



DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM PLAN

Jim Gray, Secretary
Tony Youssefi, Executive Director
Office for Civil Rights and Small Business Development

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I. INTRODUCTION

The Kentucky Transportation Cabinet (Transportation Cabinet or Cabinet), in accordance with the requirements of 49 Code of Federal Regulations Part 26 (49 CFR 26), has developed the Kentucky Disadvantaged Business Enterprise Program (DBE Program) for the purpose of leveling the playing field for DBEs with respect to projects funded in whole or part by the US Department of Transportation (USDOT or DOT). The provisions of the Transportation Cabinet's DBE Program shall apply to all recipients and sub-recipients, including contractors and subcontractors, Federal aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; Airport funds authorized by 49 U.S.C. 47101, et seq.

The objectives¹ of the Transportation Cabinet's DBE Program are:

- a. To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Cabinet's highway, transit, and airport financial assistance programs;
- b. To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- c. To ensure that the Cabinet's DBE Program is narrowly tailored in accordance with applicable law;
- d. To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- e. To help remove barriers to the participation of DBEs in DOT-assisted contracts;
- f. To promote the use of DBEs in all types of federally assisted contracts and procurement activities conducted by recipients;
- g. To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- h. To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

¹49 CFR §26.1

The Transportation Cabinet has conducted a DBE Program since 1982. The program has functioned as an integral component of its federal highway construction program by providing the impetus for increasing the participation of minorities and women in contracting opportunities funded by USDOT. This program extends the commitment of the Transportation Cabinet to provide equal opportunity to all contractors, subcontractors, consultants and sub-consultants qualified to perform on USDOT assisted contracts. Each year, the Cabinet's Office for Civil Rights and Small Business Development reports to DOT's Departmental Office of Civil Rights by January 1st the following information²:

1. The number and percentage of in-state and out-of-state DBE certifications by gender and ethnicity (Black American, Asian-Pacific American, Native American, Hispanic American, Subcontinent-Asian Americans, and non-minority);
2. The number of DBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible;
3. The number of decertified firms:
 - i. Total in-state and out-of-state firms decertified;
 - ii. Names of in-state and out-of-state firms decertified because SEDO exceeded the personal net worth cap;
 - iii. Names of in-state and out-of-state firms decertified for excess gross receipts beyond the relevant size standard.
4. The number of in-state and out-of-state firms summarily suspended;
5. The number of in-state and out-of-state applications received for an individualized determination of social and economic disadvantage status;
6. The number of in-state and out-of-state firms certified whose owner(s) made an individualized showing of social and economic disadvantaged status.

This program document supersedes any previously issued policy or procedural statements that may conflict with its content. In the event that any language within this program document conflicts with the regulations found at 49 CFR 26, the regulations shall have primary authority.

² 49 CFR §26.11(e)

II. POLICY STATEMENT (49 CFR 26.23)

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Andy Beshear
GOVERNOR

TRANSPORTATION CABINET

200 Mero Street
Frankfort, Kentucky 40601

Jim Gray
SECRETARY

II. POLICY STATEMENT (49 CFR 26.23) DISADVANTAGED BUSINESS ENTERPRISE PROGRAM POLICY STATEMENT

Official Order **113560**

Section 26.1, 26.23 Objectives/Policy Statement

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

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

1. To ensure nondiscrimination in the award and administration of USDOT - assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. To promote the use of DBE's in all types of federally-assisted contracts and procurement activities conducted by the Department;
6. To help remove barriers to the participation of DBEs in USDOT assisted contracts;
7. To assist the development of firms that can compete successfully in the market place outside the DBE Program.

The Cabinet's Office for Civil Rights and Small Business Development has delegated a DBE Liaison Officer (DBELO). In that capacity, the DBELO is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by the DBELO in its financial assistance agreements with the Department of Transportation.

Furthermore, the Cabinet, its sub-recipients, contractors and subcontractors shall not discriminate on the basis of race, color, or national origin in the award and performance of USDOT-assisted contracts or in the administration of its DBE program or the requirements of 49 CFR Part 26.

This policy statement shall be prominently posted throughout all of the Cabinet offices and disseminated to DBE and non-DBE business communities that perform work for us on USDOT-assisted contracts.

Signed and approved this _____ day of 1/16/2024 2024.

DocuSigned by:

9DC832F7B94544E...
Jim Gray, Secretary
Kentucky Transportation Cabinet

APPROVED AS TO FORM AND LEGALITY

J. Todd Shipp, Esq., Special Assistant, Office of Legal Services

III. ASSURANCES

(49 CFR §26.13)

Each financial assistance agreement the Transportation Cabinet signs with a USDOT operating administration (or a primary recipient) must include the following assurance:

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under 49 CFR part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

Each contract the Transportation Cabinet signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted 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, which may include, but is not limited to:

- (1) Withholding monthly progress payments;
- (2) Assessing sanctions
- (3) Liquidated damages; and/or
- (4) Disqualifying the contractor from future bidding as non-responsible.

IV. REVISED UCP AGREEMENT

Unified Certification Programs

(49 CFR §26.81)

The Cabinet's DBE certification process is conducted in accordance with the Kentucky Unified Certification Program (UCP) Agreement as approved by FHWA. The UCP provides that the Cabinet shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program in Kentucky. The signed Revised UCP Agreement is provided on the following pages.

**REVISED AGREEMENT GOVERNING
THE KENTUCKY CERTIFICATION PROGRAM
FOR THE DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

THIS AGREEMENT is made and entered into by and between the Kentucky Transportation Cabinet (KYTC) and the undersigned Kentucky recipients of funds allocated by the United States Department of Transportation's (USDOT) Federal Highway Administration (FHWA), as defined by 49 CFR §26.5 and as listed in Appendix A. This document replaces all prior agreements governing the Kentucky Unified Certification Program (KUCP) for the Disadvantaged Business Enterprise (DBE) Program.

RECITALS

WHEREAS, as the largest direct recipient of FHWA-allocated funding in the Commonwealth of Kentucky, KYTC is the agency designated by FHWA to act as the primary certification entity for the DBE Program in the Commonwealth;

WHEREAS, in accordance with the requirements of 49 CFR Part 26, Subpart E, the Kentucky recipients of USDOT funds established in 2002 a unified DBE certification program in the Commonwealth (KUCP) for the purpose of developing a uniform certification process in accordance with the requirements of 49 CFR §26.81;

WHEREAS, 49 CFR §26.21 requires all recipients of federal transportation funds in the Commonwealth participate in a DBE Program and comply with the requirements of 49 CFR Part 26, including the participation in the KUCP in order to continue to receive said funds per 49 CFR §26.81; and

WHEREAS, the KYTC DBE Certification Committee [DBE Committee] shall make all certification decisions on behalf of USDOT recipients in the Commonwealth as a prerequisite to participation in the DBE Program. Certification decisions made by the KUCP shall bind on all USDOT recipients in the state and shall provide a single certification entity to all applicants for certification. 49 CFR §26.81(b).

WHEREAS, the governing board of each recipient entity has by resolution authorized participation in the KUCP and continued operation of the KUCP; and

WHEREAS, pursuant to the original agreement establishing the KUCP, each undersigned recipient and/or future recipients of federal transportation funds are bound by its terms.

NOW, THEREFORE, in consideration of the mutual promises and benefits that each party shall derive therefrom the recipients agree as follows:

ARTICLE I

PURPOSE

The parties have entered into this Agreement for the purpose of operating the KUCP to be administered by the Kentucky Transportation Cabinet's Office for Civil Rights and Small Business Development (KYTC/OCRSBD). The KYTC/OCRSBD will oversee the process for designation of a Certification Committee as provided in the approved KYTC DBE Program under section III DBE Certification Process, A and in accordance with 600 KAR 4:010, Sec.5.

ARTICLE II

SERVICES

Section 2.1 Kentucky Unified Certification Program (KUCP)

The KUCP has been created and implemented in accordance with 49 CFR §26.5, as amended April 9, 2024.

A. The KUCP will follow all certification, continuation, decertification and removal procedures in accordance with the certification standards contained in 49 CFR Part 26, Subparts D and E as they are from time to time interpreted or modified by the FHWA.

B. Application Procedure for Certification:

- i. Firms seeking certification will apply online using our application portal <http://bit.ly/KentuckyDBE>.
- ii. Upon receipt of an application for DBE certification, the application shall be assigned to an investigator who will then review the application, including supporting documentation, to verify that the information is complete. They will then schedule an on-site review and collect any additional information required by the Certification Committee to determine the eligibility of the applicant to participate in the program.
- iii. The Certification Committee shall meet at least every 30 days to consider completed applications. Certification decisions shall be rendered within 90 days of receipt of all required documentation by OCRSBD.
- iv. Out-of-state firms applying for certification in Kentucky must be certified as a DBE by their jurisdiction of original certification (JOC) to be considered for DBE certification by KYTC. On-site reviews from out-of-state applicants will be accepted from the JOC certification entity. OCRSBD personnel shall review the three items¹ required from the DBE for interstate certification and shall accept the DBE's certification from its JOC within 10 days of receiving all necessary information. All other aspects of the certification process for out-of-state firms shall follow the KYTC DBE Program Plan, 49 CFR Parts 23 and 26, and 600 KAR 4:010.
- v. A firm receiving a *Notice of Intent (NOI) to Decertify* its certification must request a hearing within 10 days after the NOI was sent if the DBE wants an informal hearing before the Certification Committee to present information to the Certification Committee to support continued participation in the DBE Program. The informal hearing may be conducted in person, telephonically or by video conference at the firm's request.

The informal hearing will be conducted within no fewer than 30 days and no more than 45 days from the date of the NOI. If the DBE does not want a hearing, or does not give timely notice to OCRSBD that it wants one, the DBE may still provide written information and arguments rebutting the reasons for decertification stated in the NOI. Any request for a hearing or a written argument must be directed to electronically to KYTC.OCRSBD@ky.gov or by mail to:

¹ 49 CFR §26.85(c)

Kentucky Transportation Cabinet
Office for Civil Rights & Small Business Development
200 Mero Street, 6th Floor West
Frankfort, KY 40622

A firm receiving a *Notice of Decision (NOD)* to deny or decertify its certification has the right to appeal.

The appeal of a decision by the Certification Committee shall be emailed to DBEAppeals@dot.gov within forty-five (45) days of the date of the decision of the committee. The appeal shall include the denied certification notice and other pertinent information and provide a full and specific statement as to why the decision is erroneous, what significant fact was not considered, or what provisions of 49 CFR Part 26 were not properly applied. USDOT shall not accept notices of intent or partial or otherwise non-compliant submissions. The appeal must include the Cabinet's name, date of the Cabinet's decision, and the firm's/applicant's contact information. If they do not have access to email, they may send a letter to the following address:

U.S. Department of Transportation
Departmental Office of Civil Rights
Disadvantaged Business Enterprise Program Division
1200 New Jersey Avenue SE
Washington, DC 20590

In the event an applicant or firm would like an alternate appeal process, they may elect to appeal final decisions under this section pursuant to KRS 13B.

An applicant who is denied certification, or whose certification is removed by the committee, shall not reapply for DBE certification for six (6) months from the date of notice of the denial or removal.

The Kentucky electronic DBE Directory is maintained on the KYTC website, and will be updated as OCRSBD receives notice of changes of the status of certified DBEs.

- C. The KUCP will cooperate fully with oversight, review and monitoring activities of the USDOT and its operating administrations.
- D. The KUCP will implement USDOT directives and guidance concerning certification, continuation, removal and decertification procedures in accordance with the certification standards and procedures contained in of CFR 49, Subparts D and E and with 600 KAR 4:010 to the extent that state law complies with the federal requirements.
- E. Each recipient party to this Agreement shall ensure that the KUCP has sufficient resources and expertise to carry out the requirements of 49 CFR Part 26.

Section 2.2 Kentucky Unified Certification DBE Committee

The certification entity for the Kentucky Transportation Cabinet is the DBE Certification Committee. The DBE Certification Committee shall operate in accordance with the UCP Agreement and shall make certification eligibility determinations consistent with 49 CFR 26.

Based upon 600 KAR 4010 the DBE Certification Committee shall include:

A. The following voting members:

- (1) Executive Director, Office of Project Development, or a proxy
- (2) Director of the Division of Construction, or a proxy; and
- (3) Director of the Division of Construction Procurement, or a proxy; and

B. The non-voting members:

- (1) Manager of the Small Business Development Branch, or a proxy who shall chair the Certification Committee.
- (2) The Kentucky administrator of the Federal Highway Administration or FHWA, or a proxy may attend Certification Committee meetings as a non-voting member.

C. Advisory Panel.

- (1) The cabinet shall establish a DBE Certification Advisory Panel whose members may be called upon as needed by the Certification Committee to provide technical counsel regarding a firm's eligibility.
- (2) The DBE Certification Advisory Panel shall be comprised of representatives of the following cabinet divisions:
 - a) Division of Contract Procurement;
 - b) Division of Professional Services;
 - c) Division of Highway Design;
 - d) Division of Audits;
 - e) Division of Highway Safety;
 - f) Division of Licensing; and
 - g) Office of Legal Services.

D. Certification Committee Procedures.

- (1) Upon voting, a simple majority shall constitute a quorum. If only two (2) certification members vote and if they disagree rendering the vote a tie, the Executive director of the Office for Civil Rights and Small Business Development or the executive director's proxy, shall cast the tie breaking vote.
- (2) A summary record of each DBE Certification Committee meeting shall be retained by the Office for Civil Rights and Small Business Development for at least three (3) years from the date of initial notice of certification.

- (3) The completed applications, staff summaries, and recommendations shall be provided to the DBE Certification Committee members no less than five (5) business days in advance of the scheduled meeting in which the application is to be considered.
- (4) The Certification Committee shall have the authority to remove a firm's eligibility for DBE certification as establish in 49 CFR 26.87.

Section 2.3 DBE Directory

The DBE Directory will be maintained in electronic format by the KYTC, DBE Program Coordinator. The DBE Directory is available to the public through the KYTC website at <http://bit.ly/KentuckyDBE>. Each recipient will provide a link on its website to the KYTC website. Upon receipt of a written request, KYTC will distribute a printed copy of the DBE Directory to any recipient to be made available to the public.

Section 2.4 Classification of Business and Financial Information

Each recipient under this Agreement shall safeguard from disclosure to unauthorized persons any information that may reasonably be considered confidential business information consistent with federal, state and local laws and 26 CFR Part 26.109(b).

ARTICLE III

TERM AND SCOPE OF AGREEMENT

Section 3.1 Term

This revised agreement shall be effective immediately upon its execution by all parties hereto and the approval of the KUCP by the Secretary of the USDOT. This Agreement and the KUCP shall continue in force as long as required by federal laws and regulations, unless terminated pursuant to Section 3.2 of the Agreement.

Section 3.2 Early Termination

Any party to this Agreement may terminate its relationship with the KUCP upon a showing of non-recipient status USDOT approval.

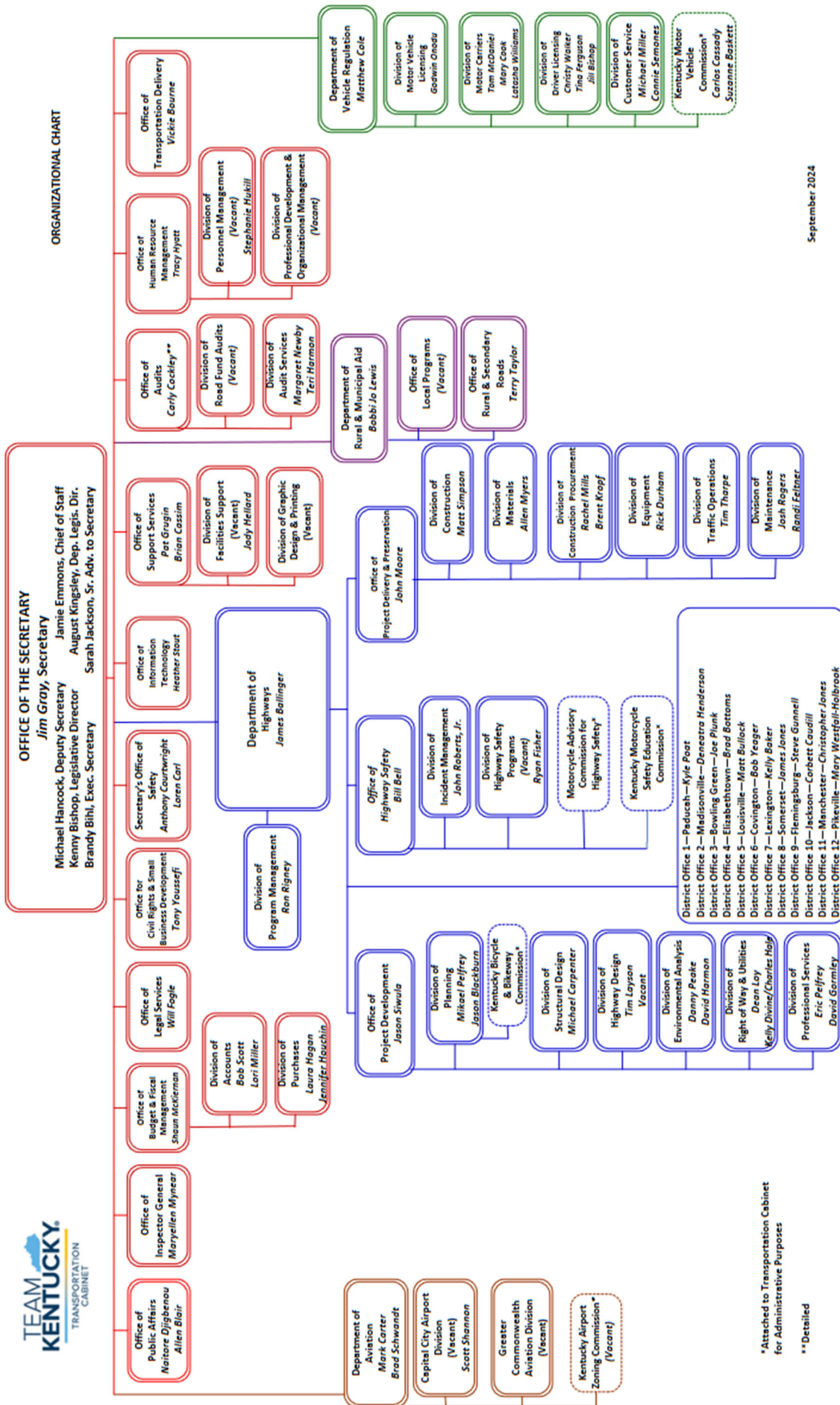
Section 3.3 Limited Agreement

This Agreement is limited in scope, and nothing contained herein shall imply any relationship between any of the signing parties beyond the creation and implementation of the KUCP.

V. ADMINISTRATION

The Disadvantaged Business Enterprise (DBE) Program is located in the Small Business Development Branch within the Office for Civil Rights and Small Business Development (OCRSBD). A Kentucky Transportation Cabinet organizational chart displaying the Cabinet's structure and an organizational chart of the OCRSBD is provided on the following pages.

ORGANIZATIONAL CHART

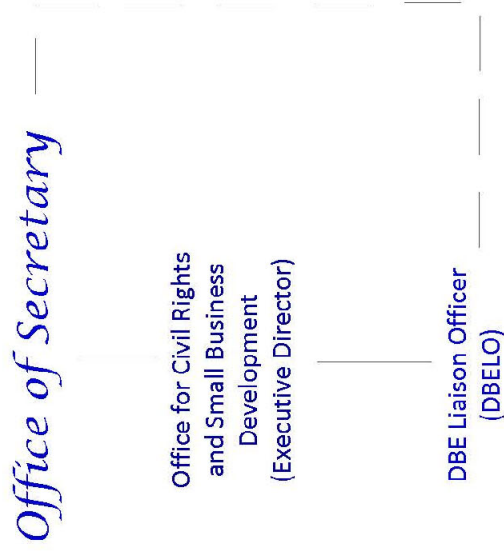


* Attached to Transportation Cabinet
for Administrative Purposes

** Detailed

September 2024

Office for Civil Rights & Small Business Development



05-09-2024

DBE Liaison Officer

(49 CFR §26.25)

The Executive Director of the Office for OCRSBD shall make a recommendation to the Secretary of the Transportation Cabinet who will appoint a DBE Liaison Officer (DBELO).

The DBELO shall be responsible for implementing all aspects of the Transportation Cabinet's DBE Program and ensuring that the Transportation Cabinet complies with all provisions of 49 CFR 26. The DBELO shall have direct and independent access to the Secretary of the Transportation Cabinet concerning DBE Program matters. At this time the DBELO is Brad Putty.

The DBELO can be reached at 502-564-3601 in the OCRSBD of the Kentucky Transportation Cabinet located at 200 Mero Street, Sixth Floor West, Frankfort, Kentucky 40622.

The duties of the DBELO include, but are not limited to:

- Communication with the Federal Highway Administration concerning the operation of the Transportation Cabinet's DBE Program;
- Keeping the Secretary of the Transportation Cabinet informed concerning the workings and status of the DBE Program;
- Compilation of reports required by the Federal Highway Administration;
- Communication with DBEs and non-DBEs concerning the requirements of the DBE Program;
- Management of the compilation of information required for the certification of DBEs;
- Preliminary investigation of complaints about the performance and activities of DBEs; and
- Coordinating the Unified Certification Application (UCA).

Responsibilities of the Office for Civil Rights and Small Business Development

The Office for Civil Rights and Small Business Development (OCRSD) is dedicated to the promotion and protection of the civil rights of employees and applicants for employment within the Transportation Cabinet, along with ensuring that disadvantaged businesses have the maximum opportunity to participate in the DBE Program, as mandated by 49 CFR 26.

The OCRSD has the following responsibilities regarding the DBE Program:

DBE Certification

The OCRSD is primarily responsible for the processing of DBE certification applications. The OCRSD conducts on-site reviews of DBE firms and compiles a factual report of the information collected concerning applicants for DBE certification for presentation to the DBE Certification Committee. Applications for DBE certification are processed through OCRSD. The OCRSD may consult with other Divisions and/or Offices in the Cabinet on matters related to documentation submitted by the applicant during the application process.

Records Retention

600 KAR 4:010 (6)

The OCRSBD shall retain all records related to a certified DBE firm for a period of not less than five (5) years from the date of the notice of certification.

Supportive Services

The OCRSBD provides supportive services to DBEs and potential DBEs free of charge. These services range from group seminars covering practical issues related to the highway construction business to individual counseling. The intent of OCRSBD's supportive services efforts is to assist DBEs in developing the technical and business management skills necessary to succeed in the transportation industry in accordance with 49 CFR §26.51. For information concerning available assistance and schedules of upcoming activities, check the OCRSBD website at <https://bit.ly/kydbe> or by telephone at 502-564-3601.

Reporting Requirements

The OCRSBD is responsible for the compilation of information and preparation of reports required to be submitted to the USDOT in accordance with 49 CFR 26 and the Final Rule changes.

Monitoring Performance

(49 CFR §26.37)

The Cabinet's DBE Program includes a monitoring and enforcement mechanism to ensure that work is committed to DBEs. The Cabinet utilizes a Commercially Useful Function (CUF) Review process in order to ensure work is actually performed by the DBE. Field personnel responsible for each project will perform CUF Reviews on each DBE firm. In order for a contractor to receive DBE credit on Cabinet projects the DBE must perform a CUF. To perform a CUF Review, a DBE must carry out all contract responsibilities by performing, managing, and supervising its work while utilizing their own equipment.

The Cabinet's DBE Program includes implementing a running tally mechanism to ensure the following:

- (1) A running tally (with respect to achieving the overall goal) that provides for a frequent comparison of cumulative DBE awards/commitments to DOT-assisted prime contract awards to determine whether the current implementation of contract goals is projected to be sufficient to meet the annual goal. This running tally will inform the decisions to implement goals on contracts to be advertised according to the established contract goal-setting process.
- (2) A running tally (with respect to each DBE Commitment) that provides for a frequent comparison of payments made to each listed DBE relative to the progress of work, including payments for such work to the prime contractor to determine whether the contractor is on track with meeting its DBE commitment and whether any projected shortfall exists that requires the prime contractor's good faith efforts to address to meet the contract goal pursuant to §26.53(g).

Setting Contract Goals

Below are the basic procedures for setting goals on Kentucky Transportation Cabinet (KYTC) projects requiring a DBE goal. The goal setting committee consists of three (3) members, one (1) each from Construction Procurement, Construction Branch, and Office for Civil Rights and Small Business Development. Construction Procurement provides a copy of the field estimate to each committee member prior to the goal setting committee meeting. Each member uses their unique expertise and resources as they review the project line item by line item, in order to make individual recommendations and determine which tasks DBEs can perform.

During each meeting, members bring their recommendations and prepare to explain the rationale for each. The OCRSBD member ensures the directory is updated monthly to allow members to have access to the most up-to-date information of available DBEs on the website. Members then proceed to discuss each project and what items are to be included to make up the goal recommendation. If the members' numbers differ greatly, each member then explains why he/she included or excluded certain items as being something that a DBE could perform. This time is used to determine if there is a special circumstance or additional information that one has that the others do not, which may have impacted recommendations.

The goal setting committee attempts to reach a consensus with the understanding that it must set attainable goals that will meet the overall goal of x%. However, these goals must not be proposed without a strong consideration of safety, quality or ethics. The committee then finalizes the goals, and all members agree upon said goals. Construction Procurement captures the goals in writing and forwards them for final approval to the State Highway Engineer. Construction Procurement keeps the final data. Because the information is sensitive, the individual members shred their copy of the field estimate.

Uniform Report

(49 CFR §26.11(a))

The Cabinet's DBE Program commits to using the Uniform Report³ to submit an accurate report of DBE Awards or Commitments and Payments to DOT. The report is due June 1 and December 1 of each year.

DBE Program Plan & Updates

(49 CFR §26.21)

The Cabinet will implement all of the provisions of 49 CFR 26 and of this DBE Program Plan consistent with USDOT requirements and the Final Rule changes. All updates to the plan will be submitted to the operating administration affected and the Federal Highway Administration for approval. The DBE Program Plan applies to all subrecipients, local public agencies, and all others who are awarded federally assisted contracts.

³ <https://www.transportation.gov/DBEFORMS>

DBE Directory

(49 CFR §26.31)

The Cabinet shall maintain and make available a current directory of all firms eligible to participate in the DBE Program. The DBE directory shall be updated monthly, published on the Cabinet's website at <https://bit.ly/kydbe> and will identify eligible DBE certified and prequalified firms by its business address, business phone number, firm website(s), and the types of work the firm has been certified to perform as a DBE. This directory shall also include certified material suppliers, trucking and related service providers eligible to participate in the DBE program.

Bidders List

(49 CFR §26.11)

The purpose of the Bidders List information is to compile as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on federally assisted contracts for use in helping set overall goals, and to provide the Cabinet with data for evaluating the extent to which the objectives of §26.1 are being achieved. The Cabinet shall maintain the list and utilize it to assist in setting overall goals. The list shall consist of all DBE and non-DBE firms prequalified to do business with the Cabinet. Prequalified contractors include all prime and subcontractors that have expressed they are ready, willing and able to do business with the Cabinet in accordance with state laws.

The Cabinet will maintain the Bidders List which will provide the following information:

- (a) Firm name;
- (b) Firm address;
- (c) Firm's status as a DBE or non-DBE;
- (d) Age of firm; and
- (e) Annual gross receipts of the firm.
- (f) Race and gender for the owners
- (g) NAICS Codes applicable to each scope of work proposed by the firm in its bid

In addition, the Cabinet shall collect from each prime contractor at the time of bid submission, the firm names, addresses and contact persons of all DBE firms who have been asked to bid and shall identify all DBE firms who submitted bids for work on the subject contract.

Prime contractors shall be required to list on the General DBE Participation Plan, the names of all DBEs who submitted bids for each contract on which they are successful. To supplement the information, the Transportation Cabinet may conduct a survey of certified.

DBEs concerning the number and the type of Transportation Cabinet contract(s) on which they have submitted written bids for the preceding construction season.

The OCRSBD, in coordination with the Division of Construction Procurement and the Division of Construction, will maintain and update the Bidders List by reviewing the records of the Prequalification Section of the Division of Construction Procurement. All the above data is on file with the Division of Construction Procurement and OCRSBD and any contractor (prime or sub) failing to provide any of the required data may not be allowed to work on any contracts with the Transportation Cabinet.

OCRSD shall submit to USDOT once system is complete and no later than Dec. 1 following the fiscal year in which the relevant contract was awarded. In the case of a “design-build” contracting situation where subcontracts will be solicited throughout the contract period as defined in a DBE Performance Plan, the data must be entered no later than Dec. 1 following the fiscal year in which the design-build contractor awards the relevant subcontract(s).

Financial Institutions

(49 CFR §26.27)

The Cabinet will survey the financial institutions within the state on an annual basis to identify those institutions that are owned and controlled by socially and economically disadvantaged individuals. For those institutions identified as being owned and controlled by socially and economically disadvantaged individuals, the Transportation Cabinet will investigate the services provided, compile the data and make all reasonable efforts to encourage the utilization of these services by prime contractors and subcontractors whenever possible.

VI. PROGRAM GOAL

The national goal, which is an aspirational goal for the DBE Program, is not less than ten percent (10%) of federal transportation funds (49 CFR §26.41) authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and Titles I, III and V of the Moving Ahead for Progress in the 21st Century (MAP-21).

The Federal government does not dictate the amount of the goal (49 CFR § 26.41(c)); therefore, the Cabinet must set an overall goal for its DBE Program in accordance with 49 CFR §26.45. In addition, the DBE Program does not set quotas for DBE participation, nor is it a set-aside program (49 CFR §26.43).

The Cabinet is required to submit overall goals by August 1, for legal sufficiency approval. The Cabinet’s triennial goals are due in 2026, 2029, and 2031.

The Cabinet has established a DBE Program goal for USDOT-assisted contracts, and it can be found on the website under the 2023-2025 Goal Methodology (<https://bit.ly/kydbe>).

Procedures for Setting the Annual Overall Goal

In accordance with 49 CFR §26.45(c), the Cabinet derives the overall DBE Program goal utilizing the USDOT recommended three-step procedure. This procedure assists state recipients in setting fair and equitable DBE goals and allows for the individual states to make adjustments for an individual state’s circumstances. This guide is published on the titled, USDOT’s website Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program <http://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>.

- The **first** of the three-step process establishes a baseline that considers the degree of representation of DBE firms in the state’s competitive highway construction environment.
- The **second** step allows for adjustment of this baseline to accommodate situational differences that may occur from state to state, from year to year.
- The **third** step establishes race/gender-neutral and race/gender-conscious categories to give an indication of how the overall goal is best implemented and accomplished.

Goal Methodology

To comply with 49 CFR §26.45, the Kentucky Transportation Cabinet (KYTC) establishes its overall DBE goal based on the availability of ready, willing and able DBEs relative to the availability of all ready, willing and able firms within the Kentucky highway construction industry.

A. Step One - Base Figure –§26.45(c)

Under the regulations, recipients must begin the goal-setting process by determining a base figure for the relative availability of DBEs.

1. Method Selected

KYTC uses an alternate method that includes census data, a prequalification directory, and the Kentucky DBE directory. This approach is based on local market conditions and accounts for state prequalification requirements. Although KYTC utilized its prequalification directory in the calculation of available DBEs and non-DBEs, it was not an exclusive source of data.

2. Description of Data Used

Data used in this calculation includes prequalified prime and sub-contractors, consultants, and appraisers that sought work on Federal Highway Administration (FHWA) assisted construction projects in the local market area during the period of October-September of the appropriate fiscal year. Firms with North American Industry Classification System (NAICS) codes that do not relate to highway construction have not been included in the calculations.

The number of firms across the state conducting business in the NAICS codes in which the KYTC seeks participation will be determined by the most current census data. The data used to make this determination is the data available from the most recent fiscal year(s). KYTC has determined that 75% or more of the contractors and subcontractors with which it does business are located within the state of Kentucky.

To comply with Kentucky law, KRS §176.140, and its related regulations, firms must be financially and professionally qualified to do business with the state before submitting bids on any project issued by KYTC. As such, the KYTC believes that use of the prequalification directory, in addition to the census data and DBE directory, is the most appropriate source from which to collect data on the actual available firms. The use of this data provides a more accurate count of firms that are able to participate and bid on KYTC projects.

KYTC acknowledges that USDOT encourages recipients to consider supplementing the number of firms in its DBE directory for the purposes of goal-setting by considering potential DBEs. KYTC has determined that its current goal-setting process truly reflects the actual availability of ready, willing, and able DBEs in the local market area without the necessity to include potential DBEs.

KYTC further acknowledges that USDOT recommends weighting based on categories of contractors.

3. Calculations Performed

Relative Base Figure

Considering the three categories of contracts (construction, professional services and right of way/utilities), the formula used to calculate the base figure becomes:

$$\frac{\text{DBE Contractors and Subcontractors} + \text{DBE consultants}}{\text{All Contractors and Subcontractors} + \text{All Consultants}} = \text{Relative Base Figure}$$

B. Step Two – Adjustments – §26.45(d)

DBE regulations at 49 CFR §26.45(d), require an examination of available evidence in the local market to determine what adjustment to the base figure is needed, if any, to establish the overall goal.

C. Public Participation - §26.45(g)

KYTC conducts public forums across the state in the districts to provide an opportunity for public feedback about the goal and its methodology. The comments are recorded and provided as documentation.

D. Race/Gender Neutral and Conscious Measures - §26.51

KYTC measures race-conscious participation by counting payments made to DBEs to fulfill contract goals. KYTC measures race-neutral participation by counting payments made to DBEs in excess of contract goals or payments made to DBEs on contracts where no DBE goal has been set.

Also, the KYTC will seek to provide DBEs supportive services specific to their needs, to help them grow and develop. This will include classroom and on-site technical, contracting procedures and requirements, management assistance and educational training opportunities to certified DBE firms in order to increase employment potential. These services will target DBEs to improve their long-term development, increase opportunities to participate, and achieve eventual self-sufficiency. Kentucky's Business Development Program (BDP) will also aid in this regard. Those firms utilizing the BDP will be able to take advantage of classes and resources in a program that will target their company's areas of need. We also plan to make the states DBE directory accessible in as many formats as possible to the universe of contractors.

Shortfall Analysis

The Code of Federal Regulations 49 C.F.R. §26.47 requires state transportation agencies who do not meet their goal for DBE participation to do the following in order to be regarded by FHWA as implementing the DBE program in good faith:

1. Analyze in detail the reasons for the difference between the overall goal and the awards and commitments in that fiscal year;

2. Establish specific steps and milestones to correct the problems identified in your analysis and to enable you to meet fully your goal for the new fiscal year.

The KYTC will begin its analysis by looking at the NAICS codes where federally funded project dollars were let and awarded during the FFY.

Next, the KYTC will review its DBE directory to determine the availability of DBEs in the NAICS codes where project dollars were spent. Doing so will focus the analysis on the DBE availability to perform in those related services.

Preliminary Injunction Affecting Disadvantaged Business Program

On September 23, 2024, the Court issued a preliminary injunction prohibiting USDOT from mandating the use of the DBE program's race- and gender-based rebuttable presumptions of disadvantage on USDOT-funded contracts on which Plaintiffs bid for work as subcontractors. The Federal Highway Administration ("FHWA") has issued guidance concerning this injunction and the Cabinet will be following as guided. For further information and guidance, please visit <https://highways.dot.gov/civil-rights/programs/dbe/resources> or <https://highways.dot.gov/media/57786>.

VII. CERTIFICATION STANDARDS

Burden of Proof

(49 CFR §26.61)

Certification is required to participate in the DBE Program. The DBE certification process is separate and distinct from the prequalification process.

- (a) In determining whether to certify a firm, the Cabinet must apply the standards of Subpart D. Unless the context indicates otherwise, singular terms include their plural forms and vice versa.
- (b) The firm has the burden of demonstrating, by a preponderance of the evidence, i.e., more likely than not, that it satisfies all of the requirements in Subpart D. In determining whether the firm has met its burden, the Cabinet considers all the information in the record, viewed as a whole.
 - (1) **Exception 1.** In a decertification proceeding the Cabinet bears the burden of proving, by a preponderance of the evidence, that the firm is no longer eligible for certification under the rules of this part.
 - (2) **Exception 2.** If the Cabinet has a reasonable basis to believe that an individual who is a member of a group in §26.67(a) of this section is not, in fact, socially and/or economically disadvantaged, the Cabinet bears the burden of proving, by a preponderance of the evidence, that the individual is not socially and/or economically disadvantaged.

Firms owned and controlled by individuals identified in 49 CFR §26.67(a) as socially and economically disadvantaged are presumed to be eligible to participate in the Kentucky DBE Program. As a result, these individuals do not bear the burden of proving their eligibility. However, this eligibility presumption is rebuttable based upon the individual owner(s) ability to meet the personal net worth threshold of \$2.047 million.

General Certification Rules

(49 CFR §26.63)

The Cabinet must consider general rules, except as otherwise provided, when making a determination of whether an applicant is DBE eligible. These factors are found at 49 CFR §26.63:

(a) General Rules. Except as otherwise provided:

- (1) The firm must be for-profit and engaged in business activities.
- (2) In making eligibility determinations, the Cabinet may not consider whether a firm performs a commercially useful function (CUF), or the potential effect on goals or counting.
- (3) The Cabinet cannot condition eligibility on State prequalification requirements for bidding on contracts.
- (4) Certification is not a warranty of competence or suitability.
- (5) The Cabinet determines eligibility based on the evidence it has at the time of its decision, not on the basis of historical or outdated information, giving full effect to the “curative measures” provisions of this part.
- (6) Entering into a fraudulent transaction or presenting false information to obtain or maintain DBE certification is disqualifying.

(b) Indirect Ownership. A subsidiary that SEDOs own, and control indirectly is eligible, if it satisfies the other requirements of this part and only under the following circumstances. See examples⁴ under this part for further analysis.

- (1) **Look-through**. SEDOs own at least 51 percent of subsidiary through their ownership of the parent firm as shown in the aforementioned examples.
- (2) **Control**. SEDOs control the parent firm, and the parent firm controls the subsidiary.
- (3) **One tier of separation**. The SEDOs indirectly own the subsidiary through the parent firm and no other intermediary. That is, no applicant or DBE may be more than one entity (the parent firm) removed from its individual SEDOs.

(c) Indian Tribes, NHOs, and ANCAs

(1) ***Indian Tribes and NHOs***.

A firm that is owned by an Indian Tribe or Native Hawaiian organization (NHO), rather than by Indians or Native Hawaiians as individuals, is eligible if it meets all other certification requirements in this part.

⁴ 49 CFR §26.63(b)(4)

(2) ***Alaska Native Corporations (ANCs).***

- i. Notwithstanding any other provisions of this subpart, a subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification if it meets all the following requirements:
 - A. The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;
 - B. The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and
 - C. The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.
- ii. As a certifier to whom an ANC-related entity applies for certification, a certifier must not use the Uniform Certified Application. The certifier must obtain from the firm documentation sufficient to demonstrate that the entity meets the requirements of paragraph (c)(2)(i) of this section. The certifier must also obtain sufficient information about the firm to allow the certifier to administer its program (e.g., information that would appear in a UCP directory).
- iii. If an ANC-related firm does not meet all the conditions of paragraph (c)(2)(i) of this section, then it must meet the requirements of paragraph (c)(1) of this section in order to be certified.

Business Size Determinations

(49 CFR §26.65)

To be an eligible DBE, a firm (including its affiliates) shall be an existing small business, as defined by Small Business Administration (SBA) standards.

- (a) ***By NAICS Code.*** A firm (including its affiliates) must be a small business, as defined by the Small Business Administration (SBA). The Cabinet must apply the SBA business size limit in 13 CFR part 121 which corresponds to the applicable primary industry classifications (NAICS codes). The firm is ineligible when its affiliated “receipts” (computed on a cash basis), as defined in 13 CFR §121.104(a) and averaged over the firm’s preceding five fiscal years, exceed the applicable SBA size cap(s).
- (b) ***Statutory Cap.*** Even if a firm is a small business under 49 CFR §26.65(a), it is ineligible to perform DBE work on FHWA or FTA assisted contracts if its affiliated annual gross receipts, as defined in 13 CFR §121.104, averaged over the firm’s previous three fiscal years exceed \$31.84 million (as of March 1, 2025). The Department will adjust this amount annually and post the adjusted amount on its website available at <https://www.transportation.gov/DBEsizestandards>.

Group Membership Determinations

(49 CFR §26.67(a))

(a) Group membership—

- (1) **General rule.** Citizens of the United States (or lawfully admitted permanent residents) who are women, Black American, Hispanic American, Native American, Asian Pacific American, Subcontinent Asian American, or other minorities found to be disadvantaged by the Small Business Administration (SBA), are rebuttably presumed to be socially and economically disadvantaged. A firm owner claiming the presumption must specify of which groups in this paragraph (a)(1) she or he is a member on the Declaration of Eligibility (DOE).
- (2) **Native American group membership.** An owner claiming Native American group membership must submit a signed DOE as well as proof of enrollment in a federally or State-recognized Indian Tribe. An owner claiming Native Hawaiian or Alaska Native group membership must submit documentation legally recognized under State or Federal law attesting to the individual's status as a member of that group.
- (3) **Questioning group membership.** (1) The Cabinet may not question claims of group membership as a matter of course and the Cabinet must not impose a disproportionate burden on members of any particular group. Imposing a disproportionate burden on members of a particular group could violate Title VI of the Civil Rights Act of 1964, paragraph (b) of this section, and/or 49 CFR part 21.
 - (i) If the Cabinet has a well-founded reason(s) to question an owner's claim of membership in a group in paragraph (a)(1) of this section, it must provide the individual a written explanation of its reason(s), using the most recent email address provided. The firm bears the burden of proving, by a preponderance of the evidence, that the owner is a member of the group in question.⁵
 - (ii) The Cabinet's written explanation must instruct the individual to submit evidence demonstrating that the individual has held herself/himself/themself out publicly as a member of the group for a long period of time prior to applying for DBE certification, and that the relevant community considers the individual a member. The Cabinet may not require the individual to provide evidence beyond that related to group membership.
 - (iii) The owner must email the Cabinet evidence described in paragraph (a)(3)(ii) of this section no later than 20 days after the written explanation. The Cabinet must email the owner a decision no later than 30 days after receiving timely submitted evidence.
 - (iv) If the Cabinet determines that an individual has not demonstrated group membership, then the Cabinet's decision must specifically reference the evidence in the record that formed the basis for the conclusion and give a detailed explanation of why the evidence submitted was insufficient. It must also inform the individual of the right to appeal, as provided in §26.89(a), and of the right to reapply at any time under paragraph (d) of this section.

⁵ 89 Fed. Reg. 24970 (April 9, 2024)

Group membership determinations made by the Transportation Cabinet may be appealed to USDOT.⁶

Social and Economic Disadvantage Determinations

(49 CFR §26.67)

Determinations of social and economic disadvantage are made by the Cabinet in accordance with 49 CFR §26.67.

Affidavit of Social and Economic Disadvantage

Each owner on whom the firm relies for certification must submit a Declaration of Eligibility (DOE) indicating that they are socially and economically disadvantaged.

Statement of Personal Net Worth

Each owner on whom the firm relies for certification must submit a corroborating personal net worth (PNW) statement, including required attachments. The owner must report their PNW on the form, available at <https://www.Transportation.gov/DBEFORMS>.

The Cabinet, with a legitimate and demonstrable need for the additional information, may require an owner to provide additional information on a case-by-case basis to verify the accuracy and completeness of the PNW statement.

The following rules⁷ apply to the PNW statement, without regard to State community property, equitable distribution, or similar rules. The socially and economically disadvantaged owner (SEDO) reports assets and liabilities that she owns or is deemed to own. Ownership tracks title to the asset or obligor status on the liability except where otherwise provided or when the transaction results in evasion or abuse.

- (1) The owner excludes her ownership interest in the applicant or DBE.
- (2) The owner excludes her share of the equity in her primary residence. There is no exclusion when the SEDO does not own the home.
- (3) The owner includes the full value of the contents of her primary residence unless she cohabits with a spouse or domestic partner, in which case she excludes only 50 percent of those assets.
- (4) The owner includes the value of all motor vehicles, including watercraft and ATVs, titled in her name or of which she is the principal operator.
- (5) The owner excludes the liabilities of any other party and those contingent on a future event or of undetermined value as of the date of the PNW Statement.
- (6) The owner includes her proportional share of the balance of a debt on which she shares joint and severable liability with other primary debtors.

⁶ 49 CFR §26.89

⁷ 49 CFR §26.68(c)

- (7) The owner includes assets transferred to relatives or related entities within the two years preceding any UCA or DOE, when the assets so transferred during the period have an aggregate value of more than \$20,000. Relatives include the owner's spouse or domestic partner, children (whether biological, adopted or stepchildren), siblings (including stepsiblings and those of the spouse or domestic partner), and parents (including stepparents and those of the spouse or domestic partner). Related entities include for-profit privately held companies of which any relative is an owner, officer, director, or equivalent; and family or other trusts of which the owner or any relative is grantor, trustee, or beneficiary, except when the transfer is irrevocable.
- (8) The owner excludes direct payments, on behalf of immediate family members or their children, to unrelated providers of healthcare, education, or legal services.
- (9) The owner excludes direct payments to providers of goods and services directly related to a celebration of an immediate family member's or that family member's child's significant, normally non-recurring life event.
- (10) The owner excludes from net worth all assets in qualified retirement accounts but must report those accounts, the value of assets in them, and any significant terms and restrictions concerning the assets' use, to the certifier.

The Cabinet reserves the right to more closely scrutinize applicants who present a personal net worth of more than \$1.72 million, but less than \$2.047 million and may be asked to provide additional or confirmatory financial information.

Regulatory Adjustments. The Department will adjust the PNW cap every 3 years on the anniversary of the adjustment date described in this section. The Department will post the adjustments on the Departmental Office of Civil Rights' web page, available at <https://www.Transportation.gov/DBEPNW>. Each such adjustment will become the currently applicable PNW limit for purposes of this regulation. The Department will use formula 1 to adjust the PNW limit:

Formula 1⁸

Future Year PNW Cap = [\$1,600,000] *	$\frac{\text{Q1-Q4 Average Household Net Worth of Future Year / Total Households of Future Year}}{\frac{\text{Q1-Q4 Average Household Net worth of 2019 (\$106,722,704 million / Total Households of 2019 (128,579))}}{}}$
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Confidentiality. Notwithstanding any provision of Federal or State law, must not release an individual's PNW statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under §26.89 or to any other State to which the individual's firm has applied for certification under §26.85.

⁸ 89 Fed. Reg. 55089 (July 3, 2024)

Rebutting the Presumption of Social and Economic Disadvantage

Rebuttal of Social Disadvantage

If the Cabinet has a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially disadvantaged, a §26.87 proceeding must be initiated, regardless of the firm's DBE status. In such a proceeding, the Cabinet shall bear the burden of proving ineligibility. If the Cabinet finds that the owner is not socially disadvantaged, its decision letter must inform the firm of its appeal rights.

Rebuttal of Economic Disadvantage

If the Cabinet has a reasonable basis to believe that an individual who submits a PNW Statement that is below the currently applicable PNW cap is not economically disadvantaged, the Cabinet may rebut the individual's presumption of economic disadvantage proceeding as provided in §26.87. The Cabinet must not attempt to rebut presumed economic disadvantage as a matter of course and it must avoid imposing unnecessary burdens on individual owners or disproportionately impose them on members of a particular group.

Economic Disadvantage in fact.

To rebut the presumption, the Cabinet must prove that a *reasonable person* would not consider the individual economically disadvantaged. The Cabinet may consider assets and income, free use of them or ready access to their benefits, and any other trappings of wealth considered relevant. There are no assets (including retirement assets), income, equity, or other exclusions and no limitations on inclusions. A broad and general analysis suffices in most cases: the owner has, or enjoys the benefits of, income of X; two homes worth approximately Y; substantial interests in outside businesses Q, R, and S; four rental properties of aggregate value Z; etc. The Cabinet need only demonstrate "ballpark" values based on available evidence. The reasonable person is not party to detailed financial information. S/he considers the owner's overall circumstances and lifestyle. The Cabinet must proceed as provided in §26.87.

Non-presumptive Disadvantage.

An owner who is not presumed to be socially and economically disadvantaged (SED) under 49 CFR §26.67(a) may demonstrate that he is SED based on his own experiences and circumstances that occurred within American society.

- (1) To attempt to prove individual SED, the owner provides the Cabinet a Personal Narrative (PN) that describes in detail specific acts or omissions by others, which impeded his progress or success in education, employment, and/or business, including obtaining financing on terms available to similarly situated, non-disadvantaged persons.
- (2) The PN must identify at least one objective basis for the detrimental discrimination. The basis may be any identifiable status or condition. The PN must describe this objective distinguishing feature(s) (ODF) in sufficient detail to justify the owner's conclusion that it prompted the prejudicial acts or omissions.
- (3) The PN must state how and to what extent the discrimination caused the owner harm, including a full description of type and magnitude.

- (4) The owner must establish that he is economically disadvantaged in fact and that he is economically disadvantaged relative to similarly situated non-disadvantaged individuals.
- (5) The owner must attach to the PN a current PNW statement and any other financial information he considers relevant.
- (6) This rule does not prescribe how the owner must satisfy his burden of proving disadvantage. He need not, for example, have filed any formal complaint, or prove discrimination under a particular statute.

Ownership

(49 CFR §26.69)

Determinations of ownership for purposes of DBE eligibility are made by the Transportation Cabinet in accordance with 49 CFR §26.69.

- (a) **General rule.** A SEDO must own at least 51 percent of each class of ownership of the firm. Each SEDO whose ownership is necessary to the firm's eligibility must demonstrate that her ownership satisfies the requirements of this section. If not, the firm is ineligible.
- (b) **Overall Requirements.** A SEDO's acquisition and maintenance of an ownership interest meets the requirements of this section only if the SEDO demonstrates the following:
 - (1) **Acquisition.** The SEDO acquires ownership at fair value and by one or more "investments," as defined in paragraph (c) of this section.
 - (2) **Proportion.** No owner derives benefits or bears burdens that are clearly disproportionate to their ownership shares.
 - (3) **Maintenance.** This section's requirements continue to apply after the SEDO's acquisition and the firm's certification. That is, the SEDO must maintain her investment and its proportion relative to those of other owners.
 - i. The SEDO may not withdraw or revoke her investment.
 - ii. When an existing co-owner contributes significant, additional, post-acquisition cash or property to the firm, the SEDO must increase her own investment to a level not clearly disproportionate to the non-SEDOS' investment.
 - iii. An organic increase in the value of the business does not affect maintenance because the value of the owners' investments remains proportional.
- (c) **Investments.** A SEDO may acquire ownership by purchase, capital contribution, or gift. Subject to the other requirements of this section, each is considered an "investment" in the firm, as are additional purchases, contributions, and qualifying gifts.
 - (1) Investments are unconditional and at full risk of loss.
 - (2) Investments include a significant outlay of the SEDO's own money.

- (3) For purposes of this part, title determines ownership of assets used for investments and of ownership interests themselves. This rule applies regardless of contrary community property, equitable distribution, banking, contract, or similar laws, rules, or principles.
 - i. The person who has title to the asset owns it in proportion to her share of title.
 - ii. However, the title rule is deemed not to apply when it produces a certification result that is manifestly unjust.
- (4) If the SEDO jointly (50/50) owns an investment of cash or property, the SEDO may claim at least a 51 percent ownership interest only if the other joint owner formally transfers to the SEDO enough of his ownership in the invested asset(s) to bring the SEDO's investment to at least 51 percent of all investments in the firm. Such transfers may be gifts described in paragraph (e) of this section.

(d) ***Purchases and capital contributions.***

- (1) A purchase of an ownership interest is an investment when the consideration is entirely monetary and not a trade of property or services.
- (2) Capital that the SEDO contributes directly to the company is an investment when the contribution is all cash or a combination of cash and tangible property and/or realty.
- (3) Contributions of time, labor, services, and the like are not investments or components of investments.
- (4) Loans are not investments. The proceeds of loans may be investments to the extent that they finance the SEDO's qualifying purchase or capital contribution.
- (5) Debt-financed purchases or capital contributions are investments when they comply with the rules in this section and in §26.70.
- (6) Guarantees are not investments.
- (7) The firm's purchases or sales of property, including ownership in itself or other companies, are not the SEDO's investments.
- (8) Other persons' or entities' purchases or capital contributions are not the SEDO's investments.

(e) ***Gifts.*** A gift to the SEDO is an investment when it meets the requirements of this section. The gift rules apply to partial gifts, bequests, inheritances, trust distributions, and transfers for inadequate consideration. They apply to gifts of ownership interests and to gifts of cash or property that the SEDO invests. The following requirements apply to gifts on which the SEDO relies for her investment.

- (1) The transferor/donor is or immediately becomes uninvolved with the firm in any capacity and in any other business that contracts with the firm other than as a lessor or provider of standard support services;

- (2) The transferor does not derive undue benefit; and
 - (3) A writing documents the gift. When the SEDO cannot reasonably produce better evidence, a receipt, cancelled check, or transfer confirmation suffices, if the writing identifies transferor, transferee, amount or value, and date.
- (f) **Curative measures.** The rules of this section do not prohibit transactions that further the objectives of, and compliance with, the provisions of this part. A SEDO or firm may enter into legitimate transactions, alter the terms of ownership, make additional investments, or bolster underlying documentation in a good faith effort to remove, surmount, or correct defects in eligibility, as long as the actions are consistent with this part.
- (1) The Cabinet may notify the firm of eligibility concerns and give the firm time, if the firm wishes, to attempt to remedy impediments to certification.
 - (2) The firm may, of its own volition, take curative action up to the time of the Cabinet's decision. However, it must present evidence of curation before the Cabinet's decision.
 - (3) The Cabinet may provide general assistance and guidance but not professional (legal, accounting, valuation, etc.) advice or opinions.
 - (4) While the Cabinet may not affirmatively impede attempts to cure, it may maintain its decision timeline and make its decision based on available evidence.
 - (5) The Cabinet must deny or remove certification when the firm's efforts or submissions violate the anti-abuse rules below.
- (g) **Anti-abuse rules.**
- (1) The substance and not the form of transactions drives the eligibility determination.
 - (2) The certifier must deny applications based on sham transactions or false representations, and it must decertify DBEs that engage in or make them. Transactions or representations designed to evade or materially mislead subject the firm to the same consequences.
 - (3) Fraud renders the firm ineligible and subjects it to sanctions, suspension, debarment, criminal prosecution, civil litigation, and any other consequence or recourse not proscribed in this part.

Debt-financed investments.
(49 CFR §26.70)

- (a) Subject to the other provisions of this subpart, a SEDO may borrow money to finance an §26.69(c) investment entirely or partially if the SEDO has paid, on a net basis, at least 15% (fifteen percent) of the total value of the investment by the time the firm applies for certification.
- (1) The SEDO pays the net 15 percent portion of the investment to Seller or Applicant (as the case may be) from her own, not borrowed, money.

- (2) Money that the SEDO receives as a §26.69(e) gift is her own money.
- (3) The firm, whether Applicant or DBE, does not finance any part of the investment, directly or indirectly.
- (b) The loan is real, enforceable, not in default, not offset by another agreement, and on standard commercial, arm's length terms. The following conditions also apply:
 - (1) The SEDO is the sole debtor.
 - (2) The firm is not party to the loan in any capacity, including as a guarantor.
 - (3) The SEDO does not rely on the company's credit or other resources to repay any part of the debt or otherwise to finance any part of her investment.
 - (4) The loan agreement requires level, regularly recurring payments of principal and interest, according to a standard amortization schedule, at least until the SEDO satisfies requirements in paragraph (a) of this section.
 - (5) The loan agreement permits prepayments, including by refinancing.
- (c) If the creditor forgives or cancels all or part of the debt, or the SEDO defaults, the entire debt-financed portion of the SEDO's purchase or capital contribution is no longer an investment.
- (d) Paragraph (c) of the section does not prohibit refinancing with debt that meets the requirements of this section or preclude prompt curation under §26.69(f).

Control.

(49 CFR §26.71)

(a) **General Rules.**

- (1) One or more SEDOs of the firm must control it.
- (2) Control determinations must consider all pertinent facts, viewed together and in context.
- (3) A firm must have operations in the business for which it seeks certification at the time it applies. Certifiers do not certify plans or intentions, or issue contingent or conditional certifications.
- (b) **SEDO as final decision maker.** A SEDO must be the ultimate decision maker in fact, regardless of operational, policy, or delegation arrangements.
- (c) **Governance.** Governance provisions may not require that any SEDO obtain concurrence or consent from a non-SEDO to transact business on behalf of the firm.
 - (1) **Highest officer position.** A SEDO must hold the highest officer position in the company (e.g., chief executive officer or president).

- (2) **Board of directors.** Except as detailed in paragraph (c)(4) of this section, a SEDO must have present control of the firm's board of directors, or other governing body, through the number of eligible votes.
 - i. **Quorum requirements.** Provisions for the establishment of a quorum must not block the SEDO from calling a meeting to vote and transact business on behalf of the firm.
 - ii. **Shareholder actions.** A SEDO's authority to change the firm's composition via shareholder action does not prove control within the meaning of paragraph (c) of this section.
 - (3) **Partnerships.** In a partnership, at least one SEDO must serve as a general partner, with control over all partnership decisions.
 - (4) **Exception.** Bylaws or other governing provisions that require non-SEDO consent for extraordinary actions generally do not contravene the rules in paragraph (c) of this section. Non-exclusive examples are a sale of the company or substantially all of its assets, mergers, and a sudden, wholesale change of type of business.
- (d) **Expertise.** At least one SEDO must have an overall understanding of the business and its essential operations sufficient to make sound managerial decisions not primarily of an administrative nature. The requirements of this paragraph (d) vary with type of business, degree of technological complexity, and scale.
- (e) **SEDO decisions.** The firm must show that the SEDO critically analyzes information provided by non-SEDOs and uses that analysis to make independent decisions.
- (f) **Delegation.** A SEDO may delegate administrative activities or operational oversight to a non-SED individual as long as at least one SEDO retains unilateral power to fire the delegate(s), and the chain of command is evident to all participants in the company and to all persons and entities with whom the firm conducts business.
- (1) No non-SED participant may have power equal to or greater than that of a SEDO, considering all the circumstances. Aggregate magnitude and significance govern; a numerical tally does not.
 - (2) Non-SED participants may not make non-routine purchases or disbursements, enter into substantial contracts, or make decisions that affect company viability without the SEDO's consent.
 - (3) Written provisions or policies that specify the terms under which non-SED participants may sign or act on the SEDO's behalf with respect to recurring matters generally do not violate this paragraph (f), as long as they are consistent with the SEDO having ultimate responsibility for the action.
- (g) **Independent business.**
- (1) If the firm receives from or shares personnel, facilities, equipment, financial support, or other essential resources, with another business (whether a DBE or non-DBE firm) or individual on other than commercially reasonable terms, the firm must prove that it would be viable as a going concern without the arrangement.
 - (2) The firm must not regularly use another firm's business-critical vehicles, equipment, machinery, or facilities to provide a product or service under contract to the same firm or one in a substantially similar business.

- i. **Exception 1.** Paragraphs (g)(1) and (2) of this section do not preclude the firm from providing services to a single customer or to a small number of them, provided that the firm is not merely a conduit, captive, or unnecessary third party acting on behalf of another firm or individual. Similarly, providing a volume discount to such a customer does not impair viability unless the firm repeatedly provides the service at a significant and unsustainable loss.
 - ii. **Exception 2.** A firm may share essential resources and deal exclusively with another firm that a SEDO controls and of which the SEDO owns at least 51 percent ownership.
- (h) **Franchise and license agreements.** A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the certifier should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license if the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

NAICS Codes.

(49 CFR §26.73)

- (a) The Cabinet must grant certification to a firm only for specific types of work that the SEDO controls. To become certified in an additional type of work, the firm must demonstrate to the Cabinet only that its SEDO controls the firm with respect to that type of work. The Cabinet must not require that the firm be recertified or submit a new application for certification but must verify the SEDO's control of the firm in the additional type of work.
 - (1) A correct NAICS code is the one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification.
 - (2) If there is not a NAICS code that fully, clearly, or sufficiently narrowly describes the type(s) of work for which the firm seeks certification, the Cabinet must supplement or limit the assigned NAICS code(s) with a clear, specific, and concise narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is insufficient.
 - (3) Firms and certifiers must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the Cabinet needs to make an appropriate NAICS code designation.

- (4) The Cabinet may change a certification classification or description if there is a factual basis in the record, in which case it must notify the firm 30 days before making the change. The Cabinet may not apply such changes retroactively.
- (5) In addition to applying the appropriate NAICS code, the Cabinet may apply a descriptor from a classification scheme of equivalent detail and specificity. Such a descriptor (e.g., a “work code”) does not supersede or limit the types of work for which a DBE is eligible under an appropriate NAICS code.

Prequalification - Certificates of Eligibility to Contract

All contractors who propose to do work with the Cabinet must obtain a Certificate of Eligibility to contract⁹ or obtain a waiver of the requirement from the Cabinet. This requirement also applies to DBEs seeking to contract with the Cabinet, or seeking to act as subcontractors on Cabinet projects. This process is called “prequalification” and is separate and distinct from the DBE certification process.

Construction contractors must be prequalified by the Division of Construction Procurement. An application for a Certificate of Eligibility must be obtained from the Division of Construction Procurement. Engineering, design, surveying and other professional services firms must be prequalified through the Division of Professional Services. The Certificate of Eligibility is obtained independently of the DBE certification. A potential DBE may apply for a Certificate of Eligibility prior to completing the DBE certification process.

Contractors who engage in professional engineering must meet the requirements of 600 KAR 6:040. Firms that do not engage in professional engineering, but wish to provide other services to the Cabinet must meet the requirements of 603 KAR 2:015.

All applicants for Certificates of Eligibility are required to prove that they are financially solvent and that they have access to the equipment and expertise necessary to perform the work. The applicant’s experience record shall be verified, and performance reports of active contractors will be reviewed. The Prequalification Section shall determine the maximum financial capacity of the applicant, as provided in the regulations.

Certificates of Eligibility must be renewed within one-hundred twenty (120) days after the end of the applicant’s fiscal year. The applicant must file its application for continuation within 90 days of the end of its fiscal year. The Cabinet has thirty (30) days to process the application.¹⁰

VIII. CERTIFICATION PROCEDURES

Application Process

In-State

The Cabinet shall determine the eligibility of firms applying for DBE certification within 90 days receiving all information required from the applicant in accordance with §26.83. The Cabinet may extend this time period once, for no more than an additional 30 days, upon written notice to the firm,

⁹ Kentucky Revised Statutes 176.130

¹⁰ 603 KAR 2:015(6)

explaining fully and specifically the reasons for the extension.¹¹ All firms seeking DBE certification shall submit an application form, found at <https://transportation.gov/DBEFORMS>, for certification to the Cabinet's OCRSBD and they will receive notification of the receipt of that application within 30 days.

- Each application form shall be completed in full along with all required documentation attached. If the application is incomplete, the OCRSBD will contact the applicant within 30 days of filing¹² to request missing information or additional information. Incomplete applications will not be processed.
- The Cabinet may request additional information and clarification of information contained in the application at any time in the application process in order to determine if an applicant firm should be certified. Failure of the applicant firm to provide the requested information shall be cause for the Cabinet to terminate the application.
- The person signing the Declaration of Eligibility (DOE) at the end of the Uniform Certification Application (UCA), subscribe to as true under penalty of perjury that all information provided is current, accurate, and complete and shall identify his or her position with the firm or business enterprise applying for certification.

On-Site Review and Owner Interview

(49 CFR §26.83(c))

- The Cabinet shall perform an on-site review ("OSR") of each new applicant located within the boundaries of Kentucky visiting the firm's principal place of business, virtually or in person, and interviewing the SEDO, officers, and key personnel.

The OSR will be attended by at least two (2) OCRSBD investigators, which may include a manager or the DBELO. The review shall include a review of the applicant's file (application and attachments), notes, photos and other documentation gathered during the OSR. This information shall be compiled and summarized for the use and review of the DBE Certification Committee and kept in the firm's files.

- The Cabinet shall review the following prior, during or after the OSR:
 - Review SEDO, officers, and key personnel résumés and/or work histories.
 - Analyze documentation related to the legal structure, ownership, and control of the applicant firm.
 - Analyze the bonding and financial capacity of the firm; lease and loan agreements; and bank account signature cards.
 - Determine the work history of the firm, including contracts it has received, work it has completed; and payroll records.
 - Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any.
 - Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program.
 - Obtain complete Federal income tax returns (or requests for extensions) filed by the firm, any affiliate firms, and the socially and economically disadvantaged owners for the last 5 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service.

¹¹ 49 CFR §26.83(l)(1)

¹² 49 CFR §26.83(k)

- Will visit one or more active job sites (if there is one).
- Will maintain a complete audio recording of the interview as a permanent backup in electronic format and may be transcribed if needed.
- Will perform a certification review of any certified firm at intervals of at least three years and conduct a new OSR.
- May also perform periodic OSRs and make unannounced visits to the DBE's office(s) and/or job site(s) through its on-going monitoring of certified DBE firms doing work with the Cabinet or upon receipt of a third-party complaint concerning the eligibility of any firm certified by the Cabinet.

Failure of the applicant firm to participate in the OSR shall be reasonable cause for the Cabinet to deny or remove the DBE status.

OCRSD will rely on another certifier's report of its OSR of all out-of-state DBEs certified by the Cabinet. However, in the event that the Cabinet has information indicating that the DBE may be acting in violation of the requirements of 49 CFR 26, the Cabinet may initiate additional investigations.

Interstate Certification

(49 CFR §26.85)

An interstate applicant must be certified as a DBE by the state transportation agency responsible for certifying firms under 49 CFR 26 in an applicant's jurisdiction of original certification ("JOC")¹³. The JOC is the State in which the firm maintains its principal place of business at the time of application unless and until the firm loses certification in that jurisdiction. The Cabinet is required to process and accept the DBE's certification from its JOC. This section applies to DBEs certified in any UCP.

To obtain certification by the Cabinet, the interstate DBE must provide¹⁴:

- (1) A cover letter with its application that specifies that the DBE is applying for interstate certification, identifies all UCPs in which the DBE is certified (including the UCP that originally certified it);
- (2) An electronic image of the UCP directory of the original UCP that shows the DBE certification; and
- (3) A new Declaration of Eligibility ("DOE").

Within 10 business days of receiving the documents required above, the Cabinet will confirm the certification of the DBE preferably by reference to the UCP directory of the JOC.

If the DBE fulfills the requirements above and the Cabinet confirms the DBE's certification, the Cabinet will certify the DBE immediately without undergoing further procedures and provide the DBE a letter documenting its certification with the Cabinet.

¹³ 89 Fed. Reg. 24937 (April 9, 2024)

¹⁴ 49 CFR §26.85(c)

Post-interstate Certification Proceedings

(49 CFR §26.85(g))

- After the Cabinet certifies the DBE, the Cabinet may request a fully unredacted copy of all, or a portion of, the DBE's certification file from any other UCP in which the DBE is certified.
- A UCP must provide a complete unredacted copy of the DBE's certification materials to the Cabinet within 30 days of receiving the request. Confidentiality requirements of §26.83(d) and §26.109(b) do not apply.
- Once the Cabinet certifies the DBE, then it will treat the DBE as it treats other DBEs, for all purposes.
- The DBE must provide an annual DOE with documentation of gross receipts, under §26.83(j), to certifying UCPs on the anniversary date of the DBE's original certification by its JOC.

Resources Available to DBE Applicants

During the period prior to the formal submittal of the application, the OCRSBD shall:

- a. When requested by the applicant, provide technical advice needed by the applicant in completing the application form and the supporting documentation; and
- b. When requested by the applicant, advise the applicant firm of the requirements of 49 CFR 26 and direct applicants to www.transportation.gov/DBEFORMS for access to required USDOT forms.

Evaluation of Application

The Cabinet shall use the eligibility standards set forth in 49 CFR Part 26 to determine the eligibility of a firm to be certified or continued as a DBE.

Notice of Certification

An applicant for DBE certification shall be notified in writing of the DBE's determination of eligibility within fifteen (15) business days of the DBE Certification Committee meeting at which the determination is made.

Withdrawals

If an applicant for DBE/ACDBE certification withdraws its application before the Cabinet issues a decision, the applicant can resubmit the application at any time. However, the Cabinet may place the reapplication at the "end of the line," behind other applications that have been made since the firm's previous application was withdrawn. The Cabinet may also apply a waiting period¹⁵ to a firm that has established a pattern of withdrawing applications before its decision.¹⁶

¹⁵ 49 CFR 26.86(c)

¹⁶ 49 CFR 26.83(n)

Duration of Certification

In accordance with 49 CFR §26.83(h), once a DBE is certified, the firm remains certified unless and/or until the Cabinet removes certification, in whole or in part (i.e., NAICS code removal), through the procedures of 49 CFR §26.87. It is the policy of the Federal Highway Administration (“FHWA”) that DBE certification does not expire. It is the Cabinet’s policy to conduct a review process for all Kentucky certified firms. A review of the certified firm will be performed every three (3) years on the date of original certification. Certification must be affirmatively revoked using the prescribed procedures.

Certified DBEs must inform the Cabinet, in writing¹⁷, of any change in circumstances affecting their ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in the application form, along with supporting documentation describing the nature of such changes, and a duly executed DOE with the notice. Changes in management responsibility among members of a limited liability company are also covered by this requirement. Failure to provide notification of a material change in the DBE’s circumstances that affects its continued eligibility within 30 days of its occurrence may be considered non-compliance/failure to cooperate, in accordance with 49 CFR §26.109(c).

Continuation

Per 49 CFR §26.83(j), DBEs must provide every year on the anniversary of its original certification date, a new DOE along with gross receipts for its most recently completed fiscal year, calculated on a cash basis regardless of the DBE’s overall accounting method; therefore, the Cabinet will notify each DBE forty-five (45) days prior to the original certification date of the firm’s initial certification, of the requirement to submit a DOE if the firm intends to continue its certification.

The DOE shall be submitted to the Cabinet and include specified documentation of the (SBA business) firm’s size and gross receipts for its most recently completed fiscal year, calculated on a cash basis regardless of the DBE’s overall accounting method. If the DOE is not received by the original certification date, the Cabinet shall initiate the process to remove the DBE’s eligibility. Removal proceedings shall be initiated by a written notice to the DBE pursuant to 49 CFR §26.87.

Denials of Eligibility

If an application for certification as a DBE is denied by the DBE Certification Committee, the Cabinet shall issue a formal notice of decision setting forth the reasons for denial. A denial may be appealed to the Cabinet in accordance with KRS 13B within thirty (30) days of the receipt of the notice. The applicant may also appeal the decertification decision directly to the United States Department of Transportation.

A DBE firm shall not reapply for certification for six (6) months from the day after the date of the decision letter is emailed. After the waiting period expires, the denied DBE may reapply to the Cabinet. The Cabinet shall inform the DBE of its rights, and specify the date the waiting period ends, in the decision letter.

Upon a showing of good cause, the Cabinet may permit exceptions to this policy. The Cabinet reserves the right to permit an applicant firm to reapply for certification prior to the one (1) year from

¹⁷ 49 CFR §26.83(i)

the effective date of denial, but not less than three (3) months from the effective date of denial if determined to be in the best interest of the Cabinet.

Removals

The Cabinet may perform periodic reviews or on-site reviews of a certified DBE firm during its certification period to verify the continued eligibility of the firm. This process may include sending certified letters to a DBE firm's address on file with the Cabinet in an attempt to verify information. If the Cabinet finds noncompliance with the eligibility criteria, the certified firm fails to provide reasonable information requested or the firm fails to maintain current information with the Transportation Cabinet, the Cabinet shall initiate proceedings consistent with 49 CFR §26.87 to remove the firm.

At the time of the preliminary determination that removal proceedings may be appropriate, but at least forty-five (45) days prior to submittal of the information supporting removal to the Committee, OCRSBD shall issue a notice of intent (NOI) to decertify the DBE.

The NOI shall:

- Clearly and succinctly state each reason for the proposed action, and specifically identify the supporting evidence for each reason;
- Notify the DBE of its right to respond in writing, at an informal hearing, or both; and
- Inform the DBE of the hearing scheduled on a date no fewer than 30 days and no more than 45 days from the date of the NOI.

If the DBE wants a hearing, it must email the Cabinet saying so within 10 days of the NOI to KYTC.OCRSBD@ky.gov. If the DBE does not do so, it loses its opportunity for a hearing. The Cabinet and DBE may negotiate a different hearing date from that stated in the NOI, however, parties must not engage in dilatory tactics. If the DBE does not want a hearing, or does not give timely notice to the Cabinet that it wants one, the DBE may still provide written information and arguments to the Cabinet rebutting the reasons for decertification stated in the NOI. The DBE can submit the written information/arguments electronically to KYTC.OCRSBD@ky.gov or by mail to:

Kentucky Transportation Cabinet
Office for Civil Rights & Small Business Development
200 Mero Street, 6th Floor West
Frankfort, KY 40622

The Cabinet shall send the firm a Notice of decision (NOD) no later than 30 days of the informal hearing and/or receiving written arguments/evidence from the firm in response to the NOI. The NOD shall describe with particularity the reason(s) for the Cabinet's decision, including specific references to the evidence in the record that supports each reason. The NOD shall also inform the firm of the consequences of the decision¹⁸ and of its appeal rights¹⁹.

¹⁸ 49 CFR §26.87(j)

¹⁹ 49 CFR §26.89

The Cabinet will promptly provide the applicant copies of all documents and other information on which it based the denial if the applicant requests them.

The Cabinet will establish a waiting period for reapplication of no more than six (6) months. That period begins to run the day after the date of the decision letter is emailed. After the waiting period expires, the denied firm may reapply to any member of the UCP that denied the application. The Cabinet will inform the applicant of that right, and specify the date the waiting period ends, in its decision letter. An appeal does not extend the waiting period.²⁰

Decisions of the DBE Certification Committee may be appealed under the provisions of KRS 13B. Administrative determinations made in accordance with the procedures set forth in KRS 13B may be appealed to the USDOT. The Cabinet decision remains in effect until the Department resolves the appeal or the certifier reverses itself.

Termination of Applications

The firm bears the burden of proving that it continues to meet the standards for being classified as a Disadvantaged Business Enterprise (DBE). The Kentucky Transportation Cabinet reserves the right to request any additional information deemed necessary to determine if an individual is economically disadvantaged and/or the firm is certifiable. Failure to cooperate and/or provide requested crucial information within the time specified is grounds for termination of the application process

Once a firm's application has been submitted, applications that are incomplete or that include insufficient supporting documentation will not be processed until all necessary documents are received by KYTC. The application will be assigned to a Program Investigator. The Program Investigator will conduct a preliminary review to determine if the application is complete and includes all of the required documents required for all applicants. If the application is incomplete, the applicant will be sent a request to provide the missing information. If the firm does not respond and provide requested crucial information within the time specified is grounds for termination of the process. The applicant can re-apply at any time.

Suspensions

If a DBE is found to be willfully non-compliant, the Department will notify the DBE of the sanctions to be imposed, which may include suspension, decertification or debarment.

The firm's certification will be suspended as soon as the Cabinet transmits electronic notice to the firm's owner at the last known email address. Throughout this suspension period, the DBE may **not** be considered to meet a contract or participation goal on contracts executed during the suspension period.

The Cabinet adheres to the regulations outlined in 49 CFR §26.88, regarding suspension rules. There are three types of suspensions that could affect the firm.

a) Summary Suspension

A Summary Suspension is an extraordinary remedy for lapses in compliance that cannot be reasonably or adequately resolved in a timely manner by other means.

²⁰ 49 CFR 26.86(d)

The Cabinet shall consider the burden placed on the DBE and on itself when determining whether a Summary Suspension is a prudent and proportionately effective response.

b) Mandatory Suspension

A Mandatory Suspension is when the Cabinet has clear and credible evidence of the DBE's or its SEDO's involvement in fraud or other serious criminal activity as the Operating Administration (OA) with oversight so directs.

c) Elective Suspension

An Elective Suspension could be when the Cabinet has discretion to suspend the DBE summarily if the Cabinet has clear and credible evidence that the DBE's continued certification poses a substantial threat to the program's integrity.

Or the Elective Suspension could be when an owner upon whom the firm relies for eligibility does not timely file the declaration of eligibility and gross receipts documentation requested annually²¹.

The Cabinet may coordinate with other remedies for Mandatory or Elective suspensions by sending a simple information request or a Notice of Intent (NOI) in response.

The Cabinet may elect to suspend the same DBE just once in any 12-month period.

The Cabinet shall notify the firm by email, of its Summary Suspension Notice (SSN) on a business day during regular business hours explaining the actions, reasons for suspension, consequences, and evidence on which the Cabinet relies.

The SSN regardless of type, must demand that the DBE show cause why it should remain certified and provide the time and date of a virtual show-cause hearing at which the firm may present information and arguments concerning why the Cabinet should lift the suspension. The SSN must also advise that the DBE may provide written information and arguments in lieu of or in addition to attending the hearing.

- The Elective SSNs may not cite more than one reason for the suspension; and
- Mandatory SSNs may state multiple reasons for the suspension.

The hearing date must be a business day that is at least fifteen (15) but not more than twenty-five (25) days after the date of the SSN notice. The DBE may respond in writing in lieu of or in addition to attending the hearing; however, it will have waived its right to a hearing if it does not confirm its attendance within ten (10) days of the notice and will have forfeited its certification if it does not acknowledge the notice within fifteen (15) days. The show-cause hearing shall be conducted as a video conference on a standard commercial platform that the DBE may readily access at no cost.

The DBE may provide information and arguments concerning its continuing eligibility until the 15th day following the suspension notice or the day of the hearing, if any, whichever is later. The DBE must email any written response it provides to KYTC.OCRSBD@ky.gov. Email submissions

²¹ 49 CFR §26.83(j)

correctly addressed are effective when sent. The Cabinet may permit additional submissions after the hearing, as long as the extension ends on a business day that is not more than thirty (30) days after the notice.

The Cabinet shall adhere to the scopes and burdens of suspension proceedings as follows:

- Suspension proceedings are limited to the suspension ground specified in the notice.
- The Cabinet may not amend its reason(s) for summarily suspending certification, nor may it electively suspend the firm again during the 12-month period following the notice.
- The DBE has the burden of producing information and/or making arguments concerning its continued eligibility, but it need only contest the reason cited.
- The Cabinet has the burden of proving its case by a preponderance of the evidence. It shall issue a Notice of Decision (NOD) within thirty (30) days of the suspension notice or lift the suspension. Any NOD shall rely only on the reason given in the summary suspension notice.
- The DBE's failure to provide information contesting the suspension shall not impair the Cabinet's ability to prove its case. That is, the uncontested evidence upon which the Cabinet relies in its notice, if substantial, will constitute a preponderance of the evidence for purposes of the NOD.

The DBE remains suspended during the proceedings described in this section but in no case for more than 30 days. If the Cabinet has not lifted the suspension or provided a rule-compliant NOD by 4:30 p.m. on the 30th day, then it shall lift the suspension and amend applicable DBE lists and databases by 12 p.m. the following business day.

The DBE may appeal the final decision noted by the NOD's reason(s) given in the summary suspension notice.

The DBE may **not** appeal the suspension itself unless the following applies then the DBE may petition USDOT for an order to vacate a certifier's action if:

- a) The Cabinet sends a second elective SSN within 12 months, or
- b) Cites multiple reasons in an Elective SSN

The DBE may also petition to USDOT for an order to compel if the Cabinet fails to act within the thirty (30) day time limit as noted above.

In order for the DBE to appeal it must:

- Email the request under the subject line, "REQUEST FOR ENFORCEMENT ORDER" in all caps to DBEAppeals@dot.gov;
- Limit the request to a one-page explanation that includes the Cabinet's name and the suspension dates; contact information for the Cabinet, the DBE, and the DBE's SEDO(s); the general nature and date of the firm's response, if any, to the second suspension notice; and the suspension notice(s) itself.

Challenges to DBE Eligibility

600 KAR 4:010(10)

A third party may challenge the socially and economically disadvantaged status of an applicant for DBE status or of a certified DBE. The challenge shall be made in writing to the OCSBD.

With its letter, the challenging third party shall include all information available to it, which is relevant to a determination of whether the challenged party is in fact socially and economically disadvantaged.

The Cabinet shall determine, on the basis of the information provided by the challenging party and through its own review of the applicant or DBE's eligibility, if there is reason to believe that the challenged party is in fact not socially and economically disadvantaged.

If the Cabinet determines there is no reason to believe the challenged party is not eligible, the Cabinet shall notify the complaining party in writing of its determination concerning the eligibility of the challenged party. This shall terminate the proceeding.

If the Cabinet determines that there is reason to believe that the challenged party is not socially and economically disadvantaged, the OCSBD shall notify the challenged party that his or her status as a socially and economically disadvantaged individual has been challenged.

The notice shall:

1. Summarize the grounds for the challenge and the subsequent findings of the investigation; and
2. Require the challenged party to provide OCSBD, within thirty (30) days, information sufficient to evaluate its status as a socially and economically disadvantaged and qualified DBE.

Failure to provide the requested information within the time limit specified shall be cause for the DBE to be decertified or denied certification. If the socially and economically disadvantaged status of a new applicant is challenged, the challenge proceedings shall be completed prior to completion of the certification.

The Cabinet shall evaluate the information available and make a proposed determination as to the social and economic disadvantage of the challenged party. The OCSBD shall notify both parties of this proposed determination, setting forth the basis for its determination²².

The presumption that the challenged party as a socially and economically disadvantaged individual shall remain in effect until the determination has been made. The decision of the Cabinet after an appeal and hearing before the KYTC Secretary²³ may be appealed to the USDOT by the adversely affected party under the procedures of 49 CFR §26.89.

²² 49 CFR §26.87

²³ See Appeals and Hearings Section, Page 41

Appeals

Applicants and decertified firms affected by a decision of the Cabinet may appeal these adverse Notices of Decision (NOD) to USDOT. If the applicant or decertified firm wants to file an appeal, they must email the Department at DBEAppeals@dot.gov within 45 days of the date of this decision, including a narrative that explains fully and specifically why they believe the decision is in error, what outcome-determinative facts the Cabinet did not consider, and/or what part 26 provisions the Cabinet misapplied; including the Cabinet's name, date of the Cabinet's decision, and the firm's/applicant's contact information. If they do not have access to email, they may send a letter to the following address:

U.S. Department of Transportation
Departmental Office of Civil Rights
Disadvantaged Business Enterprise Program Division
1200 New Jersey Avenue SE
Washington, DC 20590

The Cabinet shall provide to the USDOT a complete administrative record including a video, audio, or transcript of any hearing, including all supporting and requested documents, files and application forms, within twenty (20) days of USDOT's request. The administrative record shall be well organized, indexed, and paginated and the Cabinet shall provide the appellant a copy of any supplemental information provided to USDOT. USDOT may extend the time period when the Cabinet demonstrates good cause.

The Cabinet shall promptly implement any USDOT certification appeal decisions affecting the eligibility of a firm adversely affected by the Cabinet's decision to deny its DBE certification. All USDOT decisions are administratively final unless they say otherwise²⁴.

IX. DBE CERTIFICATION COMMITTEE

The certification entity for the Kentucky Transportation Cabinet is the DBE Certification Committee. The DBE Certification Committee shall operate in accordance with the UCP Agreement and shall make certification eligibility determinations consistent with 49 CFR 26.

Based upon 600 KAR 4010 the DBE Certification Committee shall include:

A. The following voting members:

- (1) Executive Director, Office of Project Development, or a proxy
- (2) Director of the Division of Construction, or a proxy; and
- (3) Director of the Division of Construction Procurement, or a proxy; and

B. The non-voting members:

- (1) Manager of the Small Business Development Branch, or a proxy who shall chair the Certification Committee.
- (2) The Kentucky administrator of the Federal Highway Administration or FHWA, or a proxy may attend Certification Committee meetings as a non-voting member.

²⁴ 49 CFR §26.89(h)

C. Advisory Panel.

- (1) The cabinet shall establish a DBE Certification Advisory Panel whose members may be called upon as needed by the Certification Committee to provide technical counsel regarding a firm's eligibility.
- (2) The DBE Certification Advisory Panel shall be comprised of representatives of the following cabinet divisions:
 - (i) Division of Contract Procurement;
 - (ii) Division of Professional Services;
 - (iii) Division of Highway Design;
 - (iv) Division of Audits;
 - (v) Division of Highway Safety;
 - (vi) Division of Licensing; and
 - (vii) Office of Legal Services.

D. Certification Committee Procedures.

- (1) Upon voting, a simple majority shall constitute a quorum. If only two (2) certification members vote and if they disagree rendering the vote a tie, the Executive director of the Office for Civil Rights and Small Business Development or the executive director's proxy, shall cast the tie breaking vote.
- (2) A summary record of each DBE Certification Committee meeting shall be retained by the Office for Civil Rights and Small Business Development for at least three (3) years from the date of initial notice of certification.
- (3) The completed applications, staff summaries, and recommendations shall be provided to the DBE Certification Committee members no less than five (5) business days in advance of the scheduled meeting in which the application is to be considered.
- (4) The Certification Committee shall have the authority to remove a firm's eligibility for DBE certification as establish in 49 CFR 26.87.

X. SMALL BUSINESS PARTICIPATION

Recognizing that the DBE Program goals should be met through a mixture of race conscious and race neutral methods and that by definition, DBE firms are small businesses, the Transportation Cabinet seeks to implement a small business element into its current DBE Program Plan in accordance with applicable law.²⁵ The Cabinet is including this element to facilitate competition by, and expand opportunities for, small businesses. The Cabinet is committed to taking all reasonable steps to eliminate obstacles to small businesses that may preclude their participation in procurements as prime contractors or subcontractors. The Cabinet will meet its objectives using the following methods and strategies that are pending approval:

Small Business Goal and Outreach

1. Small Business Goal: The Cabinet sets a goal on all FHWA-assisted transportation projects of two million dollars (\$2,000,000) or more for participation by small businesses. All small businesses, who otherwise meet the requirements set out

²⁵ 49 CFR 26.39

herein, may compete for these prime contract and subcontract awards, regardless of the owner's gender, race or geographic location. This small business goal would be in addition to the DBE contract goals, which may be required pursuant to applicable law or policy.

2. How Goal Will be Determined: Basic procedures for setting the small business goals on Cabinet projects will be as follows: the goal setting committee, which consists of three (3) members, one (1) member from each, Construction Procurement, Permits Branch and the Office for Civil Rights, will set the small business goals. Construction Procurement will provide a copy of the field estimate to each member prior to the goal setting committee meeting. Each member will review the project line item by line item and determine which tasks small businesses can perform. Each member will look at it with their own unique expertise and resources and make their individual recommendations.

During each meeting, members bring their recommendations and prepare to explain the rationale for each. Members then proceed to discuss each project and what items are to be included to make up the goal recommendation. If the members' numbers differ greatly, each member then explains why he/she included or excluded certain items as being something that a small business could perform. This time is used to determine if there are any special circumstances or additional information needed, which may have impacted recommendations.

The goal setting committee attempts to reach a consensus with the understanding that it must set attainable goals, with full consideration of safety, quality and ethics, which will meet the overall goal of x%. The committee finalizes the goal, and all members agree. Construction Procurement captures all goals in writing and forwards them for final approval to the State Highway Engineer. Construction Procurement keeps the final data. Because the information is sensitive, individual members shred their copy of the field estimate.

3. Outreach: The Cabinet will seek to develop and implement outreach training opportunities for small businesses through current Cabinet services. Each year, the Cabinet holds public forums across the state. These forums provide an opportunity to introduce the Small Business program to the public and affords the opportunity to discuss the DBE program, its goals and the goal setting process with the public and current DBEs. In addition, forums are used to explain the certification program, the application process and to encourage and assist any interested small business owners to make application.

Certification Standards

1. A business or firm seeking to be certified as a Small Business Enterprise (SBE) for purposes of participating in the Small Business element of the Cabinet's DBE Program Plan must have a personal net worth of less than \$2.047 million and does not exceed \$31.84 million in averaged gross annual receipts in accordance with SBA's standards stated in 49 CFR 26 and 23.
2. A business or firm must meet the definitions specified in Section 3 of the Small Business Act and the Small Business Administration regulations implementing it (13

CFR Part 121). A small business is a business that is independently owned and operated, organized for profit and not dominant in its field. Depending on the industry, size standard eligibility is based on the average number of employees for the preceding twelve (12) months or on sales volume averaged over a (5) five-year period.

Certification Procedures

1. A business or firm seeking to be certified as a SBE must complete and submit an application and affidavit with the requested documentation to the OCRSBD. An incomplete application will not be processed.
2. Review of a signed and complete application will be a desk audit performed by the Cabinet's DBE Liaison Officer and/or his/her designee, with required documentation to include but not limited to, a list of equipment, long term leases, rental agreements, personal and business taxes, a balance sheet and a Secretary of State registration.
3. The Cabinet's DBE Liaison Officer and/or his/her designee will have sixty (60) days to process the completed application and issue a determination.
4. Upon certification, the SBE will be certified for a period of three (3) years. At the expiration of this certification period, the SBE will be required to submit an updated application for continued eligibility.
5. Once certified, all SBEs must submit a "Declaration of Eligibility" and "Personal Net Worth Statement" annually to reconfirm their firm's eligibility status.
6. Certified SBEs must provide current information concerning matters that may impact their eligibility, as well as current contact information. Failure to provide current information impacting eligibility (including personal net worth and gross receipts) may result in decertification.
7. If an application for certification as a SBE is denied by the Cabinet's DBE Liaison Officer and/or his or her designee, the Cabinet shall issue a formal notice of denial setting forth the reasons for denial. A request for reconsideration may be made to the OCRSBD Executive Director within ten (10) days of the date of the formal notice of denial by emailing KYTC.OCRSBD@ky.gov. In consultation with the Cabinet's Executive Director of the Office of Legal Services (OLS), the OCRSBD Executive Director will review the record and any additional information the aggrieved party wishes to submit along with a position statement as to why it is believed the determination of non-eligibility was in error. The OCRSBD Executive Director and OLS Executive Director may also consult with FHWA as part of the review of the request for reconsideration. The OCRSBD Executive Director shall have thirty (30) days to issue a final determination.

Reciprocal Certification

The Cabinet will accept the following certifications without the necessity of application for participation in the Small Business element of the Cabinet's DBE Program with applicable stipulations:

1. KYTC DBE Certification – DBE Certification by KYTC which stipulates that a firm has

been determined to meet all the requirements in accordance with 49 CFR Part 26. All certification determinations are evidenced by a letter of DBE certification issued by KYTC.

2. SBA 8(a) Business Development Certification (as described in 13 CFR Parts 121 and 124) – will require submittal of five (5) years of business tax returns.

Decertification

The Cabinet shall perform periodic reviews of a certified SBE firm during its certification period to verify the continued eligibility of the firm. This process may include sending certified letters and/or emails to a SBE firm's contact on file in an attempt to verify information. If the Cabinet finds noncompliance with the eligibility criteria, the certified firm fails to provide reasonable information requested or the firm fails to maintain current information with the Cabinet, the Cabinet shall decertify the firm.

At the time of the preliminary determination that decertification may be appropriate, OCRSBD shall issue a notice to the SBE of the intent to decertify the firm. The notice shall outline the evidence supporting decertification and ask for information to support the firm's continued eligibility. The SBE firm shall have thirty (30) days from the receipt of the notice to supply the information to OCRSBD for review.

The effective date of decertification shall be thirty (30) days after the date the notice of decertification is mailed to the firm provided the firm does not appeal the decertification to the Cabinet. If a firm appeals decertification, the effective date shall be the date of the final ruling of the Executive Director of OCRSBD. Decertification shall be for a specific period of time but not less than one (1) year.

XI. CONTRACT ADMINISTRATION

Recipient/Contractor Assurances

Each Federal-aid construction or design contract approved by the Cabinet shall include the following assurance:

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 USDOT-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.

Contract Award Process

The Cabinet reviews each federally-funded highway contract to determine if it is appropriate to set a DBE goal. If a DBE goal is set on a highway contract, the project goal will be provided in the *Notice to Contractors* issued at least twenty-one (21) days prior to the project letting and in the project proposal.

Contractors shall exercise all necessary and good faith efforts to ensure that DBEs participate in at least the percent of the total dollar amount of the project goal designated in the contract. For

example, if the project cost is \$10 million and carries a six percent (6%) goal, \$600,000 of the contract shall be allocated to certified DBEs, or the contractor must show that all good faith efforts were exerted to meet the goal. (See Good Faith Efforts.)

1. Certification of Contract Goal

Contractors shall certify their anticipated DBE participation in their bids on projects for which a DBE goal has been established as follows:

The bidder certifies that it has secured participation by Disadvantaged Business Enterprises ("DBE") in the amount of (x) percent of the total value of this contract, and that the DBE participation is in compliance with the requirements of 49 CFR Part 26 and the policies of the Kentucky Transportation Cabinet pertaining to the DBE Program.

BIDS SUBMITTED WHICH DO NOT INCLUDE CERTIFICATION OF DBE PARTICIPATION WILL NOT BE READ PUBLICLY.

These bids WILL NOT be considered for award by the Transportation Cabinet and will be returned to the bidder.

2. Tips for Contractors

The Cabinet has, and will, continue to reject entire bid packages for failure to comply with the policies contained in this section.

- If there is a goal on the project, bidders may not leave the certification blank. Bids that do not include a percentage in the certification will be rejected as non-responsive.
- Bidders may designate zero (0) in the certification and still have their bids considered for award. However, bidders who certify zero (0) as their goal must prove through the Good Faith Efforts process that they have made good faith efforts to meet the DBE project goal.
- Any bid that includes a DBE participation percentage of less than the project goal set by the Cabinet will be required to submit a "Good Faith Efforts" Package for review by the Cabinet's Good Faith Efforts Committee.

3. After the Letting

After the letting, the Cabinet will review each proposal containing a DBE goal and determine if a General DBE Participation Plan has been submitted. Prime Contractors awarded a contract are required to make available a copy of all DBE subcontracts²⁶. Plans submitted with low bids will be reviewed to ensure that the DBEs listed are DBE certified and that they hold certificates of eligibility to perform the work that is to be contracted to them. Discrepancies in these areas may cause the bid to be rejected and the second responsive bid will then be reviewed for compliance.

The Cabinet schedules project lettings as needed. Following the letting, the low bid on each project is submitted to the Awards Committee at the earliest possible date to be

²⁶ 49 CFR 26.53(j)

considered for award. If the low bidder has met the DBE goal and has included its General DBE Participation Plan in its bid package, then the Awards Committee may consider the bid as soon as the Division of Construction Procurement can approve the General DBE Participation Plan.

The low bidder who does not submit a General DBE Participation Plan with the bid must submit it within seven (7) calendar days of receipt of notification that it is the low bidder. The project will not be considered for award prior to submission and approval of the low bidder's General DBE Participation Plan.

If the Cabinet determines that the low bidder has not complied with the DBE Program goal and policies, the Cabinet may award the project to the next lowest responsive bidder, or rebid it.

Proving Good Faith Efforts

Once a DBE goal is established on a contract, the Cabinet may only award the contract to a prime contractor who has made a good faith effort to meet the DBE goal. The contract shall not be awarded unless the low bidder can show prior to the award that it has either met the contract goal or it expended sufficient good faith efforts to meet the goal and despite those efforts, failed. The Cabinet shall not withhold an award of a contract if the low bidder has made a good faith effort to meet a project goal but has failed despite those efforts.

1. Defining Good Faith²⁷ "Good faith" is obtained if:

- Prime Contractors awarded a contract are required to make available a copy of all DBE subcontracts;
- The prime contractor documents that it has obtained enough DBE participation to meet the goal; or
- The prime contractor documents that it made adequate good faith efforts to meet the goal, even though it did not succeed.
- If a bidder fails to meet the goal established on a contract, then it may still be awarded the contract if it can be shown that it made all necessary and reasonable steps to secure the required DBE participation. The bidder must provide the Cabinet with sufficient documentation to meet this test. The bidder must provide the GFE Efforts Committee with a Good Faith Efforts Package. The Good Faith Efforts Package shall include, but need not be limited to, information showing evidence of the following²⁸:
 - Whether the bidder attended any pre-bid meetings that were scheduled by the Cabinet to inform DBEs of subcontracting opportunities;
 - Whether the bidder provided solicitations through reasonable and available means;
 - Whether the bidder provided written notice to all DBEs listed in the DBE

²⁷ 49 CFR 26.53

²⁸ Further guidance may be found in 49 CFR Part 26, Appendix A.

directory who are prequalified in the areas of work that the bidder will be contracting;

- Whether the bidder followed up initial solicitations of interest by contacting DBEs to determine with certainty whether they were interested. If a reasonable amount of DBEs within the targeted districts do not provide an intent to quote, or no DBEs are prequalified in the subcontracted areas, the bidder must notify the DBELO in the OCRSBD to give notification of the bidder's inability to get DBE quotes;
- Whether the bidder selected portions of the work to be performed by DBEs in order to increase the likelihood of meeting the contract goals. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise perform these work items with its own forces;
- Whether the bidder provided interested DBEs with adequate and timely information about the plans, specifications and requirements of the contract;
- Whether the bidder negotiated in good faith with interested DBEs not rejecting them as unqualified without sound reasons based on a thorough investigation of their capabilities. Any rejection should be so noted in writing with a description as to why an agreement could not be reached;
- Whether quotes were received from interested DBEs but were rejected as unacceptable without sound reasons why the quotations were considered unacceptable. The fact that the DBEs' quote for the work is not the lowest quote received, will not in itself be considered as a sound reason for rejecting the quote as unacceptable. The fact that the bidder has the ability and/or desire to perform the contract work with its own forces will not be considered a sound reason for rejecting a DBE quote. Nothing in this provision shall be construed to require the bidder to accept unreasonable quotes in order to satisfy DBE goals;
- Whether the bidder specifically negotiated with subcontractors to assume part of the responsibility to meet the contract DBE goal when the work to be subcontracted includes potential DBE participation;
- Whether the bidder made any efforts and/or offered assistance to interested DBEs in obtaining the necessary equipment, supplies, materials, insurance and/or bonding to satisfy the work requirements of the bid proposal; and
- Any other evidence that the bidder submits which may show that the bidder has made reasonably good faith efforts to include DBE participation.

2. Good Faith Effort Packages

If the DBE participation submitted in the bid by the lowest responsive bidder does not meet or exceed the DBE contract goal, the lowest responsive bidder must submit a Good Faith Efforts Package to satisfy the Transportation Cabinet that sufficient good faith efforts were made to meet the contract goals prior to submission of the bid.

Efforts to increase the goal after bid submission will not be considered in justifying the good faith effort, unless the prime contractor/consultant can show that the proposed DBE was solicited prior to the letting date. DBEs utilized in achieving the DBE goal must be certified and prequalified at the time the bid is submitted. Prequalification may or may not be required depending on the work item.

One (1) complete set and nine (9) copies of this information must be received in the Division of Construction Procurement no later than 12:00 noon of the tenth calendar day following opening of bids.

When the information submitted includes repetitious solicitation letters, it is acceptable to submit a sample representative letter along with a distribution list of the firms solicited. Documentation of DBE quotations shall be a part of the good faith effort submittal as necessary to demonstrate compliance with the factors listed below, which the Cabinet considers in judging good faith efforts. This documentation may include written subcontractors' quotes, telephone log notations of verbal quotes, or other types of quote documentation. The Good Faith Efforts Package shall include, but may not be limited to, information showing evidence of a bidder's efforts to meet the goal.

3. Failure to Meet Good Faith Effort Requirement

When the low bidder fails to submit sufficient DBE participation to meet the contract goal and the Good Faith Efforts Committee determines that the low bidder failed to make sufficient efforts to meet the contract goal, the bidder will be notified that it has not made a good faith effort. The bidder will be offered the opportunity to meet in person for administrative reconsideration. The Good Faith Efforts Committee shall make its determination based upon the record as a whole.

The bidder will be notified of the Good Faith Efforts Committee's decision within 24 hours of its decision. The notification will be confirmed in writing. The bidder will have 24 hours to request reconsideration of the Good Faith Efforts Committee's decision. The reconsideration meeting will be held within two (2) working days of the receipt of a request from the bidder for reconsideration.

The Cabinet reserves the right to award the contract to the next lowest responsive bidder or to rebid the contract in the event that the contract is not awarded to the low bidder as the result of a failure to meet the good faith requirement. Refer to the Administrative Reconsideration Section below.

4. Good Faith Efforts after the Contract Award

In instances where a DBE subcontractor cannot or will not perform work as contracted, the prime contractor may be required to replace the DBE subcontractor on the job, or prove good faith efforts to do so.

Good Faith Efforts Committee

The Division of Construction Procurement has primary responsibility for the review of all submittals of requests for determinations of Good Faith Efforts by contractors seeking to act as prime contractors on Cabinet projects that receive federal highway funds. The recommendations of the

Division of Construction Procurement will submit all documentation concerning good faith efforts to the Good Faith Efforts Committee for consideration and final approval.

1. Good Faith Efforts Committee Membership

The following entities shall be represented on the Committee:

Chair:

- Office of the State Highway Engineer

Members:

- Cabinet Secretary, or his designee
- Office for Civil Rights and Small Business Development Division of Construction
- Division of Construction Procurement Internal/External Audits Branch

Secretary:

- Division of Construction Procurement

Advisor:

- Office of Legal Services

Resource:

- DBE Liaison Officer

Ex Officio Invitees:

- Federal Highway Administration
- Kentucky Association of Highway Contractors

2. Rules of Operation

Committee members must attend all meetings of the Good Faith Efforts Committee or be represented by a proxy. The proxy shall be named in advance and designated by the director of the subject entity in writing and shall attend Committee meetings on all occasions when the member is unavailable. The intent of this provision is that the Good Faith Efforts Committee be comprised of persons familiar with the purpose, goals and operations of the DBE Program and the Cabinet's contract procedures.

All members must receive notice of the meeting not less than five (5) working days prior to the meetings. When possible, the notice will include all Good Faith Efforts Packages submitted to the Cabinet by prospective bidders. In the event that the State Highway Engineer cannot attend, then the Deputy State Highway Engineer for Project Delivery or his proxy will attend and act as Chair.

The Good Faith Efforts Committee meetings are held on the Monday after the Good Faith Efforts Packages are due to the Cabinet. If the Monday is a holiday, the Committee meeting will be held on the Tuesday following the date that the Good Faith Efforts Packages are due or on a date designated by the State Highway Engineer.

3. Good Faith Efforts Committee Procedures

The Good Faith Efforts Committee meeting is for the purpose of allowing the members to analyze the Good Faith Efforts Packages and to ask questions of the Division of Construction Procurement staff concerning the bidder's efforts. The Chair will then call for a vote and only designated voting members along with the Secretary and advisor will remain while the committee votes to make the determination of good faith.

A representative of the Division of Construction Procurement acts as Secretary to the Good Faith Efforts Committee. Official minutes are recorded and must be typed, approved and signed by the representative as Secretary and by the State Highway Engineer as Chair. Votes are then recorded; the validity of the good faith effort will be determined by a simple majority vote after the Committee members have had an opportunity to review and consider the Good Faith Efforts Package as a whole. In the event of a tie, the Chair shall then cast the tie-breaking vote.

If the vote of the Committee is not unanimous, individual votes shall be recorded. The original minutes are retained in the Good Faith Efforts Committee's files in the Division of Construction Procurement. Each Committee member receives a copy of the minutes.

The contractor requesting approval of good faith efforts may attend the Good Faith Efforts Committee meeting, but must leave with all non-voting members when the committee votes.

In the event that the Committee determines, by a preponderance of the evidence, that the lowest responsive bidder has failed to meet the Good Faith Efforts criteria, then that bidder will be rejected, and the Good Faith Efforts Package of the next lowest responsive bidder may be requested (if that bidder did not meet the goal) and reviewed in the same manner or the Cabinet, at its discretion, may elect to rebid the project.

4. Good Faith Efforts Packages

Requirements for the contents of Good Faith Efforts Packages is contained in the Special Note included in the requests for proposals issued to prospective bidders on all highway construction projects receiving federal funds.

All Good Faith Efforts Packages shall be submitted to the Cabinet within ten (10) days of the receipt of notice that the contractor is the low bidder.

The Good Faith Efforts Packages will be evaluated for completeness by the Division of Construction Procurement in accordance with 49 CFR 26 and this DBE Program Plan. Good Faith Efforts Packages shall be presented to the Good Faith Efforts Committee members when they have been determined to be complete. The Division of Construction Procurement may request more information from the bidder prior to the presentation of the Good Faith Efforts Package to the Good Faith Efforts Committee.

5. Administrative Reconsideration

Where the lowest responsive bidder fails to submit sufficient participation by DBE firms to meet the contract goal, and upon determination by the Good Faith Efforts Committee based upon the information submitted that the lowest responsive bidder failed to make sufficient good faith efforts to meet the contract goal, the bidder will be offered an opportunity to meet in person for administrative reconsideration. The reconsideration meeting will be held within two (2) business days of the receipt of a request from the bidder for reconsideration or on the first date on which the Good Faith Efforts Committee may meet.

The Office of the Secretary of the Cabinet or his/her designee will hear the request for reconsideration. The bidder will have the opportunity to present written documentation or

argument concerning the issue of whether it met the goal or made an adequate good faith effort. The bidder will receive a written decision on the reconsideration explaining the basis for the finding that the bidder did or did not meet the goal or made adequate good faith efforts to do so.

The result of the reconsideration process is not administratively appealable to the Transportation Cabinet or the USDOT.

Prompt Payment and Retainage

Prime contractors for the Cabinet shall be required to pay all subcontractors and material suppliers and other service providers within seven (7) calendar days after receipt of payment from the Cabinet for work performed, materials furnished, or services provided on Federal-aid highway construction and design projects.

The Cabinet may withhold retainage from the prime and release a percentage of the retainage incrementally as portions of the contract are completed and accepted, e.g. monthly progress payments.

The Cabinet requires prime contractors to release all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after the Cabinet pays the prime, which could be the portion that is included in the prime's payment.

Affidavit of Subcontractor Payment

USDOT requires, pursuant to 49 CFR 26.37(b), the Cabinet to monitor and verify that work subcontracted to DBE firms is actually performed by the DBE. Additionally, the Cabinet is required to report the DBE participation on each project. Therefore, it is the Cabinet's responsibility to discern whether payments are made to DBE firm. The Affidavit of Subcontractor Payment²⁹ is to be completed and submitted to OCRSBD within seven (7) business days of being paid by the Cabinet. The affidavit verifies the actual payments made to DBE firms. Each DBE firm must verify the actual payment amount.

Over-Concentration³⁰

The Cabinet may review its DBE participation annually with respect to the areas of work in which DBE firms receive subcontracts. When there is an indication that DBE firms are performing work on USDOT assisted contracts to an extent in which non-DBE firms are being excluded from that type of work, the Cabinet, following an investigation, will take appropriate corrective action.

The Cabinet devises measures to address over-concentration of DBE firms once it has been clearly documented. Measures available to address over-concentration may include the use of incentives, technical assistance, business development programs, mentor-protégé programs and other appropriate measures designed to assist DBE firms to perform work in areas outside the area(s) of over-concentration. When areas of over-concentration have been documented to exist, the Cabinet will take appropriate measures to address the over-concentration in conjunction with USDOT. The Cabinet will notify prospective bidders on a project of any exception in the bid proposal.

²⁹ The Affidavit of Subcontractor Payment is available through OCRSBD

³⁰ 49 CFR 26.33

Second-Tier Subcontracts

Second-tier subcontracts between a subcontractor and a DBE firm may be approved by the Cabinet prior to the beginning of work on the second-tier subcontract. Second-tier subcontracts may be credited to the DBE goal established for a USDOT assisted contract.

DBE Workforce and Supervision

At least 30 percent (30%) of the work outlined in the subcontract shall be performed by the DBE subcontractor's work force.

A DBE subcontractor shall designate in writing a project superintendent who will supervise the subcontractor's work force daily. The project superintendent shall not be employed by any other contractor on the same project for the life of the project.

If a DBE is the prime contractor on a project, which has participation goals established for the project, the work performed by the DBE shall count toward the participation goal.

DBE Supportive Services/Business Development Program

The scope of work for a statewide DBE supportive service program are conducting a needs assessment, providing procurement, contract management, and business management assistance to help both construction and professional service DBE firms acquire greater proficiency in business and technical skills. Education in KYTC's contract and agreement specifications will be highlighted.

A comprehensive program will also include networking/marketing opportunities by non-DBE prime contractors and KYTC staff. The program goals include procurement assistance to DBEs to "even the playing field" in their competition with non-disadvantaged businesses for federal-aid highway construction contracts and subcontracts.

Business Development Program

Developmental Stage: One component of the program will be a DBE Orientation that will provide selected firms with information and guidance on the Regulations governing the DBE program and their responsibilities as a DBE, which includes commercially useful function.

Based upon the goals and objectives identified in the selected firms' business plans, KYTC will provide resources designed to assist the firms with reaching those goals and help eliminate any barriers that may exist. This may include classes on certified payrolls, bonding, business management, etc.

Transitional Stage: KYTC will provide networking opportunities with prime contractors and/or subcontractors in the region for selected firms prior to their graduation from the program.

KYTC may solicit in-kind services or funds from various industries such as banks, surety companies, and other business-related entities or agencies. KYTC partnered with the Small Business Transportation Resource Center, South Atlantic Region to provide a second Bonding Education Program and as of May 2024 six (6) DBEs completed this Bonding Education Program.

KYTC will follow the established request for proposal process for any required contracts for services related to this program.

XII. COUNTING DBE PARTICIPATION

The Cabinet shall count DBE participation toward its overall and contract goals as provided in 49 CFR 26.55.

Participation of a DBE subcontractor is not counted toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

A DBE firm's participation is not counted toward any DBE goals if the firm was not certified as a DBE at the time of the execution of the contract.

A DBE firm as provided in 49 CFR 26.55 that ceased to be certified can no longer count towards the overall goal on future contracts. Work performed prior to the change in DBE status will count.

Value of Work Performed by the DBE

When a DBE participates in a contract, the Cabinet shall count only the value of the work actually performed by the DBE toward DBE goals.

The dollar value of work performed by a DBE firm is not counted if the firm is not certified at the time of the execution of the contract.³¹

Termination and Replacement of DBEs

No prime contractor on a USDOT assisted contract shall terminate for convenience, a DBE subcontractor approved to meet a DBE contract goal (or an approved DBE substitute firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without the prior written consent of the Cabinet. A prime contractor shall not be entitled to any payment for work or materials without prior written consent of the Cabinet. The OCRSBD and DBELO must be consulted prior to any consent or approval given for termination and/or replacement of a DBE.

When a DBE subcontractor is terminated or fails to complete its work on a contract for any reason, the Cabinet shall require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal established for the procurement.

Certified DBE firms approved to meet Federal-aid contract goals may be replaced on a project only with the prior approval of the Cabinet.

The participation is not counted of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the contractor has paid the DBE the amount being counted.

³¹ 49 CFR 26.55(g)

Suppliers, Manufacturers, Distributors and Brokers

The Cabinet allows the use of DBE suppliers for credit toward DBE goals, provided they meet the criteria found at 49 CFR 26.55(e). DBE suppliers shall provide information confirming that they are a “regular dealer” and can perform a “commercially useful function” as a supplier. “Commercially useful function” is considered in determining whether the contributions of suppliers and brokers may be counted toward the DBE goal.³²

The Cabinet shall determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer, distributor, or a transaction facilitator) on a contract-by-contract basis.

The prime contractor may count expenditures for materials and supplies obtained from certified DBE suppliers, manufacturers, regular dealers, distributors, and transaction facilitators/brokers on which the DBE assumes actual and contractual responsibility for providing materials and supplies as follows:

Manufacturers

- If the materials or supplies are obtained from a DBE manufacturer, count one hundred percent (100%) of the cost of the materials or supplies.
- A manufacturer is a firm that owns (or leases) and operates a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
- Manufacturing includes blending or modifying raw materials or assembling components to create the product to meet contract specifications.
 - ▶ When a DBE makes minor modifications to the materials, supplies, articles, or equipment, the DBE is **not** a manufacturer. Minor modifications are additional changes to a manufactured product that are small in scope and add minimal value to the final product.
- The Cabinet shall, during the certification process, assess a DBE’s ability to meet the requirements of a DBE manufacturer. The DBE manufacturer shall demonstrate that it has the facilities, means and expertise to manufacture any item for which it presents itself to be a manufacturer. The DBE manufacturer shall also be required to provide proof that it operates the manufacturing facility independently.
 - ▶ A “manufacturer” who attempts to set up a precast concrete manufacturing facility on property owned and controlled by an established pre-cast manufacturer, will be required to show that it is not dependent upon the established company for its existence or success.

³² 49 CFR 26.55(e)(2)(i)

Regular Dealers

- If the materials or supplies are purchased from a DBE regular dealer, count sixty percent (60%) of the cost of the materials or supplies (including transportation costs) count toward DBE goals.
- A regular dealer is a firm that owns (or leases) and operates, a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in sufficient quantities, and regularly sold or leased to the public in the usual course of business.
- Items kept and regularly sold by the DBE are of the “general character” when they share the same material characteristics and application as the items specified by the contract.
- The Cabinet will keep a system through questionnaires, inventory records, reviews, or other methods to determine that³³:
 - ▶ A regular dealer, over a reasonable period of time, keeps sufficient quantities and regularly sells the items in question.
 - ▶ A regular dealer of bulk items owns/leases and operates distribution equipment for the products it sells.
 - ▶ Regular dealers who do not own the equipment necessary to deliver the items, must have a lease agreement with the provider of the transportation equipment in order for the transportation costs associated with supplying the item to be counted toward the DBE goal.³⁴
- The following are requirements for the lease of transportation equipment by the DBE:
 - The lease must be in effect prior to the date of the letting of the contract.
 - A lease must indicate that the DBE has exclusive use of and control over the vehicle(s) leased. This requirement does not preclude the leased vehicle(s) from working for others during the term of the lease with the consent of the DBE, as long as the lease gives the DBE priority for use of the leased vehicle(s).
 - Leases must be for a definitive period. Leases cannot be on an ad hoc basis or for a single project. The purpose of this provision is to show a regular, ongoing relationship between the lessor and the DBE.
 - The lease may include provisions for the lease of a driver/operator.

³³ 49 CFR 26.55(e)(2)(iv)(A)

- The lease must address the price to be charged the DBE for use of the transportation and distribution equipment. This provision need not state the exact pricing but may consist of a means of calculating the rate.
 - Both parties must sign the lease.
- ▶ A DBE supplier has the demonstrated capacity to perform a commercially useful function (CUF) as a regular dealer prior to its participation. To perform a CUF in the transaction, the DBE must demonstrate that it will be responsible for the execution of the work of the contract and meet its responsibilities by actually performing, managing and supervising the work involved.
- The DBE supplier must demonstrate that it is responsible for the following:
 - Negotiating price;
 - Determining quality and quantity;
 - Ordering materials;
 - Installation (if applicable);
 - Paying for the materials;
 - Assuming the risk of loss for the materials until they are accepted by the prime contractor for use on the job. (Obtaining insurance for the risk of loss in transport is an indication of assumption of risk); and
 - The price paid for the work must be commensurate with the work performed to supply the materials.
- A DBE may be a regular dealer in such bulk items as petroleum products, steel, concrete or concrete products, gravel, stone, or asphalt without owning and operating a place of business, as provided above, if the firm both owns and operates distribution equipment used to deliver the products.
 - ▶ Any supplementing of regular dealers' own distribution equipment must be by a long-term operating lease and not on an ad hoc or contract-by-contract basis.
- A DBE supplier of items that are not typically stocked due to their unique characteristics (e.g., limited shelf life or items ordered to specification) should be considered in the same manner as a regular dealer of bulk items.
 - ▶ If the DBE supplier of these items does not own or lease distribution equipment, as described above, it is not a regular dealer.
- Packagers, brokers, manufacturers' representatives, or other persons who arrange, facilitate, or expedite transactions are **not** regular dealers within the meaning of the above clarifications.

Distributors

- If the materials or supplies are purchased from a DBE distributor that neither maintains sufficient inventory nor uses its own distribution equipment for the products in question, count forty percent (40%) of the cost of materials or supplies (including transportation costs).
- A DBE distributor is an established business that engages in the regular sale or lease of the items specified by the contract.
- A DBE distributor assumes responsibility for the items it purchases once they leave the point of origin (e.g., a manufacturer's facility), making it liable for any loss or damage not covered by the carrier's insurance.
- A DBE distributor performs a CUF when it demonstrates ownership of the items in question and assumes all risk for loss or damage during transportation, evidenced by the terms of the purchase order or a bill of lading (BOL) from a third party, indicating Free on Board (FOB) at the point of origin or similar terms that transfer responsibility of the items in question to the DBE distributor.
 - ▶ If these conditions are met, DBE distributors may receive 40 percent for drop-shipped items. Terms that transfer liability to the distributor at the delivery destination (e.g., FOB destination), or deliveries made or arranged by the manufacturer or another seller do not satisfy this requirement.
 - ▶ When a distributor "drop ships" materials without assuming risk or does not operate in accordance with its distributorship agreement, credit is limited to fees or commissions.
- Brokers and packagers shall **not** be regarded as manufacturers or regular dealers within the meaning of this section.

DBE Regular Dealer/Distributor Affirmation Form

- Available at <https://www.transportation.gov/mission/civil-rights/dbe-regular-dealer-distributor-affirmation>.
 - ▶ This form can be used as a tool for recipients, prime contractors, regular dealers, and distributors to carry out their respective responsibilities under these regulations (use of this tool is **not** mandatory).
 - ▶ The form may be used by each DBE supplier whose participation is submitted by a bidder for regular dealer or distributor credit on a federally-assisted contract with a DBE participation goal.
 - ▶ The form may also be used by prime contractors in connection with DBE regular dealers or distributors participation submitted after a contract has been awarded provided such participation is subject to the recipient's prior evaluation and approval.

- ▶ If this form is used, it should be accompanied by the bidder's commitment, contract, or purchase order showing the materials the DBE regular dealer or distributor is supplying.

Transaction Facilitators/Brokers

- Brokers may be utilized for DBE credit, however, only the dollar value of the commission paid to the broker can be applied toward the goal, provided that the fees or commissions are reasonable for the work performed.
- The prime contractor may count toward its DBE goal the following expenditures to certified DBEs that are not manufacturers, distributors, or regular dealers:
 - ▶ With respect to materials or supplies purchased from a DBE that is neither a manufacturer, a regular dealer, nor a distributor, count the entire amount of fees or commissions charged that you deem to be reasonable, including transportation charges for the delivery of materials or supplies. Do **not** count any portion of the cost of the materials and supplies themselves.
- The fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services, and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services;
- The fees charged for delivery of materials and supplies required on a job site (but not the cost of materials and supplies themselves) when the hauler, trucker or delivery service is not also the manufacturer of, or a regular dealer in, the materials and supplies provided that the fee is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services; and
- The fees or commissions charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

The prime contractor may count only expenditures to certified DBEs that perform a "commercially useful function" in the work of the specific contract toward the DBE participation goal established for the project.

- Examples:
 - If the prime contractor utilizes the services of a DBE to provide bridge beams to a \$30 million project and pays a 1 percent (1%) commission on \$3 million worth of beams to the DBE to handle the paperwork, then the prime contractor may apply \$30,000 toward the DBE goal. In this scenario, the DBE does not have responsibility for the ordering or transportation of the beams, nor does it assume the risk of loss in transit.
 - On the other hand, if the DBE arranges transport with the manufacturer, takes ownership and assumes the risk of loss for the beams in transit, arranges the transportation with his own forces or through long-term lease and supervises the delivery, then that DBE is a legitimate supplier and may count \$1.8 million (60%) toward the DBE goal.

Trucking Firms³⁴

The Cabinet will use the following factors to determine whether a DBE trucking company is performing a commercially useful function:

1. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
2. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
3. The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
4. The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
5. The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE that leases trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers.

Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate DOT operating administration.

► Example to paragraph (5):

- DBE Firm X uses two of its own trucks on a contract.
 - It leases two trucks from DBE Firm Y.
 - And six trucks equipped with drivers from non-DBE Firm Z.
 - DBE credit would be awarded for the total value of transportation services provided by Firm X (DBE) and Firm Y (DBE), and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z (non-DBE).
 - In all, full credit would be allowed for the participation of eight trucks.
 - DBE credit could be awarded only for the fees or commissions pertaining to the remaining trucks Firm X receives as a result of the lease with Firm Z.
6. The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own

³⁴ 49 CFR 26.55(d)

employees as drivers, it is entitled to credit for the total value of these hauling services.

► Example to paragraph (6):

- DBE Firm X uses two of its own trucks on a contract.
- It leases two additional trucks from non-DBE Firm Z.
- Firm X uses its own employees to drive the trucks leased from Firm Z.
- DBE credit would be awarded for the total value of the transportation services provided by all four trucks.

7. For purposes of the above, a lease must indicate that the DBE has exclusive use of and control over the truck.

This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck.

Leased trucks **must** display the name and identification number of the DBE.

Joint Ventures

Joint venture means an association of an ACDBE/DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the ACDBE/DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Joint venture entities are **not** certifiable as ACDBEs.

Those firms operating out of joint ventures are looked at the same as any other DBE for counting purposes. They will be heavily scrutinized as to control and independence by the Office for Civil Rights before DBE credit can be given.

When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.³⁵

For gross receipts attributable to joint venture partners, a firm must include in its gross receipts its proportionate share of joint venture receipts, unless the proportionate share already is accounted for in receipts reflecting transactions between the firm and its joint ventures (e.g., subcontracts from a joint venture entity to joint venture partners).³⁶

When an ACDBE performs as a participant in a joint venture, count a portion of the gross receipts equal to the distinct, clearly defined portion of the work of the concession that the ACDBE performs with its own forces toward ACDBE goals.³⁷

³⁵ 49 CFR 26.55(b)

³⁶ 49 CFR 23.33(c)

³⁷ 49 CFR 23.55(d)

XIII. CONTRACT PERFORMANCE MONITORING

The Transportation Cabinet shall have primary responsibility for monitoring active Federal-aid contracts and enforcing the provisions of the DBE Program.

Monitoring of the Execution of Work by DBEs

Construction field personnel are vital to the success of the Cabinet's DBE Program. Federal law requires that the work of DBE contractors be monitored in the field as part of the effort to assure that DBEs are actually performing the work.³⁸

Section engineers and inspectors are assigned the responsibility for monitoring the work of DBE contractors on a project-by-project basis. When monitoring DBE contractors, section engineers shall:

- Notify the DBELO immediately of any irregularities or issues that arise with regard to a DBE work item or DBE contractor/supplier.
- Know whether a project has a DBE goal and the amount of the goal;
- Know the names of any DBE contractors or DBE suppliers who have approved subcontracts the project;
- Know what work each DBE contractor has been subcontracted to perform;
- Keep apprised of the schedule for DBE contractor work and notify the OCRSBD when the DBE contractor is scheduled to be on the job;
- Monitor and document work performed by the DBE contractor and note whether the work is being performed by employees of the DBE firm or by the prime contractor or another non-DBE firm;
- Complete a Commercially Useful Function (CUF) monitoring form and submit it to the OCRSBD staff, per the instructions listed on the CUF monitoring form;
- Ensure that certified payrolls are promptly provided by DBE contractors; and
- Confirm that DBE subcontractors are in compliance with 49 CFR 26 concerning ownership and leasing of equipment;

Daily inspection reports shall reflect the activities of the DBE contractors and prime contractors, including the number and classification of personnel working on the job.

The Cabinet may monitor the work of any DBE contractors. Other agencies and/or offices, including civil rights authorities, the Federal Highway Administration, the Division of Construction Procurement, the Office of Legal Services and the Office of Inspector General (OIG) of the Cabinet may monitor the work of DBEs and contractors as necessary.

³⁸ 49 CFR 26.37(b)

Sub Recipients

A sub recipient is defined for the purposes of this DBE program update as an entity that receives USDOT financial assistance through KYTC. All sub recipients that administer contracts with USDOT financial assistance are required to fully conform to the DBE program requirements of KYTC's DBE Program. Any questions or complaints requiring additional technical assistance can be forwarded to the KYTC's Office for Civil Rights and Small Business Development (KYTC.OCRSBD@ky.gov).

Monitoring Sub Recipients

Each USDOT assisted contract that sub recipients sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) includes all assurances. Sub recipients are required to oversee compliance with DBE program requirements by contractors who perform work on USDOT assisted contracts. KYTC is responsible for ensuring that sub recipients comply with DBE program requirements. KYTC will monitor sub recipients' performance and DBE program compliance. Any sub recipient who fails to comply with DBE program requirements may be subject to formal enforcement action in accordance with 49 CFR Parts 26.103, 26.105 and 26.107 or other appropriate action by the concerned operating administration.

Contract Goal Attainment

USDOT requires, pursuant to 49 CFR 26.37(b), the Cabinet to monitor and verify that work subcontracted to DBE firms is actually performed by the DBE. Additionally, the Cabinet is required to report the DBE participation on each project. Therefore, it is the Cabinet's responsibility to discern whether payments are made to DBE firm. The Affidavit of Subcontractor Payment is to be completed and submitted to OCRSBD within seven (7) business days of being paid by the Cabinet. The affidavit verifies the actual payments made to DBE firms. Each DBE firm must verify the actual payment amount.

Tracking of Payments made to DBEs

The Cabinet requires that prime contractors pay DBE subcontractors for satisfactory performance within seven (7) calendar days of the receipt of payment from the Cabinet.³⁹

The OCRSBD is responsible for the confirmation of payments made to DBE subcontractors.

Problems with payment by prime contractors should be reported to the Office for Civil Rights and Small Business Development at 502-564-3601 or KYTC.OCRSBD@ky.gov.

The federal regulation, 49 CFR 26 requires that the Cabinet confirm that payments made to DBEs equal the awards and commitments reflected in contracts containing DBE goals. A running tally of contract commitments and payments to DBE subcontractors is maintained by the Cabinet to confirm the status of payments to each DBE.⁴⁰

³⁹ 49 CFR 26.29

⁴⁰ 49 CFR 26.37

Prime contractors must incorporate a requirement into DBE subcontracts, including supply contracts, requiring DBEs to provide OCRSBD with a copy of all checks and/or Electronic Funds Statements (EFT) received from the prime contractor within fourteen (14) days of receipt of payment for work performed on Transportation Cabinet projects. See Affidavit of Subcontractor Payment.⁴¹

Corrective Action

Areas of non-compliance within the DBE Program will be documented by the Cabinet and appropriate corrective action recommended when necessary. On documented cases of noncompliance, the Cabinet will notify the prime contractor in detail of the noted deficiencies and the action necessary to remedy or correct these deficiencies. Failure of the prime contractor to correct noted deficiencies may result in:

- (a) Withholding progress payments;
- (b) Sanction and/or reprimand;
- (c) Termination of contract; or
- (d) Other actions as appropriate.

XIV. RESPONSIBILITIES OF THE DIVISION OF CONSTRUCTION PROCUREMENT

The Division of Construction Procurement is primarily responsible for the advertising, letting, award and administration of highway construction contracts. This responsibility also encompasses duties related to the administration of the contractual aspects of the DBE Program.

Prequalification of DBEs

All contractors, subcontractors and DBEs who propose to do work with the Cabinet must obtain a Certificate of Eligibility to contract⁴² or obtain a waiver of the requirement from the Cabinet. The Certificate of Eligibility requirement is separate from, and unrelated to, the DBE certification. DBEs must be prequalified and certified prior to the letting of any contract on which they wish to participate for DBE credit. The process of obtaining a Certificate of Eligibility is conducted through the Division of Construction Procurement.

Compilation of the Notice to Contractors and Bid Proposal

The Division of Construction Procurement must issue a Notice to Contractors not less than twenty-one (21) days prior to the letting of any federal highway contract for bid. The notice includes the DBE project goal on federally-funded projects. The Division of Construction Procurement is responsible for the compilation of the bid proposal, which includes the Special Note applicable to the DBE goal.

⁴¹ <https://transportation.ky.gov/Civil-Rights-and-Small-Business-Development/Documents/DBE%20-%20Subcontractor%20Payment%20Affidavit.docx>

⁴² Kentucky Revised Statutes 176.140. This process is also known as “prequalification”.

Monitoring of the Bidding Process

An official from the Division of Construction Procurement monitors the bidding process. This official shall confirm that all bidders have certified their DBE participation in their bids for projects when a DBE goal has been established.

Bids submitted that do not include certification of DBE participation will not be considered for award by the Cabinet and will be returned to the bidder.

Review and Approval of DBE Contracts and Subcontracts

The Division of Construction Procurement, in consultation with the Division of Construction, has the responsibility and authority to approve all subcontracts for firms on construction contracts, including DBEs.

With regard to contracts for consultant design, the Division of Professional Services has the responsibility and authority to approve all subcontracts, including DBE subcontracts, in consultation with the user division.

The OCRSBD is available as a consultant to confirm DBE certification and DBE abilities.

Good Faith Efforts (GFE)

The Division of Construction Procurement, in consultation with OCRSBD, has primary responsibility for the review of all submittals of requests for determinations of Good Faith Efforts by prime contractors on Cabinet projects. The Division of Construction Procurement makes a determination of completeness and reviews Good Faith Efforts Packages, then makes recommendations to the Good Faith Efforts Committee for consideration.

Bidders are required to submit GFE at the time of bid, they must certify that they will meet the goal or submit the GFE package. As a matter of responsibility, they have (10) days after bid opening to submit the DBE plan with the commitments which includes who the DBE's are, what work they will perform and what the percentages are for each DBE. The number of days after bid opening cannot exceed (5) days beginning January of 2017.

XV. MANAGEMENT OF REPORTS OF POTENTIAL DBE PROGRAM VIOLATIONS

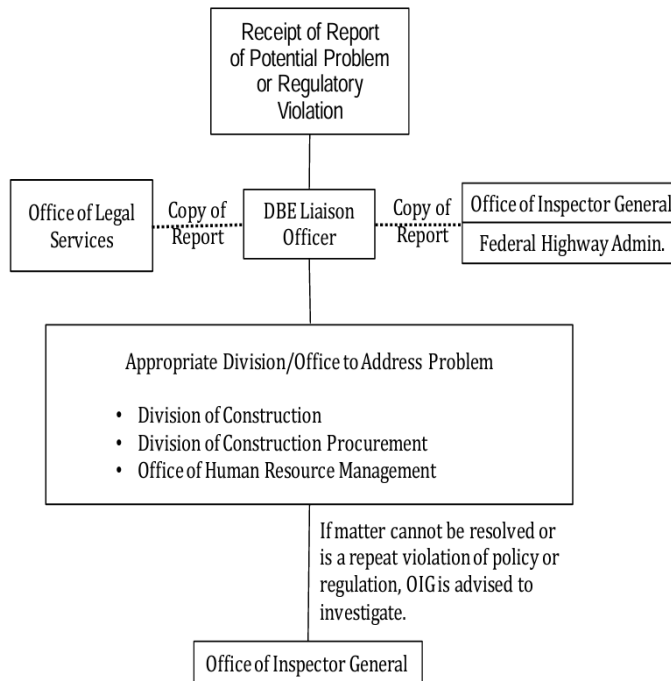
The Division of Construction, the Division of Construction Procurement and the OCRSBD have the responsibility for monitoring compliance with 49 CFR 26. Non-DBE and DBE contractors are equally responsible for compliance. All of these entities shall be responsible for reporting incidences of noncompliance with the regulations.

The recipient of a problematic report related to the conduct of DBEs, contractors or others regarding the DBE Program, shall forward the information to the DBELO. The DBELO shall work with the appropriate division of the Cabinet (Construction, Construction Procurement, OCRSBD, etc.), the DBE and the prime contractor to address the reported problem.

The DBELO shall copy all reports of regulatory violations related to the DBE Program to the OIG, the Office of Legal Services and the Division Office of the Federal Highway Administration.

If the problem cannot be resolved or if the alleged violator has been involved in prior DBE Program violations, the OIG and Office of Legal Services shall be notified immediately. The OIG may determine at any time that a report of alleged wrongdoing warrants an investigation by the OIG. The OIG may issue a report of findings and make appropriate recommendations. Potential criminal violations will be referred to the appropriate authorities.

Management of Reports of DBE Program Violations



XVI. ROLE OF THE OFFICE OF INSPECTOR GENERAL (OIG)

Issues involving reports of wrongdoing and serious violations of the DBE Program will be referred to the Cabinet's OIG. If the OIG determines it appropriate, it may conduct an investigation of the reported incident. If the OIG determines that violations have occurred, then it may recommend that action be taken against contractors, DBEs or Cabinet personnel involved.

If the OIG determines that criminal activity may have occurred, the matter shall be reported to the appropriate law enforcement agency for investigation.

XVII. RECORD KEEPING AND REPORTING

The Cabinet shall maintain such records and provide DBE Program data as directed by the USDOT and its operating administrations as required by 49 CFR 26.11 of the governing Federal regulations. This shall include monthly, quarterly, extraordinary and annual reports.

All contractors and subcontractors shall maintain such records as are necessary to ensure DBE Program compliance and shall maintain such records for at least three (3) years following the completion of the contract. Such records shall be available for inspection by the Cabinet, USDOT and its administration representatives or federal law enforcement agencies, departments and officials upon request.

The Cabinet shall maintain strict confidentiality with regard to all personal financial information submitted by applicants for DBE Program certification. Personal financial information submitted to the Cabinet may be provided to a third party only with the written consent of the individual to whom the information pertains.

In responding to requests for information concerning any aspect of the DBE program, the Cabinet complies with provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Cabinet may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.

Notwithstanding any provision of Federal or State law, the Cabinet will not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. The Cabinet must transmit this information to DOT in any certification appeal proceeding under 49 CFR §26.89 or to any other state to which the individual's firm has applied for certification under 49 CFR §26.85(g).

XVIII. PUBLIC PARTICIPATION

The Cabinet continuously consults with minority, women's, general contracting groups, fraternal, community and educational organizations, as well as other organizations and officials who could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on the opportunities for DBE firms and the Cabinet's efforts to level the playing field with respect to the participation of DBE firms.

The Cabinet conducts regional public hearings on its DBE Program goal, and any changes to the DBE Program. The Cabinet will provide adequate public notice of all hearings through general circulation media and minority-focused media, as well as, contractors' organizations, DBE firms, highway contractors and other affected organizations, groups and individuals.

XIX. COMPLIANCE AND ENFORCEMENT

(49 CFR 26.101)

The Commonwealth of Kentucky acknowledges that the Cabinet will:

- a. Cooperate fully and promptly in a complaint investigation, compliance review, or any inquiries in the Cabinet's DBE Program. Failure to comply may subject the Cabinet to formal enforcement actions by FHWA and FTA⁴³ or FAA⁴⁴ or appropriate program sanctions by the concerned operating administration, such as suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include actions under 23 CFR 1.36⁴⁵, actions under 49 U.S.C. 47106(d), 47111(d), and 47122⁴⁶, and actions permitted under 49 U.S.C. Chapter 53⁴⁷ or applicable FTA program requirements.

⁴³ 49 CFR §26.103

⁴⁴ 49 CFR §26.105

⁴⁵ FHWA

⁴⁶ FAA

⁴⁷ FTA

- b. The Cabinet will not be subject to compliance actions or sanctions for failing to carry out any requirement because you have been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

XX. DEFINITIONS

NOTE: Additional definitions applicable to the DBE Program may be found in:

- 49 CFR 26.5 <https://www.ecfr.gov/current/title-49/section-26.5>
- 49 CFR 23.3 <https://www.ecfr.gov/current/title-49/section-23.3> and
- 600 KAR. 4:010 <https://apps.legislature.ky.gov/law/kar/titles/600/004/010/>.

Affiliation has the same meaning the term has in the Small Business Administration (“SBA”) regulations, 13 CFR Part 121.

1. Except as otherwise provided in 13 CFR Part 121, concerns are affiliates of each other when, either directly or indirectly:
 - i. One concern controls or has the power to control the other; or
 - ii. A third party or parties control or has the power to control both; or
 - iii. An identity of interest between or among parties exists such that affiliation may be found.
2. In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

Airport Concession Disadvantaged Business Enterprise (“ACDBE”) means a firm seeking to operate as a concession that is a for profit business concern:

- (a) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- (b) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation (“ANC”) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.).

Assets mean all the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

Applicant or **Firm** means any corporation, partnership, sole proprietorship or limited liability company applying with the Transportation Cabinet for certification or continuation as a disadvantaged business enterprise.

Approval means that the applicant has been determined by the DBE Certification Committee to comply with the disadvantaged business enterprise criteria established in 49 CFR Part 26, Subpart D and 49 CFR Part 23.

Broker or Transaction Facilitators any person(s) or firm who arranges or expedites transactions for materials or supplies, and does not take physical possession of the materials or supplies at their place of business for resale.

Business (firm), business concern or business enterprise means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States, or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.

Cabinet means the Kentucky Transportation Cabinet.

Certification means the process used by the Transportation Cabinet to determine if an applicant complies with the disadvantaged business enterprise criteria established in 49 CFR 26, Subpart D and 49 CFR Part 23.

Challenge means an action in which a third-party question the socially and economically disadvantaged status of certified DBE program participant or applicant for DBE certification.

Commercially useful function (“CUF”) means a DBE performs a “CUF” when it is responsible for the execution of the work of a contract and is carrying out its responsibility by actually performing, managing and supervising the work involved.

With respect to furnishing materials and supplies as part of the DBE contract, the DBE performs a CUF when the DBE is responsible for negotiating price, determining quality and quantity, ordering materials and installing (where applicable) and paying for the material itself.

A DBE does not perform a CUF if its role is limited to that of an extra participant in a transaction, contract or project through which funds are passed in order to obtain the appearance of DBE participation. See also 49 CFR 26.55.

Compliance means that a recipient has correctly implemented the requirements of 49 CFR 26.

Concession means one or more of the types of for-profit businesses that serve the traveling public listed in paragraph (1) or (2) of this definition:

- (1) A business, located on an airport subject to this part, that is engaged in the sale of consumer goods or services to the traveling public under an agreement with the recipient, another concessionaire, or the owner or lessee of a terminal, if other than the recipient.
- (2) A business conducting one or more of the following covered activities, even if it does not maintain an office, store, or other business location on an airport subject to this part, as long as the activities take place on the airport: Management contracts and subcontracts, a web-based or other electronic business in a terminal or which passengers can access at the terminal, an advertising business that provides advertising displays or messages to the public on the airport, or a business that provides goods and services to concessionaires.
- (3) For purposes of this subpart, a business is not considered to be “located on the airport” solely because it picks up and/or delivers customers under a permit, license, or other agreement. For example, providers of taxi, limousine, car rental, or hotel services are not considered to be located on the airport just because they send shuttles onto airport grounds to pick up passengers or drop them off. A business is considered to be “located on the airport,” however, if it has an on-airport facility. Such facilities include in the case of a taxi operator, a dispatcher; in the case of a limousine, a booth selling tickets to the public; in the case of a car rental company, a counter at which its services are sold to the public or a ready return facility; and in the case of a hotel operator, a hotel located anywhere on airport property.
- (4) Any business meeting the definition of concession is covered by this subpart, regardless of the name given to the agreement with the recipient, concessionaire, or airport terminal owner or lessee. A concession may be operated under various types of agreements, including but not limited to the following:
 - (i) Leases.
 - (ii) Subleases.
 - (iii) Permits.
 - (iv) Contracts or subcontracts.
 - (v) Other instruments or arrangements.
- (5) The conduct of an aeronautical activity is not considered a concession for purposes of this subpart. Aeronautical activities include scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight carrying capacities; fixed base operators; flight schools; recreational service providers (e.g., skydiving, parachute-jumping, flying guides); and air tour services.
- (6) Other examples of entities that do not meet the definition of a concession include flight kitchens and in-flight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, telephone and electric service to the airport facility, holding companies, and skycap services under contract with an air carrier or airport.

Concessionaire means a firm that owns and controls a concession or a portion of a concession.

Contingent Liability means a liability that depends on the occurrence of a future and

uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern/firm, legal claims and judgments, and provisions for federal income tax.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered to be a contract.

Contractor means one who participates, through a contract or subcontract (at any tier), in a DOT assisted highway, transit, or airport program.

Days mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

DBELO means Disadvantaged Business Enterprise Liaison Officer.

Denial means the Transportation Cabinet has determined that the applicant does not comply with the disadvantaged business enterprise eligibility criteria established in 49 CFR Part 26, Subpart D and as required by this administrative regulation.

Department, "DOT", or "USDOT" means the U.S. Department of Transportation, including the Office of the Secretary, the Departmental Office of Civil Rights, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

Disadvantaged Business Enterprise or ("DBE") means a for-profit small business concern:

- (a) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged; and
- (b) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

Distributor is an established business that engages in the regular sale or lease of the items specified by the contract assuming responsibility for the items it purchases once they leave the point of origin (e.g., a manufacturer's facility), making it liable for any loss or damage not covered by the carrier's insurance.

DOT or USDOT assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

Good Faith Efforts means efforts to achieve an ACDBE/DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Immediate Family Member means father, mother, husband, wife, son, daughter, brother,

sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

Indian Tribe or Native American Tribe means any federally or State-recognized Tribe, band, nation, or other organized group of Indians (Native Americans), or an ANC.

Joint Venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Liabilities mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

Manufacturer is a firm that owns (or leases) and operates a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

Notice means a written or electronic notice from the Transportation Cabinet or Office for Civil Rights and Small Business Development delivered by certified mail to the business address listed on the application form.

Notice of decision or NOD means determination that denies a firm's application or decertifies an ACDBE/DBE.

Notice of intent or NOI means recipients letter informing an ACDBE/DBE of a suspension or proposed decertification.

On-Site Visit means an interview conducted by the Office for Civil Rights and Small Business Development with principals of the firm at its primary place of business, reviewing business related documents, and inspecting business facilities or equipment pursuant to 49 CFR 26.83(c).

Operating Administration or (OA) means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes

his or her designees.

Personal Net Worth (PNW) means the net value of an individual's reportable assets and liabilities, per the calculation rules in 49 CFR Part 26.68.

- (a) The owner includes the full value of the contents of her primary residence unless she cohabits with a spouse or domestic partner, in which case she excludes only 50 percent of those assets; the value of all motor vehicles, including watercraft and ATVs, titled in her name or of which she is the principal operator; her proportional share of the balance of a debt on which she shares joint and severable liability with other primary debtors; and assets transferred to relatives or related entities within the two years preceding any UCA or DOE, when the assets so transferred during the period have an aggregate value of more than \$20,000.
- (b) The owner excludes her ownership interest in the applicant or DBE; her share of the equity in her primary residence (there is no exclusion when the SEDO does not own the home); the liabilities of any other party and those contingent on a future event or of undetermined value as of the date of the PNW Statement; direct payments, on behalf of immediate family members or their children, to unrelated providers of healthcare, education, or legal services; direct payments to providers of goods and services directly related to a celebration of an immediate family member's or that family member's child's significant, normally non-recurring life event; and all assets in qualified retirement accounts but must report those accounts, the value of assets in them, and any significant terms and restrictions concerning the assets' use, to the certifier.

Prequalified or Prequalification refers to the process or receipt of a certificate of eligibility issued by the Cabinet. Firms doing business with the Cabinet must be prequalified and issued a certificate of eligibility to contract with the Cabinet in accordance with KRS 176.140 and the regulations found at 603 KAR 2:015 (highway construction) and 600 KAR 6:040 (professional services).

Primary Industry Classification means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available on the Internet at the U.S. Census Bureau Web site: <https://www.census.gov/naics/>.

Primary Recipient means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient.

Principal Place of means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business for program purposes. The term does not include construction trailers or other temporary construction sites.

Program means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

Race-conscious measure or program is one that is focused specifically on assisting only ACDBE/DBEs, including women-owned ACDBE/DBEs. For the purposes of this part, race-conscious measures include gender-conscious measures.

Race-neutral means a measure or program that is, or can be, used to assist all small businesses, without making distinctions or classifications on the basis of race or gender. For the purposes of this part, *race-neutral* includes gender-neutrality.

Recipient means any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or that has applied for such assistance.

Receipts means all revenue (computed on a cash basis) in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances (on cash accrual. Generally, receipts are considered “total income” (or in the case of a sole proprietorship “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms. Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income, and employee-based costs such as payroll taxes, may not be excluded from receipts. If a concern has not been in business for five (5) years, the average weekly revenue for the number of weeks the concern has been in business is multiplied by fifty-two (52) to determine its average annual receipts.

Regular dealer is a firm that owns (or leases) and operates, a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in sufficient quantities, and regularly sold or leased to the public in the usual course of business.

Relatives include the owner's spouse or domestic partner, children (whether biological, adopted or stepchildren), siblings (including stepsiblings and those of the spouse or domestic partner), and parents (including stepparents and those of the spouse or domestic partner).

Related entities include for-profit privately held companies of which any relative is an owner, officer, director, or equivalent; and family or other trusts of which the owner or any relative is grantor, trustee, or beneficiary, except when the transfer is irrevocable.

Removal or removed means that a firm or business enterprise that has been certified by the Cabinet as a disadvantaged business enterprise has been determined to be ineligible, and is no longer entitled to the rights and privileges of a firm or business that has been certified by the Cabinet as a disadvantaged business enterprise.

Secretary means as appropriate either DOT's Secretary of Transportation or the Secretary's designee; and the Kentucky Transportation Cabinet or their designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a

contract solely to ACDBE/DBE firms.

Small Business Administration or SBA means the United States Small Business Administration.

SBA certified firm refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

Small business concern means, with respect to firms seeking to participate as DBEs in DOT assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in § 26.65(b) or for an ACDBE it means a for profit business that does not exceed the size standards of § 23.33.

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of a group and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

Spouse means a married person, including a person in a domestic partnership or a civil union recognized under State law.

Subcontractor means an individual firm, or corporation who, with the written consent of the Department, subcontracts any part of the contract. First tier subcontractors are those to whom a contractor subcontracts a portion of the work. Second tier subcontractors are those to whom a first-tier subcontractor subcontracts a portion of the work.

Tribally-owned concern means any concern at least 51 percent (51%) owned by an Indian tribe as defined in 49 CFR 26.

Uniform Certification Application or UCA a standardized form used by Unified Certification Programs (UCPs) to determine a business's eligibility for ACDBE/DBE certification.

Uniform Certification Program or UCP means all recipients in the same jurisdiction (normally a State) must sign an agreement establishing a UCP and submit the agreement to the Secretary for approval. The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program.

Unsworn declaration means an unsworn statement, dated and in writing, subscribed as true under penalty of perjury.

USDOT assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

You refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

XXI. FORMS & DIRECTORIES

The forms and directories used in relation to the DBE Program and SBE Program are subject to modification from time to time. Please check the Kentucky Transportation Cabinet website for current information impacting the DBE and SBE Programs or call the phone number(s) indicated.

Available through the Office for Civil Rights and Small Business Development at
<https://bit.ly/kydbe> or 502-564-3601:

Forms

DBE Application Packet
DBE Program Plan
SBE Program Application Packet
Uniform Certification Application (UCA)
Declaration of Eligibility (DOE)
Personal Net Worth (PNW) Statement

Directories

Certified & Prequalified Consultants
Certified & Prequalified ACDBEs, DBEs, and SBEs

Available through the Division of Construction Procurement at
<http://transportation.ky.gov/Construction-Procurement/Pages/default.aspx> or 502-564-3500:

Certificate for Eligibility or Continuation Prequalification Packet
DBE Detail Participation Plan
General DBE Participation Plan
Prequalified Contractors List

XXI. RESOURCE LIST

- ▶ Department of Transportation – 49 CFR Part 23 Federal Register http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr23_main_02.tpl
- ▶ Department of Transportation – 49 CFR Part 26 Federal Register http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tp
- ▶ Department of Transportation – 49 CFR Part 26 Final Rule <https://www.federalregister.gov/documents/2024/04/09/2024-05583/disadvantaged-business-enterprise-and-airport-concession-disadvantaged-business-enterprise-program>
- ▶ Uniform Certification Application (UCA) <https://www.transportation.gov/DBEFORMS>
- ▶ Personal Net Worth (PNW) Statement <https://www.transportation.gov/DBEFORMS>
- ▶ U.S. Small Business Administration Table of Small Business Size Standards Matched to Northern American Industry Classification System Codes <https://www.ecfr.gov/current/title-13/section-121.201>
- ▶ Application for Certificate of Eligibility <http://transportation.ky.gov/Organizational-Resources/Forms/TC%2014-1.pdf>
- ▶ Rules and Regulations for Prequalification of Contractors <http://transportation.ky.gov/Construction->

[Procurement/Documents/Rules%20and%20Regulation%20for%20Prequalifications%20of%20Contractors.pdf](#)

- ▶ Kentucky Revised Statutes – Relating to Qualification of Road Contractors and Material Suppliers
<https://apps.legislature.ky.gov/law/statutes/chapter.aspx?id=37983>
- ▶ Fact Sheet for Application for Certificate for Eligibility or Continuation
<https://transportation.ky.gov/Construction-Procurement/Documents/Applying%20for%20Prequalification.pdf>
- ▶ DBE Special Note
<https://transportation.ky.gov/Construction-Procurement/Pages/Disadvantaged-Business-Enterprises.aspx>
- ▶ General DBE Participation Plan
<https://transportation.ky.gov/Construction-Procurement/Pages/Disadvantaged-Business-Enterprises.aspx>
- ▶ DBE Detailed Plan/Subcontract Request
<https://transportation.ky.gov/Construction-Procurement/Pages/Disadvantaged-Business-Enterprises.aspx>
- ▶ Application for Small Business Enterprise (SBE) Certification
<https://transportation.ky.gov/Civil-Rights-and-Small-Business-Development/Documents/SBE%20Application%20-%20Kentucky.pdf>