

**Certification of Disabled Veteran Business Enterprises (“DVBE”)
and DVBE Public Contract Participation Goals
under California Government Contract Law**

Under California Public Contracting Laws, Disabled Veteran Business Enterprises (“DVBEs”) are entitled to certain preferences or advantages in public contracting and public bidding, or competitive bidding for state contracts and services, including State Public Works construction contracts.

Each State Department is required to have annual overall goals of at least three percent (3%) of the dollar amount of their contracts be performed or supplied by certified DVBEs. This can be accomplished by the award of prime contracts to DVBEs, or requiring that a percentage of each prime contractors subcontractors or suppliers be DVBEs, by dollar amounts contracted or purchased, or that good faith efforts be made to reach that goal.

Some State Departments may have higher DVBE goals. Likewise, local cities, counties and other public agencies may also have DVBE participation goals, particularly if they receive State funds for their contracts.

The law defines who is or may become a DVBE:

(5)

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

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

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

(I)

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

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

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

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

(ii) A contractor, subcontractor, or supplier will not be considered to perform a

"commercially useful function" if the contractor's, subcontractor's, or supplier's role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of a disabled veteran business enterprise participation.

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

(7)

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

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

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

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

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

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

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

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

California Military & Veterans Code § 999

"Administering agency" means the California Department of General Services', Office of Small Business and Disabled Veteran Business Enterprise Services.

To be certified as a DVBE, one therefore must submit an application to that office of the Department of General Services ("DGS").

DGS also certifies California Small Business Enterprises ("SBE") for similar public contracting goal programs, maintains a website listing certified businesses, and has programs promoting use of certified DVBEs and SBEs in State purchasing, acquisition and public works contracts.

See, <http://www.dgs.ca.gov/pd/Programs/OSDS/GetCertified.aspx>

DGS may also de-certify or revoke a certification, after a Due Process hearing.

On certain public contracts, particularly public works contracts, prime contract bidders are required to describe in their bids the names of the DVBEs who they propose to use to meet their goals on the contract, and to state the portion of the work which will be done by that DVBE.

Prime contractors are subject to penalties if these subcontractors are not used as stated, unless a substitution or replacement has been approved by the State agency or department which awarded the contract.

Public contractors are also subject to audits to make sure these goals have been met.

Because there had been some fraud in connection with the nominal use of figurehead disabled veterans, who had no real role in the ownership or operation of the DVBE business, the statute contains certain provisions to guard against this kind of fraud.¹

The statute thus provides that:

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

(I)

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

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

¹In addition to other onerous penalties, persons participating in or conspiring with others to commit such a fraud could be subject to damages under the California False Claims Act of treble the payments received under the fraudulently obtained contract or subcontract, statutory penalties, attorneys fees, and debarment from further contracting with the State!

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

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

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

Note that this statute says NOTHING about any requirement that the individual Disabled Veteran business owner *personally* hold any license of the company he or she owns.

However, some California Public agencies - CALTRANS, or the California Department of Transportation, in particular - have recently adopted of practice of requiring that the veteran personally hold the license for the business, even though Military & Veteran's Code § 999 contains no such requirement, and refuse to recognize the business as a DVBE despite the fact that it has been certified as such by the California Department of General Services!!

This CALTRANS practice appears to be clearly illegal, and ignores the statutory role of DGS in the certification and decertification of DVBEs, small business enterprises (SBE) and the like.

And the fact that the individual Disabled Veteran majority owner does not have personally the professional license needed to operate the business should thus be of NO RELEVANCE to whether the company itself "performs a commercially useful function".

(For example, even if the Veteran did have a license, the Department of General Services could still determine - based on the limited criteria set forth in the statute - that the company itself did not perform a commercially useful function).

The only requirement in the statute that addresses what the Disabled Veteran must do as an individual - as opposed to the requirement that the company "perform a commercially useful function" - is set forth in subsection (b)(7), which in addition to the requirement that the individual Veteran own at least 51% of the company, also requires that:

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

The statute further defines the required "management and control" which is to be exercised by the individual Disabled Veteran:

"(10) "Management and control" means effective and demonstrable management of the

business entity”.(Emphasis added)

An individual veteran can certainly exercise “effective and demonstrable management “of the company he or she owns without personally holding whatever license is required for that entity.

Obviously, the majority shareholder, directors and officers are the persons who “control” a corporation.

Certainly the majority owner can exercise control over a construction company even if the qualifying individual were an employee of the company, or a “Responsible Managing Employee”, as is allowed by the Contractors State License Law. Bus. & Prof. Code § 7068(b)(3).

Thus, there is no requirement under California law - either in the Veterans Code, or in the Bus. & Prof. Code - that the individual Disabled Veteran owner of the business also be the licensee or RMO of the business in order for the company to perform a “commercially useful function”.

Further, the Military and Veteran’s Code does not permit an awarding entity to revoke or cancel a DVBE certification approved by the administering agency, the Department of General Services.

Government agencies such as CalTrans must accept the DGS certification until it has been revoked by DGS, after according the DVBE the required evidentiary hearing, and according it Due Process of Law.

“Depriving a contractor of the right to bid on a contract implicates a liberty interest. (Marvin Lieblein, Inc. v. Shewry (2006) 137 Cal.App.4th 700, 720 [40 Cal. Rptr. 3d 547] (Lieblein); see also Golden Day Schools, Inc. v. State Dept. of Education (2000) 83 Cal.App.4th 695, 707 [99 Cal. Rptr. 2d 917] (Golden Day); Stacy & Witbeck, Inc. v. City and County of San Francisco (1995) 36 Cal.App.4th 1074, 1086–1087, fn. 6 [44 Cal. Rptr. 2d 472] (Stacy).)”(Emphasis added)

Niles Freeman Equipment v. Joseph (2008) 161 Cal. App. 4th 765, 771.

Only the Department of General Services has the statutory power and right to suspend or revoke a DVBE certification issued by it. Mil. & Vet. Code § 999.9(c). *Niles Freeman Equipment v. Joseph*, supra, 161 Cal. App. 4th at 778-781.

If CALTRANS or some other state department or agency believes that a DVBE contractor has been improperly certified or is not currently qualified for DVBE status, the only option is for CALTRANS, the agency or an affected person or entity - including a competitor -

to report that contractor to the DGS or Attorney General and await their decision on a suspension or revocation of the certification.

CALTRANS and other departments or agencies thus do not have the power under the law to refuse to recognize a DVBE contractor certified by DGS, to determine that the certification was erroneous or is no longer valid, or to refuse to give a prime contractor credit toward the DVBE goal for its use of a currently certified DVBE subcontractor.

N.B. The contents of this Article do not constitute legal advice or create an attorney-client relationship, and you may not rely on it without seeking legal advice regarding your particular situation and contract from a competent construction attorney. Please also note that statutes and case law are frequently changing and these materials may become outdated.

For further information on this topic and how the current law may apply to your particular project and issues, [Contact Us](#) via email, phone (415)788-1881 or visit our website at www.wolflaw.com for other contract information.