



DEPARTMENT OF
GENERAL SERVICES

DIVISION OF ENGINEERING AND BUILDINGS

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DEB Notice 041515

(Effective: 04/15/2015)

Summary of Key Changes Mandated by Executive Order 20 (July 2014)

1. Key Changes Resulting from the Executive Order:

a. Small business participation goal increased.

- Changed from: “goal of **40%** small business participation”
- Changed to: “**exceed** a target goal of **42%** small business participation”

b. Micro business designation created.

c. Set aside programs for construction (up to \$100,000) and professional services (up to \$50,000) created.

d. Added a requirement to include a “procurement plan” with all bids/proposals.

- Changed from: “each prime shall include in its proposal/bid a SWAM participation component”
- Changed to: “Executive branch agencies shall require each prime contractor to include in its proposal(s)/bid a SWAM procurement plan.”

- i. For construction procured via an Invitation for Bid (IFB), or Design-Bid-Build, the evaluation of the small business procurement plan with the bid (and the potential for a bidder to be non-responsive) represents a key change. The following statement is added to the IFB: *“Target Goal. Under Executive Order 20, July 22, 2014, Cabinet Secretaries and all executive branch agencies have been directed to continue and advance the following on a race and gender neutral basis: exceed a target goal of 42% with small businesses certified by DSBSD.”* Agencies will then be afforded the opportunity, on the bid form, to specify a minimum small business participation requirement based upon their local circumstances. Bidders will be required to submit their small business participation percentage on the bid form. A bidder’s small business procurement plan (as summarized and represented by the small business participation percentage entered on the bid form) must be entered on the bid form for a given bidder to be considered responsive. An entry by a bidder of zero is acceptable if the agency has chosen to not specify a minimum small business requirement. A bidder will be considered responsive if their percentage entry is greater than or equal to the minimum specified by the agency.

- ii. For construction procured via a Request for Proposal (RFP), including Construction Management at Risk (CM@R) and Design-Build(DB), there will be a similar process in

which offerors' proposed small business procurement plans (as represented by their proposed small business participation percentage) are entered on standardized forms for CM@R and DB. Proposed participation percentages will then be evaluated against the available points for small business participation as allocated in the RFP.

- iii. For professional services procured via a Request for Proposal (RFP), there will be a similar process in which offerors' proposed small business procurement plans (again, as represented by their proposed small business percentage) are entered on appropriate, standardized forms (i.e., AE-1A). Proposed participation percentages will then be evaluated against the available points for small business participation as allocated in the RFP.

e. **Added significant emphasis on ensuring and documenting compliance.**

- Changed from: Before final payment is made, the contractor must certify evidence satisfactory to the Commonwealth of compliance with the contract's small business Procurement Plan
- Changed to: Before final payment is made, the purchasing agency shall confirm that the contractor has certified compliance with the contract's small business procurement plan.
 - If there are any variances between the contractor's required small business procurement plan and the actual participation, the contractor shall provide a written explanation.
 - The written explanation shall be kept with the contract file and made available upon request.
 - Contracts and renewals may include a provision allowing final payment to be withheld until the contractor is in compliance with its small business procurement plan. (This option has been added to the various general conditions.)

f. **Added a requirement to review prior small business compliance before renewing or entering into new contracts.**

- Added: Prior to entering into a new contract or renewing a contract with a contractor, an agency shall review a contractor's record of compliance with small business procurement plan requirements. A contractor's failure to satisfactorily meet designated small business procurement plan requirements shall be considered in the prospective award or renewal of any future contracts with the contractor.
- A requirement has been added to appropriate RFP and RFQ forms for the offerors to provide data on prior small business utilization. (For referenced projects, this is typically the percentage proposed and the percentage delivered at contract completion.)

2. Tools/Forms to Evaluate Small Business Requirements:

Method of Procurement	Evaluation of <u>prior</u> small business compliance <u>prior to</u> award	Evaluation of <u>proposed</u> small business procurement plans <u>prior to</u> award (<u>key concept, evaluate percentage prior to</u> award)	Evaluation of small business compliance after award
Competitive Negotiation (A/E, Professional Services)	Use AE-5 (para 8) and evaluate as a part of the RFP process.	Use AE-1A (para 9) and evaluate as a part of the RFP process.	If award is to a large business, and the large business proposed a small business participation percentage, then provide more detailed small business participation plan on DGS form 30-360 <u>within 30 days of award</u> . Then, large business primes subsequently report actual small business participation and progress towards “proposed small business percentage” using either DGS form 30-360, DGS form 30-361(pilot), or other locally specified format.
Competitive Sealed Bidding (Construction via an Invitation for Bid, i.e., Design-Bid-Build)	N/A (cost is basis of award)	Evaluate on the bid form. At the bid stage, this becomes a “go or no-go” process in which bidder is considered responsive or non- responsive (i.e., did bidder’s small business participation percentage equal or exceed that specified by agency?).	If award is to a large business, and the large business bid a small business participation percentage, then provide more detailed small business participation plan on DGS form 30-360 <u>within 30 days of award</u> . Then, large business primes subsequently report actual small business participation and progress towards “small business bid percentage” using either CO-12, DGS form 30-360, DGS form 30-361(pilot), or other locally specified format.
Competitive Negotiation (Construction Management at Risk, or CM@R)	Use modified CO-16 and evaluate during RFQ process.	Use specialized RFQ and RFP forms due to uniqueness of CM@R (i.e., a maximum of 10% of the work may be self-performed by the CM).	If award is to a large business, and the large business proposed a small business participation percentage, then provide more detailed small business participation plan on DGS form 30-360 <u>within 30 days of agreement to a GMP</u> . Then, large business primes subsequently report actual small business participation and progress towards the “proposed small business percentage” using either CO-12, DGS form 30-360, DGS form 30-361 (pilot), or other locally specified format.
Competitive Negotiation (Design- Build or DB)	Use modified CO-16 and evaluate during RFQ process.	Use specialized RFQ and RFP forms due to uniqueness of DB.	If award is to a large business, and the large business proposed a small business participation percentage, then provide more detailed small business participation plan on form DGS-30-360 <u>within 30 days of award</u> . Then, large business primes subsequently report actual small business participation and progress towards the “proposed small business percentage” using either CO-12, DGS form 30-360, DGS form 30-361 (pilot), or other locally specified format.

3. What Hasn't Changed:

- The executive order reiterated that this is a race and gender-neutral small business program; when evaluating bids/proposals, emphasis is on small business participation.
- When evaluating small business participation, it is essential that firms are DSBSD-certified small businesses.
- This remains primarily a decentralized program where agencies manage their programs based upon their local circumstances.
- eVA requirements associated with small purchases greater than \$30,000 and up to \$100,000:
 - i. Posting of public notice of IFBs: not required where vendors have been pre-qualified, such as in the DGS/DEB Small business pool; otherwise, required.
 - ii. Posting of notice of award: required (currently must use modified "sole source" entries to accomplish this in eVA, but we will pursue a modification to eVA to simply this)

4. Definitions:

- **Micro businesses:** Those businesses, certified by DSBSD, as those having no more than 25 employees AND no more than \$3M in average annual revenue over last 3 years.
- **Small businesses:** Those businesses, certified by DSBSD, as compliant with § 2.2-1604/§ 2.2-4310: "Small business" means a business that is at least 51 percent independently owned and controlled by one or more individuals who are U.S. citizens or legal resident aliens and, together with affiliates, has 250 or fewer employees OR average annual gross receipts of \$10 million or less averaged over the previous three years. One or more of the individual owners shall control both the management and daily business operations of the small businesses.

5. Summary of Set Aside Programs per (EO20, 22 Jul 14); also, reference “Small Purchase Procedures,”:

What	Who	\$	CPSM process
Construction (stand-alone contracts; not subcontracts)	Micro businesses	<10k	Contact 2 micros , award to low if fair/reasonable. If price not fair/reasonable, OR, upon due diligence no micro business in a particular category exists or was willing to submit, then proceed to small business set aside procedures below.
Construction(stand-alone contracts; not subcontracts)	Small businesses	≥ 10k and ≤ 100k	Contact 4 smalls and 1 micro (unless upon due diligence no micro business in a particular category exists or was willing to submit) and award to low if fair/reasonable; if not fair/reasonable, then remove set aside and contact five (5) businesses.
Professional Services	Micro businesses	<10k	<p>Contact 1 micro; if price not fair/reasonable, then contact another micro and repeat until a fair/reasonable price is available; if, upon due diligence, it is determined that no micro businesses in this category exists, is willing to participate, or is appropriately qualified, then a small (as opposed to a micro) business may be contacted .</p> <p>Likely options for a given agency to achieve this set aside: (1) use term contractor if term contractor is also a micro or small business (2) or, alternatively, use “Category B, Small Purchase Professional Service Procurements” procedure as outlined in 3.1.8.3.2 (previously \$5,000 and less, <u>but this has been increased to \$10,000</u>). (3) use a term contractor which is a large business, if in the original term contract solicitation/RFP, small business participation was evaluated. For any option selected, the repeated use of the same contractor is not allowed.</p>
Professional Services	Small businesses	≥ 10k and ≤ 50k	<p>Contact 1 micro; if price not fair/reasonable, then contact a small business and repeat until a fair/reasonable price is available; if, upon due diligence, it is determined that no micro businesses in this category exists, is willing to participate, or is appropriately qualified, then a small business may be contacted initially.</p> <p>Likely options for a given agency to achieve this set aside: same as above.</p>

6. Impact of EO20 on A/E Term Contracts:

A/E term contractors may only be used as follows for a given project order:

- Task orders less than \$10,000: A/E term contractor must also be a certified micro business and appropriately qualified to do the work; if not, may use term contractor which is a small business.
- Task orders between \$10,000 and \$50,000 (inclusive): A/E term contractor must also be a certified small business and appropriately qualified to do the work.
- Procedures must be in place to ensure that repeated use of the same term contractor is not allowed.
- No change, but as a reminder, if the A/E fee exceeds \$200,000, then the term contract may not be used.
- When they are re-solicited, A/E term contracts will include the evaluation of the small business procurement plan as described above. In those cases where small business participation has been evaluated/considered in the basis of award of the A/E term contracts, the A/E term contractors (typically small businesses but occasionally large ones) may alternatively be used without consideration of the above set-asides. This means that a term contractor, who happens to be a large business, could be used for a task order less than \$50,000 if that large business was previously evaluated for proposed small business participation over the life of the contract.

7. Feedback:

As we implement these new procedures, we welcome feedback and recommendations for improvement. Furthermore, this topic will be a focus area at our upcoming Capital Outlay and Facilities Management Forum on May 6th, 2015.
