

FAQs

Title 74, Section 303 and PennDOT's Diverse Business Participation Program

Q: What is Section 303 of Title 74 of Pennsylvania's Consolidated Statutes?

A: Section 303 is a law that requires certain public entities to provide opportunities for diverse businesses (DBs) to participate as subcontractors for certain public transportation contracts.

Q: What government entities fall within the requirements of Section 303?

A: The Department of Transportation, the Pa. Turnpike Commission and local transportation organizations, collectively called contracting entities, are subject to the diverse business participation requirements of Section 303.

Q: What is a local transportation organization?

A: Any of the following: (1) a political subdivision or a public transportation authority, port authority or redevelopment authority organized under the laws of this Commonwealth or pursuant to an interstate compact or otherwise empowered to render, contract for rendering of or assist in the rendering of transportation services in a limited area in this Commonwealth, even though it may also render or assist in tendering transportation service in adjacent states; (2) a nonprofit association that directly or indirectly provides public transportation service; or (3) a nonprofit association of public transportation providers operating within this Commonwealth.

Q: What contracting opportunities fall within the requirements of Section 303?

A: Section 303 applies to competitive contract opportunities administered by a contracting entity for construction and professional services relating to transportation projects funded pursuant to Title 74 or Title 75 of the Pennsylvania Consolidated Statutes.

Q: Does Section 303 apply when federal funds are used in the project?

A: No. Section 303 only applies to non-federally funded transportation projects. When federal funds from the United States Department of Transportation are used, the Disadvantaged Business Enterprise (DBE) program applies.

Q: What is a diverse business?

A: A disadvantaged business, minority-owned or women-owned business or service-disabled veteran-owned or veteran-owned small business that has been certified by a third-party certifying organization and is both an ECMS Business Partner and, if required, pre-qualified.

Q: What is a third-party certifying organization?

A: An organization that certifies a small business, minority-owned business, women-owned business, or veteran-owned small business as a DB, including the National Minority Supplier Development Council; the Women's Business Enterprise Council, the Small Business Administration; the Small Business Administration - Veteran Small Business Certification (VetCert); and the Pennsylvania Unified Certification Program.

Q: Will PennDOT be certifying DBs?

A: No.

Q: What is a disadvantaged business?

A: A business that is owned or controlled by a majority of persons, not limited to members of minority groups, who are subject to racial or ethnic prejudice or cultural bias.

Q: What is a minority-owned business?

A: A business owned and controlled by a majority of individuals who are African Americans, Hispanic Americans, Native Americans, Asian Americans, Alaskans or Pacific Islanders.

Q: What is a woman-owned business?

A: A business owned and controlled by a majority of individuals who are women.

Q: What is a service-disabled veteran-owned business?

A: A business in the United States which is independently owned and controlled by a service-disabled veteran or veterans, not dominant in its field of operation, and employs 100 or fewer employees.

Q: What is a service-disabled veteran?

A: An individual being in possession of a disability rating letter issued by the United States Department of Veterans Affairs or a disability determination from the United States Department of Defense or, if approved by the Department of General Services, a surviving spouse or permanent caregiver of a such a service-disabled veteran.

Q: What is a veteran-owned small business?

A: A business in the United States which is independently owned and controlled by a service-disabled veteran or veterans, not dominant in its field of operation, and employs 100 or fewer employees.

Q: What is a veteran?

A: An individual who served on active duty in the United States Armed Forces, including a reservist or member of the National Guard who was discharged or released from the service under honorable conditions, a reservist or member of the National Guard who completed an initial term of enlistment or qualifying period of service, and a reservist or member of the National Guard who was disabled in the line of duty during training.

Q: Will PennDOT maintain a database of DBs?

A: Yes. The database is part of ECMS.

Q: Are DBEs diverse businesses?

A: Yes. All DBEs have been added to the DB database.

Q: What if a bidder or offeror wants to use a DB that is not in the database?

A: Documentation proving they are a DB must be supplied to PennDOT as part of the good faith efforts of the bidder or offeror.

Q: How will other DBs be added to the database?

A: In general, DBs will be added to the database as their information is supplied to PennDOT as part of their prequalification application, qualifications packages or Confidential Non-ECMS Diverse Business Verification Form (EO-386). However, PennDOT will accept a DB's information at any time in order to be added to the database.

Q: Must a DB be prequalified before submitted for subcontractor approval or does conditional approval apply for new DBs that are not ECMS Partners or prequalified?

A: A DB must be an ECMS Business Partner and must be prequalified (if required). It's possible that the prequalification status issued by the Prequalification Office would be conditional.

Q: Must diverse businesses be small businesses?

A: Not in general. Only veteran-owned small businesses must be small (i.e., employs 100 or fewer employees, independently owned and not dominant in their field).

Q: Is a business that has been certified as a small business by the Small Business Administration a diverse business under the DB program?

A: Not necessarily. The small business would also need show that it meets one of the diversity requirements in the definition of diverse business, i.e., that it is a disadvantaged business, minority-owned or women-owned business or service-disabled veteran-owned or veteran-owned small business. A diverse business is defined as a disadvantaged business, minority-owned or women-owned business or service-disabled veteran-owned or veteran-owned small business that has been certified by a third-party certifying organization; not all businesses that have been certified by a third-party certifying organization.

Q: Can entities which have graduated from the federal DBE program qualify as diverse businesses?

A: Perhaps for other than veteran-owned small businesses, depending on the requirements of the third-party certification organizations.

Q: What is construction?

A: The process of building, altering, repairing, improving, or demolishing any public structure or building or other public improvements of any kind to any public real property.

Q: What is a subcontractor?

A: Subcontractor is not defined in Section 303. The Department defines it as any individual, partnership, firm or corporation entering into a contract with the prime contractor for work under the contract, including those providing professional or other services.

Q: What are professional services?

A: An industry of infrequent, technical or unique functions performed by independent contractors or consultants whose occupation is the rendering of the services, including design professional services as defined in Section 901 of the Procurement Code, 62 Pa.C.S. §901 (relating to definitions); legal services; advertising or public relations services; accounting, auditing or actuarial services; security consulting services; computer and information technology services; and insurance underwriting services.

Q: Does Section 303 require the establishment of goals?

A: No. Section 303(a)(1) requires that the contracting entities ensure that all competitive contract opportunities subject to the section seek to maximize participation by diverse business.

Q: What must contracting entities include in solicitations for bids and requests for proposals on competitive contracting opportunities?

A: The solicitations and requests must include: (1) that the bidder or offeror document and submit to the contracting entity all good faith efforts to solicit subcontractors that are diverse businesses during the bidding or proposal process; (2) provide within seven days of being declared the low bidder or successful offeror the name and business address of each subcontractor that is a diverse business that will provide construction or professional services in connection with the performance of the contract; and (3) language encouraging bidders and offerors to utilize and give consideration to contractors offering to utilize diverse businesses in the selection and award of contracts.

Q: Must the contract include any specific provisions under Section 303?

A: Yes. The contract must include provisions prohibiting discrimination in accordance with 62 Pa.C.S. §3701 (relating to contract provisions prohibiting discrimination) and the prompt payment policies between a contractor and a subcontractor adopted by the Department of General Services under 62 Pa.C.S. §3933 (relating to contractors' and subcontractors' payment obligations).

Q: Are there any other duties placed upon contracting entities by Section 303?

A: Yes. Contracting entities must (1) ensure that their commitment to participation by diverse businesses is clearly understood and appropriately implemented and enforced by them; and (2) designate a responsible official to supervise their diverse business program and ensure compliance with the entity. In addition, the Department of Transportation and Pa. Turnpike Commission must also impose sanctions as may be appropriate under 62 Pa.C.S. §531 (relating to debarment or suspension) against businesses that fail to comply with diverse business requirements.

Q: Are there any requirements in relation to the replacement of a diverse business?

A: Yes, if at any time during the evaluation of a bid or proposal, or the construction of the project or the performance of a professional service, it becomes necessary to replace a subcontractor that is a DB, the bidder, offeror, or contractor must immediately notify PennDOT of the need for the replacement. The notice must include the reason for the replacement.

Q: Does PennDOT have any additional duties under Section 303?

A: Yes. PennDOT, with assistance of a Diverse Business Supportive Services Center must conduct the necessary and appropriate outreach for purposes of identifying diverse businesses in general construction or professional services capable of performing contracts and submit a report to legislative officials summarizing the participation level of DBs.

Q: Has PennDOT contracted with an entity to assist them as a diverse business supportive service center?

A: Yes. PennDOT has contracted with ProRank Business Solutions LLC.

Q: Must the Pa. Turnpike Commission and local transportation organizations cooperate with PennDOT to complete the report that must be submitted to legislative officials?

A: Yes.

Q: Will PennDOT have goals under its DB program?

A: No. PennDOT's DB program is a good faith efforts program.

Q: What are good faith efforts?

A: Good faith efforts are those that one could reasonably expect a bidder or offeror to take if the bidder or offeror were actively and aggressively trying to obtain DB participation for work being subcontracted. Mere *pro forma* efforts are not good faith efforts. The following illustrate the types of efforts that may be taken to exercise good faith efforts but are not exclusive or exhaustive. All relevant factors and types of efforts to obtain DB participation for work being subcontracted will be considered.

- 1. Efforts made to solicit through all reasonable and available means (e.g., use of the DB Directory, attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBs with the capability to perform the work of the contract or agreement. The bidder should provide written notification, at least 15 calendar days before the bid opening for construction and at least five calendar days before the time solicitations are due for consultant proposals, to allow the DBs to respond to the solicitation. The bidder or offeror must determine with certainty if the DBs are interested by taking appropriate steps to follow up initial solicitations.**
- 2. Efforts made to select portions of the work to be performed by DBs. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DB participation.**
- 3. Efforts made to provide interested DBs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.**
- 4. Efforts made to negotiate in good faith with interested DBs. Bidders and offerors are encouraged to make a portion of the work available to DBs and to select those portions of the work needs consistent with the available DBs so as to facilitate participation of DBs. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBs to perform the work. A bidder or offeror using good business judgment would consider a number of factors in negotiating with subcontractors, including DB subcontractors, and would take a firm's price and capabilities into consideration as well as its own ability or desire to perform the work with its own work force.**
- 5. Efforts made to thoroughly investigate DBs for qualification based on their capabilities. Bidders and offerors cannot reject or withhold solicitation of DBs as being unqualified without sound reasons based on this investigation of their capabilities. The DBs standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's or consultant's efforts to meet the good faith efforts requirement.**
- 6. Efforts to assist interested DBs in obtaining bonding, lines of credit, or insurance.**

7. **Efforts to assist interested DBs in obtaining necessary equipment, supplies, materials, or related assistance or services.**
8. **Efforts to effectively use existing databases and the resources of supportive services to assist in finding DBs.**

Q: Can the cost of using a DB be a factor in determining whether to use a DB for subcontractor work without violating the requirement to make good faith efforts to use DB subcontractors?

A: Yes. A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DB subcontractors, and would take a firm's price quote into consideration.

Q: Can qualifications of a DB be a factor in determining whether to use a DB for sub consultant work without violating the requirement to make good faith efforts to use DB sub consultants?

A: Yes. An offeror using good business judgment would consider a number of factors in negotiating with sub consultants, including DB sub consultants, and would take a firm's capabilities into consideration.

Q: What is the purpose of indicating that solicitations to DBs should be made 15 days prior to a bid opening?

A: The purpose is to ensure that DBs are afforded sufficient time to make an offer in relation to the work being subcontracted. The 15-day solicitation is not a requirement but illustrates what would constitute a reasonable effort. It is modeled after similar language in PennDOT's federal DBE program.

Q: Must bidders or offerors complete all fields in the ECMS commitment and solicitation screens for construction contracts?

A: Bidders and offerors can present their good faith efforts by completing the commitment and solicitation screens in ECMS and/or by submitting paper documentation by e-mail. The DB requirements do not define what information is required to complete the ECMS screens; they only provide that completion of the screens is a method to present good faith effort. Completion of as many fields as possible may assist the bidder or offeror in demonstrating good faith efforts and would assist PennDOT in reviewing good faith efforts.

Q: How should bidders and offerors present their good faith efforts for professional service contracts?

A: Bidders and offerors can demonstrate their good faith efforts to solicit diverse business subcontractors by submitting the EO-387 form with supporting documentation via email to pd-non-ecms-db@pa.gov or by fax to (717) 772-4026.

Q: Must bidders or offerors solicit DBs that are not ECMS business partners?

A: No, but good faith efforts to solicit DBs apply when subcontracting work.

Q: Can a contractor self-perform 100% of the work under the contract?

A: Yes. If this is the case, documentation must be provided to PennDOT at the same time good faith efforts would need to be provided. For professional service contracts identify it on the EO-387 form. For construction contracts a statement that the work will be 100% self-performed is sufficient documentation.

Q: What if a bidder or offeror stated at the time of bid or proposal that the work would be 100% self-performed, but later decides to subcontract work?

A: The contractor must attach good faith effort documentation along with the Public Works Employment Verification Form to the ECMS subcontractor request. A consultant must submit good faith effort documentation along with the a revised EO-387 form to request to add a subconsultant.

Q: Are bidders required to solicit participation from DB in the areas that bidders do not intend to subcontract?

A: No. The good faith requirements only apply to work that is being subcontracted.

Q: Is there a continuing obligation to exercise good faith efforts after the contract is awarded?

A: Yes, when subcontracting work, including additional work, under the contract.

Q: How will good faith efforts be reviewed?

A: The Good Faith Review Officer (defined as the Department's Executive Deputy Secretary for Administration or designee) is ultimately responsible to make the GFE determination but will not be acting alone. An interdisciplinary review team will initially review and make a recommendation to the Good Faith Review Officer. For construction and consulting engineer contracts, the committee is comprised of an individual from Contract Awards, Consultant Agreements, and the Bureau of Equal Opportunity. The Good Faith Review Officer can also consult with others as deemed necessary in making a decision.

Q: Can a bid or proposal be rejected for failure to exercise good faith efforts?

A: Yes. In this case the project will be awarded to the next responsible bidder or offeror. The rejected bidder or offeror may protest the bid or offer.

Q: Is there a reporting requirement after the completion of construction?

A: Yes. When requested, or within 30 days of the end of the contract, the contractor or consultant must submit a report to PennDOT summarizing the use of approved subcontractors not on the ECMS DB list as provided in subsection VI of the requirements.

Q: Is there a reporting requirement on professional service contracts?

A: Primes are required to report their Diverse Business subcontractor payment during the project via the Monthly Diverse Business Subcontracting Status Report (EO-402DB.)

Q: How will compliance be monitored, and sanctions imposed.

A: Contractor compliance will be reviewed and verified by PennDOT following performance of the work and submission of the final report of DB participation. The contractor will be notified and given the chance to respond before any sanctions are applied.

Q: How are suppliers being addressed?

A: Suppliers are not included within the good faith requirements of Section 303. Section 303(a) (1.1) is directed to documenting good faith efforts to solicit subcontractors that are diverse businesses

that will provide the contractor with *construction* in connection with the performance of the contract. Under the Procurement Code, the definition of construction does not extend to the provision of supplies, which is a separately defined term. Bidders are, however, encouraged to utilize and give consideration to the use of alltypes of diverse businesses in the selection and award of contracts and may not impermissibly discriminate in the solicitation and selection of suppliers for Department contracts. The Department will track the use of suppliers that are diverse businesses to maximize the participation by diverse businesses in competitive contract opportunities.

Q: How is trucking being addressed?

A: Good faith efforts apply to subcontracting trucking. A DB in this regard must meet the following requirements:

- 1. Is responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract; there cannot be a contrived arrangement for the purpose of being a DB.**
- 2. Owns, insures, and operates a majority of the trucks used on the contract.**
- 3. Uses a majority of drivers it employs.**
- 4. Be approved in ECMS as trucking services.**

Q: What if the requirements of PennDOT's DB program conflict with the 408 specifications?

A: The DB program requirements apply.

Q: What if I have other questions?

A: For general questions regarding the DB program, please contact the Bureau of Equal Opportunity at 717-787-5891. For questions related to the ECMS system, please contact the PennDOT help desk at (717) 783-8330.