



U.S. Department
of Transportation

Federal Highway
Administration

Memorandum

Subject: **ACTION**: Preliminary Injunction
Affecting Disadvantaged Business
Program

Date: November 4, 2024

From: Irene Rico
Associate Administrator
Office of Civil Rights

In Reply Refer To:
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To: Shundreka Givan
Division Administrator
Boday Borres
Deputy Division Administrators

On September 23, 2024, the U.S. District Court for the Eastern District of Kentucky issued a preliminary injunction against the U.S. Department of Transportation (“USDOT”) in Indiana and Kentucky with regard to the Disadvantaged Business Enterprise (“DBE”) program. The decision was issued in a lawsuit brought by two non-DBE firms: Mid-America Milling Company (“MAMCO”) and Bagshaw Trucking (“Bagshaw”) (collectively, the “Plaintiffs”).

The Court enjoined USDOT from “mandating the use of race- and gender-based presumptions for United States Department of Transportation contracts impacted by DBE goals upon which the Plaintiffs bid.” The court’s decision also states that “the scope of the preliminary injunction shall apply to the Plaintiffs in the states within which they operate, Kentucky and Indiana.”

1. USDOT is analyzing the preliminary injunction in consultation with the U.S. Department of Justice (“DOJ”). I am writing to provide immediate, interim guidance for Federal-aid projects that are obligated by the Kentucky Transportation Cabinet (“KYTC”). FHWA, after consultation with the USDOT Acting General Counsel and DOJ, is issuing this guidance to comply with the court’s preliminary injunction. This guidance supplements previous guidance regarding the implementation of the preliminary injunction. Plaintiffs (both MAMCO and Bagshaw Trucking) have each provided a written list that highlights four KYTC contracts on which one or both of them plan to bid, scheduled for letting on November 14, 2024. Moreover, Plaintiffs have designated a KYTC Request for Proposal (“RFP”) for the I-65 Central Corridor Project contract on which MAMCO plans to bid as a subcontractor. These contracts, and the DBE goal from the RFP, are listed in Appendix A.

2. Notwithstanding 49 CFR Part 26, USDOT will not mandate that KYTC include DBE contract goals on the contracts identified in Appendix A utilizing federal funds. In addition, FHWA will not concur in the award of the contracts listed in Appendix A if they contain DBE goals higher than 0% (including where the FHWA's concurrence responsibility has been assumed by KYTC under the FHWA/State Stewardship and Oversight Agreement). Therefore, KYTC should set a 0% DBE goal for the contracts identified in Appendix A.
3. KYTC, in turn, should issue an addendum setting a 0% DBE goal for the contracts identified in Appendix A prior to the letting.
4. Plaintiffs MAMCO and Bagshaw have indicated that they may identify additional USDOT-funded KYTC contracts, scheduled for future lettings, on which they intend to bid. USDOT will consult with KYTC about any actions that are necessary to ensure compliance with the preliminary injunction with respect to such contracts.
5. Other than the limitations set forth in this and previous guidance, KYTC may continue to fully implement the DOT DBE program, including setting DBE contract goals on contracts that are not identified in Appendix A or in the FHWA's October 8, 2024, memorandum concerning the October 24 letting.

USDOT will provide additional written guidance in the near future.

Please share this guidance with your State department of transportation.

cc: Ayanna Butler, Chief Counsel
Mayela Sosa, DFS Mid-America

Appendix A

Contracts for November 14th Letting:

CALL 101 **CONTRACT ID 241112**

GRANT COUNTY
NHPP 0757(154) : I-75 (MP 157.7) PAVEMENT REHAB WITH BRIDGE WORK (2024CCR) (MP 162.7), A DISTANCE OF 5.00 MILES. ASPHALT PAVEMENT & ROADWAY REHAB.
SYP NO. 06-20026.00. THE DBE PARTICIPATION GOAL IS 9.00%.

CALL 103 **CONTRACT ID 245368**

KENTON COUNTY
STP BRZ 9030 (486) : CR 1021 (MP 0.00) ADDRESS DEFICIENCIES OF ERNSTBRIDGE ROAD OVER CSX RAILROAD (059C00048N) (MP 0.07), A DISTANCE OF 0.07 MILES. BRIDGE REPLACEMENT.
SYP NO. 06-10046.00. THE DBE PARTICIPATION GOAL IS 5.50%.

CALL 201 **CONTRACT ID 241316**

CARROLL, GALLATIN COUNTIES
NHPP IM 0712 (082)
LOUISVILLE-CINCINNATI ROAD (I-71)
THE DBE PARTICIPATION GOAL IS 12.00%.

CARROLL COUNTY
NHPP IM 0712 (082) : LOUISVILLE-CINCINNATI ROAD (I-71) BEGINNING IN CARROLL COUNTY AT MP 52.778 EXTENDING NORTHEASTERLY TO THE GALLATIN COUNTY LINE WITH BRIDGE WORK, A DISTANCE OF 0.14 MILES. WIDENING.
SYP NO. 06-20021.00.
GALLATIN COUNTY
NHPP IM 0712 (082) : LOUISVILLE-CINCINNATI ROAD (I-71) FROM THE CARROLL COUNTY LINE EXTENDING NORTHEASTERLY TO MP 57.364, A DISTANCE OF 3.15 MILES. WIDENING.
SYP NO. 06-20021.00.

CALL 200 **CONTRACT ID 241016**

SHELBY COUNTY
106GR24D016
I-64
THE DBE PARTICIPATION GOAL IS 11.00%.

SHELBY COUNTY
NHPP IM 0643(046) : I-64 (MP 32.29) WIDEN I-64 TO 6 LANES FORM 0.458 MILES EAST OF THE KY-55 INTERCHANGE FROM MP 32.29 TO MP 36.04 IN SHELBY COUNTY (MP 36.04), A DISTANCE OF 3.75 MILES. ASPHALT REHAB INTERSTATE/PARKWAY.
SYP NO. 05-00065.40.
SHELBY COUNTY
NHPP IM 0643(046) : I-64 (MP 36.00) REDUCE CONGESTION ON I-64 FROM 0.83 MILES EAST OF THE KY-53 INTERCHANGE TO THE KY-1790 UNDERPASS. (INCLUDES SYP NO. 05-00475.00) (MP 38.30), A DISTANCE OF 2.30 MILES. ASPHALT REHAB INTERSTATE/PARKWAY.
SYP NO. 05-00065.40.
SHELBY COUNTY
NHPP IM 0643(060) : I-64 (MP 27.88) ADDRESS CONDITION OF I-64 FROM MP 27.88 TO MP 32.40 IN SHELBY COUNTY WITH BRIDGE WORK (2024CCR) (MP 32.40), A DISTANCE OF 4.52 MILES. ASPHALT REHAB INTERSTATE/PARKWAY.
SYP NO. 05-22028.00.

RFP for I-65 Central Corridor Project:

1.7.2.1 **DBE Goal**

The DBE goal for the Project will be established after selection of the Contractor and is expected to range between 6% and 12% of the total Project value. The Contractor will be required to exercise all necessary and reasonable steps to ensure that the DBE goal is met.