

Navigating the Complex Landscape of Small, Disadvantaged & Minority Business Goals in Ohio's Heavy-Highway Industry

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Those of us in the heavy/highway industry are increasingly aware of the level of importance that federal, state and local governments place on small, disadvantaged or minority businesses and minority or disadvantaged persons' hiring goals.

In Ohio, we face a myriad of those goals depending on what the type of project is, where it's located, what the funding sources are, etc. In my experience, having worked in the heavy/highway industry for more than 30 years and in the minority business and hiring preference programs for more than 20, there can be some confusion between the different types of small, disadvantaged or minority business goals or even programs that benefit minority businesses and minority hirings.

While at the Ohio Department of Transportation (ODOT), I managed the Disadvantaged Business Enterprise

(DBE), Encouraging Diversity, Growth & Equity (EDGE), and Minority Business Enterprise (MBE) sections of the Department for a short while. Even those of us who are hip-deep in the nuances and details of these programs daily, occasionally struggle with them, and it can be hard to discern the differences between the programs and focus on the requirements of each and the goals for which they were created. And all too often, those who set the goals or who are responsible for enforcing them are themselves in flux and have their own priorities modified because of the changes in the regulations and the changes in the position of the government authorities that are promoting them.

One would think that the rules would be in some level of stasis, but frankly it seems that the local, state and federal laws are

ever-changing or at least are regularly under irregular and often inconsistent interpretation.

While I was at ODOT in 2011 – to help ourselves, our constituents and even our management at the time – we assembled a chart for an “at-a-glance,” quick-and-easy review of these small, disadvantaged, or minority business goal regulations. The chart described the regulation; the program itself; the entity responsible for it; and the highlights of the program. We also included the type of funds being used for the projects and programs because that was the main controller of each. One can find a link to a newer version of that original document in ODOT's web portal, but the Department has



REFERENCE GUIDE

Turn to the next page for an at-a-glance pullout chart of Ohio's minority business and agency programs.

MBE (MINORITY BUSINESS ENTERPRISE) STATE PROGRAM | CERTIFICATION THROUGH ODOT

Overview: The Ohio Department of Development (ODOD) is responsible for certification and oversight of the MBE program – as well as the EDGE and WBE programs. Ohio's MBE program is designed to assist minority businesses in obtaining state government contracts that do not involve federal funds. MBE applies to procurement of goods and services, professional services and information technology services. Each state agency will have a goal generally around 15% of annual "eligible" purchases. MBE, EDGE and WBE firms must provide a commercially useful function as determined by the ODOD and in compliance with Ohio Administrative Code (OAC) 123:2-14-06.

ODOT's Goal: 20% set-aside (sheltered procurement) and 5% participation for state-funded purchases of goods and services (e.g., snowplows, aggregate, quick-setting concrete, traffic cones, some services) (note: ODOT's set-aside goal exceeds the minimum 15%).

MBE Eligibility: Business owner(s) must be members of one or more of the following groups: Blacks, American Indians, Hispanics or Asians.

Certification Requirements (in part):

- The business must be a for-profit entity.
- In business at least one year prior to applying for certification.
- The minority business owner must own and control at least 51% for one year prior to applying for certification.
- Owner must be an Ohio resident.
- Owner must be a U.S. citizen.
- Owner must have control over day-to-day operations.
- Owner must have all licenses, permits and authorities required by law to perform the scope of work.

Website: <https://development.ohio.gov/business/minority-business>

EDGE (ENCOURAGING DIVERSITY, GROWTH & EQUITY) STATE PROGRAM | CERTIFICATION THROUGH ODOT

Overview: EDGE is an assistance program for economically and socially disadvantaged business enterprises. The program establishes goals for state agencies, boards and commissions in awarding contracts to certified EDGE eligible businesses. EDGE applies to procurements of supplies and services, professional services, information technology services, construction and professional design services. EDGE goals are only permitted on state-funded projects. The EDGE program was initially modeled after the DBE program and shares similar criteria.

ODOT's Goal: 5% of highway construction & design contracts that are 100% state funded, e.g., bridge repair, highway lighting, resurfacing, design services. Other state agencies apply EDGE goals in construction at 5% as well.

EDGE Eligibility: An EDGE participant must be a small socially and economically disadvantaged business enterprise owned and controlled by U.S. citizens who are Ohio residents.

Certification Requirements (in part):

- Socially disadvantaged requirements include race, ethnic origin, gender, physical/mental disability or long-term residency in an environment isolated from mainstream Ohio society (e.g. Appalachia).
- Economically disadvantaged criteria includes both of the following:
 - Personal net worth (PNW) of each Owner must not exceed \$250,000 at the time of program entry.
 - PNW of each Owner must not exceed \$750,000 during participation.
- Fair market value of all assets of the business must not exceed \$4 million.

Website: <https://development.ohio.gov/business/minority-business/certifications/encouraging-diversity-growth-and-equity-program>

DBE (DISADVANTAGED BUSINESS ENTERPRISE) FEDERAL PROGRAM | CERTIFICATION THROUGH THE OHIO UCP

Overview: The primary remedial goal and objective of the DBE program is to level the playing field by providing DBEs a fair opportunity to compete for federally funded transportation contracts. ODOT is the primary certification agency in Ohio for DBEs, but other agencies that received federal DOT funds can certify and all such certifications are processed through the Unified Certification Program or UCP. DBEs must be ready, willing and able to perform work on DOT funded projects. And, despite the overall goal, ODOT often places significantly lower goals on projects based on the availability of the DBEs for the work.

ODOT's DBE Goals (tri-annual):

- 15.7% of federally funded highway construction and design contracts (e.g. major highway reconstruction, geotechnical design, environmental consulting) in Federal Fiscal Years '23, '24 and '25 (ODOT's "Overall" Goal).
- 11.9% of federally funded transit contracts.

DBE Eligibility: To be certified as a DBE, a firm must be an independent small business owned (51% minimum) and controlled by a socially and economically disadvantaged individual (or multiple socially and economically disadvantaged individuals).

Certification Requirements (in part):

- Rebuttably presumed to be socially and economically disadvantaged are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and women. Others may be eligible on a case-by-case basis.
- The socially and economically disadvantaged individual(s) owning and controlling a firm must have personal net worth (PNW) of less than \$1.32 million.
- A firm must meet SBA small business size standards. However, if a firm that meets SBA small business size standards has gross receipts exceeding \$30.4 million (averaged over its previous three fiscal years), the firm's DBE certification will only be recognized on FAA-assisted projects.

Website: <https://www.transportation.ohio.gov/programs/business-economic-opportunity/dbe/dbe-certification>

SBE (SMALL BUSINESS ENTERPRISE) FEDERAL PROGRAM | CERTIFICATION THROUGH ODOT

Overview: ODOT's SBE program is a race/gender-neutral set-aside program that restricts competition for prime contracts on certain federally funded highway construction and design contracts (e.g., culvert replacement, geotechnical design, environmental consulting) to small businesses that have been certified through the program. SBE firms must be prequalified (at bid time) with ODOT in order to bid on SBE set-aside projects. The SBE must perform or exercise responsibility for at least 30% of the total cost of its contract with its own workforce. The SBE program is a federally funded program and ODOT selects projects that are "eligible" based essentially on the ready, willing and able SBEs capable of doing work on the project and to manage the project as a prime.

ODOT's Aspirational Goals for the Program: ODOT represents it is committed to fair and equal opportunities for firms of all size to do business with the state. The SBE Program is established to ensure that small businesses receive fair opportunities to participate in ODOT contracting and consulting activities as prime contractors.

SBE Eligibility: To be certified as an SBE, a firm must be an independent small business owned (51% minimum) and controlled by an individual or multiple individuals having personal net worth (PNW) of less than \$1.32 million.

Certification Requirements (Same as for DBE, except):

- A firm must perform work in construction or construction-related consultant services as a prime contractor and be capable of performing or exercising responsibility for at least 30% of the total cost of a construction or construction-related consultant services contract with its own workforce.
- A firm (including its affiliates) must have average annual receipts of no more than \$15 million (construction firms) or \$7 million (construction-related consultant services firms) over previous three fiscal years (prorated if <3 years old).
- The individual(s) owning and controlling a firm must have adjusted gross income(s) of no more than \$350,000.
- SBE certification is race- and gender-neutral.

Website: <https://www.transportation.ohio.gov/programs/business-economic-opportunity/sbe/sbe-certification>

WBE (WOMEN-OWNED BUSINESS ENTERPRISE) STATE PROGRAM | CERTIFICATION THROUGH ODOD

Overview: The WBE program is designed to assist women-owned businesses in obtaining contracts for goods and professional services. The WBE program does not apply a procurement goal or set-aside target for state contracts. Each program's certification process, including verification of status, is slightly different. The ODOD website provides templates to use that walk businesses through the documentation necessary.

Benefits of Certification: Similar to other programs, once certified through DOD, the WBE can use that certification in local government programs and use the services and resources of the DOD in their business development.

WBE Eligibility: The business must be owned and controlled by a woman who is a U.S. citizen and a resident of Ohio or a reciprocal state (if certified pursuant to section 123.154(D) of the Revised Code).

Certification Requirements (in part):

- Have been in business for at least one year prior to applying.
- Be at least 51% women owned.

Website: <https://development.ohio.gov/business/minority-business/certifications/women-business-enterprise-program>

OTHER LOCAL AGENCY PROGRAMS CINCINNATI, CLEVELAND AND COLUMBUS

Cincinnati: The Department of Economic Inclusion administers three business enterprise programs with a total of five certification types including **MBEs, WBEs, Minority Women Business Enterprise (MWBE), SBEs, Emerging Local Business Enterprise (ELBE) and Small Local Business Enterprise (SLBE)**. The goal is to expand opportunities for small, minority-owned, and women-owned businesses as both subcontractors and prime contractors on City projects.

Website: <https://www.cincinnati-oh.gov/inclusion/registration-certification/business-enterprise-certification/>

Cleveland: Organizations bidding on Cleveland contracts are required to comply with City Code Chapter 187, to ensure participation by **Cleveland Small Businesses (CSBs), Regional Cleveland Area Small Business (RCSB), MBEs, and Female Business Enterprises (FBEs)**. CSBs, MBEs and FBEs must be certified by the Office of Equal Opportunity so that contractors may receive participation credits when hiring them as subs. Companies interested in certification must complete a notarized certification application and submit it for review.

Website: <https://www.clevelandohio.gov/city-hall/departments/law/divisions/office-equal-opportunity>

Columbus: Columbus' Office of Diversity and Inclusion offers free gender and race-based certification. Becoming a certified **MBE, WBE, EBE, LGBTBE, SLBE, VBE** permits the City to identify those ready, willing and able to perform on City contracts. It is City's intent to provide business concerns owned by minority and female persons the maximum practicable opportunity to participate in City contracts.

Website: <https://www.columbus.gov/odi/supplier-diversity/Business-Certifications/>

VFBE (VETERAN-FRIENDLY BUSINESS ENTERPRISE) STATE PROGRAM | CERTIFICATION THROUGH ODOD OR ODOT

Overview: The State of Ohio's Veteran-Friendly Business Enterprise (VFBE) Procurement program provides preference to certified firms that submit bids or proposals related to the state's purchases of supplies and services and the construction of transportation facilities. The enabling statute for the VFBE program was R.C. 122.925. The regulations that govern the program are found in Ohio Administrative Code Chapters 123-5-1 & 5501:2-12. ODOT and ODOD have some overlapping jurisdiction.

Benefits of Certification: Similar to other programs, once certified through DOD, the VFBE can use that certification in local government programs and use the services and resources of the DOD in their business development.

Outreach & Performance: By law, ODOT and ODOD are to implement outreach programs for VFBEs and to establish criteria for program performance. This preference program is somewhat unique and probably least understood.

Certification Requirements (in part):

- At least 10% of its employees are veterans or on active service;
- At least 51% of the applicant business is owned by veterans or persons on active service;
- If the applicant business is a corporation, 51% of which is not owned by veterans or persons on active service, at least 51% of the board of directors are veterans or persons on active service; or
- The business is certified by the United States Department of Veterans Affairs as a Service-Disabled Veteran-Owned Small Business or a Veteran-Owned Small Business and the owner(s) of the business meets the definition of veteran as defined in Rule 122:5-1-16 of the Ohio Administrative Code.

Website: <https://development.ohio.gov/business/minority-business/certifications/veteran-friendly-business-enterprise-procurement-program>

OTHER LOCAL AGENCY PROGRAMS OTIC, NEORS D AND FRANKLIN COUNTY ENGINEER

Ohio Turnpike and Infrastructure Commission (OTIC): The OTIC's Office of Equity and Inclusion issues distinct certifications for entities qualifying as MBEs, Local Disadvantaged Business Enterprises (LDBEs), and SBE. If your company meets the requirements to participate in OTIC's Diversity and Inclusion Program, follow the link to access its application portal.

Website: <https://www.ohioturnpike.org/business/oei>

Northeast Ohio Regional Sewer District (NEORS D): The (small) Business Opportunity Program (BOP) focuses economic impacts in the geographic area it serves and provides a greater opportunity to do business with the District, resulting in job and business growth for the local business community. Federal SBE standards are used and registered businesses across 12 counties may be BOP eligible, including MWSBEs in Ashtabula, Carroll, Cuyahoga, Geauga, Lake, Lorain, Mahoning, Medina, Portage, Stark, Summit and Trumbull.

Website: <https://www.neorsd.org/business-home/business-opportunity-program/>

Franklin County Engineer (FCE): The FCE Equitable Business Enterprise (EBE) program was established to remove barriers to participation of disadvantaged businesses on FCE locally funded project and to assist in the development of firms that can compete successfully in the marketplace outside the FCE EBE program. A minimum 10% EBE participation goal will be established on engineering and design related services agreements that have subconsulting opportunities, as determined by the FCEO.

Website: <https://www.franklincountyengineer.org/diversity-inclusion/>

not brought it current and not added several of the other programs that are particularly impactful to our industry here in Ohio.

It is for this reason that I put together the chart that is appended to this article. In it, you will see the following programs: DBE, MBE, Veteran-Friendly Business Enterprise (VFBE), Women-Owned Business Enterprise (WBE), Small Business Enterprise (SBE), EDGE and "Other." From my experience, these are the most-significant programs impacting heavy/highway contractors and designers. They can be confusing, as not every MBE is a DBE, nor is every DBE an MBE, and this nuance could make a contractor not compliant and lose a contract if not understood at certain critical junctures of a project, such as bid time.

In 2021, Ohio House Bill 110 changed the law and soon thereafter Revised Code 122.921-.924 codified the long-overdue ability of a small, disadvantaged, or minority firm to be certified by the state and have that certification apply, as a matter of law, with every local government requiring similar certifications. In other words, once you were certified as an MBE by the Ohio Department of Development (ODOD) (not DAS any longer), that MBE certification is to be valid for the City of Dayton's MBE program, NEORS's MBE program, Lucas County's MBE program, etc. The intent of the law change was simple – to save companies, individuals and the government time and money seeking essentially the same certifications over and over across the state. Also, to enforce some level of consistency between these preference programs. This is not dissimilar to the multi-state Unified Certification Program that has been used by ODOT, other federal programs in Ohio and even other states for more than 20 years.

My hope is that the chart on pages 23 & 24 can be used to avoid unintended traps for the unwary. Personally, I believe that these programs are worthy of reasonable use and reasonable implementation, and over the years I have personally drafted many provisions in contracts to implement them and assisted with the drafting of the VFBE Rules. But there are certainly times when enforcement of them has resulted in an unjust result, and contractors who do good work in Ohio and elsewhere have suffered through either losing a job, being unduly punished, or losing out on work that they were otherwise qualified to perform. Unfortunately, sometimes these are the costs of implementing these types of preference programs, but the more they evolve and become part of the fabric of doing business, the fewer issues arise with them. I think that is universally understood and agreed upon. However, again, they must be reasonable and reasonably enforced.

The information in the attached chart is not likely to change immediately and probably should be updated bi-annually or certainly if any major laws change. Indeed, it appears that every governor or president wants to make their mark in this realm. Therefore, each time a new one gets into office, their policies tend to influence these programs. Thus, this chart should be used as a baseline of information – not as legal advice – and as a starting point to make sure you understand the programs, and, then, if there are any issues or confusion, first call the regulating agencies (which are linked in the chart) and then seek expert advice.

The federal, state and local regulators that are in charge of these programs can sometimes seem aggressive and all too often are perceived as setting up roadblocks to project success. But

overwhelmingly, they are simply trying to do their job; address pressures from their management, industry and minority owners; and work within a system that can be confusing and appears to always be in flux. Hopefully, this chart will provide a quick-and-easy guide and direct the reader to the right groups to answer detailed questions. If you need any additional information, there are also private groups that can assist majority- and minority-owned businesses, and I would be happy to provide their contact information.



Tom Pannett serves in an Of Counsel role at the Columbus law firm Kegler Brown Hill + Ritter, which he assumed in 2021 after more than 31 years of government service. While at ODOT, Pannett worked as an engineer, attorney and manager. He managed the MBE/DBE/EDGE/ outreach and supportive services programs for a number of years and finished his career as the administrator of the Office of Contract Sales and Estimating. He also served as an Assistant Attorney General representing ODOT. Pannett practices general transportation law with a focus on eminent domain and construction litigation and is a frequent presenter on engineering ethics.

