# GUIDELINES FOR SMALL BUSINESS CONSTRUCTION CONTRACTS



HARRISBURG, PENNSYLVANIA
2013 EDITION

# **Guidelines for the**

# **DGS Small Business Reserve Program**

### **For Construction Contracts**

# §1 General

- **a.**) Pursuant to Executive Order 2011-09, the purpose of the Department of General Services' Small Business Program For Construction Contracts ("the SB Construction Program") is to provide DGS-certified small construction businesses with opportunities to compete for commonwealth agency construction contracts solely against other DGS-certified small construction businesses to foster opportunities for growth and advancement among these small construction businesses.
- **b.**) All commonwealth agencies under the governor's jurisdiction are required to identify and set aside contracts for DGS' SB Construction Program. Agencies awarding contracts under §301(c) of the Commonwealth Procurement Code shall, pursuant to the Governor's Executive Order 2011-09, set aside projects for award to a Small Business program created and coordinated with the Department of General Services. Independent agencies are encouraged to participate in the SB Construction Program.
- c.) Under this program, a business in the construction industry that satisfactorily completes the self-certification process will be deemed a "Small Construction Business". Only Small Construction Businesses will be eligible to bid on prime contracts issued within this Program.
- d.) Certification and participation in DGS' Small Business Program is race and gender neutral. The DGS SB website may contain optional links to assist a Small Business interested in pursuing other certifications, but self-certification in the Small Business Program is a separate and distinct process from DGS' certification process for minority, woman, veteran or disadvantaged businesses.
- **e.)** DGS reserves the right to modify these guidelines as necessary. The amended guidelines will be posted on the DGS website with the changes highlighted for easy comparison to the prior version.

- §2 **Definitions** For purposes of this program, the following definitions shall apply.
  - **a.)** Calendar year time period spanning 365 days, unless leap year, which would span 366 days.
  - **b.**) Commonwealth employee an individual drawing a salary or wages from a Commonwealth agency for which the Commonwealth agency is required by law to file a W-2 form with the Internal Revenue Service.
  - **c.**) **Contract** a type of written agreement, regardless of what it may be called, for the procurement of construction services executed by all parties in accordance with the Act of October 15, 1980 (P.L. 950, No. 164) as amended, known as the Commonwealth Attorneys Act.
  - **d.**) **For Profit Business** entity that is formed and operated with the intention of earning a profit.
  - **e.**) **Gross Sales Income** the total value of sales per calendar year before discounting customer discounts, returns or allowances, or taxes and deductions.
  - **f.) Invitation to Qualify** All documents, including those either attached or incorporated by reference for qualifying small construction businesses in Tier 1.
  - **g.**) **Performance Evaluation database** An internal database used by DGS personnel to evaluate the performance of design professionals and contractors throughout the course of each project.
  - **h.) Project** The entire scope of work to be performed by all prime contractors through a coordinated effort within the same time period and at the same facility.
  - **i.**) **Responsible Bidder** A bidder that has submitted a responsive bid and possesses the capability to fully perform the contract requirements in all respects and the integrity and reliability to assure good faith performance.
  - **j.**) **Responsive Bid** A bid which conforms in all material respects to the requirements and criteria in the invitation for bids.
  - **k.) Small Business** shall:
    - **1.** be a for-profit business:
    - 2. be independently owned and operated; and
    - 3. not be dominant in its field of operation; and

- **4.** employ one hundred (100) or fewer employees; and
- 5. not be a subsidiary of any other business; and
- **6.** for a corporation, have a certificate of authority to do business in Pennsylvania as required by the Business Corporation Law, approved May 5, 1933, P.L. 364, as amended, or for an individual or partnership trading under a fictitious or assumed name must be registered under the Fictitious Name of Pennsylvania, namely the Act of May 24, 1945, P.L. 967, as amended; and
- 7. not have exceed the three-year average maximum amount of gross sales income per calendar year described below for the largest tier; and
- **8.** have properly licensed personnel as required by applicable law to perform the scope of work set forth in the contract.

Any business capable of proving all eight (8) elements may proceed to the self-certification process and, if successful, participate as a prime contractor in one of the three tiers set up within the SB Construction Program.

- **l.**) **Vendor Number** a six digit number assigned by DGS to all businesses registered to conduct business with the Commonwealth.
- **m.**) **Work Order** a written authorization from DGS which provides, among other items, the scope of work, project duration and lump sum price. A Work Order will only be issued on Tier 1 projects.

# §3 Scope of Work for Small Construction Business Program and Exclusions

- a) An Agency funded project with an estimated total project value between \$5,000 and less than \$300,000.00 is subject to this Program. These projects are reserved to be bid, awarded and performed only by properly self-certified DGS Small Construction Businesses. The exclusions are as follows:
  - 1. If DGS determines that there are no Small Construction Businesses available to bid the project or all bidders are non-responsive, then DGS reserves the right to exempt that particular project from the Small Business program.

- **2.** An Agency funded project with an estimated total project value equal to or greater than \$300,000.00 is not encompassed within the scope of this Program.
  - 1. A Small Construction Business of any Tier may bid upon and perform as either a prime contractor or a subcontractor on any non-Small Business project.
- **3.** A project with an estimated total construction contract award value for the entire scope of work less than \$5,000 is not encompassed within the scope of this Program.
- **4.** A project with 100% of the labor to be performed by Commonwealth employees is not subject to this Program.
- **5.** Contracts, regardless of dollar value, for emergency work, sole source procurements, leasehold improvements, historic preservation work, or as otherwise approved for exemption by the Secretary of the Department of General Services, are not encompassed within the scope of this Program.
- **b)** The contracts for design professional services to be performed for projects within this Program have separate Guidelines.

# §4 Tiers for Small Construction Businesses

**a.)** Tiers – A Small Construction Business shall be certified as described in the Self-Certification Section to compete within only one of the following three tiers. If a business exceeds conditions within a particular tier as of the date of self-certification, that business will not be eligible for certification in that tier. The Department will re-evaluate the Gross Sales Income limits annually and may change the amounts for the following year based upon the actual data of the sales limits submitted by the Small Businesses. Any business previously certified will not be governed by any amendment to Gross Sales Income limits for the duration of their self-certification.

### 1. Tier 1

### i. Qualifications/Limits

- **A.** Gross Sales Income: Up to \$300,000 total gross sales income averaged over the last 3 calendar years; and
- **B.** Small Construction Businesses within this tier will compete for single contract projects with an estimated award amount between \$5,000 and \$24,999.99.
  - 1. If the project requires selection of a design professional or otherwise requires sealed drawings, DGS reserves the right to assign the project to Tier 2.
- **C.** Small Construction Businesses within this tier must self-perform 100% of the scope of work of every Work Order with employees on their payroll.
- **D.** A Small Construction Business within this tier may be self-certified for more than one trade (general or HVAC or plumbing or electrical).

### ii. Performance and Restrictions

- **A.** All properly self-certified Small Construction Businesses in this tier will be eligible to complete an Invitation to Qualify (ITQ) which will be issued by the Department's Public Works deputate.
  - 1. Upon successful completion of the ITQ, the Small Construction Business will be awarded a zero (\$0) dollar contract by DGS.
  - 2. If the Small Construction Business is a successful bidder on a Tier 1 project, the agency that bid the project will award a Work Order against the existing zero (\$0) dollar contract.
  - **3.** The agency that bid the project will award, administer and pay for the work performed under the Work Order.
  - **4.** DGS will monitor awards and performance but will not bid, inspect, or pay for the work.

- **B.** A Small Business within this tier may only perform one Work Order at any time. If only administrative work remains on a Work Order, the Small Business may bid on other projects.
  - 1. DGS or the Funding Agency reserves the right to declare a Small Construction Business a non-responsible bidder on a particular project if they have an existing Work Order not completed by bid opening date or they repeatedly withdraw bids.
- **C.** The Small Business must, as part of the bid documents on each project, inform the Funding Agency of any current work orders and other projects they are bidding.
- **D.** If the Small Business is the apparent low bidder on more than one project concurrently, they will be awarded the Work Order with the highest dollar value and rejected as non-responsive on the other project bid(s).
- **E.** Due to threshold limits, the Prevailing Wage Act and the Separations Act do not apply to Work Orders awarded within this tier.
  - 1. The maximum Work Order of \$24,999.99 will be strictly enforced to avoid any violation of thresholds established by law. A Work Order for less than \$24,999.99 may have change orders that increase the price, but under no circumstances will any change order work be allowed to increase the Work Order amount beyond \$24,999.99.

### F. Bonds

1. In order to foster participation and opportunity for Tier 1 Small Construction Businesses, Bid Security (bid bonds, certified checks or bank checks) will not be required from any Tier 1 Small Business Contractors.

- 2. In order to foster participation and opportunity for Tier 1 Small Businesses, no Payment or Performance bonds or other security will be required from any Tier 1 Small Business Contractors.
  - a. DGS reserves the right to declare a Small Construction Business a non-responsible contractor if DGS determines that the Small Construction Business's performance on any project is unsatisfactory and results in the default of the Small Construction Business.
  - b. DGS may institute involuntary withdrawal from the Program for any Small Construction Business whose performance on any project is unsatisfactory.
- **G.** Insurance requirements are set forth in the General Conditions of the Contract. At a minimum, the Small Business must have General Liability insurance and Workers' Compensation insurance in amounts adequate to perform the Work in compliance with applicable law.

### 2. Tier 2

### i. Oualifications/Limits

- **A.** Gross Sales Income: Between \$300,000 and \$3,000,000 in total gross sales income averaged over the last 3 calendar years.
- **B.** Small Construction Businesses within this tier will compete for contracts with a Project estimated award amount between \$25,000.00 and \$99,999.99.
  - 1. DGS reserves the right to determine, prior to releasing the project for bid if, based upon scope and the potential for unforeseen change orders, the project is more properly deemed to be a Tier 3 project.

### ii. Performance and Restrictions

- **A.** Small Construction Businesses within this tier will bid on each project and will not receive a \$0 contract or submit to the ITQ process.
- **B.** There is a maximum of 3 Base Bids in Tier 2 projects.
- **C.** DGS will determine, based upon project scope and location, whether DGS will administer construction. The decision will be made prior to releasing the project for bids.
- **D.** Small Construction Businesses within this tier must self-perform at least 51% of the labor cost of every contract awarded under this program, unless the Department directs otherwise, such as to ensure certified installers.
  - 1. Any work to be subcontracted may only be subcontracted to Small Construction Businesses in Tier 2 or Tier 1, who must self-perform 100% of the subcontract value, unless the Department directs otherwise.
- **E.** Small Construction Businesses within this tier may:
  - 1. be self-certified for more than one discipline; and
  - 2. bid on more than one contract on any project; and
  - **3.** be awarded and perform multiple concurrent Small Construction Business contracts.
- **F.** DGS reserves the right to declare a Small Construction Business a non-responsible bidder if DGS determines that performance on one or more of its current contracts is unsatisfactory.

# G. Bonds

- 1. The Department will require Bid Security (bid bonds, certified checks or bank checks) in the amount of 5% of the highest base bid price.
- 2. The Department will require Performance Security (bond, certified check or an irrevocable stand-by letter of credit as provided in the Bid Proposal from Tier 2 Small

Business Contractors in the amount of **50%** of the contract award value.

**H.** Insurance requirements are set forth in the General Conditions of the Contract. At a minimum, the Small Business must have General Liability insurance and Workers' Compensation insurance in amounts adequate to perform the Work in compliance with applicable law.

### 3. Tier 3

# i. Qualifications/Limits

- **A.** Gross Sales Income: Between \$3,000,001 and \$20,000,000 in total gross sales income averaged over the last 3 calendar years.
- **B.** Contractors within this tier will compete for contracts on projects with an estimated project value between \$100,000 and \$299,999.99.

### ii. Performance and Restrictions

- **A.** Small Construction Businesses within this tier must self-perform at least 51% of the labor cost of every contract awarded under this program, unless the Department directs otherwise, such as to ensure certified installers.
  - Any work to be subcontracted may only be subcontracted to Small Construction Businesses in Tier 1, Tier 2 or Tier 3, who must self-perform 100% of the labor cost of the subcontract.
- **B.** Small Construction Businesses within this tier may:
  - 1. be self-certified for more than one discipline; and
  - 2. bid on more than one contract on any project; and
  - **3.** be awarded and perform multiple concurrent contracts.
- **C.** DGS reserves the right to declare a Small Construction Business a non-responsible bidder if DGS determines that performance on one or more of its current contracts is unsatisfactory.

### **D.** Bonds

- The Department will require Bid Security (bid bonds, certified checks or bank checks) in the amount of 10% of the highest base bid price.
- 2. The Department will require Payment and Performance bonds from Tier 3 Small Business Contractors in the amount of 100% of the contract award value.
- **E.** Insurance requirements are set forth in the General Conditions of the Contract. At a minimum, the Small Construction Business must have General Liability insurance and Workers' Compensation insurance in amounts adequate to perform the Work in compliance with applicable law.

# §5 Self-Certification to Become a Small Construction Business

- **a.) Vendor Number** Before going to the self-certification step, a Small Business must have a Vendor Number, which is assigned by the DGS to all businesses who do business with the Commonwealth. This number is separate from a Small Business number.
  - 1. Process to obtain a Vendor Number, go to <a href="www.dgs.pa.state">www.dgs.pa.state</a> and click on the tab on the left side labeled "Doing Business with the Commonwealth", then click upon "Procurement" and follow instructions in the Supplier Service Center for New Procurement Supplier Registration.
- **b.**) **Process -** The process for certification is set forth at the link on the DGS SB Construction Program www.smallbusiness.pa.gov. The link will provide a step-by-step questionnaire to be completed by a duly authorized person representing the business.
  - During the self-certification process, a business must recognize and answer questions based upon the understanding that a Small Construction Business must self-perform at least 51% of the labor value on every contract.

- 2. At the successful completion of the questionnaire, the business will be self-certified within one of the three available tiers. The program will automatically assign the proper tier; the business does not select the tier. The Small Construction Business should print out the certification, which will contain a DGS SB Construction identification number which shall be used by the Small Business for bidding and performing projects.
- **c.**) **Time Period Certification is Valid** The Self-Certification shall be valid for a period of 1 year from the day the DGS SB Construction identification number is issued.
- **d.**) Fluctuation of Data within the 1 year period The Small Business' gross sales figure may fluctuate within that 1 calendar year certification period so long as the figure was accurate at the time of the certification.
- e.) Re-certification The Small Construction Business assumes responsibility for re-certifying before the lapse of the 1 year period. If the certification lapses, the business may not submit a bid, be awarded any Small Construction projects, or be a subcontractor on a Small Construction project. A Small Construction Business must have a valid DGS SB Construction identification number in order to be deemed a responsive bidder. Any business without a valid identification number as of bid date will be rejected.

### §6 Enforcement and Verification of Eligibility

- a.) Every Small Construction Business that is awarded a construction contract or a Work Order will be subject to examination by the Commonwealth to verify the accuracy of the statements made during the self-certification process and to verify self-performance of the contract or Work Order and subcontracting only to other Small Construction Businesses.
- **b.**) Before a contract or Work Order can be issued for signature, the Small Construction Business must pass a Contractor Responsibility Program review.
- **c.**) All Small Construction Businesses who are awarded a contract or Work Order will automatically be entered into the DGS Performance Evaluation database.

- **d.**) DGS retains the right to investigate at any time and for any reason the accuracy of any and all statements or assertions made by any business or individual in obtaining either self-certification as a small business or in bidding on a commonwealth contract reserved for small businesses.
- **e.**) Any individual or firm submitting a self-certification or a bid on a commonwealth contract reserved for small businesses agrees to cooperate fully with any commonwealth agency in verifying the accuracy and current status of the business' status.
- **f.**) Any business determined by the Commonwealth to have provided false information in connection with obtaining or attempting to obtain either certification or a contract under this DGS SB Construction Program shall repay all reasonable expenses incurred by the Commonwealth during the investigation of the business.
- **g.**) Subject to the provisions of 18 Pa.C.S. § 4904 Unsworn Falsifications to Authorities, anyone providing false information to the Commonwealth of Pennsylvania in connection with obtaining or attempting to obtain either certification or a contract under the Small Business Reserve program will be subject to the following:
  - **1.** A determination by the Contracting Officer that the business and/or person is not responsible;
  - **2.** A determination that a contract entered into is void or voidable under \$1711.2 of the Commonwealth Procurement Code;
  - **3.** Reimbursement of any costs incurred by the Commonwealth in investigating potential violations relating to the validity of information submitted during the self-certification process;
  - **4.** Suspension and/or debarment under §531 of the Commonwealth Procurement Code;
  - **5.** Criminal prosecution for procurement fraud, perjury, or other applicable crimes; and

**6.** All other actions permitted by law deemed necessary to protect the Commonwealth's interest and ensure compliance with the laws of the Commonwealth.

# §7 Scope of Work And Procurement Requirements

- **a.**) The Funding Agency will bid, award and inspect all Tier 1 projects.
- **b.**) DGS will bid all Tier 2 and all Tier 3 projects.
- **c.**) Award to the Lowest Responsible Bidder Each prime contract or Work Order will be advertised and awarded in accordance with the provisions of §512 of the Commonwealth Procurement Code.
  - 1. Only properly self-certified Tier 1 Small Construction Businesses will receive a notice of the invitation to bid on projects encompassed by this Program. Notice to Tier 2 and Tier 3 Small Construction Businesses will be issued through electronic publication and the DGS SB Construction Program website.
  - **2.** Any potential bidder who does not have a DGS SB Construction identification number as of bid date will not be eligible to bid on projects encompassed by this Program.
  - **3.** Any person or company bidding on a Small Business Reserve procurement that does not have a valid DGS SB Construction identification number at bid opening date/time will have its bid rejected for that project on the ground that the bidder is not responsive.
  - **4.** Bids for all Tiers will be opened publicly and a bid tab prepared and posted on the DGS SB Construction Program website or the Funding Agency's web site.
  - **5.** All Tier 2 and Tier 3 contracts and Tier 1 Work Orders awarded under this program will only be awarded to the lowest responsible bidder using the competitive sealed bidding method.
- **d.**) **Separations Act** In accordance with Section 322(6) o the Commonwealth Procurement Code, construction contracts where the total construction costs are equal to or greater than \$25,000.00 are subject to the requirements of the

Separations Act. This act requires that HVAC, plumbing and electrical contract work must be separated from the work to be performed by general contractors.

- 1. Since Tier 1 projects will be single contract projects with a total cost less than \$25,000, the Separations Act will not apply to Tier 1 contracts.
- 2. On Tier 2 and Tier 3 projects, DGS' design professional or the Funding Agency will define the scope of work for each Small Construction Business prime contract and ensure that the Work is properly separated when issuing bid packages on each project.

# e.) Prevailing Wage Act and Davis Bacon Act –

- 1. Tier 1 projects will be single contract projects with a total cost less than \$25,000, so the Prevailing Wage Act will not apply to Tier 1 contracts.
- 2. To the extent any Small Business project has federal funds involved, the Davis-Bacon Act may apply. Davis-Bacon Act may apply to contracts in excess of \$2,000 for the construction, alteration and/or repair, including painting and decorating, of a public building or public work.
- **3.** On Tier 2 and Tier 3 projects, DGS will obtain and include Prevailing Wages or Davis-Bacon Wages in bid proposals on any Small Business project with an award value equal to or greater than the threshold amount required by law. Any Small Construction Business awarded a Tier 2 or Tier 3 contract shall comply with the Prevailing Wage Act or Davis-Bacon Act as applicable.
- Business Contractor contract is for a public work and they are therefore subject to the provisions, duties, obligations, remedies and penalties of the Public Works Employment Verification Act, 43 P.S. §§167.1-167.11. According to the Public Works Employment Verification Act, Contractors are required to utilize the Federal E-Verify program to verify the employment eligibility of each new employee hired after January 1, 2013 and to submit to DGS or the Funding Agency a Commonwealth Public Works Employment

- Verification Form available on the DGS web site at <a href="www.dgs.state,pa.gov">www.dgs.state,pa.gov</a> prior to being awarded a contract.
- g.) Prompt Payment Schedule In accordance with §3931 of the Commonwealth Procurement Code, performance of Work in accordance with the terms of the construction contract entitles a prime contractor to timely payment by DGS or the Funding Agency. In addition, performance by a subcontractor in accordance with the terms of the contract entitles the subcontractor to payment from the contractor. The performance of contracts and subcontracts under this Program is subject to the full requirements of the Prompt Payment Schedule requirements.

# §8 Commonwealth Training Opportunities for Small Construction Businesses

- a.) Quarterly Work Sessions DGS will conduct work sessions to review DGS procedures for construction. These sessions are free and open to all Small Construction Businesses who have obtained a DGS SB Construction identification number. The one-day sessions will be held in Harrisburg and may last for 3 to 4 hours. DGS personnel will discuss issues such as Separations Act compliance, DGS Administrative Procedures, Critical Path Method construction scheduling, change orders, billing procedures and construction administration. Each Small Construction Business is strongly encouraged to send at least 1 employee to one of these work sessions within 4 months of receiving a DGS SB Construction identification number. DGS will facilitate on-line registration for these sessions.
- b.) Special Informational Sessions DGS will endeavor to conduct special sessions to present new technology or other topics of interest. These optional sessions may have limited space availability and will be open on a first come first serve basis. Topics may include Building Information Modeling, sustainable design, cost estimating, video meeting software, business development planning, and other areas of interest. Small Construction Businesses are encouraged to contact DGS to suggest topics of interest. DGS will facilitate on-line registration for these sessions.

# §9 Withdrawal or Termination from the Program

- **a.**) A Small Construction Business may withdraw from the Program at any time for any reason but may re-enter at any time with proper self-certification.
  - 1. The tier assignment will be based upon the current Gross Sales Income limits in effect at the time of re-certification.
- **b.**) The date of withdrawal shall be the date DGS receives <u>written notice</u> from the Small Construction Business of their intent to withdraw.
- **c.**) As of the date of withdrawal,
  - the business will not be eligible to bid on any Small Construction Business projects; and
  - 2. the business will not receive any further notices or invitations to bid on Small Construction Business projects; and
  - **3.** the business will not be eligible to be a subcontractor on any Small Business projects; and
  - 4. the business' SB Construction identification number will be designated as inactive and will not appear in the Small Construction Business database.
- **d.**) The Department may terminate a Small Construction Business' eligibility to participate in the Program by revoking the business' SB Construction identification number for one or more of the following reasons:
  - a final determination by an authority having jurisdiction that the Small Construction Business violated any one or more of the requirements set forth in these Guidelines describing Enforcement and Verification of Eligibility.
  - a written notice of default and/or notice of termination issued by DGS pursuant to the terms of the General Conditions of the Small Construction Business contract.

# §10 Monitoring and Reporting System to Measure Effectiveness of Program

**a.**) Pursuant to Paragraph 2(e) of the Governor's Executive Order 2011-09, DGS will implement performance measures to evaluate the success of the program.