

TRANSPORTATION CABINET
Office for Civil Rights and Small Business Development
(Amendment)

600 KAR 4:010. Certification of disadvantaged business enterprises.

RELATES TO: 49 C.F.R. Parts 23, 26, 15 U.S.C. 637 (a), (d), (m), Titles 23 U.S.C., 49 U.S.C., Pub. L. 114-94

STATUTORY AUTHORITY: KRS 174.080, 49 C.F.R. 26.3, 26.21

NECESSITY, FUNCTION, AND CONFORMITY: 49 C.F.R. 26.3 and 26.21 require that recipients of federal-aid highway funds authorized under Titles I and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Titles 23 and 49 U.S.C., or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), and Fix America's Surface Transportation Act of 2015 (FAST), Pub. L. 114-94, from the United States Department of Transportation (USDOT) implement a program to ensure nondiscrimination in the award and administration of USDOT-assisted contracts in its highway financial assistance programs. The Kentucky Transportation Cabinet, as a recipient of these funds, is required by 49 C.F.R. 26.21 to have a program that requires the participation of disadvantaged, minority, and women-owned business enterprises in contracts financed in whole or in part with these funds. This administrative regulation establishes the requirements for certification of DBE firms pursuant to federal law.

Section 1. Definitions.

- (1) "ACDBE" means an Airport Concessionaire Disadvantaged Business Enterprise as defined by 49 C.F.R. 23.3(2).
- (2) "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.
- (3) "Approval" means that the applicant has been determined by the DBE Certification Committee to comply with the disadvantaged business enterprise eligibility criteria as established in 49 C.F.R. Part 26, Subpart D and 49 C.F.R. Part 23.
- (4) "Cabinet" means the Transportation Cabinet.
- (5) "Certification" means the process used by the Transportation Cabinet to determine if an applicant complies with the disadvantaged business enterprise criteria established in 49 C.F.R. Part 26, Subpart D and 49 C.F.R. Part 23.
- (6) "Denial" means the cabinet has determined that the applicant does not comply with the disadvantaged business enterprise eligibility criteria established in 49 C.F.R. Part 26, Subpart D and as required by this administrative regulation.
- (7) "Department" or "DOT" means the United States Department of Transportation.
- (8) "Disadvantaged business enterprise" or "DBE" is defined by 49 C.F.R. 26.5, Subpart D.
- (9) "Ineligibility complaint" means an action of a third party alleging verbally or in writing that a firm is ineligible to participate in the DBE program.
- (10) "Notice" means a written notice from the Transportation Cabinet or Office for Civil Rights and Small Business Development delivered via certified mail to the business address listed on the application form.
- (11) "On-site visit" means an interview conducted by the Office of Civil Rights and Small Business Development with principals of the firm at its primary place of business, reviewing business-related documents, and inspecting business facilities or equipment pursuant to 49 C.F.R. 26.83(c).
- (12) "Program" is defined by 49 C.F.R. 26.5.

- (13) "Removal" or "removed" means that a firm or business enterprise that has been certified by the cabinet as a disadvantaged business enterprise has been determined to be ineligible, and is no longer entitled to the rights and privileges of a firm or business that has been certified by the cabinet as a disadvantaged business enterprise.
- (14) "Small Business Administration" or "SBA" is defined by 49 C.F.R. 26.5.
- (15) "Small business concern" is defined by 49 C.F.R. 26.5.
- (16) "Socially and economically disadvantaged individual" is defined by 49 C.F.R. 26.5.
- (17) "Unified Certification Program" or "UCP" is defined by 40 C.F.R. 26.81.
- (18) "USDOT" means the United States Department of Transportation.

Section 2. Certification Committee.

- (1) The cabinet shall establish and maintain a Certification Committee for the purpose of determining the eligibility of an applicant for certification as a DBE as established in 49 C.F.R. 26.83.
- (2) The Certification Committee shall include:
 - (a) The following voting members:
 - 1. Executive Director, Office of Project Development, or a proxy;
 - 2. Director of the Division of Construction, or a proxy; and
 - 3. Director of the Division of Construction Procurement, or a proxy; and
 - (b) The non-voting member, Manager of the Small Business Development Branch, or a proxy who shall chair the Certification Committee.
- (3) The Kentucky administrator of the Federal Highway Administration or FHWA, or a proxy may attend Certification Committee meetings ex officio.

Section 3. Advisory Panel.

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

Section 4. Certification Committee Procedures.

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

Section 5. Applications for Certification.

- (1) The UCP application review process for approval 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.
- (2) 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.
- (3) The completed UCP application shall be submitted electronically to the cabinet's Office for Civil Rights and Small Business.
- (4) 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.
- (5) 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.
- (6) 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.
- (7) The Office for Civil Rights and Small Business Development shall conduct an on-site visit at the firm's primary place of business pursuant to 49 C.F.R. 26.83(c).
- (8) An applicant for DBE, or ACDBE certification, or a certified DBE or ACDBE may withdraw without penalty from the DBE program prior to the Certification Committee making a decision regarding the application.

Section 6. Appeals.

- (1) The appeal of a decision by the Certification Committee shall be emailed to S33AppealsManagementRecords@dot.gov within ninety (90) days of the date of the decision of the committee. The appeal shall include the denied certification notice and other pertinent information and provide a full and specific statement as to why the decision is erroneous, what significant fact was not considered, or what provisions of 49 C.F.R. Part 26 were not properly applied. USDOT shall not accept notices of intent or partial or otherwise non-compliant submissions.
- (2) An applicant who is denied certification, or whose certification is removed by the committee, shall not reapply for DBE certification for six (6) months from the date of notice of the denial or removal.

JIM GRAY, Secretary

MELVIN BYNES, Executive Director

APPROVED BY AGENCY: August 12, 2022

FILED WITH LRC: August 15, 2022 at 11:10 a.m.

PUBLIC HEARING AND COMMENT PERIOD: A public hearing on this administrative regulation shall be held on October 26, 2022, at 10:00 a.m. EST, at the Transportation Cabinet, Transportation Cabinet Building, 200 Mero Street, Frankfort, Kentucky 40622. Individuals interested in being heard at this hearing shall notify this agency in writing five (5) working days prior to the hearing, of their intent to attend. If you have a disability for which the Transportation Cabinet needs to provide accommodations, please notify us of your requirement five working days prior to the hearing. This request does not have to be in writing. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a

written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through 11:59 p.m. EST on October 31, 2022. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Jon Johnson, Staff Attorney Manager / Assistant General Counsel, Transportation Cabinet, Office of Legal Services, 200 Mero Street, Frankfort, Kentucky 40622, Telephone: (502) 782-8180, Fax: (502) 564-5238, Email: Jon.Johnson@ky.gov