



Policies and Procedures

Policy for Approval of Third-Tier Contracting to Meet MBE Goals

Background/Purpose

This policy outlines the conditions under which third tier contracting may be used to fulfill Minority Business Enterprise (MBE) goals for State of Maryland procurement contracts. It provides clear guidance on the processes for requesting approval, establishing when such contracting is necessary, and the role of the awarding State Unit in tracking and approving these arrangements.

Acronyms

DGS – Department of General Services

OSP – Office of State Procurement

MBE – Minority Business Enterprise

GOSBA – Governor's Office of Small, Minority and Women Business Affairs

Definitions

Prime Contractor – means a person or firm that has a State procurement contract with a Unit.

Second-Tier Subcontractor – means a subcontractor who participates with the Prime Contractor to perform a portion of the original contract work.

Third-Tier Subcontractor – means a subcontractor who performs a portion of the work awarded to a Second-Tier Subcontractor.

Unit – per Section 11- 101 of the State Finance and Procurement Article, Unit means an officer or other entity that is in the Executive Branch of State Government and is authorized by law to enter into a procurement contract.

Related Statutes, Regulations, and BPW Advisories

- Maryland Annotated Code, State Finance and Procurement Article, Title 14, Subtitle 3
- COMAR 21.11.03.01 – COMAR 21.11.03.017
- BPW Advisory 2001-1

Procedures

1A. Pre-approval of Third Tier Contracting

If the Unit has already determined that third-tier contracting *is* approved as a method for meeting MBE goals for a *specific* procurement, a written request for approval is *not* required. The pre-approval of third-tier contracting must be noted within the solicitation and communicated during the pre-bid conference. If the Unit has already pre-approved the use of third-tier contracting, vendors may proceed to utilize third-tier subcontractors in preparing the MBE Participation Schedule.

Example Solicitation Language: For the purposes of this solicitation, the use of third-tier contracting to meet MBE goals is allowable. DGS will carefully review and approve any such arrangements to ensure compliance with the State of Maryland procurement policies and the goals for MBE participation in state contracts. Prime contractors are required to provide clear documentation and justification for the need to engage third-tier subcontractors and must obtain prior approval before proceeding with any contract awards.

1B. Conditions for Approval of Third-tier Contracting

If the Unit has *not* already determined that third-tier contracting is approved as a method for meeting MBE goals for a *specific* procurement, a written request for approval *is* required. To ensure that third-tier contracting is appropriately used to meet MBE goals, the awarding Unit must verify that third-tier contracting is the only viable option for meeting the goals. In order to confirm this:

- **Assessment of MBE Availability:** The prime contractor must demonstrate, through documented outreach, that all reasonable attempts have been made to identify and engage MBE firms directly at the second-tier subcontractor level.
- **Good Faith Effort Documentation:** If the prime contractor has made diligent efforts to identify second-tier MBE subcontractors and is unable to meet the goal, they must provide evidence of these efforts. This may include:
 - Copies of requests for quotes or proposals sent to MBE firms,
 - Responses (or lack thereof) from potential subcontractors, and
 - Any outreach efforts made to certified MBE firms.
- **Market Conditions or Specialty Needs:** The Unit may determine that the specific nature of the work or market conditions necessitate third-tier contracting in order to meet the goal. This includes specialized services or goods that only certain third-tier firms can provide.

2. Written Request for Approval

Following the notification of apparent award, the prime contractor must submit a formal written request, via e-mail to the Procurement Officer, for approval detailing why third-tier contracting is necessary. The request must include the following:

- **Detailed Explanation of Need:** A clear and concise explanation of why third-tier subcontracting is required to meet the MBE goal. This should include:
 - A description of the challenges faced in engaging a second-tier MBE subcontractor,
 - A summary of outreach efforts and their results, and
 - Identification of the third-tier MBE subcontractors to be used.
- **Specific MBE Participation Breakdown:** A detailed breakdown of how third-tier subcontractors will contribute to the MBE goal. The prime contractor must provide information on the third-tier subcontractor's certification status and the amount of work they will perform.
- **Supporting Documentation:** All supporting documentation from the outreach process, including emails, letters, and records of communication with potential MBE firms.

The written request should be submitted at least **10 days** after the notification of the apparent award date to allow sufficient time for review and approval.

3. Unit Approval Process

The awarding Unit must review and approve any third-tier arrangements prior to the award of the contract. The Unit will review and approve the need for third-tier contracting before any awards are finalized, ensuring that it is a last resort to meet MBE goals. This approval process includes:

- **Written Approval by Unit:** The Unit must approve third-tier contracting **in writing**. This approval will be issued in the form of a formal letter or memorandum from the Unit's procurement officer or MBE liaison.
 - The approval letter will include:
 - The names of the third-tier subcontractors approved for use,
 - A statement confirming that third-tier contracting is necessary and complies with the MBE goals,
 - A request for submission of relevant MBE forms for approved third-tier subcontractors, and
 - Any conditions or limitations on the use of third-tier contracting.

4. Compliance and Reporting

- **Review of MBE Utilization and Fair Solicitation Affidavit & Participation Schedule:** The Unit must review the MBE Utilization and Fair Solicitation Affidavit & Participation Schedule to ensure that all requirements are met per COMAR 21.11.03.09.
- **Tracking and Monitoring:** If approval is granted, the Unit will track the use of third-tier subcontractors and their compliance with the MBE goal through the following:
 - Updating the Contractor Compliance Tracking System (such as FMIS) with the approved third-tier subcontractors,
 - Regular monitoring and reporting throughout the contract performance period to ensure that the third-tier subcontractors are fulfilling their commitments and the goal is being met, and
 - Verification that payments to third-tier subcontractors are properly documented and compliant with MBE requirements.
- **Reporting and Documentation:** The awarding Unit will maintain a record of all approved third-tier contracting arrangements, including:
 - The original request from the prime contractor,
 - The written approval from the Unit,
 - Compliance reports submitted by the prime contractor, and
 - Any correspondence with the prime contractor regarding changes or adjustments to subcontractor arrangements.

If third-tier contracting is used, the Unit will monitor compliance throughout the term of the contract to ensure ongoing MBE participation.

5. Exceptions and Considerations

- All requirements pertaining to MBE second-tier subcontractors also apply to third-tier subcontractors.
- **Contract Modifications:** If, during the contract term, any changes are made to the subcontractor arrangement (e.g., substitution of third-tier firms), the prime contractor must submit an updated written request, amended MBE forms, and obtain approval from the Unit before those changes can be implemented.

Version Number	Published Date	Reason for Change
1	5 – 16 – 25	Establishment of Policy