

**AGREEMENT BY AND BETWEEN
THE OHIO DEPARTMENT OF TRANSPORTATION
AND
THE KENTUCKY TRANSPORTATION CABINET
CONCERNING
RECIPROCITY OF DBE CERTIFICATIONS**

This AGREEMENT (“Agreement”), made and entered into by and between the STATE OF OHIO, acting by and through the OHIO DEPARTMENT OF TRANSPORTATION (“ODOT”), and the COMMONWEALTH OF KENTUCKY, acting by and through the KENTUCKY TRANSPORTATION CABINET (“KYTC”), is executed pursuant to the terms and conditions set forth herein and shall be effective as of the date of approval by the Office of the OHIO Attorney General (“Effective Date”). ODOT and KYTC are jointly referred to herein as the “Parties” and each individually as a “Party.”

WITNESSETH

WHEREAS, ODOT is the agency responsible for Ohio’s certification of disadvantaged business enterprise (“DBE”) firms and the operation of Ohio’s DBE Program under the Unified Certification Program (“UCP”) in accordance with the requirements of 49 CFR Part 26 in the State of OHIO, and KYTC is the agency responsible for Kentucky’s certification of DBE firms and the operation of Kentucky’s DBE Program under the UCP in accordance with the requirements of 49 CFR Part 26 in the Commonwealth of Kentucky; and

WHEREAS, the Brent Spence Bridge is the centerpiece of a nationally-recognized corridor for freight and interstate travel that connects Ohio and Kentucky across the Ohio River; and

WHEREAS, the Brent Spence Bridge Project (hereinafter “Project”) will improve the operational characteristics of an approximate 7.8-mile segment of I-75 within Kentucky and Ohio by improving traffic flow, level of service, and safety; correcting geometric deficiencies; and maintaining connectivity to key regional and national transportation corridors. includes 4 phases to construct a new companion bridge, provide significant improvements to the current bridge, construct and improve new bridge approaches and interchanges in Ohio and Kentucky, and improve safety and access to the Covington and Cincinnati business districts; and

WHEREAS, the Project anticipated to be comprised of four phases including: (i) the construction of a new interchange on I-75 in Ohio between Findlay Street and Marshall Avenue to connect I-75 to the new Western Hills Viaduct (Ohio PID 114161) (“Brent Spence Bridge Phase I”), (ii) the reconstruction and widening of I-75 from Linn Street to Findlay Street and the reconstruction of Gest Street from Freeman Avenue to U.S. 50 (Ohio PID 113361) (“Brent Spence Bridge Phase II”), (iii) the improvement of the existing approaches to the Brent Spence Bridge and of the improvements comprising the Brent Spence Bridge from approximately state line mile 186.7 in Kentucky to approximately state line mile 2.7 in Ohio (“Brent Spence Bridge Phase III”), and (iv) the

development and construction of a companion bridge to the Brent Spence Bridge (the “Companion Bridge Phase”)

WHEREAS, ODOT and KYTC agree to help remove any potential barriers to the participation of eligible certified DBE firms by establishing a Reciprocal DBE Certification Agreement for the Project; and

WHEREAS, pursuant to 49 CFR §26.81(e) and (t), ODOT and KYTC may, at their discretion, accept the certification of any other UCP, enter into written reciprocity agreements with other UCPs, or grant reciprocity to another jurisdiction’s certification decisions; and

WHEREAS, the Parties agree that reciprocal acceptance of certification of DBE firms in their respective states is mutually beneficial in their efforts to achieve the objectives of the DBE Program as they are stated in 49 CFR §26.1, achieve each state’s DBE participation goals, and to facilitate the completion of the Project.

NOW, THEREFORE, in consideration of the promises and covenants herein contained and other good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, and intending to be legally bound, the Parties hereby agree as follows:

1. **Purpose.** The purpose of this Agreement is to:
 - a. Remove regulatory and administrative barriers which discourage participation by certified DBE firms in significant federally-funded transportation projects;
 - b. Increase opportunities for DBE firms;
 - c. Increase the availability of certified DBE firms during the Project by allowing unimpeded certification reciprocity between the states’ primary transportation agencies;
 - d. Work cooperatively with sister recipient agencies to assist in the achievement of their respective DBE participation goals; and
 - e. Reduce the cost of construction projects by increasing price competition amongst contractors.
2. **Term.** This Agreement shall be effective through the completion of all phases of the Project, unless terminated early as provided herein. This Agreement may be amended in writing at the pleasure of the Parties and with the approval by the Federal Highway Administration (FHWA).
3. **Early Termination.** This Agreement may be terminated by either Party for any reason upon 45 days written notice to the other Party. Such notice shall be delivered by certified mail. If a DBE firm is utilizing this Agreement in its non-home state and is in the process of providing services on any phase of the Project when this Agreement is terminated or expires under its own terms, the DBE firm shall be allowed to continue to work in its non-home state until the Project on which it is providing services ends.
4. **Reciprocity.**

- a. The Parties agree that Ohio and Kentucky DBEs certified in their respective home states shall be eligible to work as a certified DBE contractor/consultant or subcontractor/subconsultant, without seeking further DBE certification, on all design and construction phases related to the Project.
 - b. Each Party to this Agreement shall retain primacy over the administration of its DBE certification decisions. Each Party to this Agreement shall have the authority to cite, discipline, or remove DBEs working in the state where the project is executed in accordance with its required performance standards. As out-of-state DBEs will not be certified other than in their home state, only the home state may remove the firm's DBE certification. DBEs operating under this Agreement are subject to all policies, statutes, and regulations, including the DBE regulations under 49 CFR Part 26, governing the execution of construction contracts of the state in which the work occurs.
 - c. Prior to revoking a DBE certification that may materially impact the Project, the revoking Party shall notify and request concurrence from the other Party.
 - d. This Agreement does not grant interstate certification to DBEs. DBEs working under this Agreement will only be listed in the DBE Directory of their home state.
 - e. Each Party retains the right to consider a bidder's use of the reciprocity exchange as one component of a thorough good faith efforts analysis.
 - f. This Agreement does not amend, alter, or affect the power of either Party to remove the certification of a DBE in accordance with 49 CFR §26.87. Further, within its own discretion, each Party to this Agreement shall be responsible for pursuing necessary discipline, sanctions, or removals (as well as any resulting administrative proceedings or litigation) against DBEs certified by that Party. Each Party shall bear all costs associated with such proceedings that occur in regard to DBEs certified by that Party.
 - g. If a DBE certified in both Ohio and Kentucky has its certification removed for cause by one of the Parties, the DBE may not use this Agreement to retain its eligibility to work as a certified DBE contractor or subcontractor in the state that removed its certification.
5. **Notification.** The Parties each agree to notify the other monthly with a list of DBE firms involved in any completed investigation, as well as any DBE firm that has been suspended or removed from the home state's certification list. The Parties also agree to notify the other as soon as practicable when a DBE is subject to a complaint pursuant to 49 CFR §26.103 or 49 CFR §26.87 and when a DBE firm has been suspended pursuant to 49 CFR §26.88.
6. **Procurement.** Certified DBEs seeking work under this Agreement must comply with the procurement and bidding requirements of the state in which the Project is executed
7. **Compliance.**

- a. In addition to federal standards, DBEs must comply with all applicable local and state guidance, statutes, regulations, and policies applicable to the work performed in the State of Ohio. Sanctions for non-compliance shall be at the discretion of ODOT.
 - b. DBEs shall comply with the policies and procedures of the State of Ohio. Work performed by DBEs shall be monitored in accordance with 49 CFR Part 26, Subpart F.
 - c. Each state shall have the authority to remove underperforming DBEs who fail to meet the state's regulatory performance standards for the Project. For the Project, a DBE may be removed from the Project in accordance with the performance standards and requirements of each participating agency.
8. **Administration of Agreement.** The Parties recognize that the success of this Agreement is dependent upon cooperation and communication between the Parties. To facilitate the success of this Agreement, the Parties shall meet no less than bi-monthly at a predetermined date and time to be determined by the Parties.
 - a. The meeting shall be attended by representatives of each state's DBE Program with knowledge of the operation of the DBE Program and authorized to make decisions with regard to the administration of their respective DBE Programs;
 - b. Attendees must include the DBE liaisons or their designee;
 - c. Attendees shall include those persons responsible for certification, monitoring, and communications;
 - d. Federal Highway Administration ("FHWA") representatives from both states shall be extended an invitation; and
 - e. The meeting agenda will be set by the DBE Liaisons with input for other attendees.
9. **Communication.** The Parties shall share all documents and any updates thereto, pertaining to the operation of its respective program that may impact implementation of this Agreement. At a minimum, the communication shall include:
 - a. A monthly report listing DBEs utilizing the benefits of this Agreement;
 - b. State regulations supplementing 49 CFR Part 26;
 - c. Communications pertaining to issues related to potential decertification;
 - d. Updated DBE Program Directory, as soon as practicable, including names of DBE firms removed, suspended, decertified, and withdrawals;
 - e. All communications with representatives of FHWA regarding the execution and operation of this Agreement;
 - f. All information concerning an investigation of inadequate performance, wrongdoing, malfeasance, or other misconduct by a DBE working under this Agreement; and
 - g. The results of the routine monitoring of DBE performance.
10. **Notice to Parties.** The Parties agree the following, or their successors, are the designated persons for each Party:
 - a. To ODOT:

Juleda Stoltz
DBE Program Manager, Office of Business & Economic Opportunity
1980 West Broad Street
Columbus, OH 43223
Phone: (614) 466-6905
Email: Juleda.Stoltz@dot.ohio.gov

And with copy to:

Brianne Brown
Deputy Chief Legal Counsel
Ohio Department of Transportation
1980 West Broad Street
Columbus, OH 43223
Phone: (614) 466-7440
Email: Brianne.Brown@dot.ohio.gov

- b. To KYTC:
Melvin Bynes
Executive Director, Office for Civil Rights and Small Business Development
200 Mero Street, 6th Floor West
Frankfort, Kentucky 40622
Phone: (502) 564-3601
Email: melvin.bynes2@ky.gov

And with copy to:

Todd Shipp
Legal Counsel, Kentucky Transportation Cabinet
200 Mero Street, 6th Floor West
Frankfort, Kentucky 40622
Email: Todd.Shipp@ky.gov

11. **Drafting.** No Party shall be deemed to be the primary drafter of this Agreement, and the terms of this Agreement shall not be construed against any Party as the drafter of this Agreement. Each Party is equally responsible for this Agreement's terms and conditions.
12. **Modifications.** This Agreement shall not be modified, amended or supplemented, or any rights herein waived, unless specifically agreed upon in writing by the Parties hereto, and approved by FHWA.
13. **Sovereignty.** The Parties have entered into this Agreement as sovereign entities and not as principal and agent or as a joint venture. Nothing herein shall be construed as consent by either state to suit in the courts of the other state, or waiver of that state's sovereign immunity or rights under the Eleventh Article of Amendment to the Constitution of the United States.


14. **Third Party Claims.** This Agreement does not grant any rights to any party except ODOT/State of Ohio and KYTC/Commonwealth of Kentucky. Nothing in this Agreement shall be deemed to create or give rise to any right of action in, or any liability to, any third party claiming to have suffered a loss, damage, or injury by virtue of any alleged failure by either Party hereto to comply with the terms of this Agreement.
15. **Compliance with Laws.** The Parties agree to comply with all applicable laws of their respective states and with all federal laws.
16. **DBE Requirements and Nondiscrimination Assurances.** Pursuant to the Civil Rights Act of 1964, the Parties shall not discriminate against any employee or applicant for employment, to be employed in the performance of work under this Agreement, with respect to hire, tenure, terms, conditions, or privileges of employment or any matter directly or indirectly related to employment, because of race, color, religion, sex, disability, national origin, age, or status as a veteran. The Parties shall ensure that consultants incorporate similar requirements in all of their contracts for any of the work prescribed herein and will require all consultants' subcontractors for any part of such work to incorporate such requirements in all subcontracts for such work.
17. **Funding Cancellation.** If either Party makes a written determination that funds are not appropriated or otherwise available to support continuation of performance of this Agreement, this Agreement shall be terminated and cancelled. A determination by the Director of the Ohio State Budget Agency or the Secretary of KYTC that funds are not appropriated or otherwise available to support continuation of performance shall be final and conclusive.
18. **Hold Harmless.** The Parties agree to exculpate and hold harmless each other and their officials and employees from any liability due to loss, damage, injuries, or other casualties of whatever kind, to the person or property of anyone arising out of, or resulting from the performance of, this Agreement or the work connected therewith, or from the installation, existence, use, maintenance, condition, repairs, alteration or removal of any equipment or material, to the extent such liability is caused by the negligence of either Party, including any claims arising out of the Worker's Compensation Act or any other law, ordinance, order or decree. The Parties shall not provide indemnification to each other or to any other party.
19. **Unified Certification Program.** It is the intention of the Parties that this Agreement grant UCPs organized under 49 CFR §26.81 the discretion to utilize DBEs certified and in good standing pursuant to 49 CFR Parts 23 or 26 for credit toward their individual goals.
20. **Signatures.** Any Party hereto may deliver a copy of its counterpart signature page to this Agreement via fax or e-mail. Each Party hereto shall be entitled to rely upon a facsimile or electronic signature of any other Party delivered in such a

manner as if such signature were an original. Any person executing this Agreement in a representative capacity hereby warrants that he/she has been duly authorized by his/her principal to execute this Agreement on such principal's behalf. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute but one and the same instrument.

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The State of Ohio, acting by and through ODOT, and the Commonwealth of Kentucky, acting by and through the Kentucky Transportation Cabinet have, through their duly authorized representatives, entered into this Agreement. The Parties, having read and understood the foregoing terms of this Agreement, do by their respective signatures dated below agree to the terms thereof.

COMMONWEALTH OF KENTUCKY

X 

James P. Gray II, Secretary
Kentucky Transportation Cabinet

Approved as to Form and Legality:

X 

Office of Legal Services
Kentucky Transportation Cabinet

STATE OF OHIO

X *Jack Marchbanks*

Jack Marchbanks, Director
Ohio Department of Transportation

Approved as to Form and Legality:

X *[Signature]*

Office of Chief Legal
Ohio Department of Transportation