Disadvantaged Business Enterprise

Program Plan

2016
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Director’s Letter of Commitment/Policy Statement

The Ohio Department of Transportation (ODOT) has established a Disadvantaged Business Enterprise (DBE) Program in full accordance with regulations of the United States Department of Transportation (USDOT), 49 CFR Part 26. ODOT receives Federal financial assistance from USDOT, and as a condition of receiving this assistance, ODOT has signed an assurance that it will fully comply with 49 CFR Part 26.

It is the policy of ODOT to ensure DBEs, as defined in 49 CFR Part 26, have an equal opportunity to receive and participate in USDOT-assisted contracts and procurement activities. It is also our policy, our practice, and our privilege to:

(a) Ensure nondiscrimination in the award and administration of USDOT-assisted contracts and procurement activities;
(b) Create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts and procurement activities;
(c) Ensure that the DBE Program is narrowly tailored in accordance with applicable law;
(d) Ensure that only firms that meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
(e) Help remove barriers to the participation of DBEs in USDOT-assisted contracts and procurement activities;
(f) Promote the use of DBEs in all types of Federally-assisted contracts and procurement activities ODOT conducts;
(g) Assist the development of firms that can compete successfully in the marketplace outside the DBE Program.

The Director of ODOT is responsible for the implementation of the DBE program. The Director has designated the Administrator of the Office of Business and Economic Opportunity (OBEO), Deborah Green, as the DBE Liaison Officer (DBEO). In that capacity, and as the Administrator of OBEO, the DBEO is responsible for administering all aspects of the ODOT DBE Program and ensuring ODOT complies fully with all provisions of 49 CFR Part 26. Implementation of the DBE program is given the same priority as complying with all other legal obligations incurred by ODOT in its financial assistance agreements with USDOT. As with all things at ODOT, the DBE Program will be a model of excellence in government.

ODOT has disseminated this policy statement to the federal operating administrations and all the components of our organization. This policy will be disseminated in all subsequent agreements between ODOT and all firms/organizations, doing business with ODOT.

Jack Marchbanks, Ph.D.  
Director  

Date  
10-1-19
SUBPART A – GENERAL REQUIREMENTS

Section 26.1   Objectives

It is the policy of ODOT to ensure DBEs, as defined in 49 CFR Part 26, have an equal opportunity to receive and participate in USDOT-assisted contracts and procurement activities. As the main objectives of the DBE program, it is also our policy, our practice, and our privilege to:

(a) Ensure nondiscrimination in the award and administration of USDOT-assisted contracts and procurement activities;
(b) Create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts and procurement activities;
(c) Ensure that the DBE Program is narrowly tailored in accordance with applicable law;
(d) Ensure that only firms that meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
(e) Help remove barriers to the participation of DBEs in USDOT-assisted contracts and procurement activities;
(f) Promote the use of DBEs in all types of Federally-assisted contracts and procurement activities conducted by recipients;
(g) Assist the development of firms that can compete successfully in the marketplace outside the DBE Program; and
(h) Provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

ODOT will use and track race-neutral and race-conscious means to meet recommended DBE goals on projects funded in whole or in part by USDOT funds. Contract goals shall be set for suitable USDOT-assisted construction, consulting, procurement, and service contracts or grants with subcontracting opportunities.

Section 26.3   Applicability

As a recipient of federal funds, ODOT is required to administer a DBE Program in compliance with all laws, regulations, executive orders and guidance.

Section 26.5   Definitions

The terms used in this program are as defined in 49 CFR §26.5.

Section 26.7   Non-discrimination Requirements

ODOT will never exclude any person from participation in, deny any person the benefits of, or
otherwise discriminate against anyone in connection with the award and performance of any contract or procurement activity covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

In administering its DBE program, ODOT will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE program with respect to individuals of a particular race, color, sex, or national origin.

Section 26.11 Record Keeping Requirements

(a) ODOT will report DBE participation using USDOT Form, “Uniform Report of DBE Commitments/Awards and Payments” on a semi-annual basis on June 1 and December 1. ODOT’s procedure for tracking DBE payments and commitments for ODOT’s transit-related and subrecipient contracts is set forth in Exhibit A herein.

(b) ODOT will continue to provide data about its DBE program to USDOT as directed by USDOT operating administrations.

(c) ODOT maintains a bidder’s list

1. The purpose of ODOT bidder’s list is to provide as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on ODOT’s Federally-assisted contracts for use in helping ODOT set its overall goals.

2. ODOT bidder’s list contains the following information:
   i. Firm Name;
   ii. Firm Address;
   iii. Firm website, if any;
   iv. Whether the Firm is listed in the Ohio UCP;
   v. Year the Firm was established;
   vi. Annual gross receipts of the Firm, if known. Otherwise listed by gross receipts bracket.

3. ODOT collects the information for its bidder’s list in a variety of ways.
   i. Plan-Holder’s List: ODOT maintains a plan-holder’s list for each construction project it sells. Bidders who order plans through ODOT will be placed on the plan-holder’s list. ODOT will survey the firms on a yearly basis to collect the data referenced in section (c) 2, above and will incorporate these firms and the required data into its bidder’s list.
   ii. Prequalification: ODOT prequalifies firms to participate on projects by determining the bidder’s dollar bidding capacity and the work types for which the bidder is experienced (construction) and/or reviewing the firm’s credentials (professional services). ODOT maintains files on all prequalified firms and collects the information set forth in section (c) 2, above. ODOT will incorporate all prequalified firms and the required data into its bidder’s list.
   iii. UCP Directory: ODOT will incorporate all firms listed in the Ohio UCP directory along with all required data set forth in section (c) 2 above into its bidder’s list.
   iv. SBE Certification: ODOT certifies firms as Small Business Enterprises (SBE) who qualify for the program based upon business size standards and personal net worth limitations (see §26.39). As part of the SBE certification process, ODOT
collects the data set forth in section (c) 2 above. ODOT incorporates the SBE certified firms, along with the required data, into its bidder’s list.

v. 2016 Disparity Study Availability Analysis: ODOT finalized a disparity study in 2016. As a part of the disparity study, an availability analysis was conducted to ascertain the universe of firms ready, willing, and able to participate on ODOT contracts. ODOT incorporated the results of the availability analysis, including the data required under section (c) 2 above, into its bidder’s list.

vi. Collection of Data from Subrecipients: ODOT subrecipients will obtain the data referenced in section (c) 2 above on all firms with which they do business, as well as all firms that have sought to do business with them (as evidenced by the submission of bids or quotes).

(d) ODOT maintains records documenting a firm’s compliance with the requirements of 49 CFR Part 26. ODOT will retain, indefinitely, application packages for each certified DBE, including affidavits of no change; changes submitted by the firm; and onsite review documentation. Other records will be retained for three years or by ODOT’s record retention laws, whichever is longer.¹ ODOT stores this information in hard-copy and electronic format which is only accessible to authorized ODOT personnel in order to maintain confidentiality.

(e) ODOT will submit the UCP report required under 49 CFR Part 26.11(e) to USDOT’s Office of Civil Rights by January 1 of each year.

Section 26.13 Federal Financial Assistance Agreement

Each financial assistance agreement ODOT signs with a USDOT operating administration (or a primary recipient) includes the following assurance:

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any USDOT assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of USDOT assisted contracts. The recipient’s DBE Program as required by 49 CFR Part 26 and as approved by USDOT, is incorporated by reference in this agreement. Upon notification to the recipient of its failure to carry out of its approved program, the Department may impose sanctions as provided for under 49 CFR Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

Contract Clause – Non Discrimination

The following clause is placed in every USDOT-assisted contract and subcontract:

The contractor, sub-recipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The

¹ ODOT’s records retention schedule for such files is four years.
contractor shall carry out applicable requirements of 49 CFR Part 26 in the award
and administration of USDOT assisted contracts. 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 recipient deems
appropriate, which may include, but is not limited to: (1) withholding monthly
progress payments; (2) assessing sanctions; (3) liquidated damages; and/or (4)
disqualifying the contractor from future bidding as non-responsible.

ODOT will ensure compliance with this section through the applicable quality assurance review and/or
pre-award concurrence process.

**SUBPART B – ADMINISTRATIVE REQUIREMENTS**

**Section 26.21 DBE Program**

As a direct recipient of Federal funds, grants, and/or assistance, ODOT will work to ensure compliance
with 49 CFR Part 26. Any and all subrecipients of said Federal funds, grants, and/or assistance must
comply with ODOT’s DBE Plan. Subrecipients cannot have a plan independent from ODOT’s plan.

ODOT’s DBE Plan will be updated and approved by USDOT operating administrations when there have
been significant changes to the current approved plan.

**Section 26.23 Policy Statement**

The [ODOT DBE Policy Statement](http://www.dot.state.oh.us/Divisions/ODI/SDBE/Pages/default.aspx) is set forth as part of this DBE Program Plan Document and is also
available on the ODOT website at:

**Section 26.25 DBE Liaison Officer (DBELO)**

The following individual has been designated as ODOT’s DBELO:

Ms. Deborah Green  
Administrator  
Office of Small & Disadvantaged Business Enterprise  
Division of Opportunity, Diversity, and Inclusion  
Ohio Department of Transportation  
1980 W. Broad Street, MS 3270  
Columbus, OH 43223  
Telephone: (614) 466-7699  
Email: Deborah.Green@dot.ohio.gov

The Director of ODOT is responsible for the implementation of the DBE program. The DBELO
has direct and independent access to the Director concerning any and all DBE program
matters. An organizational chart displaying the Division of Opportunity, Diversity, & Inclusion
(ODI), the DBELO’s position in the organization and link to the Director, and the official acknowledgement letters to both FHWA and FTA are found in Exhibit B of this DBE Program Plan.

The DBELO, or her designee, is responsible for administering the development, implementation, and monitoring of all aspects of the ODOT DBE Program and ensuring ODOT complies fully with all provisions of 49 CFR Part 26. Implementation of the DBE program is given the same priority as complying with all other legal obligations incurred by ODOT in its financial assistance agreements with the USDOT. The DBELO’s duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required by USDOT;
2. Reviews third-party contracts and purchase requisitions for compliance with this program;
3. Works with all departments to set overall annual goals;
4. Ensures the bid notices and request for proposals are available to DBEs in a timely manner;
5. Identifies contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goal attainment); identifies ways to improve progress and monitors results;
6. Analyzes ODOT’s progress toward goal attainment and identifies ways to improve progress;
7. Advises the Director on DBE matters and achievements;
8. Participates with assistant legal counsel and project personnel to determine contractor compliance with good faith efforts but is not involved with the administrative reconsideration;
9. Manages written consent of terminations and/or replacements of DBEs on federally-funded projects;
10. Provides DBEs with information and assistance in preparing bids, obtaining bonding and insurance;
11. Plans and participates in DBE training seminars;
12. Certifies DBEs according to the criteria set by USDOT and acts as liaison to the Uniform Certification Program (UCP) in Ohio;
13. Provides outreach to DBEs and community organizations to advise them of opportunities;
14. Maintains ODOT’s updated directory of certified DBEs.

As the Administrator of the Office of Small & Disadvantaged Business Enterprise (OSDBE), Ms. Green is responsible for managing OSDBE staff and staffing needs to administer a top notch DBE Program. All correspondence related to ODOT’s DBE Program should be directed to Ms. Green.

Section 26.27 DBE Financial Institutions

ODOT recognizes Minority Depository Institutions (MDIs) can be a critically important partner in the development of the DBE ecosystem. The Federal Deposit Insurance Corporation (FDIC) publishes a Minority Depository Institutions (MDIs) Report that lists the current MDIs across the United States that are registered with the FDIC. ODOT will conduct an annual review of the FDIC MDI Report, assess the new MDIs available within the State of Ohio and its neighboring states, invite them to partner with ODOT’s DBE Program, and encourage them to receive ODOT’s outreach communications and quarterly ODI newsletters.

ODOT understands access to opportunity (contracts and procurement activities) has the highest impact
on small businesses pursuing heavy highway or transit projects, and access to capital is the next critical concern. ODOT will seek to partner with MDIs to provide the full extent of services offered to qualifying DBEs, subcontractors, contractors, subconsultants, consultants, and recipients. ODOT will provide to the partnering MDIs the contact name, mailing address, and email address of each DBE firm and will encourage the MDIs to reach out to the contact list.

ODOT will also seek subject matter expert participation from MDIs for outreach events to provide a platform for the MDIs to provide education regarding their financial services and to speak directly to bidders of ODOT projects.

Refer to Exhibit C for details about the FDIC Quarterly MDI Report and assessment of which MDIs ODOT will engage for its DBE Program.

**Section 26.29 Prompt Payment Mechanisms**

Federal and Ohio State law require the prompt payment of subcontractors, subconsultants, subrecipients, and suppliers by the awarded prime contractor or consultant. This provision also ensures that second tier subcontractors, subconsultants, and suppliers are paid promptly.

**Construction Contracts Clause**

The prompt payment contractual language for construction contracts is included in the Construction and Material Specification (C&MS) (2016) at Section 107.21.

In order to ensure prompt payment by a prime contractor to a subcontractor, ODOT has implemented the following processes:

1. **PN 031**: ODOT includes PN 031 in all construction contracts, which is included below:

   **PN 031 – 02/22/2016 - PROMPT PAYMENT**

   The Code of Federal Regulations (CFR) 49, 26.29 requires that ODOT establish a mechanism to monitor Prompt Payment requirements to all subcontractors.

   The Prime Contractor shall notify the Department that it has complied with the Prompt Payment requirements set forth in Construction and Materials Specification 107.21 utilizing the Civil Rights and Labor (CRL) System. To report payments, the Prime Contractor will enter the total for each subcontractor payment into CRL within 10 calendar days of payment from ODOT.

   CRL Requirements with interactive training guides can be found at http://transportation.ohio.gov/crl/ under “Ohio DOT Reference Materials.”

   The affirmation of compliance shall include the following information:
   1. The name of the subcontractor or supplier that was paid;
   2. The dollar amount of the payment to the subcontractor or supplier;
   3. The date the subcontractor/supplier was paid.
Subcontractors or suppliers will affirm the payment was made in the CRL system, on the date and in the amount listed in the affirmation. The Prime Contractor shall include this affirmation requirement in all subcontractor and supplier contracts that it enters into and further require that all subcontractors and suppliers place the same payment obligation in each of their lower tier contracts.

(2) **C-95 Process**: ODOT uses the C95 process to evaluate contractors annually and at the end of a project. In order to ensure that ODOT is monitoring for prompt payment of all amounts owed to subcontractors, including retainage, ODOT includes prompt payment as a component of the C95 process. This allows ODOT to monitor each project and contractor for compliance using these guidelines.

**Consultant Contract Clause**

The consultant shall pay each subconsultant within 30 calendar days after receipt of payment from the Department for services performed and invoiced by the subconsultant. The consultant shall also require that this contractual obligation be placed in all subconsultant contracts that it enters into and further require that all subconsultants place the same payment obligation in each of their lower tier contracts. If the invoice submitted to the consultant (or subconsultant) contains a defect or impropriety, the consultant shall send written notification to the firm within fifteen days after receipt of the invoice. The notice shall contain a description of the defect or impropriety and any additional information necessary to correct the defect or impropriety. If the consultant sends such written notification to the firm, the required payment date shall be thirty days after the consultant receives a proper invoice.

A consultant that fails to make payment for the services by the required payment date shall pay an interest charge to the subconsultant, unless the amount of the interest charge is less than ten dollars. The interest charge on amounts due shall be paid to the subconsultant for the period beginning on the day after the required payment date and ending on the day that payment of the amount due is made. The amount of the interest charge that remains unpaid at the end of any thirty-day period after the required payment date, including amounts under ten dollars, shall be added to the principal amount of the debt and thereafter the interest charge shall accrue on the principal amount of the debt plus the added interest charge. The interest charge shall be at the rate per calendar month that equals one-twelfth of the rate per annum prescribed by section 5703.47 of the Revised Code for the calendar year that includes the month for which the interest charge accrues.

Repeated failures to pay subconsultants timely pursuant to this section will result in a finding by the Department that the consultant is in breach of contract and subject to all legal consequences that such a finding entails.

**Prompt Payment Investigation Process**

In the event funds are unlawfully retained by an ODOT contractor, the subcontractor or sub-subcontractor has the right to pursue their legal remedies. In the event ODOT is apprised of the lack of timely payments, ODOT will initiate an investigation to determine the cause of the lack of timely payment. Repeated violations will impact the prime or subcontractor’s ability to secure future work.
with ODOT. However, ODOT has no legal right to interfere in a contract between a prime and sub when funds are being reasonably retained to protect the prime against faulty workmanship.

Retainage

By law, ODOT does not hold retainage in its payment to contractors. With careful consideration of the three options afforded ODOT by 49 CFR Part 26.29, ODOT has chosen to pursue the second method to ensure prompt and full payment of retainage from the prime contractor/consultant to the subcontractor(s)/subconsultant(s). Hence, the contractor/consultant may withhold retainage from its subcontractors/subconsultants. In order to ensure that if and when retainage is held by a contractor/consultant it will be paid in a timely manner to the subcontractor/subconsultant, the following processes have been implemented by ODOT:

1. **M&CS**: Section 107.21 of the Material and Construction Specifications includes language clarifying that payment of retainage must be made within 10 calendar days of ODOT’s acceptance of the work;
2. **C-95 Process**: ODOT uses the C-95 process to evaluate contractors annually and at the end of a project. In order to ensure that ODOT is monitoring for prompt payment of all amounts owed to subcontractors, including retainage, ODOT includes prompt payment as a performance component of the C-95 process; this allows ODOT to monitor each project and contractor for compliance using these guidelines.

Monitoring Payments to DBEs

ODOT will utilize an internal monitoring system to assess payment transactions between ODOT and each project’s awarded prime contractor or consultant, and the duration for the prime to in turn complete payments to its subcontractors or subconsultants within the allowable 10 calendar days. ODOT will require prime contractors and consultants to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of ODOT or USDOT. This reporting requirement also extends to any certified DBE subcontractor or subconsultant.

ODOT will perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors and subconsultants to ensure that the actual amount paid to DBE subcontractors or subconsultants equals or exceeds the dollar amounts stated in the DBE Utilization Plan.

Section 26.31 Directory

ODOT maintains a directory identifying all firms eligible to participate as DBEs. The directory lists the firm’s pertinent information, inclusive of firm name, address, phone number, email address, ethnic group of primary ownership, prequalification status, certification status, original certification date is available on the certificate, and the approved NAICS Code(s) and corresponding NAICS Code description(s) defining the type of work the firm has been certified to perform as an eligible DBE.

ODOT will utilize its Outreach resources on an on-going basis to connect with all relevant agencies, trade unions, and associations, to identify potential DBE firms, and, once certified, add these firms to its DBE
Directory.

ODOT updates the directory in real time. The Directory is available by any of the following means:

1. ODOT Website Address:
http://www.dot.state.oh.us/Divisions/ODI/SDBE/Pages/DBE-Directory.aspx

2. By Mail
Ohio Department of Transportation
Division of Opportunity, Inclusion, and Opportunity
Office of Small & Disadvantaged Business Enterprise
1980 W. Broad Street, MS: 3270
Columbus, OH 43223

3. By Telephone
+1 (614) 752-5756

Section 26.33 Overconcentration

If the DBELO or her designee determines that the DBE participation is so over-concentrated in certain types of work or in contracting or procurement opportunities that it unduly burdens the participation of non-DBEs in that type of work, the DBELO or her designee will develop appropriate measures to address the overconcentration. The DBELO or her designee will seek approval from the appropriate operating administration(s), as required. Once approved, the measures will become an integral part of ODOT’s DBE Program. Measures to address DBE overconcentration in a particular field may include, but are not limited to the following:

1. The DBELO or her designee will develop ways to assist DBEs to move into non-traditional areas of work, including but not limited to;
   (a) Outreach efforts;
   (b) Use of incentives;
   (c) Technical assistance;
   (d) Capacity building;
   (e) Mentor/Protégé programs;
   (f) Business development programs; and
   (g) Other appropriate measures such as providing assistance with obtaining bonding and capital designed to assist the DBEs in performing work outside of the specific field where over-concentration is occurring.

2. The DBELO or her designee may vary the use of DBE contract goals;

3. The DBELO or her designee may work with prime contractors and consultants to find and use DBEs in other industry areas; and/or

4. For construction projects, the DBELO will work with the Division of Construction to add an overconcentration performance metric to the C-95\(^2\) process

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\(^2\) Please refer to the C-95 Contractor Evaluation Form.
Upon receipt of an allegation of overconcentration, ODOT will consult with the appropriate operating administration regarding the allegation and next steps to be taken.

**Section 26.35 Business Development Program**

ODOT, as part of its regular business, has developed a number of program strategies that will ensure the fullest possible participation of DBE contractors in heavy highway construction and DBE consultants on engineering projects. These program strategies include, but are not limited to: providing timely notification of opportunities, outreach, education, mentoring, and technical assistance through capacity building, which are provided through ODOT’s DBE Supportive Services Program (DBE/SSP). DBE/SSP offers tuition reimbursement for ODOT-and non-ODOT-sponsored seminars. Reimbursement can be obtained if attending relevant trade shows, association sponsored programs, workshops, and professional conferences. Tuition reimbursement can be obtained for formal education courses such as relevant technical training from a university, community college, technical trade school, or courses offered by ODOT.

DBE/SSP (please see Exhibit D) also offers one-on-one technical services designed to assist in the growth and self-sufficiency of DBE firms with the ability to participate in the Federally-assisted heavy highway program, which includes engineering services. These technical services are offered at zero cost to those DBE firms determined to be eligible to participate in accordance with 23 CFR Part 230, Subpart B, and 49 CFR Part 26, and have a work specialty related to the highway construction industry. The technical services offered include customized help from professionals in marketing plans, business plan development, loan packages, advertising/promotion, accounting services, bidding/estimating, bonding, small business fundamental information systems, website development, and overall capacity building services.

ODOT has, as part of its regular business, developed a number of robust programmatic strategies that will ensure the fullest possible inclusion and participation of DBEs in Federally-assisted programs and projects. The two most noteworthy programs are the Mentor/Protégé Program and the Capacity Building Program (CBP).

The Mentor/Protégé Program has been developed as a permanent aspect of ODOT’s DBE Program. It involves a comprehensive developmental program of hands-on training and assistance in all phases of the heavy highway industry. It is intended to help DBE firms increase business acumen, understand how to do business with ODOT, become more competitive at bidding and performing work, and grow to be a mentor to other firms. ODOT contractors and consultants are encouraged to participate as mentors to assist DBEs as protégés in developing technical and business capabilities as well as growing capacity. [Click here for the application](#).

Likewise, the CBP has been developed to assist DBE firms in building and implementing viable business strategies, expanding technical skills, and enhancing leadership and collaboration capabilities. The CBP will target DBEs that have established themselves as a viable business but are seeking to increase capacity through building in-house technical expertise, pursuing larger contracting opportunities, and/or transitioning from the role of subcontractor to prime contractor. Specific focus will be placed on improving the DBE's infrastructure, its performance on projects, improving the DBE's ability to perform on ODOT projects, identifying an avenue for sustainable work, and developing a strategy that will lead to

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additional profit-generating opportunities. Please refer to Exhibit E for complete details of the CBP.

**Section 26.37 Monitoring and Enforcement Mechanisms**

ODOT utilizes the following mechanisms in monitoring and enforcement activities:

1. ODOT will bring to the attention of USDOT any false, fraudulent, or dishonest conduct in connection with the program, so that USDOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the USDOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in Section 26.109. ODOT has the authority to ensure compliance with DBE requirements by withholding progress payments until the contractor has satisfied compliance requirements.

2. ODOT will consider similar action under state legal authorities, including responsibility determinations in future contracts, removal of firms from the prequalified bidders and consultants’ lists or revocation of DBE certification if applicable, pursuant to Ohio Administrative Code Section 5501:2-3-10. ODOT monitors compliance with the DBE requirements through district construction staff and provides direction on how to monitor through the DBE CUF Monitoring Procedures found under Exhibit F.

3. ODOT has also developed a CUF DBE Monitoring Report that is used by its District Contractor Compliance Officers (CCOs) to document and certify ODOT’s efforts to assess the DBE subcontractors are performing CUF. GODOT developed a CUF Form for District Construction staff to complete and submit to the District CCOs. The frequency in DBE monitoring and delineating parameters and timeframes for compliance monitoring are also indicated in the DBE CUF Monitoring Procedures.
   a. For professional service contracts, the DBE commitments and payments reported will be monitored through a random selection process. ODOT’s Contractor Compliance Liaison will randomly select 10% of the professional service contracts and verify with the DBE firms that the dollars reported by the prime consultant are accurate using the DBE Affidavit of Payment form, a copy of which is attached as Exhibit G.
   b. For professional service contracts specifically related to Transit, ODOT has developed a CUF Form to be completed by its subrecipients.

4. ODOT recognizes that ongoing staff training and professional development opportunities are essential in maintaining competent compliance professionals. ODI provides ongoing technical assistance and training to district and field staff regarding changes to state and federal regulations.

5. ODOT ensures Form FHWA-1273 is physically incorporated in each construction contracted funded under Title 23 (excluding emergency contracts solely intended for debris removal). The contractor (or subcontractor) must insert this form in its entirety in each subcontract and further require its inclusion in all lower tier subcontracts (excluding purchase orders, rental agreements, and other agreements for suppliers or services).
   a. ODOT requires, as outlined in FHWA-1273, prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection, upon request by any authorized representative of ODOT or USDOT. This reporting requirement also extends to any certified DBE subcontractor.

6. ODOT will keep a running tally of actual DBE goal attainments. This will be accomplished as outlined in PN 031. Actual payment to the DBE will be compared to the original subcontract
amount and attainment of the DBE goal will be calculated based on the contract amount and the actual payments made to the DBE.

a. Reporting of DBE participation to USDOT will indicate both commitments and attainments as required by USDOT, “Uniform Report of DBE Awards, Commitments, and Payments” form. DBE Commitment is reported in the reporting period in which the award of the contract is made. This information is reported on the top half of the Uniform Report of DBE Awards or Commitments and Payments form. The report of DBE participation is based on the actual dollars paid to the DBEs in full on that project for the reporting period in which the project has been completed. This is reported on the bottom portion of the Uniform Report (completed projects).

b. ODOT will perform interim audits of contract payments to DBEs. The audits will review payments to DBE subcontractors to ensure the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the DBE Utilization Plan.

c. ODOT will report DBE participation using USDOT Form, “Uniform Report of DBE Commitments/Awards and Payments” on a semi-annual basis on June 1 and December 1. ODOT’s procedure for tracking DBE payments and commitments for ODOT’s transit-related and subrecipient contracts is set forth in Exhibit A herein.

DBE Affidavit of Subcontractor Payment Verification Process – Former PN 013 (prior to May 2015)³

The Code of Federal Regulations 49, Part 26.37(b), requires ODOT to monitor and verify that work subcontracted to DBE firms is actually performed by those subcontracted DBEs. Additionally, ODOT is required to report the DBE participation on each project. Therefore, it is ODOT’s responsibility to confirm whether payments are made to DBE firms. The DBE Affidavit of Subcontractor Payment is to be completed and signed by the contractor within 15 days of the completion of the project. The affidavit seeks to verify actual payments made to DBE firms on the project. Each DBE firm must verify the actual payment amount.

For those prime contracts where DBE affidavit information is not in the database nor is the DBE affidavit in the DBE affidavit file, a form letter is sent to the prime advising that a completed and notarized DBE affidavit for the DBEs on its project must be submitted to the Contractor Compliance Liaison in OSDBE. A two-week deadline is given for submission of this information.

If the DBE affidavit is not received by the due date, nor is a letter offering explanation as to the delay, a second letter is written to the prime contractor requesting said documentation. A one-week deadline is given for submission of this information. ODOT will consider invoking sanctions if the deadline is not met.

In addition to tracking the actual receipt of the DBE affidavit, goal attainment or non-attainments is

³ Currently, there are projects still proceedings under the old PN 013. Projects under the old proposal note follow the process outlined herein.
also tracked. Any non-attainment of the goal is then investigated by OSDBE.

Section 26.39 Fostering small business participation

ODOT established a Small Business Enterprise (SBE) Program in order to continuously meet the maximum achievable portion of its DBE goal through race-neutral means. (see Exhibit H– Small Business Enterprise Program). To ensure that the maximum achievable portion of the overall DBE goal is met by using race-neutral means, ODOT assesses the latest availability data and take measures to facilitate competition and small business participation on ODOT contracts. Currently, the SBE Program only applies to construction projects.
SUBPART C – GOALS, GOOD FAITH EFFORTS, AND COUNTING

Section 26.43 Set-asides or Quotas

ODOT does not use quotas or set-asides in any way in the administration of its DBE program.

Section 26.45 Overall Goals

ODOT will submit its triennial overall DBE goal to the appropriate operating administrations on August 1 of the year specified by the operating administration. The next goal will be submitted to the appropriate operating administrations on August 1, 2016 for review and approval.

ODOT will establish project-specific DBE goals if and when directed by the appropriate operating administrations.

A description of the methodology to calculate the overall goal and the goal calculations can be found in Exhibit I. This section of the program document will be updated every three years or after an adjustment of the overall goals, which has been approved by USDOT.

Before establishing its overall goal, in accordance with 26.45(g)(1)(i), ODOT will consult with minority and women contractor and/or consultant groups, general contractors and consultants, community organizations, and other organizations or officials to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and ODOT’s efforts to establish a level playing field for the participation of DBEs. This consultation is required to include a scheduled, direct, interactive exchange (e.g., a face-to-face meeting, video conference, or teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the goal setting process, and it must occur before ODOT is required to submit its methodology to the appropriate operating administration for review. ODOT will document in its goal submission the consultation process in which it engaged.4

Following the consultation, ODOT will publish a notice of the proposed overall goal(s) informing the public that the proposed goal(s) and its rationale are available for inspection during normal business hours at ODOT Central Office for 30 days following the date of the notice and informing the public that ODOT will accept comments on the goals for 45 days from the date of the notice. The overall goal will be published in newspapers (e.g., Advertiser Tribunal, Akron Beacon Journal, Athens Messenger, Bellefontaine Examiner, Call and Post, Chillicothe Gazette, Chronicle Telegram, Cincinnati Post, Columbus Dispatch, Daily Sentinel, Dayton Newspapers, Inc., Delaware Gazette, Lima News, Marietta Times, The Cleveland Plain Dealer, The Courier, The Mt. Vernon News, The Repository, The Sandusky Register, The

4 In February 2015, ODOT in association with the Ohio Turnpike Infrastructure Commission retained the services of BBC Research & Consulting and Exstare Federal Services Group to conduct a disparity study for each agency, which included a market availability study. In January 2016, ODOT amended the scope of services to include a market availability study for DBE goal methodology related to FTA-funded projects. Thus, for its FY 2017-2019 DBE Goal Methodology submittal to FHWA and FTA, the public participation and information gathering was obtained during the aforementioned studies.

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Times Recorder, Toledo Blade, Vindicator Printing Co., Wooster Daily Record, Inc.), in publications such as OhioMBE, and on ODOT’s website. In addition, ODOT will email the notice to all DBEs. Normally, ODOT will issue the notice no later than June 10 and it will include the address to which comments may be sent and where the proposal may be reviewed. A Proposed Public Participation Timeline is attached as Exhibit J.

ODOT’s overall goal submission to the operating administrations will include: the goal (including the breakout of estimated race-neutral and race-conscious participation, as appropriate); a copy of the methodology, worksheets, etc. used to develop the goal; a summary of information and comments received during the public participation process and ODOT’s responses; and proof of publication of the goal in media outlets listed above.

ODOT will implement its overall goal on October 1 of the specified year unless it has received other instructions from the operating administrations. If ODOT establishes a goal on a project basis, it will begin using the goal by the time of the first solicitation for a USDOT-assisted contract for the project. ODOT’s goal will remain effective for the duration of the three-year period established and approved by the operating administrations.

Section 26.47 Failure to Meet Overall Goals

The Shortfall Analysis Process – If the awards and commitments shown on the Uniform Report of Awards and Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, ODOT will submit to USDOT a document analyzing in detail the reasons for the difference between the overall goal and the awards and commitments in that fiscal year and establishing specific steps and milestones to correct the issues identified in the analysis.

To produce this document, ODOT will pursue the following steps to assess the race-conscious and race-neutral performance. First, analyze the DBE market availability, thresholds on making projects race-conscious versus race-neutral, and the goal setting process. ODOT will then assess the root cause(s) driving the shortfall, and project impacts of targeted, time phased corrective actions to resolve the identified shortfall on an immediate, strategic, and sustainable basis:

1. Pareto the project types and associated dollar values awarded in the targeted period;
   (a) Consider construction, consulting, and transit projects
2. Pareto the common work types and associated dollar values tied to the project types listed in Step (1) above;
3. Use the ODOT “Walkway” to identify and pair the relevant NAICS codes to the governing work types listed in Step (2) above;
4. Reference the UCP and bidder’s list to identify the relevant list of current and active DBEs with respect to the NAICS codes identified in Step (3) above;
5. Assess the consumption potential, including prequalification status, bidding limits, growth rate, geographical location, and individual capacity to perform additional work, for each DBE on the list resulting from Step (4) above, and categorize by work type / NAICS code;

5 ODOT uses its “Walkway” to align work types with NAICS codes.
(6) Compare the dollar amount assessed in Step (5) above with expected goal performance identified in the Uniform Report of Awards and Commitments and Payments for the fiscal period in question;

(7) Assess the list of race-neutral projects and their performance to determine whether similar projects should be race-conscious with assigned goals moving forward;

(8) Critique the goal setting process and resulting project goals established for each race-conscious project performed during the fiscal period in question, determine whether sufficient information was available to establish the project goals, and determine whether the project goals should have been more aggressive;
   (a) Assess this for all goal-driven construction projects and awards during the period;
   (b) Assess this for all goal-driven consulting projects and awards during the period;
   (c) Assess this for all goal driven transit grant awards during the period;

(9) Leverage the data from Steps (1) through (6) along with the perspective gained from Steps (7) and (8) and consider options to develop, grow, and/or accelerate the Business Development Plan of record by challenging the relevance, effectiveness, efficiency, growth potential, and impact of these programs;
   (a) Supportive Services
   (b) Mentor/Protégé Program
   (c) Capacity Building Program
   (d) SBE Program
   (e) Outreach Initiatives
   (f) New Programmatic Considerations

(10) Identify the impact potential of each viable consideration arising from Step (9) above, and implement the corrective actions necessary to achieve the projected impact, being conscious of the need to identify required resources to make these measure actionable;

(11) Produce an official report for USDOT with the findings, projections, and implementation procedures.

This report document will be submitted to USDOT within 90 days of the end of the fiscal year, December 31, as a part of ODOT’s duty to implement its DBE program in good faith. ODOT will implement the corrective actions to which it has committed or any conditions imposed by USDOT following its review of the analysis and corrective actions.

Section 26.49 Transit Vehicle Manufacturers Goals

Each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, must certify that it has complied with the requirements of 49 CFR 26.49. A copy of the TVM Certification is attached as Exhibit L.

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6 Historically, the Office of Transit has operated its DBE Program using race-neutral measures. ODOT does not intend to implement a race-conscious program as it relates to its FTA-funded program. If, however, ODOT were to implement a race-conscious program in this area, it would use the framework provided in Exhibit K.
A TVM’s failure to implement the DBE Program in the manner as prescribed in this section and throughout 49 CFR part 26 will be deemed as non-compliance, which will result in removal from FTA’s certified TVMs list, resulting in that manufacturer becoming ineligible to bid. Only those transit vehicle manufacturers listed on FTA’s certified list of Transit Vehicle Manufacturers, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved, at the time of solicitation are eligible to bid.

ODOT maintains a State purchasing schedule for transit vehicles. A State purchasing schedule is an arrangement that a State establishes with multiple vendors in which those vendors agree to provide essentially an option to the State, and its subordinate governmental entities and others it might include in its programs, to acquire specific property or services in the future at established prices. ODOT usually refers to its State purchasing schedule for transit vehicles as “vehicle term contracts.”

ODOT selects a single vendor for each type of transit vehicle available on its State purchasing schedule. ODOT selects its vendors using a formal Invitation to Bid process. As part of this process, each bidder must certify that it (or, if the bidder is a dealer/distributor, that the transit vehicle manufacturer who will actually be producing the vehicles) is listed on FTA’s certified list of Transit Vehicle Manufacturers, or that it has submitted a goal methodology to FTA that has been approved or has not been disapproved, at the time of solicitation. Bidders that cannot make this certification will be deemed non-responsive. Prior to entering into an agreement with a vendor, ODOT confirms the bidder’s certification by confirming the bidder’s presence on FTA’s Eligible TVMs List.

When subrecipients choose not to use the State purchasing schedule when procuring transit vehicles with a total value of $50,000 or more: As part of the pre-bid concurrence process, ODOT will ensure that subrecipients have a mechanism to obtain each bidder’s certification that it (or, if the bidder is a dealer/distributor, that the transit vehicle manufacturer who will actually be producing the vehicles) is listed on FTA’s certified list of Transit Vehicle Manufacturers, or that it has submitted a goal methodology to FTA that has been approved or has not been disapproved, at the time of solicitation. Furthermore, ODOT will ensure that subrecipients will deem non-responsive any bidders that cannot make this certification. As part of the pre-award concurrence process, ODOT will ensure that subrecipients actually collected and confirmed the certifications.

FTA recipients are required to submit within 30 days of making an award, the name of the successful bidder, and the total dollar value of the contract in the manner prescribed in the grant agreement. Within 30 days of entering into an agreement with a vendor, ODOT will report the name of the successful bidder to the FTA Regional Civil Rights Officer. Within 30 days of executing a purchase order for transit vehicles, ODOT will report the vendor name, the specific number of vehicles purchased, and the price of the vehicles to the FTA Regional Civil Rights Officer. Subrecipients must submit the above information to ODOT within 15 days of executing a purchase order so that ODOT can make the required report to the FTA Regional Civil Rights Officer within the 30 day timeframe.

Section 26.51(a-c) Race-Neutral Measures

ODOT endeavors to meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any
time a DBE wins a contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal. Currently, ODOT’s Transit DBE goal is 100% race-neutral.

The following are some race-neutral means utilized by ODOT to facilitate race-neutral DBE participation:

1. Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses.

2. Providing access to overcoming limitations such as inability to obtain bonding or financing.

3. Providing technical assistance and other services.

4. Carrying out information and communications programs on contracting procedures and specific contract opportunities.

5. Providing services to help DBEs and other small businesses improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, achieve eventual self-sufficiency, develop their capability to utilize emerging technology, and conduct business through electronic means as a part of ODOT’s business development programming.

Each time ODOT submits its overall goal for review by the concerned operating administration, ODOT submits its projection of the portion of the goal it expects to meet through race-neutral means and the basis for that projection. The projection is subject to the approval of the concerning operating administration, in conjunction with its review of ODOT’s overall goal.

As noted above, ODOT’s Transit DBE goal is 100% race-neutral. As such, at this time, Transit does not set contract goals. However, based on past participation and projections, ODOT does set contract goals on FHWA-assisted contracts that have subcontracting opportunities as outlined below.

**Section 26.51(d-g) Contract Goals**

Contract goals are established on construction and professional service contracts so that, over the period to which the overall goal applies, they will cumulatively result in meeting that portion of ODOT’s overall goal that is not projected to be met through the use of race-neutral means.

ODOT will establish contract goals only on those USDOT-assisted contracts and professional services agreements that have subcontracting opportunities. ODOT does not need to establish a contract goal on every contract or professional services agreement, and the size of the subcontract goals will be adapted to the circumstances of the contract or professional services agreement (e.g., type, location of work, availability of DBEs to perform the particular work, etc.).

**ODOT Project DBE Goal Setting**
In order to set project specific DBE goals on USDOT-assisted projects or professional services agreements, ODOT has established a DBE Goal Setting Committee. This Committee is comprised of members from OSDBE, Structural Engineering, Construction Management, Roadway Engineering, Consultant Services, Contracts, Outreach, Transit (for Transit projects), and Local Projects. Projects or professional services agreements are evaluated by ODOT’s Office of Estimating and then by ODOT’s Office of Consultant Services. Before the project is advertised, each project or professional services agreement is presented to the DBE Goal Setting Committee to determine if a DBE goal should be assigned to the project or professional services agreement. If it is determined that a DBE goal is appropriate, the goal will be assigned in the form of a percentage of the project or professional services agreement.

The members of the Committee will review the projected work types included in the respective project or professional services agreement. Consideration will be given to the availability of DBE firms that may be available for the project or professional services agreement. Items that are taken into consideration may include, but are not limited to, the list of existing certified DBE firms, the work types or services performed by certified DBE firms, the availability of certified DBE firms in the project area, and associative knowledge of the members of the Committee. Once a project or professional services agreement has been evaluated by the Committee, it will be advertised with the DBE goal that was assigned by the Committee, if any.

**ODOT Bidding Process**

All bidders are required to submit a DBE Utilization Plan at the time of bid setting forth specific information demonstrating how the bidder plans to achieve the DBE goal. By submitting a DBE Utilization Plan, the bidder is affirming that it will be using the DBE firms identified in the Utilization Plan to meet the DBE contract goal. The DBE Utilization Plan includes the following information:

1. The names and addresses of the certified DBE firm(s) that will be used to meet the DBE goal;
2. A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;
3. Whether the DBE firm(s) being used to meet the goal will be utilized as a subcontractor, regular dealer, manufacturer, consultant, or other capacity; and
4. The dollar amount of the participation of each DBE firm used to meet the DBE goal.

The Apparent Low Bidder will ensure the DBE firms being utilized to meet the DBE goal affirm their participation in the bid within five calendar days after the bid opening. The **DBE Affirmation Form** will be utilized as written confirmation from each listed DBE firm that it is participating in the contract or professional services agreement in the kind and amount of work provided in the bidder’s DBE Utilization Plan. The Apparent Low Bidder will submit a separate DBE Affirmation Form for each DBE it is utilizing to meet the DBE goal. All other bidders will submit a DBE Affirmation Form(s) if notified that the information is required in order for ODOT to complete its bid assessment. Bidders have five calendar days from the date of notification to submit all required DBE Affirmation Forms. Notification will be by phone or email.
In the event a DBE firm fails to confirm the information contained in the DBE Affirmation Form within five calendar days of bid opening, the Apparent Low Bidder needs to submit a Request to Terminate/Substitute DBE Form, as set forth herein, and described below in order for the Apparent Low Bidder to still be considered for contract award. The Apparent Low Bidder must provide all efforts it made to obtain the affirmation from the DBE firm and will need to attach proof of these efforts.

In the event that the bidder is also a certified DBE firm, the bidder is required to complete a DBE Utilization Plan as set forth above. In this instance, however, the certified DBE bidder would not need to submit a DBE Affirmation Form for the work it is planning to self-perform in order to meet the goal. ODOT will consider the submission of the bid as the certified DBE bidder’s written confirmation that it is participating in the contract or professional services agreement. However, a DBE Affirmation Form must be submitted for all other DBE firms that are being utilized toward the DBE goal.

Section 26.53 Good Faith Efforts Procedures

In the event that the DBE contract goal established by ODOT is not met, the Apparent Low Bidder (prime contractor or consultant) must demonstrate that it made adequate good faith efforts (GFEs) to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so.

The Apparent Low Bidder must demonstrate its GFEs by submitting the following information within five calendar days after the bid opening:

1. All written quotes received from certified DBE firms;
2. All written (including email) communications between the Apparent Low Bidder and DBE firms;
3. All written solicitations to DBE firms, even if unsuccessful;
4. Copies of each non-DBE quote when a non-DBE was selected over a DBE for work on the contract or professional services agreement;
5. Phone logs of communications with DBE firms.

ODOT will utilize the guidance set forth in 49 CFR §26.53 Appendix A in determining whether the Apparent Low Bidder has made adequate GFEs to meet the goal. ODOT will review the GFE documentation and issue a written determination on whether adequate GFEs have been demonstrated prior to contract award.

In the event ODOT determines that the Apparent Low Bidder has failed to demonstrate adequate GFEs to meet the goal, the Apparent Low Bidder will have an opportunity for administrative reconsideration prior to the contract being awarded. As part of this reconsideration, the Apparent Low Bidder may provide written documentation or argument concerning the issue of whether it met the goal or made adequate GFEs to do so. Such written documentation or argument must be provided to ODOT within two business days of ODOT’s written determination that GFEs were not adequately demonstrated. The Apparent Low Bidder may also include in its written documentation a request for an in person meeting to discuss the issue of whether it met the goal or made adequate GFEs to do so.
ODOT will send the Apparent Low Bidder a written decision on reconsideration explaining the basis for finding that the Apparent Low Bidder did or did not meet the goal or make adequate GFEs to do so. The result of the reconsideration process is not administratively appealable to USDOT.

At this time, ODOT’s Transit DBE goal is 100% race-neutral and therefore ODOT does not set DBE contract goals for transit projects. If, in the future, ODOT’s Transit DBE goal becomes race-conscious, ODOT will use the sample GFE template attached as Exhibit M to evaluate the GFEs of its subrecipients’ contractors or consultants and to determine whether they are sufficient.

**Termination or Replacement of a DBE**

By submitting a DBE Utilization Plan, the bidder is committing to use the DBE firms identified in the plan. The Apparent Low Bidder/Awarded Contractor will utilize the specific DBEs listed in the DBE Utilization Plan to perform the work and supply the materials for which each is listed unless the Apparent Low Bidder/Awarded Contractor obtains written consent as provided herein.

In order to request termination or substitution of a DBE firm, the Apparent Low Bidder/Awarded Contractor will utilize the Request to Terminate/Substitute DBE Form. This termination/replacement procedure applies only to DBE firms or the amount of work being utilized to meet the goal. Without ODOT’s written consent to terminate/replace a DBE firm being utilized to meet the goal, the Awarded Contractor is not entitled to any payment for DBE listed work or materials unless it is performed or supplied by the listed DBE. This requirement is outlined in PN 013.

**Good Cause**

ODOT will provide written consent to terminate a DBE only if it agrees, for reasons stated in a concurrence document, that the Apparent Low Bidder/Awarded Contractor has good cause to terminate the DBE firm.

Good cause to terminate a DBE includes the following circumstances:

1) The listed DBE firm fails or refuses to provide the required DBE Affirmation Form or to execute a written contract;
2) The listed DBE firm fails or refuses to perform the work of its subcontract in a manner consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE firm to perform its work on the subcontract results from the bad faith or discriminatory action of the Awarded Contractor;
3) The listed DBE firm fails or refuses to meet the Awarded Contractor’s reasonable, nondiscriminatory bond requirements.
4) The listed DBE firm becomes bankrupt, insolvent, or exhibits credit unworthiness;
5) The listed DBE firm is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1200 or applicable state law;
6) ODOT has determined that the listed DBE firm is not a responsible contractor;
7) The listed DBE firm voluntarily withdraws from the project and provides the Awarded Contractor written notice of its withdrawal;
8) The listed DBE is ineligible to receive DBE credit for the type of work required;
9) A DBE owner passes away or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract; and

10) Other documented good cause that ODOT determines supports the termination of the DBE firm. Provided, that good cause does not exist if the Awarded Contractor seeks to terminate a DBE it relied upon to obtain the contract so that the Awarded Contractor can self-perform the work for which the DBE contractor was engaged or so that the Awarded Contractor can substitute another DBE or non-DBE contractor after contract award.

**Replacement**

When a DBE firm is terminated or fails to complete its work on the contract for any reason the Awarded Contractor must make GFEs to find another DBE firm. These GFEs must be directed at finding another DBE to perform at least the same amount (not necessarily the same type) of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal. The GFEs must be documented by the Awarded Contractor. If ODOT requests documentation under this provision, the Awarded Contractor must submit the documentation within seven calendar days, which may be extended for an additional seven calendar days if necessary at the request of the Awarded Contractor, and ODOT will provide a written determination to the contractor stating whether or not GFEs have been demonstrated. In addition to post-award terminations, the provisions of this section apply to pre-award deletions and substitutions of DBE firms put forward by bidders in the DBE Utilization Plan.

**Written Notice to DBE**

Before submitting its request to ODOT to terminate and/or substitute a DBE firm, the Apparent Low Bidder/Awarded Contractor must give notice in writing to the DBE firm, with a copy to ODOT, of its intent to request to terminate and/or substitute and must include the reason(s) for the request.

The Apparent Low Bidder/Awarded Contractor must give the DBE firm five calendar days to respond to the notice, advising ODOT and the Apparent Low Bidder/Awarded Contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why ODOT should not approve the Apparent Low Bidder/Awarded Contractor's request. If required in a particular case as a matter of public necessity (e.g., safety), ODOT may provide a response period shorter than five days.

**Goal Attainment Post-Award**

The Awarded Contractor must make available upon request a copy of all DBE subcontracts. The Awarded Contractor will ensure that all subcontracts or agreements with DBEs require that the subcontract and all lower tier subcontractors be performed in accordance with Proposal Note 013.

Approval of a DBE Utilization Plan does not ensure approval of C-92 Requests to Sublet nor does approval of a DBE Utilization Plan indicate that the DBE goal has been met. ODOT will monitor goal attainment throughout the life of the project. It is the responsibility of the Awarded Contractor to advise ODOT of any changes to the DBE Utilization plan throughout the life of the project.

**Sanctions and Administrative Remedies**
Failure to do any of the following will result in the bid being rejected in accordance with ORC §5525.08:

1) Failure to submit a complete DBE Utilization Plan at the time of bid;
2) Failure to submit DBE Affirmation Form(s) and/or failure to submit Request to Terminate/Substitute DBE Form(s) as required.
3) Failure to meet the goal and/or failure to demonstrate GFEs to meet the goal as required. ODOT will not penalize a company for failure to achieve dollar amounts listed beyond the contract goal.

Failure by the Apparent Low Bidder and/or Awarded Contractor/Consultant to carry out the requirements of Proposal Note 013 is a material breach of the contract and may result in the termination of the contract or other remedies available by law including suspension and/or revocation of a contractor’s or consultant’s prequalification and/or debarment.

In the event the post award GFEs are not approved by ODOT, the prime contractor/consultant may face the following ODOT-issued sanctions:

1) Letter of Reprimand
2) Liquidated damages equivalent to the DBE shortfall
3) If a pattern of paying liquidated damages persists or the contractor/consultant has falsified, misrepresented or withheld information, ODOT can pursue other remedies available by law including suspension, revocation, and/or debarment

Factors to be considered in issuing sanctions may include, but are not limited to the following:

- The magnitude and the type of offense
- The degree of the contractor’s culpability
- Any steps taken to rectify the situation
- The contractor’s record of performance on other projects including, but not limited to:
  - annual DBE participation
  - annual DBE participation on projects without goals
  - the number of complaints ODOT has received regarding the contractor
  - the number of times the contractor has been previously sanctioned by ODOT

ODOT issued GFE guidance, developed a template for contractor/consultants to complete regarding GFEs in the event of a shortfall, and outlined sanctions in the event a contractor/consultant did not demonstrate adequate GFEs. The completed GFE templates are to be submitted to ODOT to document a prime contractor’s or consultant’s GFEs.

**Section 26.55 Counting DBE Participation**

7 It should be noted that prime contractors/consultants are strongly encouraged to subcontract with DBE firms to assist in enhancing capacity regardless of whether the work will count toward the DBE goal. Such partnerships will allow ODOT to meet the maximum achievable portion of its overall DBE goal through race-neutral measures.
DBE certification does not guarantee that ODOT will count the firm’s work on a project towards ODOT’s DBE goal. In order for services performed by a DBE to count toward the ODOT goal, the firm must perform a CUF and its work must be in the NAICS code for which the DBE is certified.

Expenditures to a DBE contractor can be counted toward DBE goals only if the DBE is performing a CUF on that contract. Considerations in determining CUFs include the following:

1. A DBE performs a CUF when the DBE is responsible for execution of the work and is actually performing, managing, and supervising the work involved. To perform a CUF, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable), and paying for the material itself;
2. To determine whether a DBE is performing a CUF, ODOT must evaluate the amount of work subcontracted, industry practices, whether the amount the DBE is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors;
3. ODOT must presume a DBE is not performing a CUF if the DBE’s role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to create the appearance of DBE participation. In determining whether a DBE is such an extra participant, ODOT must examine similar transactions, particularly those in which DBEs do not participate;
4. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of the DBE’s contract with its own workforce, or the DBE 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, ODOT must presume that the DBE is not performing a CUF. The 30% requirement does not apply to DBE trucking; and
5. When a DBE is presumed not to be performing a CUF as stated in paragraphs 2 and 3, the DBE may present evidence to rebut this presumption. ODOT may determine that the DBE is performing a CUF given the type of work involved and normal industry practices.

Monitoring CUF plays a vital role in the success of ODOT’s DBE Program. In keeping with normal contract requirements, it is the primary responsibility of the prime contractor/consultant to ensure that the DBE is performing a CUF. ODOT, as the contracting agency, has oversight responsibility to ensure that the prime contractor/consultant has effectively met this responsibility under its contract with ODOT.

In determining the portion of DBE work on a project that will count toward the DBE goal, please refer to the bulleted list below. This list is not an exhaustive list; ODOT may request additional information from the prime contractor/consultant and/or DBE firm to determine the portions of work ODOT will count as DBE participation.

1. The DBE firm is performing a CUF;
2. The work is in the NAICS code for which the DBE is certified;
3. The work is performed by the DBE’s own workforce;
(4) Supplies and equipment purchased or leased by the DBE are not affiliated with the prime contractor/consultant;

(5) The cost of supplies and materials obtained by the DBE for the work is counted including purchases and leased equipment;

(6) Reasonable fees or commissions charged by a DBE for providing a bona fide service, or for providing bonds or insurance required for performance of an ODOT contract may be counted. Examples of bona fide services include professional, technical, consultant, or managerial services; and

(7) The work a DBE subcontracts to others is counted only if the work is subcontracted to another DBE. Work subcontracted to non-DBEs does not count.

When a DBE subcontracts part of the DBE’s work to another firm, the value of the subcontracted work is counted only if the work is subcontracted to another DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

When a DBE performs as a participant in a joint venture, DBE credit will be counted only for work that is clearly defined in the contract that the DBE performs with the DBE’s own management, workforce, and equipment. All CUF rules still apply.

Considerations in determining whether a DBE trucking company is performing a CUF include the following:

(1) The DBE will be responsible for the management and supervision of the entire trucking operation on a particular contract. A DBE is not performing a CUF under a contract if the contract is entered into for the purpose of creating the appearance of DBE participation;

(2) The DBE must own and operate at least one fully licensed, insured, and operational truck used on the contract;

(3) The DBE receives credit for the total value of the transportation services the DBE provides on the contract using trucks the DBE owns, insures, and operates using drivers it employs;

(4) If a DBE leases trucks (lessor) from another DBE (lessee), including an owner-operator who is certified as a DBE, the DBE lessor receives credit for the total value of the transportation services the lessee DBE provides on the contract; and

(5) A lease must indicate that the DBE has exclusive use of and control over the truck, including responsibility of maintenance and insurance for the truck. This does not preclude the leased truck from working for others during the term of the lease with the DBE’s consent, as long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the DBE’s name and identification number.

ODOT will ensure no contract goal credit will be provided under either of the following conditions:

(1) The subcontracted DBE firm is not certified at the time of contract award; and

(2) Prime contractor’s or consultant’s payments to the certified DBEs on the project have not been paid.

CCOs will advise the prime contractor at the Pre-Construction Meeting to maintain and make available to ODOT, when so requested, records substantiating the performance of a CUF by a DBE contractor and supplier as part of the contractor’s compliance. Contractor records, which may be reviewed to
substantiate CUF, include, but are not limited to:

- Contracts, subcontracts, or rental agreements
- Delivery tickets
- Invoices
- Bills of Lading
- Lease agreements
- Hauling tickets
- Contractor’s daily trucking records
- Canceled checks
- Bank records
- Equipment titles of ownership
- Material/supply agreements
- Payroll records

ODOT records which will be reviewed to confirm CUF include, but are not limited to:

- Contractual commitments
- Daily reports and project photos
- Subcontractor payments
- CUF Reports completed by the CCOs
- CUF Form and Prevailing Wage (PW) Interviews
- Payroll records
- DBE Directory Information
- NAICS website information
- ODOT Work Type – NAICS Walkway

In the assessment of a CUF, a district should request copies of invoices based on the following factors:

1. The DBE is a material supplier, manufacturer, or regular dealer on a project;
2. There is a concern that the DBE is not performing a CUF and invoices are needed for further verification.

When a DBE is presumed not to be performing a CUF, the DBE may present evidence to rebut this presumption. Decisions regarding CUF determinations are subject to review by concerned operating administrations. However, CUF decisions are not appealable to USDOT as such are considered to be contract administration issues.

ODOT’s internal monitoring system and electronic bidding system provide the conduit for contractors to submit the DBE Utilization Plan at time of bid and the DBE Affirmations five days after bid. Contractors are trained on how to utilize these programs through webinars when necessary. This is where DBE utilization and CUF tracking begin.

Please refer to ODOT’s CUF Procedures (Exhibit F), FHWA Approval of ODOT CUF Procedures (Exhibit N), DBE CUF Form (Exhibit O), CUF Report (Exhibit P), and Trucking Guidelines.
SUBPART D – CERTIFICATION STANDARDS

Section 26.61—26.73 Certification Process

ODOT will use the certification standards of Subpart D of Part 26 and the certification procedures of Subpart E of Part 26 to determine the eligibility of firms to participate as DBEs in USDOT-assisted contracts. To be certified as a DBE, a firm must meet ALL certification eligibility standards. ODOT will make certification decisions based on the facts as a whole.

For information about the DBE certification process or to apply for DBE certification, firms should contact:

Ohio Department of Transportation
Division of Opportunity, Diversity, and Inclusion
Office of Small and Disadvantaged Business Enterprise
1980 W. Broad Street, MS 3720
Columbus, Ohio 43223
Telephone: +1 (614) 752-5756

The Ohio Unified Certification Program (UCP) certification application forms and documentation requirements are linked herein or can be found online at http://www.OhioUCP.org.

It is noted that in order for any individual NAICS code to be added, the firm must:

1. Provide evidence of three contracts where the applying firm has previously performed relevant work in the NAICS Code sought;
2. Provide proof of ownership for the equipment necessary to perform the work; and

For suppliers, three purchase orders/invoices will needed to be provided and will be reviewed to complete the NAICS code assignment.

Once a firm’s certification application and supporting documentation has been received, reviewed, and deemed complete, an on-site review will be scheduled with the firm to validate the information provided.

Personal Net Worth (PNW)

Each individual owner of a firm applying to participate in the DBE Program to provide a PNW statement, as required by USDOT, certifying that he or she has a PNW that does not exceed $1.32 million. This statement must be supported with a signed, notarized statement of PNW with appropriate supporting documentation. ODOT examines the PNW statement, and, if needed, requires the applicant to correct the PNW statement when necessary. The PNW statement is maintained as part of the complete application file. ODOT evaluated the PNW statement based on guidance contained in § 26.67. A PNW verification checklist is attached hereto as Exhibit Q.
SUBPART E – CERTIFICATION PROCEDURES

Section 26.81 Unified Certification Programs

ODOT is responsible for oversight of the Ohio UCP. The following is a description of the UCP. At this time, ODOT is the sole agency certifying heavy highway construction and engineering related firms.

The Ohio UCP is a "one stop" certification process for the Federal DBE Program in Ohio. The Ohio UCP consolidates all DBE firms certified by any of the four different agencies into one centralized DBE Directory for USDOT-assisted contracts for airport, highways, and transit. A firm’s DBE certification is valid at any Ohio entity receiving USDOT funds and has a DBE Program. Small businesses desiring DBE certification must submit their application to one of the four certifying agencies within the state.

The Ohio Department of Transportation (ODOT)
Division of Opportunity, Diversity, and Inclusion
Office of Small and Disadvantaged Business Enterprise
1980 W. Broad Street, MS 3270
Columbus, OH  43223
http://www.dot.state.oh.us/dbe
+1 (614) 752-5756

Greater Cleveland Regional Transit Authority (GCRTA)
1240 W. 6th Street
Cleveland, OH  44113-1331
http://www.riderta.com/dbe
+1 (216) 566-5169
+1 (216) 781-4752 (fax)

Cleveland Hopkins International Airport
PO Box 81009
Cleveland, OH  44181-0009
+1 (216) 265-6791
+1 (216) 265-6096 (fax)

City of Dayton
371 W. Second Street, Suite 100
Dayton, OH  45402
http://www.cityofdayton.org
+1 (937) 333-1403
+1 (937) 222-4589 (fax)

Firms certified by each of the four agencies above are included in one consolidated and centralized DBE Directory. There are currently over 1,000 certified DBE firms in the shared database. Because this is the mechanism that has been established in accordance with the latest applicable Federal regulations, ODOT does NOT accept any reciprocal DBE certification agreements from non-Ohio UCP members.
Section 26.83 Procedures for Certification Decisions

The DBE certification process allows small businesses, which are independently owned and controlled by one or more socially and economically disadvantaged individuals, admittance into the DBE Program. ODOT’s goal is to remove barriers to DBE participation in USDOT-assisted highway and transit projects. DBE certification standards and procedures include collecting information, applying the criteria for eligibility, providing a DBE eligibility determination, and implementing an appeal process for denials and de-certifications.

In accordance with 49 CFR Part 26:

(1) ODOT makes certifications determinations based on all of the requirements of Part 26 Subpart D – Certification Standards and Subpart E – Certification Procedures;
(2) ODOT provides eligibility determinations for new applications within 90 days of receipt of a complete application;
   (a) A complete application is comprised of the application, the unsworn declaration executed under penalty of perjury of the laws of the United States or an affidavit sworn to by the applicant before a person who is authorized by State law to administer oaths, the supporting documents shown on the checklist, and the timely response to any request for additional information from the certifying agency. The completed application is then reviewed by the certifying agent for desk review.
   (b) Within 30 days of receiving the initial application, the firm will be notified if additional information and/or supporting documentation is needed to complete a desk review.
(3) ODOT safeguards applicant information and documents in accordance with §§ 26.109, 26.67(a)(2)(ii); and
(4) ODOT cooperates fully with other USDOT recipients regarding all DBE issues.

There is no application fee for DBE certification. All applications for certification must be accompanied by either an unsworn declaration or sworn affidavit as outlined above attesting to the accuracy and truthfulness of the information provided in 49 CFR Part 26.83. ODOT must rebuttably presume that members of the designated groups identified in §26.67(a) are socially and economically disadvantaged. This means members of these groups do not have the burden of proving they are socially and economically disadvantaged. In order to obtain the benefit of the rebuttable presumption, individuals must submit a signed, notarized statement that they are a member of one of the groups in §26.67(a). Applicants have the obligation to provide ODOT with information concerning their economic disadvantage.

The Ohio UCP certification application must be submitted by each firm seeking DBE certification. A DBE certifying agent will conduct an on-site review at the applicant firm’s premises after a complete application has been received. In the event the firm has a warehouse or equipment stored offsite, an onsite review will also be conducted at those locations. The purpose of the on-site review is to verify information submitted, assess the firm’s capabilities and capacity, and determine the independence of the firm and the control or management of the firm demonstrated by the disadvantaged owner(s).

Applicant firms must allow the DBE certifying agent to examine and review all books, records,
documents and files of the firm and its affiliates, inspect its place of business and equipment, and allow interviews of its principals, agents, and employees.

Refusal to permit such inquiries shall be grounds for denial of certification. The DBE certification agent may contact firms (i.e., contract, invoices, purchase order verifications, customers, etc.) or individuals associated with or having direct knowledge of the firm applying for certification as a normal part of its investigation.

OSDBE will make every reasonable effort to schedule the on-site review within 30 days of receipt of a complete application. The DBE certifying agent will contact the firm to schedule the onsite review. Once confirmed, an invitation is sent to the firm including the date, time, and location of the onsite review as well as what information to have available for examination during the onsite review. If the applicant is unable to attend the scheduled interview, the onsite review will be rescheduled. If the applicant fails to attend the onsite review, the file is closed and the firm is denied certification.

A standard set of questions (Exhibit R) will be asked of all firms and photographs may be taken during the onsite review to support ODOT’s certification decision. Copies of the onsite review questions and answers as well as any photographs taken are part of the permanent certification file.

The onsite review conducted for firms headquartered or having their principal place of business in Ohio will include:

1. A visit to the firm’s home office;
2. A review of any of the firm’s records as deemed necessary;
3. Personal interviews with the firm’s principal owner(s), manager, and other individuals as deemed necessary;
4. Onsite reviews to the firm’s active ODOT construction projects (if applicable);
5. Review of information from other states if the firm is or has been certified as a DBE in another state; and
6. Review of any information deemed necessary and obtained from other sources.

A checklist detailing the DBE certification process is attached hereto as Exhibit S.

Annual Declarations

ODOT requires every certified DBE firm to declare its eligibility on an annual basis. The purpose of the annual declaration is to verify continued eligibility in the DBE Program and identify owner or company changes that may affect DBE certification including gross receipts. This information is required to maintain DBE certification. A checklist detailing the annual declaration process is attached hereto as Exhibit T.

Section 26.85 Interstate Certification

ODOT does not automatically accept DBE certification of a firm from other State UCPs as provided in 49 CFR 26.85(b). ODOT will process out-of-state applications in accordance with 49 CFR 26.85(c) & (d).
part of this process, the out-of-state applicant must provide the following documentation to ODOT:

1. A complete copy of the application form, all supporting documents, and any other information the applicant firm has submitted to the State UCP in its home state related to the applicant firm’s certification. This includes affidavits of no change (see §26.83(j)) and any notices of changes (see §26.83(i)) that the applicant firm has submitted to the State UCP in its home state, as well as any correspondence the applicant firm has had with the State UCP in its home state or any other recipient concerning the applicant firm’s application or status as a DBE firm.

2. Any notices or correspondence from states other than the State UCP in its home state relating to the applicant firm’s status as an applicant or certified DBE in those states. For example, if the applicant firm has been denied certification or has been decertified in another state, or subject to a decertification action there, the applicant firm must inform ODOT of this fact and provide all documentation concerning this action.

3. If the applicant firm has filed a certification appeal with USDOT (see §26.89), the applicant firm must inform ODOT of this fact and provide the letter of appeal and USDOT’s response to that appeal.

4. An affidavit sworn to by all of the firm’s owners before a person authorized by state law to administer oaths which contains the information as set forth in 49 CFR 26.85(c)(4)(i) and (ii).

A checklist detailing the interstate certification process is attached hereto as Exhibit U.

Section 26.86 Denials of Initial Requests for Certification

When an applicant is denied certification as a DBE, he or she will be notified in writing of the reasons for that decision with specific references to the evidence in the record that supports each reason for the denial. The applicant may request an administrative appeal by writing to the USDOT in accordance with 49 CFR §26.89. The applicant cannot apply again for certification until 12 months has lapsed from the date the denial notice was received by the firm.

Section 26.87 Removal/Decertification of DBE Firm

The action to remove/decertify a DBE firm may originate from a review of a firm’s records, standard operating procedures, and/or a third-party ineligibility complaint. ODOT will require claims of ineligibility to be documented to officially initiate an investigation. All documented claims of ineligibility challenges must be elevated to the DBELO. The DBELO and/or her assigned designee will investigate these claims for reasonable cause.

When ODOT, or any other UCP certifying entity, determines there is reasonable cause to believe that a firm is ineligible for failing to meet the requirements of the DBE program, either through its own review of the records concerning the firm or through a third-party challenge, ODOT will follow the following process:

1. ODOT will notify the business in writing of its intent to decertify the firm;

2. The firm will be given the opportunity to request an informal hearing within 30 days of receipt of the notice of intent to decertify. The informal hearing process will be conducted in accordance with 49 CFR 26.87(d)-(g);
(3) Following the decision of the informal hearing, ODOT will provide the firm written notice of the
decision and the specific reasons for it. The notice will inform the firm of the consequences of
the decision and of the availability of an appeal to the USDOT under 49 CFR 26.89;

(4) A firm will remain an eligible DBE during the pendency of the informal hearing process. The firm
will not be removed from eligibility until after the aforementioned notice of decision is issued
by ODOT to the firm.

When, upon completing the investigation, the DBELO and/or her assigned designee determines
reasonable cause to pursue removal/decertification does not exist, no action will be taken against the
DBE firm in question. A written determination will be created for every ineligibility challenge and filed in
the records of the DBE firm in question.

Section 26.88 Suspension of Certification

Circumstances supporting ODOT’s need to immediately suspend a firm’s DBE certification without
adhering to the requirements in §26.87(d) include:

(a) When an individual owner whose ownership and control of the firm are necessary to the firm’s
certification passes away or is incarcerated;

(b)(1) When there is adequate evidence to believe that there has been a material change in
circumstances that may affect the eligibility of the DBE firm to remain certified, or when the DBE
fails to notify the recipient or UCP in writing of any material change in circumstances as required
by §26.83(i) or fails to timely file an affidavit of no change under §26.83(j);

(2) In determining the adequacy of the evidence to issue a suspension under (b)(1), ODOT will
consider all relevant factors, including how much information is available, the credibility of the
information and allegations given the circumstances, whether or not important allegations are
corroborated, and what inferences can reasonably be drawn as a result.

(c) The concerned operating administration may direct ODOT to take action pursuant to paragraph
(a) or (b) if it determines that information available to it is sufficient to warrant immediate
suspension;

(d) When a firm is suspended pursuant to paragraph (a) or (b), ODOT will immediately notify the
DBE of the suspension by email and certified mail, return receipt requested, to the last known
address of the owner(s) of the DBE firm;

(e) Suspension is a temporary status of ineligibility pending an expedited show cause
hearing/proceeding under §26.87 to determine whether the DBE is eligible to participate in the
program or should be removed. The suspension takes effect when the DBE receives, or is
deemed to have received, the Notice of Suspension;

(f) While suspended, the DBE may not be considered to meet a contract goal on a new contract,
and, any work it does on a contract received during the suspension will not be counted toward
ODOT’s overall goal. The DBE may continue to perform under an existing contract executed
before the DBE received a Notice of Suspension and may be counted toward the contract goal
during the period of suspension as long as the DBE is performing a CUF under the existing
contract.

(g) Following receipt of the Notice of Suspension, if the DBE firm believes it is no longer eligible, it
may voluntarily withdraw from the program, in which case no further action is required. If the
DBE firm believes that its eligibility should be reinstated, it must provide to ODOT information
demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30
days of receiving this information, ODOT will either lift the suspension and reinstate the firm’s
DBE certification or commence a decertification action under §26.87. If ODOT commences a
decertification proceeding, the suspension remains in effect during the proceeding.

(h) The decision to immediately suspend a DBE firm under paragraph (a) or (b) above is not
appealable to USDOT. The failure of ODOT to either lift the suspension and reinstate the firm or
commence a decertification proceeding, as required by paragraph (g) above, is appealable to
USDOT under §26.89, as a constructive decertification.

Section 26.89 Certification Appeals to USDOT

ODOT abides by the follow process to address certification appeals:

(1) When ODOT denies certification to an applicant firm, ODOT will state in the denial letter that
the firm has the right to appeal and that all appeals must be sent to USDOT, Office of Civil
Rights, 1200 New Jersey Avenue, SE, Washington, DC 20590 within 90 days of receipt of the
decision;
(2) If the firm chooses to appeal, ODOT’s decision to deny certification remains in effect pending
USDOT’s decision.

Section 26.91 Actions Taken Following USDOT Certification Appeal Decisions

The decisions of USDOT are binding on ODOT. Such decisions are not binding, however, on other USDOT
grantees. ODOT will take the following actions after USDOT decisions:

(1) If USDOT determines that ODOT erroneously certified a firm, ODOT must remove the firm’s
eligibility on receipt of the determination without further proceedings;
(2) If USDOT determines that ODOT erroneously failed to find reasonable cause to remove the
firm’s eligibility, ODOT will expeditiously commence a hearing to determine whether the firm’s
eligibility should be removed;
(3) If USDOT determines that ODOT erroneously declined to certify or remove eligibility of the firm,
ODOT must certify the firm effective on the date of receipt of the written notice;
(4) If USDOT determines that ODOT erroneously determined that the presumption of social and
economic disadvantage either should or should not be deemed rebutted, ODOT must take
appropriate corrective action as determined by USDOT;
(5) If USDOT affirms ODOT’s determination, no further action is necessary;
(6) When USDOT has upheld ODOT’s denial of certification or removal of eligibility of a firm, or
directed the removal of a firm’s eligibility, other grantees with whom the firm is certified may
commence a proceeding to remove the firm’s eligibility. If ODOT receives information on a
USDOT decision of DBE eligibility or ineligibility, ODOT will consider the USDOT action in any
certification action involving the firm.

SUBPART F – COMPLIANCE AND ENFORCEMENT

Section 26.101 Compliance Procedures that Apply to ODOT
If ODOT fails to comply with any requirement of this section, it is subject to formal enforcement action under §§ 26.103 or 26.105 or appropriate program sanctions by USDOT, such as the suspension or termination of Federal funds or refusal to approve projects, grants, or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program actions provided for under 23 CFR 1.36; in the case of the FAA program, actions consistent with 49 USC 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 USC Chapter 53 or applicable FTA program requirements.

As provided in statute, ODOT will not be subject to compliance actions or sanctions for failing to carry out these requirements because it has been prevented from complying due to a Federal court issuing a final order in which it has found that the requirement is unconstitutional.

Section 26.103 Enforcement Actions that Apply in FHWA and FTA Programs

The provisions of this section apply to enforcement actions under FHWA and FTA programs:

**Noncompliance complaints.** Any person who believes that ODOT has failed to comply with its obligation under this part may file a written complaint with the USDOT Office of Civil Rights. The complaint must be filed no later than 180 days after the date of the alleged violation or the date on which the continuing course of conduct was discovered. In response to a written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of the individual's identity as provided in § 26.109(b). Complaints under this part are limited to allegations of violations of the provisions of this section.

**Compliance reviews.** USDOT may review ODOT’s compliance with this section at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the initiation of a compliance review based on complaints received.

**Reasonable cause notice.** If it appears, from the investigation of a complaint or the results of a compliance review, that ODOT is in noncompliance with this part, the appropriate USDOT operating administration will promptly send ODOT, return receipt requested, a written notice advising that there is reasonable cause to find ODOT in noncompliance. The notice will state the reasons for the finding and direct ODOT to reply within 30 days concerning whether ODOT wishes to begin conciliation.

**Conciliation.** If ODOT requests conciliation, the appropriate USDOT operating administration will pursue conciliation for at least 30, but not more than 120, days from the date of ODOT’s request. The appropriate USDOT operating administration may extend the conciliation periods for up to 30 days for good cause, consistent with applicable statues.

If ODOT and the appropriate USDOT operating administration sign a conciliation agreement, the matter is regarded as closed and ODOT is regarded as being in compliance. The conciliation agreement sets forth the measures ODOT has taken or will take to ensure compliance. While a conciliation agreement is in effect, ODOT will remain eligible for Federal financial assistance.

The FHWA Ohio Division Office and/or appropriate FTA Regional Office will monitor ODOT’s implementation of the conciliation agreement and ensure that its terms are complied with. If ODOT fails
to carry out the terms of a conciliation agreement, ODOT will be deemed to be in noncompliance.

If ODOT does not request conciliation, or a conciliation agreement is not signed within the time provided above, enforcement proceeding will begin.

**Enforcement actions.** Enforcement actions will be taken as provided. Applicable findings in enforcement proceeding are binding on all USDOT offices.

**Section 26.107 Enforcement Actions that Apply to Firms Participating in the DBE Program**

1. If a firm that does not meet the eligibility criteria of Subpart D outlined above and the firm attempts to participate in a USDOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, ODOT may initiate suspension or debarment proceedings against the firm under 49 CFR Part 29;

2. If a firm, in order to meet DBE contract goals or other DBE Program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of Subpart D, ODOT may initiate suspension or debarment proceedings against the firm under 49 CFR Part 29;

3. In a suspension or debarment proceeding brought under paragraph (1) or (2) above, the concerned operating administration may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude ODOT from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended, or debarred;

4. USDOT may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE Program whose conduct is subject to such action under 49 CFR Part 31;

5. USDOT may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any USDOT-assisted program, or otherwise violates applicable Federal statutes.

**Section 26.109 Information, Confidentiality, and Cooperation**

ODOT will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with federal, state, and local laws (Federal Freedom of Information and Privacy Acts (5 USC 552 and 552a) and Ohio Revised Code Chapter 149.43).

Notwithstanding any contrary provisions of state or local law, ODOT will not release personal financial information submitted in response to the personal net worth requirements to a third party (other than USDOT) without the written consent of the DBE firm.