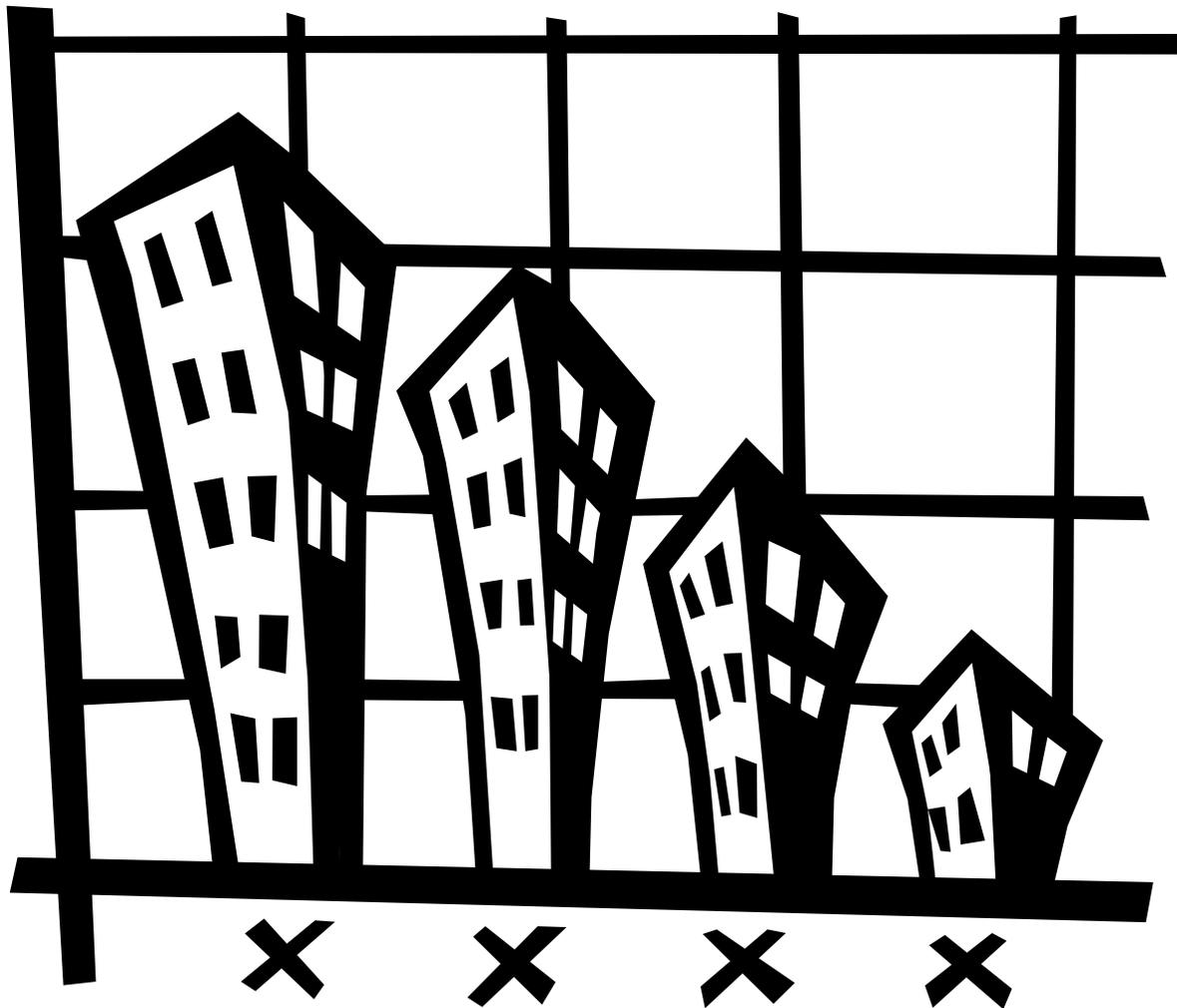




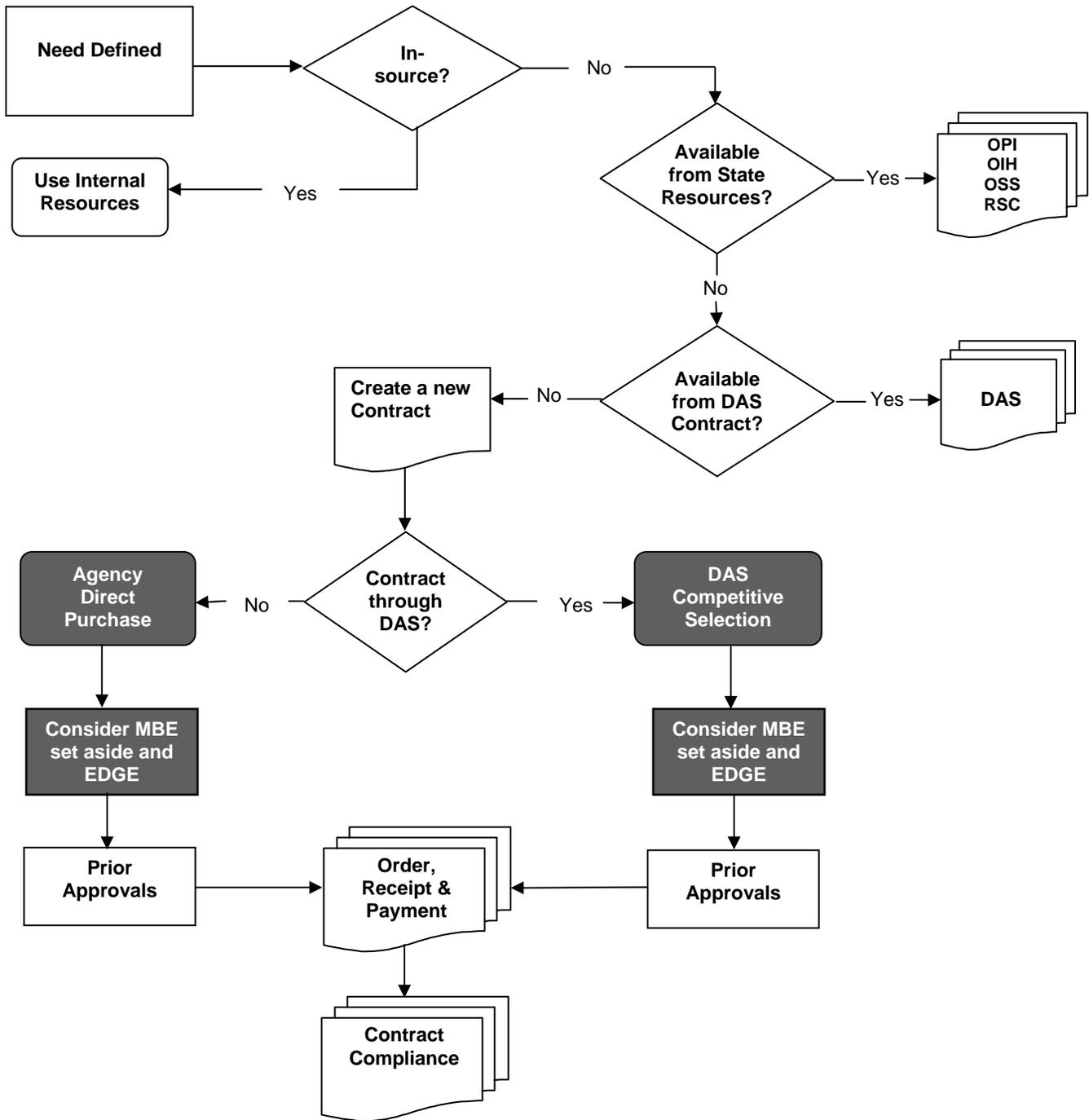
**Minority Business Enterprise (MBE)
and Encouraging Diversity, Growth
& Equity (EDGE) Programs**

**Chapter
7**



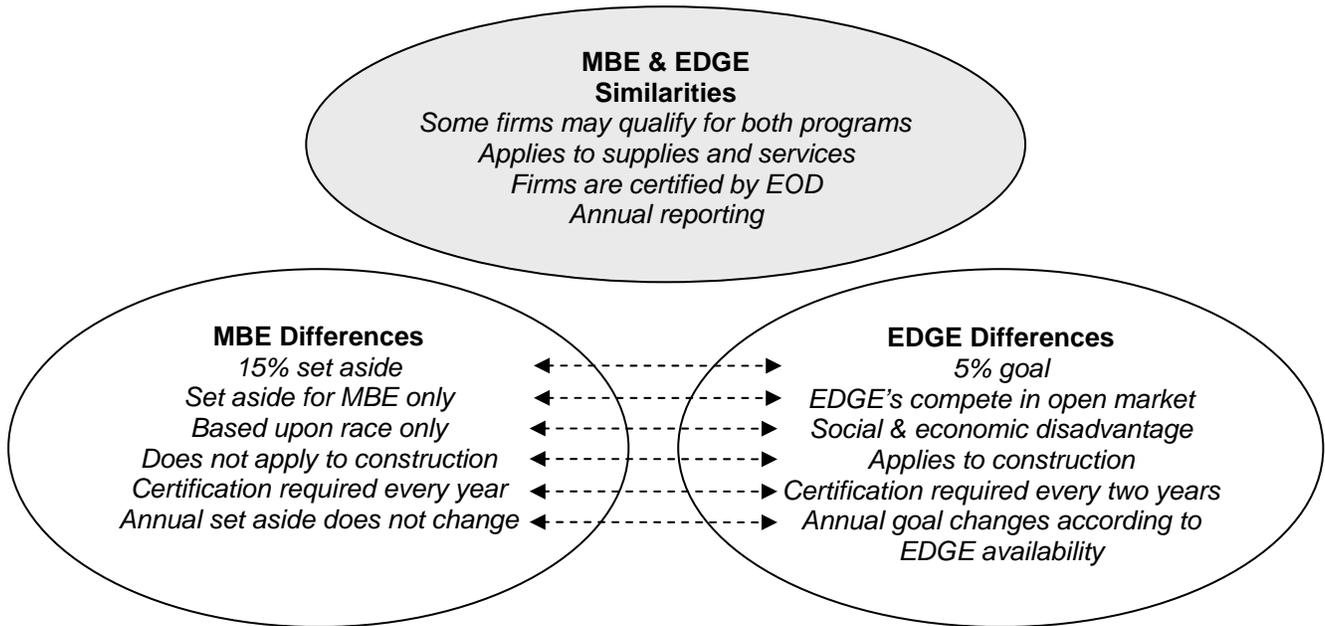
7.0 Overview

Whether the purchase will be made through DAS or made under the agency's direct purchase authority, consideration must be given to minority set aside and small business programs established by law and Governor's executive order. This Chapter will explain both programs and walk you through the each process.



7.1 Minority and Small Business Preferences

The Minority Business Enterprise (MBE) and Encouraging Diversity, Growth and Equity (EDGE) Programs allow government entities to consider certain social and economic factors in awarding contracts. The programs have both similarities and differences.



An overview of each program follows.

7.1.1 MBE Set Aside Overview

A Minority Business Enterprise (MBE) is an individual, partnership, corporation, or joint venture of any kind that is owned and controlled by United States citizens who are residents of Ohio, **and** who are members of one of the following economically disadvantaged groups:

- Blacks,
- Native Americans,
- Hispanics, and
- Orientals,

and who are certified by the Ohio Department of Administrative Services, State Equal Employment Opportunity (EEO) Coordinator.

A “set aside” is defined as a purchase selected for restricted competition among certified MBE’s only.

With few exceptions, state agencies are required to select a number of purchases, the aggregate value of which equals approximately 15% of the total goods and services purchased for the current fiscal year, for set aside competition. In order to reach the 15% goal, agencies may purchase from set aside contracts awarded by DAS and/or agencies may set aside their own procurements under direct purchase authority. Agencies exempt from this requirement are the legislative and judicial branches, boards of elections, and the adjutant general.

In light of developments across the country regarding set-asides, there has been some discussion about the legal foundation for Ohio’s program. The Ohio Supreme Court, in a lengthy review of minority set aside jurisprudence in 1999, concluded that Ohio’s MBE provisions for goods and services were constitutional. This ruling, combined with the Governor’s Executive Order 2000-03T, Policies & Procedures to Implement the MBE Program for State Purchases of Goods and Services, sets out a firm basis and commitment to achieving the letter and spirit of the law.

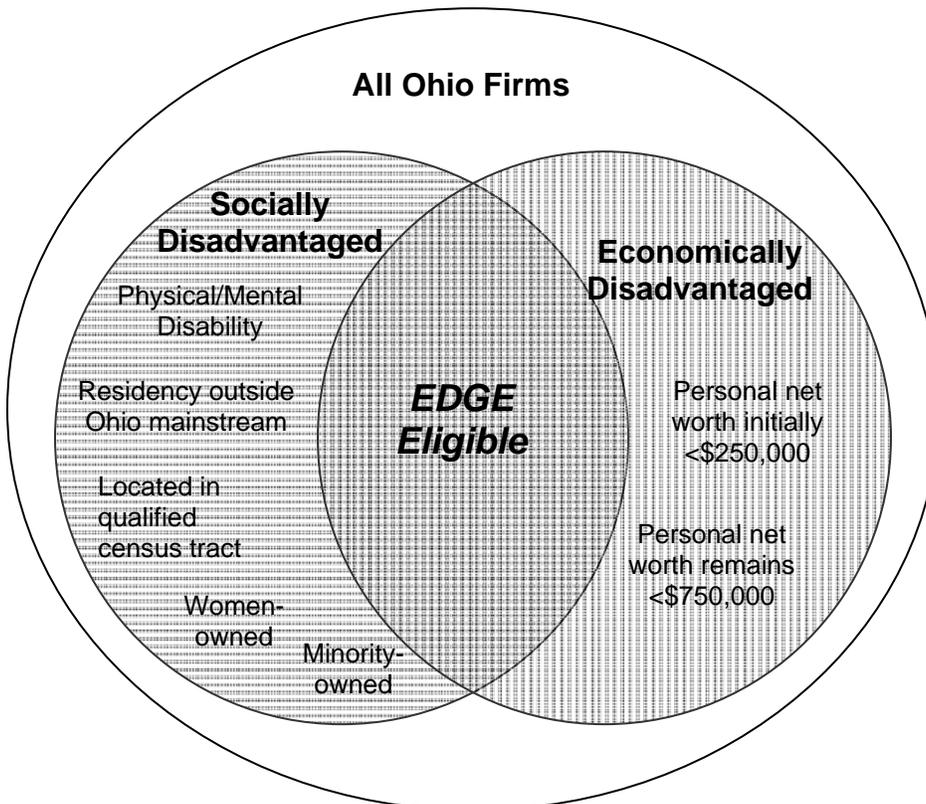
The DAS Equal Opportunity Division (EOD) administers and monitors the MBE program for state government. For more information, please contact EOD at 614-466-8380, or visit the web site at: www.state.oh.us/das/eod/index.htm.

7.1.2 EDGE Overview

EDGE is a contract assistance program designed to assist socially and economically disadvantaged businesses in Ohio. It was originally created by Executive Order 2002-17T in December 2002, and was codified in July 2003.

EDGE establishes goals for state agencies, boards and commissions in awarding contracts. The program applies to procurements of supplies and services, professional services, information technology services, and construction, architecture and engineering.

An EDGE participant must be a small socially and economically disadvantaged business enterprise owned and controlled by U.S. citizens who are Ohio residents. A business enterprise may qualify if the owner meets the criteria for both social and economic disadvantage:



Social Disadvantage

Those individuals who have at least one objective distinguishing feature that has significantly inhibited their business success, such as:

- race
- ethnic origin
- gender
- physical/mental disability
- long-term residency in an environment isolated from mainstream Ohio society
- located in a qualified census tract, or
- other objective relevant reason(s).

Economic disadvantage

- personal net worth of each owner must not exceed \$250,000 at program entry, **and**
- personal net worth of each owner must not exceed \$750,000 during program participation.

The principle behind EDGE is matching contractor **availability** with **utilization**. **Availability** means that a vendor is ready, willing, and able to perform the specified work. An example of an available vendor is one that bids on a state contract and has not been disqualified during the bid process. **Utilization** means that the state has contracted with the vendor to perform the specified work. By tracking both availability and utilization of EDGE participants, the state can determine whether these participants are obtaining a proportionate share of state contracts, and whether disparities exist.

To the extent that any agency of the State is authorized to make purchases, the agency shall establish procurement goals based on a percentage level of participation tied to some measure of percentage of contractor availability and eligible expenditures. For FY2004, the initial goal is **5%** of awarded contracts for supplies, services, and construction.

All of the following are possible ways that agencies can help meet their 5% goal:

- Purchasing from an EDGE vendor on a DAS contract;
- Awarding an open market contract to an EDGE vendor with no preferences;
- For purchases under the direct agency authority threshold, soliciting bids exclusively from EDGE vendors;

- Using an EDGE preference within a Request for Proposal (RFP) issued by the agency;
- Purchasing from a MBE set aside contract, when the MBE is cross-certified as an EDGE.

EDGE is **not** a set aside program. Agencies are not required to set aside certain contracts for EDGE participants only. Regardless of the procurement process used, any state business activity with an EDGE counts as utilization.

According to the executive order and new law, every cabinet-level state agency shall, within the constraints of statutory authority and as otherwise provided by law:

- Take appropriate steps to foster, support and encourage the participation of underutilized businesses and encourage such businesses to compete for construction contracts and the procurement of goods and services by including a participation goal for construction contracts and requests for proposals when subcontractors or sub-consultants are used.
- Review its projected annual procurements to determine, based on EDGE Program participant availability, which procurements will be designated as eligible for EDGE. Once participation goals are established, monitor and report program compliance to the Department of Administrative Services.
- Examine its internal agency procurement policies, procedures and practices and remove those elements that adversely impact small and minority-owned or women-owned businesses.
- Examine and eliminate all unnecessary barriers to equitable participation, including, but not limited to, the following items: bonding and licensing requirements, excessive experience requirements, massive procurements (unbundling contracts when practicable), use of proprietary specifications and other procurement-related requirements.
- Beginning on July 1, 2003, set an initial goal that approximately 5% of eligible direct expenditures in the areas of construction, architecture/engineering, professional services, goods and services, and information technology services be awarded to EDGE Program participants.
- Provide the Department of Administrative Services' Equal Opportunity Division with quarterly reports and annual projections on EDGE utilization.

More information on the EDGE program can be obtained at www.ohio.gov/das/eod/edge.

7.2 Achieving Program Goals through DAS contracts

When making a purchase through competitive selection, DAS is required to set aside a number of such purchases for MBE participation only, the aggregate value of which equals approximately 15% of the estimated total value of all purchases to be made through competitive selection in the current fiscal year. The DAS Offices of State Purchasing, State Printing, and Acquisition Management are each responsible for selecting their respective contracts for set aside, in cooperation with EOD.

DAS will also make available contracts awarded to EDGE's. Purchases from these contracts count toward EDGE goals.

7.2.1 Selecting Term Contracts for MBE Set Aside

Each year DAS selects certain term contracts to be set aside for MBE's only. The State Purchasing process is explained here as a guide to assist state agencies in selecting their own contracts for set aside. The full six-step process is described in State Purchasing Internal Procedure PUR-05. An abbreviated version of the procedure and its timetable follows.

- Organize term contracts. Not later than October 15th of the current fiscal year, State Purchasing prepares a listing of all term contracts that will be active in the approaching fiscal year. The list includes those contracts that will be expiring and may be rebid or renewed and those contracts that are continuing into their second or

third year of activation. Contracts are listed by effective date, open market/set aside/partially set aside status, and include a history as to which fiscal year(s) the contract was in a set aside status.

2. EOD first review. The list of active term contracts is forwarded to the EEO Coordinator by November 1st of the current fiscal year. EOD reviews the list, giving priority to those contracts scheduled to expire in the approaching fiscal year. EOD notes those contracts that are candidates for either partial or full set aside and prepares their supportive documentation for discussion and forwarding to State Purchasing by December 31st of the current fiscal year.
3. Documentation and history. Concurrent with submitting the list to EOD, contract analysts prepare documentation and history of their assigned contracts that will be expiring in the approaching fiscal year. The information assists State Purchasing management in the decision process with EOD to determine those contracts to be set aside.
4. EOD second review. EOD forwards their list of recommendations to State Purchasing no later than December 31st of the current fiscal year. EOD and State Purchasing meet no later than January 31st to review and discuss recommendations. At a minimum, factors considered in the selection process include:
 - a) Broker based or distributor based structure.
 - b) Number of qualified MBE's available to bid (minimum 2, 4+ preferred).
 - c) History of contract being set aside previously.
 - d) Impact upon state if set aside.
 - e) Impact upon MBE community if set aside.
 - f) Impact upon DAS and agency goals if set aside.A final listing of contracts recommended for set aside is prepared.
5. Final Listing. The final list of term contracts to be set aside is combined with all other term contracts that will active in the approaching fiscal year, including those from State Printing and Acquisitions Management. The MBE share as a percentage of the total is determined, and adjusted as necessary to attain the 15% goal. The final list receives the necessary DAS internal approvals no later than February 28th of the current fiscal year. The approved listing is then distributed to DAS management and contract analysts to permit them to begin work on the contract for the approaching fiscal year. The list is distributed to EOD and other interested parties, and available on the State Procurement and EOD web sites.
6. Adjustments to the Approved Listing. During the course of the fiscal year it may be necessary to make adjustments to the approved list. Some reasons for adjustments include a change of status from MBE to open market or vice-versa, new contract offerings, or cancellation of the contract. State Purchasing advises EOD when adjustments are necessary, and may select other contracts for set aside to offset any reductions so as to maintain the approximate 15% goal.

7.2.2 Selecting One-time Bids for Set Aside

Agencies may request DAS to set aside a one-time contract that will be awarded on their behalf. Additionally, DAS may decide that the particular purchase is a candidate for set aside. Following is the process that State Purchasing uses in selecting one-time bids for set aside. While the full process is described in State Purchasing Procedure PUR-06, an abbreviated version is included here.

1. Purchase Requisition. The agency forwards their purchase request to State Purchasing via the ADM-0500 requisition. The requisition contains specifications, funding information and other requirements of the agency. The agency may place a notation on the requisition to bid the procurement as a set aside purchase. The requisition is reviewed by the procurement manager and/or contract analyst(s). If requested for set aside, State Purchasing will generally honor the request. If not requested to be set aside, State Purchasing may select the request be set aside to assist in meeting the 15% goal for DAS. The agency will be notified of any such decision.
2. Suitability determination for set aside. State Purchasing may determine that it is not appropriate to bid the purchase as a set aside. Factors that may cause State Purchasing to bid the purchase to the open market rather than as a set aside include:
 - There are not sufficient qualified MBE's available to bid the purchase. Two or more bidders must be available to foster competition. The buyer will retrieve a list of certified MBE's from the EOD file.

- The size and nature of the purchase may not be conducive to the MBE community registered for the product or service area. For example, if the contract is too small or too large, or located in a distant area, competition may be limited.
- A significant number of other purchase requests for similar products or services have been selected for set aside. Issuing the new request to the open market will prevent a potential of selecting entire categories of products or services for MBE set aside.

State Purchasing discusses the above situations with EOD prior to making a final determination. Denial of an agency set aside request must be approved by the State Purchasing Administrator. In the event of a denial, the agency will be advised of the final determination and the reasons supporting the determination.

3. **Bid and Award.** If the set aside is approved, State Purchasing will complete preparation of the bid documents and issue formal notice of the intended purchase to registered MBE's. Bids will be opened on the specified date and the contract(s) awarded to the lowest responsive and responsible bidder following standard process. The contract award will consist of a State of Ohio Purchase Order (ORDE). State Purchasing will enter the ORDE into the Central Accounting System (CAS) as a MBE set aside purchase. Once funding is approved in CAS, State Purchasing will forward copies of the ORDE to the contractor and respective agency.

7.2.3 Finding DAS Contracts to Meet MBE Set Aside and EDGE Goals

Agencies are encouraged to purchase supplies and services from MBE and EDGE vendors on DAS contracts. Using the State Procurement web site, one can find contracts with MBE vendors by taking the following path:

www.ohio.gov/procure (State Procurement home page)

Select "Current Contracts"

Under "Search by Contract Type," use right down arrow to select "Set Aside (MBE) Contracts"

On "Search for MBE Contracts" page, further refine your search, or click on "Search" to view all contracts.

One can find contracts with EDGE vendors by taking the following path:

www.ohio.gov/procure (State Procurement home page)

Select "Current Contracts"

Under "Search by Contract Type," use right down arrow to select "EDGE"

On "Search for EDGE Contracts" page, further refine your search, or click on "Search" to view all contracts.

As part of the EDGE initial launch, all current MBE's will be cross-certified automatically as EDGE vendors. Later when a vendor's MBE certification is reviewed for renewal, EOD will determine whether the firm is qualified to maintain EDGE certification. Therefore, initially all MBE contracts will automatically qualify as EDGE contracts, and one can use MBE contracts to reach EDGE goals.

7.3 Achieving Program Goals through Agency Direct Authority

Agencies may choose to achieve MBE and EDGE goals through purchases made under their direct authority. Following are guidelines for both programs.

7.3.1 MBE Set Aside through Agency Direct Authority

In order to reach their 15% set aside requirement, agencies may choose to set aside some contracts that are created under their direct purchase authority. As guidance, agencies should consider following do's and don'ts for set asides:

- Do not arbitrarily set aside 15% of every contract.
- Do not arbitrarily select one entire contract area for set aside, i.e., all of the contracts for the purchase of shoes.
- Do consider contract incumbency or longevity (who has had the contract for the last 2 years).
- Do look for opportunities to encourage minority business growth. Look at past years and ask whether a set aside opportunity has ever been provided by your agency in that contract category.

- Do consider adverse impact on both minorities and non-minorities. In contract categories where set aside opportunity has never before been offered lies the potential for adverse impact to non-minorities who have held the contracts long term and to minorities who are seeking to “break into” heretofore inaccessible markets.
- Do consider industry standards.
- Do consider, where appropriate, dividing purchases or contracts into smaller contracts or multiple contracts.
- Do consider the pool of certified MBE’s in your various contract or purchasing categories.
- Do monitor quarterly and adjust your projections and selections as necessary.
- Do check the EOD web site for the latest listing of certified MBE’s, and for the list of DAS contracts set aside for the current fiscal year.

7.3.2 EDGE Compliance through Agency Direct Authority

Agencies may also choose to include EDGE goals in purchases made under agency direct authority. Some of the allowable methods to increase EDGE participation include:

- Soliciting direct quotations from a large number of EDGE’s;
- Including a point preference for an EDGE vendor in an agency-issued Request for Proposal;
- Including a point preference for using an EDGE subcontractor in an agency-issued Request for Proposal;
- Requiring an EDGE subcontracting goal on a construction or service contract;
- Purchasing from an agency-issued MBE set aside contract, when the MBE is cross-certified as an EDGE.

Agencies may obtain a current listing of EDGE firms at www.ohio.gov/das/eod/edge.

Choice of compliance method has an impact on reporting requirements, explained in the subsequent section.

7.4 EDGE Waivers

In the event that a particular contract requires EDGE subcontractor participation, responding vendors may request relief from the EDGE requirement if no EDGE vendors are available.

EDGE waivers are reviewed and processed by the agency awarding the contract, according to standard guidelines. The standard documentation for processing an EDGE waiver is the good faith effort log, which is to be included with the vendor’s bid or proposal. The good faith effort log demonstrates that the contractor has performed due diligence in attempting to secure EDGE participation for the contract. The contractor should record any contacts with EDGE’s on the log. The agency will review the documentation and render a waiver decision. The agency may request the assistance of the DAS EOD office to determine good faith.

Sample good faith effort log forms are available on the EDGE web site at www.ohio.gov/das/eod/edge.

7.5 Reporting

Agencies are required to submit to EOD a combined MBE/EDGE Annual Expenditure Plan outline. EOD will provide agencies with quarterly and annual reports relative to expenditures with both programs.

7.5.1 MBE Reporting

Agencies are required to report MBE expenditures to EOD on a quarterly and annual basis.

One point often confused is the distinction between *set aside* and *participation*. In a set aside bid, competition is restricted exclusively to MBE’s. Should an agency award a contract to an MBE through an open market bid, purchases with that MBE are reported to EOD as MBE participation, but not as set aside.

MBE goods and services participation spending, when verified by the agency, may be included in a section of EOD’s statewide report but cannot be part of the report’s statutory set aside goal achievement, since competition was not limited to MBE firms. Any spending with Ohio minority firms may become a part of the report’s appendix, and reported as other good faith efforts. For more information on MBE reporting, please refer to the EOD web site at www.ohio.gov/das/eod.

7.5.2 EDGE Reporting

The intent of EDGE reporting is to compare availability of certain types of firms vs. utilization of those same types. Reporting can be grouped into levels, from the simplest to the most comprehensive:

Level	When to use	Track Availability by	Track Utilization by
One	Direct expenditures under purchase authority threshold; all expenditures through DAS contracts	CAS report of total spending by agency	CAS report of EDGE spending by agency
Two	Agency ITB's or RFP's above direct purchase authority threshold	Bid or proposal tabulations, and \$ value of contracts awarded by these methods	EDGE spending on contracts awarded by these methods
Three	Agency contracts that utilize subcontractors	Agency spending on contracts of this type	Agency spending on EDGE subcontractors
Four	Agency contracts that utilize subcontractors, in which prime contractor has applied for a waiver of EDGE requirements	Contractor applying for waiver must provide good faith effort log showing available EDGE's contacted	Agency spending on EDGE subcontractors

For all EDGE reporting, forms are available on the EDGE web site at www.ohio.gov/das/eod/edge.

Questions & Answers

Q: Must agencies identify three (3) MBE's before a contract can be set aside?

A: No. Agencies have frequently used a "rule of three available bidders." However, the threat of at least one other bidder is sufficient to establish the presence of competition *whether or not the other bidder submits a response or bid*. Hence, a competition is established even when there is only one response. A single response from a bidder would not invalidate the set aside contract for want of competition.

It is recommended that at least two MBE's be identified and registered in the commodity code of the potential purchase. If only one MBE is available, the purchase would be considered sole source, and would require Controlling Board approval (see Chapter 8).

Q: Should "availability" be a factor?

A: Yes. There are at least three types of "availability." First, *available* can pertain to those potential contracts to be set aside for MBE competition only. Second, *available* can pertain to those MBE's identified as having *registered* in the trade, goods or services being solicited by the agency (as discussed in the preceding question). Third, *available* can pertain to those MBE's who *respond* to the bid solicitation and are subsequently determined to be responsive and responsible bidders by the agency.

As with every contract, the letting agency will determine this last type of availability. This latter type of availability or capability evaluation is separate and apart from the availability or MBE trade registration analysis done by the agency when determining which purchases to set aside for MBE competition.

Q: Is there a difference between "certified" and "registered"?

A: Yes. The Equal Opportunity Division *certifies* that applications to Ohio's MBE program, as outlined in ORC 125.081, have met the five basic requirements for participation: ownership, control, ethnicity, Ohio residency, and United States citizenship. Vendors may also become *certified* in the EDGE program.

At any time, vendors may *register* on the State Procurement web site to be notified of bid opportunities. *Registration* gives the vendor an electronic notice of an opportunity, regardless of certification status.

Q: Does the Equal Opportunity Division certify MBE's in particular areas of business?

A: Yes. Certificates issued to MBE's specify that the holder of the certificate is either a supplier of goods/services, or a construction prime contractor. EOD's publication of certified MBE's limits identification to those two basic categories and by NIGP code.

Q: Who will evaluate the qualifications of the MBE bidders?

A: OAC 123:2-15-01, Rule (B)(11) states, in part: "Any applicant desiring to bid on a contract awarded by any agency other than the department of administrative services must meet any pre-qualification requirements of that agency." Practically speaking, the bid specifications and the evaluation of capability process that agencies utilize for determining the ability of any open market bidder to perform on the contract will suffice for determining the qualifications of MBE vendors as well.

Q: From what source will agencies obtain registration lists of certified MBE's?

A: The EOD web site at www.state.oh.us/das/eod/mbecert.htm contains an updated list of certified MBE's. Agencies may download and print the listing, or search the list using various criteria.

Q: How will future EDGE procurement goals be set?

A: The initial baseline procurement goal will be 5 percent. After a year of program operation the initial agency goal will be reviewed by the Ohio Department of Administrative Services (DAS) with the agency and adjusted accordingly based on EDGE-contractor availability and eligible agency procurements.

Q: What is the difference between the EDGE program and the MBE program?

A: Both programs assist underutilized businesses in obtaining state government contracts. Underutilized businesses may be eligible for certification with the MBE and EDGE program. MBE certification is limited to members of four statutorily designated racial groups. MBE procurement involves sheltered market or set-aside contracts let by virtually all state agencies. EDGE certification is open to any Ohio-based small business that has been certified as socially and economically disadvantaged. EDGE procurement is limited to direct discretionary cabinet-level agency purchases and does not involve bidding credits, sheltered markets or set-aside contracts.

Q: How will EDGE goals and MBE set aside requirements be reconciled?

A: Underutilized businesses may be eligible for certification with both the MBE and EDGE programs. A business has an opportunity to obtain contracts through actively participating in both programs. When projecting MBE and EDGE procurements, agencies may realize that it is possible for the procurement to be made from a vendor under either program. Should this occur, the larger 15 percent MBE set aside requirement should be met first, and in doing so the 5 percent EDGE goal will be indirectly met. On the other hand, when possible, EDGE procurements should be made first from vendors that are EDGE-only certified to help both MBE and EDGE participants to be utilized by agencies.

Q: How will EDGE spending be tracked in the Central Accounting System (CAS)?

A: EDGE vendors will have a designator in CAS, similar to MBE vendors.

Q: How will the EDGE program be monitored?

A: The state EEO coordinator and agency EEO officers will be primarily responsible for program monitoring and accountability. Agency EEO officers or other designated personnel will be trained and given an enhanced role and responsibility for individual agency compliance. In addition to monitoring agency compliance and submitting reports to DAS, EEO officers will receive complaints, investigate disputes and review agency waivers. DAS will be responsible for overall program oversight and annual reports to the governor.

Q: How will EDGE disputes be resolved?

A: When possible disputes involving agencies and certified vendors will be mediated through the alternative dispute resolution process. Vendors or agencies that experience problems with utilization or compliance may file a complaint with DAS or the contracting agency EEO officer. Once received, the complaint or dispute will be reviewed, investigated and resolved or referred to alternative dispute resolution when appropriate. However, certification disputes must be appealed to the DAS Equal Opportunity Division, the division responsible for certification.

Q: How will EDGE waivers be granted?

A: The contract-letting entity will be responsible for granting waivers. Contractors documenting a good faith effort to comply with the established participation goal, may request a waiver if they are unable to comply. The waiver process and necessary documentation to warrant the granting of a waiver will be uniform throughout the state and subject to review by the agency EEO officer and state EEO coordinator.