

TITLE 2. Administration

Division 2. Financial Operations

Chapter 3. Department of General Services

Subchapter 8. **Office of Small Business Procurement and Contracts**

Subchapter 8. Office of Small Business Procurement and Contracts

Article 1. General Provisions

§1896. Definition of Terms As Used in This Subchapter.

(a) "Business Concern" means:

(1) an entity organized for profit, including but not limited to, an individual, partnership, corporation, joint venture, association or cooperative; and

(2) for purposes of the Prompt Payment Act, California Government Code Section 927 et seq., a duly authorized non-profit corporation.

(b) "Affiliate" means a business concern which is a subsidiary of or owned in part by another business concern such that the applicant business concern is subject to the control of a non-applicant business concern(s). As an alternative to actual ownership, an affiliation may be based upon the existence of other appropriate factors including common management, shared or common employees and existing contractual relationships: Provided, however, that the restraints imposed on a franchisee by its franchise agreement shall not be conclusive in determining whether the franchisor controls or has the power to control and, therefore, is affiliated with the franchisee, so long as the franchisee maintains the right to profit from its efforts, commensurate with ownership and bears the risk of loss or failure. In the following circumstances there will be a presumption that business concerns are affiliates, however, such presumption may be rebutted by clear and convincing evidence that an affiliation does not, in fact, exist:

(1) If the concern applying for classification as a small business has been assisted by another concern, which is engaged in a similar or commonly related business activity, to meet bonding or other security requirements, and the assisting concern is listed or otherwise designated as a subcontractor or supplier for more than 40% of the contract price required to be performed per the prime bid.

(2) If the controlling or majority owners of concerns which are engaged in similar or commonly related business activity are familiarly related, as defined herein, and have established a business or financial relationship between them.

(3) If 70% or more of the annual receipts for a business concern's preceding fiscal year are derived from the sale, lease or rental of goods supplied by a single manufacturer or supplier and such goods have been acquired by such business concern for:

(A) More accommodating terms and conditions than generally offered by the manufacturer or supplier to other customers; or

(B) A lesser price than generally offered by the manufacturer or supplier to other customers.

(c) "Control" means the authority or ability to regulate, direct, dominate or directly influence the day-to-day operations of any business concern. Every business concern is considered as having one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative, and it is immaterial whether it is exercised so long as the power to control exists. If the concern under consideration is a corporation, it should be noted that a party is considered to control or have the power to control a business concern if such party controls or has the power to control fifty percent or more of its voting stock. In addition, a party is considered to control or have the power to control a concern even though such party owns, controls, or has the power to control less than fifty percent of the concern's voting stock if the block of stock such party owns, controls, or has the power to control, is large as compared with any other outstanding block of stock. If two or more parties each owns, controls, or has the power to control less than fifty percent of the voting stock of a

concern and such minority block is equal or substantially equal in size, and large as compared with any other block outstanding, there is a presumption that each of such parties controls or has the power to control such concern; however, such presumption may be rebutted by clear and convincing evidence that such control or power to control, in fact, does not exist. If a concern's voting stock is distributed other than as described above, its management (officers and directors) is deemed to be in control of such concern. Where more than one class of stock is authorized, all classes of stock and/or subscription agreements may be considered in determining whether the applicant is subject to the control of another entity.

(d) "Conglomerate" means a business concern made up of three or more companies that are legally authorized to do business, simultaneously, within the same or related industries. Factors which may be considered in determining whether the applicant business concern is part of a conglomerate include, but are not limited to, the following:

- (1) Authority and restrictions as indicated in the articles of incorporation, by laws, partnership agreements and/or other business agreements and documents.
- (2) The financial interest and/or participation in any other business by any owner or key personnel;
- (3) Past and current employment history of owners involved in the business.
- (4) Members of the board of directors and corporate officers;
- (5) Experience, training and expertise of any owners;
- (6) Recent changes in ownership and/or control of the business;
- (7) Financial obligations to and capital contributions from non owners of the business concern;
- (8) Any documents which indicate who has ultimate authority to make policy and management decisions that legally obligate the business concern.

Business concerns that are affiliated with a conglomerate shall be conclusively presumed to be a conglomerate.

(e) "State Agency" means all State departments, offices, boards, commissions, institutions, State universities and colleges and special organizational entities within State government.

(f) "Joint Venture" means an association of business concerns established for the purpose of engaging in and carrying out a single business venture for joint profit, for which purpose they combine their efforts, property, money, skills or knowledge, but without creating a partnership or a corporation. Additionally, the Joint Venture Agreement must provide that there shall be a distribution of costs, profits, losses and liabilities among all coadventurers in proportion to their contribution to the enterprise.

(g) "Manufacturer" means a business as defined in Government Code Section 14837(c).

(h) "Industry Dominance" means the exercise or ability to exercise a controlling or major influence, on a statewide basis, in a kind of business activity or field of operation in which a number of business concerns are primarily engaged. In determining whether a business concern is dominant in its field of operation, the following criteria, among others, shall be considered: volume of business; financial resources; competitive status or position; ownership or control of materials, processes, license agreements and facilities; sales territory and nature of business activity. Conglomerates, as defined, shall be presumed to be dominant in their field(s) of operation. Such presumption may be rebutted by clear and convincing evidence that the conglomerate is not, in fact, capable of asserting a major influence or indirect control in the given industry or field of operation. Such evidence may be found on the face of the application or in other documents requested by the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, pursuant to Section 1896(d) of this subchapter.

(i) "Bid" means 1) an offer or proposal of terms made with the purpose of securing the acceptance thereof, by a state agency, thereby creating a contract, or 2) an invitation or solicitation of bids where the state reserves the right to make multiple awards pursuant to such invitation or solicitation.

(j) "Average Annual Gross Receipts" means all pecuniary gross receipts (less returns, allowances and interaffiliate transactions), the assignment of such receipts notwithstanding, of a business concern from whatever source derived, as entered or to have been entered on its regular books of account for its most recently completed fiscal year (whether on a cash, accrual, completed contracts, percentage of completion or other commonly recognized and accepted accounting method). Proof of average annual gross receipts must be provided in the form of either:

- (1) A copy of completed tax returns (with all schedules), as filed with the United States Department of the Treasury, Internal Revenue Service, for Federal income tax purposes; or
- (2) Audited financial statements covering the applicant business concern and all affiliates; or
- (3) If the documents required under 1 or 2 above are unavailable, an unaudited financial statement covering the applicant business concern and all affiliates; and
- (4) A duly sworn and notarized statement which attests to the truthfulness and accuracy of the unaudited financial statement as well as the authority of the signatory to make such representation regarding the applicant business concern and a promise to provide the information required under 1 or 2 above within 90 days of the effective date of certification.

Average annual gross receipts will be determined by adding the gross receipts for the applicant concern and any affiliates during the previous three tax years and dividing by three. Should a sole proprietorship or partnership be in business for less than three tax years, additional prior year(s) personal and affiliate gross receipts will be considered to complete the aggregate gross receipts for the previous three years to be averaged. Should a corporation be in business for less than three tax years, the average annual gross receipts will be determined by dividing the total gross receipts by the number of tax years the corporation has been in business.

If a concern which has been in business more than 12 months changes its tax year (fiscal year), its annual receipts will be determined from its most recently completed 36 month period in business. Once the new fiscal year has been completed, the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, may require a new application which sets forth the applicant's annual receipts under the new fiscal year cycle.

If a concern has acquired an affiliate during the applicable tax year, it is necessary in computing the applicant's annual receipts, to include the affiliate's receipts during the entire applicable tax year, rather than only its receipts during the period in which it has been an affiliate. The receipts of a former affiliate are to be included if such concern was an affiliate during a portion of the applicable tax year.

(k) "Familial Relationship" means relationships between the following family members: Husband, wife, child, stepchild, mother, father, grandparent, brother, sister, grandchild, stepbrother, stepsister, stepmother, stepfather, mother-in-law, father-in-law, brother-in-law, sister-in-law, daughter-in-law, son-in-law, and if related by blood, uncle, aunt, niece, nephew.

(l) "Small Business" as used with regard to a public works contract as defined in Division 2, Part 1, Chapter 1, Section 1101 of the California Public Contract Code, means a business concern which has been issued a currently valid Contractor's license by the State of California and meets the following requirements:

- (1) Has requested the status of a small business and has been approved as such by the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources.
- (2) Is not, together with any affiliate(s), dominant in its field of operation(s).
- (3) Is independently owned and operated, the principal office of which is located in California, and the officers, in the case of a corporation, or owners in all other cases, of such business domiciled in California.
- (4) Together with any affiliates, has 100 or fewer employees, and average annual gross receipts of ten million dollars (\$10,000,000) or less over the previous three tax years.

The firm shall also set forth on the bid form the name and nature of any business which has assisted it in obtaining bonding for submission of the bid with respect to which the firm seeks a Small Business Preference, and if the firm which rendered bonding assistance is listed as a subcontractor on such bid there shall be set forth on the bid form the percentage of the contract price called for by the prime bid which will be performed by subcontractor.

(m) "Small Business" as used with regard to an agreement for the purchase, lease or rental (with option to purchase) of goods means:

- (1) A business concern which has requested the status of small business and has been approved as such by the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources.
- (2) Is not, together with any affiliate(s), dominant in its field of operation(s).

- (3) Is independently owned and operated, the principal office of which is located in California, and the officers, in the case of a corporation, or owners in all other cases, of such business domiciled in California.
- (4) A non manufacturer, together with any affiliates, has 100 or fewer employees, and average annual gross receipts of ten million dollars (\$10,000,000) or less over the previous three years.
- (5) A manufacturer, together with any affiliates has 100 or fewer employees.
- (n) With regard to services the following shall apply:
- (1) "Service firm" means any business concern doing business with or proposing to do business with the State of California pursuant to an agreement for the performance of services.
- (2) "Agreement for the performance of services" means any contractual arrangement not involving the following:
- (A) Public works contracts as defined by the provision of Division 2, Part 1, Chapter 1, Section 1101 of the California Public Contract Code.
- (B) The sale, manufacture, lease, or rental, with the option to purchase, of goods; or
- (C) Arrangements where the services provided are merely incidental to the sale, manufacture, lease or rental, with the option to purchase, of goods.
- (3) "Small Business," when used in reference to a service firm means:
- (A) A business concern which has requested the status of small business and has been approved as such by the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources.
- (B) Is not, together with any affiliate(s), dominant in its field of operation(s).
- (C) Is independently owned and operated, the principal office of which is located in California, and the officers, in the case of a corporation, or owners in all other cases, of such business domiciled in California.
- (D) Together with any affiliates, has 100 or fewer employees, and average annual gross receipts of ten million dollars (\$10,000,000) or less over the previous three tax years.
- (o) "Agent" means one who (1) undertakes to transact some business, or to manage or control some affair for a principal by authority and on account of such principal and to render an account of it to such principal, or (2) is authorized by another to act for him or her, one entrusted with another's business or, (3) represents and acts for another under the contractual relationship of agency.

Article 2. Small Business Preference

§1896.2. Preferences.

Each State agency, as defined, shall grant to all qualified small businesses, a preference, in awarding contracts, not to exceed 5%. Such preference shall be administered in the following manner(s):

- (a) When a state agency procurement is primarily for the purchase, lease or rental, with option to purchase, of goods, such agency shall grant a bidding preference equal to five percent (5%) of the lowest responsible bid, if that low bid has been submitted by a bidder who is not certified as a small business. In no event however, shall the cost of the small business preference exceed the sum of \$50,000 for any bid submitted.
- (b) When a state agency procurement is primarily for public works, such agency shall grant the prescribed preference in the following manner(s):
- (1) On public works agreements where the lowest responsible bid exceeds \$100,000; and the work to be performed requires a type "A" or "B" contractor's license and two or more subcontractors will be used, preferences shall only be granted to those small business bidders who certify, under penalty of perjury, that at least fifty percent (50%) of subcontractors utilized on the job are certified small businesses. In meeting the 50% requirement, bidders may use certified small businesses and/or small businesses that have applied for certification no later than 5:00 p.m. on the bid opening date and are subsequently granted certification. The 50% small business subcontractor utilization level shall be maintained throughout the term of the contract. The preference shall otherwise be applied as provided in subsection (a) of this section.
- (2) In all other procurements involving public works, the small business preference shall be applied in the manner specified in subsection (a) of this section.
- (3) In no event shall the cost of the small business preference exceed the sum of \$50,000 for any bid submitted.

(c) When a state agency procurement is for an agreement for the performance of services, as defined, such agency shall grant the prescribed preference in the following manner:

(1) When the required service(s) are being solicited by means of an Invitation for Bids or a Request for Proposals and the contract will be awarded to the firm or individual submitting the lowest responsible monetary bid, preferences shall be applied in the manner specified in subsection (a) of this section.

(2) When the required services are being solicited by means of a Request for Proposals (RFP's) and the contracting agency establishes that it is necessary that the contract be awarded to a firm or individual based upon the total accumulation of points, all qualified small businesses shall be granted, in addition to the earned score, a preference consisting of five percent of the price component of the highest scored proposal, if that proposal is submitted by another bidder who is not certified as a small business.

Because RFP's which provide for contract award via the secondary method (point count) have the effect of diluting the benefit of the small business preference, the use of such RFP's is strongly discouraged and must be limited to those rare instances when agencies seek a unique solution to a specified problem which cannot be resolved by the lowest bidder.

(d) Notwithstanding any other provisions, the small business preference shall be applied to the procurement of electronic data processing and telecommunication goods and services only in those instances where the award will be made to the lowest responsible bidder meeting specifications. When an agency elects to award an electronic data processing or telecommunication contract on a basis other than cost alone, the small business preference shall not apply. When an agency elects to award an electronic data processing or telecommunication contract to the lowest responsible bidder meeting specifications, the small business preference shall be administered in the manner specified in subsection (a) of this section.

(e) If, after applying the preference (as described in the preceding subsections) to a small business bidder's bid, that bid is equal to or lower than the lowest non-small business bid, or equal to or higher than the highest scored non-small business proposal, the award shall be made to the small business.

(f) All other requirements of law, including but not limited to, the State Contract Act and the Subletting and Subcontracting Fair Practices Act, as well as applicable sections of the California Labor Code, shall apply.

§1896.4. Assistance.

(a) The Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, will provide the following, in addition to other forms of assistance:

(1) Assist small businesses by providing information regarding all of the following:

(A) Identification of potential small business subcontractors and potential subcontracting opportunities.

(B) Solicitation protest procedures and timelines.

(C) Prompt payment procedures.

(2) Develop and maintain an outreach and education program to assist small businesses to establish the California Multiple Award Schedule (CMAS). The department shall actively promote the availability of small business suppliers to deliver or provide a broad range of goods and services to governmental agencies through their participation in the California multiple award schedule program and other types of contracts established by state agencies for repetitively used and commonly needed goods and services.

(3) When the director consolidates the needs of multiple state agencies and establishes a contract for repetitively purchased or commonly needed goods or services, the director shall both encourage bidders to utilize small business suppliers and subcontractors, and utilize multiple award methods whenever practicable to further ensure that a fair proportion of needed goods and services are obtained from small businesses.

(4) Establish a training and development program for acquisition professionals, including methods for structuring solicitations to enhance the participation of small businesses in state contracting.

(5) Establish a recognition and awards program for state employees who make an outstanding contribution to the state's overall effort to increase the level of small business participation in state contracting.

(6) Prepare, and make available to the public, a directory of certified small business suppliers.

(7) Identify areas where improvements in the level of participation of small businesses in state contracting can be achieved.

(b) Assistance in obtaining information on licensing, bonding, and insurance requirements necessary to bid.

(c) Assistance in the preparation of bids and proposals to be submitted to state agencies.

(d) Assistance in understanding the provisions of the State Contract Act, applicable Labor Code provisions and the Subletting and Sub-Contracting Act as they apply to construction contracts, and the State Purchasing Act as it applies to State procurements.

§1896.6. Agents.

Agents by definition are not independently owned and operated and cannot therefore qualify as a Small Business. Persons employed for the sale of goods or services such as brokers, factors, commission agents, commission merchants, factory representatives, or mercantile agents are included in the definition of agents set forth at subsection 1896(o). There is a presumption that persons transacting business under such titles or similar titles are agents; however, such presumption may be rebutted by clear and convincing evidence that an agency relationship in fact does not exist.

In determining whether an agency relationship exists, consideration shall be given to all appropriate factors, including contractual relationships, apparent business arrangements, the passage of title to goods or merchandise, shipping and billing practices, inventories, and control in dictating bid quotes. Where a firm represents a manufacturer or supplier as an agent and also transacts business with the same manufacturer or supplier and for the same products on a non-agent basis, there will be a conclusive presumption that the concerns are affiliated.

§1896.8. Reports.

To assist the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resource, and the Department of General Services in preparing reports and compiling information in accordance with the Small Business Procurement and Contract Act, all state agencies shall submit reports at such intervals and upon such formats as requested by the Department of General Services.

§1896.10. Prequalification.

Prequalification of Small Business Bidders on State Procurements. Notwithstanding the requirements of Section 1896 et seq., of the California Code of Regulations, the Director may modify the requirements for the *Experience* and *Inventory* normally required as stated in the Rules for Prequalification of Vendors under Section 1890 of the California Code of Regulations if a Small Business can present evidence that they have the ability, resources, and facilities to adequately supply the State.

(a) Such evidence may, among other things, consist of:

(1) Adequate capitalization or financial backing

(2) Bondability

(3) Prior experience of individuals within the Small Business

(4) Assurances from a supplier of a Small Business that adequate supplies are available to the bidder to meet the needs of the State.

§1896.12. Certification.

In order to receive the small business preference on bids submitted to state agencies, business concerns must have a completed application (including proof of annual receipts) on file with the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, request a preference and meet all applicable requirements under this subchapter and the State Small Business Procurement and Contract Act, (including but not limited to evidence to rebut presumptions) not later than five o'clock (5:00 p.m.) on the date on which the subject bid is opened. All business concerns that meet the requirements, as specified, for small business qualification shall be certified as a small business and shall be accorded all rights and privileges due

pursuant to that classification. Such certification may be valid for not less than six (6) nor more than thirty-six (36) months, however, every certified small business shall be subject to reverification of status at any time that the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, based upon information not disclosed in the most recent application, deems appropriate. Failure by a Small Business to provide information requested, pursuant to a reverification within the time specified by the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, shall be grounds for immediate decertification of status. It is the obligation of all certified small businesses to provide written notification, to the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, of any changes in the operation or ownership of the certified business concern. If a certified small business fails to notify the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, of a change in operation or ownership and such change renders the current application incomplete, the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, shall suspend the small business certification of such business concern until the current application is completed. If, upon reverification the small business no longer meets the requirements of the Small Business Procurement and Contract Act or the regulations set forth in this subchapter; the office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, shall, in accordance with Section 1896.20, immediately decertify such business concern and within twenty (20) working days of final decertification, determine whether there are grounds for the imposition of appropriate sanctions against the decertified business concern.

§1896.14. Small Business Joint Venture Exemption.

Notwithstanding any other provision, under the following circumstances, business concerns, bidding as a joint venture, as defined by Section 1896(f), shall be exempt from the annual receipts limit imposed by this subchapter:

- (a) Each individual coadventuring business concern must meet the definition of a Small Business as set forth by this subchapter; and
- (b) Each individual coadventuring business concern must be non-affiliated within the meaning of Section 1896(b); and
- (c) Each individual coadventuring business concern must have filed a completed application (including proof of annual receipts) not later than five (5) working days prior to the opening of any bid on which a small business preference is sought; and
- (d) Every individual coadventuring business concern shall agree that sanctions, imposed by the Department of General Services, on the joint venture are equally applicable to each coadventurer.

Notwithstanding the provisions of Section 1896.12, joint ventures must be certified on a bid by bid basis. It shall be presumed that certified small business joint ventures are not conglomerates within the meaning of Section 1986(d). This presumption may be rebutted by clear and convincing evidence that co-adventurers are affiliated independent of the joint venture agreement.

§1896.16. Application Processing.

Every business concern which submits an application for certification as a small business shall be notified of any deficiencies in the application within 30 working days of the receipt of such application by the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources. Once the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, has received a completed application, it shall notify the applicant of its determination within 30 working days of the receipt of such completed application. Nothing contained herein shall be construed as a limitation on the ability of the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, to certify a business concern in less than 30 working days. Based upon prior workload performance, the minimum, mean, and maximum time(s) required to process an application for certification are 2, 20, and 30 working days, respectively.

§1896.18. Sanctions for Providing False Information.

(a) A business which has obtained certification as a small business by reasons of having furnished incorrect supporting information and which by reason of such certification has been awarded a contract to which it would not otherwise be entitled shall in addition to sanctions imposed pursuant to Government Code Section 14842.5:

(1) Pay to the State any difference between the contract amount and what the State's costs would have been if the contract had been properly awarded;

(2) In addition to the amount described in subdivision (a), be assessed a penalty in an amount of not more than 10 percent of the amount of the contract involved; and

(3) Be ineligible to transact any business, directly or indirectly, with the Department for a period of not less than three months and not more than 24 months.

(b) Prior to the imposition of any sanction under subsection 1896.18(a) above, the contractor or vendor shall be entitled to a public hearing and to five days' notice of the time and place thereof. The notice shall state the reasons for the hearing.

§1896.20. Appeal of Determination.

All proposed determinations of noneligibility for certification made by the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, shall become final unless such determination is appealed in a timely manner. Any business concern which believes that the proposed determination will result in its being wrongly denied certification as a small business by the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, may file an appeal in writing, signed and dated, with the Director of the Department of General Services. The appeal must be filed no later than 10 calendar days after the date of notice of decertification or denial of certification. The Director may, upon written request which specifies the reasons for such request, extend the time for filing or waive the time limit in the interest of justice, specifying in writing the reasons for doing so. Following receipt of an appeal filed as prescribed by these regulations, the Department of General Services shall determine whether the appeal is to be resolved by written submission of material or by public hearing where the appeal is based upon an original application for certification or a renewal of an expired certification. Where the appeal is based upon the revocation of a currently valid certification the appeal shall be resolved by public hearing. In the event a public hearing is to be held, the department shall set a date, time and place for the hearing and shall so notify all interested parties not less than 5 calendar days in advance of the hearing. The department may in its discretion upon notice to all interested parties, as defined by Title 2, California Code of Regulations Section 1195(b), change the date of, postpone or continue the hearing at the request of an interested party upon showing of good cause or upon its own motion. The location of the hearing shall be at the discretion of the hearing officer and situated for the convenience of all parties.

In the event the appeal is to be determined through written submissions, notice shall be sent to all interested parties, each of whom may submit written argument in support of its position in accordance with the deadline established by the hearing officer. The determination that the appeal shall be determined through written submission shall be made upon the hearing officer's evaluation that oral or additional testimony would be unnecessary to a full understanding of the issues.

Any written submission to the Department of General Services including that submitted for purposes of the hearing shall be in an original and two copies, together with proof of service of a copy to each interested party. At any time the Department of General Services finds that an appeal is clearly insufficient on its face, entirely without merit, or outside of the jurisdiction of the department, it may make final disposition of the appeal forthwith.

The powers and responsibilities of the hearing officer, the period allowed for rendering a decision and the form of notice shall be the same as those established by Title 2, Subchapter 1.5, Sections 1195.4, 1195.5 and 1195.6 respectively, of this Code.

Article 1. General Provisions

§1896. Purpose of Subchapter

The purpose of this subchapter is to set forth the rules for applying the small business preference, and the rules, roles, responsibilities and rights of businesses and the state as they pertain to small business certification.

Note:

Authority: § 14843, Government Code.

Reference: § 14835 - 14843, Government Code.

§1896.2. Authority

The Department shall have the sole responsibility to implement the provisions of the Small Business Procurement and Contract Act, Article 1 of Chapter 6.5 of Part 5.5 of Division 3 of Title 2 of the Government Code, commencing with § 14835.

In order to determine the eligibility of a business for certification as a small business, the Department may obtain whatever information is available to it from records gathered or held by any California state or local government agency, any governmental agency of another state, or the federal government.

Note:

Authority: § 14843, Government Code.

Reference: § 14835 - 14843, Government Code.

§1896.4. Definitions

The words and phrases defined in this article shall have the following meanings whenever they appear in this subchapter, unless the context in which they are used clearly requires a different meaning.

- (a) **Affiliate** or **affiliation** refers to a relationship of direct or indirect control or shared interests, as determined in 1896.10, between the applicant or a certified small business and another business.
- (b) **ALJ** means Administrative Law Judge, as defined in Government Code Section 11502, assigned by the Office of Administrative Hearings to consider and rule on appeals of certification denial, decertification, and sanctions.
- (c) **Applicant** means a business that has filed an application for certification as a small business with the Department.
- (d) **Assignment** means a transfer of rights, responsibility, or property.
- (e) **Bid** means an offer made in response to a solicitation.
- (f) **Business** means an entity organized for profit including, but not limited to, an individual, sole proprietorship, partnership, limited liability partnership, corporation, limited liability corporation, joint venture, association or cooperative.
- (g) **Certified small business** means a business that meets the eligibility requirements contained herein, that has been certified by the Department as a small business.
- (h) **Department** means the Department of General Services.
- (i) **Employee** means an individual employed by a business that is either:
 - (1) Reported as an employee to the State of California, Employment Development Department (EDD) on the business's Quarterly Wage and Withholding Report or other format accepted by EDD, or
 - (2) Reported as an employee by the business on another state's report equivalent to the EDD's Quarterly Wage and Withholding Report.
- (j) **Gross receipts** means total income (or in the case of a sole proprietorship "gross income") plus the cost of goods sold as reported on income tax returns, including all supporting schedules and forms, as filed with the federal Internal Revenue Service and the California Franchise Tax Board.
- (k) **Joint Venture** means an association of businesses established by written agreement to engage in and carry out a single business venture for joint profit, for which purpose they combine their efforts, property, money, skills or knowledge.
- (l) **Manufacturer** means a business as defined in Government Code Section 14837(c), pursuant to the determination criteria set forth in 1896.10. A business that performs only limited or minimal manufacturing operations upon the item being produced and sold, as determined by the Department, will not be considered a manufacturer.

- (m) **Net bid price** means the verified price of a bid, after all adjustments described in the solicitation have been made.
- (n) **Non-small business** means a responsible bidder that is not certified as a small business.
- (o) **Principal office** means the business's primary place of business.
- (p) **Responsive bid** means a bid that clearly substantiates compliance without material deviation with all specifications, requirements, and the terms and conditions of the solicitation.
- (q) **Solicitation** means the notification to prospective bidders that a state agency wishes to receive bids for furnishing goods, services, information technology, or construction.
- (r) **State agency** means all State of California departments, offices, boards, commissions, institutions, State universities and colleges, and special organizational entities within State government.

Note:

Authority: § 14843, Government Code.

Reference: § 927 Et. Seq, Government Code

§ 11370.2, Government Code

§ 11502, Government Code

§ 14835 - 14843, Government Code.

Title 13 Code of Federal Regulations (CFR), Chapter I, Part 121, Section 121.104

Article 2. Small Business Preference

§1896.6 Application of the Small Business Preference

Certified small businesses will be granted the small business preference on a bid evaluation by a state agency when a responsible non-small business has submitted the lowest-priced, responsive bid or a bid that has been ranked as the highest scored bid pursuant to a solicitation evaluation method described in Section 1896.8(b), and when the certified small business:

- (a) Has submitted to the Department a complete application pursuant to 1896.12 no later than 5:00 p.m. on the date the bids are due, and is certified by the Department as a small business; and
- (b) Has submitted a timely, responsive bid; and
- (c) Is determined to be a responsible bidder; and
- (d) Has requested the small business preference in its bid.

Note:

Authority: § 14843, Government Code.

Reference: § 14835 - 14843, Government Code.

§1896.8. Computing the Small Business Preference

- (a) When contract award is to be made to the lowest responsive, responsible bidder, for evaluation purposes only, the state agency shall subtract from the bid of a certified small business a bid evaluation preference amount equal to five percent (5%) of the net bid price of the lowest responsive bid received from a responsible non-small business.
- (b) When contract award is to be made to the highest scored responsive bid submitted by a responsible bidder following an evaluation process that weighs factors other than price, together in a formula with price, the state agency shall grant to a certified small business a bid evaluation preference equal to five percent (5%) of the score of the highest scored responsive bid, computed as specified in the solicitation, if that bid has been submitted by a responsible non-small business. Under this method, the state agency shall designate the minimum number of points a bid must receive in order to be deemed responsive and of acceptable quality. A small business that does not achieve this minimum number of points is not entitled to the five percent (5%) preference.
- (c) If, after application of the preference to the bid of a certified small business, that bid is equal to or lower than the lowest priced, responsive bid from a responsible non-small business, or equal to or higher than the highest scored bid offered by a responsible non-small business, as applicable, the award shall be made to the certified small business for the amount of its bid.

(d) In no event shall the amount of the small business preference awarded on a single bid exceed \$50,000, and in no event shall the combined cost of the small business preference and preferences awarded pursuant to any other provision of law exceed \$100,000. In bids that the state has reserved the right to award by line item, or make multiple awards, the small business preference shall be applied to maximize the participation of small businesses.

Note:

Authority: § 14843, Government Code.

Reference: § 4530 - 4535.3, Government Code.

§ 7070 - 7089, Government Code.

§ 7105 - 7118, Government Code.

§ 14835 - 14843, Government Code.

§ 12102, Public Contract Code.

§ 12150 - 12226, Public Contract Code.

Article 3. Certification

§1896.10. Eligibility for Certification as a Small Business

(a) To be certified as a small business, a business must meet all of the following qualifying criteria:

(1) It is independently owned and operated; and

(2) The principal office is located in California; and

(3) The officers of the business in the case of a corporation, or the owner(s) in all other cases, are domiciled in California; and

(4) It is not dominant in its field of operation(s), and

(5) It is either:

(A) A business that, together with all affiliates, has 100 or fewer employees, and average annual gross receipts of \$10 million or less as averaged for the previous three tax years; or

(B) A manufacturer as defined herein that, together with all affiliates, has 100 or fewer employees.

(b) Joint ventures must be certified on a bid-by-bid basis. The joint venture shall not be subject to the average annual gross receipt and employee limits imposed by this subchapter. However, each individual business participating in the joint venture must be certified as a small business.

(c) Determination Criteria

(1) In determining if a business is eligible for certification, the Department may consider its organizational, operational and business relationships during the previous three tax years.

(2) The Department's determination of whether or not a business is a manufacturer may be based on, but not limited to:

(A) Whether or not the business, with its own facilities, performs the primary activities in transforming inorganic or organic substances into the end item being acquired, and is not a packager or, in the case of kits, a final assembler. The end item must possess characteristics that, as a result of mechanical, chemical, or human action, it did not possess before the original substances, parts, or components were assembled or transformed. The end item may be finished and ready for utilization or consumption, or it may be semi-finished as a raw material to be used in further manufacturing.

(B) The factors considered by the federal Small Business Administration pursuant to Title 13, Code of Federal Regulations (CFR), Chapter I, Part 121, Section 121.406(b)(2), as updated from time to time.

(C) Whether or not the majority of annual gross receipts, as determined by the department, result from the manufacture and sale of products manufactured by the business.

(3) The Department's determination of whether or not the officers or owners of a business, as applicable, are domiciled in California may be based on, but not be limited to, a review of:

(A) Voter registration records

(B) Homeowner's property tax exemption filings

(C) Driver's licenses

(D) Utility billings

- (E) Other documents, acts, occurrences, or events that indicate presence in California is more than temporary or transient.
- (4) The Department's determination of whether or not the principal office of a business is located in California shall be based on whether or not more than fifty (50) percent of the business's gross receipts are generated from an office or offices located inside the State of California.
- (5) The Department's determination of whether or not a business is affiliated with another business may be based on, but not limited to, such factors as past or present ownership, management, relationships with or ties to another business, familial relationships, contractual relationships, assignments, and other related matters. An affiliation shall be presumed to exist whenever:
 - (A) A person or business owns or controls, or has the power to control, fifty (50) percent or more of the voting stock of another business, or a block of stock which affords control because it is large, either in number of shares or voting power, when compared to other outstanding blocks of stock.
 - (B) Two or more persons or businesses each own, control, or have the power to control, less than fifty (50) percent of the voting stock of another business, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding.
 - (C) One or more owners, general partners, directors, or officers of a business controls or has the power to control the board of directors and/or the management or operations of another business.
 - (D) A business assigns a contract, in whole or in part.
 - (E) A person or business aids or assists another business or businesses in securing or obtaining business on its or their behalf and receives or will receive in exchange a commission or fee for such service.
 - (F) A person or business and another business share facilities, equipment, systems, or employees.
- (6) The following types of business relationships shall not be considered affiliations:
 - (A) A franchise and/or license agreement provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership.
 - (B) A manufacturer's representative provided that a written agreement exists between the manufacturer(s) and the representative that substantiates the independent nature of the individual businesses.
- (d) Businesses that have been certified by or on behalf of other governmental organizations may be eligible for certification as a small business if the organization uses substantially the same or more stringent definitions as those set forth in Government Code Section 14837, and substantially the same or more stringent certification analysis process than used by the Department.

Note:

Authority: § 14843, Government Code.

Reference: § 14835 - 14843, Government Code.

Title 13 CFR, Chapter I, Part 121, Section 121.103.

Title 13 CFR, Chapter I, Part 121, Section 121.406.

§1896.12. Responsibilities of the Small Business

- (a) In order to be certified by the Department as a small business, a business must:
 - (1) Submit a completed application to the Department, including all required substantiating documentation and information needed by the Department to determine the business's eligibility for small business certification; and
 - (2) Respond to any deficiency notice from the Department, by the date and time specified by the Department, with all additional information requested, or provide reasons acceptable to the Department regarding why the deficiency request cannot be fulfilled; and
 - (3) Meet all eligibility requirements as set forth in this subchapter.
- (b) A certified small business shall provide written notification to the Department of any changes in its operation or ownership during its certification period that may affect its continuing eligibility as a certified small business.

(c) Every business certified as a small business shall be subject to re-verification of status at any time. Failure by a certified small business to provide requested information that supports its continued eligibility as a certified small business, by the date and time specified by the Department, shall be grounds for decertification.

Note:

Authority: § 14843, Government Code.

Reference: § 14835 - 14843, Government Code.

§1896.14. Certification by the Department

- (a) A business meeting the eligibility and certification requirements set forth herein shall be certified as a small business, and shall be accorded all rights and privileges due pursuant to that certification.
- (b) The Department may certify businesses that have been certified by or on behalf of another governmental organization that uses substantially the same or more stringent definitions as those set forth in Government Code Section 14837, and substantially the same or more stringent certification analysis process than used by the Department.
- (c) Certification will be valid for up to thirty-six (36) months. Prior to the end of a 36-month certification period, in its sole discretion, the Department may extend the certification period up to an additional twenty-four (24) months, for a total certification period not to exceed sixty (60) months.
- (d) The application of a business that does not meet the eligibility requirements for certification as a small business will be denied.
- (e) If a certified small business is determined by the Department to no longer meet the eligibility requirements for small business certification, the business shall be decertified.
- (f) Pursuant to Government Code Section 14842, the Department may impose the following sanctions on a business that obtains or retains certification as a small business on the basis of having furnished incorrect or incomplete information to the Department, and that has been awarded one or more contracts as a result of the certification:
- (1) The business shall pay to the state any difference between the contract amount awarded to the business and the contract amount had it been properly awarded; and
 - (2) The business shall be assessed a penalty in an amount not more than ten (10) percent of the amount of the contract involved; and
 - (3) The business shall be ineligible to transact any business with the state for a period of not less than three months and not more than 24 months.
- (g) Pursuant to Government Code Section 14842.5, the Department may impose sanctions on a business for knowing, willful and intentional violations, as specified:
- (1) A penalty of not more than \$5,000; and
 - (2) Under specified conditions, the business may be prohibited from:
 - (A) Entering into a state project or state contract,
 - (B) Bidding to a state agency,
 - (C) Being a subcontractor to a contractor for a state agency,
 - (D) Being a supplier to a state agency.
- (f) Prior to denying an application for certification, decertifying a small business, or imposing any sanctions, the Department will notify the business in writing. The notice shall include the reasons for the denial, decertification, or imposition of sanctions, as applicable, and provide information regarding the process for appealing the decision(s).

Notes:

Authority: § 14843, Government Code.

Reference: § 14835 - 14843, Government Code.

Article 4. Appeals

§1896.16. Appeal of Certification Denial, Decertification, or the Imposition of Sanctions

- (a) A business, having been denied certification as a small business, or having been provided written notice by the Department of its intention to decertify the business as a small business, or of its intention to impose sanctions, may appeal the Department's determination.
- (b) An appeal shall be filed with the Department by the date and time specified by the Department in its notice. The appeal shall be in writing and include a detailed written statement of the facts supporting the appeal.
- (c) Grounds for appeal shall be:
 - (1) The applicant should have been certified as a small business based on the information contained in the application, including, if applicable, supplemental material submitted to the Department upon its request, as of the date of the Department's notice of certification denial.
 - (2) The business should remain certified as a small business based on the information contained in the application, including, if applicable, supplemental material submitted to the Department upon its request, as of the date of the Department's notice of decertification determination.
 - (3) Sanctions should not be imposed, because one of more of the conditions set forth in Government Code 14842 or 14842.5, as applicable, did not exist.

Note:

Authority: § 14843, Government Code.

Reference: § 14835 - 14843, Government Code.

§1896.18. Appeal Hearings.

Appeal hearings shall be conducted in accordance with the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) except as provided in this subchapter. It shall be the ALJ's sole discretion as to whether to conduct a hearing, or proceed with a decision based solely on the written material.

Note:

Authority: § 14843, Government Code.

Reference: § 14835 - 14843, Government Code.

§1896.20. Appeal Decisions.

The decision of the ALJ shall be an order to uphold or deny the appeal, and shall include the imposition of sanctions pursuant to Government Code Sections 14842 and 14842.5, as appropriate. If the ALJ upholds the appeal of a certification denial or decertification, the Department shall certify the business as a small business pursuant to 1896.14.

Note:

Authority: § 14843, Government Code.

Reference: § 14835 - 14843, Government Code.