

# Kentucky Transportation Cabinet Office of Transportation Delivery

Disadvantaged Business Enterprise Goal Methodology

49 CFR Part 26

Participation By Disadvantaged Business Enterprises in The  
Department of Transportation Financial Assistance Program  
Participation Goal FFY20 - FFY22

June 2019

**Executive Director: Eric Perez**

**Public Transportation Program for Federal Transit Administration**

**Federal Grantee Number: 1003**

Reference: FHWA DBE Program

Federal Transit DBE Goal Component of the Overall Cabinet Goal

U.S. Census



# Policy Statement

## Section 26.1, 26.23 Objectives

The Office of Transportation Delivery (OTD) is the recipient of federal transit funds authorized under the FAST Act and 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, II, and V of the Teas-21, Pub. L. 105-178.

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

It is the policy of the KYTC/Office of Transportation Delivery to ensure that DBEs, as defined in Part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also our policy:

1. To ensure nondiscrimination in the award and administration of DOT-assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for DOT-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 help remove barriers to the participation of DBEs in DOT assisted contracts;
6. To assist the development of firms that can compete successfully in the market place outside the DBE Program.

## Objectives

Since the Office of Transportation Delivery has received a grant from the Federal Transit Administration (FTA) of more than: \$250,000 or more in FTA planning capital and/or operating assistance in a federal fiscal year, we will continue to carry out this program until all funds from DOT financial assistance have been expended. We will provide to FTA updates representing significant changes in the program.

The overall goal of our DBE program is to ensure that firms owned and controlled by minorities, women and other socially and economically disadvantaged individuals have the maximum opportunity to grow and become self-sufficient so they are able to compete on a level playing field. The Office of Transportation Delivery will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate

against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

In accordance with section 26.45(f), OTD will submit its overall goal to FTA by August 1<sup>st</sup> of the year that it is due (three-year intervals). Before establishing the overall goal, OTD will consult with the Kentucky Transportation Cabinet's (KYTC) Office of Civil Rights and Small Business Development (OCRSBD), DBE Liaison Officer (DBELO), sub-recipients, and the general public, to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the efforts to establish a level playing field for the participation of DBEs.

Following this consultation, we will publish a notice of the proposed overall goals, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at the KYTC main office or via the KYTC/OTD website for 30 days following the date of the notice. Normally, we will issue this notice by the beginning of June and will include addresses to which comments may be sent. Work will continue on the methodology to refine the overall goal which will include a summary of information and comments received during the public participation period, along with our responses. We will begin utilizing the established overall goal by October 1 of each year, unless we have received other instructions from USDOT.

## **Bidders List**

The Office of Transportation Delivery and its sub-recipients will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. The purpose of this requirement is to allow use of the bidders list approach to calculating overall goals. The bidder list will include:

- Bidders Name,
- Bidders Address,
- DBE/non-DBE status,
- Bidders age, and
- Bidders annual gross receipts of firms.

The Office of Transportation Delivery will capture this information as a part of its quote/bid process. A contract clause will be required for prime bidders to report the name/addresses of subcontracts when a DBE goal is established on prime contracts. The Office of Transportation Delivery and its Sub-recipients will distribute a bid opportunity listing with such contracts.

## **Transit Vehicle Manufacturers Goals**

The Office of Transportation Delivery will require each transit vehicle manufacturer (TVM), as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements,

to certify that it has complied with the requirements of this section. Alternatively, the Office of Transportation Delivery may, at its discretion and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of the TVM complying with this element of the program.

## Goal Methodology

Pursuant to the requirements of 49 CFR Part 26, the Office of Transportation Delivery of the Kentucky Transportation Cabinet has established Disadvantaged Business Enterprise goals for FFY 2020, FFY 2021, and FFY 2022 for the following USDOT/Federal Transit Administration (FTA) programs for itself and its sub-recipients:

<b>Funding Category Description</b>
Section 5311 – Statewide Rural, Appalachian & RTAP
Section 5339 – Capital

The Office of Transportation Delivery will establish an overall goal of 4.4% for federally financially assisted contracts.

The goal methodology consists of a two-step process which establishes a base goal for ready and willing DBE’s and the consideration of evidence available to adjust the base figure to establish the overall goal and the use of race-neutral and/or race-conscious means to obtain the overall goal. The overall goal is expressed as a percentage of all FTA funds (exclusive of funds used for purchase of transitional TVM) that can be contracted out for services. Additionally, the Office of Transportation Delivery has not identified that overconcentration exists in the types of work that DBEs perform.

### Step One:

In establishing DBE goals for federal fiscal years 2020, 2021 and 2022, OTD had to determine where contracting capabilities existed. Utilizing previous contract spending data and our three year budget planning outlook, OTD determined the potential areas of contracting.

<b>Funding Description</b>	<b>Potential Dollar Amount</b>
Section 5311 Rural Operating	\$19,346,765 annually
Section 5311 Appalachian	\$1,764,000 annually
Section 5311(b)(3) RTAP	\$310,348 annually
Section 5339 Capital	3,500,000 annually

*See Addendum 1 – Three Year Planning Outlook – OTD Potential Funding Projects*

Using the UPC/DBE directories from KYTC and Indiana Department of Transportation (INDOT) exchange program. OTD determined its local market area, or contracting area, as being statewide and encompassing all 120 Kentucky counties. OTD set a geographical area in Indiana that would be available to either provide electronic, or shipped services, or a geographical area beneficial for

the local sub-recipients located geographically relatively close to our bordering areas. Upon identification of DBE's for these procurements, our office narrowly tailored the NAICS codes based upon available DBE's for contracting purposes. Companies conducting business in the NAICS codes were sought and then a determination was made of willing and able firms. The Cabinet and OTD did not use a disparity or available study approach as the Cabinet did not have such studies. *See Addendum 2 – KYTC & INDOT UPC Directory*

**Possible Procurement Opportunities:**

*\*Several DBEs have multiple NAICS Codes and may be listed duplicate times but will only be counted once.*

<b>Procurement Opportunities</b>	<b>NAICS Code</b>	<b>Number of Eligible DBEs</b>
Petroleum Bulk Stations	424710	2
Fuel Dealers	454310	1
Transportation Equipment & Supplies (Transit Bus Parts)	423860	1
Men's and Boy's Clothing Merchant (Uniforms)	424320	1
Women's and Girl's Clothing Merchant (Uniforms)	424330	1
Janitorial Supplies/Services	561720	16
Carpet & Upholstery Cleaning	561740	5
Other Services to Buildings & Dwellings	561790	9
Other Scientific & Technical Consulting	541690	4
Other Legal Services	541199	2
Offices of Certified Public Accountants	541211	4
Tax Preparation Services	541213	4
Payroll Services	541214	4
Other Accounting Services	541219	6
Other Advertising Services	541890	4
Administrative Management & General Consulting	541611	47
Advertising Agencies	541810	11
Media Representatives	541840	2
Outdoor Advertising	541850	3
Direct Mailing Advertising	541860	4
Investigation Services (Background)	561611	1
Insurance Agencies and Brokerages	524210	4
Office of Real Estate Appraisers	531320	4
Offices of Real Estate Agents & Brokers	531210	2
Title Abstract & Settlement Offices	541191	2
Stationary & Office Supplies Merchant	424120	4
Industrial & Personal Service Paper Merchant	424130	2
Employee Development	611430	16
Temporary Help Services	561320	7
Direct Life Insurance Carriers	524113	1

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Data Processing, Hosting, Related Services	518210	5
Computer System Design	541512	15
Computer & Office Machine Repair & Maintenance	811212	1
Security Guards & Patrol	561612	1
Other Computer Related Services	541519	7
Graphic Design Services	541430	14
Commercial & Institutional Building Construction (Bus Shelters, Transfer Station)	236220	26
Architectural Services	541310	3
Environmental Consultants	541620	22
Siding Contractors	238170	3
Flooring Contractors	238330	3
Office Equipment Wholesalers	423420	2
Engineering Services	541330	37
Roofing Contractors	238160	5
Electrical Wiring and Installation Contractors	238210	16
Structural & Steel Precast Concrete Contractors	238120	7
Poured Concrete Foundation and Structural Contractors	238110	16
Office Administrative Services	561110	9
Document Preparation Services	561410	5
Landscaping Services	561730	23
Site Preparation Contractors	238910	16
Human Resources Consulting Services	541612	9
Plumbing, Heating and Air Contractors	238220	6
Painting and Wall Covering Contractors	238320	14
Fabricated Structural Metal	332312	3
Drywall and Insulation Contractors	238310	7
Geophysical Surveying	541370	9
All Other Specialty Trade Contractors	238990	34
Masonry Contractors	238140	5
Machine Shops	332710	1
Framing Contractors	238130	5
Glass and Glazing Contractors	238150	2
Other Building Finishing Contractors	238390	6
Sign Manufacturing	339950	2
Finish Carpentry Contractors	238350	6
Building Inspection Services	541350	3
Security System Services	561621	6
Tile and Terrazzo Contractors	238340	2
Testing Laboratories	541380	5
Remediation Services	562910	2
Drafting Services	541340	9

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Communication Equipment Repair & Maintenance	811213	1
Other Telecommunications	517919	2
Commercial Screen Printing	323113	4
Medical, Dental or Hospital Equipment & Supplies	423450	1
Gift, Novelty, & Souvenir Stores	453220	1
Industrial Supplies Merchant Wholesalers	423840	1
Solid Waste	562111	2
Other Waste	562119	1
Consumer Electronics Repair & Maintenance	811211	1
Other Electronic & Precision Equipment Repair & Maintenance	811219	1
Commercial & Industrial Machinery Equipment Repair & Maintenance	811310	2
Ornamental & Architectural Metal Work	332323	7
Employment Placement Agencies	561311	1
Sheet Metal Work Manufacturing	332322	1
All Other Miscellaneous Fabricated Metal Product Manufacturing	332999	2
Metal Service Centers & Other Metal Merchant Wholesalers	423510	1
Custom Computer Programming Services	541511	2
Other Miscellaneous Durable Goods Merchant Wholesalers	423990	1
Commercial Photography	541922	2
Wholesale Trade Agents & Brokers	425120	3
Other Activities Related to Real-Estate	531390	1
Other Management Consulting Services	541618	5

*See Addendum 3 – Tailored Kentucky & Indiana Certified Directory by Category*

**Base Figure and Adjustment:**

In the goal setting process, a base figure for the relative availability of DBEs must be established. Using the USDOT approach of availability of ready, willing and able (RWA), DBEs relative to all businesses ready, willing and able to participate in Federal Transit contracts that meet the needs of the rural transit systems in the geographic area (using KYTC & INDOT UPC DBE directory with NAICS codes) and divide it by the number of all similar firms (DBE and Non-DBE with corresponding NAICS codes) using information from the US Census website to get the base figure for relative availability.

Equation: RWA DBEs /ALL RWA Firms = Base Figure

Determine Ready, Willing and Able DBEs in market area from KYTC & INDOT UPC DBE Directory	268
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Determine all Ready, Willing and Able firms performing work under the same NAICS codes from the US Census =	6,050
<b>Base Figure</b> = 268/6,050	= .044%

*See Addendum 4 – American Census Fact Finder Table*

**Step 2: Adjusted Base Figure:**

This stage consist of an examination of evidence available to our area that might be used to adjust the base figure to accommodate actual transit contracting opportunities. If any adjustment is required from the evidence, OTD would then make an adjustment to the base figure to ensure that the goal accurately reflects the level of participation OTD could expect from certified DBEs, and make the Base Figure as precise as possible. In accordance with 49 CFR Part 26 – 2(d) KYTC and OTD did not participate or conduct a disparity study nor did it choose to utilize another recipient’s goal. OTD reviewed all of the necessary evidence available to determine if an adjustment is needed to the base figure. After review of all evidence, OTD does not suggest an adjustment is necessary.

Therefore, OTD has established an overall goal of **4.4%**. Upon approval from FTA, the overall goal will go into effect beginning October 1, 2020 until September 30, 2022.

**Contract Goals:**

Contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race-neutral means.

OTD has determined that the established race-neutral means creates a level playing field for all contractors participating in public transit procurements. OTD shall consider establishing contract goals for FTA non-urbanized grantees only if participation through race-neutral means is not obtainable. OTD shall consider the availability of and previous experience with firms owned and controlled by minorities and women when establishing contract goals for DBE participation.

**Race-neutral/Race-conscious Measures:**

If DBE participation obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year.

Consistent with the requirements of Part 26.51, OTD proposes to meet its 4.4% goal by 100% race-neutral means. The Office of Transportation Delivery does not project the need to establish contract goals to meet the overall goal by race-conscious means. OTD feels that it has met its past DBE participation utilizing transportation services based on customary competitive procurements.

OTD does not use quotas in any way in the administration of this DBE program.



## **Public Participation:**

On Thursday, June 20, 2019, at 10:30 am, OTD held a public forum for DBE Goal Methodology at the Office of Federate Transportation Services of the Bluegrass, located at 1713 Jaggie Fox Way, Lexington, KY 40511. Language assistance was offered. *See a summary – Addendum 6 – KYTC Public Participation.*

OTD published its goal information on its website at:

<https://transportation.ky.gov/TransportationDelivery/Pages/default.aspx>

*See Addendum 5 - Notice of Public Forum*

No comments were received during the public review period of 30 days.

## **Good Faith Efforts Procedures:**

The obligation of the bidder/offeror is to make good faith efforts. The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts.

OTD staff will be responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive.

We will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before we commit to the performance of the contract by the bidder/offeror.

Each solicitation for which a contract goal has been established will require the bidders/offerors to submit the following information:

1. The names and addresses of DBE firms that will participate in the contract;
2. A description of the work that each DBE will perform;
3. The dollar amount of the participation of each DBE firm participating;
4. Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
5. Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractors commitment and
6. If the contract goal is not met, evidence of good faith efforts.

### **Administrative reconsideration:**

Within 10 days of being informed by a sub-recipient that it is not responsive because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidder/offerors should make this request in writing to the following reconsideration official: KYTC DBELO, Office of Civil Rights and Small Business Development, 200 Mero Street, Frankfort, KY 40601, 502-564-3601. The reconsideration official will not have played any role in the original determination that the bidder/offeror did not document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person with our reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. We will send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the U.S. Department of Transportation.

### **Good Faith Efforts when a DBE is replaced on a contract:**

OTD sub-recipients will require a contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. We will require the prime contractor to notify the KYTC DBE Liaison Officer immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation.

In this situation, we will require the prime contractor to obtain our prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts.

If the contractor fails or refuses to comply in the time specified, our contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

### **Prompt Payment:**

The KYTC/Office of Transportation Delivery (OTD) will include a clause in each DOT-assisted prime contract stating that the prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than 30 days from the receipt of each payment the prime contractor receives from KYTC/OTD and/or its sub-recipients. Delays of payment from the 30 day time frame may occur only for good cause following approval from KYTC/OTD.

### **Monitoring & Enforcement Mechanisms:**

The KYTC/Office of Transportation Delivery (OTD) will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26:

1. KYTC/OTD will bring the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps provided in 26.109.
2. KYTC/OTD will consider similar action under its own legal authorities, including responsibilities and determinations in future contracts.
3. KYTC/OTD will also provide monitoring and enforcement mechanism to verify that work committed to DBEs at contract award is actually performed by the DBEs. This will be accomplished by onsite inspections and conducting interviews of employees and DBEs. OTD staff will review contracting records in conjunction with monitoring of contract performance.
4. KYTC/OTD will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award.
5. KYTC/OTD will monitor DBE participation through Race-Neutral means and determine if an adjustment is required using – *Addendum 7 – KYTC/OTD Semi-Annual DBE Report*.

### **Record Keeping:**

The KYTC/Office of Transportation Delivery (OTD) will report DBE participation to FTA. These reports will reflect payments actually made to DBEs on DOT-assisted contracts.

### **Addendums:**

- 1. Three Year Planning Outlook – OTD Potential Funding Projects**
- 2. Kentucky & Indiana UPC Directories**
- 3. Tailored Kentucky & Indiana Certified Directory by Category**
- 4. American Census Fact Finder Table**
- 5. Notice of Public Forum**
- 6. KYTC/OTD Public Participation**
- 7. KYTC/OTD Semi-Annual DBE Report**