

# FTA

FEDERAL TRANSIT ADMINISTRATION

## OHIO DEPARTMENT OF TRANSPORTATION DBE Program Compliance Review

March 2016  
Federal Transit Administration



U.S. Department of Transportation  
Federal Transit Administration

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## Executive Summary

**Objective and Methodology** – This report details the findings of a Compliance Review of Ohio Department of Transportation’s (ODOT) Disadvantaged Business Enterprise (DBE) program implementation. The Compliance Review examined this agency’s DBE program procedures, management structures, actions, and documentation. Milligan collected documents and information from the Federal Transit Administration (FTA) and ODOT. In addition, Milligan interviewed the following entities as part of this review: ODOT officials, interested stakeholders, prime contractors and subcontractors. The three-day review included interviews, assessments of data collection systems, and review of program and contract documents.

### **ODOT’s DBE Program includes the following positive program elements –**

#### **Positive Program Elements**

- ODOT has created the Division of Opportunity, Diversity & Inclusion, and relocated the Office of Small & Disadvantaged Business Enterprise Program to the unit, to more effectively administer the DBE Program.
- ODOT has restructured the DBE Program administration to include compliance oversight for Transit Projects.

### **The Program has the following administrative deficiencies –**

#### **Administrative Deficiencies**

- ODOT’s Organization Chart does not indicate the DBELO’s direct and independent access to the agency’s highest ranking official.
- ODOT does not have mechanisms in place to monitor DBE participation and enforce legal remedies.
- ODOT’s semiannual DBE reports have been submitted late.

### **The Program has the following substantive deficiencies –**

#### **Substantive Deficiencies**

- ODOT does not have an approved DBE Program Plan.
- ODOT does not have a procedure for monitoring subrecipient contracts.
- ODOT did not meet DBE goals, and has not conducted the required shortfall analysis, or completed a corrective action plan.

ODOT’s has not met its overall goal projection for race-neutral DBE participation over the past three fiscal years. ODOT’s reported DBE participation data for FFY 2011, 2012, and 2013 reflected goal attainments of 5.62%, 8.08%, and 7.52%, respectively. The triennial goal for the three-year reporting period was set at 27.6%. ODOT was unable to present any cause that contributed to the low DBE goal attainment. For FFYs 2014 – 2016, ODOT’s DBE goal was reduced to 7.7%, and remained 100% race neutral. FFY 2014 goal attainment was 2.85%, and the first half of FFY 2015 was 0%. According to ODOT’s goal methodology, three factors contribute to the goal reduction: (1) a different methodology used for developing the median goal, (2) changes in Ohio census population, and (3) a change in ODOT’s contract consultant base, known as the Ohio Technical Assistance Program (OTAP).

Notwithstanding, this report highlights several steps to help ensure the DBE program is implemented in good faith.

## I. General Information

This chapter provides basic information concerning this Compliance Review of Ohio Department of Transportation (ODOT). Information on ODOT, the review team, and the dates of the review are presented below.

<b>Grant Recipient:</b>	Ohio Department of Transportation
<b>City/State:</b>	Columbus, Ohio
<b>Grantee Number:</b>	1225
<b>Executive Official:</b>	Jerry Wray, Director
<b>Onsite Liaison:</b>	David Walker, Compliance Officer
<b>Report Prepared By:</b>	Milligan & Company, LLC
<b>Dates of Onsite Visit:</b>	November 16 – 18, 2015
<b>Compliance Review Team Members:</b>	Lillie Claitt, Lead Reviewer Habibatu Atta Allison Reed

## 2. Jurisdiction and Authorities

The Federal Transit Administration (FTA) Office of Civil Rights is authorized by the Secretary of Transportation to conduct Civil Rights Compliance Reviews. The reviews are undertaken to ensure compliance of applicants, recipients, and subrecipients with Section 13 of the Master Agreement, Federal Transit Administration M.A. (21), October 1, 2014, and 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs."

The Ohio Department of Transportation (ODOT) is the recipient of one or more federal transit grants, loans, and/or contracts that exceed \$250,000. Hence, ODOT is subject to the Disadvantaged Business Enterprise (DBE) compliance conditions associated with the use of FTA financial assistance pursuant to 49 CFR Part 26. These regulations define the components that must be addressed and incorporated in ODOT's DBE program and were the basis for this Compliance Review.

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## 3. Purpose and Objectives

### 3.1 Purpose

The FTA Office of Civil Rights periodically conducts discretionary reviews of grant recipients and sub-recipients to determine whether they are honoring their commitment, as represented by certification to FTA, to comply with 49 CFR Part 26. FTA has determined that a Compliance Review of ODOT's DBE Program is necessary.

The primary purpose of the Compliance Review is to determine the extent to which ODOT has implemented 49 CFR Part 26, as represented in its DBE Program Plan. This Compliance Review is intended to be a fact-finding process to: (1) assess ODOT's DBE Program Plan and its implementation; (2) make recommendations regarding corrective actions deemed necessary and appropriate; and (3) provide technical assistance.

This Compliance Review is not solely designed to investigate discrimination against individual DBE firms or complainants, or to adjudicate these issues on behalf of any party.

### 3.2 Objectives

The objectives of DOT's DBE regulations, as specified in 49 CFR Part 26, are to:

- Ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's transit financial assistance programs.
- Create a level playing field on which DBEs can compete fairly for DOT-assisted contracts.
- Ensure that the Department's DBE Program is narrowly tailored in accordance with applicable law.
- Ensure that only firms that fully meet the regulatory eligibility standards are permitted to participate as DBEs.
- Help remove barriers to the participation of DBEs in DOT-assisted contracts.
- Promote the use of DBEs on all types of federally-assisted contracts and procurement activities conducted by recipients.
- Assist with the development of firms that can compete successfully in the marketplace outside the DBE Program.
- Provide appropriate flexibility to recipients of federal financial assistance in establishing and providing opportunities for DBEs.

The objectives of this Compliance Review are to:

- Determine whether ODOT is honoring its commitment to comply with 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in DOT Programs."
- Examine the required components of ODOT's DBE Program Plan against the compliance standards set forth in the regulations, DOT guidance, and FTA policies, and document the compliance status of each component.
- Gather information and data regarding the operation of ODOT's DBE Program Plan from a variety of sources, including DBE program managers, other ODOT management personnel, DBEs, prime contractors, and other stakeholders.



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## 4. Background Information

The purpose of this section is to provide an understanding of ODOT's operations and scale. The section highlights ODOT's services, budget, and the history of its DBE program.

### 4.1 Introduction to ODOT and Organizational Structure

The Ohio Department of Transportation is the administrative department of the Ohio state government responsible for developing and maintaining all state and federal highways, passenger and freight rail systems, bikeways, aviation, waterways, and port facilities for transporting people and goods throughout the state. Working with federal and local governments, the department is charged with maintaining more than 130,000 miles of Ohio highway and planning, designing, and constructing new transportation systems to foster economic growth and personal travel. The Director of Transportation is part of the Governor's Cabinet.

ODOT has divided the state of Ohio into twelve districts in order to facilitate regional development. The districts include: Lima, Bowling Green, Ashland, Akron, Jacksontown, Delaware, Sidney, Lebanon, Chillicothe, Marietta, New Philadelphia, and Cleveland. Each district is responsible for the planning, design, construction, and maintenance of the state and federal highways in their region.

Ohio has a statewide transportation plan, known as Access Ohio 2040. It is Ohio's long-range, multi-modal transportation plan, which establishes ODOT's framework for investment in Ohio's transportation system for at least twenty years. Access Ohio considers all modes of Ohio's transportation system and interconnectivity, and addresses the future needs of Ohio's airports, bicycle and pedestrian facilities, highways and bridges, water ports and inter-modal connectors, public transit and railroads. The plan was developed with the involvement of Ohio's transportation providers, local and regional government agencies, including Ohio's seventeen Metropolitan Planning Organizations (MPOs), numerous public interest groups, and the citizens of Ohio.

The Ohio Revised Code (ORC) empowers ODOT to be the agency responsible for administering the FTA Sections 5310, 5311, 5316, 5317 and 5339 programs. The ORC designated the Office of Transit within ODOT to administer these programs. The Office of Transit staff manages the day-to-day activities of the 5310, 5311, 5316, 5317 and 5339 programs, including technical assistance, planning, grant administration, monitoring, operations, maintenance programs, and ODOT's term contract purchases for transit vehicles.

ODOT has 190 Section 5310 subrecipients. The Section 5310 program is implemented to offer capital grants to private non-profit corporations and selected public bodies for the purpose of assisting those organizations in meeting the special transportation needs of elderly persons and persons with disabilities.

ODOT has 33 Section 5311 subrecipients, consisting of both public entities and private non-profit entities that provide demand-response, fixed-route, and route-deviated services. There are also 13 Section 5316 (JARC) subrecipients, 10 Section 5317 (New Freedom) subrecipients, and 22 Section 5339 subrecipients.

ODOT's DBE Program is administered by the Office of Small and Disadvantaged Business Enterprise (OSDBE), and is located within the Division of Opportunity, Diversity & Inclusion (DODI). In addition to the OSDBE, the DODI comprises the Office of Equal Opportunity, and the Office of Outreach. The DODI is headed by the Deputy Director who works to increase diversity and inclusion opportunities for all stakeholders, including those seeking to do business with ODOT, or seeking employment with ODOT.

The OSDBE has a DBE Program administrator who is the designated DBELO. The office is authorized for twenty-one staff members, which include a team of field staff responsible for performing contract compliance in the twelve districts. The OSDBE is responsible for all aspects of the DBE Program for FTA and FHWA compliance. The responsibilities include DBE certification (as a member of the Ohio Unified Certification Program), SBE certification, DBE Supportive Services, Mentor-Protégé Program, goal setting, and pre-award / post award contract compliance.

ODOT and the Ohio Turnpike and Infrastructure Commission have jointly commissioned a 2015 Disparity Study to assess the opportunities available for small, minority- or women-owned contractors and suppliers in the current market. The services of BBC Research & Consulting and Exstare Federal Services Group have been retained to conduct the study.

## 4.2 Budget and FTA-Assisted Projects

ODOT's budget comprises state and federal funds. The FFY 2016 budget is as follows:

Funding Source		Funding Amount	
Federal - FTA (Non-ARRA)		Subtotal Total:	\$ 32,648,205
Planning:	\$ 1,273,400		
Capital:	\$ 6,744,598		
Operating:	\$ 24,630,207		
State:		Subtotal Total:	\$ 7,300,000
		Total Funding Sources:	\$ 39,948,205

ODOT's approved triennial goal submission for FFY 2014 – 2016 indicated that 100% of the anticipated procurements and contracting opportunities for the Office of Transit and its subrecipients will be for professional services. According to ODOT's Transit Budget Appropriation Authority for FFY 2016, several FTA-assisted projects are currently underway, to include:

- Office of Transit
  - Transit Technical Assistance & Studies Consultant Contracts
- Subrecipients
  - Rural Transit Personal Service Consultant Contracts
  - Enhanced Mobility Personal Consultant Service Contracts
  - Statewide and Non-Metropolitan Planning & Research Consultant Contracts
  - State Safety Oversight Program Consultant Contracts

## 4.3 DBE Program

ODOT's DBE Program is established for both FTA and FHWA compliance. In June 2015, ODOT designated Ms. Deborah Green, as Acting Administrator, Office of Small and Disadvantaged Business Enterprise (OSDBE), and the agency's DBE Liaison Officer (DBELO). According to ODOT's notification to the FHWA, Ms. Green is responsible for implementing all aspects of the DBE Program including supervision of staff responsible for administering the program. There was no evidence that notification of the change was provided to the FTA. The notification stated Ms. Green has direct and independent access to Director, Jerry Wray, regarding DBE Program issues. ODOT's DBE Program Plan states that the DBELO or his/her designee is responsible for developing, implementing and monitoring the DBE Program in coordination with other officials. Currently, the OSDBE has twenty-one authorized staff positions (including the DBELO) to administer the DBE Program.

Some of Ms. Green's duties and responsibilities include: directing the operations of ODOT's SBE/DBE Program, supervising the work of support staff, coordinating with the goal setting committee in establishing overall and contract goals, overseeing monitoring activities, collecting data for DBE reporting, Ohio UCP participation, overseeing ODOT's DBE certification process, overseeing the Supportive Services and Mentor Protégé Programs, and advising the Director and Deputy Director on DBE Program matters and accomplishments.

According to the FHWA's December 2014 review of ODOT's DBE Program, the OSDBE's location within the Division of Construction Management created a conflict of interest for the proper implementation of the DBE Program, and cited the organizational structure as a deficiency. In response to the FHWA's required correction action, on July 1, 2015, ODOT created the Division of Opportunity, Diversity and Inclusion (DODI), and relocated the OSDBE to the new division. The DODI was headed by then Acting Deputy Director, Kimberly Watson. Effective January 11, 2016, Lauren Purdy was named as the Deputy Director of DODI.

Based upon the review of ODOT's semiannual reports for FFY 2011 - 2013, and the current FFY 2014 - 2016 DBE goal, the agency is implementing a 100% race neutral DBE Program. However, ODOT has not achieved its race-neutral goals over the past five fiscal years.

ODOT and the Ohio Turnpike and Infrastructure Commission have jointly commissioned a 2015 Disparity Study to assess the opportunities available for small, minority- or women-owned contractors and suppliers in the current market. The study began in February 2015, and is expected to be completed within twelve months. The services of BBC Research & Consulting and Exstare Federal Services Group have been retained to conduct the study.

## 5. Scope and Methodology

### 5.1 Scope

The team reviewed implementation of the following DBE program components specified by the FTA in this report:

- A DBE program in conformance with 49 CFR Part 26 that has been submitted to FTA
- A signed policy statement expressing a commitment to ODOT's DBE program, that states its objectives, and outlines responsibilities for implementation [49 CFR 26.23]

- Designation of a DBE liaison officer and support staff as necessary to administer the program, and a description of the authority, responsibility, and duties of the officer and the staff [49 CFR 26.25]
- Efforts made to use DBE financial institutions, by ODOT as well as prime contractors, if such institutions exist [49 CFR 26.27]
- A DBE directory including addresses, phone numbers and types of work performed, made available to the public and updated at least annually [49 CFR 26.31]
- Determination that overconcentration does (not) exist and address this problem, if necessary [49 CFR 26.33]
- Assistance provided to DBEs through Business Development Programs to help them compete successfully outside of the DBE program [49 CFR 26.35]
- An overall goal based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on a DOT-assisted contract; and proper mechanisms to implement the DBE goal [49 CFR 26.43 – 26.53]
- A shortfall analysis and corrective action plan when ODOT did not achieve its DBE goal [49 CFR 26.47]
- A process that ensures transit vehicle manufactures (TVMs) comply with the DBE requirements before bidding on FTA-assisted vehicle procurements. The process may include ODOT seeking FTA approval to establish a project-specific goal for vehicle purchases [49 CFR 26.49]
- A non-discrimination and a prompt payment clause is in all FTA-assisted contracts and a prompt payment verification process [49 CFR 26.7, 26.13, and 26.29]
- A certification process to determine whether potential DBE firms are socially and economically disadvantaged according to the regulatory requirements. The potential DBE firms must submit the standard DOT application and the standard DOT personal net worth form, along with the proper supporting documentation [49 CFR 26.65 -26.71]
- The certification procedure includes document review, onsite visit(s), eligibility determinations consistent with Subpart D of the regulations, interstate certification review process, and a certification appeals process [49 CFR 26.83 and 26.86]
- Implementation of appropriate mechanisms to ensure compliance with the DBE requirements by all program participants and appropriate breach of contract remedies. [49 CFR Part 13]. The DBE program must also include monitoring and enforcement mechanisms to ensure that work committed to DBEs at contract award is actually performed by DBEs [49 CFR Part 26.37]. Reporting must include information on payments made to DBE firms [49 CFR 26.11, 26.55].

## 5.2 Methodology

The initial step of this Compliance Review consisted of consultation with the FTA Office of Civil Rights and a review of available information from FTA's TEAM System and other sources. After reviewing this information, the team coordinated potential dates for the site visit.

The FTA Office of Civil Rights sent a notification letter to ODOT that informed the agency of the upcoming visit, requested necessary review documents, and explained the areas that would be covered during the onsite visit. The letter also informed ODOT of staff and other parties that would potentially be interviewed.

Before conducting the onsite visit, FTA requested ODOT to provide the following documents:

- Most current DBE Program plan
- DBE goal methodology submissions
- DBE semiannual reports and/or quarterly ARRA reports for the past three years
- A Memorandum of Understanding or similar documents indicating ODOT's participation in the Unified Certification Program (UCP)
- A list of FTA-assisted contracts awarded during the current and previous fiscal years
- A list of DBE firms that have worked on FTA-assisted projects sponsored by ODOT
- Documentation showing the "Good Faith Efforts" criteria and review procedures established by ODOT
- Procedures for monitoring all DBE program participants to ensure compliance with the DBE requirements, including but not limited to, a prompt payment verification process, a process for ensuring work committed to DBEs is actually performed by DBEs, and response to any DBE complaints against the agency or its prime contractors during a specified time period.

The onsite DBE Compliance Review of ODOT took place from November 16 to 18, 2015. An opening conference was conducted at the beginning of the Compliance Review with FTA representatives, ODOT staff, and the review team. The following people attended the meeting:

#### **Federal Transit Administration**

Janelle Hinton	FTA Program Analyst
Antoinette Davis	FTA Equal Opportunity Specialist
Jennifer Riess	FTA Equal Opportunity Specialist

#### **Federal Highway Administration**

<b>Rachyl Smith</b>	<b>Civil Rights Program Manager</b>
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#### **Ohio Department of Transportation**

David Walker	Compliance Officer
Dave Seech	Transit Manager
Justin Steele	Management Analyst
Lori Spencer	Federal Program Coordinator
Juana Hostin	Urban Transit Coordinator
Deborah Green	Administrator, Office of Small & Disadvantaged Business Enterprise
Aisha Powell	Assistant Legal Counsel
Skip Dunkle	Transit Manager
Lauren Purdy	Administrator, Office of Contract Sales
Chuck Dyer	Transit Administrator
Michael Sanders	Certification Analyst

#### **Milligan & Company, LLC**

Lillie Claitt	Lead Reviewer
Sandra Swiacki	Director
Habibatu Atta	Reviewer
Allison Reed	Reviewer

Following the opening conference, the review team examined ODOT's DBE Program Plan and other documents submitted by the DBE Liaison Officer. The team then conducted interviews with ODOT regarding DBE program administration, DBE goal implementation, recordkeeping, monitoring, and enforcement. These interviews included staff from its diversity, procurement, legal and finance offices. The review team then selected a sample of contracts and reviewed their DBE elements. A sample of DBE certifications were reviewed to see if the requirements were met. The review team also conducted additional interviews with prime contractors, subcontractors, and interested parties.

At the end of the review, FTA representatives, ODOT staff and the review team convened for the final exit conference and discussed initial findings and corrective actions. Attending the conference were:

#### **Federal Transit Administration**

Anita Heard	FTA Equal Opportunity Specialist
Janelle Hinton	FTA Program Analyst
Antoinette Davis	FTA Equal Opportunity Specialist
Jennifer Riess	FTA Equal Opportunity Specialist

#### **Ohio Department of Transportation**

David Walker	Compliance Officer
Dave Seech	Transit Manager
Justin Steele	Management Analyst
Lori Spencer	Federal Program Coordinator
Juana Hostin	Urban Transit Coordinator
Deborah Green	Administrator, Office of Small & Disadvantaged Business Enterprise
Aisha Powell	Assistant Legal Counsel
Michael Sanders	Certification Analyst
Chuck Dyer	Transit Administrator
Skip Dunkle	Transit Manager
Lauren Purdy	Administrator, Office of Contract Sales
Jennifer Townley	Deputy Director of Planning
Kimberly Watson	Acting Deputy Director DODI

#### **Milligan and Company, LLC**

Lillie Claitt	Lead Reviewer
Habibatu Atta	Reviewer
Allison Reed	Reviewer

Following the site visit, the review team completed a draft and final report and transmitted them to ODOT for comments. The final report incorporates ODOT's responses and identifies the remaining open corrective actions.

### **5.3 Stakeholder Interviews**

This section discusses information gathered during interviews with community representatives, stakeholder groups, and contractors regarding ODOT's DBE Program.

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Prior to the onsite, the review team interviewed two of ODOT's prime contractors awarded contracts to perform Transit Technical Assistance & Studies. The contractors are RLS & Associates, Inc. (DBE), Project #17868, and Lakatos Group, LTD (DBE), Project #17869. The interview questions included:

- *How is DBE work solicited?*
- *What is your contracting experience with the organization?*
- *Give a brief description of your current/active contract.*
- *What is the dollar value of your contract?*
- *What are the payment terms?*
- *How much have you been paid to date?*
- *Has the grantee conducted any onsite monitoring regarding DBE participation on the contract?*
- *Have there been any contract issues?*

Contractor A stated that DBE work is solicited through an RFP process. The Contractor stated that ODOT has conducted onsite monitoring regarding DBE participation on the contract. No retainage is being withheld from the DBE on the project, and subcontractors are paid directly after receiving payment from ODOT. The Contractor indicated that it has not experienced any contract performance or payment issues.

Contractor B stated that ODOT solicits every two years for technical services to support public transit. The Contractor requires interested subcontractors to present their qualifications for contract work. When ODOT sends out a request for qualifications, the firm responds. The Contractor stated that as the DBE prime contractor, there was ongoing project related communication with ODOT throughout the contract term. Contractor B noted that oftentimes subcontractors are paid out of company funds prior to being paid by ODOT. The Contractor stated that on occasion, ODOT would wait 30 days to pay the firm, and no retainage is withheld.

The two prime contractors interviewed were cooperative in providing contract and invoice payment information for the review team's examination. Details of the information reviewed are discussed later in this report.

The review team also contacted two stakeholders from ODOT's goal setting public participation meeting sign-in sheet regarding their interaction with ODOT on DBE Program issues.

The interview questions included:

1. *Are you familiar with the agency's DBE Program?*
2. *Have you been requested to participate in the development of or comment on the agency's DBE goal?*
3. *Is your organization made aware of contracting/subcontracting opportunities on the agency's contracts? If so, how?*
4. *How often is your organization contacted to provide referrals for the agency's contracting opportunities?*
5. *Do you participate in any outreach efforts organized by the agency?*
6. *What is your view of the effectiveness of the agency's DBE Program?*
7. *Are you aware of any concerns about the DBE Program from members?*

8. *Do you have any suggestions for the agency to improve their DBE Program?*

The representatives noted their firm's familiarity with ODOT's DBE program. The representatives stated that they receive solicitations from majority firms where there is a requirement for DBE participation on contracts, or if there are subcontracting opportunities. Both firms noted that they receive solicitations a few times per year.

Firm A stated that ODOT's DBE program is very effective, and the company has participated in the program for many years. The Firm suggested that ODOT's DBE program could include more communication and involvement, such as group participation and creating opportunities for working together with other firms, as opposed to always having to work individually.

Firm B stated that it has been involved in the DBE Program for many years. The Firm stated that the DBE Program is not very effective, as they have not seen any return on their participation in either the Mentor/Protégé Program or the Capacity Building Program over the past three years. The Firm stated that participating in these programs requires time and effort that puts extra strain on small firms. The Firm believes that there should be incentives, such as extra credit to encourage majority firms to seek out DBEs.



## 6. Findings and Advisory Comments

This section details the findings for each area pertinent to the DBE regulations (49 CFR Part 26) outlined in the Scope and Methodology section above. For each area, an overview of the relevant regulations and a discussion of the regulations as they apply to ODOT's DBE program are provided below. Corrective actions and a timetable to correct deficiencies for each of the requirements and sub-requirements are also presented below.

Findings are expressed in terms of "deficiency" or "no deficiency." Findings of deficiency denote policies or practices that are contrary to the DBE regulations or matters for which FTA requires additional reporting to determine whether DBE compliance issues exist.

Findings of deficiency always require corrective action and/or additional reporting, and will always be expressed as:

- A statement concerning the policy or practice in question at the time of the review
- A statement concerning the DBE requirements being violated or potentially being violated
- A statement concerning the required corrective action to resolve the issue.

Advisory comments are statements detailing recommended changes to existing policies or practices. The recommendations are designed to ensure effective DBE programmatic practices or otherwise assist the entity in achieving or maintaining compliance.

### 6.1 DBE Program Plan

#### Basic Requirement

(49 CFR Part 26.21): Recipients must have a DBE program meeting the requirements of 49 CFR Part 26. The DBE Program Plan outlines the agency's implementation of the DBE Program. Recipients do not have to submit regular updates of DBE programs. However, significant changes in the program must be submitted for approval.

#### Discussion

During this compliance review, deficiencies were found with the requirement for DBE Program Plan.

ODOT does not have an approved DBE Program Plan. According to TEAM, ODOT submitted a DBE Program Plan on August 1, 2012, which is currently listed in review status with the FTA. A copy of the 2012 plan is not in TEAM, and ODOT was unable to provide a copy of the document. Although TEAM contains a memorandum dated August 22, 2012, indicating ODOT's resubmitted DBE Small Business Element was approved by the FTA and FHWA, a copy of that approved document is also not listed in TEAM.

In response to the request for documents in preparation for the review, ODOT provided a DBE Program Plan, dated 2014, and a Small Business Element Plan dated May 11, 2015. There is no evidence that the 2014 plan was submitted to the FTA; however, ODOT provided a copy of the FHWA's letter dated June 1, 2015, approving ODOT's revised Small Business Element (from its original 2012 submission). There is no documentation or correspondence pertaining to

ODOT's revisions to the original 2012 Small Business Plan prior to the FHWA's June 2015 approval.

The review team found that ODOT's 2014 DBE Program Plan contains required elements set forth in the DBE regulations, but does not include requirements for both FHWA and FTA compliance. Sections that were deficient included:

- §26.3 does not indicate that ODOT is a recipient of federal transit funds.
- §26.51 – Meeting Overall Goals/Contract Goals. This section includes §26.51(d-g) pertaining to contract goal requirements, and excludes §26.51(a-c) pertaining to race neutral requirements, which is applicable to ODOT's transit operations.
- §26.53 – Good Faith Efforts. This section references Proposal Note (PN) 013-04/18/2014 – Disadvantaged Business Enterprise Requirements, which is included in solicitations. It does not include pre-award documentation/commitments required to determine that a bidder has met a contract goal or submitted adequate good faith efforts. The section contains the procedure for the waiver of a goal, and the reconsideration process; sanctions for failure to demonstrate good faith efforts; and post-award good faith efforts requirements when a DBE is replaced on a contract, and termination of a DBE subcontractor.

By letter dated June 10, 2015, ODOT informed the Federal Highway Administration that it has designated an Acting DBE Liaison Officer. Ms. Deborah M. Green is now the Acting Administrator, Office of Small and Disadvantaged Business Enterprise, responsible for implementing all aspects of the DBE Program, including supervision of staff responsible for administering the program. The letter states that Ms. Green has direct and independent access to the Director, effective immediately.

In July 2015, ODOT implemented an additional change in the program by creating the Division of Opportunity, Diversity & Inclusion, which comprises the Office of Small & Disadvantaged Business Enterprise, the Office of Equal Opportunity and the Office of Outreach. ODOT stated that the change is an effort to promote diversity and provide equitable opportunities both internally and externally.

### **Corrective Actions and Schedule**

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil Rights an updated DBE Program Plan that contains all required sections in their entirety, and incorporates requirements for federal transit compliance.

## **6.2 DBE Policy Statement**

### **Basic Requirement**

(49 CFR Part 26.23): Recipients must formulate and distribute a signed and dated DBE policy, stating objectives and commitment to the DBE program. This policy must be circulated throughout the recipients' organization and to the DBE and non-DBE business communities.

## Discussion

During this compliance review, deficiencies were found with the requirement for Policy Statement. ODOT's Policy Statement included in the 2014 DBE Program Plan states the objectives and commitment to the DBE Program, is signed by the Director, and dated July 11, 2014. The Policy Statement designates the Deputy Director, Division of Construction as the DBE Liaison Officer, responsible for overseeing the implementation of all aspects of the DBE Program, and states that the Administrator of the Office of Small & Disadvantaged Business Enterprise is responsible for implementing the DBE Program.

The DBE Program provides a link to ODOT's policy statement, located on the Division of Construction Management website. When the link is accessed, the document presented is a policy not signed by ODOT's Director or dated. There was no evidence that the organization's policy statement was circulated internally or externally.

The policy statement must be updated to include ODOT's recent change in 2015, relocating the Office of Small & Disadvantaged Business Enterprise to the newly created Division of Opportunity, Division and Inclusion.

## Corrective Actions and Schedule

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil Rights evidence that the Policy Statement is updated with current information reflecting the relocation of the Office of Small and Disadvantaged Business Enterprise, incorporated in the revised DBE Program, a signed copy posted on ODOT's website, and disseminated internally and externally.

## 6.3 DBE Liaison Officer

### Basic Requirement (49 CFR Part 26.25)

Recipients must have a designated DBE Liaison Officer (DBELO) who has direct and independent access to the CEO. This Liaison Officer is responsible for implementing all aspects of the DBE program and must have adequate staff to properly administer the program.

## Discussion

During this compliance review, deficiencies were found with the requirement for DBE Liaison Officer.

The DBE Program identifies two individuals who share program administration duties. The Deputy Director, Division of Construction Management, is designated as DBELO, with direct and independent access to the Director concerning DBE matters, and the Administrator of the Office of Small & Disadvantaged Business Enterprise is responsible for implementing the DBE Program. The organization chart exhibited in the DBE Program Plan displays the Deputy Director's direct and independent access to the Director. The Small and Disadvantaged Business Enterprise, Construction Administration, Contracts Sales, and Materials Management offices report to the Deputy Director, Construction Management.

According to the FHWA's December 2014 review of ODOT's DBE Program, the structure of the Division of Construction Management, and the Deputy Director's associated responsibilities, the DBELO must balance the needs of the DBE program with the demands of ODOT's efficient construction management process, which creates a conflict of interest for competent DBE program administration.

At the time of the onsite, ODOT was in the process of implementing corrective actions identified from a December 2014 FHWA DBE Compliance Review. On June 10, 2015, ODOT informed FHWA that it had designated Ms. Deborah M. Green, Acting Administrator, Office of Small and Disadvantaged Business Enterprise (OSDBE), effective immediately. The notice stated, in her acting role Ms. Green is responsible for implementing all aspects of the DBE Program. On July 1, 2015, ODOT created the Division of Opportunity, Diversity and Inclusion (ODI), and relocated OSDBE and the DBELO position from the Division of Construction Management to the new division. At the time of the onsite, Ms. Green was in the DBELO position for less than 6 months.

At the onsite, an updated organization chart was provided displaying the reorganization of the OSDBE to the Division of Opportunity, Diversity and Inclusion (DODI). DODI has a Deputy Director that manages three offices, OSDBE, EEO, and Outreach. The updated chart does not indicate either the DBELO's or the Deputy Director's direct and independent access to Director Jerry Wray.

The DBELO reported to then Deputy Director, DODI, Kimberly Watson, and now reports to Deputy Director, DODI, Lauren Purdy. According to the position description, the DBELO plans, develops, and organizes all statewide policies and activities for the DBE Program to include:

- DBE and SBE Certification (Ohio UCP)
- DBE Supportive Services Program / Mentor-Protégé Program
- Organize goal methodology and committee
- Goal-setting for construction and consulting contracts
- Oversee contractor compliance on ODOT federally funded projects in districts
- Provide direction to the Contractor Compliance Manager and District Contractor Compliance Officers relating to contractor compliance functions

The DBELO has a staff of twenty employees to administer the DBE Program (eighteen full-time, and two part-time):

- Administrative Assistant - to the Administrator.
- Contract Compliance Manager - manages all Contractor Compliance Officers in Districts and Contractor Compliance Liaison in ODOT's Central Office.
- Contract Compliance Liaison – reviews and approves DBE participation plans, evaluates and approves good faith efforts, documents and audits goal attainments.
- District Contract Compliance Officers (13) - monitors prevailing wage and DBE commercially useful function activities, conducts project onsite visits, reviews certified payroll reports, daily reports and logs, and various other reports.

- Certification Analysts – conducts SBE and DBE certification reviews.
- DBE Supportive Services Specialist – coordinates and assists the Supportive Services and Mentor-Protégé Programs.
- Certification Analysts Assistants (2 part-time) – input and maintain DBE certification and annual affidavit information in the certification management system.

The review team conducted interviews with ODOT staff regarding their involvement in the DBE Program and support of the DBELO. The departments included Project Management, Procurement, Grants Management, Legal, and IT Support. Each representative expressed his or her support of the DBE Program, and a positive working relationship with the new DBELO. However, each representative's DBE Program experience was primarily in highway contracting.

A telephone interview was conducted with the Contract Compliance Manager (District 8-Lebanon) regarding project management. The Manager stated that she is not involved in Transit's goal-setting process, but works with the project managers when conducting DBE compliance reviews. She stated that if there are issues on site, the DBELO is notified, and if required, the Legal Department is also notified. The Manager supervises ten employees responsible for performing contract monitoring functions. One direct report is responsible for the input of monitoring data in ODOT's AASHTOWare Project - Civil Rights and Labor (CRL) system. She stated that additional DBE training is needed for the district Contractor Compliance Officer positions to be more effective.

The Procurement Manager stated that he sits on the goal-setting committee for highway funded contracts but has not been involved on transit contracts. He stated that he purchases goods and services, manages the procurement cycle, opens bids, determines responsiveness to bids, and forwards any DBE questions to the Office of Transit.

The Grants Manager stated that she manages all grants, obligations, and subrecipient disbursements. The Grants Manager is not involved in Transit's goal setting process. She manages the federal and state budgets, and accesses TEAM to submit progress/milestone reports.

The Legal Department representative stated that she has not worked with Transit on the goal-setting committee. When issues are presented, the Legal Department provides advice. She stated that Legal works with the Contractor Compliance Manager and District Contract Compliance Officers in reviewing contract clauses. She stated that there have not been any actions, debarments or suspensions against a contractor on the Transit side.

### **Corrective Actions and Schedule**

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil Rights evidence that the DBE Program Plan has been updated to include current DBELO information, and an organization chart displaying DBELO's direct, independent access to the Chief Executive Officer.

On February 24, 2016, ODOT submitted a revised organizational chart indicating the DBE Liaison Officer's direct and independent access to the Chief Executive Officer. This deficiency is now closed.

## **6.4 DBE Financial Institutions**

### **Basic Requirement (49 CFR Part 26.27)**

Recipients must investigate the existence of DBE financial institutions and make efforts to use them. Recipients must also encourage prime contractors to use these DBE financial institutions.

#### **Discussion**

During this compliance review, deficiencies were found with the requirement for DBE Financial Institutions.

ODOT has not identified minority or DBE financial institutions in its DBE Program. The DBE Program states that ODOT has thoroughly investigated the full extent of services offered by financial institutions owned and controlled by small and economically disadvantaged persons in Ohio. The DBE Program indicates that ODOT has knowledge of minority-owned credit unions, but ODOT was not able to provide the names of such institutions. ODOT's DBE Program states that it will explore opportunities to work with the minority-owned credit unions.

### **Corrective Actions and Schedule**

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil Rights evidence that it has developed a procedure to investigate the existence of DBE financial institutions, plans to utilize these institutions, and efforts to encourage their use by prime contractors.

## **6.5 DBE Directory**

### **Basic Requirement (49 CFR Part 26.31)**

A DBE directory must be available to interested parties, including addresses, phone numbers, and types of work each DBE is certified to perform. This directory must be updated at least annually and must be available to contractors and the public upon request.

#### **Discussion**

During this compliance review, no deficiencies were found with the requirement for DBE Directory.

ODOT is one of four certifying agencies for the state of Ohio. ODOT maintains the Ohio Unified Certification Program (OUCP) DBE Directory. The DBE Directory is a web based system and

allows secure access by the certifying agencies for input of DBE updates. The directory is updated daily, in real-time, and contains all required DBE information, which includes: the vendor's name, certification status, ethnicity, county, address, phone number, fax number, email, NAICS Code(s), and NAICS descriptions. The DBE Directory has a search option that provides a view of the selected DBE's certification certificate.

The link to the DBE Directory is clearly identified on ODOT's website under the heading, "Doing Business with ODOT".

## **6.6 Overconcentration**

### **Basic Requirement (49 CFR Part 26.33)**

The recipient must determine if overconcentration of DBE firms exists and address the problem, if necessary.

#### **Discussion**

During this compliance review, deficiencies were found with the requirement for Overconcentration.

ODOT has not conducted an analysis to determine if an overconcentration of DBE firms exists. According to the DBE Program, if the DBELO determines that DBE overconcentration exists in certain types of work that unduly burdens the participation of non-DBEs in that type of work, the DBELO will develop appropriate measures to address the overconcentration. The DBE Program identifies ODOT's measures not limited to:

- Developing ways to assist DBEs to move into non-traditional areas of work
- Vary the use of contract goals
- Work with prime contractors to find and use DBEs in other industry areas

The DBE Program does not indicate how, or how often ODOT will conduct an overconcentration analysis.

#### **Corrective Actions and Schedule**

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil Rights a process for conducting an overconcentration analysis, including how often the analysis will be conducted.

## **6.7 Business Development Programs**

### **Basic Requirement (49 CFR Part 26.35)**

The recipient may establish a Business Development Program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program.

#### **Discussion**

During this compliance review, no deficiencies were found with the requirement for Business Development Programs. However, an Advisory Comment is made regarding this requirement.

ODOT has a formal business development program but does not include transit construction contracts in the program. The program has been administered for highway construction contracts only.

The DBE Program states that ODOT has developed a number of program strategies to ensure the fullest possible participation of DBEs in its contracting opportunities. The agency provides outreach, technical assistance, and mentoring through its Supportive Services Program. The Supportive Services Program offers professional services such as technical training and tutoring reimbursement for ODOT-sponsored seminars and non-ODOT sponsored seminars.

The Mentor-Protégé Program has been developed as a permanent aspect of ODOT's DBE Program. It provides a comprehensive developmental program of hands-on training and assistance in all phases of the construction industry.

### **Advisory Comment**

It is recommended that ODOT include transit construction contracts in its Supportive Services and Mentor-Protégé Programs activities, should they have any in the future.

## **6.8 Determining/Meeting Goals**

### **A) Calculation**

#### **Basic Requirement (49 CFR Part 26.45)**

To begin the goal-setting process, the recipient must first develop a base figure for the relative available evidence to determine whether an adjustment is warranted. Adjustments are not required and should not be made without supporting evidence.

#### **Discussion**

During this compliance review, no deficiencies were found with the requirement for Calculation of Goal. However, an Advisory Comment is made regarding this requirement.

ODOT's Office of Transit established the agency's FFY 2014 – 2016 DBE goal. The agency's DBE goal is 7.7%, and is 100% race neutral. The goal methodology was initially submitted on July 26, 2013, and a revised methodology was submitted on September 20, 2013. The goal was approved by the FTA on October 28, 2013.

#### **Step One: Determining the Base Figure**

ODOT determined that 100% of its projected contracts for FFYs 2014 – 2016 would be in the area of professional services, totaling approximately \$22,767,038 in federal funds. The projection includes the Office of Transit, Transit Systems, and subrecipient contracts. NAICS Code 54161 – Management Consulting Services was identified as the appropriate category for the anticipated work.



ODOT's market area is within its twelve districts, which are identified as Lima, Bowling Green, Ashland, Akron, Jacksontown, Delaware, Sidney, Lebanon, Chillicothe, Marietta, New Philadelphia, and Cleveland. To determine the relative availability of ready, willing and able DBEs for Step One, ODOT summarized the total number of firms in the Ohio UCP DBE Directory, and the Census Bureau's County Business Patterns database. The Census Bureau search encompassed ODOT's metropolitan area, counties, and zip codes. The DBE Directory provided a total of 309 firms, and the Census Bureau data provided a total of 3,051 firms. The total number of DBEs divided by the total number of all firms resulted in a relative DBE availability of 10.1% ( $309 / 3051 = 10.1\%$ ).

#### Step Two: Adjusting the Base Figure

ODOT's calculation included an adjustment to the base figure. A disparity study was not considered in ODOT's decision to adjust its base goal figure, and there was no evidence that a relevant disparity study was available for them to use. ODOT elected to use past participation data for the adjustment, that included total DBE payments on completed contracts reported in semiannual reports for FFY 2010 - 2012. The data generated a median goal attainment of 5.26% (see table below).

<b>Semiannual Report</b>			
FFY	Total DBE Payments	Total Prime Contract Award	Percent (%) DBE
2010	\$92,756	\$5,224,363	1.78%
2011	\$257,293	\$4,892,353	5.26%
2012	\$325,625	\$5,260,183	6.19%

The 5.26% median goal attainment figure was added to the 10.1% base goal figure, and the total divided by two ( $10.1 + 5.26 / 2$ ), to yield the FFY 2014 – 2016 DBE goal of 7.7%. The goal is 100% race neutral.

While there were no issues with ODOT's goal setting methodology, the agency did not identify the anticipated number of projects, the name of the projects and scopes of work, or breakout ODOT's subrecipient's anticipated projects/contracts. A single NAICS Code (54161) was used in the calculation, with no indication that other NAICS Codes were taken into consideration based upon the types of contracts anticipated for the triennial period.

#### **Advisory Comment**

It is recommended that ODOT list in its goal calculation the breakout of each projected project identified for ODOT and for its subrecipients, including the anticipated dollar values.

#### **B) Public Participation**

##### **Basic Requirement (49 CFR Part 26.45)**

In establishing an overall goal, the recipient must provide for public participation through consultation with minority, women, and contractor groups regarding efforts to establish a level playing field for the participation of DBEs. A notice announcing the overall goal must be published on the recipient's official website and may be published in other media outlets with an optional 30-day public comment period.

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## Discussion

During this compliance review, no deficiencies were found with the requirement for Public Participation.

ODOT's FFY 2014 - 2016 goal methodology included the public participation requirement. The Office of Transit held a DBE consultation meeting on September 20, 2013 to provide an overview of ODOT's Office of Transit, and present the proposed DBE goal. Documentation in the goal methodology included the attendee's sign-in sheet and meeting notes. There were no questions or comments received pertaining to ODOT's proposed goal.

During the goal-setting process, the DBE goal and its rationale were posted on ODOT's website for review. The approved 7.7% DBE goal is currently posted on the Office of Small and Disadvantaged Business webpage.

### C) Race-Neutral DBE Participation

#### Basic Requirement (49 CFR Part 26.51)

The recipient must meet the maximum feasible portion of the overall goal using race-neutral means of facilitating DBE participation. As of 2011, the small business element described in 49 CFR 26.39 is a mandatory race-neutral measure. Additional examples of how to reach this goal amount are listed in the regulations.

#### Discussion

During this compliance review, deficiencies were found with the requirement for Race-Neutral DBE Participation.

ODOT's DBE Program Plan includes only §26.51 (d-g) which pertains to contract goal requirements, and excludes §26.51(a-c) which pertains to race-neutral DBE participation requirements. ODOT has a Small Business Enterprise (SBE) Program that was approved by the Federal Highway Administration on June 1, 2015. The Program does not include transit related projects.

ODOT is implementing a 100% race-neutral program for its transit related contracts, and has not implemented measures to facilitate sufficient DBE participation. Based on the review of ODOT's semiannual reports from FFYs 2011 – 2015, race-neutral goals are not being met. ODOT was not able to provide documentation of any race-neutral measures it may have undertaken to ensure the attainment of its DBE goals, nor was there evidence of any race-neutral measures taken to facilitate DBE participation in its contracting opportunities.

ODOT provided the review team with an SBE Program Participation Plan dated May 11, 2015, developed by the Office of Small and Disadvantaged Business Enterprise (OSDBE) for federally-funded construction and consultant contracts. Elements of the SBE Program include:

- SBE certification
- Fostering small business participation through prequalification requirements
- Ensuring contracts are not unjustifiably bundled
- Facilitating joint ventures among SBEs

- Set-asides with bid opportunities not to exceed \$2 million for SBEs

The SBE Program Plan contains the following timeline:

<b>TIME PERIOD</b>	<b>TASK</b>
January 2015	Begin process of hiring additional staff to certify SBE firms
June 2015	Begin outreach efforts to construction and consultant community advising of the SBE program
July 2015	Begin certifying firms that apply for SBE certification
Spring 2016	Begin selling SBE set-aside construction and consultant contracts

There is no evidence that the SBE Plan has been submitted for FTA approval, or evidence that the tasks identified have been implemented.

### **Corrective Actions and Schedule**

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil Rights a process to develop and implement race-neutral measures to facilitate race-neutral participation on its contracts.

### **D) Race-Conscious DBE Participation**

#### **Basic Requirement (49 CFR Part 26.51)**

The recipient must establish contract goals to meet any portion of the goal it does not project being able to meet using race-neutral measures.

#### **Discussion**

During this compliance review, deficiencies were found with the requirement for Race-Conscious DBE Participation.

ODOT's DBE Program states that race-conscious goals will be established on construction and professional service contracts so that over a period to which the overall goal applies, they will cumulatively result in meeting the portion of the overall goal that is not projected to be met through race-neutral means. The process for establishing contract-specific goals is outlined in the DBE Program; however, the process pertains to highway projects.

Historically, ODOT's overall goal for transit contracts has not contained a RC/RN split, and the Office of Transit has only awarded race-neutral contracts. Consequently, an approach for setting future race-conscious goals has not been developed.

### **Corrective Actions and Schedule**

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil Rights a process for setting contract goals on transit related contracts.

While ODOT's goal is currently 100% race-neutral, should ODOT decide in the future to set a race-conscious portion of its goal, it must have a process already in place.

### **E) Good Faith Efforts**

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**Basic Requirement (49 CFR Part 26.53)**

The recipient may award contracts with DBE goals only to bidders who have either met the goals or conducted good faith efforts (GFE) to meet the goals. Bidders must submit the names and addresses of the DBE firms that will participate on the contract; a description of the work each DBE will perform; the dollar amount of DBE participation; written commitment to use DBEs submitted in response to the contract goal; written confirmation from each DBE listed; or good faith efforts as explained in Appendix A of 49 CFR Part 26. The bidders must submit documentation of these efforts as part of the initial bid proposal—as a matter of responsiveness; or no later than seven days after bid opening—as a matter of responsibility. The recipient must review bids using either the responsiveness or responsibility approach and document which approach will be used in its DBE program plan.

**Discussion**

During this compliance review, deficiencies were found with the requirement for Good Faith Efforts.

ODOT's DBE Program Plan states that it is the obligation of the bidder/offer to make good faith efforts (GFE). The bidder/offer can demonstrate GFE by either meeting the contract goal or documenting GFE. Reference is made to GFE examples found in Appendix A of Part 26.

Procedures for GFE evaluation are outlined in the DBE Program, and include items such as a Waiver Process for DBE Goal, a Reconsideration Process, and Sanctions. The procedures are applicable to post-award situations, such as terminating a DBE subcontractor and replacing a DBE on a contract. The procedures do not address the pre-award evaluation of documentation required to determine if a bidder's DBE commitment is sufficient to meet the DBE goal, or if adequate good faith efforts has been documented.

For this compliance review, ODOT provided a separate document setting forth its good faith efforts criteria, entitled PN 013 – 5/29/2015 – Disadvantaged Business Enterprise (DBE) Utilization Plan and Good Faith Efforts. The document is not incorporated in ODOT's DBE Program Plan.

The GFE procedure states:

*All Bidders shall submit a DBE Utilization Plan at the time of bid setting forth specific information demonstrating how the Bidder will achieve the DBE goal. By submitting a DBE Utilization Plan, the Bidder is affirming that they will be using the DBE firms identified in the Utilization Plan to meet the DBE contract goal. The DBE Utilization Plan shall be submitted with the Expedite Online Submission through the DBE List folder. Bidders shall download the dbe.bin file from:*  
<http://www.dot.state.oh.us/Divisions/ContractAdmin/Contracts/Construction/dbe.bin>.

*This file contains the current list of certified DBEs and is updated regularly. The dbe.bin file must be saved in the same directory as the Expedite EBS file.*

*The DBE Utilization Plan shall include the following information:*

- 1) The names and addresses of the certified DBE firm(s) that will be used to meet the DBE goal;*

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

The plan sets forth procedures for submitting GFE documentation, in the event a DBE goal is not met, which states:

*The Apparent Low Bidder shall demonstrate its GFEs by submitting the following information within five (5) calendar days after the bid opening:*

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

The Deputy Director of the Division of Chief Legal Counsel is the designated reconsideration official.

ODOT's transit related contract awards have been 100% race-neutral and the good faith efforts requirement was not applicable.

### **Corrective Actions and Schedule**

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil Rights evidence that the updated good faith efforts developed for transit related contracts are included in ODOT's DBE Program Plan.

## **F) Protecting Against Termination for Convenience**

### **Basic Requirements (49 CFR 26.53 and 26.13)**

Recipients must implement appropriate mechanisms to ensure that prime contractors do not terminate DBE subcontractors for convenience (e.g., to perform the work of the terminated subcontract with its own forces or those of an affiliate, or reducing the scope of DBE contract) without the transit agency's prior written consent. Failure to obtain written consent is a material breach of contract.

### **Discussion**

During this compliance review, deficiencies were found with the requirement for Protecting Against Termination for Convenience.

ODOT's DBE Program states that a contractor may not remove a DBE subcontractor without prior written consent from ODOT. Before submitting a request to terminate and/or substitute a

DBE subcontractor, the prime contractor must give notice in writing of its intent and the reason for the request to the DBE Program Manager. The prime must give the DBE subcontractor five days to respond to the prime's notice with its objection to the proposed termination.

The DBE Program does not provide sanctions for a contractor's violation of the requirements in this section, and the contracts reviewed do not contain a termination clause.

During interviews with ODOT staff, there was no evidence of any DBE terminations on ODOT's transit contracts.

### **Corrective Actions and Schedule**

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil Rights evidence of updated contract language containing required DBE termination clauses. In addition, develop and implement a process to ensure that contractors comply with the requirements.

### **G) Counting DBE Participation**

#### **Basic Requirement (49 CFR Part 26.55)**

The recipient must count only the value of work actually performed by the DBE when assessing the adequacy of DBE participation submitted in response to a contract. The recipient must review a bidder's submission to ensure the type and amount of participation is consistent with the items of work and quantities in the contract and that the bidders is only counting work performed by the DBE's own forces in accordance with the DBE requirements.

#### **Discussion**

During this compliance review, no deficiencies were found with the requirement for Counting DBE Participation.

ODOT's DBE Program indicates that it will count DBE participation toward overall and contract goals as provided in 49 CFR §26.55. The DBE Program states that a prime contractor will be given credit towards the DBE contract goal only if the DBE firm performs a commercially useful function (CUF). ODOT will determine compliance with CUF through the project monitoring procedure. All of ODOT's DBE participation was achieved through DBE prime contract awards. Each award was a professional service/consultant contract, in which the DBE contractors performed the work with their own employees, and worked directly with ODOT in completing tasks. As a result, ODOT maintained on-going monitoring and control of the DBE contractors' performance, and was directly responsible for processing progress payments.

Based on the review of ODOT's semiannual report information DBE participation was accurately reflected at 100% as a contract service provider, indicating no DBE counting issues.

### **H) Quotas**

#### **Basic Requirements (49 CFR Part 26.43)**

The recipient is not permitted to use quotas. The recipient may not use set-aside contracts unless no other method could be reasonably expected to redress egregious instances of discrimination.

## Discussion

During this compliance review, no deficiencies were found with the requirement for Quotas.

No evidence of the use of quotas by ODOT was found during the onsite visit.

## 6.9 Shortfall Analysis and Corrective Action Plan

### Basic Requirement (49 CFR Part 26.47)

The recipient must conduct a shortfall analysis and implement a corrective action plan in any fiscal year it does not meet its overall DBE goal.

## Discussion

During this compliance review, deficiencies were found with the requirement for Shortfall Analysis and Correction Action Plan.

ODOT's semiannual reports submitted for FFYs 2011 – 2015, and quarterly ARRA reports for FFYs 2011 – 2013 were examined. ODOT has historically established 100% race-neutral DBE goals. The race-neutral goal for FFYs 2011 – 2013 was set at 27.6%, which also applied to ODOT's ARRA contracts awarded during the same period. The race-neutral goal for FFYs 2014 – 2016 is set at 7.7%.

ODOT's goal attainment for the above mentioned fiscal years is shown in the following charts.

ODOT Semiannual DBE Reports DBE Goal: 27.6%

FFY	Total Prime Dollars	Total DBE Dollars	DBE %
2011	\$4,892,353	\$275,000	5.62%
2012	\$5,260,183	\$425,000	8.08%
2013	\$6,983,181	\$525,000	7.52%

ODOT - ARRA Quarterly DBE Reports DBE Goal: 27.6%

FFY	Total Prime Dollars	Total DBE Dollars	DBE %
2011	\$4,249,740	\$24,950	0.59%
2012	\$10,806,619	\$470,362	4.35%
2013	\$680,063	\$0	0.00%

ODOT Semiannual DBE Reports DBE Goal 7.7%

FFY	Total Prime Dollars	Total DBE Dollars	DBE %
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2014	\$3,727,382	\$106,209	2.85%
2015	\$3,989,002	\$0	0.00%

Over the reported FFYs, ODOT's overall DBE goals have consistently not been met, and the agency did not conduct a shortfall analysis or develop a corrective action plan.

ODOT's DBE Program states that if awards and commitments shown on its uniform DBE reports at the end of any fiscal year are less than the established overall goal, ODOT will submit a document to the USDOT, analyzing in detail the reasons for the difference, and establish steps and milestones to correct the problem identified in the analysis.

### Corrective Actions and Schedule

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil Rights documentation that a shortfall analysis for FFYs 2011 – 2013 has been conducted, and a shortfall analysis and corrective action plan for FFYs 2014 - 2015 has been completed. ODOT must also develop a procedure to ensure that a shortfall analysis and corrective action plan will be completed during necessary fiscal years.

## 6.10 Transit Vehicle Manufacturers (TVMs)

### Basic Requirement (49 CFR Part 26.49)

The recipient must require that each transit vehicle manufacturer (TVM) certify that it has complied with the regulations before accepting bids on FTA-assisted vehicle purchases. The recipient should not include vehicle procurements in its DBE goal calculations and must receive prior FTA approval before establishing project goals for vehicle purchases. The recipient is also required to submit to FTA, the names of the successful TVM bidder and the amount of the vehicle procurement within 30 days of awarding an FTA-assisted vehicle contract.

### Discussion

During this compliance review, deficiencies were found with the requirement for TVMs.

Prior to the onsite visit, ODOT submitted a list of 18 solicitations and contracts for transit vehicle purchases. The review team selected the following three transit vehicle agreements to examine:

Project	Contract Number	Awarded to:
Light Transit Vehicles  <b>Awarded: December 2014</b>	248-15	<ul style="list-style-type: none"> <li>• American Bus and Accessories, Inc. (Manufacturer: Champion Bus)</li> <li>• Transportation Equipment Sales Corporation (Manufacturer: Goshen Coach, Inc.)</li> <li>• Whitworth Bus Sales, Inc. (Manufacturer: Eldorado National)</li> </ul> <p>(split award between three bidders)</p>



Dedicated Mobility Access Vehicles  <b>Awarded: January 24, 2014</b>	251-14	Transportation Equipment Sales Corporation (Manufacturer: Mobility Ventures, LLC.)
Modified Minivans  <b>Awarded: January 24, 2014</b>	253-14	The Braun Corporation (Manufacturer: The Braun Corporation)

The review team found that each of the TVM contracts included a signed TVM certification, which referenced the appropriate DBE circular.

The files did not include documentation that the grantee reviewed the list of certified TVMs to determine eligibility to bid or otherwise confirmed TVM eligibility with FTA. For contracts after November 2014, the regulation requires recipients to submit, within 30 days of making an award, the name of the successful bidder, and the total dollar value of the contract in the manner prescribed in the grant agreement. For the applicable contract examined by the review team, ODOT did not notify FTA of the successful bidder by name within the required 30 days of award.

### **Corrective Actions and Schedule**

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil Rights a process for ensuring that TVM certification is verified prior to award and that FTA will be notified of the successful bidder(s) and the total dollar value of the contract within 30 days of award.

## **6.11 Required Contract Provisions and Enforcement**

### **A) Contract Assurance**

#### **Basic Requirements (49 CFR Part 26.13)**

Each FTA-assisted contract signed with a prime contractor (and each subcontract the prime contractor signs with a subcontractor) must include non-discrimination clauses detailed by the DBE regulations.

#### **Discussion**

During this compliance review, deficiencies were found with the requirement for Contract Assurance.

In ODOT's DBE Program, the contract assurance language states:

"The contractor, subrecipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this

contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.”

The statements in both the DBE Program and prime contracts are verbatim in accordance with the regulation in place at the time.

The regulation also requires that the grantee includes a provision to require that the contract assurance language is added to all subcontract agreements under the prime contractor. The review team found that ODOT’s DBE Program does not include this requirement. It was also found that the flow down language requirements were not included in the prime contract agreements.

The review team examined three federally-funded DBE prime contracts that ODOT awarded in FFY 2013. Only one project had a DBE subcontractor. (See table below)

<b>Prime Contractor</b>	<b>Project</b>	<b>Contract Number</b>	<b>DBE Subcontractor</b>
RLS & Associates, Inc. (DBE)  <b>Awarded – 6/27/13</b>	Transit Technical Assistance & Studies	Project # 17868	None
Lakatos Group Ltd. (DBE)  <b>Awarded – 6/27/13</b>	Transit Technical Assistance & Studies	Project # 17869	None
Burton Planning Services, LLC (DBE)  <b>Awarded – 6/27/13</b>	Transit Technical Assistance & Studies	Project # 17870	Interactive Elements

The one DBE subcontract was not available for review; however, the contract assurance language found in all of the DBE prime contracts state:

*“The contractor, subrecipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.”*

This statement is verbatim as required by 49 CFR Part 26.13 and in the DBE Program Plan; however, ODOT’s DBE Program does not include a process for ensuring that the appropriate clauses are included in every federally funded contract and subcontract.

### **Corrective Actions and Schedule**

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil a process for ensuring that the appropriate contract language is placed in every federally funded contract and subcontract.

## B) Prompt Payment

### Basic Requirements (49 CFR Part 26.29)

The recipient must establish a contract clause to require prime contractors to pay subcontractors for satisfactory performance on their contracts no later than 30 days from receipt of each payment made by the recipient. This clause must also address prompt return of retainage payments from the prime to the subcontractor within 30 days after the subcontractors' work is satisfactorily completed.

### Discussion

During this compliance review, deficiencies were found with the requirement for Prompt Payment.

#### Prompt Payment

ODOT's DBE Program states that the prime contractor agrees to pay subcontractors for satisfactory performance within 10 days following receipt of payment from ODOT. The DBE Program further states that any delay or postponement of payment by the prime contractor will result in the prime contractor paying 18% interest per annum of the payment due, which will begin on the eleventh day following the receipt of the payment from ODOT.

Prompt payment language was included in the DBE section of the three prime contracts examined; however, the clause stated that the prime contractor is required to pay its subcontractors, for satisfactory performance of work, no later than 30 days after receipt of payment from ODOT. The clause further states that *"any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval from the State."*

Subsequent to the onsite visit and review of the contracts discussed above, to further examine the payment verification and closeout process for prompt payment, the review team selected Project #17869 - Transit Technical Assistance & Studies. Lakatos Group, Ltd is the DBE prime contractor with two non-DBE subcontractors: Jane E. Miller, and Vital Assurances. The prime contractor provided the review team with payment information for the two subcontractors. The prime to subcontractor payment analysis indicates that the average number of days for the subcontractor's invoice payment is 5.4 days. On average, the prime contractor pays the subcontractors approximately 5 days before their invoice is paid by ODOT.

#### Retainage

In June 2003, USDOT issued a Final Rule on DBE that contained new requirements for prompt return of retainage. According to the Final Rule, if an agency chooses to hold retainage from a prime contractor, it must have prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after payment to the prime contractor.

ODOT's DBE Program states that the prime contractor may withhold retainage. It states that "Material and Construction Specifications includes language clarifying that payment of retainage must be made within 10 days of ODOT's acceptance of the work."

The retainage clause included in the DBE section of the three prime contracts state that the “*Contractor agrees further to return retainage payments to each subcontractor within 30 days after the subcontractor's work is satisfactorily completed*”. The contracts reviewed did not have retainage withheld.

### **Corrective Actions and Schedule**

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil a process for ensuring that the prompt payment language and return of retainage language in every USDOT-funded contract and subcontract is consistent, and in compliance with the DBE Program.

### **C) Legal Remedies**

#### **Basic Requirements (49 CFR Part 26.37)**

Recipients must implement appropriate mechanisms to ensure compliance by all participants, applying legal and contract remedies under Federal, state, and local law. Breach of contract remedies should be used as appropriate.

### **Discussion**

During this compliance review, no deficiencies were found with the requirement for Legal Remedies.

The DBE Program states that:

*“The Ohio Department of Transportation will issue sanctions if the Contractor chooses not to request a waiver; the Contractor fails to comply with the contract requirements and/or fails to demonstrate the necessary good faith effort.*

*The Ohio Department of Transportation may impose any of the following sanctions:*

- 1) letter of reprimand;*
- 2) liquidated damages computed up to the amount of goal dollars not met;*
- 3) cross-withhold from future projects;*
- 4) contract termination and/or*
- 5) other remedies available by law including suspension, revocation, and/or debarment.”*

The three contracts reviewed contain language that states, “In the event of the contractor's noncompliance with the nondiscrimination provisions of this contract, ODOT will impose such contract sanctions as it may determine to be appropriate, including, but not limited to:

- a) Withholding of payments to the contractor under the contract until the contractor complies, and/or
- b) Cancellation, termination or suspension of the contract, in whole or in part.”

There was no evidence that ODOT has had to initiate legal remedies in performance of any of its contracts.

## 6.12 Certification Standards

### Basic Requirements (49 CFR Part 26.67-26.71)

The recipient must have a certification process in place to determine whether a potential DBE firm is legitimately socially and economically disadvantaged according to the regulatory standards. The DBE applicant must submit the required DOT application and personal net worth (PNW) form with appropriate supporting documentation, as needed.

### Discussion

During this compliance review, deficiencies were found with the requirement for Certification Standards.

The State of Ohio Unified Certification Program (OUCP), dated April 2005, established the certification process for determining whether a potential DBE firm is socially and economically disadvantaged according to regulatory standards.

The four certifying members in the OUCP are the City of Dayton, Cleveland Hopkins International Airport, Greater Cleveland Regional Transit Authority (GCRTA), and the Ohio Department of Transportation (ODOT).

An overview of the Ohio UCP and DBE certification requirements is found on ODOT's website under the "Division of Opportunity, Diversity, and Inclusion" -- *Divisions > Division of Opportunity, Diversity, and Inclusion > The Disadvantaged Business Enterprise (DBE) Program*. The ACDBE and DBE application is located on the website and downloadable in Portable Document Format (PDF). The forms available on the website are:

- "Certification Application"
- "Personal Net Worth Form"
- "Annual Declaration Form" (as a PDF or a Microsoft Word document)
- "Interstate Certification Process and Application"

Two DBE Certification files reviewed contained PNW issues: BizTech Solutions, Inc., and Dave's Asphalt.

Biz Tech Solutions, Inc. applied to the DBE program on May 11, 2015. Although, the firm was denied on the basis of control, the file did not include the PNW statement, and an onsite visit was conducted July 29, 2015.

Dave's Asphalt was newly certified in the program on March 16, 2015. The PNW included in the file contained incorrect information and errors. There was no documentation in the file that demonstrated that the grantee reviewed, requested clarification, or corrected the information.

### Corrective Actions and Schedule

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil Rights a process for ensuring that PNWs are collected, examined, corrected as necessary and maintained in the certification files.

## 6.13 Certification Procedures

### A) Onsite Visits and Document Review

#### Basic Requirements (49 CFR Part 26.83)

The recipient must determine the eligibility of firms as DBEs consistent with the standards of Subpart D of the regulations. The recipient's review must include performing an onsite visit and analyzing the proper documentation.

#### Discussion

During this compliance review, deficiencies were found with the requirement for Onsite Visits and Document Review.

ODOT has an established procedure for the review of DBE certification applications that includes conducting an onsite review, requesting a home state onsite report, and the review of the certification application and supporting documents.

The review team examined eight certification files for compliance with certification requirements:

Firm Name	Status
B's Trucking	Existing
Blue Diamond Industries	Existing - ( <i>Interstate – KY</i> )
King's Business Interiors	Removal
Appalachian American Enterprises	Denial
Curry Electric Inc.	Denial
Biz Tech Solutions, LLC.	Denial
Solid Rock Construction	Denial
Dave's Asphalt	New

#### Onsite Visits

ODOT provided the reviewers with a copy of its "Onsite Review" questionnaire. The questionnaire is a comprehensive report containing seven sections pertaining to the ownership, management and control of the firm, the firm's history, equipment, finances, and the owner(s) knowledge of the business. It also includes a signed affidavit.

All eight of the files reviewed contained the required onsite visit documentation, including the interstate certification file.

#### Document Review

##### *UCP Directory*

At the time of the review, King Business Interior, which had been removed from the program on September 18, 2015, due to graduation, was still in the UCP Directory.

##### *Personal and Business Taxes*

ODOT documented that a part of the review process includes examination of personal and corporate taxes. The files that were missing tax returns are listed in the tables below:

**Personal Tax Returns**

<b>Firm</b>	<b>Type</b>	<b>Tax Year</b>
B's Trucking	Existing	2014
King's Business Interiors	Removal	2013 and 2014
Curry Electric Inc.	Denial	2014
Biz Tech Solutions, LLC.	Denial	2014

**Business Tax Returns**

<b>Firm</b>	<b>Type</b>	<b>Tax Year</b>
B's Trucking	Existing	2014
Curry Electric Inc.	Denial	2014
Biz Tech Solutions, LLC.	Denial	2014

Biz Tech Solutions, LLC, filed personal and business tax filing extensions for the 2014 tax year; however, there was no documentation in the file indicating that ODOT contacted the firm to request the completed tax returns.

**30-Day Notification**

The DBE regulation requires a recipient or UCP to advise each applicant within 30 days from receipt of the certification application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

Two of the files contained a determination letter or a request for additional information forty-four and fifty-three days, respectively, from receipt of the application. No documentation was included in many of the files to show the date that the application was completed. A determination for one of the files could not be made, because there was no evidence present for when the grantee received the application.

**90-Day Determination**

The DBE regulation requires a recipient or UCP to make decisions on applications for certification within 90 days of receiving all information from the applicant firm. The time period may be extended for no more than an additional 60 days, upon written notice to the firm.

The review team could not determine the time frame of ODOT's determination for one of the certification files examined. There was insufficient information to determine when the application was considered complete. A determination was made for Curry Electric 149 days from date of the letter requesting additional information.

**Corrective Actions and Schedule**

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil Rights:

- A process for ensuring that certification files include all of the required documents necessary to properly evaluate DBE certification eligibility.
- A process and schedule to ensure that the 30-day notification is performed.
- A process to ensure that the certification determination is conducted within the 90-day timeframe.

## **B) Annual Affidavit**

### **Basic Requirement (49 CFR Part 26.83)**

DBE firms must submit an annual affidavit affirming their DBE status. Recipients may not require DBE firms to reapply for certification or undergo a recertification process.

### **Discussion**

During this compliance review, no deficiencies were found with the requirement for Annual Affidavits.

ODOT's certification review process includes the requirement that DBE firms submit an annual affidavit affirming their DBE status. The DBE certification letter advises the firm of its Annual Review Date, and informs the firm that the Affidavit of No Change is required on an annual basis to affirm their DBE status. The DBE is also advised to notify ODOT of any material changes that may affect its DBE eligibility, such as change in firm's ownership, management or control, and further advised that the affidavit is available for download on the website.

Of the eight certification files reviewed, only two files could be examined for this requirement. Both B's Trucking and King Business Interiors have been certified as DBEs for over 5 years. King Business Interiors recently graduated from the program in 2015. Both files contained all of the annual affidavits.

## **C) Interstate Certification**

### **Basic Requirement (49 CFR 26.85)**

The recipient may accept out-of-state certifications and certify DBE firms without further procedures. Otherwise, DBEs certified in one or more states and certifying entities should follow the procedure outlined in 49 CFR 26.85(c)-(g).

### **Discussion**

During this compliance review, no deficiencies were found with the requirement for Interstate Certification.

According to ODOT's DBE Program Plan, interstate applications are not automatically accepted into the program. The applications are processed in accordance with §26.85 (c) and (d). A completed interstate certification application includes: (1) the completed DOT application from the home certifying state, along with all of the supporting documentation including annual affidavits and / or notice of changes, (2) onsite notices and correspondence regarding the applicant firm's certification status in other states, i.e. denial or removals, (3) any letters of certification appeal to the USDOT and the response, and (4) a sworn affidavit containing requirements under §26.85 (c) (4) (i) and (ii).

One file reviewed was selected as an interstate certification – Blue Diamond Industries, LLC. The firm is based and certified in Kentucky. The file included a DOT application, supporting



documents, and the necessary documentation for the onsite visit conducted on September 25, 2013.

## **D) Certification Appeals**

### **Basic Requirements (49 CFR 26.86)**

The recipient must provide a written explanation for all DBE certification denials. The document must explain the reasons for the denial and specifically reference evidence in the record to support the denial. The recipient must allow the firm to reapply for certification within 12 months or less of the initial denial. The DBE firm may appeal the certification decision to the DOT.

### **Discussion**

During this compliance review, no deficiencies were found with the requirement for Certification Appeals.

ODOT's DBE Program outlines the process for certification denials, removals and appeals. When a firm is denied DBE certification, ODOT notifies the applicant firm in writing of the reasons for the decision with specific references to the evidence for the denial. The applicant firm is advised of its right to appeal the decision to the USDOT in accordance with §26.89. If the applicant firm chooses to appeal, ODOT's decision to deny certification remains in effect, pending USDOT's decision. The applicant cannot reapply for certification until 12 months have elapsed from the date of the denial notice.

The reviewers examined four certification denials – Appalachian American Enterprises, Biz Tech Solutions, LLC, Curry Electric, Inc., and Solid Rock Construction, LLC. The review team found that ODOT followed the denial process as required by §26.86.

It was not clear when Appalachian American Enterprises applied for certification to the program. On August 18, 2015, a denial letter was sent and all the necessary requirements were included.

Biz Tech Solutions applied for certification on May 11, 2015. A letter requesting additional information was sent to the firm on July 13, 2015. On July 30, 2015, a denial letter was sent. The firm was denied on the basis of control under §26.71 (j). The applicant had a full time job, which called into question the ability to control the firm as required.

Curry Electric, Inc. applied for certification on March 31, 2015. A letter requesting additional information was sent to the firm on April 1, 2015. On August 18, 2015, a denial letter was sent. The firm was denied on the basis of ownership and control. The presumed disadvantaged owner, seeking certification, owned less than 51% of the company, which did not meet the requirements of §26.69 (b). With regard to control, the disadvantaged owner's responsibilities and experience did not demonstrate the necessary technical expertise to run such a company as required by §26.71 (g).

Solid Rock Construction applied for certification on April 15, 2015. On May 29, 2015, a denial letter was sent. The firm was denied on the basis of ownership and control. The applicant obtained ownership through a gift by a non-disadvantaged individual who is an affiliate of the applicant firm.

All firms were advised of the right to appeal the decision to the USDOT. The letters also provided the opportunity for the firms to reapply to the program after 12 months. Solid Rock Construction, LLC appealed to the USDOT; however, the file did not contain documentation that case had been reviewed.

## 6.14 Recordkeeping and Enforcements

### Basic Requirement (49 CFR Parts 26.11 and 26.37)

The recipient must provide data about its DBE program to FTA on a regular basis to FTA. The recipient must submit Semiannual Uniform Reports on June 1<sup>st</sup> and December 1<sup>st</sup> of each fiscal year using the FTA electronic grants management system, unless otherwise notified by FTA. (State Departments of Transportation must also report the percentage and location of DBE firms in the UCP Directory controlled by women, socially and economically disadvantaged individuals (other than women), and individuals who are women and are otherwise socially and economically disadvantaged individuals to the DOT Office of Civil Rights by January 1st of each year.) In addition, the recipient must implement appropriate monitoring mechanisms to ensure overall compliance by all program participants. The monitoring and enforcement measures must be conducted in conjunction with monitoring contract performance for purposes such as close out reviews for contracts.

Lastly, the recipient must maintain a bidders list complete with subcontractor firm names, addresses, DBE status, age of firm, and annual gross receipts of the firm.

### Discussion

During this compliance review, deficiencies were found with the requirement for Recordkeeping and Enforcements.

#### Reporting DBE Participation

In preparation for this compliance review, the review team examined ODOT's semiannual uniform reports from FFY 2011 to the first half of FY 2015, and quarterly ARRA DBE reports for FFYs 2011 – 2013. The majority of ODOT's semiannual uniform reports were not submitted timely (see table below), and the FFY 2014 December 1<sup>st</sup> report contained the FTA's comments that the submission was incorrect/incomplete. The review team noted that the error appears in the "Actual Payments on Contracts Completed This Reporting Period" section. The report indicates the total dollar value for prime contracts, total dollar value for DBE participation, and the goal attainment, but does not include the number of prime contracts completed for the reporting period in line 13A of the report.

Federal Fiscal Year	Report Due June 1 (For Period: October 1 – March 31)	Report Due December 1 (For Period: April 1 – September 30)
	<i>Date Submitted</i>	<i>Date Submitted</i>
2011	April 6, 2012	April 6, 2012
2012	June 5, 2012	November 27, 2012
2013	June 18, 2012	November 29, 2013
2014	July 8, 2014	January 5, 2015
2015	July 6, 2015	--

ODOT's quarterly ARRA reports were due the 10<sup>th</sup> day after each calendar quarter. There was no consistency in the dates reports were submitted. Over the three-year reporting period, some ARRA reports were submitted early, and some were submitted late. The reviewers could not determine the rationale for the inconsistent reporting schedule.

The Compliance Officer, Office of Transit, prepares and submits ODOT's semi-annual uniform reports for transit, and identified ODOT's process for collecting information required for the reports. The Office of Transit's contract award information is compiled by ODOT's Compliance Officer in a spreadsheet that contains all of the required data for the uniform reports. ODOT's transit subrecipients are required to complete and submit a similar spreadsheet listing pertinent data related to their purchases and contract awards. The Compliance Officer reviews the information and checks the names of the listed vendors for DBE status in the Ohio UCP Directory.

#### Bidders List

ODOT's DBE Program Plan states that it maintains a bidders list utilizing the Contractor Qualification (CQ) database, which lists all bidders for prime contracts and all subcontractors on each project. No additional information about the bidders list is provided in the DBE Program Plan.

During the onsite, the DBELO indicated that a bidders list was maintained, and provided a listing of projects and the Plan Holders list for three highway projects – Noise Walls, Gemini Parkway Extension, and Bridge Replacement (3 Bridges). The Plan Holder lists contained the names of the prime contractors and subcontractors for each project, and only provided the company name, address, phone number and fax number. Information pertaining to the DBEs' status, age of firm, or gross receipts was not contained on the lists. ODOT's project and contractor database is maintained by the Information Technology Department (IT).

The review team interviewed ODOT's IT support person (Tina Collins), who provided additional information about ODOT's web-based data maintenance system. The CRL compliance system is used to capture and maintain contractor and project information. Ms. Collins stated that ODOT is in the process of updating the system to capture all required information for ODOT's bidders list.

#### Monitoring

According to the DBE Program Plan, ODOT has monitoring and enforcement mechanisms to verify that work committed to DBEs at contract award is actually performed by the DBEs. The DBE Program states that this will be accomplished with the following tools:

- Form OCC-102, Affidavit of Subcontractor Payment Tracking – used to maintain a running tally of actual DBE goal attainments, compared to the original subcontract amount.
- Form CR-6, DBE Commercially Useful Function Project Site Review Form – verifies DBE employees, material and equipment used, and DBE performance.
- DBE Commercially Useful Function Project Check List – used in conjunction with Form CR-6 to identify DBE concerns on the job site such as management, workforce, equipment, materials, or performance. The form is completed by project personnel and returned to the District Contractor Compliance Officers (CCOs) for further action.

Each District CCO has responsibility for monitoring the DBE Commercially Useful Function.

ODOT's IT support person indicated that the CRL system has been launched to replace paper documents to manage contracts, and to address ODOT's state and federal monitoring and compliance needs. The web-based system is used to manage contracts, payrolls, DBE goals, on-the-job training goals, and other compliance needs.

Notwithstanding the above, at the onsite, ODOT's Office of Transit could not provide any documentation of its monitoring efforts for either its contracts or its subrecipients' contracts, nor were their procedures for ensuring subrecipient contract compliance.

### **Corrective Actions and Schedule**

Within 60 days of the issuance of the final report, ODOT must submit to the FTA Office of Civil Rights:

- A plan to develop and implement a procedure for monitoring ODOT's transit related and subrecipient contracts. This should include any forms, checklists or other tools an onsite reviewer may use to verify and document DBE participation on federally-funded contracts.
- A procedure for collecting and maintaining a record of DBE payments and commitments for ODOT's transit related and subrecipient contracts. This should include a DBE payment verification process.
- A plan to develop and implement a procedure for collecting subrecipient DBE participation information.
- A plan to ensure that semiannual DBE reports are submitted accurately and timely.
- Evidence that a bidders list is being compiled in accordance with §26.11(c).

## 7. Summary Findings

Item	Requirement of 49 CFR Part 26	Ref.	Site Visit Finding(s)	Finding(s) of Deficiency	Response Days/Date
1.	Program Plan	26.21	D	DBE Program not approved; Does not include requirements for transit compliance	Within 60 days of the issuance of the final report
2.	Policy Statement	26.23	D	Policy Statement not updated with current DBELO information; a signed copy is not posted on website	Within 60 days of the issuance of the final report
3.	DBE Liaison Officer	26.25	D	ODOT's organization chart does not indicate the DBELO's direct, independent access to highest ranking agency official	Within 60 days of the issuance of the final report  <b>Deficiency is now closed.</b>
4.	Financial Institutions	26.27	D	DBE financial institutions have not been investigated or identified	Within 60 days of the issuance of the final report
5.	DBE Directory	26.31	ND		
6.	Overconcentration	26.33	D	Overconcentration analysis was not conducted	Within 60 days of the issuance of the final report
7.	Business Development Programs	26.35	AC	Recommendation that ODOT include Transit Construction Projects in its Supportive Services & Mentor-Protégé Programs	

Item	Requirement of 49 CFR Part 26	Ref.	Site Visit Finding(s)	Finding(s) of Deficiency	Response Days/Date
8. Determining / Meeting Goals					
8.a	Calculation	26.45	AC	Recommend that ODOT provide a list of program projects in the goal methodology document	
8.b	Public Participation	26.45	ND		
8.c	Race-Neutral	26.51	D	Have not developed R/N measures to facilitate DBE participation	Within 60 days of the issuance of the final report
8.d	Race-Conscious	26.51	D	Does not have process for setting contract goals for Transits projects	Within 60 days of the issuance of the final report
8.e	Good Faith Efforts	26.53	D	DBE Program does not include GFE procedures for Transit projects	Within 60 days of the issuance of the final report
8.f	Counting DBE Participation	26.55	ND		
8.g	Protecting Against Termination for Convenience	26.53	D	Contracts do not contain required termination clause	Within 60 days of the issuance of the final report
8.h	Quotas	26.43	ND		
9.	Shortfall Analysis and Corrective Action Plan	26.47	D	ODOT has not met its FFY 2011 – 2014 DBE goals, and has not conducted a shortfall analysis, or corrective action plan	Within 60 days of the issuance of the final report

Item	Requirement of 49 CFR Part 26	Ref.	Site Visit Finding(s)	Finding(s) of Deficiency	Response Days/Date
10.	TVM	26.49	D	Did not verify TVMs FTA certification status prior to award; Report of TWM awards not submitted	Within 60 days of the issuance of the final report
11. Required Contract Provisions and Enforcement					
11.a	Contract Assurance	26.13	D	Contract assurances not contained in contract documents	Within 60 days of the issuance of the final report
11.b	Prompt Payment	26.29	D	Prompt payment clause not consistent with DBE Program Plan	Within 60 days of the issuance of the final report
11.c	Legal Remedies	26.37	ND		
12. Certification Standards		26.67-26.71	D	Certification Standards (PNW) not followed	Within 60 days of the issuance of the final report
13. Certification Procedures					
13.a	Onsite Visit	26.83	D	Document reviews incomplete, application notification letters not timely	Within 60 days of the issuance of the final report
13.b	Annual Affidavit	26.83	ND		
13.c	Interstate Certification	26.85	ND		
13.d	Certification Appeals	26.86	ND		

Item	Requirement of 49 CFR Part 26	Ref.	Site Visit Finding(s)	Finding(s) of Deficiency	Response Days/Date
14.Recordkeeping and Enforcements					
14.a	Bidders List and Reporting DBE Participation	26.11	D	No Bidders List maintained; Semiannual uniform DBE reports submitted late	Within 60 days of the issuance of the final report
14.b	Monitoring	26.37	D	No monitoring procedures; Subrecipients not monitored	Within 60 days of the issuance of the final report

Findings at the time of the site visit: ND = No Deficiencies Found; D = Deficiency; NA = Not Applicable; AC = Advisory Comment