DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM PLAN

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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 subrecipients, 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 objectives[1] 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 DBE s 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.

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

[1] 49 CFR 26.1

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 reports to DOTs Office of Civil Rights by January 1st the percentage and location in the state of certified DBE firms in the UCP Directory controlled by the following[2]:

1. Women;

2. Socially and economically disadvantaged individuals (other than women); and

3. Individuals who are women and are otherwise socially and economically disadvantaged individuals.

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)

Matthew G. Bevin
Governor

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
Frankfort, Kentucky 40622
www.transportation.ky.gov/

Greg Thomas
Secretary

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM
POLICY STATEMENT

Official Order 110250

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 as defined in part 26, have an equal opportunity to receive and participate in USDOT-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 DBEs 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 designated 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, religion, national origin, sex, sexual orientation or gender identity, ancestry, age, disability or veteran status 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 27th day of June 2016

Greg Thomas, Secretary
Kentucky Transportation Cabinet

APPROVED AS TO FORM AND LEGALITY

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

Kentucky
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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.).

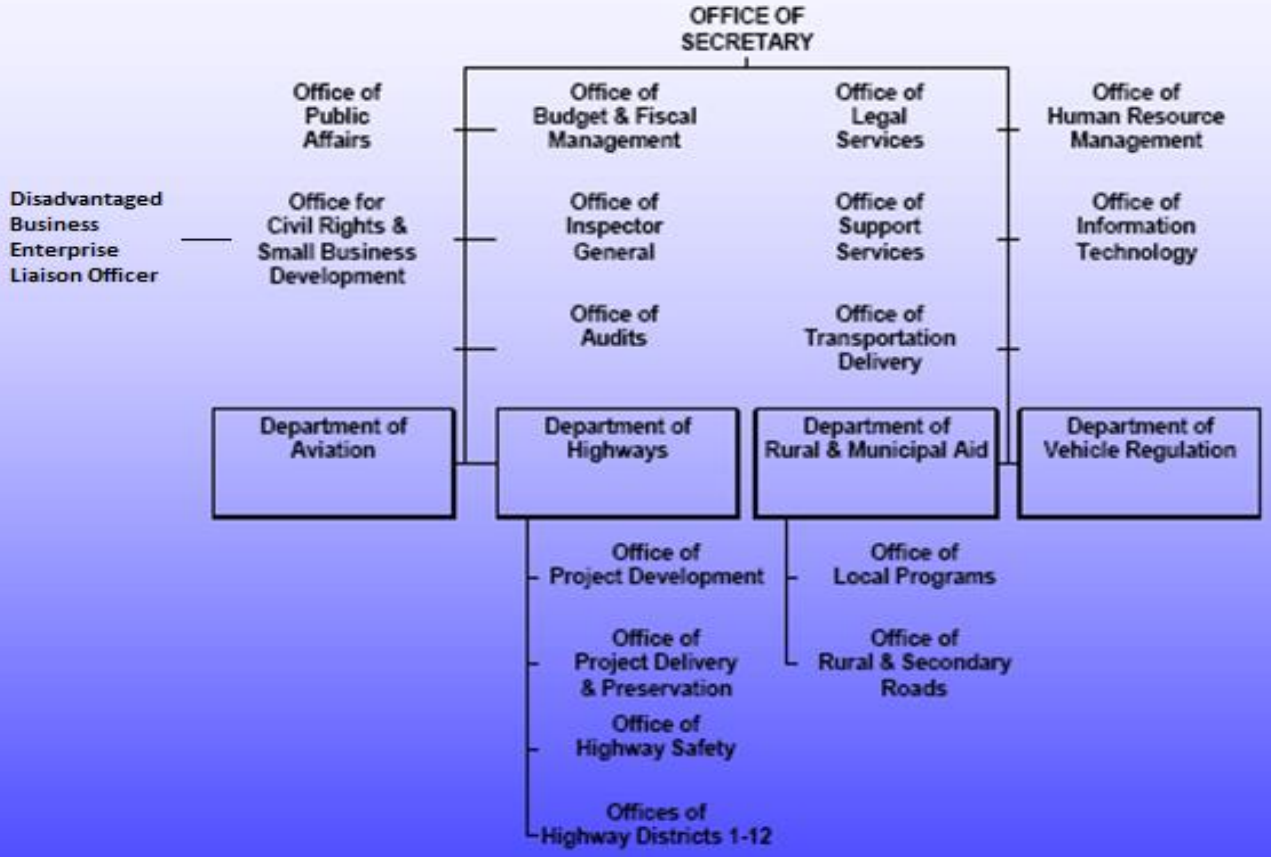
Each contract the Transportation Cabinet signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

> 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. 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.

Executive Offices & Departments



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EXECUTIVE OFFICES

Office for Civil Rights & Small Business Development

OFFICE OF EXECUTIVE DIRECTOR

- **Civil Rights Branch**
- **Small Business Development Branch**

06-16-2008

EO-11

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.

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 Program (UCP).

Responsibilities of the Office for Civil Rights and Small Business Development

The OCRSBD 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 OCRSBD has the following responsibilities regarding the DBE Program:

DBE Certification

The OCRSBD is primarily responsible for the processing of DBE certification applications. The OCRSBD 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 OCRSBD. The OCRSBD 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 http://transportation.ky.gov/Civil-Rights-and-Small-Business-Development/Pages/SmallBusinessHome.aspx 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.

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.

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, Permits 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 Report[3] 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.

[3] 49 CFR Part 26, Appendix B

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. 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.

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 http://transportation.ky.gov/Civil-Rights-and-Small-Business-Development/Pages/Certified-DBE-Directory.aspx and will identify eligible DBE certified and prequalified firms by type of work certified to perform, address and telephone number. 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 is to provide accurate data about DBE and non-DBE contractors and subcontractors who seek to work on Federally-assisted contracts. 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.

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.

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.

V. 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 26.41c), 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 require to submit overall goals by August 1, for legal sufficiency approval. The Cabinet's tri-annual goals are due in 2017, 2020, and 2023.

The Cabinet has established a DBE Program goal for USDOT-assisted contracts and it can be found on the website under 2014 Goal Methodology. http://transportation.ky.gov/Civil-Rights-and-Small-Business-Development/Pages/SmallBusinessHome.aspx

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 USDOT's website titled, 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 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 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. **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.

D. **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.

E. **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.

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.

VI. 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.

Firms applying for DBE Program certification have the burden of demonstrating to the Transportation Cabinet, by a preponderance of the evidence, that they meet the requirements of 49 CFR, Subpart D and Appendix E[4] concerning group membership or individual disadvantage, business size, ownership and control.

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 $1.32 million.

Firms owned by individuals who are not presumed to be socially and economically disadvantaged, and firms owned by individuals for whom the presumption has been rebutted, have the burden of proving, by a preponderance of the evidence, that they meet the requirements of 49 CFR 26, Appendix E.

Group Membership Determinations

Firms owned and controlled by individuals for whom a question arises concerning membership in a presumptively eligible group must prove, by a preponderance of the evidence, that said individuals are members of the group.

If the Cabinet has a reasonable basis for doubting the validity of the asserted group membership of an applicant, then it is appropriate for the OCRSBD to collect additional information. In such cases, the OCRSBD must inform the applicant, in writing, of the reasons for seeking additional documentary evidence.[5]

In making group membership determinations, the Cabinet shall consider whether the individual has held him/herself out to be a member of the group over a long period of time prior to applying for certification and whether the individual is regarded as a member of the p by the relevant community. The individual must submit appropriate documentation of group membership.

Firms applying for DBE Program certification whose claim to membership in a presumptively eligible group has been rejected by the Transportation Cabinet may demonstrate, on an individual basis, that they are socially and economically disadvantaged pursuant to 49 CFR 26, Appendix E.

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[4] 49 CFR 26.61
[5] 68 Fed. Reg. 3550 (June 16, 2003)

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

Social and Economic Disadvantage Determinations

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

1. Affidavit of Social and Economic Disadvantage

All applicants for DBE certification shall submit a signed and notarized affidavit indicating that each presumptively eligible owner whose ownership contributes to the majority is, in fact, socially and economically disadvantaged. If the individual's personal net worth exceeds $1.32 million, the individual's presumption of economic disadvantage is rebutted.

2. Statement of Personal Net Worth

Each program-eligible owner of a firm applying for DBE certification, along with his or her spouse whose ownership and control are relied upon to qualify for program participation, must submit a signed and notarized statement of personal net worth at the time the application for certification is made.

Personal net worth determinations made by the Cabinet shall exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence. A contingent liability does not reduce an individual's net worth. For example, an applicant cannot use the risk of a judgment in a pending lawsuit to reduce his or her personal net worth.

Individual applicants are required to submit their personal income tax information to the Cabinet so that an accurate determination of applicant eligibility for participation in the DBE Program can be made.[6]

The value of retirement accounts will be calculated in accordance with the standard set forth in 49 CFR 26.67.[7]

Statements of personal net worth must be submitted on the USDOT personal net worth form in conjunction with the UCP Application.[8]

The Cabinet reserves the right to more closely scrutinize applicants who present a personal net worth of more than $1 million, but less than $1.32 million. Applicants showing a net worth in excess of $1 million may be asked to provide an audited personal financial statement signed by a certified public accountant. The Cabinet will also retain the right to ask for additional or confirmatory financial information for any applicant for DBE certification.

[6] 68 Fed. Reg. 35548 (June 16, 2003)
[7] 49 CFR 26.67 and 68 Fed. Reg. 35548 (June 16, 2003)
[8] 49 CFR 26.67 and 68 Fed. Reg. 35547 (June 16, 2003)

3. Rebutting the Presumption of Social and Economic 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 and economically disadvantaged, it may initiate an inquiry to determine whether the presumption should be regarded as rebutted with respect to that individual. In such a proceeding, the Cabinet shall bear the burden of proving, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. The owners of the applicant firm shall produce all relevant information required to make a determination in the matter. Failure to do so may result in rejection of the application.

When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility unless and until he or she makes an individual showing of social and economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds the limit prescribed by USDOT, the individual is no longer eligible for participation in the DBE Program and cannot regain eligibility by making an individual showing of disadvantage.

The Transportation Cabinet may accept the certification of another USDOT recipient but is not required to do so pursuant to 49 CFR 26.85. Out-of-state applicants must be certified in their home state.[9]

Individual Determinations of Social and Economic Disadvantage

Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification.

The Cabinet shall make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to the Cabinet, by a preponderance of the evidence, that the individual(s) who own and control it are socially and economically disadvantaged. An individual, whose personal net worth exceeds $1.32 million, shall not be deemed to be economically disadvantaged. In making these determinations, the Cabinet shall use the guidance found in 49 CFR 26, Appendix E. The Cabinet shall require applicants for DBE certification who are not presumed eligible to provide sufficient information and documentation to the Cabinet to permit determinations under the guidance of Appendix E.

Business Size Determinations

To be an eligible DBE, a firm (including its affiliates) shall be an existing small business, as defined by Small Business Administration (SBA) standards. The Cabinet shall apply the current SBA business size standards found in 13 CFR 121 appropriate to the type(s) of work the firm seeks to perform in USDOT-assisted contracts.

[9] 600 KAR 4:010

Even if the firm meets the requirements of 49 CFR 26, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (13 CFR Part 121.402), over the firm's three (3) previous fiscal years, in excess of $23.98 million. The USDOT adjusts this amount for inflation from time to time.

Ownership Determinations

Determinations of ownership for purposes of DBE eligibility are made by the Transportation Cabinet in accordance with 49 CFR 26.69. All of the facts relative to ownership must be viewed as a whole.

To be an eligible DBE, a firm must be at least 51 percent (51%) owned by socially and economically disadvantaged individuals.

Corporations - socially and economically disadvantaged individuals must own at least 51 percent (51%) of each class of voting stock outstanding and 51 percent (51%) of the aggregate of all stock outstanding.

Partnerships - at least 51 percent (51%) of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.
Limited liability firms - at least 51 percent (51%) of each class of member interest must be owned by socially and economically disadvantaged individuals.

1. Ownership

The firm's ownership by socially and economically disadvantaged individuals must be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance not merely the form, of arrangements.

2. Contributions of Securities

All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided below, no securities or assets held in trust or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if:

(a) The beneficial owner of securities or assets held in trust is a disadvantaged individual and the trustee is the same or another such individual; or

(b) The beneficial owner of securities or assets held in trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation

where the same disadvantaged individual is the sole grantor, beneficiary and trustee.

3. Contributions of Capital

The contributions of capital by the socially and economically disadvantaged owners to acquire ownership interests must be real and substantial in accordance with 49 CFR 26.69(e).

Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in the firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

4. Contributions of Expertise

The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

The owner's expertise must be:

(a) In a specialized field;

(b) Of outstanding quality;

(c) In areas critical to the firm's operations;

(d) Indispensable to the firm's potential success;

(e) Specific to the type of work the firm performs; and

(f) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

The individual whose expertise is relied upon must have a significant financial investment in the firm.

5. Assets Gained Through Divorce, Inheritance or Death

The Cabinet will consider all interests in a business or other assets obtained by the individual resulting from a final property settlement or court order in a divorce or legal separation provided that no term or condition of the agreement or divorce decree is inconsistent with this section, or through inheritance, or otherwise because of the death of the former owner, as held by a socially and economically disadvantaged individual for purposes of determining ownership.

6. Gifts or Transfers

The Cabinet must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift or transfer without adequate consideration from any non-disadvantaged individual or non-DBE firm who is:

(a) Involved in the same firm for which the individual is seeking certification or an affiliate of that firm;

(b) Involved in the same or similar line of business; or

(c) Engaged in an on-going business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to the Cabinet, by clear and convincing evidence, that:

(1) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(2) The disadvantaged individual actually controls the management and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

7. Marital Assets

The Cabinet shall apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(a) When marital assets (other than the assets of the business in question) held jointly or as community property by both spouses are used to acquire the ownership interest asserted by one spouse, the Cabinet must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. The Cabinet does not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm; and

(b) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

8. Situations Warranting Additional Investigation

The Cabinet may consider the following factors in determining the ownership of a firm. However, the Cabinet cannot find a firm ineligible solely because the capitalization for the firm was obtained in one of the following ways:

(a) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift or transfer without adequate consideration other than as set forth in paragraph 6 above;

(b) There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or person property, bank signature cards or other documents; or

(c) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, the Transportation Cabinet must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

The DBE Program regulations do not prohibit the certification of a firm owned by spouses when an ineligible spouse, who retains ownership in the firm, is involved in the applicant business in any capacity. The regulations do, however, place a greater burden of proof, requiring the firm to show by "clear and convincing evidence" that any gift or transfer of assets to the eligible spouse without adequate consideration was made for reasons other than obtaining certification as a DBE and the disadvantaged individual actually controls the management, policy and operations of the firm, notwithstanding the continuing participation of the non-disadvantaged individual who provided the gift or transfer.

Control Determinations

Determinations of whether a disadvantaged individual controls the firm are made in accordance with 49 CFR 26.71. In determining whether socially and economically disadvantaged owners control a firm, the Transportation Cabinet shall consider all the facts in the record, viewed as a whole.

1. Independence

Only an independent business can be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms. The Cabinet must consider several factors when determining whether the applicant DBE firm is independent including:

- relationships with non-DBE firms in such areas as facilities, equipment, financial and/or bonding support and other resources;

- whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm;

- the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm; and

- the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

2. Restrictions on Control

The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that it can reasonably be concluded that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management and policy.

A DBE firm must not be subject to any formal or informal restrictions that limit the customary discretion of the socially and economically disadvantaged owners to operate the firm. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in 49 CFR 26.69 (j)(2).

The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

(a) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president);

(b) In a corporation, disadvantaged owners must control the board of directors; and

(c) In a partnership, one or more disadvantaged owners must serve as general partners with control over all partnership decisions.

3. Involvement of Non-DBEs

Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm or be disproportionately responsible for the operation of the firm.

The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated.

In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

4. Knowledge of the Business

The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management and policy making. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

5. Business Licenses

If state law requires a person(s) to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged person(s) who own and control a potential DBE firm of that type must possess the required license or credential. If state law does not require such a person to have such a license or credential to own and/or control a firm, the Cabinet shall not deny certification solely on the ground that the person lacks the license or credential. The Cabinet, however, may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owner(s) actually control the firm.

6. Compensation of the DBE Owner

The Cabinet may consider differences in compensation between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the

persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. The Cabinet may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, the Cabinet may consider a difference between the compensation of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

7. Outside Employment by the DBE Owner

In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

8. Participation of Family Members

A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner or in another capacity. Except as otherwise provided, the Cabinet must make a judgment about the control the socially and economically disadvantaged owner exercises vis-à-vis other persons involved in the business as is done in other situations without regard to whether or not the other persons are immediate family members.

If the Cabinet cannot determine that the socially and economically disadvantaged owners as distinct from the family, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

Where a firm was formerly owned and controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate to the Cabinet, by clear and convincing evidence, that:

(a) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(b) The disadvantaged individual actually controls the management, policy and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

9. Ownership of Equipment

In determining whether a firm is controlled by its socially and economically disadvantaged owners, the Cabinet may consider whether the firm owns equipment necessary to perform its work. However, the Cabinet must not determine that a firm is not controlled by socially and economically disadvantaged individual(s) solely because the firm leases, rather than owns, such equipment where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

10. Certification for Specific Types of Work - NAICS Codes

The Cabinet shall grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in additional types of work, the firm must demonstrate to the Cabinet only that it's socially and economically disadvantaged owners are able to control the firm with respect to that type of work. The Transportation Cabinet may not, in this situation, require that the firm be re-certified or submit a new application for certification, but must verify the disadvantaged owner's control of the firm in the additional type of work. The types of work a firm can perform (whether on initial certification or when a new type of work is added) must be described in terms of the most specific available North American Industry Classification System (NAICS) code for that type of work. A correct NAICS code is 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.

11. Franchise Firms

A business operating under a franchise or license agreement may be certified if it meets the standards in 49 CFR 26 and the franchiser or licenser is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the Cabinet shall generally not consider the restraints relating to standardized quality, advertising, accounting format and other provisions imposed on the franchisee agreement or licensee by the franchise agreement or license, provided that 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.

12. Use of Leased Employees

The socially and economically disadvantaged individual(s) controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individual(s) from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being

responsible for hiring, firing, training, assigning and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

Prequalification - Certificates of Eligibility to Contract

All contractors who propose to do work with the Cabinet must obtain a Certificate of Eligibility to contract[10] 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.[11]

Management Development Course

Firms prequalified by the Cabinet under KRS 45A.825, 600 KAR Chapter 6, or 603 KAR 2:015 to engage in highway construction, design or right-of-way activities shall attend at least one (1), one-week management development course every three (3) years. Certified DBE firms not based in Kentucky may be required by the Cabinet to attend at least one (1) management development course.

Certified DBE firms, which have previously attended a management development course and which have been cited for a violation of the governing federal regulation or Kentucky Administrative Regulations, may be required to attend an additional management development course.

[10] Kentucky Revised Statutes 176.130
[11] 603 KAR 2:015(6)

All owners of firms required to attend a management development course shall attend the course. The owners of certified DBE firms that are not required to attend the management development course, may apply to attend. The Cabinet shall accommodate them on a space available basis.

Other Rules Affecting Certification

The Cabinet must consider other factors when making a determination of whether an applicant is DBE eligible. These factors are found at 49 CFR 26.73 and include:

- Whether a DBE applicant can perform a "commercially useful function" as a DBE contractor cannot be considered during the certification process and is not appealable to USDOT. Certification will be made based on looking at the standards as a whole.

- The Cabinet shall consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE Program.

- Only firms organized for profit may be eligible DBEs. Non-profit entities, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.[12]

- DBE firms must be owned by individuals who are socially and economically disadvantaged. Except as set forth in 49 CFR 26.73 (e), a firm that is not owned by such individuals, but instead is owned by another firm, even a DBE firm, cannot be an eligible DBE.[13]

The Cabinet shall evaluate the eligibility of a firm on the basis of present circumstances. The Cabinet shall not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of 49 CFR 26. The Cabinet cannot refuse to certify a firm solely on the basis that it is a newly formed firm.

DBE firms and firms seeking DBE certification must cooperate fully with the Cabinet's and USDOT's requests for information relevant to the certification process. Failure or refusal to provide such information is a ground for denial or removal of certification.

[12] 49 CFR 26.73(d)
[13] 49 CFR 26.73(e)

VII. CERTIFICATION PROCEDURES

Application Process

In-State

The Cabinet's DBE certification process is conducted in accordance with the Kentucky Unified Certification Program (UCP) Agreement[14] as approved by FHWA. The UCP provides that the Cabinet is the primary certification authority for the USDOT DBE Program in Kentucky.

The Cabinet shall determine the eligibility of firms applying for DBE certification within 90 days receipt of a completed UCP Certification Application *and Personal Net Worth Statement (PNW).* This time period may be extended once, for no more than an additional 60 days. A written notice must be sent to the applicant firm explaining fully and specifically the reasons for the extension.[15] All firms seeking DBE certification shall submit an application 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 with all required documentation attached. If the application is incomplete, the OCRSBD will contact the applicant to request missing information or additional information. Incomplete applications will not be processed.

- The Cabinet may request additional information 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 deny the application.

- The person signing the application 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)

On-site review 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 on-site review. This information shall be compiled and summarized for the use and review of the DBE Certification Committee.

The Cabinet:

- Shall perform an on-site review of each new applicant located within the boundaries of Kentucky.

- Will perform an on-site review of any certified firm that is applying for continuation of its DBE status.

[14] 49 CFR 26.81
[15] 49 CFR 26.83(k)

- May also perform periodic on-site reviews 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 on-site review shall be sufficient cause for the Cabinet to deny or remove the DBE status.

OCRSBD will rely on reports of findings from on-site visits from all out-of-state DBEs seeking certification 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
(**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 the state in which the firm has residence. An applicant's "home state" is the state in which it maintains its principal place of business. The Cabinet is not required to process an application for certification from a firm having its principal place of business outside Kentucky if the firm is not certified by the UCP in the state in which it maintains its principal place of business.

Interstate Certification procedures

The Kentucky Transportation Cabinet UCP does not have application reciprocity with other State UCPs. Firms must be certified in their home state (State A) before seeking certification in Kentucky under the rule. The Kentucky Transportation Cabinet processes interstate DBE applications as quickly and efficiently as possible. Applications are assigned to investigators for review on a first-in, first assigned basis. Our goal is to make an eligibility determination within 60 days from the date the application is complete. Based on the options presented in the Federal Regulations for DBEs, the Kentucky Transportation Cabinet has opted to not certify a firm solely based on the home state's certification. Instead the Kentucky Transportation Cabinet will make their own decision based on the following information that is to be provided by the firm:

1- A complete copy of the application form and all supporting documents and any other information submitted to any state related to its certification. This includes affidavits of no change and any notices of changes submitted to your home state, as well as all correspondence with your home state UCP concerning your application or status as a DBE firm;

2- All notices or correspondence from UCPs other than your home state relating to your status as an applicant or certified DBE in those states. If you have been denied certification or were decertified in another state, or are subject to a decertification action there, you must inform the Kentucky Transportation Cabinet of this fact and provide all documentation concerning this action.

3- If a certification appeal with USDOT has been filed, the firm must disclose this and provide its appeal letter and USDOT's response;
4- An affidavit sworn to by the firm's owners before a person authorized by state law to administer such oaths or an unsworn declaration under penalty of perjury that the firm's owner has submitted all information required by 49 CFR Part 26.85(c), that the information is correct, and that the information submitted is identical to the information submitted to the home state.

In Out-of-State pre-certification decisions, the burden of proof continues to lie with the applicant. OCRSBD office will make arrangements with the applicant's home state to acquire a copy of their on-site visit report.

In accordance with federal rules governing cooperation, failure of the applicant to provide any of the above documentation is grounds for denial of certification (see § 26.109). Out-of-state applicants are limited to the NAICS work code(s) for which they are certified to perform according to their home state DBE Program.
Upon receipt of a copy of the original home-state application form, the Personal Financial Statement form, all supporting documents, and any other information submitted to their home state or any other related to the applicant's certification, the Kentucky Transportation Cabinet will review and make determinations in regards to certifying or denying an out-of-state applicant firm.

If KYTC has determined that there is good cause to believe that the home state's certification is erroneous or should not apply in Kentucky, KYTC will, no later than 60 days from the date on which it received all information required from the applicant firm, send to the applicant firm a notice stating the reasons for its determination. This notice will state the specific reasons why KYTC believes that the firm does not meet the requirements 49 CFR part 26 for DBE eligibility. This notice will offer the applicant firm 30 days to respond to KYTC with respect to the reasons listed. The applicant firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of 49 CFR part 26 with respect to each issue raised by the notice. Within 30 days of the receipt of the response from the firm, KYTC will issue a written decision made by OCRSBD staff. The applicant's KYTC certification is stayed pending the outcome of the review process.

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.

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.

Duration of Certification

In accordance with 49 CFR 26.83(h), once a DBE is certified, it shall remain certified unless and until its certification has been removed through the procedures found in 49 CFR 26.87. It is the policy of the Federal Highway Administration 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 of certification beginning from the date of the initial notice of certification. Certification must be affirmatively revoked using the prescribed procedures.

If, within thirty (30) days of a change in ownership or control, the firm notifies the Cabinet of the change, the Cabinet may extend the continuation date of the DBE firm with reasonable conditions placed on the firm. The Cabinet must then review the firm's eligibility status based upon a review of the firm's current circumstances.

Certified DBEs must provide current information concerning matters that may or would impact their eligibility as well as current contact information. Failure to provide current information impacting eligibility (including ownership, personal net worth and gross receipts) may result in the firm's removal.

Continuation

Per 49 CFR 26.83(j), DBEs must provide an affidavit attesting to the firm's circumstances affecting its ability to meet the set requirements on the anniversary date of certification; therefore, the Cabinet will notify each DBE forty-five (45) days prior to the anniversary date of the firm's certification, of the requirement to submit an affidavit if the firm intends to continue its certification. The affidavit shall attest to the following:

- That there have been no changes made in the organization, structure, ownership and control of the firm since the last application was filed; and

- That the application form and attachments would be identical to the last one filed.

The affidavit shall be submitted to the Cabinet on the No Change Affidavit, and include documentation of the (SBA business) firm's size and gross receipts for the most recent three (3) years. If the affidavit is not received by the continuation 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 denial 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.

An applicant firm shall not reapply for certification for one (1) year from the effective date of denial. The effective date of denial shall be the date the notice is received or delivery is attempted.

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 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.

Removal

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 to the DBE of the intent to remove the firm. The notice shall outline the evidence supporting removal and ask for information to support the firm's continued eligibility. The DBE firm shall have thirty (30) days from the receipt of the notice to supply the information to OCRSBD for the Committee's review. The firm will be afforded the opportunity for an informal hearing before the DBE Certification Committee, at which time the firm may respond to the Cabinet's reasons for the proposal to remove its eligibility.

The effective date of removal shall be the date the notice of removal is received or attempted to be delivered to the firm, provided the firm does not appeal the removal to the Cabinet. If a firm appeals the removal, the effective date shall be the date of the receipt or attempted delivery of the notice of removal. Removal shall be for a specific period of time but not less than one (1) year.

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 firm may continue to work as a DBE until all appeals are exhausted.

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 an Investigator. The 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 sanction notice will inform the DBE that it may notify the Cabinet within fifteen (15) days to request a hearing to show proof that the determination was incorrect. If no request is made within fifteen (15) days, the penalty becomes final. If a hearing is requested, the penalty does not become final until the Cabinet renders its decision. The Cabinet's decision will set forth the reasons relied upon in making the decision to the U.S. Department of Transportation. If KYTC chooses to proceed in the removal of DBE certification eligibility, the Cabinet will follow the steps outlined in 49 CFR Part 26.87.

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 OCRSBD.

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 OCRSBD 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 OCRSBD, 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 OCRSBD shall notify both parties of this proposed determination, setting forth the basis for its determination[16].
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 Secretary[17] may be appealed to the USDOT by the adversely affected party under the procedures of 49 CFR 26.89.

Appeals

Any party adversely affected by a decision of the Cabinet may appeal that decision within ninety (90) days of the notice of determination to USDOT. The appeal shall be filed in writing. Appeals made to USDOT shall be filed within ninety (90) days of receipt of the adverse determination and must be sent to the following address:

US Department of Transportation
Office of Civil Rights
1200 New Jersey Ave., S.E., Room 5414
Washington, DC 20590

The Cabinet shall provide to the USDOT a complete record of all administrative proceedings held on the matter including all supporting and requested documents, files and application

[16] 49 CFR 26.87
[17] See Appeals and Hearings Section, Page 41

forms, within twenty (20) days receipt of a notification by the USDOT that an appeal has been filed with USDOT in the matter.

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.

UCP Agreement

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 an 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

The KUCP has been created and implemented in accordance with 49 CFR §26.5, as amended Jan. 28, 2011.

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. https://apps.transportation.ky.gov/dbe/

ii. Upon electronic receipt of an application for DBE certification, the application shall be assigned to and 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 home state to be considered for DBE certification by KYTC. Onsite reviews from out-of-state applicants will be accepted from the home state certification entity. OCRSBD personnel shall work through the home state's certification entity to obtain any additional information from the applicant needed to make certification decisions. Certification decisions shall be rendered within 60 days of receipt of all required documentation by OCRSBD. 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.

An applicant may appeal an adverse certification decision in writing to the United States Department of Transportation, Office of Civil Rights, 1200 New Jersey Ave., S.E., Room 541, Washington, D.C. 20590. Appeals must be submitted within 90 days of the adverse certification determination.

v. A firm receiving a Notice of *Intent to Remove* its certification may request 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 telephonically or by video conference at the certified entity's request.

Requests for an oral hearing must be submitted within 10 days of receipt of the notification. The informal hearing will be conducted within 30 days of receipt of the request by OCRSBD. Written arguments must be submitted within 30 days of notification of the intent to decertify. Any request for a hearing or a written argument must be directed to the Civil Rights and Small Business Development Director at the Kentucky Transportation Cabinet, 200 Mero Street, 6th Floor, Frankfort, KY 40622.

c. 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.

d. The KUCP will cooperate fully with oversight, review and monitoring activities of the USDOT and its operating administrations.

e. 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.
f. 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

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 https://transportation.ky.gov/Civil-Rights-and-Small-Business-Development/Pages/Certified-DBE-Directory.aspx. 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.

VIII. 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.

The DBE Certification Committee shall include

A. The following voting members:

(1) Executive Director, Office for Civil Rights & Small Business Development or his/her designee, Chair, nonvoting member;

(2) Executive Director, Office of Legal Services or his/her designee, nonvoting member; and the

(3) Director of the Division of Internal Audits, or his/her designee;

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 ex officio.

C. Advisory Panel.

(1) The cabinet shall establish a DBE Certification Advisory Pan-el 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; and
f) Division of Licensing.

(1) Certification Committee Procedures.

a) The Executive Director of the Office for Civil Rights and Small Business Development or the executive director's proxy, and a voting member of the DBE Certification Committee shall constitute a quorum and shall each have one (1) vote. In the event of a tie, the deciding vote shall be rendered by the executive director or his or her proxy.
b) 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.
c) 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.

d) The Certification Committee shall have the authority to remove a firm's eligibility for DBE certification as established in 49 C.F.R. 26.87.

D. Applications for Certification.

a) The UCP application review process for approv-al of certification, and continuation of certification as a DBE, or ACDBE shall be conducted pursuant to 49 C.F.R. 26.83, 26.85, and 26.86.

b) A UCP application shall be approved by the Federal Highway Administration pursuant to Appendix F to 49 C.F.R. Part 26. A link to the electronic version of the application form shall be available on the Kentucky Transportation Cabinet Web site.

c) The completed UCP application shall be submitted electronically to the cabinet's Office for Civil Rights and Small Business.

d) An incomplete UCP application missing the required information or documentation shall not be processed until the documentation and information requirements are received by the Office for Civil Rights and Small Business Development.

e) A UCP application submitted by a firm having a principal business office registered in the Commonwealth of Kentucky shall be reviewed in accordance with 49 C.F.R. Parts 23 and 26, Subpart D.

f) A UCP application submitted by a firm whose primary office is registered in a state other than Kentucky shall be submitted for approval of DBE certification in Kentucky to the Office for Civil Rights and Small Business Development for review in accordance with 49 C.F.R. 23 and 49 C.F.R. 26.85.

g) The Office for Civil Rights and Small Business Development shall conduct an on-site vis-it at the firm's primary place of business pursuant to 49 C.F.R. 26.83(c).

h) An applicant for DBE, or ACDBE certification, or a certified DBE or ACDBE may with-draw without penalty from the DBE program prior to the Certification Committee making a de-cision regarding the application.

IX. 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.[18] 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 will set 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 herein, may compete for these prime contract and subcontract awards, regardless of the owner's gender, race or geographic location. This small business goal is in addition to the DBE contract goals, which may be required pursuant to applicable law or policy. If a small business goal is not set on a FHWA-assisted contract of two million dollars ($2,000,000) or more, the goal setting committee[19] will document why a small business goal is inappropriate and the factors which were considered in making that determination, including project scope and estimated availability of firms.

   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

[18] 49 CFR 26.39

[19] The goal setting committee for the DBE Program will also be responsible for setting the Small Business goal on FHWA-assisted contracts.

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.

2. 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.

Unbundling

The Cabinet considered unbundling as a feasible strategy and/or method as part of its Small Business element of its Program Plan. However, based on the structure and administrative processes associated with the Cabinet's bidding and letting of contracts, it was determined that unbundling would not be a feasible method to facilitate participation for small businesses as prime contractors and subcontractors.

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 $1.32 million[20] and does not exceed $23.98 million in gross annual receipts.

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 three-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, notarized 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

[20] See 49 CFR 26

agreements, personal and business taxes, a balance sheet and 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 "No Change Affidavit" 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 Director within ten (10) days of the date of the formal notice of denial. In consultation with the Cabinet's Director of the Office of Legal Services (OLS), the OCRSBD 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 Director and OLS Director may also consult with FHWA as part of the review of the request for reconsideration. The OCRSBD 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 three (3) 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 to a SBE 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 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 Director of OCRSBD. Decertification shall be for a specific period of time but not less than one (1) year.

Implementation Schedule

The Cabinet will implement its Small Business element of its DBE Program within six (6) months of FHWA approval of this program.

X. 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. <u>After the Letting</u>

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 subcontracts[21]. 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 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 re-bid 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.

[21] 49 CFR 26.53(j)

1. Defining Good Faith[22]

"Good faith" is obtained if[23]:

- 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 Good Faith 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 following[24]:

- 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 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;

[22] 49 CFR 26.53
[23] 49 CFR 26.53(a)
[24] Further guidance may be found in 49 CFR Part 26, Appendix A.

- 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 reasonable good faith efforts to include DBE participation.

2. Good Faith Efforts 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.[25]

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.

[25] Page 55, Section 5

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 Payment[26] 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.

[26] The Affidavit of Subcontractor Payment is available through OCRSBD

Over-Concentration[27]

The Cabinet shall 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, shall take appropriate corrective action.

The Cabinet shall devise 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 shall take appropriate measures to address the over-concentration in conjunction with USDOT. The Cabinet shall notify prospective bidders on a project of any exception in the bid proposal.

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.

If any certified DBE is found to be non-compliant with any of the requirements of the administrative regulations governing the DBE Program, the firm may have its certification suspended for a specific period of time. The Cabinet shall notify the certified DBE of the pending suspension. The notice shall specify the reasons for the pending suspension.

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

[27] 49 CFR 26.33

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 in May of 2015. Six 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.

XI. 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.

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.

Suppliers, Manufacturers and Brokers

The prime contractor may count expenditures for materials and supplies obtained from certified DBE suppliers and manufacturers on which the DBE assumes actual and contractual responsibility for providing materials and supplies as follows:

- The prime contractor may count its entire expenditure to a DBE manufacturer who operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the contractor;

- If the materials or supplies are purchased from a DBE regular dealer, count sixty percent (60%) of the cost of the materials or supplies count toward DBE goals. A regular dealer is a person that owns, operates or maintains 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 stock and regularly sold or leased to the public in the usual course of business.

- Brokers and packagers shall not be regarded as manufacturers or regular dealers within the meaning of this section.

The prime contractor may count toward its DBE goal the following expenditures to certified DBEs that are not manufacturers or regular dealers:

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.

Trucking Firms[28]

The Cabinet will count for DBE credit the dollar value attributable to no more than twice the number of trucks on a contract owned by a DBE firm or leased from another DBE firm.

For example, if DBE Firm X owned two trucks, leased two others from another DBE firm and leased six others from a non-DBE firm, the DBE credit authorized for Firm X's participation would be equivalent to the dollar value of work attributable to eight trucks (four trucks owned or leased from DBEs, multiplied by two). DBE credit for the remaining two non-DBE trucks leased for the contract would be limited to fees and commissions received by the DBE firm pertaining to those two trucks.

The Cabinet shall use the following factors in determining whether a DBE trucking firm is performing a "commercially useful function":

- The DBE firm 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.
- The DBE firm must itself own and operate at least one fully licensed, insured and operational truck used on the contract.

[28] 68 Fed. Reg. 3551 (June 16, 2003) and 49 CFR 26.55(d)(5)

- The DBE firm receives credit for the total value of the transportation services it provides on a contract using trucks it owns and insures and operates drivers it employs.

- The DBE firm may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE firm that leases trucks from another DBE firm receives credit for the total value of the transportation service the lessee DBE firm provides on the contract.

- The DBE firm may also lease trucks from non-DBE firms, including owner-operators. The DBE firm that leases trucks from a non-DBE firm is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE firm does not receive credit for the total value of the transportation services provided by the lessee since these services are not provided by a DBE firm.

- To be approved by the Cabinet, a lease must indicate the DBE firm 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 firm, so long as the lease gives the DBE firm absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE firm.

Joint Ventures

Joint ventures are not certified in the state of Kentucky. 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.

XII. 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.[29]

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:

- 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;
- Ensure that certified payrolls are promptly provided by DBE contractors;
- Confirm that DBE subcontractors are in compliance with 49 CFR 26 concerning ownership and leasing of equipment; and
- Notify the DBELO immediately of any irregularities or issues that arise with regard to a DBE work item or DBE contactor/supplier.

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.

[29] 49 CFR 26.37(b)

Monitoring by other divisions or agencies does not alleviate the need or lessen the responsibility for section engineers and inspectors to monitor the work of DBEs. The OCRSBD staff may monitor the work of DBE's depending staff availability and scheduling.

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.

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.[30]

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.

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

[30] 49 CFR 26.29

running tally of contract commitments and payments to DBE subcontractors is maintained by the Cabinet to confirm the status of payments to each DBE.[31]

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.[32]

DBE Suppliers 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.[33]

Sixty percent (60%) of the cost of items supplied by a certified DBE supplier may be counted toward a DBE project goal.

1. Regular Dealer

   In order to be considered a *regular dealer* in the specific materials supplied, the DBE must:

   - Own, operate or maintain a store, warehouse or other establishment in which the materials, supplies, articles or equipment of the general character described in the contract specifications are bought, kept in stock, and are regularly sold or leased to the public in the usual course of business; and

   - Be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the materials, supplies, articles or equipment in question.

2. Bulk Items

   Bulk items such as petroleum, cement, gravel, stone or asphalt may be supplied by a DBE who both owns and operates distribution equipment for the products.

   Approval of Items Supplied

   The DBE must show that it is a *regular dealer* of each item to be supplied and that it is capable of performing the work that it is seeking to be certified to do.

[31] 49 CFR 26.37
[32] Page 56
[33] 49 CFR 26.73(a)

3. Commercially Useful Function

In order to have their work counted toward the DBE goal, suppliers must perform a “commercially useful function” on the project. To perform a "commercially useful function" 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.

4. Dos and Don’ts of DBE Suppliers

If the firm is a prime contractor seeking to use a DBE supplier to meet a DBE contract goal or a potential supplier, ask the following questions:

- Does the “firm” order, assume ownership and the risk of loss of supplied items during transit? If not, then the “firm” is really a broker and only the brokerage fee can be counted.
- Is the “firm” responsible for transporting the items either with their own equipment or through a long-term lease? If so, they are likely to be a supplier, if not, then the DBE is likely acting as a broker.

5. Leases by Suppliers

Suppliers who are *regular dealers* in the items they supply, but 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]

[34] 49 CFR 26.55(e) and 64 Fed. Reg. 5096 (February 2, 1999)

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.
- 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.

6. Brokers[35]

Brokers, repackagers, packagers and manufacturer's representatives or other persons who arrange or expedite transactions, are not *regular dealers* and their contributions shall not be counted as those of suppliers. 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.

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.

[35] 49 CFR 26.55(e)(3)

Requirements for DBE Manufacturers

A firm may count one hundred percent (100%) of the dollar value of the cost of materials or supplies produced by a DBE manufacturer.[36]

A manufacturer is a firm that operates or maintains a factory or establishment on the premises that produces the materials, supplies, articles or equipment required under the contract and of the general character described in the contract specifications.

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.

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 non-compliance, 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.

[36] 49 CFR 26.55(e)(1)(i)

XIII. 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 contract[37] 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.

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.

[37] Kentucky Revised Statutes 176.140. This process is also known as “prequalification”.

Good Faith Efforts

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.

XIV. MANAGEMENT OF REPORTS OF POTENTIAL DBE PROGRAM VIOLATIONS

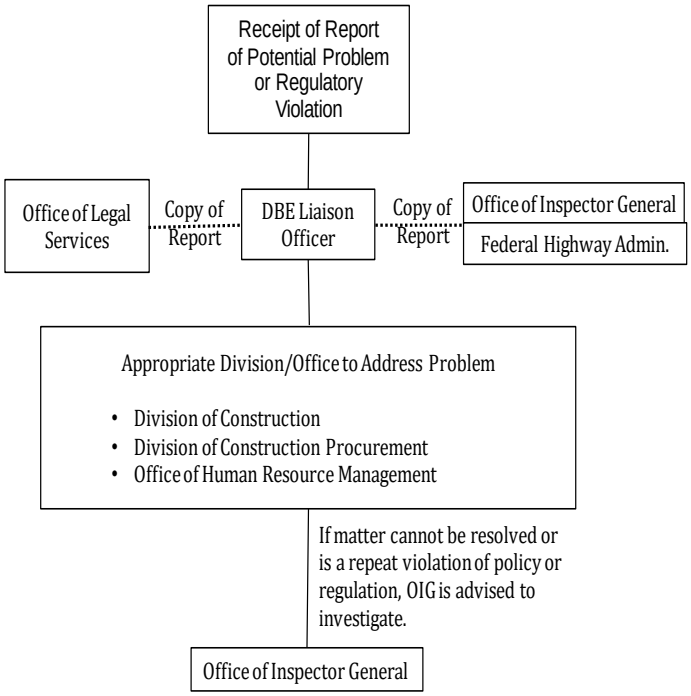
The Division of Construction, the Division of Construction Procurement and the OCRSBD have the responsibility for monitoring compliance with 49 CFR 26. Non-DBE and DBE contractors are equally responsible for compliance. All of these entities shall be responsible for reporting incidences of non-compliance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



XV. 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.

XVI. 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.

XVII. 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 publishes a legal notice in the major print media (including minority-focused) within the Commonwealth announcing its proposed overall DBE Program goal and the methodology by which it is derived. The goal and its rationale are available for public inspection and for a thirty (30) day comment period during normal working hours (8:00 a.m. to 4:30 p.m.) at the OCRSBD.

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.

XVIII. 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 FTA[38] or FAA[39] 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 1.36[40], actions under 49 U.S.C. 47106(d), 47111(d), and 47122[41], and actions permitted under 49 U.S.C. Chapter 53[42] or applicable FTA program requirements.

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.

[38] 49 CFR §26.103
[39] 49 CFR §26.105
[40] FHWA
[41] FAA
[42] FTA

XIX. DEFINITIONS

NOTE: Additional definitions applicable to the DBE Program may be found in 49 CFR 26.5 www.fhwa.dot.gov/hep/49cfr26.htm#sec.26.5 and 600 KAR. 4:010 http://www.lrc.ky.gov/kar/600/004/010.htm.

Affiliation has the same meaning the term has in the Small Business Administration ("SBA") regulations, 13 CFR Part 121. The calculation of a business concern's size includes the employees or receipts of all affiliates. Affiliation with another business concern is based on the power to control, whether exercised or not. Such factors as common ownership, common management and identity of interest (often found in members of the same family) among others, are indicators of affiliation. Power to control exists when a party or parties have fifty percent (50%) or more ownership. It may also exist with considerably less than fifty percent (50%) ownership by contractual arrangement or when one or more parties own a large share compared to other parties. The affiliated business concerns need not be in the same line of business.

(a) 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.

(b) 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.

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 Metlaktla 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).*

Annual Receipts means the business concern's gross or total income, plus cost of goods sold, as defined by or reported on the concern's Federal Income Tax return. The term does not include, however, net capital gains or losses, or taxes collected for and remitted to a taxing authority if included in gross or total income. The business concern may not deduct income taxes, property taxes, cost of materials, or funds paid to subcontractors. Travel, real estate and advertising agents, providers of conference management services,

freight forwarders, customs brokers and tour operators may deduct amounts they collect on behalf of another. If a concern has not been in business for three (3) 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.

Applicant or ***Firm*** means any corporation, partnership, sole proprietorship or joint venture 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 meet the disadvantaged business enterprise eligibility criteria as outlined in 49 CFR 26.

Cabinet means the Kentucky Transportation Cabinet.

Certification means the process whereby the Cabinet determines if an applicant meets the disadvantaged business enterprise criteria set forth in 49 CFR 26.

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

Commercially useful function means a DBE performs a **"Commercially useful function"** 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 "commercially useful function" 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 "commercially useful function" 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.

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. A lease is considered to be a contract.

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

DBELO means Disadvantaged Business Enterprise Liaison Officer.

Department **or ("USDOT")** means the U.S. Department of Transportation, including the Office of the Secretary, 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 (51%) owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent (51%) 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.

Good Faith Efforts means efforts to achieve a DBE goal or other requirement of 49 CFR 26 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 means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group or community resides. See definition of "Tribally-owned Concern" in this section.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area that 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 49 CFR 26.

Operating Administration or **(OA)** means any of the following parts of USDOT: 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 the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: the individual's ownership interest in an applicant or participating DBE firm, or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

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: *http://www.census.gov/eos/www/naics/.*

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

Principal Place of Business 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 business records are kept are in different locations, the recipient will determine the principal place of business for DBE Program purposes.

Program means any undertaking on a recipient's part to use USDOT financial assistance, authorized by the laws to which 49 CFR 26 applies.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of 49 CFR 26, *race-neutral* includes gender-neutrality.

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

Regular dealer means a firm that owns, operates, or maintains a store, warehouse or other establishment in which the materials, supplies, articles or general equipment of the general character described by the specifications and required under the contract are bought, kept in stock and regularly sold or leased to the public in the usual course of business. To be a *regular dealer*, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A regular dealer may not act exclusively as a supplier for contractors on Federal-aid highway construction projects. A person may be a *regular dealer* in bulk items, such as rock and asphalt, without owning, operating or maintaining a place of business as provided above, if the person both owns and operates distribution equipment for the products.

Secretary means as appropriate either the Secretary of Transportation of USDOT, the Kentucky Transportation Cabinet or their designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

Small business concern means, with respect to firms seeking to participate as DBEs in USDOT-assisted contracts, a small business concern as defined pursuant to Section 3 of the Small Business Act and Small Business Administration (SBA) regulations implementing it, 13 CFR Part 121, that also does not exceed the cap on average annual gross receipts specified in 49 CFR 26.65(b).

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is (1) found by a recipient to be socially and economically disadvantaged on a case-by-case basis; or (2) an individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(a) "Black Americans" which includes persons having origins in any of the Black racial groups of Africa;

(b) "Hispanic Americans" which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American or other Spanish or Portuguese culture or origin, regardless of race;

(c) "Native Americans" which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;

(d) "Asian-Pacific Americans" which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia or Hong Kong;

(e) "Subcontinent Asian Americans" which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(f) Women;

(g) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

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.

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.

XIX. 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 http://transportation.ky.gov/Civil-Rights-and-Small-Business-Development/Pages/SmallBusinessHome.aspx or 502-564-3601:

Forms
DBE Application Packet
DBE Program Plan
SBE Program Application Packet
Unified Certification Program (UCP) Application Packet
No Change Affidavit
Personal Net Worth Statement
Interstate Certification Affidavit

Directories
Certified & Prequalified Consultants
Certified & Prequalified DBEs
Certified ACDBE Directory
Certified DBE Directory
Certified SBE Directory
Consultant Directory
Material Suppliers Directory

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://cms.dot.gov/civil-rights/disadvantaged-business-enterprise/disadvantaged-business-enterprise-dbe-program-final

- UCP Application
  http://www.dot.gov/sites/dot.dev/files/docs/DBE_Uniform_Certification_Application.pdf

- Disadvantaged Business Enterprise Personal Financial Statement
  http://www.dot.gov/sites/dot.dev/files/docs/SBA_413_2014.pdf

- U.S. Small Business Administration Table of Small Business Size Standards Matched to Northern American Industry Classification System Codes
  http:/www.sba.gov/content/small-business-size-standards

- Good Faith Efforts Committee Operating Procedures

- Application for Certificate of Eligibility
  http://transportation.ky.gov/Organizational-Resources/Forms/TC%2014-1.pdf

- Rules and Regulations for Prequalifications 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
  http://www.lrc.ky.gov/Statutes/chapter.aspx?id=37983

- Fact Sheet for Application for Certificate for Eligibility or Continuation
  http://transportation.ky.gov/Construction-Procurement/Documents/Instructions%20For%20Prequalification%20Application.pdf

- DBE Special Note
  http://transportation.ky.gov/Construction-Procurement/Pages/Disadvantaged-Business-Enterprises.aspx

- General DBE Participation Plan
  http://transportation.ky.gov/Construction-Procurement/Pages/Disadvantaged-Business-Enterprises.aspx

- DBE Detailed Plan/Subcontract Request
  http://transportation.ky.gov/Construction-Procurement/Pages/Disadvantaged-Business-Enterprises.aspx

- Application for Small Business Enterprise (SBE) Certification
  http://transportation.ky.gov/Civil-Rights-and-Small-Business-Development/Documents/SBE_ApplicationPacket.pdf