



# STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE BILL ANALYSIS

Date Amended:	<b>08/06/02</b>	Bill No:	<b>SB 1045</b>
Subject:	<b>Human Resources</b>	Author:	<b>Polanco</b>
Board Position:	<b>Support</b>	Related Bills:	<b>SB 1161 (Polanco)</b>

## BILL SUMMARY

This bill would do the following: 1) Declare the intent of the Legislature to reaffirm diversity as a public policy goal in employment and contracting; 2) Authorize agencies, in contracting for and procuring goods, services, information technology, construction, architecture, and engineering consulting, and other consulting services, to engage in recruitment and outreach programs to increase diversity; and 3) Require each agency awarding a contract or procuring goods or services to collect information and report annually to the Governor and the Legislature on the participation level of minority, women, and disabled veteran-owned businesses.

## ANALYSIS

### Current Law

Beginning in 1989, Public Contract Code Section 10115 et seq. required state agencies to meet statewide participation goals of specified percentages of the overall dollar amount expended each year on contract and procurement activities for minority, women, and disabled veteran business enterprises. Each agency was required to periodically report the results of their efforts and implement remedial efforts if participation goals were not met.

Proposition 209, approved by the voters on November 5, 1996, added Section 31 to Article I of the California Constitution. This section provides that the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

In litigation that challenged the constitutionality of those established participation goals for minority and women business enterprises, it was argued that requiring the achievement of minority and women business enterprise goals or good faith efforts to achieve the same are unconstitutional and violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Proposition 209 and the related litigation effectively ended race and gender based affirmative action programs in state government (*Monterey Mechanical Co. v. Wilson*, 125 F3d 702 (9<sup>th</sup> Cir. 1997)).

As a result of that litigation, Governor Wilson's 1998 Executive Order W-172-98 required every state agency to cease any enforcement of the minority and women business enterprise participation goals and the good faith requirements related thereto.

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Participation goals for disabled veteran business enterprises were not affected by Proposition 209 or the Executive Order.

### **Proposed Law**

This bill would add Sections 11139.6, 11139.7, and 11139.8 to the Government Code. Section 11139.6 makes findings and declarations, including findings that the prohibition in Section 31(a) does not prevent governmental agencies from engaging in public sector outreach programs that, in addition to general recruitment, may include focused outreach and recruitment of minority groups and women, if they are underrepresented in entry level positions. This section would also require agencies to use current state civilian labor force data as specified. In addition, this section states the intent to allow public sector employers to conduct outreach efforts that supplement word-of-mouth recruitment, which would include placement of job announcements in such media instruments as (1) general circulation newspapers, publications, radio and television stations, and electronic media, (2) local and regional community newspapers, (3) non-English newspapers whose primary audience are residents of minority and low-income communities, (4) other publications whose primary audience is comprised of minority groups or women, and (5) recruitment booths at job fairs or conferences oriented to both the general market and minorities or women.

Section 11139.7 would authorize state agencies, in contracting for and procuring goods, services, information technology, construction, architecture, and engineering consulting, and other consulting services, to engage in focused outreach activities to increase participation by California's small business sector and increase diversity in the state's contracting and procurement activities. The outreach activities may include the following: 1) Invitations to bid distributed to small business and trade associations, ethnic chambers of commerce, professional minority, women, and disabled veteran-owned business and professional groups, as appropriate; 2) Publications of advertising in trade papers and other publication focusing on small business enterprises, including publications in languages other than English and/or those whose primary readership is minority, women, or disabled veteran-owned businesses; 3) Outreach by agency small business advocates to state and local small business and trade associations and chambers of commerce including ethnic chambers of commerce, and professional minority, women, and disabled veteran-owned business and professional groups, as appropriate.

Section 11139.8 would require that, commencing January 1, 2003, each state agency awarding a contract or procuring goods or services shall collect information and report to the Governor and the Legislature on the level of participation by minority, women, and disabled veteran-owned business enterprises in contract and procurement activities. The reports would be required to be submitted annually, on or before July 1 of each year, and must include the dollar values of contract awards for the following categories of contractors: 1) Construction; 2) Architecture and engineering and other professional services; 3) Procurement of materials, supplies, and equipment; and 4) Information technology procurements.

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## Background

In analyzing the scope of Proposition 209 in terms of the appropriateness of the ballot summary's use of the phrase "affirmative action," the court cited various definitions of the term affirmative action that further indicated that it includes many programs not covered by Proposition 209, including "the encouragement of increased representation of women and minority-group members" (*Lungren v. Superior Court of Sacramento* (1996) 48 Cal App.4<sup>th</sup> 435, 442.) This bill codifies the pronouncements of the court that Proposition 209's prohibitions on discrimination and granting preferential treatment do not prohibit governmental agencies from engaging in outreach or recruitment in public employment, education, or contracting. A 1997 Legislative Counsel opinion determined that "outreach efforts by themselves do not involve 'preferences,' since after obtaining the broader pool, the employer may make its selection in a race- and sex-blind fashion." The opinion further stated that "The prohibition in Section 31. . . against preferential treatment refers to programs that confer a benefit to persons within a specific class based on race, sex, color, ethnicity, or national origin to the exclusion of persons who are not within that class, but would not include an outreach program designed to provide information or otherwise increase the diversity of the pool of applicants for such a benefit."

Legislation similar to this bill, Senate Bill 44 (Polanco) from the 1999-2000 Legislative Session, was vetoed. Governor Davis' veto message advocated diversity in the public workforce, and stated that "outreach programs can be fashioned that are constitutionally permissible, based on socio-economic status, geographic area or other non-race-based characteristics." The message further stated the Governor's intent to appoint a Task Force on Diversity and Outreach to examine ways in which state government may fashion and conduct outreach programs that are constitutionally permissible. Senator Polanco and Assembly Member Kuehl, along with state agency, business, academic, and community leaders, make up the task force membership.

The Governor's Task Force on Diversity and Outreach concluded, among other things, that data on minority business participation is not currently available, and that lack of useful data on minority business participation in state contracting is an overarching issue to be addressed.

## COMMENTS

- 1. Sponsor and purpose.** This bill is sponsored by the Los Angeles Hispanic Employees Association to clarify that Proposition 209 does not prevent governmental agencies from engaging in efforts to increase diversity in public policy employment and contracting by enhancing current recruitment and outreach programs.
- 2. Summary of amendments.** The **August 6, 2002** amendments extended the date for which a state agency, awarding a contract or procuring goods or services, is required to submit a report to the Governor and the Legislature on the level of participation by minority, women, and disabled veteran-owned business enterprises in contract and procurement activities. The commencement date for filing the annual report was extended to July 1, 2003, from July 1, 2002.

The **June 27, 2002 amendment** made one nonsubstantive change to the bill.

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- 3. The Board's current contracting and procurement outreach efforts are aimed at successfully meeting the Small Business and Disabled Veterans Participation Goals, which may also reach minority and women businesses.** The Board's Contract and Procurement Section continues to make an effort to meet the Disabled Veteran Business Enterprise goals, which are still in effect. The current approach to minorities and women is consistent with the direction provided by the Department of General Services, the control agency for contracting and procurement. The Board is successful in meeting both small business and Disabled Veteran Business Enterprise participation goals, and occasionally uses focused advertising seeking Disabled Veteran Business Enterprises or small businesses, but has not attempted to specifically target women or minorities since the issuance of EO W-172-98
- 4. The Board is also currently involved in recruitment and diversity efforts.** Those efforts include: (1) Campus recruitment and outreach activities; (2) Recruitment advertising; (3) Proposed enhancements to recruitment outreach efforts; (4) Statistical representation of manager and supervisor positions; (5) The Equal Employment Opportunity Officer's duties and responsibilities. Board statistics indicate an increase in the participation of individuals of Asian, Black, and Hispanic origin in the Board's Business Taxes Administrator series and Supervising Tax Auditor series, and an increase in the participation of individuals of Black, Filipino, and Hispanic origin in the Business Taxes Compliance Supervisor series.
- 5. Related legislation.** This bill is similar to SB 1161 (Polanco), which would establish a state policy that examination and employment information be broadly disseminated to all sectors of California's workforce and would require the State Personnel Board to develop a system to require state agencies, including the Board of Equalization, to disseminate state recruitment, examination, and employment information in accordance with that policy.

### **COST ESTIMATE**

This bill would increase the workload in the Board's contracting and procurement section by establishing new record keeping and reporting requirements related to contracting. The associated implementation requirements that would be issued by the Department of General Services are unknown, however, the cost impact of this bill is expected to be absorbable.

### **REVENUE ESTIMATE**

This bill would not impact the state's revenues.

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