



NORTHEAST OHIO AREAWIDE COORDINATING AGENCY

MEMORANDUM

TO: NOACA Board of Directors

FROM: Grace Gallucci, Executive Director

DATE: March 3, 2017

RE: **Resolution 2017-014 – Disadvantaged Business Enterprises (DBE) Program Policy Revisions**

ACTION REQUESTED

The Board of Directors is asked to approve Disadvantaged Business Enterprises (DBE) policy revisions.

The Finance and Audit Committee and Policy Committee support this recommendation.

BACKGROUND/JUSTIFICATION FOR CURRENT ACTION

Primary objectives of the United States Department of Transportation's (USDOT) Disadvantaged Business Enterprise (DBE) program are to:

1. Ensure nondiscrimination in the award and administration of USDOT-assisted contracts through its highway, transit, and airport financial assistance programs; and
2. To create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts.

All recipients that meet the following categories and let USDOT-assisted contracts must have a DBE program established that meets the requirements of Title 49, Part 26 of the Code of Federal Regulations:

1. Federal Highway Administration (FHWA) primary recipients receiving funds authorized by a statute to which Part 26 applies.
 - NOACA is not a FHWA primary recipient, however it will be responsible for demonstrating that it has policies and procedures in place to ensure compliance with the Ohio Department of Transportation's (ODOT) DBE program requirements for NOACA let and administered FHWA assisted contracts.
2. Federal Transit Administration (FTA) recipients receiving planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds \$250,000 per Federal Fiscal Year.
 - NOACA is a recipient of defined FTA assistance and must have a DBE program in place should the agency or subrecipient project sponsors let FTA assisted prime contracts exceeding \$250,000 in a federal fiscal year.

NOACA's DBE program responsibilities apply only to federally-assisted contracts that are let and administered by the agency or its subrecipients. The Ohio Department of Transportation is responsible for DBE program requirements pertaining to consultant and/or construction contracts associated with transportation projects let and administered by ODOT or local public agencies that are funded through NOACA's capital infrastructure programs.

NOACA currently has an approved DBE policy and program, however it was last updated in 2001 and revisions are needed to make it current with federal and state regulatory changes. The NOACA DBE program and policy revisions will ensure compliance with current requirements, including:

- Overall Policy Statement
- DBE Liaison Responsibilities
- Goal Setting
- Good Faith Efforts
- Compliance and Enforcement
- Prompt Payment
- Monitoring and Reporting

This item was presented to the Finance and Audit Committee in August 2016 and the Policy Committee in October 2016 for information. Input from both committees has been utilized to draft final recommendations. The final draft was presented to the Finance and Audit Committee in November 2016 and the Policy Committee in February 2017 for recommendation of approval.

FINANCIAL IMPACT

There is no financial impact for this decision.

CONCLUSION/NEXT STEPS

With Board approval, the policy revisions will be implemented as stated. Staff will draft internal procedures for ensuring compliance with this policy utilizing the existing U.S. Department of Transportation DBE program plan template.

Attachments: Draft DBE Program Policy

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NOACA DISADVANTAGED BUSINESS ENTERPRISES (DBE) PROGRAM POLICY

The Northeast Ohio Areawide Coordinating Agency (NOACA) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. NOACA has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, NOACA has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of NOACA to ensure that DBEs as defined in part 26, have an equal opportunity to receive and participate in NOACA and DOT-assisted contracts. It is also our policy:

1. To ensure nondiscrimination in the award and administration of NOACA and DOT assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for NOACA and 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 NOACA and DOT assisted contracts;
6. To assist eligible firms to become DBE certified to be eligible to compete for NOACA and DOT assisted contracts.

The Director of Programming has been delegated as the DBE Liaison Officer. In that capacity, the Director of Programming 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 NOACA in its financial assistance agreements with the Department of Transportation.

NOACA has disseminated this policy statement to the NOACA Board of Directors 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. NOACA will post its DBE policy on its website, email it to all Board of Directors members and alternates, email it to all local communities and counties in our service area, and include it in language all posted RFPs henceforth.

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DISADVANTAGED BUSINESS ENTERPRISES (DBE) PROGRAM

NOACA will provide to ODOT and FTA updates to this policy and program that represent significant changes.

NON-DISCRIMINATION

NOACA will never exclude any person from participating in, deny any persons 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, NOACA 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.

NOACA does not use quotas in any way in the administration of this DBE program.

CERTIFICATION REQUIREMENTS

Only businesses certified as DBEs under the State of Ohio Unified Certification Program will be considered in meeting NOACA DBE program requirements. The Ohio UCP is a "one stop" certification process for the Federal DBE Programs in Ohio. The Ohio UCP consolidates all DBE firms certified by four different agencies into one centralized DBE Directory for US DOT funded contracts for Airport, Highways, and Public Transit. The four approved certification agencies are the Ohio Department of Transportation, the Greater Cleveland Regional Transit Authority, the City of Dayton and the Cleveland Hopkins International Airport. Non-Ohio firms and vendors that are certified in accordance with other state or local processes must seek certification through the Ohio UCP prior to award of a contract.

A listing of currently certified DBEs in Ohio can be accessed from the Ohio Unified DBE Directory at www.ohioucp.org. Potential DBEs may also access the website for information on how to become certified. To qualify for certification as a DBE, an applicant must meet the eligibility standards established in the federal regulations at 49 CFR Part 26 and 13 CFR Part 121.

GOAL SETTING

The following goal setting methodologies will be utilized, depending on the source of funding programmed for the contract or service:

FEDERAL HIGHWAY ADMINISTRATION (FHWA) ASSISTED CONTRACTS

NOACA must operate its DBE program under ODOT's FHWA-approved DBE program plan. NOACA will request a DBE goal on a contract by contract basis through the ODOT DBE Goal Setting Committee for all federally assisted contracts. The ODOT DBE Goal Setting Committee will assign a corresponding percentage of work to be performed by DBE businesses based on the following: availability of ready, willing, and able DBE certified firms, location of the project, work types on the project, and past participation on similar projects.

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. If the ODOT determined goal is 0% NOACA will not assign an individual contract goal, however will still encourage the use of DBE's to complete the work and will consider DBE participation for preference in the award of contracts.

FEDERAL TRANSIT ADMINISTRATION (FTA) ASSISTED CONTRACTS

As a direct recipient of FTA assistance, NOACA must have a DBE program if in any Federal fiscal year (FFY) the cumulative value of DBE program eligible contracts expected for award will exceed \$250,000 in Federal funds.

The following methods will be followed by NOACA to establish DBE goal setting for FTA assisted contracts:

- a. NOACA's DBE goal does not apply to vehicle purchases.
- b. NOACA is confident in the Greater Cleveland Regional Transit Authority's (GCRTA) DBE Goal calculation methods, which involve extensive public involvement and a comment period. Therefore, NOACA will adopt the most current GCRTA methodology and goal for applicable FTA contracts and subcontracts.
- c. NOACA will update this goal every three years once GCRTA updates their goal and plan.

The current GCRTA DBE goal setting is as follows:

The Federal Fiscal Year (FFY) runs from Sept. 1-Aug 31. Every three years, GCRTA proposes a DBE goal for all federally assisted contract expenditures in accordance with the following methodology:

- Before establishing the overall DBE goal, staff consults and seeks input from community organizations and interested parties that could be expected to have information and data concerning the availability of disadvantaged and non-disadvantaged businesses.
- A proposed overall DBE goal is calculated using a methodology approved by the FTA that considers the availability of ready, willing and able DBE firms to perform the work required on contracts GCRTA expects to award during a three-year period, as compared to the overall availability of firms to perform such work.
- The proposed goal is submitted to GCRTA Board of Trustees for consideration and approval. Once approved by the Board, the general public is informed of the proposed goal through a notice published in a newspaper of general circulation.
- The proposed goal and its rationale are available for public inspection and comment at GCRTA during normal business hours for 30 days after the notice appears.

NOACA LOCAL FUND ASSISTED CONTRACTS

NOACA will request a DBE goal on a contract by contract basis utilizing ODOT or GCRTA DBE goal setting processes, depending on the nature of the contract or service.

DBE LAISON OFFICER

NOACA has designated a DBE Liaison Officer (DBELO) in its Division of Programming. The DBELO is responsible for implementing all aspects of the DBE program, from policy to through reporting. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by NOACA in its financial assistance agreements with the

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Department of Transportation and Federal Transit Administration. The DBELO shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any FHWA or FTA assisted contract in administration of its DBE requirements. The DBELO has direct, independent access to the Executive Director concerning DBE program matters.

DBELO Responsibilities

The DBELO is responsible for developing, implementing and monitoring the DBE program in coordination with other appropriate officials. Duties and responsibilities include the following:

1. Monitors projects and reports data and other information as required by ODOT and FTA to ensure DBE program compliance.
2. Reviews contracts, purchase requisitions, and requests for reimbursement for compliance with this program.
3. Analyzes NOACA's progress toward goal attainment and identifies ways to improve progress.
4. Advises the Executive Director on DBE matters and achievement.

NOACA will disseminate this policy statement to the NOACA Board of Directors. NOACA will utilize its website as a medium for public information, i.e., RFP's and public announcements.

REQUIRED CONTRACT PROVISIONS

NOACA has signed the following assurances, applicable to all DOT-assisted contracts and their administration. The following language is required for inclusion in financial assistance agreements with all sub-recipients:

NOACA 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. The recipient'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 the [Recipient] 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.).

Per 49 CFR 26.13b, NOACA will ensure that the following language is also placed verbatim 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

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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.

PROMPT PAYMENT

NOACA will include the following clause in each DOT and FTA assisted prime contract:

The prime contractor agrees to pay each sub contractor under this prime contract for satisfactory performance of its contract no later than 30 days from the receipt of each payment the prime contractor receives from NOACA. The contractor shall also require that this contractual obligation be placed in all Subcontractor contracts that it enters into and further require that all Subcontractors place the same payment obligation in each of their lower tier contracts. If the invoice submitted to the Contractor (or Subcontractor) contains a defect or impropriety, the Contractor shall send written notification to the firm within fifteen days after receipt of the invoice. The notice shall contain a description of the defect or impropriety and any additional information necessary to correct the defect or impropriety. If the Consultant sends such written notification to the firm, the required payment date shall be thirty days after the Consultant receives a proper invoice.

The prime contractor agrees further to return retainage payments to each sub contractor within 30 days after the subcontractor's work is satisfactorily completed.

Any delay or postponements of payment from the 30-day period may occur only for good cause following written approval of NOACA.

Repeated failures to pay Subcontractors timely pursuant to this section will result in a finding by the NOACA that the Consultant is in breach of Contract and subject to all legal consequences that such a finding entails.

NOACA will monitor payments made to the DBE contractor/sub contractor prior to the reimbursement of each invoice to ensure that the determined goal is being achieved.

REQUIRED PROPOSAL NOTE:

To be inserted into NOACA contracts that are assisted with FHWA / FTA funds, when applicable:

It is the policy of NOACA, as required by the United States Department of Transportation (US DOT) that Disadvantaged Business Enterprises (DBEs) shall have equal opportunity to compete for this federally assisted contract and/or subcontract with another other contractor to perform the requested services. Consequently, the requirements of Title 49 CFR Part 26 will apply to this contract. If not a DBE itself, the Contractor must use its best efforts to solicit from and to utilize DBE subcontractors with meaningful minority groups and female representation among their employees. The Contractor must ensure that the DBE subcontractor(s) is performing a "commercially useful function" as defined in NOACA policy.

This proposal includes a **DBE Goal of X%**. At least this percent of the agreement shall be performed by certified DBE firms. The percentage goal may be met if the awarded Contractor is DBE certified. If the goal is 0% the Contractor is not required to perform an

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individual contract goal, however NOACA will still encourage the use of DBE's to complete the work and will consider DBE participation for preference in the award of the contract.

Only firms certified as DBE through a State's Unified Certification Program (UCP) will be counted toward meeting this goal. A listing of currently certified DBEs in Ohio can be accessed on the UCP website at www.ohioucp.org. Potential DBEs may also access the website to obtain information on how to become certified. To qualify for certification as a DBE, an applicant must meet the eligibility standards established in the federal regulations at 49 CFR Part 26 and 13 CFR Part 121. DBE certification must be in place at the time of contract award and throughout performance of the contract.

The Contractor must document the progress and efforts being made in securing the services of DBE subcontractors. In the event the Contractor is unable to meet the DBE goal placed on the contract, a request for a waiver of all or part of the goal may be made to NOACA. The written request must indicate a good faith effort was made to meet the goal.

The Contractor's proposal must include the percentage of work to be performed by each DBE subcontractor, and a description of the work to be performed by each. Contractor proposals that do not include the minimum percentage of DBE participation noted above, or that cannot demonstrate good faith efforts to include DBEs, will be rejected. If selected, the Contractor's price proposal shall reflect the required level of DBE participation, or provide an explanation of how the requirement will be met in later phases of the work.

GOOD FAITH EFFORTS

The Contractor must document the progress and efforts being made in securing the services of DBE subcontractors. In the event the Contractor is unable to meet the DBE Goal placed on a project, good faith efforts to secure DBE participation must be demonstrated. The written request must indicate a good faith effort was made to meet the goal and be sent to the DBE Liaison Officer, NOACA Division of Programming, 1299 Superior Avenue, Cleveland, Ohio, 44114. There will be no extension of time for the project granted if the Contractor wishes to avail themselves of this process.

NOACA shall consider the following information and documentation when considering Good Faith Efforts (GFE) have been met:

1. Dollar value and % of DBE goal. Dollar value and % of waiver request.
2. Signed copy of each subcontract or purchase order agreement between the prime and DBE subcontractor utilized in meeting the contract goal.
3. Copy of dated written communication, fax confirmation, personal contact, follow up and negotiation with the DBE's.
4. Copy of dated written communication and/or fax confirmation that bidder solicited and provided DBE's with adequate information about the plans, specifications and requirements of the contract in a timely manner to assist them in responding to a solicitation.
5. Copy of dated written communication of each noncompetitive DBE quote that includes the dollar value of each reference item and work type.
6. Copy of dated written communication of DBE's that were not interested in providing a

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quote for the project.

7. Documentation of all negotiating efforts and reason for rejecting DBE bids for service.
8. Solicitations made by the Vendor/Consultant/Contractor for subcontracting opportunities and DBE quotes through associations, networks, or other appropriate methods of announcement.
9. Documentation of GFE to meet the DBE subcontract goal, by looking beyond the items typically subcontracted or consideration of subcontracting items normally performed by the prime as a way to meet the DBE goal.

NOACA will review the submitted documentation and issue a written decision within ten (10) business days.

COMMERCIALLY USEFUL FUNCTION

NOACA is required to monitor DBE contractors to ensure they are performing a Commercially Useful Function (CUF) on the project. A DBE is performing a CUF when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved with the DBE's employees. A DBE firm must have the proper North American Industry Classification System (NAICS) codes for the type of work they are performing. The DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the materials and installation (where applicable), and paying for the work components itself.

REPORTING

NOACA will report DBE participation to ODOT for FHWA assisted contracts and FTA for FTA assisted contracts on quarterly basis, using DOT Form 4630.

CONFIDENTIALITY

NOACA will safeguard from disclosure to third parties information that may reasonably be regarded as confidential proprietary business information, consistent with federal, state and local law. Notwithstanding any contrary provisions of state or local law, we will not release personal financial information submitted in response to the net worth requirements to a third-party (other than DOT/FTA) without written consent of the subcommittee.

DRAFT

**RESOLUTION 2017-014
(DBE PROGRAM POLICY
REVISIONS)**

**RESOLUTION OF THE BOARD OF DIRECTORS
OF THE
NORTHEAST OHIO AREAWIDE COORDINATING AGENCY**

WHEREAS, the Northeast Ohio Areawide Coordinating Agency (NOACA) is the Metropolitan Planning Organization (MPO) for the counties of Cuyahoga, Geauga, Lake, Lorain, and Medina, and the City of Cleveland; and the areawide water quality management agency for the same region; and

WHEREAS, Title 49, Part 26 of the Code of Federal Regulations defines requirements to be followed for the participation of Disadvantaged Business Enterprises (DBE) in United States Department of Transportation (US DOT) financial assistance programs; and

WHEREAS, the objectives of the United States Department of Transportation's (USDOT) Disadvantaged Business Enterprise (DBE) program are to 1. Ensure nondiscrimination in the award and administration of USDOT-assisted contracts, 2. Create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts; and

WHEREAS, funding recipients that let USDOT assisted contracts must comply with DBE program established that meets the requirements of Title 49, Part 26 of the Code of Federal Regulations; and

WHEREAS, in August, 2000, the Board of Directors approved a DBE policy, modified in 2011, that contains agency policies and procedures for administration of its DBE program responsibilities; and

WHEREAS, on November 2, 2014, US DOT announced Disadvantaged Business Enterprise: Program Implementation Modifications Rule that revised federal requirements associated with DBE program roles and responsibilities; and

WHEREAS, revisions are needed to the current DBE policy to ensure compliance with federal regulations and Ohio Department of Transportation (ODOT) program management procedures; and

WHEREAS, staff will develop internal procedures for ensuring compliance with the revised policy utilizing US DOT DBE program plan guidance.

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the Northeast Ohio Areawide Coordinating Agency, consisting of 45 principal officials serving general purpose local governments throughout and within the counties of Cuyahoga, Geauga, Lake, Lorain, and Medina that:

Section 1: The Disadvantaged Business Enterprises (DBE) Policy revisions, as defined in the attached policy document is approved.

Section 2: The Executive Director is authorized to implement the revised policy.

Section 3: The Executive Director is authorized to transmit certified copies of this resolution to appropriate federal, state, and local agencies.

Certified to be a true copy of a Resolution of the Board of Directors of the Northeast Ohio Areawide Coordinating Agency adopted this 10th day of March 2017.

Secretary: _____

Date Signed: _____

3/10/17