

OHIO TURNPIKE AND INFRASTRUCTURE COMMISSION

Resolution Reauthorizing the Ohio Turnpike and Infrastructure Commission's Business Inclusion Program for a Six Year Period

WHEREAS, the policy of the Ohio Turnpike and Infrastructure Commission ("Commission") is to ensure that all disadvantaged businesses, including those owned and controlled by minorities and women, have the fullest possible opportunity to participate in contracts involving the expenditure of Commission funds, including leases, purchase orders and all forms of agreement where work, labor, services, supplies, equipment and materials, or any combination of the foregoing; and

WHEREAS, in furtherance of its policy, the Commission adopted Resolution No. 18-2014 on March 24, 2014, authorizing the Executive Director to retain a consultant to conduct a study ("Disparity Study") to determine whether any disparity exists between the availability of minority- and woman-owned businesses to perform on its contracts and the Commission's utilization of such businesses; and

WHEREAS, in April 2016, BBC Research & Consulting reported to the Commission the results from the Disparity Study. The Disparity Study found that a disparity existed between the availability of minority- and woman-owned businesses ready, willing and able to perform the Commission's contracts for construction, professional services and goods and support services and the actual participation of those businesses in the Commission's contracting opportunities. Based on evidence from the Disparity Study, the Commission determined that it has a legitimate governmental interest to remedy the effects of societal discrimination; and

WHEREAS, to remedy the underutilization of minority- and woman-owned businesses on the Commission's contracts, the 2016 Disparity Study recommended: (i) improved monitoring of minority- and woman-owned business and other disadvantaged business enterprises on the Commission's contracts; (2) establishing a race- and gender-neutral small business enterprise ("SBE") program; and (3) implementing narrowly tailored race- and gender-conscious remedial actions to address the inference of discriminatory conduct against minority- and woman-owned businesses if such neutral measures fail to eliminate the disparity between availability and utilization of those businesses; and

WHEREAS, pursuant to Resolution No. 43-2016, adopted on June 20, 2016, the Commission established a Small, Minority and Disadvantaged Business Inclusion Program (the "Program") with the purpose of "...ensuring there are equal opportunities for small, minority and otherwise disadvantaged businesses [*i.e.*, veteran owned businesses] to participate in the Commission's business transactions, preventing its contracting dollars from disparately affecting disadvantaged businesses, and eliminating the effects of discrimination on competition for its contracting opportunities;" and

WHEREAS, the Program was authorized for an initial period of six (6) years, subject to review and reauthorization by the Commission, and that initial six (6) year period expired as of June 19, 2022; and

WHEREAS, pursuant to Resolution No. 35-2022, adopted May 16, 2022, the Commission extended the Program for an interim period of one (1) year until June 19, 2023, to allow time for the Commission to complete an Availability Study and present to the Commission a formal request to reauthorize the Program with necessary improvements and changes to ensure the Program continues to serve its intended purpose; and

WHEREAS, at the meeting held on May 15, 2023, the Director of Contracts Administration presented a resolution to the Commission to reauthorize the Program for a new 6-year period with changes based on the Availability Study and best practices and the resolution was tabled, and later died due to lack of action taken, because members had questions about the Program changes, mostly regarding the addition of sheltered market opportunities; and

WHEREAS, at the meeting held on June 19, 2023, the Director of Contracts Administration provided Commission members with written responses to questions submitted by the members and pursuant to Resolution No. 50-2023, adopted June 19, 2023, the Commission extended the Program for 6-months, through December 19, 2023, to provide additional time for staff to address remaining questions; and

WHEREAS, at the meeting held on September 18, 2023, the Director of Contracts Administration provided an update on the Program changes and has since finalized the Standards and Practices Manual based on feedback from the Commission that the sheltered market opportunities process mirror that of the Ohio Department of Transportation as part of its SBE program; and

WHEREAS, the final, updated Standards and Practices Manual (the “Manual”), a copy of which is attached, includes the following main changes, among others:

- A. SBE Certification. The Manual currently provides for certification of SBEs, MBEs and DBEs. Since the Program is race- and gender-neutral, it should only provide for the certification of SBEs. It is important to note that minority- and woman-owned businesses as well as other disadvantaged businesses, including veteran-owned businesses, may still meet the criteria to be certified as SBEs. The Manual has been updated to include this change.
- B. 100% Self-Performance Credit. The Program currently limits the credit SBEs performing as prime contractors can apply towards contract goals to 20% of the work self-performed by the prime contractor. If the SBE prime contractor cannot meet the contract goal through its own self performance, then it must hire another SBE to meet the contract goal. This has caused confusion during the procurement process and can be seen as a deterrent to encouraging SBEs to perform as prime contractors. The Manual has been updated to allow an SBE performing as a prime contractor to receive 100% credit for its self-performance toward the contract goal which is consistent with other race- and gender-neutral programs.
- C. Annual Aspirational Goal. As suggested by the Availability Study, the Commission will establish an Annual Aspirational Goal for the participation of SBEs in its contracts and will measure the annual participation of SBEs and its progress toward meeting the Annual Goal. The Manual has been updated to include this process.
- D. Contract Goals. The Manual has been updated to clearly articulate factors to be used in setting contract goals that may be higher or lower than the Annual Aspirational Goals.
- E. Sheltered Market Opportunities. The Manual has been updated to establish a Sheltered Market Opportunities process which will identify a portion of Commission contracts for competition only by SBEs in the areas of construction and consulting services and for contracts amounts that do not exceed \$2 million. OEI will meet with user departments annually to identify projects or contracts that are appropriate for sheltered market procurements in the next 12 months. If no responsive and responsible bids or proposals are received in response to a sheltered market opportunity, or if pricing is determined to be unfair or unreasonable, the contract will be re-bid using typical open competition procedures to all businesses.
- F. Bid Discounts. The Manual has been updated to set new limits on bid discounts which may be given to SBEs. The existing bid discount maximum is \$7,500. This has been changed to a % based on contract amount – 5% for contracts under \$500,000; 3% for contracts from \$500,000 to under \$1 million and 2% for contracts over \$1 million.
- G. Modifications. The Manual permits the Executive Director to make modifications to the Program to address legal, financial, operational or other managerial issues that may arise (for example, changes in applicable legal or regulatory requirements,

changes in staffing, position or title, etc.).

- H. Term/Reauthorization. If the Program is reauthorized, it will continue for another term of six (6) years. At the end of six (6) years, the Commission will be tasked with reviewing the Program and determining whether to continue, revise or suspend the Program.

WHEREAS, the Director of Contracts Administration recommends that the Program be reauthorized for a period of six (6) years in the form provided in the updated Manual; and

WHEREAS, the Executive Director has reviewed the recommendation of the Director of Contracts Administration and recommends that the Commission reauthorize the Program for a period of six (6) years in the form provided in the updated Manual; and

WHEREAS, the Commission has duly considered such recommendations.

NOW, THEREFORE, BE IT

RESOLVED, that the Commission finds it has a legitimate governmental interest in continuing the Business Inclusion Program to increase opportunities for small and disadvantaged businesses to compete for and perform on Commission projects and contracts; and

FURTHER RESOLVED, that the Commission reauthorizes the Business Inclusion Program and approves the updated Standards and Practice Manual for a period of six (6) years, commencing on the date of passage of this Resolution.

(Resolution No. 95-2023 adopted October 16, 2023)