

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2462 Session of
2022

INTRODUCED BY A. DAVIS, GUENST AND BROOKS, MARCH 30, 2022

REFERRED TO COMMITTEE ON TRANSPORTATION, MARCH 30, 2022

AN ACT

1 Amending Title 74 (Transportation) of the Pennsylvania
2 Consolidated Statutes, in administrative practice and
3 procedure, repealing provisions relating to diverse business
4 participation; providing for small and diverse businesses;
5 and establishing the Small Diverse Business Program.

6 The General Assembly of the Commonwealth of Pennsylvania
7 hereby enacts as follows:

8 Section 1. Section 303 of Title 74 of the Pennsylvania
9 Consolidated Statutes is repealed:

10 [§ 303. Diverse business participation.

11 (a) General rule.--In administering contracts for
12 construction and professional services relating to
13 transportation projects which are funded pursuant to the
14 provisions of this title or 75 Pa.C.S. (relating to vehicles),
15 the contracting entities shall:

16 (1) Be responsible for ensuring that all competitive
17 contract opportunities subject to this section which are
18 issued by the contracting entities seek to maximize
19 participation by diverse businesses.

20 (1.1) Include in solicitations for bids and requests for

1 proposals on all competitive contracting opportunities
2 subject to this section notice to the bidder or offeror that:

3 (i) The bidder or offeror shall document and submit
4 to the applicable contracting entity all good faith
5 efforts to solicit subcontractors that are diverse
6 businesses during the bidding or proposal process.

7 (ii) The bidder or offeror shall provide within
8 seven days of being declared the low bidder or successful
9 offeror the name and business address of each
10 subcontractor that is a diverse business that will
11 provide the contractor with construction or professional
12 services in connection with the performance of the
13 contract.

14 (2) Include in the solicitations for bids and requests
15 for proposals under paragraph (1.1) language encouraging
16 bidders and offerors to utilize and give consideration to
17 contractors offering to utilize diverse businesses in the
18 selection and award of contracts.

19 (3) Ensure that the contracting entities' commitment to
20 participation by diverse businesses is clearly understood and
21 appropriately implemented and enforced by all the contracting
22 entities.

23 (4) Designate a responsible official to supervise the
24 contracting entities' diverse business program and ensure
25 compliance within the contracting entities.

26 (5) (Reserved).

27 (6) Impose sanctions, as may be appropriate under 62
28 Pa.C.S. § 531 (relating to debarment or suspension), against
29 businesses that fail to comply with this section or the
30 policies of the Commonwealth related to diverse businesses.

1 This paragraph shall not apply to a local transportation
2 organization.

3 (7) Ensure that each contract entered into with a
4 contractor under this section includes provisions prohibiting
5 discrimination in accordance with 62 Pa.C.S. § 3701 (relating
6 to contract provisions prohibiting discrimination).

7 (a.1) Additional duties of department.--The department, with
8 the assistance of a diverse business enterprise supportive
9 services center, shall have the following duties:

10 (1) Conduct the necessary and appropriate outreach,
11 including using the database available on the Internet
12 website of the Department of General Services and the Federal
13 Government's system of award management database, for
14 purposes of identifying diverse businesses in general
15 construction or professional services capable of performing
16 contracts subject to this section.

17 (2) By October 1, 2014, and each October 1 thereafter,
18 submit a report to the chairman and minority chairman of the
19 Transportation Committee of the Senate and the chairman and
20 minority chairman of the Transportation Committee of the
21 House of Representatives summarizing the participation level
22 of diverse businesses in all competitive contract
23 opportunities issued by contracting entities. The commission
24 and local transportation organizations shall cooperate with
25 the department to complete the report. The report shall
26 include:

27 (i) The percentage of participation by diverse
28 businesses.

29 (ii) The total value of all contracts executed which
30 include participation by diverse businesses pursuant to

1 this section in the prior year.

2 (iii) The number of businesses penalized for
3 violating this section.

4 (3) Transmit the report under paragraph (2) to the
5 Pennsylvania Minority Business Development Authority,
6 established under the act of July 22, 1974 (P.L.598, No.206),
7 known as the Pennsylvania Minority Business Development
8 Authority Act. The authority shall review the report to
9 assess the effectiveness in advancing this section and to
10 make any recommendations for changes in this section deemed
11 necessary or desirable to the secretary and the chairman and
12 minority chairman of the Transportation Committee of the
13 Senate and the chairman and minority chairman of the
14 Transportation Committee of the House of Representatives.

15 (a.2) Replacement of diverse business.--If, at any time
16 during the evaluation of a bid or proposal or the construction
17 of a project or the performance of a professional service
18 pursuant to a bid, proposal or contract subject to this section,
19 it becomes necessary to replace a subcontractor that is a
20 diverse business, the bidder, offeror or contractor, as
21 appropriate, shall immediately notify the contracting entity of
22 the need to replace the diverse business. The notice shall
23 include the reasons for the replacement.

24 (a.3) Applicability.--The following shall apply to a
25 contractor and contract subject to subsection (a):

26 (1) The provisions of 62 Pa.C.S. § 2108 (relating to
27 compliance with Federal requirements).

28 (2) Prompt payment policies between a contractor and
29 subcontractor adopted by the Department of General Services
30 pursuant to 62 Pa.C.S. Pt. II (relating to general

1 procurement provisions).

2 (a.4) Construction.--Nothing in this section shall be
3 construed to supersede, nullify or otherwise affect 51 Pa.C.S. §
4 9603 (relating to participation goal). In the case of an
5 inconsistency between this section and 51 Pa.C.S. Ch. 96
6 (relating to veteran-owned small businesses), the provisions of
7 51 Pa.C.S. Ch. 96 shall prevail.

8 (b) Definitions.--As used in this section, the following
9 words and phrases shall have the meanings given to them in this
10 subsection:

11 "Commission." As defined in section 8102 (relating to
12 definitions).

13 "Contract." As defined in 62 Pa.C.S. § 103 (relating to
14 definitions).

15 "Contracting entities." The following:

16 (1) The department.

17 (2) The commission.

18 (3) A local transportation organization.

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

23 "Diverse business." A disadvantaged business, minority-owned
24 or women-owned business or service-disabled veteran-owned or
25 veteran-owned small business that has been certified by a third-
26 party certifying organization.

27 "Local transportation organization." Any of the following:

28 (1) A political subdivision or a public transportation
29 authority, port authority or redevelopment authority
30 organized under the laws of this Commonwealth or pursuant to

1 an interstate compact or otherwise empowered to render,
2 contract for the rendering of or assist in the rendering of
3 transportation service in a limited area in this
4 Commonwealth, even though it may also render or assist in
5 rendering transportation service in adjacent states.

6 (2) A nonprofit association that directly or indirectly
7 provides public transportation service.

8 (3) A nonprofit association of public transportation
9 providers operating within this Commonwealth.

10 "Minority-owned business." A business owned and controlled
11 by a majority of individuals who are African Americans, Hispanic
12 Americans, Native Americans, Asian Americans, Alaskans or
13 Pacific Islanders.

14 "Professional services." An industry of infrequent,
15 technical or unique functions performed by independent
16 contractors or consultants whose occupation is the rendering of
17 the services. The term includes:

18 (1) Design professional services as defined in 62
19 Pa.C.S. § 901 (relating to definitions).

20 (2) Legal services.

21 (3) Advertising or public relations services.

22 (4) Accounting, auditing or actuarial services.

23 (5) Security consultant services.

24 (6) Computer and information technology services.

25 (7) Insurance underwriting services.

26 "Service-disabled veteran-owned small business." As defined
27 in 51 Pa.C.S. § 9601 (relating to definitions).

28 "Third-party certifying organization." An organization that
29 certifies a small business, minority-owned business, women-owned
30 business or veteran-owned small business as a diverse business.

1 The term includes:

2 (1) The National Minority Supplier Development Council.

3 (2) The Women's Business Development Enterprise National
4 Council.

5 (3) The Small Business Administration.

6 (4) The Department of Veterans Affairs.

7 (5) The Pennsylvania Unified Certification Program.

8 "Veteran-owned small business." As defined in 51 Pa.C.S. §
9 9601 (relating to definitions).

10 "Women-owned business." A business owned and controlled by a
11 majority of individuals who are women.]

12 Section 2. Title 74 is amended by adding a chapter to read:

13 CHAPTER 4

14 SMALL AND DIVERSE BUSINESSES

15 Sec.

16 401. Policy.

17 402. Definitions.

18 403. Small Diverse Business Program.

19 404. Nonapplicability.

20 405. Duties of department.

21 406. Request for full or partial waiver and good-faith efforts.

22 407. Bonding and progress payments.

23 408. Report to General Assembly.

24 409. Compliance.

25 410. Aspirational target.

26 411. Disparity study.

27 412. Program review and expiration.

28 § 401. Policy.

29 The policy of the department is to provide equitable
30 opportunities in its procurements to small businesses and small

1 diverse businesses, both as prime contractors and
2 subcontractors, and to assist small businesses and small diverse
3 businesses in learning how to do business with the department.
4 The department shall implement this policy in accordance with
5 department regulations and policy.

6 § 402. Definitions.

7 The following words and phrases when used in this chapter
8 shall have the meanings given to them in this section unless the
9 context clearly indicates otherwise:

10 "Aspirational target." A target established by the secretary
11 under section 410 (relating to aspirational target).

12 "Bidder." A person that submits a bid in response to an
13 invitation for bids.

14 "Commonwealth agency." An executive agency, an independent
15 agency or a State-affiliated entity as defined in 62 Pa.C.S. §
16 103 (relating to definitions).

17 "Contract." A type of written agreement, regardless of what
18 it may be called, for the procurement or disposal of supplies,
19 services or construction and executed by all parties in
20 accordance with the act of October 15, 1980 (P.L.950, No.164),
21 known as the Commonwealth Attorneys Act.

22 "Contract-specific goal." A goal established by the
23 department in collaboration with the purchasing agency for use
24 of small diverse businesses on a specific procurement.

25 "Disparity study." A study conducted to determine whether
26 there is a disparity between the availability and use of small
27 diverse businesses in department procurement.

28 "Good-faith efforts." The practices or activities instituted
29 by a bidder or offeror to promote and ensure participation by
30 small diverse businesses in department procurement in order to

1 meet a contract-specific goal.

2 "Local transportation organization." A political subdivision
3 or a public transportation authority, port authority or
4 redevelopment authority organized under the laws of this
5 Commonwealth or an interstate compact or otherwise empowered to
6 render contract for the rendering or assist in the rendering of
7 transportation service in a limited area in this Commonwealth
8 and in adjacent states.

9 "Offeror." A person that submits a proposal in response to a
10 request for proposals.

11 "Procurement." Buying, purchasing, renting, leasing,
12 licensing or otherwise acquiring any supplies, services or
13 construction. The term also includes all functions that pertain
14 to the obtaining of any supply, service or construction,
15 including description of requirements, selection and
16 solicitation of sources, preparation and award of contract and
17 all phases of contract administration.

18 "Program." The Small Diverse Business Program established
19 under section 403 (relating to Small Diverse Business Program).

20 "Purchasing agency." A Commonwealth agency or local
21 transportation organization authorized by this part or by other
22 law to enter into contracts for itself or as the agent of
23 another Commonwealth agency. When purchasing for another
24 Commonwealth agency, the purchasing agency acts on behalf of the
25 principal which needs the supplies, services and construction
26 and shall coordinate and cooperate with that agency.

27 "Race-neutral and gender-neutral measures." Methodologies
28 that are or can be used to assist businesses, notwithstanding
29 the social, economic, racial or gender composition of the
30 individuals that own or control the business.

1 "Small business." A business in the United States that is
2 independently owned and is not dominant in its field of
3 operation.

4 "Small diverse business." A small business owned and
5 controlled by a majority of persons, not limited to members of
6 minority groups, women, service-disabled veterans or veterans
7 that have been deprived of the opportunity to develop and
8 maintain a competitive position in the economy because of
9 economic and social disadvantages.

10 "Utilization schedule." A document, submitted by a bidder or
11 offeror as part of a bid or proposal, in which a bidder or
12 offeror commits to a level of small diverse business
13 participation for a contract. If required by the solicitation, a
14 utilization schedule may also require a bidder or offeror to
15 identify:

16 (1) The small diverse businesses that will be utilized.

17 (2) Associated responsibilities and scopes of work.

18 (3) The dollar value or percentages of the work to be
19 performed.

20 § 403. Small Diverse Business Program.

21 The Small Diverse Business Program is established in the
22 department.

23 § 404. Nonapplicability.

24 This chapter shall not apply to procurements for parts and
25 materials.

26 § 405. Duties of department.

27 The department shall administer the program. The department's
28 duties shall include:

29 (1) Formulating, proposing and implementing policy and
30 regulations for the development, implementation and

1 monitoring of the program, including the process or
2 procedures to govern the following:

3 (i) The process and criteria for certification,
4 verification, recertification and decertification of
5 small businesses and small diverse businesses.

6 (ii) The setting of contract-specific goals.

7 (iii) Changes to solicitation and contract language,
8 requirements and forms.

9 (iv) Monitoring and tracking contract commitments
10 and utilization of small diverse businesses.

11 (v) Mentor-protégé programs.

12 (vi) Program-related education, training, networking
13 and outreach.

14 (vii) Any other processes or procedures that the
15 department deems necessary to implement the program.

16 (2) Developing, using and assisting purchasing agencies
17 in using race-neutral and gender-neutral measures to
18 facilitate the participation of all firms in department
19 procurement activities, including the implementation of a
20 program to reserve procurements for award to small businesses
21 only.

22 (3) Developing and maintaining a directory of small
23 businesses and small diverse businesses.

24 (4) Providing information and assistance to small
25 businesses and small diverse businesses relating to the
26 program, including special training programs to assist small
27 businesses and small diverse businesses in learning how to do
28 business with the department and serving as a liaison to
29 community, contractors, professionals and supplier groups,
30 associations and organizations.

1 (5) Establishing thresholds for procurements which
2 require the setting of contract-specific goals.

3 (6) Ensuring that small diverse businesses are solicited
4 on procurements for which the businesses may be suited.

5 (7) Establishing contract-specific goals, in
6 collaboration with the purchasing agency, based upon relevant
7 factors, including the availability of small diverse
8 businesses to provide the construction or professional
9 services required by the scope of work of the procurement.

10 (8) In collaboration with the purchasing agency,
11 reviewing utilization schedules, considering requests for
12 waivers of contract-specific goals based upon a showing of
13 good-faith efforts and evaluating the extent to which
14 contract-specific goals were achieved.

15 (9) Monitoring contracts to evaluate compliance with
16 contract-specific goals and commitments.

17 (10) Receiving, reviewing and acting upon complaints and
18 suggestions concerning the program, with the assistance of
19 the purchasing agency, as appropriate.

20 (11) Evaluating the effectiveness and utility of the
21 program.

22 (12) Monitoring the program and the department's
23 progress towards the aspirational target.

24 (13) Establishing business assistance offices throughout
25 this Commonwealth to assist and carry out the provisions of
26 the program.

27 (14) Requiring that all applications for small
28 businesses and small diverse businesses verification under
29 this chapter shall be sworn under oath.

30 (15) Identifying barriers to equitable participation by

1 small diverse businesses in department procurement.

2 (16) Designating staff to assist small businesses and
3 small diverse businesses in learning how to participate in
4 department procurement in accordance with this chapter.

5 (17) Developing the conditions under which a contract-
6 specific goal may be waived, either partially or fully, upon
7 request of a bidder or offeror in accordance with section 407
8 (relating to bonding and progress payments).

9 § 406. Request for full or partial waiver and good-faith
10 efforts.

11 Notwithstanding any provision of this chapter to the
12 contrary, bidders or offerors may request a partial or full
13 waiver of a contract-specific goal for small diverse business
14 participation. A bidder or offeror requesting a partial or full
15 waiver shall submit, in writing, a report detailing the bidder's
16 or offeror's efforts to meet the contract-specific goal as
17 required by the solicitation. In reviewing a bidder's or
18 offeror's written request for a partial or full waiver of a
19 contract-specific goal, the purchasing agency, based on the
20 recommendation of the department, shall determine if a bidder or
21 offeror has made good-faith efforts to meet the contract-
22 specific goal and to what extent the waiver request should be
23 granted. In determining if a bidder or offeror has made good-
24 faith efforts, the purchasing agency and the department may
25 consider levels of participation by small diverse businesses by
26 other bidders or offerors.

27 § 407. Bonding and progress payments.

28 (a) Bonding.--Notwithstanding any provisions of law to the
29 contrary, a purchasing agency may reduce the amount or change
30 the types of bonding normally required or accept alternative

1 forms of security to the extent reasonably necessary to
2 encourage procurement from small businesses and small diverse
3 businesses.

4 (b) Progress payments.--A purchasing agency may make special
5 provisions for progress payments as it deems reasonably
6 necessary to encourage procurement from small businesses and
7 small diverse businesses.

8 § 408. Report to General Assembly.

9 The department shall annually report in writing to the
10 General Assembly concerning the awarding of contracts and
11 subcontracts to small businesses and small diverse businesses
12 during the preceding fiscal year. The report shall include
13 statistical information regarding the program and information
14 regarding small businesses and small diverse businesses,
15 including business classification, location and industry. In
16 preparing the report, the department shall verify whether
17 commitments made to small diverse businesses in the course of
18 awarding these contracts have been maintained or achieved.

19 § 409. Compliance.

20 (a) Federal requirements.--If a procurement involves the
21 expenditure of Federal assistance or contract funds, the
22 purchasing agency shall comply with Federal law and authorized
23 regulations which are mandatorily applicable and which are not
24 presently reflected in this chapter.

25 (b) Federal disadvantaged business goals.--Notwithstanding
26 any other provision of this chapter, a local transportation
27 organization shall be deemed in compliance with this chapter if
28 the local transportation organization applies its Federal
29 disadvantaged business goals to State-funded contracts.

30 § 410. Aspirational target.

1 The secretary shall set an aspirational target for small
2 diverse business participation by the department, which shall be
3 reviewed and adjusted every five years upon completion of a
4 disparity study.

5 § 411. Disparity study.

6 Beginning no later than June 30, 2022, and at least once
7 every five years thereafter, the department shall complete a
8 Statewide disparity study on the availability and use of small
9 diverse businesses, the results of which shall be used to set an
10 aspirational target under section 410 (relating to aspirational
11 target). The secretary shall transmit notification to the
12 Legislative Reference Bureau for publication in the Pennsylvania
13 Bulletin whether or not the disparity study shows a
14 statistically significant disparity.

15 § 412. Program review and expiration.

16 (a) Review.--Upon completion of the disparity study
17 conducted under section 411 (relating to disparity study), the
18 department shall review the results and recommendations of the
19 disparity study and the operation of and evidentiary basis for
20 the program in order to determine whether the department has a
21 continuing compelling interest in remedying discrimination
22 against small diverse businesses in its marketplace and the
23 permissible scope of any narrowly tailored remedies to redress
24 discrimination against small diverse businesses so that the
25 department will not function as a passive participant in a
26 discriminatory marketplace.

27 (b) Expiration.--This chapter shall expire January 1, 2028,
28 unless the disparity study completed under section 411 shows a
29 statistically significant disparity in the utilization of small
30 diverse businesses. If the disparity study shows a statistically

1 significant disparity, the program shall renew for an additional
2 five years with the review and expiration under this section
3 each occurring every five years thereafter until the disparity
4 study shows no statistically significant disparity in the
5 utilization of small diverse businesses.

6 Section 3. This act shall take effect in 120 days.