


MEMORANDUM

Subject: Bureau of Procurement Policy Directive 2020-1, Revised April 20, 2022

To: Agency Liaisons
Deputy Secretaries for Administration
Procurement Directors
Procurement Policy Council
OGC Transactions Practice Group

Cc: Kerry Kirkland, Deputy Secretary for Diversity, Inclusion and Small Business Opportunities
Robert A. Carr, Deputy Secretary for Public Works
Kenneth J. Hess, Deputy Secretary for Procurement
Janice Pistor, Chief Procurement Officer
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From: Curtis M. Topper 
Secretary of General Services

Date: April 20, 2022

Through Executive Order 2015-11, Diversity, Inclusion and Small Business Opportunities in Commonwealth Procurement and in Pennsylvania's Economy, Governor Tom Wolf recognized the need for goal setting and results management to ensure and increase diversity, inclusion and small business opportunities in Commonwealth procurement contracts. Accordingly, the Commonwealth completed its first ever statewide Disparity Study in 2018 to determine whether there is a disparity between the availability of Small Diverse Businesses (SDBs) and Veteran Business Enterprises (VBEs) and the Commonwealth's utilization of SDBs and VBEs in Commonwealth procurement contracts.

The Disparity Study demonstrated that SDBs and VBEs were not receiving Commonwealth contracting dollars in the amount that would be expected based upon their availability to perform the work the Commonwealth requires. The magnitude of the gap between their availability to perform work, and how much they were actually utilized, created an inference that they were being discriminated against in Commonwealth contracting procedures. Therefore, the Department has created a goal setting program with an overall aspirational target of achieving 26.3 percent of state contract spending with SDBs and 4.6 percent of state contract spending with VBEs, as supported and recommended by the Disparity Study.

The goal setting program is intended to ensure the proper utilization of SDBs and VBEs in Commonwealth contracting. The goal setting program will require the setting of narrowly-tailored, contract-specific goals for all supplies and services procurements of \$250,000 and above, and all design professional and construction procurements of \$300,000 and above (which increased to \$400,000 effective July 1, 2020). The Department, in conjunction with the Issuing

Office, will calculate an SDB goal and a separate VBE goal for each contract based upon factors such as the scope of work, geographic location for the work, the availability of SDB or VBE firms, and SDB and VBE utilization on prior similar contracts. Bidders or offerors must agree to meet the contract specific goals or they must demonstrate they made good faith efforts towards meeting the contract specific goals and receive a waiver from the Issuing Office based upon the recommendation from the Department of General Services' Bureau of Diversity, Inclusion and Small Business Opportunities (BDISBO).

The goal setting program will replace the SDB/SB scoring that had been in use in best value procurements in the Commonwealth, returning the 20% of evaluation points to be re-allocated between technical and cost scoring. It will also replace the good faith efforts program for low bid construction projects. SDB and VBE participation will no longer be an optional part of Commonwealth contracting – all bidders or offerors must comply with the goals or receive a waiver in order to be deemed responsive and eligible for contract award.

Goal setting is a better methodology than scoring for SDB/SB participation because it will allow the Commonwealth to award contracts based on the quality and cost of supplies and services while still ensuring that SDBs and VBEs receive an equitable portion of Commonwealth spend. Also, because goal setting can be applied to both low bid and best value procurements, SDBs and VBEs will have significantly more opportunities for participation in areas in which they had historically not received any consideration. Finally, a narrowly-tailored goal setting program supported by the results of a disparity study has been recognized as the foremost constitutional method to ensure the proper utilization of disadvantaged businesses in government contracting.

Therefore, pursuant to Sections 301(a) and 311 of the Commonwealth Procurement Code (62 Pa.C.S. §§301(a), 311), I find and determine as a policy matter that goal setting is critical to ensuring the fair treatment of SDB and VBE businesses in Commonwealth contracting.

Accordingly, effective June 15, 2020, I direct Public Works to implement goal setting on all construction and design professional procurements that meet or exceed \$300,000 (\$400,000 effective July 1, 2020). Additionally, effective August 17, 2020, I direct the Bureau of Procurement and all Agencies to implement goal setting on all procurements that meet or exceed \$250,000.

In addition to the goal setting program for disadvantaged businesses, I also direct the Bureau of Procurement and all Agencies to use the Small Business Reserve program as a race and gender neutral measure to set aside procurements for award only to Small Businesses (SBs), whenever applicable and appropriate, with the goal of achieving at least 15 percent of contract spending with PA-certified small businesses.

I also adopt the attached revised BDISBO Policy, which contains the details of the goal setting program and changes to the existing Internal Guidelines for Small Business Self-Certification and Small Diverse Business Verification – Statement of Policy at 4 Pa. Code, Subchapter D, Sections 58.301-306 and Contract Compliance – Construction Contracts – Statement of Policy at 4 Pa. Code, Subchapter B, Section 68.102. These changes are necessary to support the goal setting program.

In order to simplify procurements and eliminate confusion, I have increased the threshold for agencies to use RFPs and best value RFQs (“RF(x)”) as the default procurement method to purchases of \$250,000 and over. We communicated this change to the agencies effective January 27, 2020. All Agencies are therefore directed to utilize an RF(x) process to conduct competitive procurements for supplies and services of \$250,000 and over unless a BOP-125 Request to Use Competitive Sealed Bidding (IFB) Method of Procurement for Supplies and Services of \$250,000 and over is approved by the Chief Procurement Officer. This revised Policy Directive 2020-1 therefore supersedes BOP Policy Directive 2018-1 and BOP Policy Directive 2018-2.

In addition, this revised Policy Directive 2020-1 and the attached revised BDISBO Policy amends the following sections of the DGS Procurement Handbook and related forms and processes, which will be revised to implement this change:

1. Part 1, Chapter 2: The definition of “Small Business” and “Small Diverse Business” are replaced with those definitions in the revised BDISBO Policy. A definition of Veteran Business Enterprise is also added.
2. Part 1, Chapter 3(H): The Bureau of Small Business Opportunities (currently BDISBO) will be setting an SDB participation goal and a VBE participation goal with the assistance of the Issuing Office, will review the SDB and/or VBE participation submittals and required documents, and will evaluate any good faith efforts waiver requests with the Issuing Office. BDISBO will not conduct any scoring activities.
3. Part 1, Chapter 6 (A)(2): IFBs will include contract specific goals for SDB and VBE participation and will follow the goal setting program in the revised BDISBO policy.
4. Part 1, Chapter 6 (B): BDISBO will not conduct any scoring of SDB and SB Participation submittals. They will instead provide goal setting and submittal review activities as detailed in paragraph 2 above.
5. Part 1, Chapter 6: Competitive Sealed Bidding for procurements will only be the usual method of contractor selection for procurements under \$250,000. For procurements of \$250,000 and over, Agencies shall utilize a Competitive Sealed Proposal or RF(x) process to conduct competitive procurements for supplies and services unless a BOP-125 Request to Use Competitive Sealed Bidding(IFB) Method of Procurement for Supplies and Services of \$250,000 and over is approved by the Chief Procurement Officer.
6. Part 1, Chapter 21: The definitions of “Small Business” and “Small Diverse Business” are replaced by the definitions in the attached revised BDISBO policy. All references to the Small Business Procurement Initiatives are replaced by the Small Business Reserve Program in the revised BDISBO policy, and all references to the Small Diverse Business Procurement Program are replaced by the goal setting program set forth in the revised BDISBO policy.

7. Part II, Chapter 7: Because the new goal setting policy fully replaces the former SDB and SB participation scoring, the 20% (or 200) of total evaluation points are not allocated towards SDB (and SB) participation. The scoring weights for RFPs for services will be 65% technical criterion and 35% cost criterion. The scoring weights for RFPs for materials with services and materials only will be 30% technical criterion and 70% cost criterion.
8. Part II, Chapter 7(b)(2)(j), (10)(a): BDISBO will not conduct any scoring of SDB and SB Participation submittals. They will instead provide goal setting and submittal review activities as detailed in paragraph 2 above.
9. Part IV, Chapter 9: The Small Business Reserve program in the revised BDISBO Policy supersedes the Small Business Construction Program.
10. Part IV, Chapter 14: The definition of “Small Business” and “Small Diverse Business” are replaced with those definitions in the revised BDISBO policy. The Department will not use the Small Diverse Business Program for Low Bid Capital Construction Projects set forth in Subsection (C), but will instead use the goal setting program set forth in the revised BDISBO policy.

In the event of a conflict between the revised BDISBO policy and provisions of the Procurement Handbook, the revised BDISBO policy shall take precedence.

Bureau of Diversity, Inclusion and Small Business Opportunities Policy
Revised April 20, 2022

I. Purpose.

It is the Policy of the Commonwealth of Pennsylvania to prevent discrimination against and ensure the proper utilization of self-certified Small Businesses (SBs) and verified Small Diverse Businesses (SDBs) and Veteran Business Enterprises (VBEs) in state contracting, and establishes that:

- (a) The Secretary of General Services shall establish the SDB and VBE aspirational targets for the Commonwealth. The Secretary will set one aspirational target for those SDBs that are minority business enterprises, woman business enterprises, disabled-owned business enterprises, LGBT business enterprises, and service-disabled veteran-owned small business enterprises. The Secretary will set a separate aspirational target for those VBEs that are veteran-owned small business enterprises and service-disabled veteran-owned small business enterprises, which shall not be less than 3% participation by VBEs, and shall apply to the total value of all contracts available to Small Businesses in each fiscal year. Both overall aspirational SDB and VBE aspirational targets shall be reviewed and adjusted every five years upon completion of a disparity study and shall be published on the Department of General Service's website at www.dgs.pa.gov.
- (b) The SDB and VBE aspirational targets set forth in subsection (a) apply until different SDB and VBE aspirational targets are established in accordance with this policy.
- (c) All Commonwealth agencies under the governor's jurisdiction are required to identify and target fifteen percent (15%) of their agency contract spend for Small Business Reserve (SBR) (formerly referred to as Small Business Procurement Initiative) procurements issued pursuant to Executive Order 2011-09, and pursuant to direction provided by the Department. Independent agencies are also encouraged to participate. Incidental spend, i.e., spend to Department self-certified SBs outside of SBR procurements, shall be counted toward an agency's targeted 15% SBR program spend.
- (d) Each Agency shall:
 - (1) To the maximum extent feasible, use race- and gender-neutral measures in meeting the SDB aspirational target under subsection (a); and
 - (2) Structure its procurement procedures to achieve both the SDB and VBE aspirational targets based upon the Agency's total dollar value of all procurement payments made directly or indirectly to Department-verified SDBs and VBEs.

II. Scope.

- (a) Except as otherwise provided in subsections (b), (c), and (d), this policy applies to every procurement of supplies, services, construction, and design professional services subject to the Commonwealth Procurement Code (62 Pa.C.S. §§ 101-2311).
- (b) SDB and VBE participation goals are not required to be set (but may be set) for:
 - (1) Procurements for non-capital construction or capital construction contracts, both having an estimated value of less than \$400,000;
 - (2) Procurements for design professional services having an estimated value of less than \$400,000;
 - (3) Procurements for supplies or services having an estimated value of less than \$250,000;
 - (4) Procurements issued under the Small Business Reserve Program;
 - (5) Sole source procurements, emergency procurements, or procurements of supplies manufactured and services performed by persons with disabilities issued under Sections 515, 516 or 520 the Procurement Code;
 - (6) Purchases of products manufactured and services performed by inmates of Department of Corrections state correctional institutions by Pennsylvania Correctional Industries pursuant to 61 Pa.C.S. § 3127;
 - (7) Procurements where there are no sub-contractable items of work, as determined by the Department of General Services' Bureau of Diversity, Inclusion and Small Business Opportunities (BDISBO);
 - (8) Contracts between agencies or between the Commonwealth and its political subdivisions or other governments entered into in accordance with Chapter 19 of the Commonwealth Procurement Code, relating to intergovernmental relations. 62 Pa.C.S. §§ 1901-1913. Nothing in this policy shall prevent any Commonwealth Agency or political subdivision from complying with the terms and conditions of any grant, gift, bequest or cooperative agreement; or
 - (9) Procurements designated as a contract to be made without any participation goals as set forth in II(c) below.
- (c) The Commonwealth's Deputy Secretary of Diversity, Inclusion and Small Business Opportunities, or their designee, and the Deputy Secretary for Procurement or the Deputy Secretary for Public Works, as appropriate, or their designee(s) may waive any of the provisions of Sections XIII, XIV, and XV of this policy for a procurement in which the public interest cannot reasonably accommodate use of those procedures. Such a waiver must be in writing and included within the contract file.

- (d) The Commonwealth's Deputy Secretary of Diversity, Inclusion and Small Business Opportunities, or their designee, in their sole discretion, may waive any of the provisions of Sections XIII, XIV, and XV of this policy for procurements issued by an Agency whose purchasing data was not included within the most recently issued Disparity Study. If such a waiver is provided, the Commonwealth's Deputy Secretary of Diversity, Inclusion and Small Business Opportunities or their designee may direct the State Affiliated Entity to utilize race- and gender-neutral measures or other procurement procedures in an effort to achieve both the SDB and VBE aspirational targets.

III. Definitions.

The following words and terms, when used in this policy, have the following meanings, unless the context clearly indicates otherwise:

Agency – An executive agency, an independent agency, and a State-affiliated entity.

Agency Liaison – An Agency employee reporting directly to a Secretary, Deputy Secretary, Agency head or equivalent responsible for assisting the department on issues related to the SDB and VBE Programs.

BDISBO – The Department of General Services' Bureau of Diversity, Inclusion and Small Business Opportunities.

Bid or proposal – For purposes of this policy, the document(s) and information submitted in response to a solicitation, including but not limited to a bid, proposal, quote, or application.

Bidder or offeror – For purposes of this policy, the person submitting document(s) and information in response to a solicitation, including but not limited to a bidder, offeror, or applicant.

Commercially Useful Function – The performance of a distinct element of work required for the Contract, with the requisite skill and expertise.

Contract Specific Goal – A goal established by the Department in collaboration with the purchasing agency for use of SDBs or VBEs on a specific procurement.

Contractor – a person that has entered into a contract with a Commonwealth agency. For purposes of this policy, this term includes but is not limited to a design professional.

Department – The Department of General Services of the Commonwealth.

Disability – Physical or mental impairment, or both, that substantially limits one or more major life activities and can be demonstrated by appropriate documentation from a licensed vocational rehabilitation specialist, an Agency that issues disability benefits or a licensed medical professional.

Disparity study – A study completed to determine whether there is a disparity between the availability of Small Diverse Businesses and Veteran Business Enterprises and the Commonwealth’s utilization of Small Diverse Businesses and Veteran Business Enterprises.

DOBE – Disability-Owned Business Enterprise – A small for-profit business which is at least 51% owned and controlled by one or more persons with disabilities. In the case of a corporation, at least 51% of the stock shall be owned by one or more persons with disabilities.

Good Faith Efforts – Efforts by a bidder or offeror to obtain participation by SDBs or VBEs in order to meet a Contract Specific Goal.

Good Faith Effort Waiver Request – documentation submitted by a bidder or offeror requesting a full or partial waiver of the SDB or VBE Contract Specific Goals demonstrating the Good Faith Efforts taken by the bidder or offeror to achieve the Contract Specific Goals.

Letter of Commitment – a document signed by both a bidder or offeror and SDB or VBE subcontractor, supplier, or manufacturer acknowledging an understanding that the bidder or offeror, if awarded the contract, will utilize the SDB or VBE in the percentage and for the work set forth within the document. Unless otherwise specified within the solicitation, a Letter of Commitment must identify, at a minimum:

- (i) The fixed numerical percentage of the commitment made to the SDB or VBE subcontractor, manufacturer, or supplier based upon the Commonwealth spend or the total dollar value of the contract revenue received by the prime; or, if specified by the solicitation, the total dollar value of the commitment made to the SDB or VBE subcontractor, manufacturer, or supplier; and
- (ii) A description of the services or supplies the SDB or VBE will provide, that are consistent with services or supplies the SDB or VBE is certified to provide; and
- (iii) The timeframe during the original contract duration or the initial contract term and any extensions, options and renewals the SDB or VBE will perform or provide the services and/or supplies; and
- (iv) The name and telephone number of the bidder or offeror’s point of contact for the SDB or VBE participation; and
- (v) The name and telephone number of the primary contact person for the SDB or VBE.

LGBTBE – LGBT Business Enterprise – A small for-profit business which is at least 51% owned and controlled by one or more lesbian, gay, bisexual or transgender (LGBT) persons. In the case of a corporation, at least 51% of the stock must be owned by one or more LGBT persons.

Manufacturer – A firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles or equipment required under the contract and of the general character described by the specifications.

MBE – Minority Business Enterprise – A small for-profit business which is at least 51% owned and controlled by one or more minorities. In the case of a corporation, at least 51% of the stock must be owned by one or more minorities.

Nonstocking supplier – A firm that does not carry inventory but orders materials from a manufacturer, manufacturer’s representative or a stocking supplier. For a nonstocking supplier to receive credit, the nonstocking supplier shall perform a useful business function by engaging in meaningful work (that is, negotiating price; determining quality and quantity; ordering materials; and paying for the materials). Industry practices and other relevant factors will be considered.

Participation Submittal – a submittal that must be submitted by bidders or offerors for procurements with a Contract Specific Goal. The bidder or offeror must indicate on the Participation Submittal whether the bidder or offeror intends to meet the Contract Specific Goal or is requesting a Good Faith Effort Waiver, in whole or in part, of the Contract Specific Goal. A procurement may require an SDB Participation Submittal, a VBE Participation Submittal, or both.

Permanent caregiver – The spouse, or an individual who is at least 18 years of age, who is legally designated, in writing, to undertake responsibility for managing the well-being of the service-disabled veteran with permanent and severe disability. See 13 CFR 125.8(c) (relating to what definitions are important in the Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) Program).

Race and Gender-Neutral Measures – Methodologies that are or can be used to assist all businesses, notwithstanding the social, economic, racial, or gender composition of those who own or control the business. Race and Gender-Neutral Measures include but are not limited to the following:

- (i) Any outreach efforts to advise SBs, SDBs, and VBEs of contracting opportunities within the Commonwealth in accordance with subsections (ii) – (iv) below;
- (ii) Agencies periodically conducting meetings with SBs, SDBs, and VBEs, as appropriate, to advise of upcoming Agency procurement opportunities, which shall be coordinated with BDISBO and other agencies that make similar procurements;
- (iii) BDISBO periodically convening seminars that include SBs, SDBs, and VBEs and appropriate personnel of the various agencies, which shall include topics of interest to prospective or current SBs, SDBs, and VBEs such as Commonwealth procurement procedures, SB self-certification and SDB and VBE verification, anticipated Commonwealth procurements, and technical assistance to SBs, SDBs, and VBEs relating to the procurement process;
- (iv) Technical Assistance and Business Development programs available to SBs, SDBs, and VBEs;

- (v) Contract Specific Goals for use of VBEs;
- (vi) SBR procurements, which shall be made in accordance with Section XII of this policy and do not require Contract Specific Goals; and
- (vii) An evaluation of each potential contract to determine and, if practicable, abate any impediments to full and open competition with an emphasis on removing impediments that affect SDBs.

Secretary – The Secretary of the Department.

SDVBE – Service-Disabled Veteran Business Enterprise or Service-Disabled Veteran-Owned Small Business Enterprise – A small for-profit business which is at least 51% owned and controlled by one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of a veteran). See 13 CFR 125.10(a) (relating to who does SBA consider to control an SDVO SBC).

SB – Small Business –

(i) A for-profit business in the United States which is independently owned, is not dominant in its field of operation, employs no more than the maximum number of employees established by 62 Pa.C.S. § 2102 (relating to definitions) and earns less than \$38.5 million in gross annual revenues.

(ii) The Department reserves the right to alter revenue and employee limits in the future, and any changes will appear in the Department's guidelines at www.smallbusiness.pa.gov.

SBR – Small Business Reserve – a procurement issued pursuant to the Small Business Procurement Initiative set forth in Executive Order 2011-09 to promote the prosperity and economic growth of all small businesses to enable them to successfully compete for commonwealth contracts on a level playing field.

SDB – Small Diverse Business – For purposes of this policy, this designation includes MBEs, WBEs, DOBEs, LGBTBEs, SDVBEs, and other disadvantaged businesses that have been so certified by one of the Department's approved third-party certifying entities.

SDB Program – The Commonwealth's Small Diverse Business Program, which shall include the Public Works Participation Program.

Stocking supplier – A firm that owns, operates or maintains a store, warehouse or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock and regularly sold or leased to the public in the usual course of business.

Utilization Schedule – A document, submitted by a bidder or offeror as part of a bid or proposal, in which a Bidder or Offeror commits to a level of SDB or VBE participation for a

contract, identifies the associated responsibilities and scope(s) of work, and identifies the dollar value and/or percentages of the work to be performed.

VBE – Veteran Business Enterprise – For purposes of this policy, this designation includes Veteran-Owned Small Business Enterprises and Service-Disabled Veteran-Owned Small Business Enterprises.

VBE Program – The Commonwealth’s Veteran Business Enterprise Program.

Veteran-Owned Small Business Enterprise – A small for-profit business which is at least 51% owned and controlled by one or more veterans. In the case of a corporation, at least 51% of the stock must be owned by one or more veterans.

Veteran – One of the following:

(i) A person who served on active duty in the United States Armed Forces, including the Reserve and National Guard, who was discharged or released from service under honorable conditions.

(ii) A Reservist or member of the National Guard who completed an initial term of enlistment or qualifying period of service.

(iii) A Reservist or member of the National Guard who was disabled in the line of duty during training.

WBE – Woman Business Enterprise – A small for-profit business which is at least 51% owned and controlled by one or more women. In the case of a corporation, at least 51% of the stock must be owned by one or more women.

IV. Self-certification of eligible Small Businesses.

(a) *Online self-certification for SBs.* To participate in the SBR and the SDB or VBE Program, small businesses shall self-certify through an online application process outlined at www.dgs.pa.gov. The SB self-certification enables eligible small businesses to compete for prime contracting opportunities with the Commonwealth against other eligible small businesses. Upon successful completion of the self-certification process, the small business will be issued a certificate. The self-certification will remain in effect for 2 years. The SB shall recertify every two years to maintain its status as a self-certified SB.

(b) *Eligibility requirements.*

(1) A small business shall meet the following requirements to self-certify as a Small Business with the Department:

(i) The business must be a for-profit United States business that is independently owned. Factors that determine independent ownership include the date the business

was established, together with its relationship with other firms in terms of operational and managerial control, personnel, facilities, equipment, financial support, [and] exclusive dealings, and the extent to which resources are shared with other firms. A business that is a subsidiary of another business or is owned principally by another business entity or by a trust (including an employee stock ownership plan [ESOP]) does not meet this requirement. However, if a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, in turn owns and controls an operating subsidiary, the subsidiary may be considered independently owned if it otherwise meets all SB eligibility requirements. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

- (ii) The business may not be dominant in its field of operation.
 - (iii) The business may not employ more than 100 full-time equivalent employees.
 - (iv) The business shall earn less than the amounts designated by the Department, that is, a three-year average of \$38.5 million in gross annual revenues.
- (2) The Department reserves the right to alter employee numbers and revenue limits. Changes will appear in the Department's guidelines at www.smallbusiness.pa.gov.
- (c) *Disclaimer.* The Department's self-certification process, as set forth in this Section, is limited to SB status and should not be construed as an endorsement of the SB expertise.
 - (d) *Program auditing.* The Department reserves the right to audit SB status either randomly or based on allegations of non-eligibility. In addition to the decertification process set forth below, and subject to the provisions of the Unsworn Falsifications to Authorities Act, 18 P.S. § 4904, anyone providing false information to the Commonwealth of Pennsylvania in connection with a contract under the SBR program may be subject to any or all of the following: debarment or suspension; revocation of any Small Business, Small Diverse Business, or Veteran Business Enterprise status; exclusion from the SBR; a determination that the bidder is not responsible under the Contractor Responsibility Program; a determination that a contract entered into is void or voidable under Section 1711.2 of the Commonwealth Procurement Code, 62 Pa. C.S. § 1711.2; liability for any costs incurred by the Commonwealth in investigating potential violations relating to the validity of information submitted during the Small Business self-certification process; and criminal prosecution or other legal action permitted by law and deemed necessary to protect the Commonwealth's interest and ensure compliance with the laws of the Commonwealth.

V. Verification of eligible Small Diverse Businesses or Veteran Business Enterprises.

- (a) *Prerequisite.* To complete the verification process for consideration as an SDB or VBE, the business shall, as a prerequisite, complete the self-certification process in Section IV (relating to self-certification of eligible SBs) and shall hold the resultant certificate in support of the verification process in this Section.
- (b) *Verification of SDB status.* The Department will verify MBE, WBE, DOBE, LGBTBE, SDVBE, or disadvantaged business status through the verification of certification from one or more of the following approved third-party entities:
- (1) The Unified Certification Program.
 - (2) The National Minority Supplier Development Council.
 - (3) The Women's Business Enterprise National Council.
 - (4) Disability:IN.
 - (5) The National LGBT Chamber of Commerce.
 - (6) The United States Small Business Administration 8(a) Program.
 - (7) Additional entities as identified, approved and publicly posted by the Department on its web site at <https://www.dgs.pa.gov/Small%20Diverse%20Business%20Program/Small-Diverse-Business-Verification/Pages/default.aspx>.
- (c) *Verification of VBE status.* The Department will verify VBE status through the verification of certification from one or more of the following approved third-party entities:
- (1) The United States Department of Veteran Affairs through the <https://www.vetbiz.va.gov/business> database.
 - (2) Additional entities as identified, approved and publicly posted by the Department on its web site at <https://www.dgs.pa.gov/Small%20Diverse%20Business%20Program/Small-Diverse-Business-Verification/Pages/default.aspx>.
- (d) *Documentation.* Applicants shall submit proof of active certifications from approved third parties in accordance with the requirements outlined on the Department's web site. The Department reserves the right to request additional information and conduct further review or auditing as needed.
- (e) *Single expiration date.* Regardless of the expiration date of the approved third-party certification, the expiration date of the Department verification as an SDB or VBE is the

same as the SB self-certification expiration date. To maintain status as an SDB or VBE, a firm shall provide an active third-party certification upon successfully recertifying as a SB.

- (f) *Disclaimer.* The Department's verification process, as set forth in this Section, is limited to SDB or VBE status and should not be construed as an endorsement of SDB or VBE expertise.

VI. Voluntary withdrawal of Small Business self-certification or Small Diverse Business or Veteran Business Enterprise verification.

- (a) A SB, SDB, or VBE may voluntarily withdraw its self-certification or verification at any time for any reason.
- (b) The date of withdrawal is the date on which the Department receives written notice from the SB, SDB, or VBE of its intent to withdraw.
- (c) As of the date of withdrawal:
 - (1) The SB, SDB, or VBE will not receive notifications related to or be able to bid on an SBR procurement.
 - (2) The SB, SDB, or VBE will not receive notifications related to the SDB or VBE programs or be considered an active, verified SDB or VBE.
- (d) A SB, SDB, or VBE may return to self-certify or verify, or both, its status at any time so long as it still meets the eligibility requirements associated thereupon.
- (e) If the SDB or VBE was included on a prime contractor's Utilization Schedule prior to its voluntary withdrawal or expiration of its SDB or VBE status, the prime contractor will still receive credit for utilizing the former SDB or VBE toward its SDB or VBE Contract Specific Goal as applicable.

VII. Decertification of Small Business, Small Diverse Business, or Veteran Business Enterprise status.

- (a) The Department will decertify businesses from certified SB status or verified SDB or VBE status, or all such statuses, for the following reasons:
 - (1) The business received certification by knowingly submitting false and misleading information;
 - (2) The business knowingly allowed the misuse of its certification status;
 - (3) The business failed to cooperate with or respond to a request for information from the Department or another Commonwealth Agency or official;

- (4) The alternate certifying entity decertifies the business;
 - (5) The Department issues a written notice of default and/or notice of termination pursuant to the terms and conditions of a contract issued as the result of an SBR procurement;
or
 - (6) For any other good cause as determined by the Department.
- (b) The Department reserves the right to consider other causes that impact business status to be sufficient to warrant decertification.
 - (c) By certified mail, the Department will send the business a Notice of Proposal to Decertify that:
 - (1) Specifies the reasons for the proposed decertification in terms that will place the business on notice of the conduct or transactions upon which the notice is based.
 - (2) States the grounds relied upon under subsection (a) for proposing decertification.
 - (3) Advises that, within 20 calendar days after receipt of the Notice of Proposal to Decertify, the business may submit in person, in writing, or through a representative, information in opposition to the proposed decertification, including information that raises a genuine dispute over the material facts.
 - (4) States the potential effect of the proposed decertification.
 - (5) Advises that the Secretary of the Department or a designee will make this decision.
 - (d) If the business is in fact decertified, the decision letter will also inform the decertified business of its rights of review.
 - (e) If the actions of the business are the subject of an indictment, information or other criminal charge, the Department may temporarily suspend the certification until the determination is made to decertify or reinstate. A review of this temporary suspension may be made by the Secretary or a designee.

VIII. Review of Decertification of Small Business, Small Diverse Business, or Veteran Business Enterprise status.

- (a) The request for review of decertification shall be made in writing to the Secretary and state the grounds upon which the request is based. Relevant documents, if available, should also be submitted with the request for review.
- (b) The Secretary or a designee may reject requests that are untimely (more than 30 calendar days after the date of the decertification letter) or insufficient (do not raise issues alleging that the decertification is in error).

- (c) The Secretary or a designee shall consider the request for review and any response or reply and may request and review such additional documents or information they deem necessary to render a decision and may, at their sole discretion, conduct a hearing consistent with Section IX.
- (d) Upon completing an evaluation of the request for review of decertification, the Secretary or a designee shall issue a written determination stating the reasons for the decision. The determination shall be issued within 60 days of the receipt of the request for review of decertification unless extended by consent of the Secretary or a designee and the business that filed the request. The determination shall be the final order of the Department.

IX. Hearing.

- (a) *Scope.* The Secretary may delegate to a designee the responsibility to conduct a fact-finding hearing and to prepare a report and recommendation. Fact-finding hearings will be held only when the business requests a review of its decertification under Section VIII.
- (b) *Purpose.* The fact-finding hearing will be held to determine the operative facts forming the basis for the decertification action as delineated in the notice of decertification provided to the business. The hearing will also determine the sufficiency of the grounds for the review. The fact-finding hearing affords the business an additional opportunity to demonstrate that the facts upon which the decertification is based are insufficient, incorrect or otherwise do not warrant decertification. The business may present information and arguments in accordance with the grounds stated in the request for review indicating why it should not be decertified. Other information may be used by the designee to make a recommendation to the Secretary of the Department.
- (c) *Conduct of the hearing.* If a hearing is warranted, it will be conducted under 2 Pa.C.S. § § 502—508 and 701—704 (relating to Administrative Agency Law). If the Department is the moving party, it has the burden of proof.

X. Agency Liaison.

The head of each Agency shall designate an employee to be an Agency Liaison in the administration of that Agency's SB, SDB, and VBE programs. The Agency Liaison shall be a high-level employee reporting directly to a Secretary or Agency head who is knowledgeable of Agency procurement activity and has the authority to collect, analyze, and report Agency spend data. The Agency Liaison is responsible for coordinating Agency outreach efforts to the SB, SDB, and VBE communities, reviewing Agency contracting procedures to ensure compliance with this policy, assisting in the resolution of contracting issues, and submitting required SB, SDB, and VBE program reports or information.

XI. Database of self-certified Small Businesses and verified Small Diverse Businesses and Veteran Business Enterprises.

- (a) The Department shall publish and maintain in an electronic format available to the general public an online, searchable database listing certified SBs and verified SDBs and VBEs. The online, searchable database shall specify the type of supplies, services, construction, or professional services primarily provided by the SB, SDB, or VBE and the effective dates and expiration dates of self-certification for each SB and verification for each SDB and VBE. It shall include the address, phone number, and contact person for the SB, SDB, or VBE. It shall also include whether the SDB is a MBE, WBE, DOBE, LGBTBE, and/or SDVBE; and whether the VBE is a veteran-owned small business enterprise or service-disabled veteran-owned small business enterprise.
- (b) The online, searchable database may include other information the Department considers necessary or appropriate to encourage participation in the procurement process by SBs, SDBs and VBEs.
- (c) The online, searchable database shall be updated at least monthly.

XII. Small Business Reserve Program

(a) General.

- (1) Pursuant to Executive Order 2011-09, the purpose of the Department's Small Business Reserve (SBR) program, formally known as the Small Business Procurement Initiative, is to direct the Department to develop and implement policy initiatives to increase opportunities for Small Businesses to compete for award of commonwealth contracts as prime contractors. While the SBR program aims to foster competitive procurement, it does not guarantee every properly certified Small Business will receive a contract.
- (2) Under the SBR program, a business that satisfactorily completes the Department's self-certification process will be deemed a "Small Business." Only Small Businesses will be eligible to bid or propose as prime contractors for procurements issued under this program. A business is not eligible for an award of a contract issued as a result of an SBR procurement if the Department terminated their Small Business self-certification after submittal of the bid or proposal but prior to contract award. If the Department terminates a Small Business' self-certification during the initial contract term, the agency is not required to cancel the contract; however, the agency shall not exercise any contract renewals or options.
- (3) Certification and participation in the Department's SBR program is race and gender neutral. However, because Small Diverse Businesses and Veteran Business Enterprises must meet the requirements for self-certification as a Small Business, they will also be eligible to participate in the SBR program. Therefore, for purposes of the SBR program, all references to "Small Business" shall also include Small Diverse Businesses and Veteran Business Enterprises.

- (4) DGS reserves the right to issue guidelines as necessary with additional details on the operation of the SBR Program, which shall be posted on the Department's website.

(b) Eligibility for SBR procurements and exclusions

- (1) Prior to considering a procurement for the SBR program, agencies must determine whether the goods or services should be procured through UniqueSource or Correctional Industries.
- (2) Agencies shall determine whether to include a procurement in the SBR program on a case by case basis utilizing the following criteria:
 - (i) A minimum of three (3) Small Businesses must exist in the appropriate geographical area that are qualified to responsibly provide the goods or services required to generate competition.
 - (ii) The Small Businesses must be able to satisfactorily provide the scope of the supplies or services required (e.g., distribute goods across the Commonwealth, provide a specific expertise).
 - (iii) The contract value for the initial contract term must be less than the Small Business threshold for gross annual revenue.
 - (iv) Any other factors that an agency deems relevant in determining whether a procurement is suitable for competition by, and award to, Small Businesses.
- (3) Agencies shall consider the practical severability of all contracts and may not bundle contracts for the purpose of precluding or limiting inclusion in the SBR program.
- (4) Independent agencies shall utilize the criteria in (b) above to determine whether a procurement for supplies that has been delegated by DGS shall be included in the SBR program.
- (5) Agencies shall document in writing their determination as to whether a procurement shall be included in the SBR program and shall maintain a copy of the written determination in the official contract file.
- (6) Contracts for small, no bid, emergency or sole source procurements - regardless of dollar value - are exempt from the requirements of the SBR program. However, agencies are encouraged to utilize Small Businesses whenever possible for small, no bid, emergency, and sole source procurements.

(c) Procurement processes

- (1) Agencies shall utilize the procurement processes documented in the Procurement

Handbook for all SBR procurements, subject to the following:

- (i) For SBR procurements, agencies shall only seek competition from and shall only award contracts to those businesses possessing a valid Department-issued Small Business certification as of the bid or proposal due date and time, unless otherwise set forth in the procurement.
 - (ii) Notices of SBR procurements shall be issued through the Department's publicly accessible Internet website consistent with Section 106.1(b) of the Commonwealth Procurement Code, 62 Pa. C.S. § 106.1(b). The public notice of an invitation for bids or requests for proposals shall indicate that the procurement is being issued as part of the SBR program.
 - (iii) Agencies shall reject as non-responsive any bid or proposal submitted by an entity that is not a Department self-certified Small Business as of the bid or proposal due date and time, unless otherwise set forth in the procurement.
- (2) The selected Small Business must self-perform at least 51% of the work.
- (3) An SBR procurement may be canceled and re-issued as a procurement open to all businesses when, after issuing the SBR-designated solicitation, the issuing agency determines that one of the conditions set forth in Subsections (b)(2) above does not reasonably exist. The decision to cancel and re-issue a procurement shall be made in accordance with Section 521 of the Commonwealth Procurement Code, 62 Pa. C.S. § 521, and shall be deemed final. The re-issued procurement may, but is not required to, be considered for the setting of SDB and VBE participation goals.

(d) Monitoring and Reporting to Measure Effectiveness of Program.

- (1) Pursuant to Paragraph 2(e) of Executive Order 2011-09, the Department will measure the effectiveness of the SBR program by monitoring the following data on a yearly basis:
- (i) The increase or decrease in the number of businesses attempting and/or successfully completing the Small Business self-certification process;
 - (ii) The increase or decrease in the number of contracts awarded to Small Businesses by agency and overall; and
 - (iii) The increase or decrease in the payments to Small Businesses by agency and overall.
- (2) Pursuant to Paragraph 4(c) of Executive Order 2011-09, agencies shall provide to the Department, in the format and frequency requested by the Department, reports on the agency's progress in meeting its 15% SBR participation goal.

XIII. Small Diverse Business Program.

- (a) *Scope.* The provisions of Subchapter XII shall apply to all procurements within the scope of this Policy except for procurements for construction and design professional services.
- (b) *Purpose.* To attain the SDB aspirational target under Section I of this policy, BDISBO, with the cooperation of the issuing Agency, shall attempt to set, where required, Contract Specific Goals for SDB participation. Each goal shall be expressed within the solicitation as a percentage of the dollar value of the contract.
- (c) *Waivers.* Bidders or offerors may in all instances request a partial or full waiver of a Contract Specific Goal for SDB participation, as set forth in Section XVI.
- (d) *Goal Setting.*
 - (1) BDISBO, with the cooperation of issuing Agency, shall assess the potential for SDB prime contractor and subcontractor participation in each procurement and estimate the amount of participation if any before the solicitation is issued.
 - (2) In setting a Contract Specific Goal, BDISBO and Agencies:
 - (iv) May not set a goal that solely relies on the Commonwealth's overall aspirational target, or any other jurisdiction's overall percentage goal; and
 - (v) Must incorporate an analysis of:
 - (A) The potential subcontract opportunities available in the procurement, which shall include the provision of supplies or services;
 - (B) The availability percentages for those subcontract opportunities as derived from the Commonwealth's most recent disparity study;
 - (C) The number of SDBs listed in the online searchable database of SDBs or otherwise identified as being certified to provide those subcontract opportunities;
 - (D) The availability of SDBs to respond competitively to the potential subcontract opportunities including geographical proximity, when relevant, and desired work location of SDBs identified under (ii)(C) of this Section to the location of the work to be performed;
 - (E) The feasibility of subcontracting opportunities given the nature and extent of the proposed contract;
 - (F) Participation of SDBs on past contracts of similar size, scope, and location; and

(G) Other factors that contribute to Constitutional goal setting.

(e) *Solicitation Documentation.*

- (1) Each solicitation containing Contract Specific Goals for SDB participation shall contain those terms, conditions, and forms related to SDB participation as required by the Department.
- (2) When a Contract Specific Goal for SDB participation is set for a procurement, a bidder or offeror shall submit with its bid or proposal a completed SDB Participation Submittal. A bidder or offeror must indicate one of the following on the SDB Participation Submittal:
 - (i) Their agreement to meet the Contract Specific Goal for SDB participation in full. In this instance a bidder or offeror must provide an SDB Utilization Schedule which identifies how the bidder or offeror will meet the Contract Specific Goal;
 - (ii) Their agreement to meet a portion of the Contract Specific Goal for SDB participation and request a partial waiver for the remainder of the Contract Specific Goal. In this instance a bidder or offeror must provide an SDB Utilization Schedule which identifies how the bidder or offeror will meet a portion of the Contract Specific Goal and also provide documentation of the bidder or offeror's Good Faith Efforts to meet the unmet portion of the Contract Specific Goal as set forth in Section XVI below; or
 - (iii) Request a Good Faith Efforts Waiver from all of the Contract Specific Goal. In this instance a bidder or offeror must provide documentation of the bidder or offeror's Good Faith Efforts to meet the Contract Specific Goal for SDB participation as set forth in Section XVI below.
- (3) The failure to complete and submit the SDB Participation Submittal and additional required documentation as set forth in the solicitation documents may result in a determination that the bid or proposal is not responsive.

(f) *SDB Subcontracting Provisions.*

- (1) A bidder or offeror that is an SDB may satisfy a Contract Specific Goal for SDB participation through their own self-performance.
- (2) When an SDB performs as a participant in a joint venture, the Commonwealth may count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the SDB performs with its own forces toward fulfilling the SDB participation goal, subject to the requirements of subsection (4) below.

- (3) Because the Contract Specific Goal for SDB participation is independent of any Contract Specific Goal for VBE participation, work performed by an SDB that is also a VBE can be used to meet both a Contract Specific Goal for SDB participation and a Contract Specific Goal for VBE participation through the same work.
- (4) A contractor may only count dollar amounts actually paid to an SDB for performance of a Commercially Useful Function towards satisfying its SDB participation commitments. In addition, the SDB subcontractor, through its own employees, must perform at least 50% of the amount of the subcontract.

(g) *Contract requirements.*

- (1) A prime contractor's commitment to meet Contract Specific Goals and their commitment to utilize SDBs listed within the SDB Utilization Schedule shall become contractual obligations of the prime contractor. A prime contractor's failure to meet the SDB commitments may result in the imposition of sanctions as set forth in Section XVIII(d) of this policy, Section 531 of the Commonwealth Procurement Code, (62 Pa. C.S. § 531), and any additional sanctions available under the contract.
- (2) Solicitation documents completed and submitted by the selected bidder or offeror in connection with its SDB participation commitments including the SDB Participation Submittal, SDB Utilization Schedule, and, if applicable, any documentation supporting a request for a Good Faith Efforts Waiver shall be made part of the contract.

(h) *Subcontract requirements.*

- (1) The selected bidder or offeror and the SDBs that will be used to satisfy the selected bidder or offeror's SDB commitments must enter into a final, definitive subcontract agreement signed by the selected bidder or offeror and the SDB within the time frame specified in the solicitation document. The subcontract agreement must contain those items as specified in the solicitation document.
- (2) If a subcontract agreement is required by the solicitation document but the selected bidder or offeror and a SDB listed on the SDB Utilization Schedule cannot agree upon a definitive subcontract within the required time frame specified in the solicitation, the selected bidder or offeror must provide written notification to the issuing Agency and BDISBO to assist with resolution.
- (3) The prime contractor must provide a copy of any required subcontract with an SDB to BDISBO or the Agency within ten (10) business days of receiving such a request.

XIV. Program for Construction and Design Professional Services.

- (a) *Scope.* The provisions of Subchapter XIII shall apply to all procurements for construction and design professional services.
- (b) *Purpose.* To attain the SDB aspirational target under Section I of this policy, BDISBO, with the cooperation of the issuing Agency, shall attempt to set, where required, Contract Specific Goals for SDB participation. Each goal shall be expressed within the solicitation as a percentage of the dollar value of the contract.
- (c) *Waivers.* Bidders or offerors may in all instances request a partial or full waiver of a Contract Specific Goal for SDB participation, as set forth in Section XVI below.
- (d) *Goal Setting.*
 - (1) BDISBO, with the cooperation of issuing Agency, shall assess the potential for SDB participation in each procurement and estimate the amount of participation if any before the solicitation is issued.
 - (2) In setting a Contract Specific Goal, BDISBO and Agencies:
 - (i) May not set a goal that solely relies on the Commonwealth's overall aspirational target, or any other jurisdiction's overall percentage goal; and
 - (ii) Must incorporate an analysis of:
 - (A) The potential subcontract opportunities available in the prime contract, which shall include the provision of supplies or services;
 - (B) The availability percentages for those subcontract opportunities as derived from the Commonwealth's most recent disparity study;
 - (C) The number of SDBs listed in the online searchable database of SDBs or otherwise identified as being certified to provide those subcontract opportunities;
 - (D) The availability of SDBs to respond competitively to the potential subcontract opportunities including geographical proximity, when relevant, and desired work location of SDBs identified under (ii)(C) of this Section to the location of the work to be performed;
 - (E) The feasibility of subcontracting opportunities given the nature and extent of the proposed contract;
 - (F) Participation of SDBs on past contracts of similar size, scope, and location; and

(G) Other factors that contribute to Constitutional goal setting.

(e) *Solicitation Documentation.*

- (1) Each solicitation containing Contract Specific Goals for SDB participation shall contain those terms, conditions, and forms related to SDB participation as required by the Department.
- (2) When a Contract Specific Goal for SDB participation is set for a procurement, a bidder or offeror shall submit with its bid or proposal a completed SDB Participation Submittal. A bidder or offeror must indicate one of the following on the SDB Participation Submittal:
 - (i) Their agreement to meet the Contract Specific Goal for SDB participation in full. In this instance a bidder or offeror must provide an SDB Utilization Schedule which identifies how the bidder or offeror will meet the Contract Specific Goal;
 - (ii) Their agreement to meet a portion of the Contract Specific Goal for SDB participation and request a partial waiver for the remainder of the Contract Specific Goal. In this instance a bidder or offeror must provide an SDB Utilization Schedule which identifies how the bidder or offeror will meet a portion of the Contract Specific Goal and also provide documentation of the bidder or offeror's Good Faith Efforts to meet the unmet portion of the Contract Specific Goal as set forth in Section XVI below; or
 - (iii) Request a Good Faith Efforts Waiver from all of the Contract Specific Goal. In this instance a bidder or offeror must provide documentation of the bidder or offeror's Good Faith Efforts to meet the Contract Specific Goal for SDB participation as set forth in Section XVI below.
- (3) The failure to complete and submit the SDB Participation Submittal and additional required documentation as set forth in the solicitation documents may result in a determination of nonresponsiveness.

(f) *SDB Subcontracting Provisions.*

- (1) A bidder or offeror that is an SDB may satisfy a Contract Specific Goal for SDB participation through their own self-performance.
- (2) When an SDB performs as a participant in a joint venture, the Commonwealth may count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the SDB performs with its own forces toward fulfilling the SDB participation goal subject to the subcontracting category and crediting set forth in subsection (4) below.

- (3) Because the Contract Specific Goal for SDB participation is independent of any Contract Specific Goal for VBE participation, work performed by an SDB that is also a VBE can be used to meet both a Contract Specific Goal for SDB participation and a Contract Specific Goal for VBE participation through the same work.
- (4) Contractors may satisfy a Contract Specific Goal for SDB participation through the use of SDB subcontractors, manufacturers, or suppliers in accordance with the following chart, unless otherwise specified in the procurement documents:

<i>SDB Subcontracting Category</i>	<i>% of Credit</i>
<i>Subcontractors:</i> The SDB subcontractor, through its own employees, shall perform at least 50% of the amount of the subcontract, unless the SDB subcontractor is performing one of the functions listed below.	Count 100% of the subcontract amount.
<i>Manufacturer</i>	Count 100% of the total cost of the materials or supplies purchased from the SDB manufacturer.
<i>Stocking supplier</i>	Count 60% of the total cost of the materials or supplies purchased from the SDB stocking supplier.
<i>Nonstocking supplier</i>	Count only the amount of the fee or commission charged by the SDB nonstocking supplier for assistance in the procurement of the materials and supplies provided the fees are reasonable and not excessive as compared with fees customarily allowed for similar services and as further defined in the solicitation.

(g) *Contract requirements.*

- (1) A prime contractor’s commitment to meet Contract Specific Goals and their commitment to utilize SDBs listed within the SDB Utilization Schedule shall become contractual obligations of the prime contractor. A prime contractor’s failure to meet the SDB commitments may result in the imposition of sanctions as set forth in Section XVIII(d) of this policy, Section 531 of the Commonwealth Procurement Code, (62 Pa. C.S. § 531), and any additional sanctions available under the contract.
- (2) Solicitation documents completed and submitted by the selected bidder or offeror in connection with its SDB participation commitments including the SDB Participation Submittal, SDB Utilization Schedule, and, if applicable, any documentation supporting a request for a Good Faith Efforts Waiver shall be made part of the contract.

(h) *Subcontract requirements.*

- (1) The selected bidder or offeror and the SDBs that will be used to satisfy the selected bidder or offeror's SDB commitments must enter into a final, definitive subcontract agreement signed by the selected bidder or offeror and the SDB within the time frame specified in the solicitation document. The subcontract agreement must contain those items as specified in the solicitation document.
- (2) If a subcontract agreement is required by the solicitation document but the selected bidder or offeror and a SDB listed on the SDB Utilization Schedule cannot agree upon a definitive subcontract within the required time frame specified in the solicitation, the selected bidder or offeror must provide written notification to the issuing Agency and BDISBO to assist with resolution.
- (3) The prime contractor must provide a copy of any required subcontract with an SDB to BDISBO or the Agency within ten (10) business days of receiving such a request.
- (4) The subcontract requirements set forth in this subsection (h) apply to contracts between a design professional and its consultant(s)

XV. Veteran Business Enterprise Program.

- (a) *Scope.* The provisions of Subchapter XIV shall apply to all procurements within the scope of this Policy.
- (b) *Purpose.* To attain the VBE aspirational target under Section I of this policy, BDISBO, with the cooperation of the issuing Agency, shall attempt to set, where required, Contract Specific Goals for VBE participation. Each goal shall be expressed within the solicitation as a percentage of the dollar value of the contract.
- (c) *Waivers.* Bidders or offerors may in all instances request a partial or full waiver of a Contract Specific Goal for VBE participation, as set forth in Section XVI below.
- (d) *Goal Setting.*
 - (1) BDISBO, with the cooperation of issuing Agency, shall assess the potential for VBE participation in each procurement and estimate the amount of participation if any before the solicitation is issued.
 - (2) In setting a Contract Specific Goal, BDISBO and Agencies:
 - (i) May not set a goal that solely relies on the Commonwealth's overall aspirational target, or any other jurisdiction's overall percentage goal; and
 - (ii) May incorporate an analysis of:

- (A) The potential subcontract opportunities available in the prime contract, which shall include the provision of supplies or services;
- (B) The availability percentages for those subcontract opportunities as derived from the Commonwealth's most recent disparity study;
- (C) The number of VBEs listed in the online searchable database of VBEs or otherwise identified as being certified to provide those subcontract opportunities;
- (D) The availability of VBEs to respond competitively to the potential subcontract opportunities including geographical proximity, when relevant, and desired work location of VBEs identified under (ii)(C) of this Section to the location of the work to be performed;
- (E) The feasibility of subcontracting opportunities given the nature and extent of the proposed contract;
- (F) Participation of VBEs on past contracts of similar size, scope, and location; and
- (G) Any other pertinent factors.

(e) *Solicitation Documentation.*

- (1) Each solicitation containing Contract Specific Goals for VBE participation shall contain those terms, conditions, and forms related to VBE participation as required by the Department.
- (2) When a Contract Specific Goal for VBE participation is set for a procurement, a bidder or offeror shall submit with its bid or proposal a completed VBE Participation Submittal. A bidder or offeror must indicate one of the following on the VBE Participation Submittal:
 - (i) Their agreement to meet the Contract Specific Goal for VBE participation in full. In this instance a bidder or offeror must provide a VBE Utilization Schedule which identifies how the bidder or offeror will meet the Contract Specific Goal;
 - (ii) Their agreement to meet a portion of the Contract Specific Goal for VBE participation and request a partial waiver for the remainder of the Contract Specific Goal. In this instance a bidder or offeror must provide a VBE Utilization Schedule which identifies how the bidder or offeror will meet a portion of the Contract Specific Goal and also provide documentation of the bidder or offeror's Good Faith Efforts to meet the unmet portion of the Contract Specific Goal for VBE participation. The documentation and determination

process for Good Faith Efforts Wavier requests for Contract Specific Goals for VBE participation shall be consistent with the documentation and determination process for Good Faith Effort Waiver Requests for Contract Specific Goals for SDB participation set forth in Section XVI below; or

(iii) Request a Good Faith Efforts Waiver from all of the Contract Specific Goal. In this instance a bidder or offeror must provide documentation of the bidder or offeror's Good Faith Efforts to meet the Contract Specific Goal for VBE participation. The documentation and determination process for Good Faith Efforts Wavier requests for Contract Specific Goals for VBE participation shall be consistent with the documentation and determination process for Good Faith Effort Waiver Requests for Contract Specific Goals for SDB participation set forth in Section XVI below.

(3) The failure to complete and submit the VBE Participation Submittal and additional required documentation as set forth in the solicitation documents may result in a determination that the bid or proposal is not responsive.

(f) *VBE Subcontracting Provisions.*

(1) A bidder or offeror that is a VBE may satisfy a Contract Specific Goal for VBE participation through their own self-performance.

(2) When a VBE performs as a participant in a joint venture, the Commonwealth may count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the VBE performs with its own forces toward fulfilling the VBE participation goal, subject to the provisions of subsection (4) below.

(3) Because the Contract Specific Goal for VBE participation is independent of any Contract Specific Goal for SDB participation, work performed by a VBE that is also an SDB can be used to meet both a Contract Specific Goal for VBE participation and a Contract Specific Goal for SDB participation through the same work.

(4) For procurements subject to the Small Diverse Business Program, prime Contractors may satisfy a Contract Specific Goal for VBE participation through the use of VBEs in accordance with Section XIII unless otherwise specified in the procurement documents. For procurements subject to the Program for Construction and Design Professional Services, prime Contractors may satisfy a Contract Specific Goal for VBE participation through the use of VBE subcontractors, manufacturers, or suppliers in accordance with Section XIV unless otherwise specified in the procurement documents.

(g) *Contract requirements.*

- (1) A prime contractor's commitment to meet Contract Specific Goals and their commitment to utilize VBEs listed within the VBE Utilization Schedule shall become contractual obligations of the prime contractor. A prime contractor's failure to meet the VBE commitments may result in the imposition of sanctions as set forth in Section XVIII(d) of this policy, Section 531 of the Commonwealth Procurement Code, (62 Pa. C.S. § 531), and any additional sanctions available under the contract.
- (2) Solicitation documents completed and submitted by the selected bidder or offeror in connection with its VBE participation commitments including the VBE Participation Submittal, VBE Utilization Schedule, and, if applicable, any documentation supporting a request for a Good Faith Efforts Waiver shall be made part of the contract.

(h) *Subcontract requirements.*

- (1) For procurements subject to the Small Diverse Business Program, the subcontract requirements of Section XIII apply to prime Contractor commitments to VBEs in the same manner as they apply to commitments to SDBs. For procurements subject to the Program for Construction and Design Professional Services, the subcontract requirements of Section XIV apply to prime Contractor commitments to VBEs in the same manner as they apply to commitments to VBEs.

XVI. Good Faith Efforts Waiver.

- (a) If a bidder or offeror believes they will be unable to achieve the Contract Specific Goal, they may in all instances request a full or partial Good Faith Efforts Waiver from the Contract Specific Goal. A request for a Good Faith Efforts Waiver may include the following supporting documentation as set forth in the Good Faith Efforts Documentation to Support Waiver Request:
 - (1) A detailed statement of the efforts made to select portions of the work proposed to be performed by SDBs (or VBEs as applicable) in order to increase the likelihood of achieving the stated goals;
 - (2) A detailed statement of the efforts made to contact and negotiate with SDBs (or VBEs as applicable), including:
 - (i) The names, addresses, dates, telephone numbers, and classification of SDBs (or VBEs as applicable) contacted, and
 - (ii) A copy of the information provided to SDBs (or VBEs as applicable) regarding the plans, specifications, and anticipated time schedule for portions of the work to be performed;

- (3) As to each SDB (or VBE as applicable) that placed a subcontract quotation or offer that the bidder or offeror considers not to be acceptable, a detailed statement of the reasons for this conclusion with supporting documentation;
 - (4) A list of SDBs (or VBEs as applicable) found to be unavailable, which shall be accompanied by an unavailability verification form signed by the SDB (or VBE as applicable), or a statement from the bidder or offeror that the SDB (or VBE as applicable) refused or failed to give the written verification; and
 - (5) The record of the bidder's or offeror's compliance with the outreach efforts as set forth within the solicitation documentation.
- (b) A Good Faith Efforts Waiver of a Contract Specific Goal may be granted only upon a reasonable demonstration by a bidder or offeror that the Contract Specific Goal was unable to be achieved, or was unable to be achieved at a reasonable price, and if the head of the Issuing Agency or their designee based on the recommendation of BDISBO determines that the public interest is served by a Good Faith Efforts Waiver. In making a determination under this Section, the head of the issuing Agency or their designee and BDISBO may consider engineering estimates, catalogue prices, general market availability, and availability of SDBs (or VBEs as applicable) in the area in which the work is to be performed, other bids or offers and subcontract bids or offers substantiating significant variances between SDB and non-SDB (or VBE and non-VBE as applicable) cost of participation and their impact on the overall cost of the contract to the Commonwealth, and any other relevant factor. The issuing Agency shall provide written notice of the denial of a Good Faith Efforts Waiver request with a copy provided to BDISBO.
- (c) A bidder or offeror's failure to meet the Contract Specific Goal in full and their failure to demonstrate that they made Good Faith Efforts to meet any unmet portion of the Contract Specific Goal will result in a determination that the bid or proposal is not responsive.
- (d) The Good Faith Efforts Waiver request including any supporting documentation, the Good Faith Efforts Waiver determination, and the reasons for the determination shall be maintained in the official contract file.

XVII. Amendment of Commitments.

- (a) The selected bidder or offeror cannot alter its overall SDB or VBE commitments or commitments made to individual SDBs or VBEs without written approval from the Issuing Officer and BDISBO.
- (b) The selected bidder or offeror shall notify the Contracting Officer of the Issuing Office and BDISBO when circumstances arise that may negatively impact the selected bidder's or offeror's ability to comply with SDB or VBE commitments.

- (c) The selected bidder or offeror may not terminate or otherwise cancel a subcontract with a firm listed on the Utilization Schedule without showing good cause why the subcontract should be terminated or cancelled, providing a corrective action plan, and receiving written approval from the Issuing Office and BDISBO.
- (d) Both the overall percentage of SDB or VBE commitments and individual SDB or VBE commitments must be maintained in the event the contract is assigned to another prime contractor.
- (e) An agency reserves the right to require SDB or VBE participation on change orders or amendments for additional work not already subject to an SDB or VBE commitment as further described in the solicitation documents.

XVIII. Compliance.

- (a) To ensure compliance with a prime Contractor's SDB and VBE commitments, BDISBO shall:
 - (1) Verify that the firms listed in the Utilization Schedule are actually performing work and receiving compensation as set forth in the Utilization Schedule; and
 - (2) Monitor and collect data on contractor compliance with the prime Contractor's SDB and/or VBE participation commitments.
- (b) The prime Contractor shall:
 - (1) Permit BDISBO and the contracting Agency to inspect any relevant matter, including records and the jobsite and to interview subcontractors and workers;
 - (2) Ensure that SDBs or VBEs are paid any undisputed amount to which the SDB or VBE is entitled within 14 calendar days of the prime contractor's receipt of payment from the Commonwealth for such work;
 - (3) Submit to BDISBO, in the format required by BDISBO, within the time frame set forth within the solicitation document, a Utilization Report listing payments made to each SDB or VBE and any unpaid invoices over 30 calendar days old received from an SDB or VBE, and the reason payment has not been made. This information will be used to track and confirm the actual dollar amount paid to SDBs and VBEs and will serve as a record of fulfillment of the contractual commitment(s). If there was no activity, the form must be completed by stating "No activity"; and
 - (4) Include in its agreements with its SDBs and VBEs a requirement that the SDB or VBE submit to BDISBO, within the time frame set forth within the solicitation document, a report identifying the prime contract, and listing:

- (i) Payments received from the prime Contractor within the time frame covered by the report, and
 - (ii) Invoices for which the SDB or VBE has not been paid.
- (c) Upon BDISBO notifying the contracting Agency that a prime Contractor did not comply with their SDB or VBE commitments, the contracting Agency shall notify the prime Contractor in writing of its findings and shall specify what corrective actions are required. The prime Contractor is required to initiate the corrective actions within 10 business days and complete them within the time specified by the contracting Agency.
- (d) If a contracting Agency determines that material noncompliance with SDB or VBE contract provisions exists and that the prime contractor refuses or fails to take the corrective action required by the contracting Agency, the contracting Agency, in consultation with BDISBO, may impose any and all sanctions and remedies available under the contract as it deems appropriate. Such sanctions or remedies include, but are not limited to, termination of the contract; revocation of the prime contractor's SB, SDB, and/or VBE status; and/or any actions under the Commonwealth's Contractor Responsibility Program, up to and including suspension or debarment from future contracting opportunities with the Commonwealth.

XIX. Program Review and Expiration.

Within five years after the effective date of this Policy, the Department will review the operation of an evidentiary basis for the Small Diverse Business Program and the Program for Construction and Design Professional Services in order to determine whether the Commonwealth has a continuing compelling interest in remedying discrimination against SDBs in its marketplace, and the permissive scope of any narrowly tailored remedies to redress discrimination against SDBs so that the Commonwealth will not function as a passive participant in a discriminatory marketplace. This Policy shall expire on or before January 1, 2028, unless a Disparity Study completed by the Commonwealth prior to that date shows a statistically significant disparity in the utilization of SDBs. In that case, the Policy shall renew for an additional five years with the review and expiration set forth in this Section each occurring every five years thereafter until the Disparity Study shows no statistically significant disparity in the utilization of SDBs.