Judicial Council of California

SOCIOECONOMIC AND ENVIRONMENTAL PROGRAMS

CHAPTER 3

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Table of Contents

Introduction 3
Defined Terms 3
3.1 California Disabled Veteran Business Enterprise (DVBE) Program 3
A. Purpose 3
B. Administration 4
C. Outline of Principal Requirements for JBE Implementation of the DVBE Program 4
D. Adoption of Rules and Procedures for a DVBE Program 5
E. Appointing a DVBE Advocate 5
F. Waiver of a DVBE Incentive 5
G. General Requirements for DVBE Procurements 6
1. Verifying Bidder Status as a DVBE 6
2. Determining if a DVBE Performs a Commercially Useful Function 7
3. Other Requirements 8
4. Other Considerations 10
3.2 Americans with Disabilities Act Considerations 10
3.3 State Agency Buy Recycled Campaign (SABRC) Program 11
A. Utilizing Recycled Content Products 11
B. Recycled Preference and Competitive Solicitations 12
C. Supplier Certification 12
D. Printer Cartridges 13
3.4 Small Business Preference 13

INTRODUCTION

This chapter describes socioeconomic and environmental programs and considerations that affect procurement activities of Judicial Branch Entities (JBEs). The first and most extensively discussed is the California Disabled Veteran Business Enterprise (DVBE) program that is intended to increase business opportunities for disabled veteran businesses. Next, is a brief discussion of pertinent requirements of the Americans with Disabilities Act (ADA) to familiarize JBEs with the importance of making all procurement activities available to all persons, including persons with disabilities. Next, this chapter discusses the requirements of California's State Agency Buy Recycled Campaign (SABRC) program that promotes the purchase of products that are energy efficient and have other preferable environmental attributes. Finally, this chapter discusses the small business preference applicable to procurements of IT goods and services.

DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

3.1 CALIFORNIA DISABLED VETERAN BUSINESS ENTERPRISE (DVBE) PROGRAM

A. Purpose

The Legislature established the DVBE program 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. In doing so, the Legislature stated its intent "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 goals of a minimum of 3 percent of total contract value" (MVC 999(a)).

These goals apply to the total contract value expended each year by each JBE.[1]

Example: A JBE annually expends $10 million in contracts to purchase goods and services. Its DVBE participation goal would be not less than $300,000—3 percent of $10 million—that would go to certified DVBEs that are contractors, subcontractors, or

[1] Total contract value should not include the value of contracts with state entities (such as counties) that are mandated by law.

suppliers to perform a "commercially useful function" (see section 3.1.G.2) in specific procurements.

DVBE incentive: To implement the DVBE program JBEs must grant Bidders that provide DVBE participation a DVBE incentive (MVC 999.5(a)). A DVBE incentive is a prescribed percentage reduction in the DVBE Bidder's Bid price where the JBE is selecting a Bidder using the "lowest responsible Bidder" methodology or the addition of a prescribed number of points to the DVBE Bidder's Bid score where the JBE is using the "highest scoring Bidder" approach.

B. Administration

The MVC and PCC establish DGS as the administering agency for this program. In that role, DGS manages certification and decertification of companies as DVBEs. JBEs must use DGS-certified entities or entities that have DGS-approved business utilization plans to meet their DVBE goals.

C. Outline of Principal Requirements for JBE Implementation of the DVBE Program

The PCC and MVC have procedural and management requirements JBEs must fulfill. These include:

1. Adopting rules and procedures to implement the requirements of MVC 999 and the following and PCC 10115 et seq.;
2. Appointing a DVBE advocate;
3. Determining which contracts are subject to a DVBE incentive;
4. Utilizing available resources for implementation of the program; and
5. For those procurements that provide for a DVBE incentive:

    - Verifying Bidder status as a DVBE;
    - Verifying whether the certified DVBE is providing a "commercially useful function" as that term is defined below;
    - Not awarding any contract to a Bidder suspended for violating PCC 10115.10 for the period of the applicable suspension;
    - Not permitting a Vendor to utilize a subcontractor suspended for violating PCC 10115.10 for the period of the applicable suspension;
    - Notifying the Office of Small Business and Disabled Veteran Business Enterprise Services (OSDS) of alleged Vendor violations of PCC 10115.10; and

- Upon completion of the contract term, requiring each prime contractor with DVBE subcontractors to submit to the JBE certain certifications under MVC 999.5(d).

D. Adoption of Rules and Procedures for a DVBE Program

Each JBE must develop or adopt a set of rules and procedures for the implementation of a DVBE program. DGS has established a system of rules and regulations for managing the DVBE program that includes forms that may be adopted and modified by JBEs that wish to establish their own program. The Judicial Council's Business Services unit and the Legal Services office are available to assist courts in establishing a program.

Rules and procedures for the following must be established:

- A method for monitoring adherence to DVBE goals;
- Use of existing state government resources to assist in implementing the DVBE program; and
- Incentive amounts and a formula for incentive calculation for procurements that are subject to DVBE incentives.

Solicitation Documents should be drafted to include reference to DVBE procedures and contracts must include appropriate DVBE provisions.

E. Appointing a DVBE Advocate

Each JBE must designate a DVBE advocate whose duties include, but are not limited to:

- Identifying potential DVBE prime contractors or subcontractors and potential contracting opportunities; and
- Making information regarding pending solicitations available to and considering offers from certified DVBE firms capable of meeting the JBE's business needs. (MVC 999.12)

F. Waiver of a DVBE Incentive

Although all competitive procurements are subject to the DVBE incentive, a JBE, through its Procurement and Contracting Officer (PCO) or designee, has the discretion to waive inclusion of the DVBE incentive in an individual solicitation or a number of solicitations, including but not limited to where the following determining factors exist: (i)

few or no DVBE subcontracting opportunities exist, (ii) subcontracting a portion of the work is not normal for the industry, (iii) the work is so specialized that there are few or no DVBEs that can perform the work themselves without subcontracting it, or (iv) the work is a procurement pursuant to Government Code §§ 14838.5(a).[2] Note, however, that the overall DVBE participation goal of 3 percent of annual total contract value still applies. The JBE's PCO or designee must document the procurement file whenever the DVBE requirement has been waived, using a DVBE form that will include a signature from the PCO (or designee) authorizing the DVBE waiver, along with the reason(s) for waiving the DVBE incentive for the individual solicitation.

G. General Requirements for DVBE Procurements

1. Verifying Bidder Status as a DVBE

Verifying certification status: For competitive solicitations that include the DVBE incentive, JBEs must verify California DVBE certification status before a contract award regardless of the procurement approach. Status can be verified by accessing the DVBE services certified firm inquiry database, currently available at https://caleprocure.ca.gov/pages/PublicSearch/supplier-search.aspx

If this database is used in support of DVBE certification, a printout can simply be placed in the procurement file.

Business utilization plan alternative: There is an additional method for a Bidder to qualify as a DVBE for contracts for non-IT goods and for IT goods and services. For those procurements, a JBE must accept from a Bidder a DVBE business utilization plan (plan) in lieu of DGS certification (PCC 10115.15(a)). The use of a plan does not extend to non-IT service contracts.

A plan is a Bidder's written commitment to contract with certified DVBEs for at least 3 percent of its business's total contract dollars expended in California during the next year (i.e., the year after the year in which the contract is awarded). This 3-percent commitment applies to all business done by the Bidder in California, not just contracts with the State of California. The DGS procurement division provides plan approval. A plan is considered approved by the DGS on the date of submission

[2] A JBE may determine that a fiscal emergency exists necessitating the temporary suspension of the JBE's DVBE program. If a JBE suspends its program due to a fiscal emergency, the JBE should have the Approving Authority, or his/her appointee, document the extent of and reasons for the suspension.

provided the plan meets requirements set forth in PCC 10115.15. However, the DGS may audit the plan and later disapprove it. To qualify as a DVBE by use of a plan, a Bidder must provide a written certification that it has submitted its plan to DGS when it submits its Bid to the JBE.

Broker/agent status: The benefits of DVBE status are intended to apply to DVBEs that are not "brokers" or "agents." MVC 999.2(b) defines those terms as follows:

- "Broker" or "agent" means any individual or entity, or combination thereof, that does not have title, possession, control, and risk of loss of materials, supplies, services, or equipment provided to an awarding JBE, unless one or more certified disabled veterans has 51 percent ownership of the quantity and value of the materials, supplies, services, and of each piece of equipment provided under the contract.
- "Equipment broker" means any broker or agent who rents equipment, directly or indirectly, to an awarding JBE.

A DVBE that is a "broker" or "agent" must inform the JBE of its status at the time of submission of its Bid.

If a JBE contracts with a DVBE that is determined to be a broker or agent,[3] then:

- The DVBE broker or agent will not receive the benefit of its DVBE certification for the transaction, which means no DVBE incentive may be applied; and
- The JBE may not count the DVBE broker's or agent's participation in the contract towards the JBE's annual DVBE participation goal.

2. Determining if a DVBE Performs a Commercially Useful Function

Certified DVBE contractors, subcontractors, and suppliers that Bid on or seek to participate in a JBE contract must perform a commercially useful function to be eligible to participate as a DVBE in a specific procurement. The JBE is responsible for determining whether the contractor, subcontractor, or supplier will perform a commercially useful function before making a contract award to the DVBE.

A certified DVBE is deemed to perform a commercially useful function if the business does all of the following:

[3] The determination is made from the Bidder information supplied with its Bid (see preceding paragraph).

- Is responsible for the execution of a distinct element of the work of the contract;
- Carries out its obligation by actually performing, managing, or supervising the work involved;
- Performs work that is normal for its business services and functions;
- Is responsible, with respect to products, inventories, materials, and supplies required for the contract, for negotiating price, determining quality and quantity, ordering, installing, if applicable, and making payment; and
- Is not subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practices.

A contractor, subcontractor, or supplier will not be considered to perform a commercially useful function if its role is limited to that of an extra participant in a contract through which funds are passed to obtain the appearance of a DVBE participation.

3. Other Requirements

Utilizing available resources in managing the DVBE program: JBEs must utilize existing resources such as the Department of Veterans Affairs and OSDS in implementing the DVBE program. (PCC 10115.4 and MVC 999.6)

Suspended Bidders and subcontractors: A JBE may not award any contract to a Bidder suspended for violating PCC 10115.10 for the period of the applicable suspension. (See PCC 10115.10(6)(c).) A JBE may not permit a Vendor to utilize a subcontractor suspended for violating PCC 10115.10 for the period of the applicable suspension. To access a DGS list of suspended Bidders, search on *www.dgs.ca.gov/pd/Programs/OSDS/firmviolations.aspx*.

Contractor violations of PCC 10115.10: If a JBE suspects that a Vendor is in violation of PCC 10115.10, the JBE must notify OSDS. Violations include:

- Fraudulently obtaining or retaining certification as a DVBE, or aiding another to do so;
- Making a false statement to defraud a state official or employee to influence certification as a DVBE;
- Obstructing or impeding the investigation of qualifications of a business entity as a DVBE;

- Fraudulently obtaining, attempting to obtain, or helping another to obtain public monies to which there is no entitlement under the laws establishing the DVBE program; and
- Establishing or exercising control over a firm that has engaged in such activities. (See PCC 10115.10 for a complete list of violations and associated penalties.)

Contract Obligations: Every awarded contract that includes a DVBE participation incentive shall contain a provision requiring the contractor to comply with all rules, regulations, ordinances, and statutes that govern the DVBE Program, including, without limitation, MVC Section 999.5. (See PCC 10230).

Contractor post-contract certification: Upon completion of an awarded contract that contains a commitment to achieve a DVBE goal, the JBE must require the prime contractor that entered into a subcontract with a DVBE to certify to the JBE:

- The total amount of money the prime contractor received under the contract;
- The name and address of the DVBE subcontractor that participated in the performance of the contract;
- The amount of money and percentage of work each prime contractor committed to provide to each DVBE subcontractor and the amount each DVBE subcontractor received from the prime contractor; and
- That all payments under the contract have been made to the DVBE subcontractor. Upon request by the JBE, the prime contractor shall provide proof of payment for the work.

The prime contractor must provide the post-contract certification no later than the date of submission of prime contractor's final invoice to the JBE. Pursuant to Military & Veterans Code section 999.7, the JBE shall withhold $10,000 from the final payment, or withhold the full payment if it is less than $10,000, until the Contractor submits a complete and accurate post-contract certification.[4] The JBE shall allow the prime contractor to cure the deficiency after written notice of the prime contractor's failure to complete and submit an accurate post-contract certification form.

[4] JBEs must withhold this payment for contracts entered into on or after January 1, 2021, where a commitment to achieve a DVBE goal was made by the prime contractor, the prime contractor used a DVBE subcontractor to meet those DVBE commitments, and the prime contractor failed to provide the JBE with a complete and accurate post-contract certification by the date of submission of the prime contractor's final invoice.

Notwithstanding the foregoing and any other law, if after at least 15 calendar days, but no more than 30 calendar days, from the date of the written notice the prime contractor refuses to comply with these certification requirements, the JBE shall permanently deduct $10,000 from the final payment, or the full payment if less than $10,000.

The JBE must keep this certification on file for a minimum of six (6) years.

4. Other Considerations

Effect on Contracts of Failure to Meet DVBE Goals: Failure of a JBE to meet the goals established under MVC 999 et seq. and PCC 10115 et seq. does not affect the validity or enforceability of any contract (PCC 10115.6, MVC 999.8).

No Goals Reporting Requirement: There are no DVBE goals-reporting requirements in either the PCC or MVC applicable to JBEs.[5]

LPAs: If a JBE procures goods or services using an LPA that includes DVBE participation, some or all of the purchase may count toward the JBE's DVBE goal. See chapter 6 of this Manual for additional information regarding DVBE considerations when using LPAs.

SB/DVBE Option: The DVBE incentive is not applicable when a JBE conducts a procurement using the SB/DVBE option. See section D in the "Selected Topics Relevant to the Solicitation of IT Goods and Services" portion of chapter 4C of this Manual for additional information regarding the SB/DVBE option.

Replacing DVBE Subcontractors or Suppliers: A contractor shall use the DVBE subcontractors or suppliers identified in its bid or proposal, unless the JBE approves in writing replacement by another DVBE subcontractor or supplier. (See MVC 999.5(f)).

3.2 AMERICANS WITH DISABILITIES ACT CONSIDERATIONS

In compliance with the Americans with Disabilities Act (ADA) and similar California statutes, JBEs must make reasonable efforts to ensure that their programs, activities,

[5] MVC 999.7 and PCC 10115.5, which required state agencies to provide annual reports to the Governor and DGS with respect to meeting DVBE goals, were repealed effective January 1, 2007.

and services are accessible to persons with disabilities. Contracting and procurement are activities covered by these laws.

JBEs must provide reasonable accommodation to persons with disabilities that enable them to participate in the procurement process. JBEs must also be prepared to respond to questions about reasonable accommodation by persons with disabilities. The term "reasonable accommodation" does not include actions that would fundamentally alter the nature of the procurement process or that would impose an undue financial or administrative burden upon a JBE.

JBEs should designate an individual (ADA Coordinator) who is available to respond to questions or concerns regarding reasonable accommodation of disabilities in the procurement process. Solicitation Documents should advise Prospective Bidders that the JBE complies with the ADA and similar California statutes and that requests for accommodation of disabilities should be directed to the ADA Coordinator.

3.3 STATE AGENCY BUY RECYCLED CAMPAIGN (SABRC) PROGRAM

The SABRC is a joint effort between the California Department of Resources Recycling and Recovery (CalRecycle) and DGS to implement state law requiring state agencies and the Legislature to purchase recycled-content products (RCPs). It complements the efforts of the Integrated Waste Management Act (Pub. Resources Code, § 4000 et seq.), which was enacted to reduce the amount of waste going to California's landfills.

A. Utilizing Recycled Content Products

Please see PCC 12200(f) and 12207 for a complete listing of recycled product categories. PCC 12203 requires JBEs to ensure that at least 50 percent of reportable purchases are recycled products. This requirement applies to purchases in each of the targeted categories identified in PCC 12207, which includes categories covering paper products, office supplies, office products, and a wide range of other products. The required postconsumer recycled content varies by category (e.g., recycled paper products must consist of at least 30 percent postconsumer fiber). PCC 12209 provides a listing of products and the minimum recycled content percentages needed to qualify as a recycled product. PCC 12209 also provides that CalRecycle shall consider updating this list of products and the minimum recycled content percentages, beginning on January 1, 2026 and every three years thereafter. For a full description and listing of recycled products and the required minimum recycled content percentages, as well as a full description of how CalRecycle will determine whether the minimum recycled content percentages should be updated, please see PCC 12209. On and after January 1, 2020,

JBEs must ensure that at least 75 percent of reportable purchases are recycled products, except for paint, antifreeze, and tires, which remain at the 50 percent requirement. See PCC 12203(a).

Example: A JBE is purchasing $20,000 worth of paper for its copy machines. At least $10,000 of the paper must have 30 percent recycled content by weight. The other $10,000 may be any mix of recycled or nonrecycled products. For additional information, search on CalRecycle or *www.calrecycle.ca.gov.*

B. Recycled Preference and Competitive Solicitations

Under PCC 12201, a JBE shall purchase recycled products instead of nonrecycled products, if all of the following requirements are met:

- Fitness and quality of the products are equal;
- Recycled products are available at no more than 10 percent greater total cost than nonrecycled products; and
- One of the following situations applies:
    1. A JBE uses a leveraged procurement agreement through which both recycled and nonrecycled products are available.
    2. A JBE is awarding a contract using the SB/DVBE option (pursuant to Government Code section 14838.5, as further discussed in Chapter 4C of the JBCM*)* and receives offers for both recycled and nonrecycled products.
    3. A JBE awards a contract without soliciting multiple offers based on a determination that the price is fair and reasonable.

To the maximum extent economically feasible in performance of the contract work, each JBE must require Vendors to use recycled content products (PCC 12203(d)). Contact the SABRC at 916-341-6199 or *SABRC@CalRecycle.ca.gov* for information on qualifying SABRC reusable and recycled content products.

C. Supplier Certification

Unless otherwise waived as noted below, JBEs must require all Vendors to certify in writing, under penalty of perjury, the percentage of recycled content in the products, materials, goods, or supplies offered or sold to the JBE (PCC 12205). This requirement applies even if the product contains no recycled material. To access the Postconsumer-Content Certification form, search on CalRecycle or http://calrecycle.ca.gov/BuyRecycled/StateAgency/Forms/CalRecycle074.pdf.

This certification can be waived if the postconsumer recycled content can be verified by other written means such as product label, packaging, catalog, manufacturer/Vendor website, product advertisement. For additional information regarding the SABRC program, search on CalRecycle or *www.calrecycle.ca.gov/BuyRecycled/StateAgency/*.

D. Printer Cartridges

No JBE may purchase any printer or duplication cartridge for which the manufacturer, wholesaler, distributor, retailer, or remanufacturer places restrictions on the recycling or remanufacturing of that cartridge by any other person (PCC 12156). Each JBE must print a statement on the cover of its Solicitation Document for printer or duplicator cartridges, or in some other noticeable place in the Solicitation Document, notifying Prospective Bidders that it is unlawful to prohibit a printer or duplication cartridge that is sold to the state from being recycled or remanufactured, except as specified in PCC 12156(b).

3.4 SMALL BUSINESS PREFERENCE

State law requires JBEs to provide a small business preference in the award of **IT goods or services** contracts.[6] In competitive procurements of IT goods and services, JBEs must provide a five percent preference to entities that have been certified as a "small business" or "microbusiness" by DGS.[7] The small business preference is not applicable to procurements of non-IT goods or non-IT services.

The small business preference is not applicable when a JBE conducts a procurement using the SB/DVBE option. The SB/DVBE option is different from the small business preference and may be used for competitive solicitations of IT goods and services that are greater than $5,000 and less than $250,000 in value. See section D in the "Selected Topics Relevant to the Solicitation of IT Goods and Services" portion of chapter 4C of this Manual for additional information regarding the SB/DVBE option.

Each JBE must adopt small business preference procedures applicable to the competitive procurement of IT goods and services. These procedures must implement the requirements of applicable provisions of article 1 of the Small Business Procurement and Contract Act (GC 14835–14843). The Judicial Council's Legal Services office has developed a sample set of procedures, and other related materials, to assist JBEs in meeting these obligations.

[6] PCC 12102.2(c). See also chapter 4C, step 6 of this Manual for further information.
[7] See, infra, Chapter 4C, at step 6, p.7.

There are no small business preference reporting requirements applicable to JBEs.

JBEs may procure IT goods or services using LPAs that include Small Business participation. See chapter 6 of this Manual for additional information regarding Small Business considerations when using LPAs.