

# Illinois State Toll Highway Authority

## SPECIAL PROVISION FOR

### SMALL BUSINESS INITIATIVE

#### 1. POLICY STATEMENT

It is the policy of The Illinois State Toll Highway Authority (“ISTHA” or “Tollway”) that qualified Illinois Small Businesses (“SBs”), as defined herein, have maximum feasible opportunities to participate fully in the performance of contracts funded and administered by the Tollway. The Tollway seeks to (i) ensure non-discrimination in the award and administration of its contracts and associated subcontracts, (ii) ensure it is not a passive participant in a discriminatory marketplace, (iii) create a level playing field on which Illinois based SBs can compete fairly for its contracts, (iv) ensure that any and all firms permitted to participate as Small Businesses meet the eligibility standards of the Small Business Initiative applicable to prime or subcontractors, and (v) help remove barriers to the participation of SBs in Tollway contracts and associated subcontracts.

Consistent with this policy, it is the responsibility of all contractors for general contracting work, and a specific condition of all Tollway contracts to which they are parties, to ensure full and fair opportunities for SBs to compete in contracts funded and administered by the Tollway and to fully comply with this Special Provision.

#### 2. DEFINITIONS

For the purposes of this Special Provision, the following terms shall have the following meanings:

*Affiliate:* Concerns and related entities are affiliates of each other when one directly or indirectly controls or has the power to control the other, or when a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. In determining whether concerns and related entities are independently owned and operated and whether affiliation exists, the CPO will consider the totality of the circumstances and all appropriate factors, including use of common facilities, common ownership and management, identity of interest (substantially identical business or economic interests such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) and contractual arrangements. The CPO may find affiliation even if no single factor is sufficient to constitute affiliation. A franchise relationship shall not affect the determination of affiliate status if the franchise has the right to profit commensurate with ownership and bears the risk of loss or failure.

*Bid Bond* means a written guaranty, issued by an insurance company or a bank, guaranteeing the bidder will honor the terms of the bid. Bid Bond requirements shall be listed within each solicitation. The amount of the bond is variable and at the discretion of the Tollway.

*Broker* means a person or entity that fills orders by purchasing or receiving supplies from a third-party supplier rather than out of its own existing inventory and provides no substantial service other than acting as a conduit between a supplier and a customer.

*Commercially Useful Function* means a distinct element of contract work a contractor is responsible for executing, by actually performing, managing, and supervising the work or fulfilling responsibilities for such work as a Small Business Joint Venture or Teaming Agreement partner.

*Contingency Work* means anticipated work within the scope of the project that is of such an uncertain nature that the location or quantity of the work could not be identified prior to awarding the contract.

*Core Work* means anticipated work within the scope of the project that is of such a nature that the location and estimated quantity of the work could be identified prior to awarding the contract.

*Direct Allowance Items* means costs items that may include mobilization, contractor quality plan, and other items as directed on the Tollway website's [Direct Allowable Cost Document](#). Direct Allowance Items are allowable when requested by the Tollway and included in the contract. The costs are allowable when it is customary for the firm to bill for the cost, and it can be itemized in the firm's billing and accounting systems.

*Disadvantaged Business Enterprise ("DBE")* means (i) a business currently certified by the Illinois Unified Certification Program ("ILUCP") pursuant to 49 C.F.R. Part 26, (ii) a business currently certified by the City of Chicago, Illinois or the County of Cook, Illinois as a Minority or Women-Owned Business ("M/WBE") pursuant to its M/WBE program for construction contracts, Art. IV, § 2-92-650, *et seq.*, as amended, or (iii) a business currently certified by the U.S. Small Business Administration ("SBA") pursuant to the Small Business Act as an SBA 8(a) business, owned and operated by a socially and economically disadvantaged person. A DBE is considered to have current certification if the firm is listed in the directory database of the pertinent certifying agency and confirmed to be in good standing.

*Diversity Goals* refers to various goal programs administered by the Tollway which may be applied to contracts within the Small Business Initiative.

*Good Faith Efforts* means actions a contractor undertakes to achieve a DBE/VET contract goal, which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the contract goal.

*Manufacturer* means a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

*Mobilization* means preparatory work and operations necessary for the movement of personnel, equipment and incidentals to the project site for the establishment of offices, buildings and other facilities necessary for work on the project and for all other work operations which must be performed, or costs incurred when beginning work on the project.

*Performance Bond* means a surety bond, issued by an insurance company or a bank, guaranteeing a contractor's completion of a project to the Tollway's satisfaction. Performance Bond requirements shall be listed within each solicitation. The amount of the bond is variable and at the discretion of the Tollway.

*Regular Dealer* means a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a Regular Dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A firm may be a Regular Dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the firm both owns and operates distribution equipment for the products. Any supplementing of a Regular Dealer's distribution equipment shall be by a long-term lease agreement and not on an *ad hoc* or contract-by-contract basis. Packers, manufacturer representatives, or other persons who arrange or expedite transactions are not Regular Dealers.

*Rolling Owner Controlled Insurance Program ("ROCIP")* means an insurance program managed and controlled by the Tollway that provides insurance coverage for specific construction projects. Requirements regarding enrollment in the ROCIP will be listed within each solicitation and is at the discretion of the Tollway.

*Small Business* means an Illinois business currently registered by the State of Illinois Chief Procurement Office/General Services pursuant to the Small Business Set-Aside Program ("SBSP"). A SB is considered to have current registration if the firm is listed in the SBSP directory database at time of bid. The link to the directory is found at:

<https://ipg.vendorreg.com/FrontEnd/SearchRegistry.asp?TN=ipg&XID=7553&QT=C56DF4AAA C20AC51C2C73E4E1E4E6DD939C22C318D9F0C1F>

Click the Search by Reference/Small Business Set-Aside Program Registered drop-down and mark "YES".

*Small Business Exception (SBE)* means an exception given to a small business prime contractor or a Small Business Joint Venture or Teaming Agreement, as defined in this Special Provision, on a Small Business Initiative contract that allows for subcontracting with firms who are not registered by the State of Illinois Chief Procurement Office/General Services pursuant to the Small Business Set-Aside Program ("SBSP") or in the Tollway's Small Business Initiative program. Eligibility for a SBE will be determined by the Department of Diversity and Strategic Development.

*Small Business Joint Venture or Teaming Agreement* mean an association of two or more persons, or types of SBs and persons numbering two or more, proposing to perform as a prime contractor, in which each partner contributes property, capital, efforts, skill and knowledge, is responsible for a distinct, clearly defined portion of the work of the project and has a proportional share in the capital contribution, control, management, risks, and profits of the Small Business Joint Venture or Teaming Agreement as described in a written agreement that specifies the terms and conditions of the relationships between the partners and each partners' risks and responsibilities and identifies the lead partner, if any. The combined gross revenue for any Small Business Joint Venture or Teaming Agreements cannot exceed the State's \$14 million annual gross revenue threshold.

*Small Business Initiative ("SBI")* means a Tollway program in which an Illinois business may participate only if it is registered as a small business by the State of Illinois Chief Procurement Office/General Services and listed in the SBSP directory database or are part of a Small Business Joint Venture or Teaming Agreement, as defined in this Special Provision, at the time of bid. A business must also be registered in the Tollway's SBI program within 5 days of notification of apparent low bidder status.

*Supplier* means any person or entity providing supplies, including, but not limited to, equipment, materials, printing and insurance, or that finances the purchase of supplies that can be procured regularly or are available on the commercial market.

*Supplies* means all personal property, including but not limited to equipment, materials, printing and insurance.

*Utilization Plan* means a list (which all bidders are required to submit) of all subcontractors to be utilized and, where applicable, those identified to satisfy the goals outlined below.

*Disadvantaged Business Enterprise Utilization Plan ("DBE Utilization Plan")* means the list of currently certified DBEs that the Bidder commits will be utilized, including its own participation as a DBE, if applicable, in the scopes of work and the dollar values or the percentages of work to be performed pursuant to a solicitation and in conformance with this Special Provision. This utilization plan applies to Tiers 2 and 3 of the SBI.

*Veteran Utilization Plan ("VET Utilization Plan")* means the list of currently certified veteran-owned and/or service-disabled veteran-owned small businesses ("VOSB/SDVOSB") that the Bidder commits will be utilized, including its own participation as a VOSB/SDVOSB, if applicable, in the scopes of work and the dollar values or the percentages of work to be performed pursuant to a solicitation and in conformance with this Special Provision. This utilization plan applies to Tiers 2 and 3 of the SBI.

*Veteran Owned Small Business/Service Disabled Veteran Small Business* means a business currently certified by the Illinois Department of Central Management Services as a VOSB/SDVOSB. A VBP is considered to have current certification if the firm is listed in the directory database of the pertinent certifying agency at time of bid.

### 3. **CONTRACTOR ASSURANCE**

The contractor makes the following assurance and agrees to include the assurance in each subcontract the contractor signs with a subcontractor. The contractor shall not discriminate on the basis of any protected Tier identified by law in the performance of this contract. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the Tollway deems appropriate.

### 4. **SB LOCATOR REFERENCES**

Bidders should consult the Illinois Procurement Gateway (“IPG”) SB Directory as a reference source for Illinois SBs. Only firms registered as a small business in the IPG **at the time of bid opening** are eligible to be considered for this contract. The link to the directory is included in the above definition of SB.

This directory will only be used as a source to identify registered SBs that may potentially participate in this contract. Registration does not mean that a firm is in any way prequalified to provide the products and/or services in its registration specialty. “Registration” means that the Illinois Chief Procurement Office has determined, on the basis of information provided and the representations therein, that a business meets the requirements to be registered as an SB under the Illinois Procurement Code. The Illinois Chief Procurement Office does not, as a result of listing, make any representation concerning the ability of any listed firm to perform work in the specialty listed. The Tollway does not, through its use of and referral to the Illinois Procurement Gateway, make any representation concerning the ability of any listed firm to perform work in its registered specialty. Bidders must conduct their own due diligence regarding the capabilities of registered firms to perform contract work.

### 5. **SMALL BUSINESS INITIATIVE RULES AND ELIGIBILITY CRITERIA**

Procurement in construction-related work may be reserved for qualified Illinois businesses in the SBI subject to the limitations listed below.

- 5.1. An Illinois business may participate in the SBI as a prime contractor only if it is registered as a small business by the State of Illinois Chief Procurement Office/General Services and listed in the SBSP directory database or is part of a Small Business Joint Venture or Teaming Agreement, as defined in this Special Provision, at the time of bid. A business, Small Business Joint Venture or Teaming Agreement also must be registered in the Tollway’s SBI program within 5 days of notification of apparent low bidder status.
  - 5.1.1. Primes may only utilize small business subcontractors registered in the SBI. Any subcontractors identified at the time of bid not already registered with the SBI will have 14 calendar days to become registered. If the subcontractor does not meet the eligibility requirements, vendors may request the ability to find a replacement subcontractor or request a SBE from the Department of Diversity and Strategic Development.
- 5.2. No wholesale business will be considered a small business for purposes of the SBI if its annual sales for its most recently completed fiscal year exceed \$13,000,000.
- 5.3. No retail business or business selling services will be considered a small business for purposes of the SBI if its annual sales and receipts exceed \$8,000,000.

- 5.4. No Illinois manufacturing business will be considered a small business for purposes of the SBI if it employs more than 250 persons.
- 5.5. No Illinois construction business will be considered a small business for purposes of the SBI if its annual sales and receipts for its most recently completed fiscal year exceed \$14,000,000.
- 5.6. Advertisements for bids or offers for contracts under the SBI shall be designated as *Small Business Initiative* advertisements. In awarding the contracts, only bids or offers from qualified SBs shall be considered.
- 5.7. The Tollway reserves the right, at its discretion, to award a contract solicited under the SBI program as an SBI contract or a contract under the Tollway's Small Business Set Aside Program.
- 5.8. Companies not eligible for inclusion in the SBI who accept a contract reserved for the SBI risk suspension from doing future business with the Tollway for up to five years.
- 5.9. SBI contracts valued at \$1,000,000.00 or less are not required to submit a DBE/VET Utilization Plan. For SBI contracts valued at over \$1,000,000.00, the bidder must submit a DBE Utilization Plan, and a VET Utilization Plan on ISTHA Form 2026 **with the bid submission** and satisfy applicable self-performance requirements.

## 6. TIERS OF SMALL BUSINESS INITIATIVE CONTRACTS

SBI contracts shall be advertised in one of three Tiers as listed below.

### 6.1. *Small Business Initiative Tier 1*

- 6.1.1. Construction contracts with an engineers' estimated dollar value of **\$1,000,000** or less will be designated Tier 1 contracts and will be subject to the criteria specified in the bid documents and summarized below:
- 6.1.2. Prequalification by the Illinois Department of Transportation ("IDOT") is not required.
- 6.1.3. Tier 1 contracts will not include Diversity Goals. Prime contractors may be required to furnish the material, labor, equipment, and all incidentals necessary to self-perform up to 40 percent of the total Contract Award.
- 6.1.4. Prime contractors will be required to utilize only SBs as subcontractors on Tier 1 contracts. If a prime contractor cannot identify sufficient SBs to serve as subcontractors, the prime must submit a request for a Small Business Exception in accordance with Section 8.6, Small Business Exception Procedures.

### 6.2. *Small Business Initiative Tier 2*

- 6.2.1. Construction contracts with an engineers' estimated dollar value between \$1,000,001 and \$3,000,000 will be designated Tier 2 contracts and will be subject to the criteria specified in the bid documents and summarized below:
- 6.2.2. Prequalification from IDOT is not required for Tier 2 contracts unless otherwise specified by the Tollway in the bid documents.

- 6.2.3. Tier 2 contracts include Diversity goals for Core Work as stipulated in Section 7 of this Special Provision.
- 6.2.4. Prime contractors may be required to furnish the material, labor, equipment, and all incidentals necessary to self-perform up to 40 percent of the total Contract Award.
- 6.2.5. Prime contractors will be required to utilize only SBs as subcontractors on Tier 2 contracts. If a prime contractor cannot identify sufficient SBs to serve as subcontractors, the prime must submit a request for a Small Business Exception in accordance with Section 8.6, Small Business Exception Procedures.

### **6.3. Small Business Initiative Tier 3**

- 6.3.1. Construction contracts with an engineers' estimated dollar range between \$3,000,001 and \$5,000,000 will be designated Tier 3 contracts and will be subject to the criteria specified in the bid documents and summarized below:
- 6.3.2. Prequalification from IDOT is not required for Tier 3 contracts unless otherwise specified by the Tollway in the bid documents.
- 6.3.3. Tier 3 contracts include Diversity goals for Core Work as stipulated in section 7 of this Special Provision.
- 6.3.4. Prime contractors may be required to furnish the material, labor, equipment, and all incidentals necessary to self-perform up to 40 percent of the total Contract Award.
- 6.3.5. Prime contractors will be required to utilize only SBs as subcontractors on Tier 3 contracts. If a prime contractor cannot identify sufficient SBs to serve as subcontractors, the prime must submit a request for a Small Business Exception in accordance with Section 8.6, Small Business Exception Procedures.

## **7. CONTRACT GOALS TO BE ACHIEVED BY THE CONTRACTOR – Small Business Tiers 2 & 3**

This contract includes a specific DBE utilization goal of **%** for Core Work. DBE utilization goals reflect the estimated availability of DBEs to perform the scopes of work in the contract, including as a prime contractor. Consequently, in addition to the other award criteria established for the contract, ISTHA will award this contract to a bidder that either meets the DBE goal or who demonstrates good faith efforts to do so. **The Contractor's DBE commitment may apply to any and all Change Orders ("CO") and Extra Work Orders ("EWO").**

This contract includes a specific Veteran Small Business participation goal of **%** based on the availability of CMS certified VOSB/SDVOSB vendors to perform or provide the anticipated services and/or supplies required by this solicitation. The participation of VOSBs/SDVOSBs will be calculated on the amount of Core Work identified in the bid documents. In addition to the other award criteria established for this solicitation, ISTHA will award this contract to a bidder that meets the VSB goal or demonstrates good faith efforts to do so. This goal is also applicable to COs and EWOs provided by the certified VOSB/SDVOSB bidder. If bidder is a CMS certified VOSB/SDVOSB vendor, the entire goal is met and no subcontracting with a CMS certified VOSB/SDVOSB vendor is required; however, bidder must submit a Utilization Plan indicating that the goal will be met by self-performance.

The VSB goal is separate and distinct from the DBE goal. A single firm may not be utilized to achieve credit toward both DBE and VSB goals on a single project except when the firm is bidding the contract as the prime contractor, is

certified as both a DBE and VSB and will commit to meet both DBE and VSB goals by self-performing each of the same or a greater percentage of work than the DBE and VSB goals added together.

## 8. BIDDING PROCEDURES

Compliance with the bidding procedures of this Special Provision is required prior to award of the contract. The failure of the as-read low bidder to comply will render said bidder's bid non-responsive. All bids must be submitted electronically through the State's BidBuy software. Relatedly, within three (3) days after notification of apparent low bidder status, the bidder must notify subcontractors of the subcontractors' inclusion in the bid, and if the contract is awarded, bidder shall again notify the subcontractors.

### 8.1. ***Submission of the DBE/VET Utilization Plan***

For Tiers 2 and 3, a bidder must submit a DBE/VET Utilization Plan on ISTHA Form 2026 **with its bid submissions** for the SBI.

If a bid is deemed non-responsive due to a failure to submit a DBE/VET Utilization Plan or failure to comply with the bidding procedures set forth herein, ISTHA may elect to cause the forfeiture of the penal sum of the bidder's proposal guaranty.

The DBE/VET Utilization Plan shall indicate that the bidder either has obtained sufficient DBE/VET participation commitments to meet the contract goal or demonstrate and document its good faith efforts to meet the goal. The DBE/VET Utilization Plan shall further provide the name, telephone number, email address and telefax number of a responsible official of the bidder designated for purposes of notification.

If the bidder is a Small Business Joint Venture or Teaming Agreement, each Small Business Joint Venture or Teaming Agreement partner must attest to the DBE/VET Utilization Plan.

Any agreement between a contractor and a DBE/VET or other subcontractor in which the contractor precludes the DBE/VET from providing subcontracting quotations to other contractors is prohibited.

### 8.2. ***Submission of the DBE/VET Participation Commitment Statement, ISTHA Form 2025***

The DBE/VET Utilization Plan must include a DBE/VET Participation Commitment Statement, ISTHA Form 2025, for each DBE/VET proposed for the performance of work to achieve the contract goal. The signatures on these forms must be original signatures. All elements of information indicated on ISTHA Form 2025 must be provided, including but not limited to:

- 8.2.1. The name and address of each DBE/VET to be used.
- 8.2.2. A full description, including pay item numbers for DBE/VETs or associated pay items for trucking services, of the Commercially Useful Function to be performed by each DBE/VET. Descriptions such as "miscellaneous" and prices such as "lump sum" are not acceptable. Contingency Work must not be included under Pay Items and will not be approved toward DBE/VET goal participation until such time as those pay items are confirmed as required contract work.
- 8.2.3. Direct Allowance Items will not be approved toward DBE/VET participation in the DBE/VET Utilization Plan.

- 8.2.4. Except as set forth in 8.2.5, Mobilization costs associated with a particular pay item shall be included in the cost of the pay item for which it is associated but shall be separately identified, and such mobilization costs will not be approved toward DBE/VET goal participation.
- 8.2.5. If the DBE/VET is the prime contractor, the Mobilization pay item may be approved toward DBE/VET participation in the DBE/VET Utilization Plan.
- 8.2.6. The price to be paid to each DBE/VET for the identified work, shall specifically state the quantity, unit price and total subcontract price for the work to be completed by the DBE/VET. If partial pay items are to be performed by a DBE/VET, ISTHA Form 2025 must indicate the portion of each item to be performed by each DBE/VET, a unit price where appropriate and the subcontract price amount.
- 8.2.7. A commitment statement signed by the bidder and each DBE/VET evidencing availability and intent to perform a Commercially Useful Function on the project.
- 8.2.8. If the bidder is a Small Business Joint Venture or Teaming Agreement comprised of DBE/VETs and non-DBE/VETs, the DBE/VET Utilization Plan must also include a clear identification of the portion of work to be performed by each DBE/VET Small Business Joint Venture or Teaming Agreement partner(s).
- 8.2.9. If the bidder is unable to meet the DBE/VET goal, it must demonstrate it made good faith efforts to do so, as described in this Special Provision.
- 8.2.10. The contract will not be awarded until the DBE/VET Utilization Plan, including if applicable, the bidder's good faith efforts to meet the DBE/VET goal, is approved by ISTHA. The DBE/VET Utilization Plan will be approved if it demonstrates that DBE/VETs will be used to perform a Commercially Useful Function sufficient to meet the contract goal, or that the bidder made sufficient good faith efforts, as defined in this Special Provision, to meet the goal.

### **8.3. Counting DBE/VET Participation**

The DBE/VET Utilization Plan's DBE/VET commitments represent work expected to be performed and paid for upon satisfactory completion. ISTHA is only able to count toward the achievement of the contract goal the value of payments made for work actually performed by DBE/VETs. ISTHA will count DBE/VET participation, and the contractor will receive credit towards meeting the DBE/VET contract goal, as follows:

- 8.3.1. The entire amount of that portion of work that the DBE/VET's own forces is certified to perform, as indicated on the DBEs Letter of Certification, and that is performed by the DBE's own forces either as the contractor or a subcontractor shall be counted, including the cost of supplies and materials obtained by the DBE/VET for work on the contract and supplies purchased or equipment leased by the DBE/VET (except supplies and equipment the DBE/VET purchases or leases from the prime contractor or the prime contractor's Affiliate). **Work a DBE/ VET subcontracts to a non-DBE/VET does not count toward the DBE/VET goal.**
- 8.3.2. The entire amount of fees or commissions charged by a DBE/VET for providing a *bona fide* service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of a contract, shall be counted, provided the fee is reasonable and not excessive as compared with fees customarily charged for similar services.

- 8.3.3. One hundred percent of the cost of trucking services utilized on the contract shall be counted, provided the DBE/VET is responsible for the management and supervision of the entire trucking operation for which it is responsible. At least one truck owned, operated, licensed and insured by the DBE/VET must be used on the contract. Credit will only be applied for trucking activity to and from the ISTHA job site. Credit will be given for the following: (1) the DBE/VET may lease trucks from another DBE/VET, including an owner-operator who is registered as an DBE/VET; the DBE/VET who leases trucks from another DBE/VET receives credit for the total value of the transportation services the lessee DBE/VET provides on the contract; and (2) the DBE/VET may lease trucks from a non-DBE/VET, including from an owner-operator. Goal credit will be limited to the value of the reasonable fee or commission received by the DBE/VET for trucks that are leased from a non-DBE/VET.
- 8.3.4. When a DBE/VET performs as a participant in a Small Business Joint Venture or Teaming Agreement, only the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of contract work performed by the DBE/VET with its own forces, within its certified area of work and for which it is separately at risk, shall be counted. A Small Business Joint Venture or Teaming Agreement may also count the dollar value of work subcontracted to DBE/VETs other than the Small Business Joint Venture or Teaming Agreement partner(s). The Tollway will evaluate the Small Business Joint Venture or Teaming Agreement, which must be submitted with the DBE/VET Utilization Plan, for compliance with this Special Provision and eligibility for credit towards meeting the DBE/VET goal. The agreement must describe in detail the financial contribution of each partner, the list of personnel and equipment contributed and used by each partner, the responsibilities of each partner for each aspect of the Small Business Joint Venture or Teaming Agreement (if applicable), the bonding capacity of each partner (if applicable), the prequalification status of each partner, the basis and distribution of all profits and losses, and any other elements deemed relevant by the Tollway.
- 8.3.5. One hundred percent of the cost of materials obtained from a DBE/VET Manufacturer shall be counted towards the DBE/VET contract goal.
- 8.3.6. One hundred percent of the cost of materials or supplies obtained from a DBE/VET Regular Dealer or Supplier shall be counted towards the DBE/VET contract goal.
- 8.3.7. One hundred percent of the fees or transportation charges for the delivery of materials or supplies required on a job site shall be counted towards the DBE/VET contract goal but only if the payment of such fees is a customary industry practice and is commensurate with fees customarily charged for similar services.
- 8.3.8. One hundred percent of fees and commissions for the procurement of materials and supplies shall be counted towards the DBE/VET contract goal but only if the DBE/VET is not a Regular Dealer or Manufacturer, provided that such fees or commissions are determined by the Tollway, in its sole discretion, to be reasonable and not excessive as compared with fees customarily allowed for similar services.

#### **8.4. *Demonstrating Commercially Useful Function***

Only expenditures to a DBE/VET that is performing a Commercially Useful Function shall be counted. To determine whether a DBE/VET is performing a Commercially Useful Function, the Tollway will evaluate the amount of work subcontracted, industry practices, whether the amount the DBE/VET is to be paid under the contract is commensurate with the work it is actually performing and other relevant factors.

- 8.4.1. With respect to materials and supplies used on the contract, to perform a Commercially Useful Function, a DBE/VET must be responsible for negotiating price, determining quality and quantity, ordering materials, and installing (where applicable) and paying for the materials.
- 8.4.2. A DBE/VET does not perform a Commercially Useful Function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed to give the appearance of DBE/VET participation. In determining whether a DBE/VET is an extra participant, ISTHA will examine similar transactions, particularly those in which DBE/VETs do not participate.
- 8.4.3. If a DBE/VET does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force and within its certified area of work, or the DBE/VET subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, ISTHA will presume that the DBE/VET is not performing a Commercially Useful Function. When a DBE/VET is presumed not to be performing a Commercially Useful Function, the DBE/VET and the contractor may present evidence to rebut this presumption.

**8.5. *Extended Documentation Period for Apparent Low Bidders That Do Not Commit to Satisfy the Advertised DBE/VET Goal***

Except as set forth below, any contractor identified as the low bidder that does not commit to satisfy the advertised DBE/VET goal shall be allowed, upon email notification from the Tollway, an extended documentation period which will extend until 5:00 pm CT on the second business day after the day the email notification is sent (*e.g.*, if a bidder is notified on Monday, extended documentation period ends on Wednesday at 5:00 pm CT). The extended documentation period allows a contractor to supplement its initial DBE/VET Utilization Plan to add DBE/VET participation sufficient to meet the stated DBE/VET participation goal or to demonstrate additional good faith efforts to obtain DBE/VET participation. The contractor may take other action beyond any stated additional efforts in order to obtain additional DBE/VET commitments. The contractor shall submit an amended DBE/VET Utilization Plan if additional DBE/VET commitments to meet the contract goal are secured by the end of the extended documentation period. If additional DBE/VET commitments sufficient to meet the advertised contract goal are not secured, the contractor shall report the final good faith efforts made during the extended documentation period along with a request for a waiver. All additional efforts taken by the bidder before and during the extended documentation period will be considered as part of the contractor's good faith efforts.

The extended documentation period is intended to allow contractors that have made a good faith effort to secure DBE/VET participation an opportunity to meet the stated contract goal. Contractors are expected to have utilized good faith efforts in compiling their initial DBE/VET Utilization Plan, and the DBE/VET participation indicated in the initial DBE/VET Utilization Plan should reflect the participation the contractor could achieve through good faith efforts. The extended documentation period should not be used to secure significantly higher DBE/VET participation only after being identified as the low bidder. In no case should a contractor remove or replace a DBE/VET listed in the initial Utilization Plan without prior written consent of ISTHA. Under no circumstances is the contractor allowed to change the amount of the core bid submitted or any other documentation unrelated to this Special Provision. When ISTHA determines that a contractor, either through a pattern of conduct or with respect to a single bid, has failed to discharge its good faith efforts obligations in the intended fashion, ISTHA, in its discretion, may reject the bid outright without allowing the bidder to take advantage of the extended documentation period.

## **8.6. Small Business Exception Procedures**

If a prime contractor cannot identify sufficient Small Businesses to complete all subcontracted work, the prime contractor must submit a written request for a Small Business Exception. The request must document the scope of work for which Small Business participation is not available and the efforts the prime took to engage a Small Business(es) to perform that scope of work, and it must include an email from the Tollway's Department of Diversity and Strategic Development confirming that the prime attempted to secure SBs participating in the Tollway's Technical Assistance Program.

A prime contractor's request for a Small Business Exception must show the prime took all necessary and reasonable steps to subcontract with Small Businesses. Necessary and reasonable steps are those that could reasonably be expected to obtain sufficient Small Business participation.

ISTHA will consider the quality, quantity and intensity of the efforts a prime contractor made to secure Small Business participation. Mere pro forma efforts will not be considered; rather, a prime contractor is expected to actively and aggressively try to subcontract with Small Businesses.

ISTHA will consider the following actions when evaluating a request for a Small Business Exception. The listed actions are not intended to be a mandatory checklist and are not intended to be exhaustive. Other actions or efforts brought to ISTHA's attention may be relevant and will be considered by ISTHA as ISTHA deems appropriate.

- 8.6.1. Soliciting Small Businesses to perform contract work through all reasonable and available means (*e.g.*, attendance at Webinars and Networking Sessions sponsored by the Department of Diversity and Strategic Development, attendance at pre-bid meetings, advertising and/or written notices). The prime contractor must follow-up on initial inquiries to determine, with certainty, if Small Businesses are interested in performing contract work.
- 8.6.2. Providing interested Small Businesses with adequate information about the plans, specifications and requirements of the contract in a timely manner to assist them in becoming subcontractors.
- 8.6.3. Negotiating in good faith with Small Businesses. Evidence of such negotiation includes the names, addresses, e-mail address and telephone numbers of Small Businesses that were considered and a description of the information provided regarding the plans and specifications for the work selected for subcontracting.
- 8.6.4. A prime contractor exercising good faith would consider a number of factors in negotiating with Small Businesses and would take a Small Businesses' pricing and capabilities to perform contract work into account. The fact that there may be some additional costs involved to find and use a Small Business is not in itself sufficient reason for a prime to fail to use a Small Business, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make efforts to utilize a Small Business. A prime contractor is not, however, required to accept quotes from a Small Business if the quote is deemed excessive or unreasonable.

- 8.6.5 Small Businesses may not be rejected as being unqualified without sound reasons based on a thorough investigation of their capabilities. The SB contractor's standing within its industry; membership in specific groups, organizations or associations; and political or social affiliations are not legitimate causes for the rejection of or non-solicitation of bids from Small Businesses.
- 8.6.6 Making efforts to assist interested Small Businesses in obtaining bonding, lines of credit or insurance as required by the Tollway or the prime contractor.
- 8.6.7 Making efforts to assist interested Small Businesses in obtaining necessary equipment, supplies, materials or related assistance or services.
- 8.6.8 Effectively using the services of available chambers of commerce, community organizations, small business contractors' groups, local, state and federal business assistance offices, and other organizations as allowed on a case-by-case basis to aid in the recruitment and placement of Small Businesses.
- 8.6.9 Within five working days after receiving written notice of an adverse pre-final determination on its request for a Small Business Exception, a prime contractor may seek administrative reconsideration of the adverse pre-final determination by submitting a written request for administrative reconsideration to The Illinois State Toll Highway Authority, Chief of Diversity and Strategic Development at [SBI@getipass.com](mailto:SBI@getipass.com). Any such submission must be transmitted via e-mail.
- 8.6.10 The pre-final determination shall become final if a request for administrative reconsideration is not received within the above five-day period. After a pre-final determination is final, the Tollway will submit its determination for review by the CPO.
- 8.6.11 The administrative reconsideration procedure described in this Section is not intended to allow a prime contractor additional time to solicit SBs. Accordingly, neither the retention of a SB nor evidence of negotiations with a SB after the Tollway's pre-final determination will be considered in connection with a request for administrative reconsideration.
- 8.6.12 If a prime contractor seeks administrative reconsideration, the Chief of Diversity and Strategic Development, in the Chief's discretion, may extend an invitation to the contractor to meet in person or via video conference to facilitate the Chief's consideration of whether the prime contractor made all reasonable efforts to meet the requirement for Small Businesses to complete all subcontracted work. Such meeting shall extend the time for resolution of a request for administrative reconsideration.
- 8.6.13 Within 10 working days after receipt of a request for administrative reconsideration or the date of the above-referenced meeting, if any, the Chief of Diversity and Strategic Development will send the prime contractor a written decision regarding the request, including an explanation of the basis of the same. In the event the Chief of Diversity and Strategic Development determines that the prime contractor's efforts were sufficient, the prime contractor's request for a Small Business Exception will be approved. If the Chief of Diversity and Strategic Development determines that the prime contractor's efforts were insufficient, the Tollway will submit its determination for review by the CPO.

## **8.7. Good Faith Efforts Procedures**

If the prime contractor cannot obtain sufficient DBE/VET commitments to meet the contract goal, the prime contractor must document in the DBE/VET Utilization Plan submitted with its bid (using ISTHA Form(s) 2025 and the Good Faith Efforts Contact Log and Checklist, ISTHA Form 2023) its good faith efforts to meet the goal, including any DBE/VET participation. Documentation submitted after bid opening will not be accepted or reviewed.

Demonstrating good faith efforts means a prime contractor must show it took all necessary and reasonable steps to achieve the contract goal. Necessary and reasonable steps are those that could reasonably be expected to obtain sufficient DBE/VET participation.

ISTHA will consider the quality, quantity and intensity of the efforts a prime contractor made. Mere *pro forma* efforts are not good faith efforts; rather, a prime contractor is expected to make efforts reasonably expected of a prime contractor actively and aggressively trying to obtain DBE/VET participation sufficient to meet the contract goal.

The following is a list of actions ISTHA will consider when evaluating good faith efforts to obtain DBE/VET participation. The listed actions are not intended to be a mandatory checklist and are not intended to be exhaustive. Other actions or efforts brought to ISTHA's attention may be relevant and will be considered by ISTHA as ISTHA deems appropriate.

- 8.7.1. Soliciting through all reasonable and available means (*e.g.*, attendance at DBE/VET Networking Sessions sponsored by ISTHA, pre-bid meetings, advertising and/or written notices) the interest of all DBE/VETs that have the capability to perform contract work. The prime contractor must solicit this interest with sufficient time to allow DBE/VETs to respond to the solicitation, but in any event, no later than 5 calendar days prior to the bid submission date. At least two methods of solicitation of DBE/VETs must be used (*e.g.*, email and fax). The prime contractor must determine with certainty if DBE/VETs are interested by taking appropriate steps to follow-up initial solicitations.
- 8.7.2. Selecting portions of work to be performed by DBE/VETs in order to increase the likelihood that the DBE/VET goal will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE/VET participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
- 8.7.3. Providing interested DBE/VETs with adequate information about the plans, specifications and requirements of the contract in a timely manner to assist them in responding to a solicitation.
- 8.7.4. Negotiating in good faith with interested DBE/VETs. Evidence of such negotiation includes the names, addresses, e mail address and telephone numbers of DBE/VETs 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 DBE/VETs to perform the work. Making a portion of the work available to DBE/VET subcontractors and suppliers and selecting those portions of the work or material needs consistent with the available DBE/VET subcontractors and suppliers, so as to facilitate DBE/VET participation.
- 8.7.5. A prime contractor using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE/VET subcontractors, and would take a firm's price and

capabilities as well as contract goals into consideration. The fact that there may be some additional costs involved in finding and using DBE/VETs is not in itself sufficient reason for a prime contractor's failure to meet the contract DBE/VET goal, as long as such additional costs are not unreasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the prime contractor of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBE/VETs if the price difference is excessive or unreasonable.

- 8.7.6. DBE/VETs may not be rejected as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry; membership in specific groups, organizations or associations; and political or social affiliations are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the contract goal.
- 8.7.7. Making efforts to assist interested DBE/VETs in obtaining bonding, lines of credit or insurance as required by the Tollway or the Contractor.
- 8.7.8. Making efforts to assist interested DBE/VETs in obtaining necessary equipment, supplies, materials or related assistance or services.
- 8.7.9. Effectively using the services of available chambers of commerce, minority/women/small business community organizations, minority/women/small business contractors' groups, local, state and federal minority/women/small business assistance offices, and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBE/VETs.
- 8.7.10. In determining whether a prime contractor made good faith efforts, ISTHA may take into account the performance of other prime contractors in meeting the contract goal or meeting the goal on contracts of a similar nature. For example, when the apparent successful prime contractor fails to meet the contract goal, but others meet it, ISTHA will review whether, with additional reasonable efforts, the apparent successful prime contractor could have met the goal. If the apparent successful prime contractor fails to meet the goal but meets or exceeds the average DBE/VET participation obtained by other prime contractors, ISTHA may view this, in conjunction with other factors, as evidence of the apparent successful prime contractor having made good faith efforts.
- 8.7.11. A prime contractor that rejected a DBE/VET based on price must provide ISTHA with quotes received from all firms, including non-DBE/VETs, for the scope of work proposed by the rejected DBE/VET.
- 8.7.12. Within five working days after receiving written notice of an adverse pre-final determination on its DBE/VET Utilization Plan, a prime contractor may seek administrative reconsideration of the adverse determination by submitting a written request for administrative reconsideration to The Illinois State Toll Highway Authority, Chief of Contract Compliance, 2700 Ogden Avenue, Downers Grove, Illinois 60515-1703, [contractcompliance@getipass.com](mailto:contractcompliance@getipass.com). Submission via e-mail is acceptable. If a request for administrative reconsideration is deposited in the United States mail, it shall not be deemed timely unless the Tollway receives it by the fifth business day after the notification date of the pre-final determination.
- 8.7.13. The pre-final determination shall become final if a request for administrative reconsideration is not received within the above five-day period. After a pre-final determination is final, the Tollway will submit its determination for review by the CPO.

- 8.7.14. The administrative reconsideration procedure described in this Section is not intended to allow a prime contractor to have an additional opportunity to submit a new DBE/VET Utilization Plan or evidence of additional good faith efforts. Thus, a request for administrative reconsideration may not include documentation of good faith efforts made after the extended documentation period.
- 8.7.15. If a prime contractor seeks administrative reconsideration, the Chief of Contract Compliance, in the Chief's discretion, may extend an invitation to the contractor to meet in person or via video conference to facilitate the Chief's consideration of whether the prime contractor made a good faith effort to meet the goal. Such meeting shall extend the time for resolution of a request for administrative reconsideration.
- 8.7.16. Within 10 working days after receipt of a request for administrative reconsideration or the date of the above-referenced meeting, if any, the Chief of Contract Compliance will send the prime contractor a written decision regarding the request, including an explanation of the basis of the same. In the event the Chief of Contract Compliance determines that the prime contractor's good faith efforts were sufficient, the prime contractor's DBE/VET Utilization Plan will be approved. If the Chief of Contract Compliance determines that the prime contractor's good faith efforts were insufficient, the Tollway will submit its determination of non-responsiveness for review by the CPO.

## **9. CONTRACT COMPLIANCE**

### **9.1. ISTHA Forms to be Submitted**

All work indicated for performance by an approved DBE/VET shall be performed, managed and supervised by the DBE/VET executing the ISTHA Form 2025 - Participation Statement.

### **9.2. Changes to the DBE/VET Utilization Plan**

The contractor may not make changes to its contractual DBE/VET commitments, substitute a DBE/VET subcontractor or make any other changes to the DBE/VET Utilization Plan without the prior written approval of the Tollway's Procurement Department. Unauthorized changes or substitutions, including performing the work designated for a subcontractor with the contractor's own forces, shall be a violation of this Special Provision and a breach of the contract. If a Change Order or Extra Work order is issued by the Tollway, the contractor will be required to amend its DBE/VET Utilization Plan to reflect the recalculated DBE/VET dollars and any percentage change in the goal. The DBE/VET contract goal may change in the Tollway's discretion to reflect a Change Order or Extra Work Order.

Facts supporting a request for changes to a DBE/VET Utilization Plan must not have been known or reasonably knowable by the parties prior to entering into the subcontract. The contractor must negotiate in good faith with the subcontractor to resolve the issue giving rise to the change request. If requested by either party, the Tollway shall facilitate such a meeting. Where there has been a mistake or disagreement about the scope of work, the DBE/VET can be substituted, subject to approval of the Tollway's Procurement Department, only where agreement cannot be reached for a reasonable price or reasonable schedule for the correct scope of work.

Substitution of a DBE/VET subcontractor shall be permitted only under the following circumstances:

1. Unavailability after receipt of reasonable notice to proceed;
2. Failure of performance;
3. Financial incapacity;
4. Refusal by the subcontractor to honor the bid, proposal price, scope or schedule;
5. Material mistake of fact about the elements of the scope of work of a solicitation where a reasonable price cannot be agreed;
6. Failure of the subcontractor to meet insurance, licensing or bonding requirements; or
7. The subcontractor's withdrawal of its bid or proposal.

If it becomes necessary to substitute a DBE/VET or otherwise change the DBE/VET Utilization Plan, the Contractor must notify the Procurement Department in writing of the request to change the Plan. The request must state specific reasons for the substitution or change. A letter from the DBE/VET to be substituted or affected by the change stating that it cannot perform on the contract or that it agrees with the change in its scope of work must be submitted with the request. Any refusal by the DBE/VET to provide such a letter must be documented by the contractor. The Procurement Department will approve or deny a request for substitution or other change in the DBE/VET Utilization Plan in writing within 5 working days of receipt of the request.

Where the contractor has established the basis for the substitution to the Tollway's satisfaction, it must make good faith efforts to meet the contract goal by substituting a DBE/VET subcontractor. Documentation of a replacement DBE/VET, or of good faith efforts, must meet the requirements in this Special Provision. If the contract goal cannot be reached and good faith efforts have been made, the contractor may substitute with a non-DBE/VET.

If the contractor plans to hire a subcontractor for any scope of work that was not previously disclosed in the DBE/VET Utilization Plan, the contractor must obtain the approval of the Procurement Department to modify the DBE/VET Utilization Plan and, consistent with this Special Provision, must make good faith efforts to ensure that DBE/VETs have a fair opportunity to bid on the new scope of work.

A new subcontract, a new ISTHA Form 2025 for the substituted DBE/VET (if applicable) and an amended DBE/VET Utilization Plan must be executed and submitted to the Procurement Department within 5 working days of the contractor's receipt of the Tollway's approval for the substitution or other change.

### **9.3. Submission of SMALL BUSINESS DBE/VET Payment Report**

DBE Payment reporting, in such form or format as specified by the Tollway, must be submitted as specified in the Contract Compliance Payment Reporting Instructions posted on the Tollway's website.

The contractor shall maintain a record of payments to DBEs and all other subcontractors and suppliers for work performed. The records shall be made available to ISTHA for inspection and copying upon request. After the performance of the final item of work or delivery of material by a DBE and final payment to the DBE by the contractor, but not later than thirty (30) calendar days after payment has been made by ISTHA to the contractor for such work or material, the contractor shall submit partial and final waivers of lien.

All active Tollway vendors/contractors/consultants will be required to use B2GNow. Both diverse and non-diverse subcontractor payments must be reported and confirmed monthly in the system at <https://iltollway.diversitysoftware.com/>.

## **10. SANCTIONS**

The Tollway will periodically review the contractor's compliance with this Special Provision and the terms of its contract with the contractor, including the DBE/VET Utilization Plan. Without limitation, the contractor's failure to comply with this Special Provision or its DBE/VET Utilization Plan, failure to cooperate in providing information regarding its compliance with this Special Provision or its DBE/VET Utilization Plan, or provision of false or misleading information or statements concerning compliance, registration status of DBE/VETs, good faith efforts or any other material fact or representation shall constitute a material breach of this contract.. Such breach shall entitle the Tollway to declare a default, terminate the contract, impose sanctions, impose liquidated damages and/or exercise any other remedies provided for in the contract or at law or in equity.

Sanctions may include, but are not limited to, monetary sanctions (including non-release of retainage), the monetary cost of audits resulting in findings of noncompliance, liquidated damages based on the damage to the Tollway from the contractor's lack of good faith efforts and/or failure to meet the other requirements of this Special Provision, and any other sanctions permitted by law.

## **11. INACCURATE OR FRAUDULENT REPORTING**

The contractor has a duty to accurately report information pursuant to this Special Provision. A contractor who fails to supply accurate information is subject to sanctions imposed by the Tollway. A contractor who intentionally supplies inaccurate information may be subject to civil and/or criminal sanctions.

## **12. OTHER REGULATIONS**

Adherence to the DBE/VET goal does not abrogate other responsibilities of the contractor to comply with affirmative action requirements under federal or state law, municipal ordinance, prevailing government regulations or terms contained elsewhere in the contract.