APA standpoint. Existing regulatory provisions are being made consistent with changed statute. Further, the Department has no discretion to adopt rules differing in substance from requirements, penalties or sanctions set forth in statute. As such, the depicted proposed rule adjustments, especially (c)-(g), are closed to further accommodation based on public comment, almost entirely without exception. In such instances alteration can be accomplished only if there are also underlying code revisions, originating with the Legislature as bill language, culminating in new law signed by the governor.

Subsection 1896.17 will be adopted to read: Discontinued or Revoked Certification and the Imposition of Sanctions.

Existing 1896.14(d), 1896.16(f) and 1896.16(g) permits decertification or revocation of a current certification upon failure to provide information in support of continued eligibility, upon determination of ineligibility of certification, or determination that a CUF has not been performed. These provisions are being adjusted and most are to be incorporated within 1896.17. Proposed

1896.17(b) supersedes 1896.16(f), discussed below. Proposed 1896.17(a)(1) supersedes the second sentence of existing 1896.14(d) (While proposed 1896.15 (d) and (e) supersedes existing 1896.16(g), as has been discussed previously).

Subsection 1896.17(a) will be adopted. Subparagraph 1896.17(a) will permit certification “discontinuance,” an administratively initiated action on the part of OSDS (as opposed to “decertification” and “revocation” as previously set forth in existing rules). Reasons for discontinuance will include but not be limited to: (1) Failure to provide requested information (existing 1896.14(d) relocated); (2) Failure to reinstate to active status with various licensing authorities; (3) Exceeding limits on GAR or the permitted number of employees; (4) Failure to satisfy the statutory domicile requirement; and (5) Upon evidence reasonably leading to the conclusion that certification has been retained improperly. Clauses (1) through (5) represent an important, centralized checklist of the reasons for possible imposition of program participation constraints, all of which have a basis in past experience, link back to expressed possibilities in the subchapter elsewhere and/or warrant reiteration for emphasis and added clarity. The new content rectifies content deficiencies identified subsequent to the last official amendment of these rules, in accordance with the APA necessity standard.

Another objective of this proposed rule addition is to afford options when faced with evidence reasonably supporting the conclusion that the truth and correctness provisions of the act are not being followed—as GC 14839(i) and 14840(a) set forth. While this is not common or a frequent occurrence, sometimes information submitted can appear doctored, business relationships artificially stated, or other details with respect to domicile, independent ownership and other statutory requirements have a forced, unnatural or misleading appearance. When this occurs at the initial certification stage, the request is normally denied. Statutorily, with changes chaptered in 2010 (AB-177), in accordance with GC 14842 and 14842.5, revocation, suspension and penalties apply only after proof that deception has been deliberate, knowingly and with intent to defraud. Suspected deception is not otherwise addressed, and therefore the ability to hold certification in suspense, as was possible under existing rules for cause, is being retained by program authorities.

Subsection 1896.17(b) will be existing 1896.16(f) relocated. This rule continues the existing provision whereby certification is to be (may replacing shall) discontinued (replacing revoked) upon determination of ineligibility. Repealed subparagraph enumeration is depicted in leading strikeout, for orientation purposes.

Subsection 1896.17(c) will be existing 1896.16(h)(4) relocated. Existing rule language pertaining to revocation is amended in order to correspond with enacted statute. Repealed subparagraph enumeration is depicted in leading strikeout, for orientation purposes.

Subsection 1896.17(d) will be existing 1896.16(h)(1)-(2) relocated. Existing rule language pertaining to the consequences of obtaining certification on the basis of false supporting information is amended in order to correspond with enacted statute. Repealed subparagraph enumeration is depicted in leading strikeout, for orientation purposes.

Subsection 1896.17(e) will be existing 1896.16(h)(3) and existing 1896.16(m) relocated. Existing rule language pertaining to certification suspension is amended in order to correspond with enacted statute. Repealed subparagraph enumeration is depicted in leading strikeout, for orientation purposes.

Subsection 1896.17(f) will be added. Entirely new regulatory text, paraphrasing the provisions of GC 14842.5(a) is included for the first time. There are no existing rules, hence no textual amendments. Despite the APA nonduplication principle, the duplication of this statutory content is deemed necessary to satisfy the clarity standard.

Subsection 1896.17(g) will be existing 1896.16(l) relocated. Existing rule language pertaining to how long and to whom revocation applies is amended in order to correspond with enacted statute. Note that repealed subparagraph enumeration is depicted in leading strikeout, for orientation purposes. Existing 1896.16(g), to be replaced with the provisions of 1896.15, is depicted in strikeout.

Subsection 1896.17(h) will be added. Proposed new subparagraph (h) introduces an important new provision. To the degree allowed by law and only when consistent with legislative intent, this new rule would give OSDS case-by-case “exceptional circumstance” latitude. Past instances where program authorities have felt leniency or case-specific non-precedent setting exceptions were in order, but not possible under existing rules, explains what this rule is intended to remedy. It is expected to be applied rarely, in accordance with the APA necessity principle, when legally permissible and always in a non-precedential manner, in the spirit of upholding specified legislative intent.

Subsection 1896.17(i) will be added. New content appears in (i). This clause remedies an existing rules omission and achieves consistency with DVBE processes by providing for the first time the process to follow when there is suspicion of wrongdoing or abuse on the part of program participants. Instances of alleged process abuse set forth in this subsection are to be reported to and acknowledged by OSDS. On the other hand, responsibility for looking into instances of potential abuse fall upon awarding departments, as the contract process unfolds. After their assessment of the case, if allegations appear sustained, a report, documentation, and recommended action is to be transmitted to OSDS, and OSDS will proceed as statutorily directed, in accordance with due process safeguards. While these protocols have already been informally adopted for operational purposes using DVBE practice, articulation as a rule satisfies the APA necessity dictate. Existing 1896.16(j) is superseded by subsections (d) and (f) cited above. Repealed subparagraph enumeration is depicted in leading strikeout, for orientation purposes.

Subsection 1896.17(j) will be existing 1896.16(k) relocated. Existing rule language, adjusted for improved clarity, regarding participant notification of pending denials, certification discontinuance or sanction imposition is preserved in this repositioning of text. On the other hand, while existing 1896.16(k) is being so repositioned, existing 1896.16(j) has been superseded by the provisions of the preceding subsection clauses and is depicted in leading strikeout as repealed.

Subsection 1896.18 will be amended to read: Appeal of Certification Denial, Discontinuance Decertification, or the Imposition of Sanctions:

Subsection 1896.18(a) is amended. Existing subsection (a) provides that certification denials, notice of the intention to discontinue certification and/or to impose sanctions may be appealed by those so affected. These prevailing due process safeguards are being retained, with minor word adjustments as follows. A heading change and text addition reflects the substitution of discontinuance for decertification, as explained in the ISOR above. Added language affirms that determinations must be appealed within thirty calendar days from the date of the written notice. The 30-day time frame conforms to similar DVDE appeal provisions. For general clarification it

should be understood that appeals of certification decisions and suspensions from contracting with the state are distinct actions. Certification applications for new and recertifying applicants may be denied. On the other hand, a business can be suspended from contracting with the state regardless of certification status, if the provisions of GC 14842.5 are violated.

Subsection 1896.18(b) will be added. Obsolete content is deleted. Appeal time frames will be fixed by dates and times contained in OSDS notices. Remaining text is unchanged. Appeals shall be in writing and include a detailed written statement of supporting facts.

Subsection 1896.18(c) will be added. (c)(1) and (c)(2) are largely retained as currently written, with substitution of OSDS for department. The phrase, “just causes,” appears in (c)(3) for the first time and the existing list of applicable statutes expanded. Statutory usage of “just cause” originates in GC 14840(b)(2), which in that particular instance relates to requiring Form 4506-T of an applicant, expressly for the purpose of obtaining a federal tax return transcript (1896.12(c)(2) addresses this specifically). The need for such documentation occurs in the context of a certification eligibility review, or upon receiving a complaint.

Subsections 1896.18(d), (e), and (f) will be added. Subsection (d) establishes that OSDS has the authority to grant an appellant additional time to submit an appeal due to extenuating circumstances, (e) specifies that upon receipt of an appeal, OSDS will determine jurisdiction and may reject on the basis of untimeliness, late submission of relevant information or when the grounds for appeal are frivolous—without merit because they are based on grounds other than those set forth in (c). Finally (f) obligates OSDS to transmit appeals to the Office of Administrative Hearings for resolution.

Subsection 1896.20. Appeal Hearings:

Section 1896.20 will be amended; with a deletion eliminating unnecessary content: this subchapter no longer contains hearing processes other than those intended to be followed under the rules for administrative judgements. The “for purposes of this subchapter” clause prevents inconsistency with DVBE rules, which contain somewhat different provisions. Non-party submission of an Amicus brief is newly included in the existing list of similar prohibitions on interrogatories and dispositions. Absent this new rule text, these might be attempted under administrative hearing general provision rules, a latitude that could significantly escalate both the stakes and parties involved. On the other hand, prior exclusive discretion of the Administrative Law Judge (ALJ) to issue subpoenas is being dropped. This is because important factual details may be gained by subpoena, including those originating with the OSDS. These additions and subtractions, including those in the reference note, add rule clarity.

Subsection 1896.22. Appeal Decisions:

Subsection 1896.22 is amended, for improved clarity. Administrative law affords judgement options respecting decisions of an ALJ. These are not being changed, other than with the substitution of the less directive “may” for “shall,” for greater process consistency. Existing text regarding mandatory restoration of certified status, upon an upheld appeal, is being eliminated. In addition to adopting an ALJ decision, agencies may adjust or mitigate and then adopt the balance of a penalty decision, make clarifying changes to the decision, reject and re-refer the decision or reject and decide the case upon the record in question (see GC 11517(c)(2), in particular). These are outcomes beyond the simple upholding of a denial or decertification appeal, as originally described in the existing rule. Similarly, “decertification” as previously set forth has been superseded.

General Background to DVBE regulation Changes:

Changes mandated by recently chaptered legislation regarding the DVBE program are being proposed at this time. These include DVBE status conferred upon survivors, per Chapter 513, Statutes of 2015 (AB 413); CUF definition per Chapter 421, Statutes of 2012 (SB 1510) and CUF determination content, deleting obsolete text; and Tax Transcripts, Chapter 383, Statutes of 2010 (AB 2249). In addition, clean-up language on provisions regarding Joint Ventures and DVBE substitution process are also being proposed. Accordingly, regulatory subsection text for 1896.62 (l) and (t), 1896.71, 1896.73(a), 1896.73(b)(3), 1896.73(b)(3)(D), 1896.73(f), 1896.82(g), and 1896.82(h)(3)(B) will be amended, and 1896.82(h)(3)(C) newly added. This ensures that DVBE rules remain current, reflect new program expectations recently set forth in the law, clarify other expectations respecting commercially useful function, adjust authority and reference citations, and correct syntax, cross-references, grammar and punctuation for improved clarity. No further material alteration or change to existing DVBE rules are being made other than those the ISOR specifically identifies and describes.

Subsection 1896.62(l) is amended. MVC 999(b)(5)(B)(i) superseded existing rule content defining CUF with enrollment of SB 1510 (Chapter 421, Statutes of 2012). Accordingly, existing content is replaced with direct citation of the code in question. Adjustments to existing 1896.71 (b) and (c) capture the statutorily altered text originally contained in (l). These changes are without substantive regulatory effect because: (1) a change in the law dictates the rule adjustment being made, (2) adopting text which differs in substance from the statute in question is not an option, and (3) the changes maintain consistency with Small Business regulations.

Subsection 1896.62(t) is amended with word additions, deletions and punctuation adjustments arising out of recent program realization that joint venture (JV) limitations are excessive and burdensome. They were erroneously adopted. In the first place, bid-by-bid DVBE JV certification is operationally burdensome and occurs too infrequently to warrant this particular constraint. Additionally, limiting DVBE joint ventures to between only DVBEs (such as is done in the case of certified small businesses), appears contrary to statute (for example, see MVC 999.1(b) respecting bond services contracts). Accordingly, new language is proposed; broadening permitted DVBE JV to include agreements between at least one DVBE and another specified non-DVBE enterprise. While this proposed change does not exactly satisfy the “change without regulatory effect” standard, it does repair an existing legally inconsistent regulatory provision, and therefore the material alteration is in the spirit of a no-effect change, as are all of the other changes herein posed for subchapter 10.5.

Subsection 1896.71 will be added with the heading: Definition and Determination of Commercially Useful Function (CUF). The latest statutory changes specific to certified small businesses performing commercially useful functions are contained in SB 1510 (Chapter 421, Statutes of 2012), AB 177, (Chapter 342, Statutes of 2010). These enactments supersede 1896.62(l), 1896.71 and 1896.83 and at the very least would have required word additions, renumbering and punctuation adjustments to ensure consistency with GC 14837(d)(4)(A) and (B). Such text changes will be accordingly made. However, there is identified need for additional rulemaking. Responsibilities with respect to determining whether there is an ability to perform CUF, and subsequently, whether these functions have been performed as promised aren't clearly understood by awarding departments; and having no one assume CUF determination and assessment responsibilities must be avoided. Regulatory articulation of what otherwise would be obviously administrative (and therefore excused from rulemaking) must be adopted in order for there to be convincingly authoritative guidance on the matter. As the subject of determining commercially useful function first appeared as rule DVBE 1896.71, the

rule consolidation being posed at this time centers here. They also mirrors and establishes consistency with SB rule 1896.15, which also is being concurrently revised. Moreover, additional administrative procedural guidance will be afforded awarding agencies in the State Contracting Manual and OSDS written aids.

Subsection 1896.71(a) is existing 1896.82(i) relocated, and reworded for improved clarity. In accordance with MVC 999.5(a) authority granted OSDS, the phrase “supplier of goods and/or of services” is emphasized in the applied standards already contained in statutory text. This is intended to rectify instances in which it is not realized that CUF applies to goods and services suppliers, as well as contract execution, carrying out work, and so forth. This rule will correspond to proposed SB rule 1896.15(a).

Subsection 1896.71(b) is existing 1896.62(l) with word additions, renumbering and punctuation adjustments to ensure consistency with MVC 999(b)(5)(B)(i), representing change without regulatory effect. Deleted text in ~~strikeout~~ has already been incorporated in (b)(3), or is operational content unnecessary for regulatory purposes. This rule will correspond to proposed SB rule 1896.15(b).

Subsection 1896.71(c) is existing 1896.62(l)(6), slightly reworded, but already relatively consistent with MVC 999(b)(5)(B)(ii), and so represents more change without regulatory effect. Existing subsection operational content, text unnecessary for regulatory purposes, is repealed as reflected in ~~strikeout~~. This rule will correspond to proposed SB rule 1896.15(c).

Subsections 1896.71(d)(1) and (2) supersede existing 1896.83. Existing (d) text becomes (e). Previously, rules designated OSDS as responsible for ensuring the CUF requirement could be satisfied at the certification stage, and reporting CUF program violations to OSDS was required by existing 1896.71 language. Under the reformulated rules (see also 1896.15), contracting and/or procurement officials of awarding departments will be expressly charged with evaluating and monitoring for CUF compliance and can specifically refer to the State Contracting Manual for guidance. These changes are deemed essential for resolving problems which have arisen when it is determined that the CUF requirements are not being performed. This rule will correspond to proposed SB rule 1896.15(d).

Subsection 1896.71(e) is existing (d), adjusted to match newly established subsection designations, and made a little less specific with respect to contract management topic headings, which may change. Also, proposed (d)(2) provides volume specific topic guidance. This rule will correspond to proposed SB rule 1896.15(e).

Subsection clauses 1896.73(a), (b) and (f) will be amended. Existing DVBE rules pertain to subcontractor substitutions to eliminate the existing rule whereby DVBE contractor, subcontractor and supplier replacements can be by certified small businesses. This practice is not legally authorized, and was adopted in error when the DVBE rules were last amended in 2013. OSDS will be separately advising awarding departments of their continuing responsibility to follow the remaining regulations. OSDS also does not intend to assume additional responsibilities for reviewing substitution requests documenting the absence of DVBEs.

Subsection 1896.82(g) will be amended and concerns applicant submission of a specified federal tax form, as requested by OSDS staff, upon “just cause.” As this provision originates with passage of AB 2249 (Chapter 383, Statutes of 2010), it constitutes another change without substantive regulatory effect, under the APA. Inasmuch as the just cause circumstances are already specified in GC 14840(b), they are not repeated, consistent with the regulatory non-

duplication principle mentioned immediately above. If occasion warrants, OSDS staff will directly reference the code, as well as the rule, in written communications when it is deemed necessary to do so.

Subsection 1896.82(h)(3)(B) will be amended and (C) adopted to promulgate (AB 413, Chapter 513, Statutes of 2015). This provision of the MVC permits the continuation of DVBE certification under certain circumstances and for specified periods. Subparagraph (h)(3)(B) additions are reflective of the DVBE exception. The rule parallels law which permits DVBE inheritors to function and enter into new contracts after permanent medical disability or death of the individual previously authorized, so long as the contracts do not exceed the allowable three years.

Subsection 1896.83 is repealed. Existing rule language pertaining to OSDS responsibilities in determining whether there is ability to perform CUFs at the certification phase is deleted. Responsibility for determining or reporting the ability to perform such functions lies not with DGS, but rather with the awarding agency, as explained in the 1896.71 discussion above. Other statutes, regulations and administrative practices provide CUF guidance, as well. Therefore, the deletion of this rule (and substitution of 1896.71 content) upholds the regulatory standard intended to prevent the indiscriminate or mistaken incorporation of administrative language in a regulation.