

Assembly Bill No. 926

Passed the Assembly September 11, 2009

Chief Clerk of the Assembly

Passed the Senate September 10, 2009

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2009, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 14837 of the Government Code, to amend Section 999 of the Military and Veterans Code, and to amend Sections 10111, 10302, 10344, and 12104.5 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 926, Ruskin. State contracts: goods: loss leader.

(1) Existing law requires the Department of General Services to make available a report on contracting activity containing specified information, as provided.

This bill would expand the reporting requirements of the Department of General Services in the years 2011 and 2012, to include any errors reported to the Department of General Services, as specified.

(2) Existing law governs contracting between state agencies and private contractors, and sets forth requirements for the procurement of materials, supplies, equipment, and services, and the acquisition of information technology goods and services by state agencies. Under existing law, it is unlawful for any person engaged in business with this state to sell or use any article or product as a "loss leader," as defined.

This bill would require a statement of this latter provision to be specified in a solicitation for a state contract for goods, a request for proposal for a contract for services that involves the furnishing of equipment, materials, or supplies and a request for proposal for a state contract for the acquisition of information technology goods and services. This bill would require an awarding agency, on and after March 31, 2010, and until December 31, 2011, if this statement is not contained in a solicitation or request for proposal, to report this error to the Department of General Services. This bill would require the Department of General Services to post in the State Contracting Manual instructions for including this statement in all affected contracts. This bill would provide that this statement shall be deemed to part of a solicitation or request for proposal even if the statement is inadvertently omitted from the solicitation or request for proposal.

(3) Existing law encourages state agencies that enter into contracts to establish goals to facilitate the participation of small businesses and disabled veteran business enterprises.

This bill would make technical, nonsubstantive changes to those provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 14837 of the Government Code is amended to read:

14837. As used in this chapter:

(a) “Department” means the Department of General Services.

(b) “Director” means the Director of General Services.

(c) “Manufacturer” means a business that meets both of the following requirements:

(1) It is primarily engaged in the chemical or mechanical transformation of raw materials or processed substances into new products.

(2) It is classified between Codes 31 to 33, inclusive, of the North American Industry Classification System.

(d) (1) “Small business” means an independently owned and operated business that is not dominant in its field of operation, the principal office of which is located in California, the officers of which are domiciled in California, and which, together with 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, or is a manufacturer, as defined in subdivision (c), with 100 or fewer employees.

(2) “Microbusiness” is a small business which, together with affiliates, has average annual gross receipts of two million five hundred thousand dollars (\$2,500,000) or less over the previous three years, or is a manufacturer, as defined in subdivision (c), with 25 or fewer employees.

(3) The director shall conduct a biennial review of the average annual gross receipt levels specified in this subdivision and may adjust that level to reflect changes in the California Consumer Price Index for all items. To reflect unique variations or characteristics of different industries, the director may establish, to the extent necessary, either higher or lower qualifying standards

than those specified in this subdivision, or alternative standards based on other applicable criteria.

(4) Standards applied under this subdivision shall be established by regulation, in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, and shall preclude the qualification of businesses that are dominant in their industry. In addition, the standards shall provide that the certified small business or microbusiness shall provide goods or services that contribute to the fulfillment of the contract requirements by performing a commercially useful function, as defined below:

(A) A certified small business or microbusiness is deemed to perform a commercially useful function if the business does all of the following:

(i) (I) Is responsible for the execution of a distinct element of the work of the contract.

(II) Carries out its obligation by actually performing, managing, or supervising the work involved.

(III) Performs work that is normal for its business services and functions.

(ii) Is not further subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practices.

(B) A contractor, subcontractor, or supplier will not be considered to perform a commercially useful function if the contractor's, subcontractor's, or supplier's role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of small business or microbusiness participation.

(e) "Disabled veteran business enterprise" means an enterprise that has been certified as meeting the qualifications established by subdivision (g) of Section 999 of the Military and Veterans Code.

SEC. 2. Section 999 of the Military and Veterans Code is amended to read:

999. (a) This article shall be known as, and may be cited as, the California Disabled Veteran Business Enterprise Program. The California Disabled Veteran Business Enterprise Program is established to address the special needs of disabled veterans seeking rehabilitation and training through entrepreneurship and to recognize the sacrifices of Californians disabled during military service. It is the intent of the Legislature that every state

procurement authority honor California’s disabled veterans by taking all practical actions necessary to meet or exceed the disabled veteran business enterprise participation goal of a minimum of 3 percent of total contract value.

(b) As used in this article, the following definitions apply:

(1) “Administering agency” means the Treasurer in the case of contracts for professional bond services, and the Department of General Services’ Office of Small Business and Disabled Veteran Business Enterprise Services, in the case of contracts governed by Section 999.2.

(2) “Awarding department” means a state agency, department, governmental entity, or other officer or entity empowered by law to issue bonds or enter into contracts on behalf of the state.

(3) “Bonds” means bonds, notes, warrants, certificates of participation, and other evidences of indebtedness issued by, or on behalf of, the state.

(4) “Contract” includes any agreement or joint agreement to provide professional bond services to the State of California or an awarding department. “Contract” also includes any agreement or joint development agreement to provide labor, services, materials, supplies, or equipment in the performance of a contract, franchise, concession, or lease granted, let, or awarded for, and on behalf of, the state.

(5) (A) “Contractor” means any person or persons, regardless of race, color, creed, national origin, ancestry, sex, marital status, disability, religious or political affiliation, age, or any sole proprietorship, firm, partnership, joint venture, corporation, or combination thereof that submits a bid and enters into a contract with a representative of a state agency, department, governmental entity, or other officer empowered by law to enter into contracts on behalf of the state. “Contractor” includes any provider of professional bond services who enters into a contract with an awarding department.

(B) “Disabled veteran business enterprise contractor, subcontractor, or supplier” means any person or entity that has been certified by the administering agency pursuant to this article and that performs a “commercially useful function,” as defined below, in providing services or goods that contribute to the fulfillment of the contract requirements:

(i) A person or an entity is deemed to perform a “commercially useful function” if a person or entity does all of the following:

(I) (aa) Is responsible for the execution of a distinct element of the work of the contract.

(ab) Carries out the obligation by actually performing, managing, or supervising the work involved.

(ac) Performs work that is normal for its business services and functions.

(II) Is not further subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practices.

(ii) A contractor, subcontractor, or supplier will not be considered to perform a “commercially useful function” if the contractor’s, subcontractor’s, or supplier’s role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of a disabled veteran business enterprise participation.

(6) “Disabled veteran” means a veteran of the military, naval, or air service of the United States, including, but not limited to, the Philippine Commonwealth Army, the Regular Scouts, “Old Scouts,” and the Special Philippine Scouts, “New Scouts,” who has at least a 10-percent service-connected disability and who is domiciled in the state.

(7) (A) “Disabled veteran business enterprise” means a business certified by the administering agency as meeting all of the following requirements:

(i) It is a sole proprietorship at least 51 percent owned by one or more disabled veterans or, in the case of a publicly owned business, at least 51 percent of its stock is owned by one or more disabled veterans; a subsidiary that is wholly owned by a parent corporation, but only if at least 51 percent of the voting stock of the parent corporation is owned by one or more disabled veterans; or a joint venture in which at least 51 percent of the joint venture’s management, control, and earnings are held by one or more disabled veterans.

(ii) The management and control of the daily business operations are by one or more disabled veterans. The disabled veterans who exercise management and control are not required to be the same disabled veterans as the owners of the business.

(iii) It is a sole proprietorship, corporation, or partnership with its home office located in the United States, which is not a branch or subsidiary of a foreign corporation, foreign firm, or other foreign-based business.

(B) Notwithstanding subparagraph (A), after the death or the certification of a permanent medical disability of a disabled veteran who is a majority owner of a business that qualified as a disabled veteran business enterprise prior to that death or certification of a permanent medical disability, and solely for purposes of any contract entered into before that death or certification, that business shall be deemed to be a disabled veteran business enterprise for a period not to exceed three years after the date of that death or certification of a permanent medical disability, if the business is inherited or controlled by the spouse or child of that majority owner, or by both of those persons.

(8) “Foreign corporation,” “foreign firm,” or “foreign-based business” means a business entity that is incorporated or has its principal headquarters located outside the United States of America.

(9) “Goal” means a numerically expressed objective that awarding departments and contractors are required to make efforts to achieve.

(10) “Management and control” means effective and demonstrable management of the business entity.

(11) “Professional bond services” include services as financial advisers, bond counsel, underwriters in negotiated transactions, underwriter’s counsel, financial printers, feasibility consultants, and other professional services related to the issuance and sale of bonds.

SEC. 3. Section 10111 of the Public Contract Code is amended to read:

10111. Commencing January 1, 2007, the department shall make available a report on contracting activity containing the following information:

(a) A listing of consulting services contracts that the state has entered into during the previous fiscal year. The listing shall include the following:

(1) The name and identification number of each contractor.

(2) The type of bidding entered into, the number of bidders, whether the low bidder was accepted, and if the low bidder was

not accepted, an explanation of why another contractor was selected.

(3) The amount of the contract price.

(4) Whether the contract was a noncompetitive bid contract, and why the contract was a noncompetitive bid contract.

(5) Justification for entering into each consulting services contract.

(6) The purpose of the contract and the potential beneficiaries.

(7) The date when the initial contract was signed, and the date when the work began and was completed.

(b) The report shall also include a separate listing of consultant contracts completed during that fiscal year, with the same information specified in subdivision (a).

(c) The information specified in subdivisions (a) and (b) shall also include a list of any contracts underway during that fiscal year on which any change was made regarding the following:

(1) The completion date of the contract.

(2) The amount of money to be received by the contractor, if it exceeds 3 percent of the original contract price.

(3) The purpose of the contract or duties of the contractor. A brief explanation shall be given if the change in purpose is significant.

(d) The level of participation, by agency, of disabled veteran business enterprises in statewide contracting and shall include dollar values of contract award for the following categories:

(1) Construction.

(2) Architectural, engineering, and other professional services.

(3) Procurement of materials, supplies, and equipment.

(4) Information technology procurements.

Additionally, the report shall include a statistical summary detailing each awarding department's goal achievement and a statewide total of those goals.

(e) The level of participation by small business in state contracting including:

(1) Upon request, an up-to-date list of eligible small business bidders by general procurement and construction contract categories, noting company names and addresses and also noting which small businesses also qualify as microbusinesses.

(2) By general procurement and construction contract categories, statistics comparing the small business and microbusiness contract participation dollars to the total state contract participation dollars.

(3) By awarding department and general procurement and construction categories, statistics comparing the small business and microbusiness contract participation dollars to the total state contract participation dollars.

(4) Any recommendations for changes in statutes or state policies to improve opportunities for small businesses and microbusinesses.

(5) A statistical summary of small businesses and microbusinesses certified for state contracting by the number of employees at the business for each of the following categories: 0–5, 26–50, 51–75, and 76–100.

(6) To the extent feasible, beginning in the year 2008, the number of contracts awarded by the department in the categories specified in paragraph (5).

(7) The number of contracts and dollar amounts awarded annually pursuant to Section 14838.5 of the Government Code to small businesses, microbusinesses, and disabled veteran business enterprises.

(f) The level of participation of business enterprises, by race, ethnicity, and gender of owner, in contracts as identified in Section 2051 of the Government Code, to the extent that the information has been voluntarily reported to the department. In addition, the report shall contain the levels of participation of business enterprises, by race, ethnicity, and gender of owner, for the following categories of contracts, to the extent that the information has been voluntarily reported to the department:

(1) Construction.

(2) Purchases of materials, supplies, or equipment.

(3) Professional services.

(g) In the years 2011 and 2012, any errors reported to the department by an awarding agency as required by Sections 10302, 10344, and 12104.5, in the previous fiscal year.

SEC. 4. Section 10302 of the Public Contract Code is amended to read:

10302. (a) Except in cases of emergency where immediate purchase of goods without bid is necessary for the protection of the public health, welfare, or safety, whenever the department contracts for goods in excess of twenty-five thousand dollars

(\$25,000), or a higher amount as established by the director, the department shall advertise in the California State Contracts Register the availability of its solicitation, and interested suppliers, upon request, shall be furnished with copies of the solicitation. In addition to advertising in the California State Contracts Register, the department shall post in a public place a copy of the solicitation, which shall remain posted until seven days after an award has been made. Whenever a contract in excess of twenty-five thousand dollars (\$25,000), or a higher amount as established by the director, is made pursuant to this section or Section 10301 without the taking of bids, the department shall prepare a written document stating the fact of the contract together with the facts requiring the contract of the goods without the taking of bids. This document shall be maintained by the department and shall be available as a public record.

(b) (1) Every solicitation shall contain the following statement:

“It is unlawful for any person engaged in business within this state to sell or use any article or product as a “loss leader” as defined in Section 17030 of the Business and Professions Code.”

(2) On and after March 31, 2010, and until December 31, 2011, if a solicitation does not contain the statement required by paragraph (1), the awarding agency shall report this error to the department within 30 days of the date the awarding agency discovers this error.

(3) The department shall post in the State Contracting Manual instructions for including the statement required by paragraph (1) in all affected contracts.

(4) The statement required by paragraph (1) shall be deemed to be part of a solicitation even if the statement is inadvertently omitted from the solicitation.

SEC. 5. Section 10344 of the Public Contract Code is amended to read:

10344. (a) Contracts subject to the provisions of this article may be awarded under a procedure that makes use of a request for proposal. State agencies that use this procedure shall include in the request for proposal a clear, precise description of the work to be performed or services to be provided, a description of the format that proposals shall follow and the elements they shall contain, the standards the agency will use in evaluating proposals, the date on

which proposals are due and the timetable the agency will follow in reviewing and evaluating them.

State agencies that use a procedure that makes use of a request for proposal shall evaluate proposals and award contracts in accordance with the provisions of subdivision (b) or (c). No proposals shall be considered that have not been received at the place, and prior to the closing time, stated in the request for proposal.

(b) State agencies that use the evaluation and selection procedure in this subdivision shall include in the request for proposal, in addition to the information required by subdivision (a), a requirement that bidders submit their proposals with the bid price and all cost information in a separate, sealed envelope.

Proposals shall be evaluated and the contract awarded in the following manner:

(1) All proposals received shall be reviewed to determine those that meet the format requirements and the standards specified in the request for proposal.

(2) The sealed envelopes containing the bid price and cost information for those proposals that meet the format requirements and standards shall then be publicly opened and read.

(3) The contract shall be awarded to the lowest responsible bidder meeting the standards.

(c) State agencies that use the evaluation and selection procedure in this subdivision shall include in the request for proposal, in addition to the information required by subdivision (a), a description of the methods that will be used in evaluating and scoring the proposals. Any evaluation and scoring method shall ensure that substantial weight in relationship to all other criteria utilized shall be given to the contract price proposed by the bidder.

Proposals shall be evaluated and the contract awarded in the following manner:

(1) All proposals shall be reviewed to determine which meet the format requirements specified in the request for proposal.

(2) All proposals meeting the formal requirements shall then be submitted to an agency evaluation committee which shall evaluate and score the proposals using the methods specified in the request for proposal. All proposals and all evaluation and scoring sheets shall be available for public inspection at the conclusion of the committee scoring process.

(3) The contract shall be awarded to the bidder whose proposal is given the highest score by the evaluation committee.

(d) Nothing in this section shall require the awarding of the contract if no proposals are received containing bids offering a contract price that in the opinion of the state agency is a reasonable price.

(e) (1) In addition to the information required by subdivision (a), a request for proposal for a contract that involves the furnishing of equipment, materials, or supplies shall contain the following statement:

“It is unlawful for any person engaged in business within this state to sell or use any article or product as a “loss leader” as defined in Section 17030 of the Business and Professions Code.”

(2) On and after March 31, 2010, and until December 31, 2011, if a request for proposal does not contain the statement required by paragraph (1), the awarding agency shall report this error to the department within 30 days of the date the awarding agency discovers this error.

(3) The department shall post in the State Contracting Manual instructions for including the statement required by paragraph (1) in all affected contracts.

(4) The statement required by paragraph (1) shall be deemed to be part of a request for proposal even if the statement is inadvertently omitted from the request for proposal.

SEC. 6. Section 12104.5 of the Public Contract Code is amended to read:

12104.5. (a) All rules and requirements governing an information technology acquisition, for which the department determines that a request for proposal (RFP) is appropriate, shall be communicated in writing to all vendors that have expressed an intent to bid and shall be posted in a public location. Any changes to the rules and requirements governing that RFP shall be communicated in writing to all vendors that have expressed an intent to bid and shall be posted in a public location. No requirements other than those provided by law or outside of the published RFP and posted addendums shall be used by the department to score bids.

(b) (1) All requests for proposals shall contain the following statement:

“It is unlawful for any person engaged in business within this state to sell or use any article or product as a “loss leader” as defined in Section 17030 of the Business and Professions Code.”

(2) On and after March 31, 2010, and until December 31, 2011, if a request for proposal does not contain the statement required by paragraph (1), the awarding agency shall report this error to the department within 30 days of the date the awarding agency discovers this error.

(3) The department shall post in the State Contracting Manual instructions for including the statement required by paragraph (1) in all affected contracts.

(4) The statement required by paragraph (1) shall be deemed to be part of a request for proposal even if the statement is inadvertently omitted from the request for proposal.

(c) The requirements of this section shall be in addition to any other requirement provided by law.

Approved _____, 2009

Governor