

APPENDIX W

DIVERSE BUSINESS PARTICIPATION FOR NON-FEDERALLY FUNDED PROJECTS

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NOTE: For use in non-federally funded professional service contracts other than those involving design professionals administered and issued by the Pennsylvania Department of Transportation (Department).

I. GENERAL GOOD FAITH EFFORT REQUIREMENTS—

Section 303 of Title 74 of the Pennsylvania Consolidated Statutes, 74 Pa.C.S. §303, requires offerors on contracts funded pursuant to the provisions of Title 74 (Transportation) and 75 (Vehicle Code) administered and issued by the Department to make good faith efforts to solicit subcontractors that are Diverse Businesses (DBs) as defined in Section 303. The DB requirements of Section 303 apply to this contract.

Under the statute, offerors must make good faith efforts as set forth below to ensure that DBs have the opportunity to compete for and perform contracts. Do not discriminate on the basis of race, color, national origin, or sex in the award and performance of contracts. Failure to exert good faith efforts in the solicitation of subcontractors that are DBs may result in the offeror being declared ineligible for the contract.

Document and submit to the Department all good faith efforts to solicit subcontractors that are DBs as more fully described below. Offerors are encouraged to utilize and give consideration to second-tier or lower-tier subcontractors offering to utilize DBs in the selection and award of contracts.

Within 7 calendar days of being selected as the successful offeror, provide to the Department the name and business address of each subcontractors that is a DB and will provide the prime contractor with professional services in connection with the performance of the contract, all as set forth below.

If it becomes necessary to replace a subcontractor that is a DB at any time during the evaluation of a proposal or performance of awarded work the offeror or contractor, as appropriate, immediately notify the Department of the need to replace the DB. Include the reasons for the replacement in the notice.

Good faith efforts to solicit and use DBs are in addition to all other equal opportunity requirements of the contract.

Failure to comply with requirements of Section 303 or as specified may constitute a breach of contract and may result in imposition of sanctions as appropriate under Section 531 of the Procurement Code, 62 Pa.C.S. §531 (relating to debarment and suspension).

II. DEFINITIONS—

The following definitions apply for terms used in this specification:

- (a) **Disadvantaged Business.** A business that is owned or controlled by a majority of persons, not limited to members of minority groups, who are subject to racial or ethnic prejudice or cultural bias.
- (b) **Diverse Business (DB).** A disadvantaged business, minority-owned or women-owned business or service-disabled veteran-owned or veteran-owned small business that has been certified by a third-party certifying organization.
- (c) **Good Faith Effort Review Officer.** The Department's Executive Deputy Secretary for Administration or his/her designee, who reviews good faith efforts submitted by offerors.
- (d) **Minority-owned Business.** A business owned and controlled by a majority of individuals who are African Americans, Hispanic Americans, Native Americans, Asian Americans, Alaskans or Pacific Islanders.

- (e) **Professional Services.** An industry of infrequent, technical or unique functions performed by independent contractors or consultants whose occupation is the rendering of the services, including design professional services as defined in Section 901 of the Procurement Code, 62 Pa.C.S. §901 (relating to definitions); legal services; advertising or public relations services; accounting, auditing or actuarial services; security consulting services; computer and information technology services; and insurance underwriting services.
- (f) **Service-disabled Veteran.** Being in possession of a disability rating letter issued by the United States Department of Veterans Affairs or a disability determination from the United States Department of Defense or, if approved by the Department of General Services, a surviving spouse or permanent caregiver of a such a service-disabled veteran.
- (g) **Service-disabled Veteran-owned Small Business.** A business in the United States which is independently owned and controlled by a service-disabled veteran or veterans, not dominant in its field of operation, and employs 100 or fewer employees.
- (h) **Subcontractor.** Any individual, partnership, firm, or corporation entering into a contract with the contractor for work under the contract.
- (i) **Third-party Certifying Organization.** An organization that certifies a small business, minority-owned business, women-owned business or veteran-owned small business as a DB, including the National Minority Supplier Development Council; the Women’s Business Enterprise Council, the Small Business Administration; the Department of Veterans Affairs; and the Pennsylvania Unified Certification Program.
- (j) **Veteran.** An individual who served on active duty in the United States Armed Forces, including a reservist or member of the National Guard who was discharged or released from the service under honorable conditions, a reservist or member of the National Guard who completed an initial term of enlistment or qualifying period of service, and a reservist or member of the National Guard who was disabled in the line of duty during training.
- (k) **Veteran-owned Small Business.** A business in the United States which is independently owned and controlled by a veteran or veterans, is not dominant in its field of operation, and employs 100 or fewer employees.

III. ACTIONS REQUIRED BY THE OFFEROR AT THE PROPOSAL STAGE AND PRIOR TO AWARD—

- (a) **Submission Requirements.** The apparent successful offeror that will self-perform 100% of its contract is required to submit paper documentation by 3:00 P.M. prevailing local time within 7 calendar days after the selection is published. Submit paper documentation by email to minorityparticipation@pa.gov or by fax to (717) 705-1504. This paper documentation will become part of the contract.

The apparent successful offeror that will not self-perform 100% of its contract is required to demonstrate its good faith efforts to solicit subcontractors that are DBs by 3:00 P.M. prevailing local time on the seventh (7th) calendar day after the selection is published. Present good faith efforts by submitting paper documentation by email to minorityparticipation@pa.gov or by fax to (717) 705-1504. The good faith efforts will become part of the contract.

The paper documentation of good faith efforts must include the business name and business address of each DB. Supporting documentation must also include a DB acknowledgment for each DB providing services, proof of certification, and any explanation of good faith efforts the offeror would like the Department to consider. Any services to be performed by a DB are required to be readily identifiable to the contract.

When the seventh (7th) calendar day after the selection falls on a day that the Department offices are closed, submit the good faith efforts by 3:00 P.M. prevailing local time on the next business day.

Failure to electronically submit good faith efforts within 7 calendar days of the selection by the 3:00 P.M. deadline will result in rejection of the proposal. The next ranked offeror will be notified to electronically submit good faith efforts in the manner described above by 3:00 P.M. prevailing local time within 7 calendar days of the notification.

(b) Good Faith Efforts Requirements. Good faith efforts are demonstrated by seeking out DB participation in the project given all relevant circumstances. The following illustrate the types of efforts that may be taken, but they are not deemed to be exclusive or exhaustive. The Good Faith Review Officer may consider other factors and types of efforts included in an offeror's submission of good faith efforts if deemed relevant.

1. Efforts made to solicit through all reasonable and available means (e.g., use of the DB Directory, advertising and/or written notices) the interest of all certified DBs with the capability to perform the work of the contract. The offeror must provide written notification at least 5 calendar days before the time solicitations are due to allow the DBs to respond to the solicitation. The offeror must determine with certainty if DBs are interested by taking appropriate steps to follow up initial solicitations.
2. Efforts made to select portions of the work to be performed by DBs. This includes, where appropriate, breaking out contract work into economically feasible units to facilitate DB participation.
3. Efforts made to provide interested DBs with adequate information about the services required in a timely manner to assist them in responding to a solicitation.
4. Efforts made to negotiate in good faith with interested DBs. Offerors are encouraged to make a portion of the work available to DBs and to select those portions of the work needs consistent with the available DBs so as to facilitate participation of DBs. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBs that were considered; a description of the information provided regarding the required services selected for subcontracting; and evidence as to why additional contracts could not be reached for DBs to perform the services. An offeror using good business judgment would consider a number of factors in negotiating with subcontractors, including DB subcontractors, and would take a firm's capabilities into consideration as well as its own ability or desire to perform the services with its own work force.
5. Efforts made to thoroughly investigate DBs for qualification based on their capabilities. Offerors cannot reject or withhold solicitation of DBs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The DB's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of proposals in the offeror's efforts to meet the good faith efforts requirement.
6. Efforts to assist interested DBs in obtaining bonding, lines of credit, or insurance.
7. Efforts to assist interested DBs in obtaining necessary equipment, supplies, materials, or related assistance or services.
8. Efforts to effectively use existing databases and the resources of supportive services to assist in finding DBs.

IV. ACTIONS TO BE TAKEN BY THE DEPARTMENT BEFORE AWARD—

(a) Approval. If the apparent successful offeror submits acceptable good faith efforts by the deadline and meets all other contract requirements, the Department will approve the submission. The Good Faith

Review Officer will make the determination of whether the good faith efforts are acceptable. The offeror may be contacted for clarifications during the review.

- (b) **Conditional Approval.** The Department will issue a conditional approval of the good faith efforts to the apparent successful offeror if any DB is not included in the DB listing at the time the Department desires to award the contract.
- (c) **Rejection of Bid.** If the Good Faith Review Officer determines that the apparent successful offeror has failed to make acceptable good faith efforts, the proposal will be rejected and the apparent successful offeror will be notified of the rejection. The Department will then notify the next ranked offeror on the project to submit good faith efforts by 3:00 P.M. prevailing local time within 7 calendar days after notification. When the seventh (7th) calendar day after the notification falls on a day the Department offices are closed, submit good faith efforts by 3:00 P.M. prevailing local time on the next business day.

V. ACTIONS REQUIRED BY THE CONTRACTOR DURING PERFORMANCE OF THE SERVICES—

- (a) **DB Participation.** Continue good faith efforts for the life of the project.
- (b) **DB Subcontractor Approval.** Firms listed in the good faith efforts submission are not to commence work until they are approved.
- (c) **Conditional Approval Resolution.** Continually monitor conditional approval of DB subcontractors.
- (d) **Replacement or addition of DB.** If it becomes necessary to replace or add a subcontractor that is a DB at any time during performance of the services immediately notify the Department of the need to replace the DB. Include the reasons for the replacement in the notice. If a prime contractor who originally elected to self-perform all work subsequently decides to use a subcontractor for any work under the contract, the contractor must submit documentation of good faith efforts as to the work for which a subcontractor is obtained.
- (e) **Additional Work.** The obligation to make good faith efforts to solicit subcontractors that are DBs extends to additional work required for any service which is identified as to be performed by a DB.
- (f) **Payments.** Make payments to DB subcontractors in accordance with the prompt payment requirements of Chapter 39, Subchapter D of the Procurement Code, 62 Pa.C.S. §§3931 et seq. Performance of services by a DB subcontractor in accordance with the terms of the contract entitles the subcontractor to payment.
- (g) **Records and Reports.** Keep such project records as are necessary to perform the reporting function discussed below. These records can be used as documentation of good faith efforts. Design these records to indicate:
 - 1. The number of DB and non-DB subcontractors and the type of work or services performed on the project.
 - 2. The progress and efforts made in seeking out DB contractor organizations and individual DBs for services under the contract.
 - 3. Documentation of all correspondence, personal contacts, telephone calls, etc., to obtain the services of DBs. Submit reports, as required by the Department. Certify that the amounts were actually paid to the DB for services performed under the contract and keep cancelled checks on file in the home office to reflect payment for the specific contract and for inspection and audit by the Department. Track payment information and include the following:

- a. The number of contracts awarded (with approved subcontractors) to DBs, noting the type of service and amount of each contract executed with each firm and including the execution date of each contract.
- b. The amount paid to each DB during the month and the amount paid to date. If no payments are made to a DB during the month, enter a zero (\$0.00) payment.
- c. Paid invoices or a certification attesting to the actual amount paid to each firm, upon completion of the individual DB's work. In the event the actual amount paid is less than the award amount, provide a complete explanation of the difference.

Maintain all such records for a period of 3 years following acceptance of final payment. Make these records available for inspection by the Department.

VI. ACTIONS REQUIRED BY THE CONTRACTOR FOLLOWING COMPLETION OF THE SERVICES—

When requested, or within 30 days of the end of the contract submit a report to the Department summarizing the use of approved DB subcontractors.

Identify in the report the name of the subcontractor; the nature of the work or services performed by the subcontractor (i.e. prime, direct or tiered subcontractor; who certified the subcontractor as a DB; and the amount of their subcontract).

For direct and tiered subcontractors, provide the amount of the contract that is performed, managed and supervised by the DB's own forces. The value of the subcontracted work may be counted only if the DB's subcontractor is itself a DB; do not include services that a DB subcontracts to a non-DB firm.

VII. ACTIONS TO BE TAKEN BY THE DEPARTMENT FOLLOWING PERFORMANCE OF THE SERVICES—

Upon completion of the services the Department will review the actual DB participation and make a determination regarding the contractor's compliance with Section 303 and this policy. Sanctions may be imposed for noncompliance.