SENATE BILL No. 817

Introduced by Committee on Veterans Affairs (Senators Correa (Chair), Berryhill, Calderon, Cannella, La Malfa, Negrete McLeod, and Rubio)

February 18, 2011

An act to amend Sections 10115.1, 10115.4, 10115.10, and 10115.15 of the Public Contract Code, relating to state contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 817, as introduced, Committee on Veterans Affairs. State contracts: participation goals.

Existing law establishes participation goals for certain state contracts with minority business enterprises, women business enterprises, and disabled veteran business enterprises. These provisions, with respect to minority and women business enterprises, were held unconstitutional on the basis of not meeting equal protection requirements.

This bill would revise the requirements imposed on disabled veteran business enterprises to, among other changes, require a disabled veteran to have at least a 10% service-connected disability and require a disabled veteran business enterprise to submit specified income tax information to the Office of Small Business and Disabled Veteran Business Enterprise Services.

Existing law further requires an awarding state department for contracts for materials, supplies, or equipment to accept the submission by a bidder of a minority, women, or disabled veteran business enterprise utilization plan that has been approved prior to the solicitation due date by the Department of General Services, in accordance with certain criteria.

This bill would revise the minimum criteria for a business utilization plan to be approved by the Department of General Services, as specified.

The bill would also expand the types of contracts to which these provisions apply to include contracts for commodities, property, goods, professional services, construction work, or equipment, including information technology goods and services.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

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

SECTION 1. Section 10115.1 of the Public Contract Code is amended to read:

10115.1. As used in this article, the following definitions apply:

(a) "Awarding department" means any state agency, department, governmental entity, or other officer or entity empowered by law to enter into contracts on behalf of the State of California.

(b) "Contract" includes any agreement or joint development agreement to provide labor, services, material, supplies, or equipment in the performance of a contract, franchise, concession, or lease granted, let, or awarded for and on behalf of the State of California.

(c) "Contractor" means any person or persons, regardless of race, color, sex, ethnic origin, or ancestry, or any firm, partnership, corporation, or combination thereof, whether or not a minority or women business enterprise, who 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 of California.

(d) "Disabled veteran" means a veteran of the United States military, naval, or air service who has a service-connected disability of at least 10 percent or more and who is domiciled in this state.

(e) "Disabled veteran business enterprise" means a business that meets all of the following criteria:

(1) The business is at least 51 percent owned by one or more disabled veterans, except that if the business is a limited liability company, it is wholly owned by one or more disabled veterans

(2) The daily business operations are managed and controlled by one or more disabled veterans. For purposes of this paragraph, the disabled veteran who manages and controls the business is

not required to be the owner of the disabled veteran business enterprise.

(3) The home office of the business is located in the United States and is not a branch or subsidiary of a foreign corporation, foreign firm, or other foreign-based business.

(4) The business has submitted the following income tax information, as applicable, to the Office of Small Business and Disabled Veteran Business Enterprise Services:

(A) Complete copies of its federal income tax returns for the previous year after initial approval by the Department of General Services. If in operation for less than three years, the business shall submit its federal income tax returns for each year that it has operated as a business.

(B) A business that is not a sole proprietorship and rents equipment to the state shall provide its federal income tax returns for each disabled veteran owner or the firm shall be deemed to be an equipment broker.

~~(d)~~

(f) “Minority,” for purposes of this section, means a citizen or lawful permanent resident of the United States who is an ethnic person of color and who is: Black (a person having origins in any of the Black racial groups of Africa); Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin regardless of race); Native American (an American Indian, Eskimo, Aleut, or Native Hawaiian); Pacific-Asian (a person whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, or the United States Trust Territories of the Pacific including the Northern Marianas); Asian-Indian (a person whose origins are from India, Pakistan, or Bangladesh); or any other group of natural persons identified as minorities in the respective project specifications of an awarding department or participating local agency.

~~(e)~~

(g) “Minority business enterprise” means a business concern that meets all of the following criteria:

(1) The business is an individual proprietorship, partnership, corporation, or joint venture at least 51 percent owned by one or more minorities or, in the case of any business whose stock is

publicly held, at least 51 percent of the stock is owned by one or more minorities.

(2) A business whose management and daily operations are controlled by one or more minorities who own the business.

(3) A business concern with its home office located in the United States which is not a branch or subsidiary of a foreign corporation, firm, or other business.

~~(f)~~

(h) "Women business enterprise" means a business concern that meets all of the following criteria:

(1) The business is an individual proprietorship, partnership, corporation, or joint venture at least 51 percent owned by one or more women or, in the case of any business whose stock is publicly held, at least 51 percent of the stock is owned by one or more women.

(2) A business whose management and daily operations are controlled by one or more women who own the business.

(3) A business concern with its home office located in the United States which is not a branch or subsidiary of a foreign corporation, firm, or other business.

~~(g)~~

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

SEC. 2. Section 10115.4 of the Public Contract Code is amended to read:

10115.4. In implementing this article, the awarding department shall utilize existing resources such as the Office of Small ~~and Minority Business, the~~ *Business and Disabled Veteran Business Enterprise Services, the federal* Minority Business Development Agency, and the *federal* Small Business Administration.

SEC. 3. Section 10115.10 of the Public Contract Code is amended to read:

10115.10. (a) It shall be unlawful for a person or firm to:

(1) Knowingly and with intent to defraud, fraudulently obtain, retain, attempt to obtain or retain, or aid another in fraudulently obtaining or retaining or attempting to obtain or retain, acceptance or certification as a minority, women, or disabled veteran business enterprise, for the purposes of this article.

(2) Willfully and knowingly make a false statement with the intent to defraud, whether by affidavit, report, or other representation, to a state official or employee for the purpose of influencing the acceptance or certification or denial of acceptance or certification of any entity as a minority, women, or disabled veteran business enterprise.

(3) Willfully and knowingly obstruct, impede, or attempt to obstruct or impede, any state official or employee who is investigating the qualifications of a business entity which has requested acceptance or certification as a minority, women, or disabled veteran business enterprise.

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

(5) Establish, or cooperate in the establishment of, or exercise control over, a firm found to have violated any of paragraphs (1) to (4), inclusive. Any person or firm who violates this paragraph is guilty of a misdemeanor and shall be liable for a civil penalty not to exceed fifty thousand dollars ($50,000) for the first violation, and a civil penalty not to exceed two hundred thousand dollars ($200,000) for each additional, or subsequent violation.

(6) This section shall not apply to minority and women business enterprise programs conducted by public utility companies pursuant to the California Public Utilities Commission's General Order 156.

(b) Any person who violates paragraphs (1) to (4), inclusive, of subdivision (a) is guilty of a misdemeanor and shall be liable for a civil penalty not to exceed five thousand dollars ($5,000) for the first violation, and a civil penalty not to exceed twenty thousand dollars ($20,000) for each additional or subsequent violation.

(c) Any person or firm that violates subdivision (a) shall, in addition to the penalties provided for in subdivision (b), be suspended from bidding on, or participating as either a contractor, subcontractor, or supplier in, any state contract or project for a period of not less than 30 days ~~nor~~ *and not* more than one year. However, for an additional or subsequent violation the period of suspension shall be extended for a period of up to three years. Any person or firm that fails to satisfy the penalties imposed pursuant to subdivisions (b) and (c) shall be prohibited from further contracting with the state until the penalties are satisfied.

(d) The awarding department shall report all alleged violations of this section to the Office of Small ~~and Minority Business. The office~~ *Business and Disabled Veteran Business Enterprise Services. The Office of Small Business and Disabled Veteran Business Enterprise Services* shall subsequently report all alleged violations to the Attorney General who shall determine whether to bring a civil action against any person or firm for violation of this section.

(e) The ~~office~~ *Office of Small Business and Disabled Veteran Business Enterprise Services* shall monitor the status of all reported violations and shall maintain and make available to all state departments a central listing of all firms and persons who have been determined to have committed violations resulting in suspension.

(f) No awarding department shall enter into any contract with any person or firm suspended for violating this section during the period of the person's or firm's suspension. No awarding department shall award a contract to any contractor utilizing the services of any person or firm as a subcontractor suspended for violating this section during the period of the person's or firm's suspension.

(g) The awarding department shall check the central listing provided by the office to verify that the person, firm, or contractor to whom the contract is being awarded, or any person or firm being utilized as a subcontractor by that person, firm, or contractor, is not under suspension for violating this section.

SEC. 4. Section 10115.15 of the Public Contract Code is amended to read:

10115.15. (a) Notwithstanding Section 10115.2, when awarding contracts for *commodities,* materials, *property, goods,* supplies, *professional services, construction work,* or equipment, including ~~electronic data processing~~ *information technology* goods and services, an awarding department shall accept the submission by a bidder of a minority, women, and disabled veteran business enterprise utilization plan that has been approved prior to the solicitation due date by the Department of General Services. A business utilization plan shall be considered approved by the Department of General Services as of the date submitted to the department so long as the plan meets the minimum criteria established in paragraphs (1) to ~~(12)~~ *(11)*, inclusive, and shall be valid for a period of one year, unless the department has audited the utilization plan, as authorized under subdivision (b), and disapproves it for reasons specified under subdivision (c). The decision of whether to establish a minority, women, and disabled veteran business enterprise utilization plan shall be at the option of the vendor. If a bidder cites an approved utilization plan in response to the minority, women, and disabled veteran business enterprise participation requirements of a solicitation that calls for 15 percent minority-owned, 5 percent women-owned, and 3 percent disabled veteran-owned business participation, then that utilization plan shall be considered responsive to the participation goals of the solicitation document. If a solicitation specifies higher participation goals than those in the bidder's utilization plan, the bidder shall meet the goals in the solicitation *or submit an amendment to increase the percentage of specified goals*. At a minimum, the utilization plan shall include the following information:

(1) A statement of the vendor's minority, women, and disabled veteran business enterprise utilization plan, including the primary objectives of the utilization plan.

(2) An explanation showing sufficient business reasons why the vendor did not meet minority, women, and disabled veteran business enterprise participation goals set forth in the vendor's minority, women, and disabled veteran business utilization plan submitted to, and approved by, the Department of General Services in the previous year~~, if applicable~~. Further, if the vendor did not meet the minority, women, and disabled veteran business participation goals in the previous year, the vendor shall also identify remedial steps it will take to meet the goals in the current utilization plan.

(3) A statement of the vendor's minority, women, and disabled veteran business utilization goals for the succeeding year. At a minimum, these utilization goals shall be equal to the statewide participation goals set forth in subdivision (c) of Section 10115.

(4) Estimated total dollars to be ~~subcontracted~~ *contracted* by the vendor ~~for sales within the United States for the succeeding year~~ *with the State of California*.

~~(5) Estimated total dollars to be subcontracted by the vendor for sales within the State of California for the succeeding year.~~

~~(6)~~

(5) Total dollars, expressed as a percentage of the amount estimated pursuant to paragraph (4), intended to be subcontracted with each of the following:

(A) Minority business enterprises.

(B) Women business enterprises.

~~(7) Total dollars, expressed as a percentage of the amount estimated pursuant to paragraph (5), intended to be subcontracted with disabled veteran-owned business enterprises.~~

(C) Disabled veteran business enterprises.

~~(8)~~

(6) A representative listing of the products and services that the vendor anticipates subcontracting, including ~~an~~ *direct and indirect funding. An* identification of the types of subcontracting *and overhead costs* planned for minority, women, and disabled veteran business enterprises.

(7) Direct and indirect costs, as related to disabled veteran business enterprise participation, may be applied to business utilization plan goals. For purposes of this paragraph:

(A) "Direct cost" are those costs that are directly attributable to a specific state contract.

(B) "Indirect costs" are those costs which, because incurred for common or joint purposes, are not directly related to a specific contract. These indirect costs, include, but are not limited to, overhead, general, and administrative costs, such as employee fringe benefits, health insurance, retirement contributions, janitorial expenses, office supplies, landscaping, travel costs, accounting, and security costs. These indirect costs shall not be used for services and commodities of any subcontract that are directly attributable to a specific state contract.

~~(9)~~

(8) The name of the individual employed by the vendor who will administer the vendor's utilization plan, including a description of the duties of the individual.

~~(10)~~

(9) A description of the efforts that the vendor will undertake to ensure that minority, women, and disabled veteran business enterprises will have an equitable opportunity to compete for contracts.

~~(11)~~

(10) A listing of the records and reports that the vendor will maintain to demonstrate the practices and procedures that have been adopted to comply with the requirements and goals of the utilization plan.

~~(12)~~

(11) Affirmation that the vendor met the statewide minority, women, and disabled veteran business enterprise utilization goals for the previous year, if applicable.

(b) The Department of General Services shall conduct random audits of the submitted *business* utilization plans to determine compliance with this article, and shall retain on file all submitted *business* utilization plans for auditing purposes. During any audit of a submitted *business* utilization plan, the Department of General Services may ask a vendor to submit a list of all the minority, women, and disabled veteran business enterprises included as subcontractors in the vendor's *business utilization* plan for the previous year. This information shall remain confidential. Nothing in this section shall be construed to require the Department of General Services to audit all of the minority, women, and disabled veteran business enterprise utilization plans submitted by individual vendors. The Department of General Services may establish appropriate fees to cover the actual costs of conducting random audits and retaining on file all submitted plans.

(c) (1) At any time, the Department of General Services may disapprove a vendor's minority, women, and disabled veteran business enterprise utilization plan for any of the following reasons:

(A) The *business* utilization plan fails to evidence a vendor's intention to comply fully with the statewide minority, women, and disabled veteran business enterprise goals for the succeeding year, as indicated by failure of the *business* utilization plan to contain the information specified in subdivision (a).

(B) The *business* utilization plan fails to evidence sufficient business reasons for failure to achieve the minority, women, and disabled veteran business enterprise goals set forth in a *business* utilization plan submitted in the previous year, if applicable.

(C) The *business* utilization plan fails to evidence sufficient remedial steps the vendor will take if the vendor did not meet the minority, women, and disabled veteran business participation goals in the previous year~~, if applicable~~.

(2) If a vendor's *business* utilization plan is disapproved, the vendor may not submit a new *business* utilization plan to the department for a period of one year from the date of disapproval. Prior to disapproval of a vendor's *business* utilization plan, the 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.

(3) A vendor that submits a minority, women, and disabled veteran business utilization plan that is approved by the Department of General Services, and that is subsequently awarded a contract to which the vendor would not otherwise have been entitled, and ~~who~~ *that* fails to evidence intention to fully comply with the minority, women, and disabled veteran business enterprise goals in the *business* utilization plan, or fails to evidence sufficient business reasons for failing to achieve the minority, women, and disabled veteran business enterprise goals set forth in the *business* utilization plan, shall:

(A) Pay to the state any difference between the contract amount and what the state's cost would have been if the contract had been properly awarded.

(B) In addition to the amount specified in subparagraph (A), be assessed a penalty in an amount of not more than 10 percent of the amount of the contract involved.

(C) Be ineligible to transact any business with the state for a period of not less than three months and not more than 24 months.

Prior to imposition of any sanction under this chapter, 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.

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