

## Regulatory, Compliance and Government Practice

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### Pennsylvania Promulgates New Small and Diverse Business Program for IT Services

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Pennsylvania has required construction contractors to utilize minority and women businesses in state-funded construction since 1987. Within a short period of time, a parallel program was adopted for service contracting, where entities identified as “Socially or Economically Restricted Businesses” were given a degree of opportunity to provide services as prime vendors or more often as subcontractors. Of particular interest has been the impact of the services program in the information technology (“IT”) arena. In the intervening years, the program to cultivate IT services provided by small businesses seen as disadvantaged in some manner has seen intervals of expansion and contraction, largely reflecting differing administrative policies. To be blunt, some governors like this program, and some, maybe less so.

Effective with solicitations now being issued, Pennsylvania has embarked upon another manifestation of the IT services program intended to aid and develop small and diverse businesses in the Commonwealth. In the context of request-for-proposal (“RFP”) solicitations, the new program no longer allocates to proposers up to 20 percent of the RFP solicitation points.<sup>1</sup> Instead, the new program sets participation goals for IT (and other) procurements that are tailored to the particular contractual setting and that must be met unless waived on application for a full or partial waiver. There is no allocation of points for meeting the goals.

The needs of state government for information technology services seem to know no bounds. Every agency has requirements related to updating or replacing mainframe systems, providing greater citizen access to governmental services, improving security, and the like. The Commonwealth’s annual “spend” on IT services is said to be well over \$1 billion dollars; a precise number is difficult to ascertain, given that IT expenditures are spread over the state agencies.

On November 20, 2015, Governor Wolf formed the Advisory Council on Diversity, Inclusion and Small Business Opportunities. Executive Order 2015-11, 4 Pa. Code §1.831. The state agencies were directed to cooperate with the newly renamed Department of General Services’ Bureau of Diversity, Inclusion and Small Business Opportunities, affectionately referred to by its acronym as “BDISBO” (pronounced “Ba-dis’-bo”). The Order has “the goal of increasing diversity, inclusion and small business opportunities in Commonwealth procurement contracts.....” 4 Pa. Code §1.831(c)(4). IT is and of course will remain a big component of the effort.

The Commonwealth Disparity Study,<sup>2</sup> completed in 2018, reviewed five years of small and diverse participation in Commonwealth contracting. Based on the study, the Commonwealth’s aspirational goals for the program on a Commonwealth-wide basis are for state contracting dollars to include 15 percent for small businesses, 26.3 percent for small diverse businesses and 4.6 percent for veteran businesses.<sup>3</sup> These goals apply to Commonwealth contracting generally, and IT procurement in particular.<sup>4</sup>

In September 2020, the Commonwealth issued guidance in which small businesses (“SBs”) are now defined as entities which are for-profit, are independently owned, are not dominant in their fields, have fewer than 100 employees (FTEs), are U.S.-based, and gross less than an annual average of \$38.5 million. See Small Business, Small Diverse Business & Veteran Business Enterprise Application Guide (September 2020) (“Application Guide”).<sup>5</sup>

Small Diverse Businesses (“SDBs”) must first qualify as SBs and generally must be certified by third parties. Pursuant to the Application Guide, third-party verifications of SDB eligibility or eligibility as a veterans business enterprise can be obtained from seven, third-party entities, depending on the particular classification asserted. The eight classifications for which certifications as an SDB are recognized are Minority Business Enterprises (“MBE”), Women Business Enterprises (“WBE”), Minority and Women Owned Enterprises (“MWBE”), Disability- Owned Business Enterprises (“DOBE”), and LGBT-Owned Business Enterprises (“LGBTBE”). The program also recognizes Veterans Business Enterprises (“VBE”), Service Disabled Veterans Business Enterprises (“SDVBE”), and Disabled Veterans Business Enterprises (“DVBE”).

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The Commonwealth now relies on the definitions adopted and used by these seven third-parties, although subject to BDISBO verification and review presumably according to its own definitions.<sup>6</sup> This delegation allows BDISBO to focus on enforcement, for example enforcement of subcontractual commitments. See Small Diverse Business Procurement Frequently Asked Questions (“FAQs”).<sup>7</sup> Registration as a Commonwealth vendor is also required.

“Information Technology” or IT is one of the business categories covered by the program, and is defined as

. . . all goods and services associated with the design, development, installation, and implementation of information systems and applications including computers, peripherals and/or hardware as well as project management and IT consulting.

Application Guide, page 10. According to the Instructions for Completing the Small Diverse Business (SDB) Participation Submittal (June 2020) (“Instructions”),<sup>8</sup> the procurement-specific SDB participation goal and distinct VBE goal<sup>9</sup> is to be set forth in each RFP or invitation to bid (“ITB”) solicitation. In each IT solicitation in excess of \$250,000, BDISBO will establish contract-specific targets, based upon the scope of the contract, market resources, location, and other factors.<sup>10</sup>

For example, on January 6, 2021, the Department of General Services (“DGS”) issued RFP #6100048933 for staff augmentation services with an astounding SDB goal of 64 percent and a VBE goal of 6 percent; proposals are due February 11, 2021.<sup>11</sup> In RFP 001915, issued on November 2, 2020, the Department of Health (“DOH”) sought a Software as a Service (SaaS) solution to provide an Immunization Information System (IIS) for the Commonwealth of Pennsylvania. The goals for the solicitation were SDB - 8 percent, and VBE - 3 percent.<sup>12</sup> In Solicitation/Project #: OGC-2020-08, DGS issued on behalf of the Governor’s Office of General Counsel, a General Obligation Bond Counsel RFP with an SDB Participation Goal (for MBE, WBE, LGBTBE, DOBE, and SDVBE) of 34 percent. In RFP 6100005800, the Pennsylvania Turnpike Commission (PTC) solicited proposals to procure quality assurance services for its IT group. However, there does not appear to be any associated SB or SDB goals, perhaps because the Turnpike solicitation would not meet the \$250,000 threshold or because the PTC project is federally funded and subject to different requirements. Finally, note the solicitation documents for an energy-savings project for the Department of Corrections issued August 25, 2020, with an SDB goal of 9 percent and a VBE goal of 3 percent.<sup>13</sup> There does not appear to be the usual level of IT solicitations, and it is possible that there’s a temporary dearth of IT work being solicited currently due to pandemic budget constraints.

The program’s FAQs<sup>14</sup> advise that a significant commitment to SDBs is at least 5 percent of total contract value (apparently for the total of all categories), and that the prime contractor must self-perform 60 percent and cannot subcontract above 40 percent (that’s clearly not ordinarily a problem). In turn, subcontractors must self-perform at least 50 percent of the subcontract. Instructions, page 2.

Offerors for IT prime contracts need to review the Small Diverse Business Submittal Packet and the accompanying forms and complete them very carefully. The forms include aforementioned Instructions (SDB-1), the participation submittal (SDB-2), the SDB listing and utilization schedule (SDB-3), the letter-commitment (SDB-3.1), a guidance for good-faith efforts to meet the SDB participation goal (SDB-4), and guidance as to the documentation needed to support a request to waive in full or in part the SDB goal (SDB-5).<sup>15</sup> The Instructions provide in part that

A Bidder/Offeror’s failure to meet the SDB participation goal in full or their [sic] failure to receive an approved Good Faith Efforts waiver for any unmet portion of the SDB participation goal will result in the rejection of the Bid or Proposal as nonresponsive.

For offeror/proposers that do not fully meet the SDB goals, the submission of a waiver application, in advance of the submission of a bid, is critical. There is ostensibly no opportunity to amend the proposal’s SDB participation after submission.<sup>16</sup> This, coupled with the decision not to award RFP points for the level of participation, are the key criticisms of the new program.

From a legal perspective, the most nuanced part of bid and proposal evaluation is the legal question of responsiveness. When a bidder or proposer (i.e. an offeror) fails to meet the participation goal “in full” or partially, and fails to receive an approval of a waiver, the Commonwealth asserts that that failure will make the bid or proposal “nonresponsive.” At least one prior program treated the failure to meet participation levels as a matter of contractor responsibility. It will be interesting to see how this issue is resolved in practice and perhaps in the courts.

Another critical element of the evaluation of a proposal is the question of good faith. The Instructions envision submission of a waiver request that is for either partial or full and that bases the acceptability of the bid or proposal on the demonstration of good faith, defined as a demonstration by the offeror

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. . . that it took all necessary and reasonable steps to achieve the SDB participation goal. Those steps are considered necessary and reasonable when their scope, intensity, and relevance could reasonably be expected to obtain sufficient SDB participation, even if those steps were not fully successful. The Issuing Agency and Department of General Services' Bureau of Diversity, Inclusion and Small Business Opportunities (BDISBO) will determine whether or not the Offeror requesting a Good Faith Efforts waiver made adequate Good Faith Efforts by considering the quality, quantity, and intensity of the Offeror's efforts. Mere pro forma efforts are not Good Faith Efforts to meet the SDB participation requirements. The determination concerning the sufficiency of the Offeror's Good Faith Efforts is subjective; meeting quantitative formulas is not required.<sup>17</sup>

Much like past disputes over whether a contractor exhibited sufficient efforts to secure subcontractor participation and therefore contractor responsibility to warrant the award, it can reasonably be expected that disputes will arise over the application of the concept of Good Faith Efforts.

On balance we view the new program as an improvement from the Commonwealth's perspective. In one respect, the Commonwealth can expect fewer protests, given that some of the past bid protests were grounded in objection by one proposer to the participation points allocated to another, apparently successful proposer. On the other hand, we can expect additional challenges by disqualified proposers that did not successfully apply for or did not receive a full or partial waiver.<sup>18</sup>

We have several concerns. First, will the Commonwealth's salutary efforts to meet the aspirational goal of increasing diversity, inclusion and small business opportunities in contracts be met? Further, will the decision to forego allocation of points as a part of the evaluation process discourage participation among the IT proposer community? Finally, we wonder whether the courts will treat the failure to meet a goal as a matter of responsiveness, notwithstanding that it's defined as such, and the degree to which the courts will defer to the agency's determinations in applying the Good Faith Efforts standard. These are not easy questions, but then again, these are the kinds of evaluations that administrative agencies do every day and yet are also the kinds of evaluations that entities negatively impacted may dispute.

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1. The allocation of 20 percent of the total solicitation was merely a "yardstick" to measure the degree to which any one proposer would receive subcontractor participation points. The proposer with the greatest participation would receive 20 percent of the solicitation points (e.g. 200 of a total of 1000), and competing proposers, a lesser, proportional allocation. The 20 percent was not a goal. It did, however, create a strong incentive to include qualified subcontractors to a substantial extent. As such, it was more of a carrot than a stick.
  2. <https://www.dgs.pa.gov/Small%20Diverse%20Business%20Program/Pages/Commonwealth-Disparity-Study.aspx>
  3. The "aspirational, target goals going forward" are found at [https://www.dgs.pa.gov/DISBO%20Forms/FW%20\[External\]%20DISBO/DISBO%20Implementation%20Overview%20-%20FINAL%20-%20209.27.19.pdf](https://www.dgs.pa.gov/DISBO%20Forms/FW%20[External]%20DISBO/DISBO%20Implementation%20Overview%20-%20FINAL%20-%20209.27.19.pdf)
  4. A general overview of opportunities for small, small diverse, and veteran businesses can be found at <https://www.dgs.pa.gov/Small%20Diverse%20Business%20Program/Pages/Business-Resources.aspx>
  5. The thirty-page Application Guide for small, small diverse, and veterans businesses is found at <https://www.dgs.pa.gov/Small%20Diverse%20Business%20Program/Documents/Small%20Business%20Application%20Guide.pdf>
  6. See 62 Pa.C.S. §2102; 51 Pa.C.S. §9601. See also note 10 infra, citing the June 15, 2020, Policy Directive.
  7. The FAQs are found at <https://www.dgs.pa.gov/Small%20Diverse%20Business%20Program/Small-Diverse-Business-Procurement/Pages/SDB-Procurement-FAQs.aspx>
  8. See the following for an example of the Instructions that will be issued for a particular solicitation. [https://www.dgs.pa.gov/Facilities/Energy-Savings-Program/Documents/2019-1 DOT District 8/4\(2\) - Appen D Attachment - SDB PP.pdf](https://www.dgs.pa.gov/Facilities/Energy-Savings-Program/Documents/2019-1 DOT District 8/4(2) - Appen D Attachment - SDB PP.pdf)
  9. Because the VBE category is race and gender neutral, the Commonwealth has elected to set a VBE participation goal that is separate and distinct from the other SDB categories. A 3 percent VBE participation goal is, we are advised, the minimum level for all solicitations.
  10. The goal-setting process and definitions for small, small diverse and veteran businesses are set forth in <https://www.dgs.pa.gov/Documents/Procurement%20Forms/BOP%20Policy%20Directive/BOP%20Policy%20Directive%202020-1%20and%20BDISBO%20Policy.pdf>. This June 15, 2020 Policy Directive issued by the Secretary of General Services contains numerous additional provisions of general relevance to prime and subcontractors alike, including the content of the required letter of commitment from prime to sub, a list of verification entities, and the process for decertifying status.

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11. The solicitation for staff augmentation services, open on January 6, and due to close February 11, 2021, is at [https://bids.scquest.com/apps/Router/PublicEvent?tab=PHX\\_NAV\\_SourcingOpenForBid&CustomerOrg=CommonwealthPA&tmstmp=1610124452837](https://bids.scquest.com/apps/Router/PublicEvent?tab=PHX_NAV_SourcingOpenForBid&CustomerOrg=CommonwealthPA&tmstmp=1610124452837). The 64 percent , we are advised, applies only to a portion of the contract spend, rather than the total, given that there are carve outs for some of the contract dollars.
12. The solicitation for the Immunization Information System, closed on December 10, 2020, can be found at [https://bids.scquest.com/apps/Router/PublicEvent?tab=PHX\\_NAV\\_SourcingClosed&CustomerOrg=CommonwealthPA&tmstmp=1609773387339](https://bids.scquest.com/apps/Router/PublicEvent?tab=PHX_NAV_SourcingClosed&CustomerOrg=CommonwealthPA&tmstmp=1609773387339)
13. <https://www.dgs.pa.gov/Facilities/Energy-Savings-Program/Documents/2020-1%20SCI%20Fayette/GESA%202020-1%20Pre-Quote%208.25.20.pdf>. This solicitation includes the standard form of letter-commitment (SDB-3.1).
14. See note 7 *supra*.
15. The Small Business Packet with forms SDB-1, SDB-2, SDB-3, SDB-4 and SDB-5 can be found at <https://www.bidnet.com/bneattachments?/637578111.pdf> . The commitment form SDB 3.1 is a single-page form. Its content must comply with the June 15, 2020 Policy Directive, *cited* in note 10 *supra*.
16. See Instructions, *cited* in note 10 *supra*. There are errors which can be corrected in a 72-hour period, but not the three “fatal errors” identified in the Instructions, one of which is identified as “clarifications and corrections in order to meet the SDB Participation Goal.” We respectfully suggest that the Commonwealth’s objectives would be enhanced by a willingness to permit post-submission negotiations of SDB and VBE participation levels. See text and note 18 *infra*.
17. See Instructions, *cited* in note 8 *supra*, in section denominated SDB-4.
18. Especially in the RFP context, there would be no legal barrier to allowing post-bid modification of the SDB and VBE participation. This was the feature in at least one Pennsylvania minority business program in the past. Proposals are modified all the time to adjust scope, cost and the like. The decision to forego the “opportunity” to have an otherwise attractive proposal modified to improve its compliance is a policy decision.

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