

# 49 CFR Part 26 Disadvantaged Business Enterprise Program

## Policy Statement 2021-22-23

### Section 26.1, 26.23 Objectives/Policy Statement

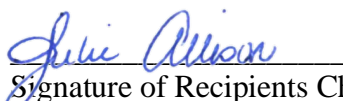
*Ohio University owner of the Gordon K Bush Airport* has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. *Ohio University* has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, the *Ohio University* has signed an assurance that it will comply with 49 CFR Part 26 (hereafter referred to as “Part 26”).

It is the policy of *Ohio University* to ensure that DBEs are defined in Part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also our policy:

1. To ensure nondiscrimination in the award and administration of DOT - assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in DOT assisted contracts;
6. To promote the use of DBEs in all types of federally-assisted contracts and procurement activities;
7. To assist the development of firms that can compete successfully in the market place outside the DBE Program.

*Cindy Perry, Director, Grants Accounting* has been delegated as the DBE Liaison Officer. In that capacity the *Director, Grants Accounting* is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by *Ohio University* in its financial assistance agreements with the Department of Transportation.

*Ohio University* has disseminated this policy statement to the *Vice President, Finance and Administration* and all of the components of our organization. We have distributed this statement to DBE and non-DBE business communities that perform work for us on DOT- assisted contracts. *This distribution was accomplished by advertisement and inclusion in bid documents.*



Signature of Recipients Chief Executive Officer  
*Julie Allison, Associate Vice President for Finance*

7-28-2021

Date

## **SUBPART A - General Requirements**

### **Section 26.1 Objectives**

The objectives are found in the policy statement on the first page of this program.

### **Section 26.3 Applicability**

*Ohio University* is the recipient of federal airport funds authorized by 49 U.S.C. 47101, et seq.

### **Section 26.5 Definitions**

*Ohio University* will adopt the definitions contained in Section 26.5 for this program.

### **Section 26.7 Non-discrimination Requirements**

*Ohio University* 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 covered by 49 CFR part 26 on the basis of race, color, sex, or national origin.

In administering its DBE program, *Ohio University* 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**

Reporting to DOT: 26.11(b)

The reporting of DBE participation to DOT is as follows:

Ohio University will submit to FAA annually on December 1 the “Uniform Report of DBE Awards or Commitments and Payments” form through the FAA Civil Rights Connect System found at <https://faa.civilrightsconnect.com/FAA/login.asp>.

Bidders List: 26.11(c) - *Ohio University* will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. The purpose of this requirement is to allow use of the bidders list approach to calculating overall goals. The bidder list will include the name, address, DBE or non-DBE status, age, and annual gross receipts of firms. This information will be collected by requesting the information in bid responses and keeping all responses on file. See sample form (**Attachment 3**) showing that the gross receipt information will be collected by asking each firm to indicate into what bracket it fits (e.g. less than \$500,000; \$500,000 - \$1 million; \$1-2 million, \$2-5 million, etc.) rather than requesting an exact figure from the firm.

### **Section 26.13 Federal Financial Assistance Agreement**

*Ohio University* has signed the following assurances, applicable to all DOT-assisted contracts and their administration:

**Assurance: 26.13(a)**

*Ohio University* shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT 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 DOT assisted contracts. *Ohio University's* DBE Program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to *Ohio University* of its failure to carry out its approved program, the Department may impose sanction as provided for under 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.).

This language will appear in financial assistance agreements with sub-recipients.

*Ohio University understands* this language is to be used verbatim, as it is stated in 26.13(a).

**Contract Assurance: 26.13b**

*Ohio University* will ensure that the following clause is placed in every DOT-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 contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT 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.

*Ohio University understands* this language is to be used verbatim, as it is stated in 26.13(b).

## **SUBPART B - ADMINISTRATIVE REQUIREMENTS**

### **Section 26.21 DBE Program Updates**

*Ohio University* is required to have a DBE program meeting the requirements of this part as it will receive grants for airport planning or development and will award prime contracts with a cumulative total exceeding \$250,000 in FAA funds in a federal fiscal year. *Ohio University* will continue to carry out this program until all funds from DOT financial assistance have been expended. The University does not have to submit regular updates of its program, as long as it remains in compliance; however, any significant changes in its program will be submitted for approval to

DOT.

### **Section 26.23 Policy Statement**

The Policy Statement is elaborated on the first page of this DBE program.

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

*Ohio University* has designated the following individual as our DBE Liaison

*Cindy Perry, Director*

*Grants Accounting*

*19 E Circle Drive, Bldg 18 3<sup>rd</sup> Flr*

*Athens, OH 45701*

*Phone: 740-593-1871 Email: [perryc@ohio.edu](mailto:perryc@ohio.edu)*

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that the *Ohio University* complies with all provision of 49 CFR Part 26. The DBELO has direct, independent access to the *Vice President for Finance* concerning DBE program matters. An organization chart displaying the DBELO's position in the organization is found in Attachment 2 to this program.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination with other appropriate officials. The DBELO does not have staff to assist in the administration of the program. The duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required by DOT.
2. Works with Capital Finance to review purchase requisitions for compliance with this program.
3. Works with all departments to set overall annual goals.
4. Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.
5. Ensures DBE goals are included in solicitations and specifications.
6. Analyzes *Ohio University's* progress toward attainment and identifies ways to improve progress.
7. Participates in pre-bid meetings.
8. Works with Capital Finance in providing DBEs with information and assistance in preparing bids, obtaining bonding and insurance.
9. Plans and participates in DBE training seminars as available.
10. Determine contractor compliance with good faith efforts.

## **Section 26.27 DBE Financial Institutions**

*Ohio University* has investigated whether there are financial institutions owned and controlled by socially and economically disadvantaged individuals in the community and has found that there are none. *Ohio University* will make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contract to make use of these institutions. *If this type of financial establishment would become available Ohio University would encourage prime contractors on DOT-assisted contracts to make use of these institutions.*

## **Section 26.29 Prompt Payment Mechanisms**

*Ohio University* has established, as part of its DBE program a contract clause to require prime contractor to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment *Ohio University* makes to the prime contractor. All FAA prompt payment complaints will be reported to Prompt Payment Complaints at <https://faa.civilrightsconnect.com>.

*Ohio University* ensures prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. *Ohio University* will use the following method to comply with this requirement according to FAA Advisory Circular 150/5370-10 Option 3: Highlighted version of standard construction terms applicable to contractors on prompt payment with statute – prompt pay act (10 days). Substantially complying without any change to our documents.

### **Option 3**

The Owner may hold retainage from prime Contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime Contractors based on these acceptances, and require a contract clause obligating the prime Contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after the Owner's payment to the prime Contractor. If Option 3 is selected, the percent withheld may range from 0% to 10% but in no case may it exceed 10%. When establishing a suitable retainage value that protects the Owner's interests, give consideration that the performance and payment bonds also provide similar protection of Owner interests. Owner may elect to incrementally release retainage if owner is satisfied its interest with completion of the project are protected in an adequate manner.

a. From the total of the amount determined to be payable on a partial payment, 8 percent of such total amount will be deducted and retained by the Owner for protection of the Owner's interests. Unless otherwise instructed by the Owner, the amount retained by the Owner will be in effect until the final payment is made except as follows:

(1) Contractor may request release of retainage on work that has been partially accepted by the Owner in accordance with Section 50-14. Contractor must provide a certified invoice to the RPR that supports the value of retainage held by the Owner for partially accepted work.

(2) In lieu of retainage, the Contractor may exercise at its option the establishment of an escrow account per paragraph 90-08.

- b. The Contractor is required to pay all subcontractors for satisfactory performance of their contracts no later than 30 days after the Contractor has received a partial payment. Contractor must provide the Owner evidence of prompt and full payment of retainage held by the prime Contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. A subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the Owner. When the Owner has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.
- c. When at least 95% of the work has been completed to the satisfaction of the RPR, the RPR shall, at the Owner's discretion and with the consent of the surety, prepare estimates of both the contract value and the cost of the remaining work to be done. The Owner may retain an amount not less than twice the contract value or estimated cost, whichever is greater, of the work remaining to be done. The remainder, less all previous payments and deductions, will then be certified for payment to the Contractor.

Ohio University will include the following clause in each DOT-assisted prime contract:

The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than 30 days from the receipt of each payment contractor receives from Ohio University. The prime contractor agrees further to return retainage payments to each subcontractor within 30 days after the subcontractors work is satisfactorily completed. Any delay or postponement of payment from the above references timeframe may occur only for good cause following written approval from Ohio University. This clause applies to both DBE and non-DBE subcontractors.

### **Section 26.31 Directory**

*Ohio University* will use the DBE Directory maintained by the Ohio Department of Transportation (ODOT) at the following website (see Attachment 4):

<http://www.dot.state.oh.us/Divisions/ODI/SDBE/Pages/DBE-Directory.aspx>

The ODOT Directory lists the firm's name, address, phone number, date of the most recent certification, and the type of work the firm has been certified to perform as a DBE. The Directory is revised annually by ODOT and is made available to any interested person.

### **Section 26.33 Overconcentration**

*Ohio University* has not identified that overconcentration exists in the types of work that DBEs perform.

### **Section 26.35 Business Development Programs**

*Ohio University* has not established a business development program.

### **Section 26.37 Monitoring and Enforcement Mechanisms**

Ohio University implements and carries out appropriate mechanisms to ensure compliance with 49 CFR Part 26 program requirements by all program participants, including prompt payment, and describes and set forth these mechanisms in Ohio University's DBE program.

Ohio University actively monitors participation by maintaining a running tally of actual DBE attainments (*e.g.*, payments actually made to DBE firms), including a means of comparing these attainments to commitments.

#### Monitoring Payments to DBEs and Non-DBEs

Ohio University undertakes ongoing monitoring of prime payments to subcontractors over the course of any covered contract. Such monitoring activities will be accomplished through the following method(s):

1. We will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (*e.g.*, referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109.
2. We will implement similar action under our own legal authorities, including responsibility determinations in future contracts.
3. We will also provide a monitoring and enforcement mechanism to verify that work committed to DBEs at contract award is actually performed by the DBEs. This will be accomplished by DBE attainments (*e.g.* payments actually made to DBE firms), with comparison of these attainments to commitments. This will be accomplished by reporting made to the DBELO and subsequent analysis by the DBELO.
4. We will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award.

Ohio University will require prime contractors to maintain records and documents of payments to DBEs for three (3) years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of Ohio University or DOT. This reporting requirement also extends to all subcontractors, both DBE and non-DBE.

- Ohio University proactively reviews contract payments to subcontractors including DBEs quarterly. Payment reviews will evaluate whether the actual amount paid to DBE subcontractors is equivalent to the amounts reported to Ohio University by the prime contractor.

#### Prompt Payment Dispute Resolution

Ohio University will take the following steps to resolve disputes as to whether work has been satisfactorily completed for purposes of §26.29.

First, Ohio University will comply with Ohio law regarding prompt payment of subcontractors by prime contracts (see Ohio Revised Code, ORC Section 4113.61) and liens by subcontractors which requires prompt payment within ten (10) days of payment of any application or request for payment or the receipt of any retainage from an owner, contractor, subcontractor or lower tier subcontractor.

Ohio University also will comply with related provisions of its standard construction contracts, which speak to these issues. Beyond this, Ohio University works closely and collaboratively with its contractors, subcontractors, and other project stake holders to resolve disputes, including at regular project meetings.

Ohio University has established, as part of its DBE program, the following mechanism(s) to ensure prompt payment and return of retainage:

(1) Alternative dispute resolution (ADR)

- Section 8.13 of the General Conditions of Ohio University's construction contract relates to alternative dispute resolution as follows:

**8.13 Alternative Dispute Resolution (ADR)**

**8.13.1** The intent of the ADR process is to resolve disputes quickly and equitably in a manner agreed upon by all parties to the dispute.

**8.13.2** The ADR procedure shall be accepted by all of the Project's key stakeholders.

**8.13.3** The accepted ADR methods shall not include binding arbitration; alter any of the requirements for Claim initiation, certification, and substantiation; or alter the administrative process described under this **Article 8**.

**8.13.4** The following forms of non-binding ADR may be considered:

**8.13.4.1** Negotiation: If negotiation is warranted, the parties to the dispute may agree to a progressive level of negotiators, invested with the authority to agree to a determination of an adjustment in the Contract Sum, Contract Times, or both.

**8.13.4.2** Dispute Review Board: If a dispute review board is the accepted ADR procedure, or the process to follow when negotiations are unsuccessful, the parties to the dispute shall jointly select 3 neutral third parties to monitor the progress of construction and provide recommended resolutions to disputes that are brought before them. The costs of the dispute review board shall be shared equally among the parties to the dispute.

**8.13.4.3** Mediation: If mediation is the accepted ADR procedure, or the process to follow when negotiations are unsuccessful, the parties to the dispute shall accept a neutral third party to mediate the dispute. The costs of mediation shall be shared equally among the parties to the dispute.

(2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.



- The university's contractors are required to follow both the General Conditions of the university's construction contracts and Ohio law regarding prompt payment of subcontractors. See section 4.6 of the General Conditions and Ohio Revised Code section 4113.61 at the following link: <http://codes.ohio.gov/orc/4113.61>

#### Prompt Payment Complaints:

Complaints by subcontractors regarding the prompt payment requirements are handled according to the following procedure.

- When Ohio University receives a complaint about non-payment from a subcontractor, the university promptly discusses the issue with both the contractor and subcontractor in an effort to facilitate a resolution that will result in the subcontractor being paid for work it has performed. The university also follows Ohio law regarding liens on public projects, which are designed to protect subcontractors and ensure that they are paid for work performed. Subcontractors also are encouraged to contact the university's DBELO with any concerns.
- If filing a prompt payment complaint with the DBELO does not result in timely and meaningful action by Ohio University to resolve prompt payment disputes, affected subcontractor may contact Julie Allison, Assistant VP for Finance.

#### Enforcement Actions for Noncompliance of Participants

Ohio University will provide appropriate means to enforce the requirements of §26.29. These means include:

- Advise the subcontractor of the existence of the contractor's payment and performance bonds;
- Deem the contractor to be in material breach of its contract for failing to promptly pay its subcontractors, particularly section 4.6 of the General Conditions, and pursue contractual remedies for termination; and
- Abide by Ohio law regarding liens on public projects, which may involve paying subcontractors directly.

Ohio University will actively implement the enforcement actions detailed above.

#### Monitoring Contracts and Work Sites

Ohio University reviews contracting records and engages in active monitoring of work sites to ensure that work committed to DBEs at contract award or subsequently (*e.g.*, as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. Work site monitoring is performed by Project Manager, Consultant and DBELO.

Contracting records are reviewed by Project Manager, Consultant and DBELO. Ohio University will maintain written certification that contracting records have been reviewed and work sites have been monitored for this purpose.

### **Section 26.39 Fostering small business participation**

Ohio University has created a Small Business element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.

The small business element is incorporated as Attachment 9 to this DBE Program. The program elements will be actively implemented to foster small business participation. **Implementation of the small business element is required in order for Ohio University to be considered by DOT as implementing this DBE program in good faith.**

## **SUBPART C - GOALS, GOOD FAITH EFFORTS, AND COUNTING**

### **Section 26.43 Set-asides or Quotas**

*Ohio University* does not use quotas in any way in the administration of this DBE program.

### **Section 26.45 Overall Goals**

Ohio University will establish an overall DBE goal covering a three-year federal fiscal year period once it anticipates awarding DOT/FAA funded prime contracts the cumulative total value of which exceeds \$250,000 in accordance with Section 26.45(f). If Ohio University does not anticipate awarding DOT/FAA funded prime contracts the cumulative total of which exceeds \$250,000 it will not develop an overall goal; however, this DBE program will remain in effect and the University will seek to fulfill the objectives outlined in 49 CFR Part 26.1.

The DBE goals will be established in accordance with the 2-step process as specified in 49 CFR Part 26.45. Any methodology we choose will be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in our market. We understand that the exclusive use of a list of prequalified contractors or plan holders or a bidder list that does not comply with the requirements of paragraph (c)(2) of this section is not an acceptable alternative means of determining the availability of DBEs.

Step 1) The first step is to determine the relative availability of DBE's in the market area, "base figure". The (DBE) Unified Certification Program site is used to obtain the data to determine a base figure. The County Business Patterns (NAICS) site is currently used to obtain the number of total applicable contractors in Ohio. The percentage goal is based on the number of DBE contractors available in the state of Ohio, divided by number of total applicable contractors in Ohio.

Step 2) The second step is to adjust the "base figure" percentage from Step 1 so that it reflects as accurately as possible the DBE participation in the absence of discrimination. Ohio University will examine past history accomplishments to adjust the goal. . The adjustment to the base figure was the median of DBE accomplishments from the prior three years reported.

26.45 (g)(1) In establishing an overall goal, Ohio University must provide for consultation and publication. This includes:

(i) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for

the participation of DBEs. The consultation must include a scheduled, direct, interactive exchange (e.g., a face-to-face meeting, video conference, teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the goal setting process, and it must occur before you are required to submit your methodology to the operating administration for review pursuant to paragraph (f) of this section. You must document in your goal submission the consultation process you engaged in. Notwithstanding paragraph (f)(4) of this section, you may not implement your proposed goal until you have complied with this requirement.

Ohio University will publish a notice of the proposed overall goals on the Grants Accounting website before submission on August 1. The Overall Three-Year DBE goal submission to DOT will include a summary of information and comments received during this public participation process.

Ohio University will begin using the overall goal upon approval from DOT.

### **Section 26.47 Failure to Meet Overall Goals**

*Ohio University* cannot be penalized, or treated by the Department as being in noncompliance with Part 26, because DBE participation falls short of an overall goal, unless Ohio University fails to administer its DBE program in good faith.

*Ohio University* will maintain an approved DBE Program and overall DBE goal, if applicable as well as administer our DBE program in good faith to be considered to be in compliance with this part.

If the University has awards and commitments shown on our Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, we will do the following in order to be regarded by the Department as implementing the DBE Program in good faith.

- 1) Analyze in detail the reasons for the difference between the overall goal and our awards and commitments in that fiscal year.
- 2) Establish specific steps and milestones to correct the problems we have identified in our analysis and to enable us to meet fully the goal for the new fiscal year.
- 3) Ohio University will prepare within 90 days at the end of the fiscal year, the analysis and corrective actions developed under paragraph (c)(1) and (2) of this section. We will retain copy of analysis and corrective actions in records for a minimum of three years and will make it available to FAA upon request.

### **Section 26.51(a-c) Breakout of Estimated Race-Neutral & Race-Conscious Participation**

The breakout of estimated race-neutral and race-conscious participation can be found in Attachment 5 to this program. This section of the program will be updated every three years or prior to the first solicitation of a DOT-assisted contract for the project.

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

*Ohio University* will use contract goals to meet any portion of the overall goal *Ohio University* does not project being able to meet using race-neutral means. Contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race-neutral means.

We will establish contract goals only on those DOT-assisted contracts that have subcontracting possibilities. We need not establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work.)

We will express our contract goals as a percentage of the Federal share of a DOT-assisted contract.

## **Section 26.53 Good Faith Efforts Procedures**

### **Demonstration of good faith efforts (26.53(a) & (c))**

The obligation of the bidder/offeror is to make good faith efforts. The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts. Examples of good faith efforts are found in Appendix A to Part 26.

Cindy Perry, DBELO, is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsible.

We will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before we commit to the performance of the contract by the bidder/offeror.

### **Information to be submitted (26.53(b))**

*Ohio University* treats bidder/offers' compliance with good faith efforts' requirements as a matter of responsibility.

The bidder/offeror will be required to present the information stipulated below no later than 5 days after bid opening as a matter of **responsibility**. Provided that, in a negotiated procurement, including a design-build procurement, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required in this section before the final selection for the contract is made by the recipient.

Each solicitation for which a contract goal has been established will require the bidders/offerors

to submit the following information:

1. The names and addresses of DBE firms that will participate in the contract;
2. A description of the work that each DBE will perform;
3. The dollar amount of the participation of each DBE firm participating;
4. Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
5. Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractors commitment and
6. If the contract goal is not met, evidence of good faith efforts.

#### **Administrative reconsideration (26.53(d))**

Within 7 days of being informed by *Ohio University* that it is not responsible because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidder/offerors should make this request in writing to the following reconsideration official: Cindy Perry, 19 E Circle Drive, Bldg 18 3<sup>rd</sup> Flr, Athens, Ohio 45701, 740-593-1871, perryc@ohio.edu. The reconsideration official will not have played any role in the original determination that the bidder/offeror did not document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person with our reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do. We will send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

#### **Good Faith Efforts when a DBE is replaced on a contract (26.53(f))**

Ohio University will require a contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. We will require the prime contractor to notify the DBE Liaison officer immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation.

In this situation, we will require the prime contractor to obtain our prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts.

If the contractor fails or refuses to comply in the time specified, our contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

### **Sample Bid Specification:**

The requirements of 49 CFR Part 26, Regulations of the U.S. Department of Transportation, apply to this contract. It is the policy of *Ohio University* to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this contract will be conditioned upon satisfying the requirements of this bid specification. These requirements apply to all bidders/offerors, including those who qualify as a DBE. A DBE contract goal of 6 percent [as determined in the goal calculation Attachment 5] has been established for this contract. The bidder/offeror shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26 (Attachment 1), to meet the contract goal for DBE participation in the performance of this contract.

The bidder/offeror will be required to submit the following information: (1) the names and addresses of DBE firms that will participate in the contract; (2) a description of the work that each DBE firm will perform; (3) the dollar amount of the participation of each DBE firm participating; (4) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet the contract goal; (5) Written confirmation from the DBE that it is participating in the contract as provided in the commitment made under (4); and (5) if the contract goal is not met, evidence of good faith efforts.

### **Section 26.55 Counting DBE Participation**

Ohio University will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55. The participation of a DBE subcontractor will not be counted toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

In the case of post-award substitutions or additions, if a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, the firm's participation will not be counted toward any DBE goals, except as provided for in §26.87(j).

## **SUBPART F - COMPLIANCE AND ENFORCEMENT**

### **Section 26.101 Compliance Procedures Applicable to Ohio University**

Ohio University understands that if it fails to comply with any requirement of this part, Ohio University may be subject to formal enforcement action under §26.103 or §26.105 or appropriate program sanctions by the concerned operating administration, 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 U.S.C. 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.

### **Section 26.109 Information, Confidentiality, Cooperation**

Ohio University will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law including Ohio Public Records Act.

Notwithstanding any provision of Federal or state law, we will not release personal financial information to a third party without the written consent of the firm that submitted the information unless required by Ohio Public Records Act or required by court order.

All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

Ohio University, contractor, or any other participant in the program will not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If we violate this prohibition, we are in noncompliance with Part 26.

### **ATTACHMENTS**

- Attachment 1 Regulations: 49 CFR part 26 website link
- Attachment 2 Organizational Chart
- Attachment 3 Bidder's List Collection Form
- Attachment 4 DBE Directory website link
- Attachment 5 Overall Goal Calculations
- Attachment 6 Forms 1 & 2 for Demonstration of Good Faith Efforts
- Attachment 7 DBE Monitoring and Enforcement
- Attachment 8 DBE Program Document Approval
- Attachment 9 Small Business Element



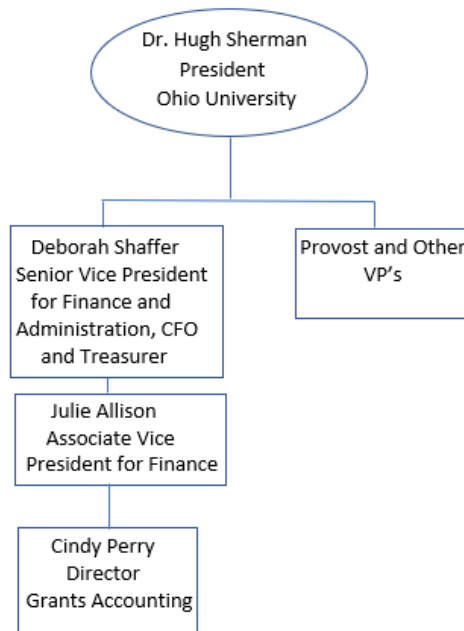
## Attachment 1

### Regulations: 49 CFR Part 26 website link

[https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26\\_main\\_02.tpl](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl)

## Attachment 2

### Organizational Chart



## Attachment 3

### Bidder's List Collection Form

**[Reminder: the information below must be collected from every bidder who submits a quote/bid to the recipient and every potential subcontractor who submitted a quote/bid to each bidder. §26.11(c) requires recipients to collect information from all bidders and subcontractors, including unsuccessful ones.]**

Firm Name	Firm Address/ Phone #	DBE or Non-DBE Status (verify via State's UCP Directory)	Age of Firm	Annual Gross Receipts
			<input type="checkbox"/> Less than 1 year <input type="checkbox"/> 1- 3 years <input type="checkbox"/> 4-7 years <input type="checkbox"/> 8-10 years <input type="checkbox"/> More than 10 years	<input type="checkbox"/> Less than \$500K <input type="checkbox"/> \$500K - \$1 million <input type="checkbox"/> \$1-2 million <input type="checkbox"/> \$2-5 million <input type="checkbox"/> Greater than \$5 million
			<input type="checkbox"/> Less than 1 year <input type="checkbox"/> 1- 3 years <input type="checkbox"/> 4-7 years <input type="checkbox"/> 8-10 years <input type="checkbox"/> More than 10 years	<input type="checkbox"/> Less than \$500K <input type="checkbox"/> \$500K - \$1 million <input type="checkbox"/> \$1-2 million <input type="checkbox"/> \$2-5 million <input type="checkbox"/> Greater than \$5 million
			<input type="checkbox"/> Less than 1 year <input type="checkbox"/> 1- 3 years <input type="checkbox"/> 4-7 years <input type="checkbox"/> 8-10 years <input type="checkbox"/> More than 10 years	<input type="checkbox"/> Less than \$500K <input type="checkbox"/> \$500K - \$1 million <input type="checkbox"/> \$1-2 million <input type="checkbox"/> \$2-5 million <input type="checkbox"/> Greater than \$5 million
			<input type="checkbox"/> Less than 1 year <input type="checkbox"/> 1- 3 years <input type="checkbox"/> 4-7 years <input type="checkbox"/> 8-10 years <input type="checkbox"/> More than 10 years	<input type="checkbox"/> Less than \$500K <input type="checkbox"/> \$500K - \$1 million <input type="checkbox"/> \$1-2 million <input type="checkbox"/> \$2-5 million <input type="checkbox"/> Greater than \$5 million
			<input type="checkbox"/> Less than 1 year <input type="checkbox"/> 1- 3 years <input type="checkbox"/> 4-7 years <input type="checkbox"/> 8-10 years <input type="checkbox"/> More than 10 years	<input type="checkbox"/> Less than \$500K <input type="checkbox"/> \$500K - \$1 million <input type="checkbox"/> \$1-2 million <input type="checkbox"/> \$2-5 million <input type="checkbox"/> Greater than \$5 million
			<input type="checkbox"/> Less than 1 year <input type="checkbox"/> 1- 3 years <input type="checkbox"/> 4-7 years <input type="checkbox"/> 8-10 years <input type="checkbox"/> More than 10 years	<input type="checkbox"/> Less than \$500K <input type="checkbox"/> \$500K - \$1 million <input type="checkbox"/> \$1-2 million <input type="checkbox"/> \$2-5 million <input type="checkbox"/> Greater than \$5 million

**Attachment 4**

**DBE Directory website link**

<https://www.dot.state.oh.us/Divisions/ODI/SDBE/Pages/DBE-Directory.aspx>

**Attachment 5**

**Overall Goal Calculations**

**Name of Recipient:** *Ohio University owner of the Gordon K Bush Airport*

**Goal Period:** FY 2021-2023, June 2021 through September 2023

**DOT assisted contract amount:**

FY 2021	<u>\$0.00</u>
FY 2022	<u>\$2,206,636</u>
FY 2023	<u>\$0.00</u>

**Overall Three-Year Goal:** 8% to be accomplished through 6% RC and 2% RN

**Total dollar amount to be expended on DBEs:** \$176,531 [*multiply goal % x DOT-assisted amount*]

**Describe the Number and Type of Contracts that the airport anticipates awarding:**

Contracts Fiscal Year #1

1. None

Contracts Fiscal Year #2

1. Bush Airport Apron Rehabilitation

Contracts Fiscal Year #3

1. None

**Market Area:** Because there are relatively few DBE's in the area surrounding the airport, the entire State of Ohio was used for the Market Area.

**Step 1: 26.45(c)**

Determine the base figure for the relative availability of DBEs. The base figure for the relative availability of DBE's was calculated as follows:

Method: Used DBE Directory and Census Bureau Data:

DBE Directory:

<https://www.dot.state.oh.us/Divisions/ODI/SDBE/Pages/DBE-Directory.aspx>

Census Bureau Data:

[https://factfinder.census.gov/faces/nav/jsf/pages/download\\_center.xhtml](https://factfinder.census.gov/faces/nav/jsf/pages/download_center.xhtml)

<b>NAICS</b>	<b>Type of Work</b>	<b>Total DBEs</b>	<b>Total All Firms</b>
2389 and 2373	Site prep and Heavy Highway	209	2,545
<b>Total</b>		209	2,545

Dividing the total number of DBEs by the total number of All Firms gives a base DBE availability figure for each contract.

Base figure = 8.2% of Total DBE firms compared to Total of All Firms.

### **Step 2: 26.45(d)**

UNI's past participation as follows:

2016 = 7.9%

2017 = 5.2%

2020 = 10.2%

Arranged from low to high, the median is 7.9%. To arrive at an overall goal, add Step 1 and to Step 2 and take an average. Therefore, 8.2% plus 7.9% = 16.1 divided by 2 = 8%.

Furthermore, there are no applicable disparity studies for the local market area or recent legal case information from the relevant jurisdictions to show evidence of barriers to entry or competitiveness of DBEs in the market area that is sufficient to warrant making an additional adjustment to the base goal.

## **Section 26.51: Breakout of Estimated**

### **Race-Neutral & Race Conscious Participation**

Ohio University will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation.

1. Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitates DBE, and other small businesses, participation;
2. Carrying out information and communication programs on contracting procedures and specific contract opportunities;
3. Ensuring distribution of DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors;

In 2020, Ohio University accomplishments exceeded the goal by 4.16%, and in 2017 by 1.2%, which may be construed as evidence of race-neutral participation. Therefore, UNI estimates that in meeting the established overall goal of 8%, it will obtain 2% from RN participation and 6% through RC measures. UNI will adjust the estimated breakout of RN and RC DBE participation as needed to reflect actual DBE participation [see §26.51(f)] and track and report RN and RC participation separately. For reporting purposes, RN DBE participation includes, but is not necessarily limited to the following: DBE participation through a prime contract obtained through customary competitive procurement procedures; DBE participation through a subcontract on a prime contract that does not carry a DBE goal, DBE participation on a prime contract exceeding a contract goal, and DBE participation through a subcontract from a prime contractor that did not consider a firm's DBE status in making the award.

### **Public Participation**

Ohio University requested a consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and efforts to establish a level playing field for the participation of DBEs. The following entities were provided the Ohio University Disadvantaged Business Enterprise Program on, June 23, 2021 at the following link and requested a scheduled consultation by June 30, 2021:

[https://www.ohio.edu/sites/default/files/sites/finance/accounting/files/Ohio%20University\\_Disadvantaged\\_Business\\_Enterprise\\_Program%20FY22%20DRAFT.pdf](https://www.ohio.edu/sites/default/files/sites/finance/accounting/files/Ohio%20University_Disadvantaged_Business_Enterprise_Program%20FY22%20DRAFT.pdf)

National Association of Women Business Owners: <https://www.nawbo.org/contact-us>

Hispanic Chamber of Commerce: [contact@hcolumbus.com](mailto:contact@hcolumbus.com)

Athens Chamber of Commerce: [dani@athenschamber.com](mailto:dani@athenschamber.com)

Commission on Economic Inclusion: [customerservice@gcpartnership.com](mailto:customerservice@gcpartnership.com)

City of Cleveland Office of Equal Opportunity:  
<http://www.city.cleveland.oh.us/CityofCleveland/Home/contact/department?code=95>

Council of Small Business Enterprises: [memberservices@cose.org](mailto:memberservices@cose.org)

G & E Contractors: [gandecontractors@msn.com](mailto:gandecontractors@msn.com)

Lanning Mechanical: lanninghvac@yahoo.com

T&M Contractors, LLC: tmcontractors@yahoo.com

This consultation is scheduled for direct, interactive exchange with as many interested stakeholders as possible focused on obtaining information relevant to the goal setting process and was conducted before the goal methodology was submitted to the United States Department of Transportation, Federal Aviation Administration for review.

The following public notice was also published to the Grants Accounting official website:  
<https://www.ohio.edu/finance/accounting/award-requirements>

## PUBLIC NOTICE

Ohio University hereby announces its proposed Disadvantaged Business Enterprise (DBE) participation goal of 8.0% for FAA-funded contracts/agreements. The proposed goal pertains to federal fiscal years 2021 through 2023 (10/1/2020 - 9/30/2023). A request for conference will be held on June 30 at 9am by contacting the DBELO, Cindy Perry, for the purpose of consulting with stakeholders to obtain information relevant to the goal-setting process.

Comments on the DBE goal publicized on June 24, 2021 can be sent to the following:

DBELO Cindy Perry 19 E Circle Drive, Bldg 18, 3rd Flr Athens, OH 45701 Phone: 1-740-593-1871 <a href="mailto:perryrc@ohio.edu">perryrc@ohio.edu</a>	OR	Federal Aviation Administration Office of Civil Rights DBE Compliance Specialist Nancy Cibic Great Lakes Region 3246 N Heritage Lane Arlington Heights, IL 60004 Phone: 1-847-294-7182
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There were no comments received during the course of either consultation.

### **Attachment 6**

#### **Forms 1 & 2 for Demonstration of Good Faith Efforts**

[Forms 1 and 2 should be provided as part of the solicitation documents.]

#### **FORM 1: DISADVANTAGED BUSINESS ENTERPRISE (DBE) UTILIZATION**

The undersigned bidder/offeror has satisfied the requirements of the bid specification in the following manner (please check the appropriate space):

\_\_\_\_\_ The bidder/offeror is committed to a minimum of \_\_\_\_\_% DBE utilization on this

contract.

\_\_\_\_\_ The bidder/offeror (if unable to meet the DBE goal of \_\_\_\_\_%) is committed to a minimum of \_\_\_\_\_% DBE utilization on this contract and should submit documentation demonstrating good faith efforts.

Name of bidder/offeror's firm: \_\_\_\_\_

State Registration No. \_\_\_\_\_

By \_\_\_\_\_  
(Signature) Title

**FORM 2: LETTER OF INTENT**

Name of bidder/offeror's firm: \_\_\_\_\_  
Address: \_\_\_\_\_  
City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Name of DBE firm: \_\_\_\_\_  
Address: \_\_\_\_\_  
City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_  
Telephone: \_\_\_\_\_

Description of work to be performed by DBE firm:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The bidder/offeror is committed to utilizing the above-named DBE firm for the work described above. The estimated dollar value of this work is \$\_\_\_\_\_.

**Affirmation**

The above-named DBE firm affirms that it will perform the portion of the contract for the estimated dollar value as stated above.

By \_\_\_\_\_ Date: \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Title)

**If the bidder/offeror does not receive award of the prime contract, any and all representations in this Letter of Intent and Affirmation shall be null and void.**

(Submit this page for each DBE subcontractor.)

**Attachment 7**

**DBE Monitoring and Enforcement Mechanisms**

Ohio University has available several remedies to enforce the DBE requirements contained in its contracts, including, but not limited to, the following:



1. Breach of contract action, pursuant to the terms of the contract;

In addition, the Federal government has available several enforcement mechanisms that it may apply to firms participating in the DBE problem, including, but not limited to, the following:

1. Suspension or debarment proceedings pursuant to 49 CFR Part 26
2. Enforcement action pursuant to 49 CFR Part 31
3. Prosecution pursuant to 18 USC 1001.

## Attachment 8

### Regulations: 49 CFR Part 26 DBE Program Document Approval

The United States Department of Transportation, Federal Aviation Administration last approved this document consistent with the language and intent of 49 CFR part 26 on April 16, 2018.

### Part 26/DBE Program for Gordon K Bush Snyder Field/Ohio University Airport (UNI)

Main	<b>DBE Programs</b>	DBE Goals & Reports	Compliance Reviews	Complaints	Inquiries	Assessments	Prompt Payment Complaints
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[Return to Program List](#)

 **This program has been approved.** No further action is required.

Program Status	 <b>Approved</b>
Submitted	<b>4/2/2018 by Cindy Perry</b>
Approved	<b>4/16/2018 by Nancy Cibic</b>
FAA Approval Date	<b>4/16/2018</b>

## Attachment 9

### Small Business Element

To be compliant with 49 CFR Part 26.5, recipients are required to create and implement a race-neutral small business element as part of their DBE programs.

From the SBA Website - [www.sba.gov](http://www.sba.gov)

What is SBA's definition of a small business concern?

Answer:

SBA defines a small business concern as one that is independently owned and operated, is organized for profit, and is not dominant in its field. Depending on the industry, size standard eligibility is based on the average number of employees for the preceding twelve months or on sales volume averaged over a three – year period.

Examples of SBA general size standards include the following:

- Manufacturing: Maximum number of employees may range from 500-1500, depending on the type of product manufactured;
- Wholesaling: Maximum number of employees may range from 100-500 depending on the particular product being provided;
- Services: Annual receipts may not exceed \$ 2.5 to \$21.5 million, depending on the particular service being provided;
- Retailing: Annual receipts may not exceed \$5.0 to \$21.0 million, depending on the particular product being provided;
- General and Heavy Construction: General construction annual receipts may not exceed \$13.5 to \$17 million, depending on the type of construction;
- Special Trade Construction: Annual receipts may not exceed \$7 million; and
- Agriculture: Annual receipts may not exceed \$0.5 to \$9.0 million, depending on the agricultural product.

If Southern Ohio would grow to the point that Small Businesses were in the minority, Ohio University would implement the following:

#### 1. Objective/ Strategies

As part of this part of this program element you may include, but are not limited to, the following strategies:

- (1) If Ohio University would have any multi-year design-build contracts or other large contracts (e.g) for “megaprojects” we would require bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, could reasonably perform.
- (2) If Ohio University had any prime contracts not having DBE contract goals. We would require the prime contractor to provide subcontracting opportunities of a size that small business, including DBEs, could reasonably perform, rather than self-performing all the work involved.
- (3) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.

## 2. Definition

- DBE firms should be identified in the Small Business element of the recipient's DBE program as eligible for the program unless there is a DBE micro-Small Business Program in place.
- Size standard should be consistent with 49 CFR 26.5 and must be no larger than the Small Business Administration's size standards. DBE firms and small firms eligible for the program should be similarly size to reduce competitive conflict between DBE and non- DBE firms.
- Personal Net Worth standards (optional) - should be consistent with 49 CFR Part 26 threshold.

## 3. Verification

- Should diligently attempt to minimize fraud and abuse in the SB element of its DBE program by verifying program eligibility of firms.

## 4. Monitoring/ Record Keeping

- How will the information be organized (for counting purposes)?
- SB element should be reasonably monitored.

## 5. Assurance

- Include the following assurances:
  1. The program is authorized under state law;
  2. Certified DBEs that meet the size criteria established under the program are presumptively eligible to participate in the program;
  3. No limits are placed on the number of contracts awarded to firms participating in the program, but every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses; and
  4. Aggressive steps will be taken to encourage those minority and women owned firms that are eligible for DBE certification to become certified.
  5. The program is open to small businesses regardless of their location (i.e., there is no local or other geographic preference).