



OHIO DEPARTMENT OF TRANSPORTATION

CENTRAL OFFICE • 1980 WEST BROAD STREET • COLUMBUS, OH 43223
JOHN R. KASICH, GOVERNOR • JERRY WRAY, DIRECTOR

April 15, 2016

Ms. Laura S. Leffler
Ohio Division Administrator
Federal Highway Administration
200 North High Street, Room 328
Columbus, OH 43215

Dear Ms. Leffler,

I am writing to request a waiver to implement a race conscious goal pursuant to 49 Code of Federal Regulations Section 26.15, so that the State of Ohio may create stronger parity and more opportunities for small and disadvantaged business enterprises within the heavy highway construction and engineering industries. In this letter, I will provide a brief summary of Ohio's actions and discoveries to date, a proposal of three courses of action that are consistent with federal regulations that would constitute our waiver, and a detailed explanation of these options, which will exclude no demographics but rather provide optimal incentives for including underutilized groups.

I. ACTION AND DISCOVERY

As part of the Kasich Administration's continuous efforts to increase diversity in a wide variety of government programs, the Ohio Department of Transportation (ODOT) and the Federal Highway Administration partnered on the first phase of the Cleveland Innerbelt Bridge Project to achieve the highest dollar value Disadvantaged Business Enterprise (DBE) participation on any single project in history, and to exceed the 15 percent participation goal. Despite our efforts, the participation of DBE-qualified firms did not accurately reflect the city's racial diversity. For the second phase, we implemented a number of race-neutral measures including a program of outreach, expanded training opportunities and technical assistance, mentoring and reimbursement of prequalification expenses, but still realized disparity between DBE utilization and regional diversity.

On March 26, 2014, Governor John Kasich and Congresswoman Marcia Fudge requested from U.S. Transportation Secretary Anthony Foxx a waiver to subdivide the DBE goals on major transportation projects in Cleveland to better reflect the city's demographic constitution. After receiving no reply to this request, Governor Kasich directed the Ohio Department of Transportation to develop an alternative approach to the city's next major project, the Opportunity Corridor, designed to connect the University Circle neighborhood with I-490 and create new opportunities for one of Ohio's most economically depressed urban areas. With permission from Warren Whitlock, FHWA Associate Administrator for Civil Rights, Ohio made an extraordinary commitment, funding the project's \$300 million construction costs with state and local resources. We then established a 20 percent total contract participation goal for Opportunity Corridor Section 1 for subcontractors certified through the state's Minority Business Enterprise (MBE) and Encouraging Diversity, Growth & Equity (EDGE) and established reflective subdivided goals among African American, Hispanic, Asian & Native American, and other ethnicities. For Opportunity Corridor Section 2, we have refined the formula and established race-neutral participation goals according to New Businesses, Small Businesses, Local Businesses, and all other EDGE businesses.

The administration understood, however, that innovative solutions in one region would not address disparities elsewhere across the state, and we took several corrective actions. The Ohio Department of Transportation created the Division of Opportunity, Diversity and Inclusion to synergize and strengthen our emphasis on civil rights protections and the outreach and support of small and disadvantaged businesses. In less than a year, we have

already exceeded goals for DBE, MBE, and EDGE spending and established an aggressive schedule of outreach and business development events.

In order to better understand the barriers to highway construction and engineering contracting opportunities that exist in Ohio, Governor Kasich directed ODOT to commission a statewide disparity study. The studies, conducted by BBC Research Consulting and Exstare Federal Services Group, began in February 2015, and focused on contracts awarded between January 1, 2010, and December 31, 2014.

The disparity study thoroughly examines a breadth of issues related to small and disadvantaged businesses, including contractor availability and utilization; training and education; access to capital, bonding and insurance; and procurement policies and practices, among other issues. Qualitative data was gathered through public meetings in Ohio's largest metropolitan areas, focus group meetings and hundreds of individual interviews. The ODOT study revealed a substantial disparity of overall contract utilization among businesses classified as Black American, Hispanic American, and Asian Pacific American (hereafter collectively referred to as underutilized DBE or "UDBE" firms). The study also reported no direct or single cause for disparity. Rather, barriers to success are associated with nationally recognized conditions related to human capital (education, employment, and experience), financial capital, business ownership, and ongoing success of the business enterprise.

II. PROPOSAL OF WAIVER OPTIONS

The Ohio Department of Transportation has identified three potential strategies for resolving disparity in the heavy highway construction and engineering industries. Each is based on a formula of incentives or emphasis, but unlike other DBE waiver requests submitted to USDOT, none of the options exclude specific groups from participation in DBE goals, and each has the potential to reduce recidivism within the DBE community.

The following is a brief summary of each:

Option 1

Ohio requests permission to reduce credit towards DBE contract goals for non-UDBE firms that is proportionate to the group's over-utilization. Ohio would continue counting UDBE firms at a 1:1 ratio. For example, if a firm is utilized at a rate of 200 percent based upon availability, then the firm's DBE credit would only count at 50 percent.

Option 2

Ohio requests permission to reduce credit towards DBE goals for non-UDBE firms that is proportionate to group's over-utilization and apply additional credit toward DBE goals for UDBE firms proportionate to the group's under-utilization. For example, if a firm is utilized at a rate of 50 percent based upon availability, then the firm's DBE credit would count at 200 percent, whereas a firm utilized at a rate of 200 percent based upon availability would count for only 50 percent DBE credit.

Option 3

Ohio requests permission to set racially subdivided goals based upon geographic availability. For example, if the availability of African American firms within the Northeastern Ohio region is 30 percent, ODOT would require 30 percent of the overall DBE goal to be fulfilled by African American firms for projects sold in that region.

III. VIABILITY OF WAIVER OPTIONS

The three waiver options presented above not only fulfill strict scrutiny requirements established by *City of Richmond v. J.A. Croson Co.* and its progeny, but also fulfill the spirit and intent of the DBE program by promoting inclusion of all firms relative to their availability. Prior waiver requests by other state transportation departments have requested exclusion of groups from goal participation and lumped together all UDBE firms without consideration of their relative underutilization. This approach necessarily resulted in the recidivism of

excluded firms back into to the DBE program and created a statistical disparity where none existed before. This approach also failed to remedy the underutilization of certain minority groups based upon their relative availability.

By contrast, the proposed waiver options are narrowly tailored to promote utilization of DBE firms based upon their relative availability. In order to be narrowly tailored, a DBE goal must consider the relationship of any numerical DBE goals to the relevant market as well as apply the program to only those groups who have suffered from discrimination. *See e.g. AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199 (9th Cir. 2013). The three proposed waiver options do precisely that: the goals are narrowly tailored relative to availability to ensure firms are neither underutilized nor over-utilized; and the goals include firms who have suffered from discrimination.

It should be noted that while certain groups may not suffer from an overall statistical disparity, the study revealed substantial quantitative evidence of disparities for minority and woman-owned businesses overall due to the existence of race and gender-based discrimination in the marketplace. Therefore, were the waiver to exclude firms that are shown to be suffering from marketplace discrimination, while perhaps being over-utilized to meet DBE goals (i.e. not suffering from a substantial statistical disparity in ODOT contracting), the inevitable result will be an underutilization or statistical disparity of these firms.

In closing, I am respectfully requesting a program waiver approving any or all of the options identified above. If you have any specific questions regarding this request, please contact Lauren Purdy, Deputy Director, Division of Opportunity, Diversity & Inclusion, Ohio Department of Transportation at Lauren.Purdy@dot.ohio.gov or 614-995-0758.

Respectfully,



Jerry Wray
Director

cc: The Honorable John R. Kasich, Ohio Governor
The Honorable Marcia L. Fudge, U.S. House of Representatives
Lauren Purdy, Deputy Director Opportunity, Diversity & Inclusion, Ohio Department of Transportation

Enclosures: 2015-2016 Ohio Public Authorities Disparity Study, Ohio Department of Transportation
Disparity Study Summary
Background Issues and Achievements