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SB-1176 Small Business Procurement and Contract Act: business size. (2015-2016)

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ENROLLED SEPTEMBER 02, 2016

PASSED IN SENATE AUGUST 29, 2016

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AMENDED IN ASSEMBLY AUGUST 15, 2016

AMENDED IN SENATE APRIL 21, 2016

CALIFORNIA LEGISLATURE— 2015–2016 REGULAR SESSION

SENATE BILL

NO. 1176

Introduced by Senators Galgiani and Hueso
(Principal coauthor: Senator Hertzberg)
(Principal coauthor: Assembly Member Jones-Sawyer)
(Coauthor: Assembly Member Gonzalez)

February 18, 2016

An act to amend Sections 14837 and 14838 of the Government Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 1176, Galgiani. Small Business Procurement and Contract Act: business size.

The Small Business Procurement and Contract Act requires the Director of General Services and the heads of other state agencies that enter into contracts for the acquisition of goods, services, and information technology and for the construction of state facilities to establish goals for the participation of small businesses and microbusinesses in these contracts, to provide for a small business preference in the award of these contracts, to give special consideration and special assistance to small businesses, and, whenever possible, to make awards to small businesses, as specified. Existing law defines a "small business" for these purposes as, among other things, an independently owned and operated business that is not dominant in its field of operation that has average annual gross receipts of \$10 million, as may be adjusted to reflect changes in the California Consumer Price Index, or less over the previous 3 years. Existing law defines a "microbusiness" as a small business which, together with affiliates, has average annual gross receipts of \$2.5 million, as may be adjusted to reflect changes in the California Consumer Price Index, or less over the previous 3 years. Existing law requires the director to conduct a biennial review of those average annual gross receipt levels and authorizes the director to adjust the average annual gross receipts threshold to reflect

changes in the California Consumer Price Index for all items. Existing law requires a contractor requesting a small business or microbusiness preference to do so under penalty of perjury.

This bill would revise those definitions by increasing the dollar amount threshold for a small business to \$15 million and for a microbusiness to \$5 million and would require those dollar amounts to be adjusted to reflect changes in the California Consumer Price Index biennially. The bill would further revise the definition of small business by specifying that, for the purposes of public works contracts, small business means a business with 200 or fewer employees and average annual gross receipts of \$25 million or less. The bill would allow directors of the department and other state agencies to count contractors that would be considered a small business or microbusiness under the changes made by this bill for the year this bill is enacted if the directors are unable to make the small business participation goals under the existing laws. The bill would allow more contractors to qualify as a small business or microbusiness, thus expanding the group of contractors authorized to request a preference filed under penalty of perjury. By expanding the crime of perjury, this bill would impose a state-mandated local program.

This bill would incorporate additional changes to Sections 14837 and 14838 of the Government Code proposed by SB 1219 that would become operative if this bill and SB 1219 are enacted and this bill is enacted last.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature hereby finds and declares all of the following:

(a) The essence of the American economic system of private enterprise is to be free, open, and to have transparent competition. Only through free, open, and transparent competition can free markets, reasonable and just prices, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be ensured. The preservation and expansion of that competition are basic to the economic well-being of this state, and that well-being cannot be realized unless the actual and potential capacity of small business enterprises is encouraged and developed.

(b) It is the policy of the state to aid the interests of small business enterprises in order to preserve reasonable and just prices and free competitive enterprise, to ensure that a fair proportion of the total purchases and contracts or subcontracts for commodities, supplies, technology, property, and services, including, but not limited to, renewable energy, wireless telecommunications, broadband, smart grid, rail, and other mega infrastructure projects, for regulated state departments are awarded to small business enterprises, and to maintain and strengthen the overall economy of the state.

(c) The opportunity for full participation in our free enterprise system by small business enterprises is essential if this state is to attain social and economic equality for those businesses and improve the functioning of the state economy.

(d) State agencies that have established small business contracting goals are awarding less than 25 percent of their mandated goals.

(e) Small business enterprises have traditionally received less than their proportional share of public entity procurement contracts, especially in renewable energy, wireless telecommunications, broadband, smart grid, rail, and other mega infrastructure projects.

(f) It is in the interest of the state to expeditiously improve the economically disadvantaged position of small business owners and employees.

(g) The position of small business enterprises can be substantially improved by expanding the definition of a small business to allow these businesses to amass the capital and expertise necessary to compete for state procurement of technology, equipment, supplies, services, materials, and construction work, especially in renewable energy, wireless telecommunications, broadband, smart grid, rail, and other mega infrastructure projects. This expansion also benefits the state departments and consumers of the state by encouraging the expansion of the number of small business enterprise suppliers for procurements, thereby encouraging competition among the suppliers and promoting economic efficiency in the process.

(h) The long-term economic viability of this state depends substantially upon the ability of small businesses to be successful.

SEC. 2. It is the intent of the Legislature by enacting this legislation to do all of the following:

(a) Encourage greater economic opportunity for small businesses.

(b) Promote competition among state departments that issue contracts in order to enhance economic efficiency in the procurement of state services.

(c) Clarify and expand the program for the procurement by state departments for small business enterprises.

SEC. 3. 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) (A) "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 fifteen million dollars (\$15,000,000) or less over the previous three years, or is a manufacturer, as defined in subdivision (c), with 100 or fewer employees.

(B) For the purposes of public works contracts, contracts awarded through competitive bids or otherwise for the erection, construction, alteration, repair, or improvement of any kind upon real property, "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 200 or fewer employees, and average annual gross receipts of twenty-five million dollars (\$25,000,000) or less over the previous three years.

(2) "Microbusiness" is a small business which, together with affiliates, has average annual gross receipts of five million dollars (\$5,000,000) 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 shall 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) 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.

(iv) 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.

(v) 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 paragraph (7) of subdivision (b) of Section 999 of the Military and Veterans Code.

SEC. 3.5. 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) (A) "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 fifteen million dollars (\$15,000,000) or less over the previous three years, or is a manufacturer, as defined in subdivision (c), with 100 or fewer employees.

(B) For the purposes of public works contracts, contracts awarded through competitive bids or otherwise for the erection, construction, alteration, repair, or improvement of any kind upon real property, "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 200 or fewer employees, and average annual gross receipts of twenty-five million dollars (\$25,000,000) or less over the previous three years.

(2) "Microbusiness" is a small business which, together with affiliates, has average annual gross receipts of five million dollars (\$5,000,000) or less over the previous three years, or is a manufacturer, as defined in subdivision (c), with 25 or fewer employees.

(3) "Employment social enterprise" means an entity that meets all of the following:

(A) Is organized as a social purpose corporation, a benefit corporation, or a nonprofit corporation.

(B) Is a California-based entity that meets one or more of the following:

(i) The entity has a principal office in California, and the officers are domiciled in California.

(ii) The entity has a major office or manufacturing facility located in California that has been licensed by the state on a continuous basis to conduct business within the state and has continuously employed California residents for work within the state during the prior three years.

(iii) The entity is a nonprofit organization incorporated in another state that has sponsored or cosponsored substantive economic and workforce development activities within this state and has provided services to individuals who face multiple barriers to employment in at least 20 of the prior 24 months.

(C) Earns 51 percent or more of its enterprise revenue from the production or assembly of goods or the provision of services, or a combination of both.

(D) Demonstrates evidence in its articles of incorporation, bylaws, or both, of the employment social enterprise's mission to provide employment with on-the-job and life skills training to a direct labor force, not including supervisors and administration, that is comprised of at least 80 percent of enterprise participants who face multiple barriers to employment. To document on-the-job and life skills training, an employment social enterprise shall provide documentation, under penalty of perjury, that one or more of the following services is being offered to individuals who face multiple barriers to employment:

(i) Basic skills and job readiness assessment.

(ii) Referral system to industry-recognized certificates and training.

(iii) Linkage to community colleges, adult schools, or other education institutions to gain an education diploma or certificate.

(iv) Partnership with local or regional workforce development boards.

(v) Job placement and retention services.

(E) (i) Has two or more enterprise participants who face multiple barriers to employment.

(ii) "Enterprise participant who faces multiple barriers to employment" means an individual that meets two or more of the following:

(I) Is an individual with employment barriers, as defined in subdivision (j) of Section 14005 of the Unemployment Insurance Code.

(II) Is or has been homeless, as defined by the United States Department of Health and Human Services as of January 1, 2016.

(III) Is an out-of-school youth. "Out-of-school youth" means an individual who meets the definition in Section 3164(a)(1)(B) of Title 29 of the United States Code.

(4) The director shall conduct a biennial review of the average annual gross receipt levels specified in this subdivision for small business and microbusiness and shall 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.

(5) 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 a small business or microbusiness that is dominant in its industry. In addition, the standards shall provide that the certified small business, microbusiness, or employment social enterprise 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, microbusiness, or employment social enterprise is deemed to perform a commercially useful function if the business does all of the following:

(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.

(iv) 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.

(v) 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, microbusiness, or employment social enterprise participation.

(e) "Disabled veteran business enterprise" means an enterprise that has been certified as meeting the qualifications established by paragraph (7) of subdivision (b) of Section 999 of the Military and Veterans Code.

(f) The amendments made to this section by the act adding this subdivision shall become operative on October 1, 2018.

SEC. 4. Section 14838 of the Government Code is amended to read:

14838. In order to facilitate the participation of small business, including microbusiness, in the provision of goods, information technology, and services to the state, and in the construction (including alteration, demolition, repair, or improvement) of state facilities, the directors of the department and other state agencies that enter those contracts, each within their respective areas of responsibility, shall do all of the following:

(a) Establish goals, consistent with those established by the Office of Small Business Certification and Resources, for the extent of participation of small businesses, including microbusinesses, in the provision of goods, information technology, and services to the state, and in the construction of state facilities.

(b) Provide for small business preference, or nonsmall business preference for bidders that provide for small business and microbusiness subcontractor participation, in the award of contracts for goods, information technology, services, and construction,

as follows:

(1) In solicitations where an award is to be made to the lowest responsible bidder meeting specifications, the preference to small business and microbusiness shall be 5 percent of the lowest responsible bidder meeting specifications. The preference to nonsmall business bidders that provide for small business or microbusiness subcontractor participation shall be, up to a maximum of 5 percent of the lowest responsible bidder meeting specifications, determined according to rules and regulations established by the Department of General Services.

(2) In solicitations where an award is to be made to the highest scored bidder based on evaluation factors in addition to price, the preference to small business or microbusiness shall be 5 percent of the highest responsible bidder's total score. The preference to nonsmall business bidders that provide for small business or microbusiness subcontractor participation shall be up to a maximum 5 percent of the highest responsible bidder's total score, determined according to rules and regulations established by the Department of General Services.

(3) The preferences under paragraphs (1) and (2) shall not be awarded to a noncompliant bidder and shall not be used to achieve any applicable minimum requirements.

(4) The preference under paragraph (1) shall not exceed fifty thousand dollars (\$50,000) for any bid, and the combined cost of preferences granted pursuant to paragraph (1) and any other provision of law shall not exceed one hundred thousand dollars (\$100,000). In bids in which the state has reserved the right to make multiple awards, this fifty thousand dollar (\$50,000) maximum preference cost shall be applied, to the extent possible, so as to maximize the dollar participation of small businesses, including microbusinesses, in the contract award.

(c) Give special consideration to small businesses and microbusinesses by both:

(1) Reducing the experience required.

(2) Reducing the level of inventory normally required.

(d) Give special assistance to small businesses and microbusinesses in the preparation and submission of the information requested in Section 14310.

(e) Under the authorization granted in Section 10163 of the Public Contract Code, make awards, whenever feasible, to small business and microbusiness bidders for each project bid upon within their prequalification rating. This may be accomplished by dividing major projects into subprojects so as to allow a small business or microbusiness contractor to qualify to bid on these subprojects.

(f) Small business and microbusiness bidders qualified in accordance with this chapter shall have precedence over nonsmall business bidders in that the application of a bidder preference for which nonsmall business bidders may be eligible under this section or any other provision of law shall not result in the denial of the award to a small business or microbusiness bidder. In the event of a precise tie between the low responsible bid of a bidder meeting specifications of a small business or microbusiness, and the low responsible bid of a bidder meeting the specifications of a disabled veteran-owned small business or microbusiness, the contract shall be awarded to the disabled veteran-owned small business or microbusiness. This provision applies if the small business or microbusiness bidder is the lowest responsible bidder, as well as if the small business or microbusiness bidder is eligible for award as the result of application of the small business and microbusiness bidder preference granted by subdivision (b).

(g) If the directors of the department and other state agencies that enter into those contracts are unable to reach the goals established under subdivision (a) in the year in which the act that added this subdivision takes effect, the directors of the department and other state agencies may count towards that goal, contracts with firms that would be considered a small business or microbusiness under the amendments made to Section 14837 by the act adding this subdivision.

SEC. 4.5. Section 14838 of the Government Code is amended to read:

14838. In order to facilitate the participation of small business, including microbusiness and employment social enterprise in the provision of goods, information technology, and services to the state, and in the construction (including alteration, demolition, repair, or improvement) of state facilities, the directors of the department and other state agencies that enter those contracts, each within their respective areas of responsibility, shall do all of the following:

(a) Establish goals, consistent with those established by the Office of Small Business Certification and Resources, for the extent of participation of small businesses, including microbusinesses, and employment social enterprises, in the provision of goods, information technology, and services to the state, and in the construction of state facilities.

(b) Provide for a small business or employment social enterprise preference, or nonsmall business preference for bidders that provide for small business, microbusiness, and employment social enterprise subcontractor participation, in the award of contracts for goods, information technology, services, and construction, as follows:

(1) In solicitations where an award is to be made to the lowest responsible bidder meeting specifications, the preference to small business, microbusiness, and employment social enterprise shall be 5 percent of the lowest responsible bidder meeting specifications. The preference to nonsmall business bidders that provide for small business, microbusiness, or employment social enterprise subcontractor participation shall be, up to a maximum of 5 percent of the lowest responsible bidder meeting specifications, determined according to rules and regulations established by the Department of General Services.

(2) In solicitations where an award is to be made to the highest scored bidder based on evaluation factors in addition to price, the preference to small business, microbusiness, or employment social enterprise shall be 5 percent of the highest responsible bidder's total score. The preference to nonsmall business bidders that provide for small business, microbusiness, or employment social enterprise subcontractor participation shall be up to a maximum 5 percent of the highest responsible bidder's total score, determined according to rules and regulations established by the Department of General Services.

(3) The preferences under paragraphs (1) and (2) shall not be awarded to a noncompliant bidder and shall not be used to achieve any applicable minimum requirements.

(4) The preference under paragraph (1) shall not exceed fifty thousand dollars (\$50,000) for any bid, and the combined cost of preferences granted pursuant to paragraph (1) and any other provision of law shall not exceed one hundred thousand dollars (\$100,000). In bids in which the state has reserved the right to make multiple awards, this fifty thousand dollar (\$50,000) maximum preference cost shall be applied, to the extent possible, so as to maximize the dollar participation of small businesses, including microbusinesses, and employment social enterprises in the contract award.

(5) A bidder may be awarded a preference for both of the following in a single bid:

(A) A small business preference or a nonsmall business preference for bidders that provide for small business or microbusiness subcontractor participation.

(B) An employment social enterprise preference or a nonsmall business preference for bidders that provide for employment social enterprise subcontractor participation.

(c) Give special consideration to small businesses, microbusinesses, and employment social enterprises by both:

(1) Reducing the experience required.

(2) Reducing the level of inventory normally required.

(d) Give special assistance to small businesses, microbusinesses, and employment social enterprises in the preparation and submission of the information requested in Section 14310.

(e) Under the authorization granted in Section 10163 of the Public Contract Code, make awards, whenever feasible, to small business, microbusiness, and employment social enterprise bidders for each project bid upon within their prequalification rating. This may be accomplished by dividing major projects into subprojects so as to allow a small business, microbusiness, or employment social enterprise contractor to qualify to bid on these subprojects.

(f) Small business, microbusiness, and employment social enterprise bidders qualified in accordance with this chapter shall have precedence over nonsmall business bidders in that the application of a bidder preference for which nonsmall business bidders may be eligible under this section or any other provision of law shall not result in the denial of the award to a small business, microbusiness, or employment social enterprise bidder. In the event of a precise tie between the low responsible bid of a bidder meeting specifications of a small business, microbusiness, or employment social enterprise and the low responsible bid of a bidder meeting the specifications of a disabled veteran-owned small business, microbusiness, or employment social enterprise, the contract shall be awarded to the disabled veteran-owned small business, microbusiness, or employment social enterprise. This provision applies if the small business, microbusiness, or employment social enterprise bidder is the lowest responsible bidder, as well as if the small business, microbusiness, or employment social enterprise bidder is eligible for award as the result of application of the small business, microbusiness, and employment social enterprise bidder preference granted by subdivision (b).

(g) In order to qualify for the incentives under this section, an employment social enterprise shall demonstrate and certify under penalty of perjury the following:

(1) Not less than 70 percent of the total labor hours, excluding supervisors and administration, required to perform the information technology or construction contract shall be completed by an enterprise participant who faces multiple barriers to

employment.

(2) Not less than 70 percent of the total labor hours, excluding supervisors and administration, required to manufacture the goods and perform the contract shall be completed by an enterprise participant who faces multiple barriers to employment. For an employment social enterprise with 25 or fewer total employees, 50 percent of the total labor hours, excluding supervisors and administration, required to manufacture the goods and perform the contract shall be completed by an enterprise participant who faces multiple barriers to employment.

(3) Not less than 80 percent of the total labor hours, excluding supervisors and administration, required to provide services and perform the contract shall be completed by an enterprise participant who faces multiple barriers to employment.

(h) If the directors of the department and other state agencies that enter into those contracts are unable to reach the goals established under subdivision (a) in the year in which the act that added this subdivision takes effect, the directors of the department and other state agencies may count towards that goal, contracts with firms that would be considered a small business or microbusiness under the amendments made to Section 14837 by the act adding this subdivision.

(i) The amendments made to this section by the act adding this subdivision shall become operative on October 1, 2018.

SEC. 5. Section 3.5 of this bill incorporates amendments to Section 14837 of the Government Code proposed by both this bill and Senate Bill 1219. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2017, (2) each bill amends Section 14837 of the Government Code, and (3) this bill is enacted after Senate Bill 1219, in which case Section 3 of this bill shall not become operative.

SEC. 6. Section 4.5 of this bill incorporates amendments to Section 14838 of the Government Code proposed by both this bill and Senate Bill 1219. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2017, (2) each bill amends Section 14838 of the Government Code, and (3) this bill is enacted after Senate Bill 1219, in which case Section 4 of this bill shall not become operative.

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.