

EXHIBIT

DIVERSE BUSINESS PARTICIPATION FOR NON-FEDERALLY FUNDED PROJECTS

NOTE: For use in non-federally funded construction and professional service procurements (as defined by 74 Pa. C.S. § 303) administered and issued by the Pennsylvania Department of Transportation outside of its Engineering and Construction Management System (ECMS).

I. DEFINITIONS

The following definitions apply for terms used in this document:

1. **Bidder** means a bidder or entity submitting a quote in response to a RFQ that does not contain a technical review, or an IFB.
2. **Contractor** means an entity awarded a state-funded under Title 74 or Title 75 construction or professional services contract, which enters into a contract with PennDOT to perform work.
3. **Diverse Business (DB)** means the same definitions as stated in 74 Pa.C.S. § 303(b).
4. **DB Acknowledgement** means an acknowledgment contained in EO-387 and a letter from the DB subcontractor, stating the DB is committing to the work the bidder or offeror submitted they would perform on the EO-387.
5. **Good Faith Review Officer** means PennDOT's Deputy Secretary for Administration or designee, who reviews good faith efforts submitted by bidder or offerors.
6. **EO-387** means the Successful Offeror's or Bidder's Intent to Subcontract Statement, PennDOT form EO-387.
7. **IFB** means Invitation for Bid.
8. **Offeror** means an offeror submitting a Proposal in response to a best value RFQ that contains a Technical Review or an RFP.
9. **PennDOT** means the Commonwealth of Pennsylvania, Department of Transportation.
10. **Professional Services** means 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.

11. Proposal means a response to an RFP or an RFQ with a technical evaluation.

12. RFQ means Request for Quote.

13. RFP mean Request for Proposal.

14. Section 303 means Section 303 of Title 74 of the Pennsylvania Consolidated Statutes, 74 Pa. C.S. §303.

15. Subcontractor means any individual, partnership, firm, or corporation entering a contract with the contractor for work under the contract.

II. GENERAL GOOD FAITH EFFORT REQUIREMENTS

This provision applies to certain Bidders and Offerors for procurements that will result in a contract or contracts funded pursuant to the provisions of Title 74 (Transportation) or Title 75 (Vehicles). Section 303, requires certain Bidders and Offerors to make all good faith efforts to solicit subcontractors that are DBs. The DB requirements of Section 303 apply to the procurement associated with the contract to which the provision is attached.

Bidders and Offerors are encouraged to utilize and give consideration to DBs, including without limitation, second-tier or lower-tier subcontractors offering to utilize DBs in the selection and award of contracts. The Bidder or Offeror shall make good faith efforts to solicit and use DBs, in addition to all other equal opportunity requirements of the contract.

Under Section 303, Bidders and Offerors must make good faith efforts to ensure that DBs have the opportunity to compete for and perform on contracts. In doing so, Bidders and Offerors shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of contracts. Failure by a Bidder or Offeror to demonstrate good faith efforts in the solicitation of subcontractors that are DBs, or otherwise violating this provision, may result in the Bidder or Offeror being declared ineligible for the contract due to a lack of responsibility or a determination that its bid or Proposal is not responsive. A Contractor's failure to comply with the requirements of Section 303 or this provision 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).

In furtherance of compliance with Section 303, Bidders and Offerors shall document and submit, to PennDOT, documentation of all good faith efforts to solicit subcontractors that are DBs through completion of form EO-387 and supporting documentation, as more fully described below in Section III. Form EO-387 is incorporated by reference and is made part of the contract. A Bidder, Offeror, or Contractor shall be bound by its commitments contained in form EO-387. Form EO-387 must include the business name and business address of each subcontractor (if applicable) that will provide

services and any other documentation of good faith efforts must include the business name and business address of each DB that was solicited to provide services.

The Bidder or Offeror shall submit Form EO-387 and supporting documentation, which shall detail the efforts the Bidder or Offeror made to solicit DB firms or potential DB firms as subcontractors. This supporting documentation could be in the form of a spreadsheet and at least contain the business name, address, person contacted, phone number and dates the potential subcontractors were called and note the conversation that occurred, or email exchanges and contents of the conversation. Furthermore, the supporting documentation must also include a DB Acknowledgment for each DB providing services (on the EO-387), proof of certification, and any explanation of good faith efforts the Bidder or Offeror would like PennDOT to consider. Any services to be performed by a DB are required to be readily identifiable to the contract.

If it becomes necessary to replace a subcontractor that is a DB at any time, the Bidder or Offeror (during the procurement) or Contractor, shall immediately notify PennDOT of the need to replace the DB and include the reasons for the replacement in the notice and revisions to the EO-387, as more fully explained below, in this Exhibit.

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 a Bidder or 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, or written notices) the interest of all certified DBs with the capability to perform subcontracted work. The Bidder or Offeror must provide written notification at least five calendar days before the time solicitation responses are due to allow the DBs to respond to the solicitation. The Bidder or 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. Bidders and 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 business 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. A Bidder or 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. Bidders or 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 Bidder's or 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.

III. ACTIONS REQUIRED BY A BIDDER OR OFFEROR PRIOR TO CONTRACT AWARD

A. This Section Shall Only Apply to an RFP or an RFQ with a Technical Evaluation

All offerors shall complete form EO-387 (this form requests offerors to document good faith efforts to solicit DBs) and submit it with their Proposal. EO-387 is intended to document compliance with Section 303. The failure to complete the form and submit it at the time of Proposal may result in rejection of the Proposal as being non-responsive. PennDOT reserves the right to request any missing information or seek clarification necessary to ensure compliance.

If an Offeror is not 100% self-performing, documentation of good faith efforts must be submitted at the time of Proposal and include the business name and business address of each DB that was solicited. Supporting documentation must also include a DB Acknowledgment, as described in the EO-387, for each DB providing services, proof of certification for DBs, and any explanation of good faith efforts the Offeror would like PennDOT to consider. Any services to be performed by a DB are required to be readily identifiable to the project.

Within seven calendar days of being selected as the apparent successful Offeror, the apparent successful Offeror, **including Offerors who are 100% self-performing**, shall provide to the PennDOT any changes to its EO-387 submitted at the time of Proposal, which may reflect additions of a subcontractor. If no changes to the EO-387 are submitted within seven days of being selected, the EO-387 submitted at the time of Proposal will be considered the final, binding documentation required to be submitted to PennDOT under Section 303. The final EO-387 documentation will become part of the contract.

Note: When the seventh calendar day after notice falls on a day that PennDOT offices are closed, the Offeror shall submit its revised EO-387 and documentation of good faith efforts on or before 3:00 p.m. EST time the next business day. The failure to provide the revised EO-387 within seven calendar days of the notice of being the apparent successful Offeror, by the 3:00 p.m. deadline, will result in rejection of the Proposal.

If it becomes necessary to replace a subcontractor that is a DB at any time during the evaluation of a Proposal, the Offeror shall immediately notify PennDOT of the need to replace the DB and include the reasons for the replacement in the notice and revisions to the EO-387. The revised EO-387 submitted under these circumstances shall replace the EO-387 submitted at the time of Proposal. After immediate notification to PennDOT of the need to replace or add a DB subcontractor, the Offeror shall seek PennDOT approval of an appropriate replacement or addition.

B. This Section Shall Only Apply When: (1) an RFQ Does NOT contain a Technical Review or (2) an IFB

A Bidder shall document all good faith efforts to solicit subcontractors that are DBs during the bidding process and provide that information when submitting EO-387 to PennDOT.

The apparent successful Bidder that will self-perform 100% of its contract is required to submit, to PennDOT's Issuing Officer, the EO-387 within seven calendar days, by 3:00 p.m. after receiving notice that it is the apparent successful Bidder. This documentation will become part of the contract.

The apparent successful Bidder that will NOT self-perform 100% of its contract is required to demonstrate its good faith efforts to solicit subcontractors that are DBs and submit, to PennDOT's Issuing Officer, the EO-387 within seven calendar days, by 3:00 p.m., after receiving notice that it is the apparent successful Bidder. This documentation will become part of the contract.

The documentation of good faith efforts must include the business name and business address of each DB. Additional documentation must also include a DB Acknowledgment for each DB providing services, proof of certification for DBs, and any explanation of good faith efforts the Bidder would like PennDOT to consider. Any services to be performed by a DB are required to be readily identifiable to the project.

Note: When the seventh calendar day after notice falls on a day that PennDOT offices are closed, the Bidder shall submit its EO-387 and documentation of good faith efforts on or before 3:00 p.m. EST time the next business day. The failure to electronically submit the EO-387 and good faith efforts within seven calendar days of the notice of being the apparent successful Bidder, by the 3:00 p.m. deadline, will result in rejection of the bid. The apparent next lowest Bidder will be notified by email to submit its EO-387 and good faith efforts in the manner described above by 3:00 P.M. prevailing local time within seven calendar days notification.

IV. ACTIONS TO BE TAKEN BY PENNDOT BEFORE AWARD

- A. **Approval.** If an Offeror or apparent successful Bidder submits acceptable good faith efforts documentation and EO-387 by the deadlines and meets all other contract requirements, PennDOT will approve the submission of the EO-387. The Good Faith Review Officer will make the determination of whether the good faith efforts are acceptable. The apparent successful Offeror or Bidder may be contacted for clarifications during the review.
- B. **Conditional Approval.** PennDOT will issue a conditional approval of the good faith efforts to the apparent successful Offeror or Bidder if any DB has not been verified as a DB at the time PennDOT desires to award the contract.
- C. **Rejection of Proposal or Bid.** If the Good Faith Review Officer determines that the Offeror or apparent successful Bidder has failed to make acceptable good faith efforts, the bid or Proposal will be rejected, and the Offeror or apparent successful Bidder will be notified of the rejection. PennDOT will then notify the next ranked Offeror or Bidder to carry out Section III above.

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

- A. **DB Participation.** The Contractor shall continue good faith efforts for the life of the project.
- B. **DB Subcontractor Approval.** DBs listed in the good faith efforts submission, EO-387, are not to commence work until they are approved by PennDOT.
- C. **Conditional Approval Resolution.** The Contractor shall 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, the Contractor shall immediately notify PennDOT of the need to replace the DB. The Contractor shall include the reasons for the replacement in the notice and revisions to the EO-387. If a prime contractor who originally elected to 100% 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, proof of certification and submit a revised EO-387. After immediate notification to PennDOT of the need to replace or add a DB subcontractor, the Contractor shall have 14 calendar days to seek PennDOT approval of an appropriate replacement or addition.
- 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.** The Contractor shall 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. The Contractor shall keep project records as are necessary to perform the reporting function discussed in this Exhibit.

1. These records can be used as documentation of good faith efforts. The Contractor shall design these records to indicate:
 - i. the number of DB and non-DB subcontractors and the type of work or services performed on the project;
 - ii. the progress and efforts made in seeking out DB contractor organizations and individual DBs for services under the contract; and
 - iii. documentation of all correspondence, personal contacts, telephone calls, etc., to obtain the services of DBs.
2. Furthermore, the Contractor shall submit reports monthly using the EO-402DB Monthly Diverse Business Subcontracting Status Report. The Contractor shall submit the completed EO-402DB report via email to pd-non-ecms-db@pa.gov. The completed EO-402DB report is due within five business days after the last day of the month. The Contractor shall 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 PennDOT. PennDOT monitors DB participation through the contract utilizing the Contractor's submittal of the EO-402DB. The Contractor shall track payment information and include the following:
 - i. 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;
 - ii. 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; and
 - iii. 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 DB percentage commitment identified in the Contractor's final EO-387, the Contractor shall provide a complete explanation of the difference.
3. The Contractor shall maintain all such records as discussed herein for a period of three years following acceptance of final payment and shall make these records available for inspection by PennDOT during normal business hours.

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

When requested, or within thirty days of the end of the contract, the Contractor shall submit a report to PennDOT summarizing the use of approved DB subcontractors.

The Contractor shall identify in the report the name of the subcontractor, the nature of the work or services performed by the subcontractor (i.e., direct - hired directly by a company or individual for a project, or tiered subcontractor - contractor selected by the primary subcontractor to perform portion

or all work related to contract or project.), who certified the subcontractor as a DB, and the amount of their subcontract.

For direct and tiered subcontractors, the Contractor shall 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; the services that a DB subcontracts to a non-DB firm will not be included.

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

Upon completion of the services provided under contract with PennDOT, PennDOT will review the actual DB participation and make a determination regarding the Contractor's compliance with Section 303 and this provision. PennDOT may impose sanctions for noncompliance.