

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

NOTICE IS HEREBY GIVEN that the Director of the Department of General Services (DGS), pursuant to the rulemaking authority granted by Government Code (GC) Subsections 14837(d)(4), 14839(g) and Section 14843 in order to implement, interpret, and make specific the Small Business Procurement and Contract Act, Article 1 of Chapter 6.5, Part 5.5 of Division 3, Title 2, Government Code, commencing with Section 14835, proposes action effecting regulations for the Small Business (SB) certification program found in California Code of Regulations (CCR), Title 2, Division 2, Chapter 3, Sections 1896 – 1896.22. To prevent regulatory disconformities, limited and primarily non-substantial adjustments in CCR, Title 2, Division 2, Chapter 3, Subchapter 10.5—Disabled Veteran Business Enterprise (DVBE) Participation Goal Program—are also proposed. These additional revisions and deletions, intended overall to be changes without regulatory effect, are in accordance with Military and Veterans Code (MVC) Subsection 999.5(a) authority granted DGS as the administrating agency.

PUBLIC HEARING

DGS will hold a public hearing from 9:00 a.m. to Noon on **Monday, August 1st, 2016**, at the DGS Auditorium, located at 707 Third Street, 1st Floor, West Sacramento, California, 95605. The auditorium is wheelchair accessible. At the hearing, any person attending may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest/Policy Statement Overview section below. DGS requests but does not require that persons who offer oral comments at the hearing also submit a written copy of their testimony at the hearing.

PUBLIC COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to DGS. Comments may also be submitted by facsimile at (916) 375-4950 or by e-mail to SBRegulations@dgs.ca.gov. The written comment period is June 17, 2016, through August 1st, 2016. The comment period closes at **5:00 p.m. on Monday, August 1th, 2016**. DGS will consider only comments received by that time or comments received at the public hearing.

Written comments may also be submitted to the following address:

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

AUTHORITY AND REFERENCE

In accordance with GC Section 14600, the DGS develops and enforces policy for the centralization of purchasing, administrative hearings and the acquisition of various services for itself and other agencies by contract. Furthermore, GC Section 14615(a) affords the

department general powers of supervision over all matters concerning the financial and business policies of the state in regard to duties, powers, responsibilities, and jurisdiction specifically vested in the department. Responsibility for implementing, interpreting, and making specific provisions of the Small Business Procurement and Contract Act is directly and specifically vested with the Office of Small Business and DVBE Services (OSDS) per above cited Government Code. Finally, DGS has lead responsibility for administration of the DVBE program in accordance Military and Veterans Code Subsections 999.5(a) and (f).

This rulemaking action incorporates chaptered legislation:

- Chapter 185, Statutes of 2005, Assembly Bill 348
- Chapter 342, Statutes of 2010, Assembly Bill 177
- Chapter 383, Statutes of 2010, Assembly Bill 2249
- Chapter 114, Statutes of 2012, Assembly Bill 1783
- Chapter 421, Statutes of 2012, Senate Bill 1510
- Chapter 76, Section 87, Statutes of 2013, Assembly Bill 383
- Chapter 513, Statutes of 2015, Assembly Bill 413

In 2010, the SB regulations were revised to reflect statutory increases in the “Gross Annual Receipts” thresholds from \$12 million to \$14 million for small businesses and from \$2.75 million to \$3.5 million for microbusinesses. Otherwise, existing rules initially adopted in 1978, and last amended substantially in 2004, have not been subsequently updated to reflect legislative enactments, and specifically those enumerated above. As regulations have neither kept up with statutory change or programmatic evolution over time, the presence of obsolete content fosters multiple difficulties because the applicable rules no longer provide clear and consistent direction for stakeholders. Inconsistent and subjective interpretations result, multiplying confusion and disconformity across the board. First and foremost, therefore, the proposed regulatory changes are intended to provide improved, more effective and clear directions for small businesses (and to the degree necessary for purposes of consistency, disabled veteran business enterprises) seeking program participation through the certification process set forth under law.

The proposed regulations further articulate the intention and commitment of the Legislature to assist SBs by communicating to them revised rules established for program administration grounded in contemporary best practice and procedure, derived directly from more than a decade’s experience with existing requirements. As SB regulations compliment DVBE regulations, these revisions are desirable from the standpoint of providing greater clarity for firms wanting to participate in both certification programs overseen by the OSDS. They also benefit small business and Disabled Veteran applicants who apply or possess dual certifications to better understand program similarities and differences. Aiding and protecting the interests of SB and DVDE program participants in this manner are among the OSDS responsibilities specifically added by the Legislature in 2005 (AB 348). Finally, the OSDS will benefit organizationally from this regulatory revise as it delivers changes allowing for administrative improvement in both the SB and DVBE certification programs.

This rulemaking, therefore, upholds and promulgates the following Government Code intent and duty sections:

- *14836(a) The Legislature hereby declares that it [...] is [...] essential that opportunity is provided for full participation in our free enterprise system by small business enterprises. (b): Further, it is the declared policy of the Legislature that the state should aid, counsel, assist, and protect, to the maximum extent possible, the interests of small business concerns, including microbusinesses, in order to preserve free competitive enterprise and to ensure*

that a fair proportion of the total purchases and contracts or subcontracts for property and services for the state be placed with these enterprises.

- 14839(d): *[The duties of the OSDS shall include]: Assisting small businesses, microbusinesses, and disabled veteran business enterprises, in complying with the procedures for bidding on state contracts.*

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

California statute currently promotes and encourages the participation of small businesses (including those of Disabled Veterans), in obtaining state contracting dollars. Existing Small Business regulations set forth the information and program requirements necessary for California businesses desiring certification for participation. In turn, certification affords these enterprises certain benefits and opportunities to be competitive in securing state contracting dollars. While significant programmatic changes are not being proposed, additions, deletions, consolidations and other modifications of CCR Title 2 are necessitated for the reasons set forth in this Notice of Proposed Rulemaking, and as the Initial Statement of Reasons (ISOR) explain in detail.

This action specifically:

- Proposes to amend Sections 1896-1896.22 (including adoption of 1896.15 and 1896.17): Changes found throughout effectuate both existing and amended statute. Rule additions, reordering or relocation, revisions in structure, syntax, grammar and/or punctuation; as well as changes ensuring regulatory consistency with a recently changed California statute—as are many of proposed adjustments—represent changes without regulatory effect, under the Administrative Procedure Act (APA). Additional adjustments in SB program’s rules proceed because necessity, clarity, consistency and nonduplication principles can no longer be upheld otherwise, in accordance with statutory expectations.
- Proposes to amend regulatory subsection text for 1896.62(l), 1896.62(t), 1896.71, 1896.73, 1896.82(g), and 1896.82(h)(3)(B), add 1896.82(h)(3)(C) and repeal 1896.83. The changes are mostly non-substantial, largely absent regulatory effect or withdraw previously adopted rules. This is to ensure that DVBE rules remain current and consistent with SB rules, repeal provisions found inconsistent with statute, reflect new program expectations recently set forth in the law, adjust authority and reference citations, and correct syntax, cross-references, grammar and punctuation for improved clarity.

Anticipated Benefits and Objectives of the Proposed Regulation:

The general non-monetary benefits anticipated by the proposed adoption include promotion of the requirements of the small business certification program to a wider audience, with improved clarity and more concise language; continued uniformity in assessing applications for certification; as well as enhancement and continuation of transparency in business and government. More specifically, it reduces stakeholder’s subjective interpretation of chaptered legislation, clarifies existing language and affords improved consistency with SB and DVBE regulations. Consequently, the Department maintains that this proposed regulation is necessary and essential for the continued administrative success of the Small Business certification program. The current regulations insufficiently promulgate over a decade’s worth of pertinent chaptered statutes. The comprehensiveness of this revision will ensure that stakeholders are aware of certification program components and requirements; incorporate chaptered legislation; eliminate or update outdated provisions; and where applicable, establish needed consistency with DVBE regulations.

Determination of Inconsistency/Incompatibility with Existing Regulations:

Certain changes incorporated in this action are necessary, in the manner more fully explained in the Initial Statement of Reasons (ISOR), to maintain consistency and compatibility within subchapters 8 and 10.5 of Title 2, Division 2, Chapter 3. Also, in order to ensure that these rules are solidly grounded, the authority and reference citations appearing in the existing text have all been thoroughly audited. Underline and strikethrough throughout the proposed text appear wherever authority which permits or obligates the agency to adopt, amend or repeal the rule in question has been found insufficient or incorrect. Likewise, changes in the citation of statute, case law, or similar binding provision which DGS implements, interprets or intends to make specific by reference are also changed when determined insufficient. On the other hand, as these are the only regulations included in the CCR governing and authorizing the Small Business certification program, inconsistencies or incompatibilities with regulations adopted by other state agencies are not expected, or known, to exist.

The Federal government has promulgated regulations affecting small business and veterans in Titles 13 and 38 of the Code of Federal Regulations (CFR) and in the Federal Acquisition Regulations (FAR). As the federal rules specified apply exclusively to the federal government and inasmuch the SB CCR rules are applicable only to a California specific program, unsupported by Federal funding, CFR/FAR and CCR inconsistencies or incompatibilities do not exist. Proposed CCR 1896.12(d)(3) would delete the only CFR specified in the existing rules. Instead, federal Small Business Administration factors for determining a business to be a manufacturer already paraphrased will be retained unchanged (as "(A)" clause), despite the citation deletion.

ECONOMIC AND FISCAL IMPACT DISCLOSURES/RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

The proposed regulations may affect small business, but as GC 14837(d) statutorily defines, only those seeking SB certification directly. While changes will have statewide applicability, the "major regulation with significant statewide economic impact" threshold of \$50 Million in any single year is not crossed. DGS has further concluded that adverse economic impacts will not be significant for the reasons disclosed here and discussed more fully in the ISOR, particularly because non-statutory changes in an existing program will be minimal. In making this declaration, the following has been relied upon:

- Data gathered over a number of years demonstrate that slightly in excess of 30,000 small businesses, including individual disabled veterans, seek certification, recertification or are otherwise OSDS processed cumulatively. Of these, however, no more than 5-10% (approximately 3,000 at most) will be affected by the proposed revisions in the upcoming fiscal year. Businesses are not obligated to seek OSDS certification, unless the intention is to take advantage of a conferred status. Also, businesses are not required to be certified in order to operate in California. However, only California-based businesses are eligible for certification and the preferences certification affords.
- 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.
- 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. 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.

- 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.

Cost Impacts on Representative Private Persons and Small Business:

- There are no fees or miscellaneous costs incurred by applicants for certification. However, to remain in good standing, registrants have to maintain licenses and registrations issued by various jurisdictions, including local governments. While these do represent indirect initial and ongoing costs, none are imposed by DGS in conjunction with the small business certification process. Moreover, existing reporting, recordkeeping and other compliance requirements apply only in the limited circumstances of clouded eligibility (infrequent) and re-registration at least every 2-5 years. As such, these rules are no more burdensome to comply with than any other financial obligation commonly encountered in the course of conducting business lawfully. Therefore, the range of direct or ongoing costs that a representative private person or business will necessarily incur in reasonable compliance are negligible and wholly consistent with those normally associated with usual and ordinary business activity and, most importantly, consistent with the voluntary nature of the program in question.
- Statutory authority has been granted for the implementation of civil monetary penalties and the collection of costs, in various amounts, imposed in the event of deliberate and willful acts of fraud associated with certification, reapplication and performance of contracts. These penalties have been established by law, and OSDS lacks authority to change the amounts or their imposition. Whether there have actually been any fines imposed is not certain, as there is no provision for centralized reporting. At the very least they afford some deterrence value, as was the legislator's stated intent.
- Statutory authority has also been granted for the imposition of sanctions, including revocation of program participation, which would represent a loss of income for the participant in question. An income loss for a representative business so sanctioned would depend entirely on the nature of the enterprise and the scope of contracted services, and is therefore difficult to reliably estimate.

MISCELLANEOUS DISCLOSURES REGARDING THE PROPOSED ACTION:

Cost to any local agency or school district which must be reimbursed in accordance with GC Sections 17500 - 17630: No reimbursement is required inasmuch as the only costs incurred are because the definition of an existing crime has been expanded, and the costs of such enactments are permitted to be unreimbursed within the meaning of Section 6, Article XIII B of the California Constitution [see specifically, Section 3, Chapter 383, Statutes of 2010].

Nondiscretionary cost or savings imposed upon local agencies: The unquantified costs of local government associated with SB certification in contract bidding are intended to be reduced by access to the statewide directory created and maintained by DGS as a program component, in accordance with AB 1783.

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

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None.

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

Significant effect on housing costs: None.

CONSIDERATION OF ALTERNATIVES

DGS must determine that no reasonable considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. DGS accordingly invites interested persons to present statements or arguments with respect to alternatives at the scheduled public hearing or during the written comment period.

CONTACT PERSONS

Inquiries concerning the subject matter of the proposed SB rulemaking revise may be directed to the following staff member with regulations adoption expertise and responsible for coordinating this action:

Mr. Ellery Kuhn,
Department of General Services, Procurement Division
Office of Small Business and DVBE Services (OSBS)
707 Third Street, 1st Floor, Room 400
West Sacramento, CA 95605
Office Phone: (916) 375-4940
Direct line: (916) 375-4589
Email: Ellery.Kuhn@dgs.ca.gov

The alternate contact person for inquiries is:

Demeshia Swanson, Staff Services Manager I
Department of General Services, Procurement Division
Office of Small Business and DVBE Services
707 Third Street, 1st Floor, Room 400
West Sacramento, CA 95605
Office Phone: (916) 375-4940
Direct line: (916) 375-4919
Email: Demeshia.Swanson@dgs.ca.gov

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

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

The Department of General Services has prepared an Initial Statement of Reasons (ISOR) for the proposed action, has available all the information upon which its proposal is based, and has available the express terms of the proposed action, with additions in underline and deletions in strikethrough format (text of proposed regulations). In addition, documented rulemaking efforts conducted in 2015 represent a “pre-2016-notice” public discussion phase. DGS will have the entire rulemaking file, including 2015 content, available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published, the current rulemaking initiative consists of the following and copies may be obtained

by contacting the OSDS Regulations Adoption Coordinator at the address, email or telephone number(s) listed above:

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

AVAILABILITY OF THE CHANGED OR MODIFIED TEXT

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

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting any of individuals identified at the above address. It shall also be posted on the internet at the below identified address.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

DGS will make available copies of the Notice of Proposed Rulemaking, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout by visiting <http://www.dgs.ca.gov/pd/Programs/OSDS/NoticeofRulemaking.aspx>