

**OHIO TURNPIKE AND  
INFRASTRUCTURE COMMISSION**



**Office of Equity and Inclusion**

**Standards and Practice Manual  
for the  
Small, Minority and Disadvantaged Business  
Enterprise Inclusion Program**

June, 2016

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## INTRODUCTION

Ohio law establishes the Ohio Turnpike and Infrastructure Commission (“Commission”) under Chapter 5537 of the Ohio Revised Code as an instrumentality of the state, and having its own separate legal identity to perform the essential governmental functions necessary to construct, operate, and maintain the Ohio Turnpike and provide funding for infrastructure projects.

As part of operating the Ohio Turnpike, the Commission adopted Resolution No. 18-2014 on March 24, 2014, reaffirming its policy to encourage diversity in contracting and providing the fullest possible opportunity for businesses that are owned by minority, female or otherwise disadvantaged individuals. Resolution No. 18-2014 instructed the preparation of a new program that establishes and prescribes the means to achieve goals for the participation of economically and socially disadvantaged businesses in Commission contracts.

Resolution No. 18-2014 authorized the Executive Director to engage a consultant to conduct a study to determine whether a disparity exists between the participation of businesses owned by minorities or otherwise disadvantaged persons in Commission contracts and the availability of those businesses to capitalize on those contracts (“Disparity Study”). Based on the findings of the Disparity Study conducted by BBC Research & Consulting and Exstare Federal Services Group, LLC (“Consultants”) identified statistical and anecdotal evidence creating an inference of passive participation in discriminatory exclusion of minority and female owned businesses under the Commission’s contracts. The Consultants made recommendations in the Disparity Study that the Commission authorized the Office of Equity and Inclusion to implement under Resolution No. 43-2016, adopted June 20, 2016.

These Standards and Practices for the Small, Minority Business Inclusion Program establish the measures to implement the program and carryout the Commission’s policy to ensure that all businesses owned and controlled by minorities, females or otherwise disadvantaged individuals have the fullest possible opportunity to participate in contracts involving the expenditure of Commission funds. These Standards and Practices are intended to provide narrowly tailored means to ensure there are equal opportunities for small, minority and otherwise disadvantaged businesses to participate in the Commission’s business transactions, prevent contracts from disparately affecting minority and women owned businesses, and eliminate the effects of discrimination on competition for its contracting opportunities.

## ARTICLE I. DEFINITIONS

The following words, terms, phrases and abbreviations shall have the following meanings:

“**Affiliate**” means a person or entity that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, another person or entity constituting an affiliate, or an identity of interest between or among

parties exists such that affiliation may be found. In determining Affiliation, the Commission shall consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether an applicant meets small business size criteria of this Policy for purposes of LDBE and SBE certification. The Commission will follow the requirements of 13 C.F.R. Part 121, as amended, in applying this definition.

**“Annual Aspirational Goal”** shall mean the targeted levels established by the Commission for the annual aggregate participation of SBEs or MBEs and LDBEs in the Commission’s Contracts.

**“Annual Gross Receipts”** means the “total income” (or in the case of a sole proprietorship, “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships), and does not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, may not be excluded from receipts.

**“Bidder” or “Contractor”** shall mean any person or entity that submits a quote, bid or proposal to the Commission in response to a solicitation issued by the Commission, or has registered as a vendor interested in doing business with the Commission, or who has been awarded a Contract by the Commission.

**“Broker”** shall mean a person or entity that fills orders by purchasing or receiving supplies from a third party rather than out of its own existing inventory, and provides no Commercially Useful Function other than acting as a conduit between a supplier and the customer.

**“Commercially Useful Function”** means responsibility to perform a component of the contract obligations by actually performing, managing and supervising the work involved. A business does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract or project through which funds are passed in order to obtain the appearance of participating in the transaction, contract or project. To perform a Commercially Useful Function as a subcontractor (as distinguished from a Manufacturer, Regular Dealer, Broker or trucking company), the business must be responsible, with respect to materials and supplies, for negotiating price, determining quality and quantity, ordering the material, and installing and paying for the material itself. If a subcontractor performs or exercises responsibility for at least 30 percent of the total cost of its subcontract with its own workforce, there is a rebuttable presumption that it is performing a commercially useful function. To determine whether a firm is performing a Commercially Useful Function, the Commission will evaluate the amount of work subcontracted, normal industry practices, whether the amount the firm is to be paid under

the Contract is commensurate with the work it is actually performing, and other factors deemed relevant.

**“Compliance”** shall mean the condition existing when the Commission determines that a participant has met the requirements set forth herein.

**“Contract”** shall mean any mutually binding legal obligation created to exchange the Commission’s funds for some good or service from a private-for-profit enterprise. In this context, the terms “contracting,” “purchasing,” and “procurement” are synonymous and refer to the process or processes under which the Commission undertakes such acquisitions. Contract does not include sole source procurements, which by their very nature limit the source of supply to one vendor; the acquisition of any interest in real property, including lease holdings; direct and indirect employee payments including payroll expenditures, pensions and unemployment compensation and other employee-related expenditures; agreements with non-profit or governmental entities; agreements with utility providers; and any other categories and subcategories of goods and services that the Commission may establish as excluded.

**“Contract Goal”** shall mean the goal or goals for SBE or MBE and LDBE participation on particular project or Contract based upon the availability of SBEs or MBEs and LDBEs to perform the scope of work.

**“Controlled”** means actual operational and managerial control, responsibilities or obligations for the applicant with the authority to make daily business decisions, direct how business is conducted and manage general enterprise operations with Experience in specified industry classifications for a period of at least one year prior to the application. The principal manager(s) that direct business decisions must not have outside business interests or employment that conflict with the interests of the applicant.

**“Economically Disadvantaged”** means a small business concern under the size standards established by the [U.S. Small Business Administration using the six digit "North American Industry Classification System"](#) under 13 CFR § 121.201 for the industry classification applicable to its area of Experience having a physical presence in Ohio. Businesses may receive certification in multiple areas of Experience; however, exceeding the size standards for a given area of Experience will result in the loss of certification and participation credit as it applies to performing scopes of work within the area of Experience on Commission projects.

**“Experience”** means demonstrated skills, knowledge or ability to perform in the field of endeavor in which certification is sought by the firm as defined by normal industry practices using six digit North American Industry Classification System identifiers. A firm shall be entitled to a rebuttable presumption that it has the Experience performing in the categories for which it is applying for certification if the firm has been in continuous operation in those categories for at least one (1) year prior to its application for certification.

**“Good Faith Efforts”** means performing necessary and reasonable actions that, by their scope, intensity, and appropriateness, would reasonably be expected to attain SBE or MBE and LDBE participation in relative proportion to those that are available to capably

perform Commercially Useful Functions under a given contract. The determination of Good Faith Efforts is based on consideration of the quality, quantity, and intensity of the different kinds of actions taken. The activities or efforts undertaken to when making a Good Faith Effort must be those that one could reasonably expect to deploy when seriously, actively and aggressively attempting to obtain SBE or MBE and LDBE participation in relative proportion to those that are available to capably perform Commercially Useful Functions under the opportunities presented in given contract.

**“Joint Venture”** means an association of two or more independent Bidders or Contractors formed to carry out a for-profit business enterprise in a single transaction or a series of transactions, for which, pursuant to a written agreement (A) the parties combine, pool, or integrate some of their assets with a view to mutual gain, but otherwise remain independent operations; and (B) a SBE, MBE or LDBE has a legal and actual right or obligation, consistent with its equity share of the Joint Venture, to: (i) contribute to the operating capital of the Joint Venture; (ii) share in the operating profits or losses of the Contract and the Joint Venture; and (iii) to perform clearly defined services under the Contract in the name of the Joint Venture.

**“Local Disadvantaged Business Enterprise (LDBE)”** shall mean any sole proprietorship, partnership, corporation, limited liability company or Joint Venture having a physical presence in Ohio that is certified by the Commission as meeting each of the following requirements:

1. Social Disadvantage: A business Owned and Controlled by Socially Disadvantaged Individual(s); and
2. Economic Disadvantage: The business is Economically Disadvantaged, or headquartered in a Qualified Census Tract.

**“Manufacturer”** means an individual (or individuals) who owns, operates, or maintains a factory or establishment that produces on the premises the components, materials and/or equipment, or supplies equipment required under the Contract of the general character described by the specifications.

**“Minority-Owned Business Enterprise (MBE)”** means any sole proprietorship, partnership, corporation, limited liability company, or Joint Venture that is certified by the Commission as a business having a physical presence in Ohio that is Owned and Controlled by one or more Minority Individuals.

**“Minority Individual”** means a natural person who is a citizen of the United States of America (or lawfully admitted permanent residents) that is a member of one of the following groups:

1. African-Americans or Blacks, which includes persons having origins in any of the Black racial groups of Africa.
2. Hispanic-Americans, which includes persons of Mexican, Puerto Rican, Cuban, Caribbean, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.

3. Native-Americans, which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians.

4. Asian-Americans, which includes persons whose origins are in any of the original peoples of the Far East, Southeast Asia, the islands of the Pacific or the Northern Marianas, or the Indian Subcontinent.

**“Personal Net Worth”** means the net value of the assets of an individual remaining after total liabilities are deducted. However, the assets do not include the individual's ownership interest in the business applicant or participant; or the individual's equity in his or her primary place of residence. Personal Net Worth includes: (a) all asset transfers within a two-year period, to the applicant business or any other business, and trust accounts; (b) the person's interest in any other business; (c) if married, half of all assets and liabilities held jointly with the individual's spouse, including, but not limited to bank accounts, insurance policies, retirement accounts, property and stocks and bonds.

**“Owned”** means having at least 51% equity interest in an applicant for at least one year prior to certification with an interest in its capital and earnings commensurate with the ownership stake.

**“Prime Contractor”** means the Contractor who enters into Contract with the Commission and who is responsible to the Commission for performance under such Contract.

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

**“Socially Disadvantaged Individual”** means a citizen of the United States of America (or lawfully admitted permanent residents) that are subjected to prejudices or bias because of their identification with a particular group without regard to their individual qualities and whose Personal Net Worth does not exceed one million three hundred and twenty thousand dollars. There is a rebuttable presumption that females, Minority Individuals and other minorities found to be disadvantaged by the federal Small Business Administration, are Socially Disadvantaged Individuals. Individuals with a physical or mental disability that has led to discriminatory practices against the person that has restricted professional acceptance, employment, or access to capital and credit, or a long term residence in a Qualified Census Tract may also qualify as Socially Disadvantaged. Social Disadvantage may also be based on a demonstration of personal experiences of substantial and chronic

disadvantage not common to other individuals, and evidence of difficulty on entering or succeeding in the business world because of disadvantages such as limited access to education, unequal treatment in employment of promotional opportunities, limited access to credit or capital under commercially favorable circumstances or exclusion from business or professional organizations.

**“Small Business Enterprise (SBE)”** means an entity certified by the Commission as a LDBE or MBE, or any sole proprietorship, partnership, corporation, limited liability company, or Joint Venture whose employees and/or annual receipts do not exceed 50% of the size standards established by the [U.S. Small Business Administration using the six digit "North American Industry Classification System"](#) under 13 CFR § 121.201 for the industry classification(s) applicable to its area of Experience, and headquartered in a Qualified Census Tract in Ohio or having a physical presence in Ohio and at least 51% Owned and Controlled by individual(s) whose personal net worth does not exceed one million three hundred and twenty thousand dollars.

**“Qualified Census Tract”** means a recognizable geographic region within the state of Ohio as a historically underutilized business zone ([HubZone](#)) established under 15 USC §362(p)(1) or an [enterprise zone](#) established under Chapter 5709 of the Ohio Revised Code, and that the Department of Administrative Services has recognized as having an average minimum household income less than eighty percent of the average non-metropolitan income of the state or has an unemployment rate of the geographic region that exceeds the unemployment rate of the state by more than one hundred forty percent.

**“User Department”** means the specific Commission department for which the Contract is intended to support in its operations.

## **ARTICLE II.** **PROGRAM ADMINISTRATION**

The Office of Equity and Inclusion is responsible for administering and enforcing the Small, Minority and Disadvantaged Business Enterprise Inclusion Program (the “Program”) established under Resolution No. 43-2016, adopted June 20, 2016 through its Program Manager. The Department of Contracts Administration shall periodically report to the Executive Director and the Commission on all matters concerning the Program.

**A. Functions of the Department of Contracts Administration:** The Office of Equity and Inclusion shall foster contracting opportunities for MBEs, LDBEs and SBEs, and strive to achieve the objectives of the Program set forth in Resolution No. 43-2016, adopted June 20, 2016 by, among other things:

1. Recommending written rules, regulations and procedures with respect to the administration of the Program and its incorporation into the Commission’s Procurement Policies and Procedures.
2. Maintaining outreach programs and Contractor advisory council(s) to promote contracting opportunities for SBEs or MBEs and LDBEs, the efficacy of the Program, and the fair and equitable administration of the Program.

3. Establishing, enhancing and maintaining relationships with agencies and stakeholders that share the goals of the Program and, whenever possible, coordinating the operation of the Program with the programs of such agencies and stakeholders.
4. Implementing uniform procedures and criteria for certifying, recertifying and decertifying businesses as SBEs, MBEs and LDBEs, accepting certifications by other agencies, maintaining a directory of certified firms, and making the directory available to all interested persons.
5. Monitoring and tracking data related to use of SBEs, MBEs and LDBEs and non-SBEs, LDBEs and MBEs as Prime Contractors, subcontractors, material suppliers and/or Joint Venture partners in connection with the award or performance of Contracts.
6. Responding to inquiries regarding Invitations to Bid or Requests for Proposals that require demonstrations of Good Faith Efforts or Contract Goals.
7. Evaluating Contractors' Good Faith Efforts to meet Contract Goals, commitments to SBEs or MBEs and LDBEs participation on Contracts and progress in meeting participation commitments in performing Contract obligations.
8. Reporting Contractors' Good Faith Efforts to meet Contract Goals, commitments to SBE or MBE and LDBE participation on Contracts and progress in meeting participation commitments in performing Contract obligations.
9. Attending pre-Bid and pre-construction conferences or kick-off meetings for other projects to explain this Program and applicable Contract Goals.
10. Tracking Contractors' achievement of Contract Goals or best efforts to meet participation commitments.
11. Working with other departments to monitor Contracts to ensure prompt payments to MBEs, LDBEs and SBEs and compliance with Contract Goals and commitments, including gathering data to facilitate such monitoring.
12. Monitoring the Program and the Commission's progress towards the Annual Goals.
13. Investigating written complaints regarding the administration of the Program.

**B. Functions of the User Departments:** The User Departments that have responsibility for Contract management shall have the following duties and responsibilities with regard to the Program:

1. Assisting with setting Contract Goals.
2. Assisting in the identification of available SBEs or MBEs and LDBEs, and providing other assistance in meeting the Contract Goals.
3. Endeavoring to maximize the opportunities for the participation of SBEs or MBEs and LDBEs in its Contracts.

4. Assisting in obtaining and reporting prime contracting and subcontracting data for those Contracts that they manage to the Office of Equity and Inclusion.
5. Assisting and supporting the implementation of race and gender neutral measures to ensure equal opportunities for all contractors and subcontractors.

**ARTICLE III.**  
**ELIGIBILITY STANDARDS FOR**  
**SBE, MBE, AND LDBE CERTIFICATION**

The Office of Equity and Inclusion will apply the following standards when determining an applicant's eligibility to participate in the Program. The determination of shall be within the sole discretion of Office of Equity and Inclusion, subject to review as herein provided. The applicant has the burden to prove that it meets the eligibility criteria set forth for certification.

**A. MINORITY BUSINESS ENTERPRISE APPLICATION.**

**1. Fast Track Application.** Businesses with a physical presence in Ohio that certified by the Ohio Department of Administrative Services, the City of Cleveland, the Northeast Ohio Regional Sewer District as an MBE will receive recognition from the Commission as an MBE after receiving authentication of the certification with those entities through a "Fast Track" application to the Commission. The Commission's Office of Equity and Inclusion may further recognize certifications by other entities as meeting the MBE eligibility requirements of the Program through Fast Track applications if the Program Manager determines that the certification standards of such entities are comparable to those required for certification under the Standard Application.

**2. Standard Application.** Any businesses that are not certified through those organizations recognized by the Fast Track application process may apply to the Program Manager for certification as a Minority Business Enterprise as follows:

- i. The application shall be made on forms supplied by the Program Manager.
- ii. The applicant shall demonstrate that it is:
  - a. Owned and Controlled by Minority Individual(s) with a physical presence in Ohio; and
  - b. Controlled by Minority Individual(s). If an applicant has been in business for less than one year, but it is the direct successor to a business that has operated for more than one year, the one-year requirement will be satisfied if the ownership and control of the businesses have remained substantially in the same persons. This requirement shall not apply to joint venture applicants.

iii. Minority Business Enterprises may conduct business as a sole proprietorship, a corporation, a limited liability company, a partnership, or a joint venture. To be eligible for certification as an MBE, the application shall provide evidence that:

a. If the minority business enterprise applicant is a sole proprietorship:

(1) The sole proprietor is a Minority Individual; and

(2) the sole proprietor has ultimate control over the management and day-to-day operations of the business; and

(3) the sole proprietor has the entire interest in the capital, assets, profits and losses of the business, not including mortgages and other types of financial arrangements secured by assets or bonds secured by revenues; and

(4) the applicant submitted true and accurate copies of all relevant financial statements reviewed or audited by a certified public accountant or tax returns for the immediate past two years, and will submit any additional financial records and other documents requested.

b. If the minority business enterprise applicant is a corporation:

(1) at least fifty-one percent of the board of directors and at least fifty-one percent of the principal executive officers are Minority Individuals, and that these persons have ultimate control over the management and day-to-day operations of the business, including but not limited to finances, management decisions and policies; and

(2) at least fifty-one percent of each class of corporate stock is owned by persons who are Minority Individuals; and

(3) the applicant submitted true and accurate copies of the articles of incorporation, including the number of shares issued, and a list of all stockholders, a copy of its code of regulations, bylaws, and financial statements audited or reviewed by a certified public accountant or tax returns for the past two fiscal years of the corporation, and will submit any additional financial records and other documents requested.

c. If the minority business enterprise applicant is a limited liability company:

(1) at least fifty-one percent of the members of the limited liability company are Minority Individuals; and

(2) at least fifty-one percent of the contributions of capital to the limited liability company are provided Minority Individuals that are members of the company; and

(3) the Minority Individuals that are members of the limited liability company have ultimate control over the management and day-to-day operations of the company, including, but not limited to, finances, management decisions and policies.

(4) the applicant submitted true and accurate copies of the articles of organization and operating agreement of the limited liability company, and a list of all its members, the corporation's financial statements audited or reviewed by a certified public accountant or tax returns for the past two fiscal years of the corporation, and will submit any additional financial records or other documents requested.

d. If the minority business enterprise applicant is a partnership:

(1) at least fifty-one per cent of each class of partnership interest is owned by partners who are Minority Individuals; and

(2) the Minority Individuals partners have ultimate control over the management and day-to-day operations of the business; and

(3) the applicant submitted true and accurate copies of the partnership agreement, and the partnership's financial statement audited or reviewed by a certified public accountant or tax returns for the immediate past two years, and will submit any other financial records or other documents requested.

e. If the minority business enterprise applicant is a joint venture:

(1) at least fifty-one percent of the joint venture is controlled by persons who have been previously certified as a Minority Business Enterprise by the Program Manager. Such MBE must have ultimate control over the management and day-to-day operations of the joint venture, and that such persons have an interest in the capital, assets, profits and losses of the joint venture proportionate to their percentage of control.

(2) the applicant submitted a true and accurate copy of the joint venture agreement. Such agreement must contain the purpose of the joint venture, the responsibilities to be performed by the MBE, the responsibilities to be performed by other joint venturers, the amount of capital contribution by each joint venture, the percentage and scope of the project to be subcontracted or supplied through non-joint venturers.

f. If an applicant for minority business enterprise certification has been in business more than one year, but less than two years, the documents required need only to be given for the time period that the business has been in operation.

iv. Failure to certify or provide any of the necessary information may be cause for disapproval of an application. Failure to produce any information required by the Program Manager or the application form will be cause for disapproval of an application.

## **B. DISADVANTAGE BUSINESS ENTERPRISE APPLICATION.**

**1. Fast Track LDBE Recognition.** Businesses with a physical presence in Ohio that are certified as a DBE by the federal Uniform Certification Program, by the Ohio Department of Administrative Services as an EDGE Business Enterprise, by the City of Cleveland as both a FBE and a CCSB, CSB or RCSB, or by the Northeast Ohio Regional Sewer District as a DBE will receive recognition from the Commission as a DBE through a “Fast Track” application after receiving authentication of the certification with those entities. The Commission’s Office of Equity and Inclusion may further recognize certifications by other entities as meeting the LDBE eligibility requirements of the Program through Fast Track applications if the Program Manager determines that the certification standards of such entities are comparable to those required for certification under the Standard Application.

**2. Standard LDBE Application.** Any businesses that are not certified through those organizations recognized by the Fast Track application process identified above may apply to the Program Manager for certification as a Disadvantaged Business Enterprise as follows:

i. The application shall be made on forms supplied by the Program Manager.

ii. The applicant shall demonstrate that it is:

a. Owned and Controlled by Socially Disadvantaged Individuals. If an applicant has been in business for less than one year, but it is the direct successor to a business that has operated for more than one year, the one-year requirement will be satisfied if the ownership and control of the businesses have remained substantially in the same persons. The one year requirement shall not apply to joint venture applicants.

(1) if applying based on race, color, ethnic origin, gender, disability, long-term residence in a Qualified Census Tract, the applicant must provide information demonstrating membership in the claimed category; or

(2) if applying based on personal disadvantage not common to other small business owners, the applicant must provide information about the impediment and how the impediment has restricted professional acceptance, employment, or access to capital and credit.

b. Economic Disadvantage in its area(s) of Experience, or its headquarters being located in a Qualified Census Tract.

(1) if applying based on the Small Business Administration standards, the applicant must provide information about the areas of Expertise using the North America Industry Classification System categories and provide evidence of its Annual Gross Receipts.

(2) if applying based on its headquarters in a Qualified Census Tract, the applicant must provide information about the location of its principal office where its highest executive officers and highest level managers maintain their workspace and perform their respective executive and managerial functions and duties.

iii. Disadvantaged Business Enterprises may do business as a sole proprietorship, a corporation, a limited liability company, a partnership, or a joint venture. To be eligible for certification as an LDBE, the application shall provide evidence that:

a. If the disadvantaged business enterprise applicant is a sole proprietorship:

(1) The sole proprietor is a Socially Disadvantaged Individual; and

(2) the sole proprietor has ultimate control over the management and day-to-day operations of the business; and

(3) the sole proprietor has the entire interest in the capital, assets, profits and losses of the applicant; and

(4) the applicant submitted true and accurate copies of all relevant financial statements audited or reviewed by a certified public accountant or tax returns for the immediate past two years, and will submit any additional financial records and other documents requested.

b. If the disadvantaged business enterprise applicant is a corporation:

(1) at least fifty-one percent of the board of directors and at least fifty-one percent of the principal executive officers are Socially Disadvantaged, and that these persons have ultimate control over the management and day-to-day operations of the business, including but not limited to finances, management decisions and policies; and

(2) at least fifty-one percent of each class of corporate stock is owned by persons who are Socially Disadvantaged; and

(3) the applicant submitted true and accurate copies of the articles of incorporation, including the number of shares issued, and a list of all stockholders, a copy of its code of regulations, bylaws, and financial statements audited or reviewed by a certified public accountant or tax returns for the past two fiscal years of the corporation, and will submit any additional financial records and other documents requested.

c. If the disadvantaged business enterprise applicant is a limited liability company:

(1) at least fifty-one percent of the members of the limited liability company are Socially Disadvantaged; and

(2) at least fifty-one percent of the contributions of capital to the limited liability company are provided by Socially Disadvantaged members of the company; and

(3) the Socially Disadvantaged members of the limited liability company have ultimate control over the management and day-to-day operations of the company, including, but not limited to, finances, management decisions and policies.

(4) the applicant submitted true and accurate copies of the articles of organization and operating agreement of the limited liability company, and a list of all its members, the corporation's financial statements audited or reviewed by a certified public accountant or tax returns for the past two fiscal years of the corporation, and will submit any additional financial records or other documents requested.

d. If the disadvantaged business enterprise applicant is a partnership:

(1) at least fifty-one per cent of each class of partnership interest is owned by partners who are Socially Disadvantaged Individuals; and

(2) the partners that are Socially Disadvantaged Individuals have ultimate control over the management and day-to-day operations of the business; and

(3) the applicant submitted true and accurate copies of the partnership agreement, and the partnership's financial statement audited or reviewed by a certified public accountant or tax returns for the immediate past two years, and will submit any other financial records or other documents requested.

e. If the socially disadvantaged business enterprise applicant is a joint venture:

(1) at least fifty-one percent of the joint venture is controlled by persons who have been previously certified as a Disadvantaged Business Enterprise by the Program Manager. Such LDBE must have ultimate control over the management and day-to-day operations of the joint venture, and that such persons have an interest in the capital, assets, profits and losses of the joint venture proportionate to their percentage of control.

(2) the applicant submitted a true and accurate copy of the joint venture agreement. Such agreement must contain the purpose of the joint venture, the responsibilities to be performed by the LDBE, the responsibilities to be performed by other participants in the joint venture, the amount of capital contribution by each joint venture, the percentage and scope of the project to be subcontracted or supplied through non-joint ventures.

f. If an applicant for disadvantaged business enterprise certification has been in business more than one year, but less than two years, the documents required need only to be given for the time period that the business has been in operation.

vi. Failure to certify or provide any of the necessary information may be cause for disapproval of an application. Failure to produce any information required by the Program Manager or the application form will be cause for disapproval of an application.

### **C. SMALL BUSINESS ENTERPRISE APPLICATION.**

**1. Fast Track Application.** Ohio businesses with a physical presence in Ohio that are certified as a DBE through the federal Uniform Certification Program, certified as an EDGE Business Enterprise by the Ohio Department of Administrative Services or certified as a SBE by the Ohio Department of Transportation will receive recognition from the Commission as a SBE through a “Fast Track” application after receiving authentication of the certification with those entities. The Commission’s Office of Equity and Inclusion may further recognize certifications by other entities as meeting the SBE eligibility requirements of the Program through Fast Track applications if the Program Manager determines that the certification standards of such entities are comparable to those required for certification under the Standard Application.

**2. Standard Application.** Any businesses that are not certified through those organizations recognized in the Fast Track application identified above may apply to the Program Manager for certification as a Small Business Enterprise as follows:

i. The application shall be made on forms supplied by the Program Manager.

ii. The applicant shall demonstrate that it is:

a. Independently Owned and Controlled without Affiliation with another entity or person for at least one year prior to making the application. If an applicant has been in business for less than one year, but it is the direct successor to a business that has operated for more than one year, the one-year requirement will be satisfied if the ownership and control of the businesses have remained substantially in the same persons. This requirement shall not apply to joint venture applicants.

b. generating Annual Gross Receipts or employing a number of employees below 50% of the Small Business Administration's standards for the industry or fields of its Expertise using the North America Industry Classification System categories.

c. at least 51% Owned and Controlled by individual(s) whose personal net worth does not exceed one million three hundred and twenty thousand dollars.

iii. Small Business Enterprises may conduct business as a sole proprietorship, a corporation, a limited liability company, or a partnership. To be eligible for certification as a SBE, the application shall include, but not be limited to, evidence that:

a. If the small business enterprise applicant is a sole proprietorship:

(1) the sole proprietor has ultimate control over the management and day-to-day operations of the business; and

(2) the sole proprietor has the entire interest in the capital, assets, profits and losses of the business, not including mortgages and other types of financial arrangements secured by assets or bonds secured by revenues; and

(3) the applicant submitted true and accurate copies of all relevant financial statements audited or reviewed by a certified public accountant or tax returns for the immediate past two years, and will submit any additional financial records and other documents requested.

b. If the small business enterprise applicant is a corporation:

(1) the board of directors and the principal executive officers are individuals that are independent and not ex officio members that serve the interests of an Affiliate, and that these persons have ultimate control over the management and day-to-day operations of the business, including but not limited to finances, management decisions and policies; and

(2) the applicant submitted true and accurate copies of the articles of incorporation, including the number of shares issued, and a list of all stockholders, a copy of its code of regulations, bylaws, and financial statements audited or reviewed by a certified public accountant or tax returns for the past two fiscal years of the corporation, and will submit any additional financial records and other documents requested.

c. If the small business enterprise applicant is a limited liability company:

(1) the members of the limited liability company are independent individuals having ultimate control over the management and day-to-day operations of the company, including, but not limited to, finances, management decisions and policies and are not ex officio members that serve the interests of an Affiliate; and

(2) the applicant submitted true and accurate copies of the articles of organization and operating agreement of the limited liability company, and a list of all its members, the corporation's financial statements audited or reviewed by a certified public accountant or tax returns for the past two fiscal years of the corporation, and will submit any additional financial records or other documents requested.

d. If the small business enterprise applicant is a partnership:

(1) each class of partnership interest is owned by independent individuals that have ultimate control over the management and day-to-day operations of the business and are not serving the interests of an Affiliate; and

(2) the applicant submitted true and accurate copies of the partnership agreement, and the partnership's financial statement audited or reviewed by a certified public accountant or tax returns for the immediate past two years, and will submit any other financial records or other documents requested.

e. If an applicant for small business enterprise certification has been in business more than one year, but less than two years, the documents required need only to be given for the time period that the business has been in operation.

iv. Failure to certify or provide any of the necessary information may be cause for disapproval of an application. Failure to produce any information required by the Program Manager or the application form will be cause for disapproval of an application.

**D. REVIEW OF APPLICATIONS.** Upon receipt of an application containing all proper certifications and required documents, the Program Manager shall review the application form to determine the applicant's eligibility for certification as a Minority Business Enterprise, Disadvantaged Business Enterprise and/or Small Business Enterprise. If verification of any item is necessary, the Program Manager may request additional documentation or support, schedule an interview with the applicant to review documents or may any other further inquiry to obtain all relevant information. Interviews may take place at the location of the business if Program Manager so determines.

**1. Approval.** If the Program Manager approves the application for certification as demonstrating the applicant meets the requirements for recognition as a Minority Business Enterprise, Disadvantaged Business Enterprise, and/or Small Business Enterprise, the applicant shall be notified and provided documentation verifying status as a MBE, LDBE and/or LDBE for a period not to exceed two years. Status as a MBE, LDBE and/or SBE is

subject to the continuing compliance of the business with these requirements and the review, at any time, by the Program Manager.

**2. Modifications.** Any change that affects the ownership, control or area of Experience as originally approved by the Program Manager makes the certification voidable. The Program Manager must receive notice within three business days of that change for new approval. Any change in the business structure of the enterprise, the ownership and control of the enterprise or the type of business conducted by a certified minority business enterprise, shall require a reapplication for certification and a review by the Program Manager.

**3. Renewal.** Each certified SBE, MBE and LDBE shall be required to reapply for certification through a renewal application submitted to the Program Manager biennially. Such renewal applications shall contain a yearly financial statement or tax returns, all pertinent financial records and other financial documents as requested, and notarized affidavits certifying the continued eligibility for certification and any material changes to the business. If the applicant timely files the biennial renewal applications, then the applicant's present certification status shall remain in effect until such time as the Program Manager determines whether certification should be continued or not.

#### **E. Certification Denial and Decertification.**

1. Notwithstanding the ability of an applicant to meet these standards, the Commission reserves the right to deny SBE, MBE or LDBE certification or decertify any business that is or has been:

- i. In arrears or declared to be in default to the Commission upon any contract or debt, or has otherwise failed to perform faithfully, fully, and completely any previous contract with the Commission;
- ii. In arrears or declared to be in material breach upon any contract, or has otherwise failed to substantially perform any previous contract; or
- iii. In default on any obligation to the Commission under the Program.

2. The Commission shall decertify a firm that does not continuously meet the eligibility criteria. Decertification by another public entity shall create a prima facie case for decertification by the Commission. The challenged firm shall have the burden of proving that its certification with the Commission should be maintained.

3. If an applicant is denied certification or recertification, it may not reapply for certification for a period of one (1) year from the date of the notice of denial. An applicant whose application for certification or recertification is denied may appeal the denial by filing a hearing application to the General Counsel within thirty (30) calendar days after of the notice of denial. The General Counsel shall be the final arbiter of all challenges.

## **ARTICLE IV. ESTABLISHMENT OF GOALS**

**A. Application.** The Disparity Study identified statistically significant disparities between the availability and utilization of minority and female owned businesses on the contracts for professional engineering services, construction services and general goods and support services. Based on the Disparity Study's findings and the Commission's compelling interests stated in Resolution No. 43-2016, adopted June 20, 2016, remedial actions are necessary to address the underutilization of minority and female owned businesses in the types of contracts studied. The Commission will first set aspirational goals for SBE participation in its contracts. If the implementation of SBE goals and other race- and gender-neutral measures do not sufficiently remedy the disparity after approximately one year, the Executive Director may authorize the implementation of MBE and LDBE goals on the Commission's contracts.

**B. Contract Goals.** The Commission will establish Contract Goals for SBEs or MBEs and LDBEs performing on specific Contracts based upon the availability of SBEs or MBEs and LDBEs to perform the opportunities presented under the given Contract. Contract goals may be set separately for SBEs or MBEs and LDBEs or for MBEs, LDBEs and SBEs combined.

## **ARTICLE V. CREDITING MBE, LDBE AND SBE PARTICIPATION**

**A.** The Commission will credit the entire amount of any of the following towards the MBE LDBE, or SBE participation on a given Contract:

1. The portion of a Contract that MBEs, LDBEs or SBEs perform with its own forces, including the cost of supplies and materials obtained by the MBE, LDBE or SBE for the work of the Contract. A MBE, LDBE or SBE performing as a Prime Contractor may count 20% of the amount self-performed towards the applicable goal for purposes of evaluation but the Commission may count 100% of the amount the MBE, LDBE or SBE self-performs as participation credit for reporting purposes.

2. The entire amount of fees or commissions charged by a MBE, LDBE or SBE for providing a bona fide service, such as professional, technical, consulting or managerial services, provided the fee is reasonable and not excessive as compared with fees customarily charged for similar services.

3. When a MBE, LDBE or SBE performs as a participant in a Joint Venture, the Commission will count only the portion of the total dollar value of the Contract equal to the distinct, clearly defined portion of the work of the Joint Venture's contract that is performed by the MBE, LDBE or SBE with its own forces.

4. The Commission will credit only MBE, LDBE or SBE participation that corresponds with performing a Commercially Useful Function.

i. The Commission will use the following factors in crediting a MBE, LDBE or SBE trucking company performing a Commercially Useful Function:

a. The MBE, LDBE or SBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting MBE, LDBE or SBE goals.

b. The MBE, LDBE or SBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

c. The MBE, LDBE or SBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

d. The MBE, LDBE or SBE may lease trucks from another MBE, LDBE or SBE, including an owner-operator who is certified as a MBE, DBE, or SBE. The MBE, LDBE or LDBE who leases trucks from another MBE, LDBE or SBE receives credit for the total value of the transportation services the lessee MBE, LDBE or SBE provides on the contract.

e. The MBE, LDBE or SBE may also lease trucks from a non-MBE, non-LDBE or non-SBE firm, including from an owner-operator. The MBE, LDBE or SBE that leases trucks equipped with drivers from a non-MBE, non-LDBE or non-SBE is entitled to credit for the total value of transportation services provided by non-MBE, non-DBE or non-SBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by MBE, LDBE or SBE-owned trucks or leased trucks with MBE, LDBE or SBE employee drivers. Additional participation by non-MBE, non-LDBE or non-SBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate Program Manager.

ii. The Commission will use the following factors in crediting a MBE, DBE or SBE material supplier performing a Commercially Useful Function:

a. The entire amount of the cost of the materials or supplies obtained from a MBE, DBE or SBE Manufacturer or Regular Dealer, and one hundred percent of the fees or transportation charges for its delivery of materials or supplies required on a job site if the payment of such fees is a customary industry practice and are commensurate with fees customarily charged for similar services.

b. With respect to materials or supplies purchased from a MBE, DBE or SBE which is neither a Manufacturer nor a Regular Dealer, the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward MBE, DBE or SBE credit, provided the fees are reasonable and not excessive as compared with fees customarily allowed for similar services.

**B.** The participation of a firm that is has multiple certifications as MBE, LDBE, and SBE may be counted towards participation credit for any certification it possesses. Provided, however, only MBE participation can count towards MBE and LDBE credit, and LDBE participation can only count towards LDBE and SBE participation.

**C.** If a firm ceases to be certified during its performance on a Contract, the dollar value of work performed under a Contract will count as long as the firm is certified at the time of Contract execution.

**D.** In determining participation achievement, the participation of a MBE, LDBE or SBE shall not be counted until that amount has been paid to the MBE, LDBE or SBE.

## **ARTICLE VI. CONTRACT AWARD PROCEDURES**

**A.** All Contractors must use Good Faith Efforts. At any time the Commission does not have Contract Goals on a given project, the use and demonstration of Good Faith Efforts are required. When a Bidder commits to achieve any Contract Goals established for a particular Contract, there is a prima facie showing that Good Faith Efforts were performed. For work self-performed by a MBE, LDBE or SBE bidding as a prime contractor, the Bidder may claim only 20% of the amount self-performed towards meeting the goal. In the absence of an established Contract Goal applicable to a particular contract, the level of SBE or MBE and LDBE and participation should correspond with the proportional availability of such firms in the marketplace to perform Commercially Useful Functions under the opportunities each contract presents.

**B.** Bidders are required to complete all forms and submit all documents as described in the solicitation regarding SBE or MBE and LDBE participation commitments and the use of Good Faith Efforts to achieve the participation. Such information shall include:

1. Identifying all SBEs or MBEs and LDBEs committed to participate in the Contract, the general scope of work being performed by each, and the approximate dollar amount that the scope represents on the Contract.
2. Identifying the portions of the work that the Bidder subdivided into practicable subparts to increase the likelihood that SBEs or MBEs and LDBEs will participate in the project.
3. Identifying all services or organizations that provided assistance in identifying and soliciting proposals from SBEs or MBEs and LDBEs to participate on the Contract.
4. Identifying all SBEs or MBEs and LDBEs that the Bidder supplied adequate and timely information to solicit a quote to participate on the Contract.
5. Identifying all SBEs or MBEs and LDBEs that engaged the Bidder in negotiating scopes of work to participate on the project.
6. Identifying all SBEs or MBEs and LDBEs that provided quotes for the project, but were not chosen to perform the work and the reason for the rejection.

**C.** The determination that a Bidder used Good Faith Efforts is based on the holistic review of the documented opportunities, availability, Good Faith Effort and commitment using the following considerations:

1. Opportunities under the project, or the subcomponents of the project that are identifiable as economically viable scopes of work that may interest subcontractors in responding to the respondent's solicitations to participate in the project. The unique opportunities each project presents is determined based on the nature of the project using in-house expertise and the aggregation of those that the bidders or respondents may identify in their bids or proposals. The Bidder can fulfil the opportunities component of Good Faith Efforts through actions that include the following:

i. Selecting and packaging portions of the work in order to increase the likelihood that the SBEs or MBEs and LDBEs will respond to solicitations expressing interest in participating on the project. This includes, where appropriate, breaking out contract work into economically feasible units to facilitate participation through subcontracting.

ii. Soliciting the interest of all SBEs or MBEs and LDBEs available to perform on the project through reasonable, meaningful and available means and providing a reasonable and meaningful time to respond.

2. Availability of SBEs or MBEs and LDBEs to capitalize on the opportunities, or the degree of ready, willing and able SBEs or MBEs and LDBEs available perform under each project. The availability consideration examines the amount of SBEs or MBEs and LDBEs in the relevant marketplace using (1) the Commission's list of certified SBEs or MBEs and LDBEs; (2) the Unified Certification Program's DBE Directory; (3) Ohio Department of Administrative Services' search results for MBE and EDGE Certified firms; (4) the City of Cleveland's MBE and FBE/CSB Registries; (5) the Northeast Ohio Regional Sewer District's Certification Directory for DBEs and MBEs; and (5) any other Ohio-centric database that the Commission recognizes as using standards that are substantially similar to the requirements for certification with the Commission. The means for a bidder or respondent to fulfill the Availability component of demonstrating good faith efforts includes the following:

i. Searching recognized registries identifying SBEs or MBEs and LDBEs that potentially could fulfill the opportunities under the project.

ii. Identifying other possible ready, willing and able SBEs or MBEs and LDBEs through the effective use of the services of available from community organizations, contractors' groups, local, state, and Federal minority/women business assistance offices, and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and utilization of SBE or MBE and LDBE entities.

3. Efforts documented by the Bidder to seek SBE or MBE and LDBE participation, or the documented attempt to meaningfully and earnestly solicit the interest of available SBEs or MBEs and LDBEs to fulfill the opportunities presented to perform on the Project,

including making a sufficient number of contacts to follow up with any available but non-responsive SBEs or MBEs and LDBEs and negotiating in good faith with SBEs or MBEs and LDBEs to reach reasonably agreeable terms for their participation. The efforts component considers the active attempts to successfully reach an agreement with interested SBEs or MBEs and LDBEs, which may include the following:

- i. Negotiating in good faith with interested SBEs or MBEs and LDBEs so as to facilitate their participation on the Project.
  - ii. Not rejecting SBEs or MBEs and LDBEs without sound reasons based on a thorough investigation of their capabilities.
  - iii. Assisting SBEs or MBEs and LDBEs in obtaining bonding, lines of credit, or insurance as required by the Bidder.
4. Commitment obtained from SBEs or MBEs and LDBEs to participate in the project, or the Bidder's representations to have made commitment(s) to utilize verified SBEs or MBEs and LDBEs to perform a Commercially Useful Function on the Contract.
  - i. Commitments provide a cross-check on the culmination of opportunities, availability and efforts. Unless the analyses under the opportunities, availability and efforts prongs demonstrate otherwise, the use of Good Faith Efforts is expected to result in the Bidder successfully representing its achievement of SBEs or MBEs and LDBEs participation on the project reflecting the opportunities the project presents and availability of SBEs or MBEs and LDBEs in the marketplace.
  - ii. The Bidder must provide justification for any lack of commitment achieving the applicable goals by showing that the failure occurred despite its Good Faith Efforts through the demonstration of the opportunity, availability and efforts involved.
5. Upon the receipt of the Bids, the Program Manager reviews the completed Demonstration of Good Faith Efforts to identify the opportunities presented under the particular Contract and availability of SBEs or MBEs and LDBEs to perform. This assessment of opportunities and availability compiles those that all Bidders may identify in their forms, but also goes outside the form to consult with in-house subject matter experts to identify additional possible opportunities and recognized certification registries for possible untapped available firms.
6. If the Program Manager finds that a Bidder did not use or demonstrate Good Faith Efforts, the Program Manager shall recommend that the Bid be deemed non-responsive, the Bidder deemed non-responsive or not the "best." In addition to other factors in its evaluation, the Commission may declare a Bid or the Bidder to not be responsible where it is determined that a Bidder has not submitted any form, affidavit, or other document required by the solicitation, these standards or reasonably requested by the Program Manager.
7. The Program Manager will submit the Good Faith Effort determination recommendation to a Good Faith Effort Committee consisting of internal personnel

outside the Department of Contracts Administration with expertise in legal, contract-specific scope of work, project management, and administration. The Good Faith Effort Committee members will review the Program Manager's determination and either approve or deny the recommendation. A majority of the Good Faith Effort Committee's approval or denial will dictate the Committee's action. If a majority of the Good Faith Effort's Committee disapproves the Program Manager's recommendation, the Director of Contract Administration may appeal the determination to the Executive Director for a final determination or recommendation to the Commission.

8. In the event that a Bidder is awarded a Contract without meeting the Contract Goal(s), such Contract award does not relieve the Bidder from the continuing contractual obligation to exercise Good Faith Efforts throughout performance of the Contract in order to meet its Commitments or to achieve higher SBE or MBE and LDBE participation levels.

**D.** The Commission may apply a Bid Discount to bids received from SBEs or MBEs and LDBEs to perform as prime contractors in the amount of five percent (5%) to remediate the effects of passive participation in discrimination as long as the discount does not violate the Commission's obligations to only make reasonable, efficient and economical expenditures.

**E.** The Commission may, as an alternative to the Bid Discount applied under division (D), provide a SBE, MBE or LDBE having submitted a bid that is no more than five percent (5%) above the apparent low bid with the opportunity to match the low bid amount. If the SBE, MBE or LDBE agrees in writing to match the apparent low bid amount, the Commission will evaluate its bid to determine whether the SBE, MBE or LDBE is the lowest responsive and responsible bidder.

**F.** The Commission may apply an Evaluation Credit of five percent (5%) of the total points awarded for proposals received from SBEs or MBEs and LDBEs consultants to perform personal or professional services to remediate the effects of passive participation in discrimination as long as the discount does not violate the Commission's obligations to only make reasonable, efficient and economical expenditures.

**G.** The maximum dollar amount a Bid Discount may afford a Bidder on any given bid shall not exceed seven thousand five hundred dollars (\$7,500.00).

## **ARTICLE VII. CONTRACT PERFORMANCE PROCEDURES**

**A.** Upon execution of a Contract based on a Bid that includes Commitments to achieve SBE or MBE and LDBE participation amounts, the Commitments shall become covenants of performance by the Contractor in favor of the Commission. The Contractor shall deliver Statements of Intent to Contract and Performed signed by the Contractor and the SBE or MBE and LDBE participating on the Contract describing the general scope and dollar amount.

**B.** Prime Contractors performing Contracts shall comply with all reporting requirements of the Commission related to use of SBE, MBE and LDBE and other subcontractors,

including, but not limited to, submitting certified participation reports with each invoice or pay estimate or completing an online report of payments made to such MBEs, LDBEs, SBEs, and other subcontractors.

**C.** The Program Manager shall monitor subcontractor participation during the course of the Contract. The Commission shall have full and timely access to the Contractor's books and records, including without limitation payroll records, tax returns and records and books of account, to determine the Contractor's compliance with its commitment to SBEs or MBE and LDBE participation and the status of any MBE, LDBE or SBE performing any portion of the Contract.

**D.** The Contractor cannot make changes to the commitment or substitute MBEs, LDBEs or SBEs named in Statement of Intent to Perform without the prior written approval of the Program Manager and the User Department. Unauthorized changes or substitutions shall be a violation of these standards and may constitute a breach of Contract, subject to the breach provisions contained in the Contract or rescission of an award. All requests for changes or substitutions of a SBEs or MBEs and LDBEs subcontractor(s) named in the Statement of Intent to Perform shall be made to the Program Manager and the User Department in writing, and shall clearly and fully set forth the basis for the request.

**E.** Contractors shall not terminate or replace a MBE, LDBE or SBE subcontractor unless the Contractor demonstrates good cause for the termination or replacement, and until the Program Manager and the User Department approve such substitution or change in writing. A Contractor shall not allow a substituted subcontractor to begin work until the Program Manager and the User Department have approved the substitution. Good cause to justify termination or replacement of SBE or MBE and LDBE subcontractors include one or more of the following instances:

1. The listed SBE, MBE or LDBE firm fails or refuses to provide the required Statement of Intent to Contract and Perform or execute a written contract.
2. The listed SBE, MBE or LDBE 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 MBE, LDBE or SBE firm to perform its work on the subcontract results from the bad faith or discriminatory action of the awarded contractor.
3. The listed MBE, LDBE or SBE firm fails or refuses to meet the awarded contractor's reasonable, nondiscriminatory bond requirements.
4. The listed MBE, LDBE or SBE firm becomes bankrupt, insolvent, or exhibits credit unworthiness.
5. The listed MBE, LDBE or SBE firm is ineligible to work on public works projects because of suspension and debarment proceedings.
6. The Commission determines that the listed SBE, MBE or LDBE firm is not a responsible contractor.

7. The listed SBE, MBE or LDBE firm voluntarily withdraws from the project and provides written notice of its withdrawal.

8. The listed SBE, MBE or LDBE is ineligible to receive SBE, MBE or LDBE credit for the type of work required.

9. A SBE, MBE or LDBE owner dies or becomes disabled with the result that the listed SBE, MBE or LDBE contractor is unable to complete its work on the contract.

10. Other documented good cause that the Commission determines compels the termination of the SBE, MBE or LDBE firm.

**F.** The facts supporting the request must not have been known nor reasonably should have been known by either party before the submission of the Bid, Commitment or Statement of Intent to Perform. Bid shopping is prohibited. The Contractor must negotiate with the SBE, MBE or LDBE or other subcontractor to resolve any disputes.

**G.** Before requesting to terminate or replace a SBE, MBE or LDBE, the Contractor must give notice in writing to the SBE, MBE or LDBE, with a copy to the Program Manager, of its intent to request to terminate or replace the SBE, MBE or LDBE, and the reason(s) for the request. The Contractor must give the SBE, MBE or LDBE five (5) calendar days to respond to the notice and describe the reasons, if any, why it objects to the proposed termination or substitution and why the Commission should not approve the termination or substitution.

**H.** Where the Contractor has established a good cause basis for the termination or replacement to the satisfaction of the Commission, the Contractor shall use its best efforts to replace the terminated MBE, LDBE or SBE with another MBE, LDBE or SBE in a manner that substantially adheres with the scope and compensation of the original terminated LDBE. The Contractor may seek the assistance of the Program Manager in obtaining a new MBE or LDBE.

**I.** Before Contract closeout, the Program Manager shall evaluate the Contractor's fulfillment of the participation commitment, taking into account all approved substitutions, terminations and changes to the Contract's scope of work. If the Program Manager determines that Good Faith Efforts to meet the SBE or MBE and LDBE contractual commitments were not made, or that fraudulent misrepresentations have been made, or any other breach of the Contract or violation of these standards has occurred, a remedy may be sought and the failure may be considered in evaluating the responsibility of the Contractor on future bids.

## **ARTICLE VIII. REMEDIES, SANCTIONS AND PENALTIES**

**A.** Scope and Applicability. Any Contractor, Bidder, SBE, MBE, LDBE or allegedly aggrieved by the provisions of this Program may submit a written complaint to the Program Manager, setting forth the bases of such complaint. After receipt of a written complaint, the allegedly aggrieved party (the Complainant) may be afforded a hearing before the Executive Director. The General Counsel shall be empowered to hear all

grievances concerning certification, de-certification, and any other grievances relative to the Program.

1. Notice of Hearing. Upon receipt of a written complaint from the Complainant, the General Counsel shall schedule a hearing within a reasonable time after receipt of such complaint. The Commission shall provide notice of the date, time, and location of the hearing to the Complainant via registered mail. A Complainant may make one (1) request to reschedule a hearing after receipt of any hearing notice provided herein. The Commission shall have no obligation to provide a rescheduled hearing for any Complainant who fails to appear at a properly scheduled hearing.

2. Hearing Conduct. The General Counsel may designate a Hearing Panel on a hearing-by-hearing basis, or at any other interval. Hearings before the designated Hearing Panel shall be informal, without strictly adhering to any given procedural or evidentiary rules. The Complainant may appear in person or via a representative designated by the Complainant. The Complainant may present evidence and witness testimony in support of the Complainant's alleged grievances. The Complainant may bring legal counsel. Abusive or otherwise disruptive language or behavior at a hearing by a Complainant will be grounds for discontinuance and/or forfeiture by the Complainant of any hearing described under this Policy.

3. Hearing Decisions. The General Counsel shall issue a written opinion setting forth the findings and recommendations within a reasonable time after the hearing based on the preponderance of the reliable, probative and substantial evidence.

4. Exhaustion of Legal Remedies. A Complainant must comply with the hearing process outlined above in order to exhaust its administrative remedies. Thereafter, a Complainant may seek any other statutory, legal or equitable remedies that may be available. Failure to exhaust all administrative remedies listed is an affirmative defense to any statutory, legal or equitable proceeding that may arise.

5. Advisory Recommendations. The designated Hearing Panel shall have authority to render advisory recommendations to General Counsel, absent a hearing, upon the request of the General Counsel.

**B. Sanctions.** Any Bidder or Contractor who violates any provision of these standards may be subject to administrative sanctions. Violations that may result in a breach of Contract include, but are not limited to, providing false or misleading information to the Commission in connection with submission of a bid, responses to requests for qualifications or proposals, Good Faith Efforts documentation, post-award compliance, or other operations.

In addition, violations may constitute a material breach of Contract, enforceable at law or in equity. A Contractor or subcontractor may be subject to sanctions and penalties if it is found by the Executive Director to have:

1. Provided false or misleading information in connection with an application for certification or recertification or colluded with others to do so;
2. Provided false or misleading information in connection with the submission of a bid

or proposal or documentation of Good Faith Efforts, post-award compliance, or other Program operations or colluded with others to do so;

3. Failed in bad faith to fulfill Contract Goals, thereby materially breaching the Contract; or

4. Failed to comply in good faith with substantive provisions of this Policy.

**C.** In addition to the breach of Contract remedies available to the Commission, the following sanctions and penalties are established for the enforcement of this Program:

1. Suspension for not to be less than two (2) years, unless the Director of Contracts Administration determines that a shorter time period is warranted. The Director may impose suspensions in excess of two (2) years in cases involving intentional or fraudulent misrepresentation or concealment of material facts, multiple acts in breach of the Program, cases where the Participant has been previously suspended, or other similarly situated misconduct.

2. Other appropriate sanctions as the Commission deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the Contractor to the satisfaction of the Executive Director.

**D.** The sole authority and power for imposition of sanctions shall lie with the Executive Director. The Commission's procurement policies shall apply to sanctions under this Policy. In determining the length of any suspension, the Executive Director shall consider the following factors:

1. Whether the failure to comply with applicable requirements involved intentional conduct or, alternatively, may be reasonably concluded to have resulted from a reasonable misunderstanding on the part of the Bidder or Contractor of the requirements of this Program.

2. The number of specific incidences of Non-Compliance of this Policy by the Bidder or Contractor.

3. Whether the Bidder or Contractor has been previously suspended or has a history of violations of this Policy.

4. Whether the Bidder or Contractor has failed or refused to provide the Commission with any information required or requested.

5. Whether the Bidder or Contractor has materially misrepresented any applicable facts in any filing or communication to the Commission.

6. Whether any subsequent restructuring of the Bidder's or Contractor's business or other action has been undertaken to cure the deficiencies in meeting applicable requirements.

**E.** Prohibition Against False Statements. It shall be unlawful for any person, knowingly, willfully and with intent, to mislead or to make any false or fraudulent

representations to the Commission. The Commission may impose sanctions against any person making such false representation. In addition, knowingly providing false information to a public official is punishable as a first degree misdemeanor, pursuant to O.R.C. § 2921.13.

#### **ARTICLE X. PROGRAM REVIEW AND SUNSET**

The Director of Contracts Administration shall report to the Commission at least annually detailing the Commission's performance under the Program. The Commission shall review these reports, including the Annual Aspirational Goals and the Commission's progress towards meeting those Goals and eliminating discrimination in its contracting activities and Marketplace.

The Program shall automatically terminate six (6) years after the date of adoption by the Commission, unless reauthorized by the Commission. The Commission shall determine whether there exists strong basis of evidence of discrimination such that the Program should be continued and ensure that the Program's goals and operations remain narrowly tailored based upon the evidence.

#### **ARTICLE XII. MODIFICATIONS TO THIS POLICY**

Upon approval of the Commission, the Office of Equity and Inclusion may make Contract-specific modifications to these standards for a particular project. Further, the Executive Director has the authority to modify this policy to address legal, financial, operational or other managerial issues that may arise.