AB-2762 Public contracts: disabled veteran business enterprises: local small business enterprises: social enterprises. (2017-2018)

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Assembly Bill No. 2762

CHAPTER 654

An act to amend Section 2002 of, and to add and repeal Section 2003 of, the Public Contract Code, relating to public contracts.

[Approved by Governor September 21, 2018. Filed with Secretary of State September 21, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2762, Carrillo. Public contracts: disabled veteran business enterprises: local small business enterprises: social enterprises.

Existing law authorizes a local agency in facilitating contract awards to small businesses to provide for a small business preference of 5% in construction, the procurement of goods, or the delivery of services, and establishes a subcontracting participation goal for small businesses on contracts with a 5% preference for those bidders who meet the goal. Existing law authorizes each local agency to define a small business for the purposes of these preferences and goals.

This bill would increase the above-described preference for small business to 7%. The bill, until January 1, 2024, would also establish preferences, in specified counties, for disabled veteran businesses and social enterprises, as defined, and would provide for the preferences to be a maximum of 7% for an individual preference and up to 15% for a single bid having 2 or more preferences. The bill would limit the value of a preference to a maximum of $150,000 under these provisions. The bill would authorize a prime contractor, with the approval of the local agency, and subject to meeting specified conditions, to substitute another subcontractor for the purpose of meeting specified goals. The bill would require that the policy under which a prime contractor may substitute a subcontractor contain, among other things, a requirement that construction subcontractors awarded construction subcontracts be afforded all the protections of the Subletting and Subcontracting Fair Practices Act and a requirement that the condition qualifying the substitution be verified with the subcontractor. The bill would require each local agency within specified counties that chooses to grant a preference under these provisions to define a small business, disabled veteran business, and social enterprise and to define their eligibility for the purposes of these preferences and goals and to establish a certification process for social enterprises using specified criteria. The bill would also authorize each local agency to define a disabled veteran business and social enterprise and to define their eligibility for the purposes of these preferences and goals.

This bill would make legislative findings and declarations as to the necessity of a special statute for the Counties of Alameda, Contra Costa, Lake, Los Angeles, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma.

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

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

SECTION 1. Section 2002 of the Public Contract Code is amended to read:

2002. (a) Notwithstanding any other provision of law requiring a local agency to award contracts to the lowest responsible bidder, any local agency may do any of the following in facilitating contract awards to small businesses:

(1) Provide for a small business preference in construction, the procurement of goods, or the delivery of services where responsibility and quality are equal.

The local agency shall set the percent and financial value of a preference. The maximum percentage of a preference shall be 7 percent of the lowest responsible bidder meeting specifications and the maximum financial value shall be one hundred fifty thousand dollars ($150,000) for any bid.

(2) Establish a subcontracting participation goal for small businesses on contracts and grant a preference, pursuant to paragraph (1), to those bidders who meet the goal.

(3) (A) Require bidders to make good faith efforts to meet a subcontracting participation goal for small business contracts. Bidders that fail to meet the goal established by the local agency, shall demonstrate that they made good faith efforts to meet the goal.

(B) A prime contractor may, subject to the approval of the local agency, substitute a subcontractor with another small business as applicable. A local agency shall approve the substitution of a subcontractor only in the instance where the substitution meets the requirements of paragraph (6) of subdivision (d) and the local agency's adopted policy.

(4) Set additional guidelines for local preference purposes.

(b) (1) The local agency shall define the eligibility for a preference authorized pursuant to this section.

(2) In defining eligibility for a "small business," a local agency shall, at a minimum, include businesses meeting the requirements of a small business enterprise certified pursuant to Article 1 (commencing with Section 14835) of Chapter 6.5 of Part 5.5 of Division 3 of Title 2 of the Government Code.

(c) Every local agency that offers a preference, pursuant to this section, shall, prior to offering a preference, adopt a procurement policy that includes, at a minimum, all of the following:

(1) A definition of an eligible entity for each preference category being utilized by the local agency.

(2) The percentage and maximum financial value of a single preference.

(3) A requirement that a preference only be awarded to a small business that performs a commercially useful function, as defined in subdivision (e).

(4) A policy regarding oversight and potential fraudulent behavior on the part of a contractor, subcontractor, or individual for the purpose of qualifying as a small business and being awarded a preference.

(5) A policy for determining whether a contractor has made a good faith effort, pursuant to paragraph (3) of subdivision (a).

(6) A policy on how a prime contractor may substitute a subcontractor, pursuant to subparagraph (B) of paragraph (3) of subdivision (a). This policy shall, at a minimum, include all of the following:

(A) The identification of the condition or conditions for which a substitution of subcontractors is authorized.

(B) A requirement that construction subcontractors awarded construction subcontracts under this section shall be afforded all the protections of the Subletting and Subcontracting Fair Practices Act (Chapter 4 (commencing with Section 4100)).

(C) A requirement that a subcontractor that served to qualify the bid package for a preference shall be replaced only with a subcontractor meeting the eligibility requirements of subdivision (b).

(D) A requirement that the condition qualifying the substitution be verified with the subcontractor.

(d) Every entity used to qualify a bid for a preference pursuant to this section shall perform a commercially useful function. A "commercially useful function" means:

(1) A contractor is deemed to perform a commercially useful function if the contractor, including a subcontractor, does all of the following:

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

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

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

(D) 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.

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

(2) A contractor or subcontractor shall not be considered to perform a commercially useful function if the contractor's or subcontractor'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 small business.

SEC. 2. Section 2003 is added to the Public Contract Code, to read:

2003. (a) Notwithstanding Section 2002 or any other law requiring a local agency to award contracts to the lowest responsible bidder, any local agency located within the Counties of Alameda, Contra Costa, Lake, Los Angeles, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma may do any of the following in facilitating contract awards to small businesses, disabled veteran businesses, or social enterprises:

(1) Provide for a small business, disabled veteran business, or social enterprise preference in construction, the procurement of goods, or the delivery of services where responsibility and quality are equal.

(A) The local agency shall set the percent and financial value of a preference. The maximum percentage of a preference shall be 7 percent of the lowest responsible bidder meeting specifications and the maximum financial value shall be one hundred fifty thousand dollars ($150,000) for any bid.

(B) If the local agency authorizes the use of more than one preference in a single bid, the local agency shall set the percentage and maximum financial value of the combined preferences. The maximum percentage of combined preferences shall be 15 percent of the lowest responsible bidder and the maximum combined financial value of all preferences shall be two hundred thousand dollars ($200,000).

(2) Establish a subcontracting participation goal for small businesses, disabled veteran businesses, or social enterprises on contracts and grant a preference, pursuant to paragraph (1), to those bidders who meet the goal.

(3) (A) Require bidders to make good faith efforts to meet a subcontracting participation goal for small business, disabled veteran business, or social enterprise contracts. Bidders that fail to meet the goal established by the local agency shall demonstrate that they made good faith efforts to meet the goal.

(B) A prime contractor may, subject to the approval of the local agency, substitute a subcontractor with another small business, disabled veteran business, or social enterprise, as applicable. A local agency shall approve the substitution of the subcontractor only in the instance where the substitution meets the requirements of paragraph (8) of subdivision (d) and the local agency's adopted policy.

(4) Set additional guidelines for local preference purposes.

(b) The local agency shall define the eligibility for a preference authorized pursuant to this section, which at a minimum, shall include businesses meeting the requirements of paragraph (1) of subdivision (c) as a small business, businesses meeting the requirements of paragraph (2) of subdivision (c) as a disabled veteran business, and an entity meeting the requirements of paragraph (3) of subdivision (c) as a social enterprise.

(c) For the purposes of this section:

(1) "Small business" includes, but is not limited to, a small business enterprise certified pursuant to Article 1 (commencing with Section 14835) of Chapter 6.5 of Part 5.5 of Division 3 of Title 2 of the Government Code.

(2) "Disabled veteran business" includes a disabled veteran business enterprise certified pursuant to Article 6 (commencing with Section 999) of Chapter 6 of Division 4 of the Military and Veterans Code.

(3) "Social enterprise" includes a nonprofit or for-profit business whose primary purpose is to benefit the economic, environmental, or social health of the community and which uses the methods and disciplines of business and the power of the marketplace to advance its social, environmental, and human justice agendas, wherein the organization applies commercial strategies to maximize improvements in human and environmental well-being that may include maximizing social impact rather than profits for external shareholders. A "social enterprise" shall be a business that has been in operation for at least one year providing transitional or permanent employment to a transitional workforce or providing social, environmental, or human justice

services. A “social enterprise” shall only include a social enterprise certified by the administering local agency or by an entity the local agency identifies in the procurement policy adopted pursuant to subdivision (d).

(4) “Transitional employment” means short-term or long-term, wage-paying, subsidized, or nonsubsidized employment that combines real work, skill development, and supportive services to help a transitional workforce overcome barriers to employment and transition to unsubsidized competitive employment.

(5) “Transitional workforce” means underemployed or hard-to-employ persons who may be homeless, formerly incarcerated, or who either have not worked for an extended period of time or face significant barriers to employment, where applicable.

(d) Every local agency that offers a preference, pursuant to this section, shall, prior to offering a preference, adopt a procurement policy that includes, at a minimum, all of the following:

(1) A definition of an eligible entity for each preference category being utilized by the local agency.

(2) The percentage and maximum financial value of a single preference.

(3) If the local agency allows multiple preferences in a bid package, the percentage and maximum financial value of multiple preferences in a bid package, if authorized by a local agency.

(4) A requirement that a preference only be awarded to a small business, disabled veteran business, or social enterprise that performs a commercially useful function, as defined in subdivision (e).

(5) A policy regarding oversight and potential fraudulent behavior on the part of a contractor, subcontractor, or individual for the purpose of qualifying as a small business, disabled veteran business, or social enterprise and being awarded a preference.

(6) If the local agency offers a preference for social enterprise participation, a certification process for social enterprises, as defined in paragraph (3) of subdivision (c).

(7) A policy for determining whether a contractor has made a good faith effort, pursuant to paragraph (3) of subdivision (a).

(8) Policy on how a prime contractor may substitute a subcontractor, pursuant to subparagraph (B) of paragraph (3) of subdivision (a). This policy shall, at a minimum, include all of the following:

(A) The identification of the condition or conditions for which a substitution of subcontractors is authorized.

(B) A requirement that construction subcontractors awarded construction subcontracts under this section shall be afforded all the protections of the Subletting and Subcontracting Fair Practices Act (Chapter 4 (commencing with Section 4100)), including a provision that in addition to substitution conditions identified in Section 4107, a prime contractor may request substitution of a social enterprise or microbusiness, certified pursuant to Section 14837 of the Government Code, due to the subcontractor’s inability to execute the contract due to staffing or scheduling conflicts that have arisen since the submittal of the bid.

(C) A requirement that a subcontractor that served to qualify the bid package for a preference shall be replaced only with a subcontractor meeting the eligibility requirements of subdivision (b).

(D) A requirement that the condition qualifying the substitution be verified with the subcontractor.

(e) Every entity used to qualify a bid for a preference pursuant to this section shall perform a commercially useful function. A “commercially useful function” means:

(1) A contractor is deemed to perform a commercially useful function if the contractor, including a subcontractor, does all of the following:

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

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

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

(D) 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.

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

(2) A contractor or subcontractor shall not be considered to perform a commercially useful function if the contractor’s or subcontractor’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 small business, a disabled veteran business, or a social enterprise.

(f) This section shall remain in effect only until January 1, 2024, and as of that date is repealed.

SEC. 3. The Legislature finds and declares that a special statute is necessary and that a general statute cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution because of the need to establish a pilot program for disabled veteran businesses and social enterprises in several counties that contain different demographic and socioeconomic conditions.