

**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~~[for Civil Rights and Small Business Development]~~, or a proxy;
    - 2. ~~[Executive]~~ Director of the Division of Construction~~[Office of Legal Services]~~, or a proxy; and
    - 3. Director of the Division of Construction Procurement~~[Internal Audits]~~, 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;~~[and]~~
  - (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, [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.]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~~submitted~~ to S33AppealsManagementRecords@dot.gov~~the United States Department of Transportation, Office of Civil Rights, 1200 New Jersey Avenue, SE, Washington D.C. 20590~~ 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](mailto:Jon.Johnson@ky.gov)

## REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

**Contact Person: Jon Johnson**

**(1) Provide a brief summary of:**

**(a) What this administrative regulation does:**

This administrative regulation establishes the requirements for certification of a Disadvantaged Business Enterprise or DBE firm.

**(b) The necessity of this administrative regulation:**

This administrative regulation is required by 49 C.F.R. 26.21 to establish an application and certification process for DBE and ACDBE firms to be certified.

**(c) How this administrative regulation conforms to the content of the authorizing statutes:**

This administrative regulation conforms to the content of the authorizing statute contained in KRS 174.080 and 49 C.F.R. 26.3, 26.21 by setting forth definitions, application process, certification, and appeals of DBE and ACDBE firms.

**(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes:**

This administrative regulation will establish the regulatory requirements of DBE and ACDBE application and certification processes pursuant to KRS 174.080.

**(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:**

**(a) How the amendment will change this existing administrative regulation:**

This amendment will change source of membership of certification committee members and update current appeal process.

**(b) The necessity of the amendment to this administrative regulation:**

This amendment is necessary because of change in make-up of committee membership and appeal process.

**(c) How the amendment conforms to the content of the authorizing statutes:**

The establishment and implementation of a DBE program is required by 49 C.F.R. Parts 23 and 26 as a condition for receipt of federal highway funding.

**(d) How the amendment will assist in the effective administration of the statutes:**

This amendment expedites and redefines the appeal process, pursuant to USDOT DBE/ACDBE Program Flexibilities Guidance.

**(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation:**

This administrative regulation affects disadvantaged, minority, and women-owned businesses desiring to apply for certification with the cabinet's DBE program. This administrative regulation also affects the KYTC Office for Civil Rights and Small Business Development. (4) Provide an analysis of how the entities identified in the previous question will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

**(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:**

**(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment:**

Applicants to the DBE program will continue to submit their applications as usual, however, the processes for review and requested appeals will be more efficient.

**(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3):**

There are no costs or fees associated with this regulation.

**(c) As a result of compliance, what benefits will accrue to the entities identified in question (3):**

This amendment will improve the efficiency of the DBE program and simplify the appeals process.

**(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:**

**(a) Initially:**

There are no costs associated with these amendments.

**(b) On a continuing basis:**

There are no continuing costs associated with these amendments.

**(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation:**

No funding is necessary.

**(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment:**

No new fees or funding will be necessary to implement this amendment.

**(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees:**

This amendment does not establish any fees or indirectly increase any fees.

**(9) TIERING: Is tiering applied?**

No. All DBE applicants are subject to the same scrutiny and regulations. However, non-resident applicant firms who are certified under the federal DBE program in their home state are subject to a provision in the federal regulations (49 C.F.R. 26.85) that provides a presumption of eligibility if making an initial application for DBE certification by the cabinet.

## FISCAL NOTE

**(1) What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?**

The Office for Civil Rights and Small Business Development in the Kentucky Transportation Cabinet.

**(2) Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation.**

KRS 174.080, 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

**(3) Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.**

This amendment should not have any effect on expenditures and revenues of a state or local government agency.

**(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year?**

Revenue will not be generated by this regulation for state or local government for the first year.

**(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years?**

Revenue will not be generated by this regulation for state or local government for subsequent years.

**(c) How much will it cost to administer this program for the first year?**

There is no cost to administer this regulation in the first year.

**(d) How much will it cost to administer this program for subsequent years?**

There is no cost to administer this regulation in subsequent years.

**Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.**

**Revenues (+/-):**n/a

**Expenditures (+/-):**n/a

**Other Explanation:**

n/a

**(4) Estimate the effect of this administrative regulation on the expenditures and cost savings of regulated entities for the first full year the administrative regulation is to be in effect.**

The effect of expenditures and costs savings for the first full year is unknown at this time.

**(a) How much cost savings will this administrative regulation generate for the regulated entities for the first year?**

Cost savings for the first year will be negligible.

**(b) How much cost savings will this administrative regulation generate for the regulated entities for subsequent years?**

Cost savings for subsequent years will be negligible.

**(c) How much will it cost the regulated entities for the first year?**

No additional costs are expected for the first year.

**(d) How much will it cost the regulated entities for subsequent years?**

No additional costs are expected for subsequent years.

**Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.**

**Cost Savings (+/-):**N/A

**Expenditures (+/-):**N/A.

**Other Explanation:**

**(5) Explain whether this administrative regulation will have a major economic impact, as defined below.**

"Major economic impact" means an overall negative or adverse economic impact from an administrative regulation of five hundred thousand dollars (\$500,000) or more on state or local government or regulated entities, in aggregate, as determined by the promulgating administrative bodies. [KRS 13A.010(13)]. This amendment should not have a major economic impact.

## FEDERAL MANDATE ANALYSIS COMPARISON

**(1) Federal statute or regulation constituting the federal mandate.**

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

**(2) State compliance standards.**

KRS 174.080.

**(3) Minimum or uniform standards contained in the federal mandate.**

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

**(4) Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate?**

This amendment does not impose stricter requirements, or additional or different responsibilities or requirements than those required by federal mandate.

**(5) Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements.**

No stricter standard, or additional or different responsibilities or requirements are imposed.