



F E D E R A L T R A N S I T A D M I N I S T R A T I O N

Kentucky Transportation Cabinet
Unified Certification Program (UCP) Compliance Review

Final Report
May 2019



U.S. Department of Transportation
Federal Transit Administration

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Executive Summary

Objective and Methodology – This report details the findings from a Compliance Review of the Kentucky Transportation Cabinet (KYTC) Unified Certification Program’s Disadvantaged Business Enterprise (DBE) certification practices and procedures. The Compliance Review examined the Kentucky Unified Certification Program’s (KUCP) DBE certification procedures, management structures, actions, and documentation. Documents and information were collected from the Federal Transit Administration (FTA) and KUCP. In addition, the following entities were interviewed as part of this review: KYTC officials, DBE applicants, DBE certified firms, firms that were denied DBE certification, and other stakeholders. The on-site review included interviews, assessments of data collection systems, and review of program and relevant documents.

KYTC’s Certification Program includes the following positive program elements –

Positive Program Elements

- KYTC had devoted adequate resources to manage the KUCP.
- KYTC staff was experienced and knowledgeable of the UCP requirements.
- DBE applications were generally processed in less time than permitted by the regulations.
- KYTC had excellent documentation in its files to support certification decisions.
- DBE certification panel members were well briefed on applicants and asked informed questions during committee meetings.

The Program has the following administrative deficiencies –

Administrative Deficiencies

- KYTC did not notify applicants of the timeframe required to wait before they could reapply after DBE certification denial or removal.
- All KUCP member agencies did not have links to the KUCP Directory on their websites, as stipulated in the UCP agreement.
- The UCP procedures in KYTC’s DBE Program did not address the requirement to send a notice to applicants within 30-days of receipt of the application.

The Program has the following substantive deficiencies –

Substantive Deficiencies

- KYTC did not document that its 2002 or 2012 UCP agreement was approved by US DOT

KUCP processed an average of 50 new DBE certification applications each calendar year. In 2016, the UCP received 52 new applications, in 2013 it received 55 new applications, and in 2018, it received 47 new applications. Additionally, KUCP annually reviewed the ongoing eligibility of approximately 200 certified DBEs, which included the processing of annual no change affidavits. The UCP had an internal process for reviewing applications within 90 days of receipt. KUCP certification logs confirmed KUCP made certification decisions within 60 days, indicating that it had adequate staff KUCP held certification committee meetings every 30 days. This report provides an in-depth assessment of KUCP’s overall certification practices.

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I. General Information

This chapter provides basic information concerning this Compliance Review of KUCP. Information on KUCP, the review team, and the dates of the review are presented below.

Grant Recipient:	Kentucky Transportation Cabinet
City/State:	Frankfort, KY
Grantee Number:	1003
Executive Official:	Greg Thomas, Secretary Kentucky Transportation Cabinet
On-site Liaison:	Jamir Davis, Executive Director Office of Civil Rights and Small Business Development
Report Prepared By:	The DMP Group, LLC
Dates of On-site Visit:	January 8-10, 2019
Compliance Review Team Members:	Maxine Marshall Dana Lucas Khalique Davis

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2. Jurisdiction and Authorities

The Federal Transit Administration (FTA) Office of Civil Rights is authorized by the Secretary of U.S. Department of Transportation (USDOT) to conduct Civil Rights Compliance Reviews. The reviews are undertaken to ensure compliance of applicants, recipients, and sub recipients with Section 13 of the Master Agreement, Federal Transit Administration M.A. (24), October 1, 2017, and 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Programs."

As direct or indirect recipients of FTA funding assistance, the UCP and its members (i.e., DOT recipients within the state) must comply with the DBE regulations at 49 C.F.R. Part 26 as a condition associated with the use of these funds. The DBE regulations define the components that must be addressed and incorporated in KYTC's UCP agreement and were the basis for this Compliance Review.

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3. Purpose and Objectives

3.1 Purpose

The FTA Office of Civil Rights periodically conducts discretionary reviews of recipients and sub recipients to determine whether they are honoring their commitment, as represented by certification to FTA, to comply with 49 CFR Part 26. FTA determined that a Compliance Review of the KUCP was necessary.

The DBE regulations require USDOT recipients to participate in a Unified Certification Program—as evidenced by a signed UCP agreement. The UCP provides “one-stop shopping” to applicants for DBE certification. An applicant is required to apply once for DBE certification which will be honored by all recipients in the state.

The primary purpose of the Compliance Review was to determine the extent KUCP met its goals and objectives as represented to DOT in its UCP agreement. This Compliance Review was intended to be a fact-finding process to (1) examine KUCP and its certification practices and procedures, (2) make recommendations regarding corrective actions deemed necessary and appropriate, and (3) provide technical assistance.

The purpose of this Compliance Review was not to directly investigate whether there has been discrimination against disadvantaged businesses by the grant recipient or its sub recipients, or to adjudicate these issues in behalf of any party.

3.2 Objectives

The objectives of Unified Certification Programs, as specified in 49 CFR Part 26, are to:

- Adhere to the certification procedures and standards and the non-discrimination requirements of 49 CFR Parts 26 and 23.
- Cooperate fully with all oversight, review, and monitoring activities of USDOT and its operating administrations.
- Implement USDOT directives and guidance on DBE certification matters.
- Make all certification and decertification decisions on behalf of all UCP members with respect to participation in the USDDOT DBE Program. Certification decisions by the UCP shall be binding on all UCP members.
- Provide a single DBE certification that will be honored by all UCP members.
- Maintain a unified DBE directory containing at least the following information for each firm listed: address, phone number, and the types of work the firm has been certified to perform.
- Ensure the UCP agreement shall commit recipients to verify that the UCP has sufficient resources and expertise to carry out the requirements of 49 CFR Parts 26 and 23.

The objectives of this Compliance Review are to:

- Determine whether the KUCP is honoring the UCP agreement submitted to the Secretary of Transportation.
- Examine the required certification procedures and standards of the KUCP against the Disadvantaged Business Enterprise program compliance standards set forth in the regulations and to document the compliance status of each component.
- Gather information and data regarding the operation of the KUCP from certifying members through interviews and certification file review.

4. Background Information

The purpose of this section is to provide an understanding of KYTC's operations and scale. The section highlights KYTC's services, budget, and the history of its DBE program.

4.1 Introduction to Kentucky Transportation Cabinet and Organizational Structure

The Kentucky Transportation Cabinet (KYTC) is committed to meet or exceed the needs and expectations of the users of Kentucky's transportation system – residents, business owners, employees and students. According to its 2003 Strategic Plan, KYTC's mission is to “provide a safe, efficient, environmentally sound and fiscally responsible transportation system that delivers economic opportunity and enhances the quality of life in Kentucky.” Today, KYTC manages an annual budget of over \$2 billion, comprised of the following funding sources:

- Road Funds (local tolls and taxes) – 60 percent
- Federal Funds (primarily FHWA) – 33 percent
- Restricted Funds (fees for specific programs) – 6 percent
- General Funds and Investment Income – 1 percent

KYTC expends 80 percent of its funding on highway construction (56%) and aid to county and municipal governments (24%). KYTC spends a limited amount of general fund revenue for public transportation.

In accordance with the requirements of 49 CFR Part 26, Subpart E, the Kentucky recipients of USDOT funds established a Unified DBE Certification Program (UCP) in 2002 for the purpose of developing a uniform certification process in accordance with the requirements of 49 CFR §26.81. KYTC is the only certifying member. The KUCP agreement was revised in 2011 and signed by representatives of the following DOT recipients:

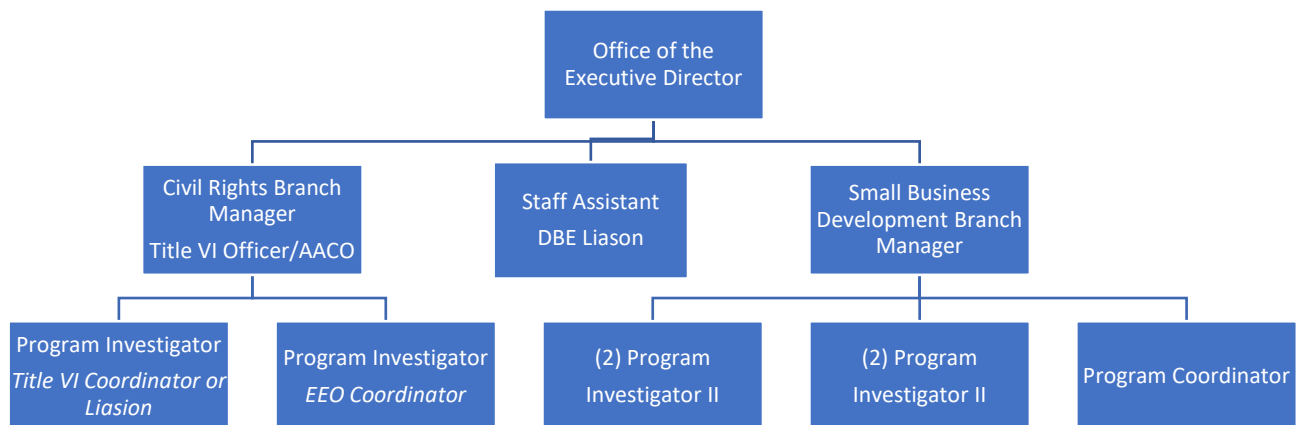
- Regional Airport Authority of Louisville and Jefferson County
- Kenton County Airport Board
- Lexington-Fayette Urban County Airport Board
- Transit Authority of River City
- Transit Authority of Northern Kentucky
- Lexington-Fayette Urban County Transit Authority
- Commonwealth of Kentucky Transportation Cabinet
- Paducah Airport Corporation

At the time of the site visit, KYTC had drafted a new UCP agreement to incorporate legislation enacted by the Kentucky General Assembly in June 2018. The bill, KAR 600.4:010, updated the State's DBE Certification procedures to reflect updates in 49 CFR Part 26. The legislation also revised the membership of the KUCP Certification Committee and the Advisory Panel and updated the Certification Procedures.

The Certification Committee was comprised of the following voting members:

- Executive Director – KYTC Office of Civil Rights and Small Business Development (OCRSBD)
- Executive Director – KYTC Office of Legal Services
- Director of the KYTC Division of Internal Audits

The Manager of the OCRSBD's Small Business Development Branch was a non-voting member who chaired the Certification Committee. The KUCP was managed by the staff of the OCRSBD, which consisted of eleven members including the Executive Director, and staff from KYTC's Civil Rights Branch and Small Business Development Branch. The Civil Rights Branch was primarily responsible for Title VI and EEO compliance and the Small Business Development Branch was responsible for the DBE and Small Business Enterprise programs. The OCRSBD's organizational chart is shown below:



4.2 Budget and FTA-Assisted Projects

The KUCP budget was entirely funded by KYTC. KYTC estimated that it spent approximately \$715,000 in personnel costs to maintain the UCP.

FTA provided the following funding to KYTC in Fiscal Year (FY) 2018:

FTA Formula Program	Amount
Section 5311	\$19,820,082
Section 5303 and 5304	\$915,987
Section 5339	\$3,500,000
Section 5310 (rural)	\$1,716,298
Section 5310 (small urban)	\$420,279
Section 5310 (Lex. Urban 55%)	\$128,039
Total	\$26,500,685

KYTC's Office of Transportation Delivery retained approximately \$1 million for state administration of the FTA program. The remainder of the funds were distributed to local transportation providers. None of these funds were used to support KUCP.

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5. Scope and Methodology

5.1 Scope

Implementation of the following DBE UCP program components specified by FTA are reviewed in this report:

1. The rebuttable presumption that members of the designated groups identified in 26.67 are socially and economically disadvantaged [49 CFR 26.61].
2. Collecting additional evidence of group membership when there is a well-founded reason to question the individual's claim of membership in a group [49 CFR 26.63].
3. Applying current Small Business Administration (SBA) business size standards found in 13 CFR Part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts [49 CFR 26.65].
4. Requiring applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged [49 CFR 26.67].
5. Considering all facts in the record, viewed as whole, when determining whether the socially and economically disadvantaged participants in a firm own the firm [49 CFR 26.69].
6. Considering all facts in the record, viewed as a whole, when determining whether socially and economically disadvantaged owners control a firm [49 CFR 26.71].
7. Excluding commercially-useful function issues from certification decisions [49 CFR 26.73].
8. Evaluating the eligibility of a firm on the basis of present circumstances and ensuring only firms organized for profit are considered eligible DBEs [49 CFR 26.73].
9. Participation as a certifying or non-certifying UCP member—as evidenced by signing the UCP agreement. [49 CFR 26.81 and 26.31].
10. Ensure that only firms certified as eligible DBEs under this section participate as DBEs on federally-assisted projects [49 CFR 26.83].
11. Properly applying interstate certification requirements. [49 CFR 26.85].
12. Issuing denial letters that clearly explain the reason why the individual was denied DBE certification [49 CFR 26.86–26.89].
13. If the UCP fails to comply with any requirement of the DBE regulations, it may be subject to formal enforcement action under program sanctions by the concerned operating

administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants, or contracts until deficiencies are remedied [49 CFR 26.101–26.109].

14. Maintaining proper records (i.e., application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews) for a minimum of 3 years. [49 CFR 26.11]
15. Submitting to the USDOT the number of minority women, non-minority women, and men that are certified DBEs in the UCP Directory. [49 CFR 26.11]

5.2 Methodology

The initial step of this Compliance Review consisted of consultation with the FTA Office of Civil Rights and a review of available information from the UCP websites and other sources. After reviewing this information, site visit dates were confirmed.

The FTA Office of Civil Rights sent a notification letter to KYTC that informed the UCP of the upcoming visit, requested necessary review documents, and explained the areas that would be covered during the on-site visit. The letter also informed KYTC of staff and other parties that would potentially be interviewed.

Before conducting the on-site visit, KUCP was asked to provide the following documents:

- Current DBE Program Plan (which should include KTC’s organization chart).
- Current Memorandum of Understanding or similar documents (i.e., current Unified Certification Program Agreement) forming the Unified Certification Program (UCP), which should be signed by all members of the UCP.
- A narrative that describes the KTC individuals and resources dedicated to implementing the DBE UCP requirements, handling DBE UCP inquiries, and educating KTC staff on DBE UCP. The narrative should include an organization chart showing KTC’s DBE UCP staff and a budget showing funds allocated to the DBE UCP.
- Agreement between the State of Kentucky and the State of Indiana describing the terms of the Indiana-Kentucky DBE Exchange, and information on the current status of the Exchange including Kentucky DBE participation on Indiana FTA-assisted projects, Indiana DBE participation on Kentucky FTA-assisted projects, a description of how DBE participation under the Exchange is monitored and counted toward each States’ DBE goal attainment.
- The certification criteria/guidelines used in determining DBE eligibility.
- Standard Operating Procedures or similar documents that explain the DBE certification process and are uniformly applied to all UCP certifying entities, including copies of the application used during certification, annual affidavits/updates, and personal net worth, etc.

- Documents or forms used during DBE certification site visits.
- Written procedures for updating the UCP DBE Directory.
- List of all firms certified, denied, and decertified or removed by the UCP in FYs 2016-current. The list must include:
 - the firm's city and state
 - the firm's ethnicity
 - the firm's gender
 - the date of site visit
 - the reasons for denial and/or decertification (e.g., size, PNW, control, etc.)
 - whether the denial decision was appealed to the UCP or USDOT
 - The result of the appeal.
- Explanation of KTC's UCP appeals process(es). List the individuals involved in the appeals process and how they are selected.
- Any third-party complaints or lawsuits regarding DBE firms certified by KTC and actions taken to resolve the matter.
- Any Freedom of Information or similar request for certification information.
- Any enforcement action against a DBE firm (e.g., suspension, debarment, etc.) regarding certification.
- The UCP ethnicity and gender breakdown required by 49 C.F.R. 26.11(e) for the last two years.
- Other pertinent information determined by KTC staff to further demonstrate its UCP operations and procedures.

An opening conference was conducted at the beginning of the Compliance Review with FHWA representatives, KYTC staff, and the review team. FTA representatives were unable to attend due the government shutdown. The following people attended the opening conference:

Kentucky Transportation Cabinet

Paul Looney, Deputy Secretary

Jamir Davis, Executive Director, Office for Civil Rights

Eric Perez, Executive Director, Office of Transportation Delivery

Tony Youssefi, Administrative Branch Manager, Office of Civil Rights

Melvin Byne, Disadvantage Business Enterprise Liaison Officer and Staff Assistant, Office of Civil Rights

Brad Patty, Investigator, Office of Civil Rights

Federal Highway Administration

Camille Robinson, Civil Rights and Realty Specialist

The DMP Group

Maxine Marshall, Lead Reviewer

Dana Lucas, Reviewer

Khalique Davis, Reviewer

Following the opening conference, the review team examined KUCP's certification and other documents submitted by the UCP. The team then conducted interviews with KUCP members and staff regarding UCP administration, organizational structure, certification procedures, record keeping, monitoring, and enforcement. A sample of DBE applications and certification decisions were selected and reviewed. Additional interviews with DBE firms, applicant firms, decertified firms, and firms that were denied DBE certified were also conducted.

At the end of the review KYTC staff, and the review team convened for the final exit conference. At the exit conference, initial findings and corrective actions were discussed with KYTC. Attending the exit conference were:

Kentucky Transportation Cabinet

Greg Thomas, Secretary

Paul Looney, Deputy Secretary

Jamir Davis, Executive Director, Office for Civil Rights

Tony Youssefi, Administrative Branch Manager, Office of Civil Rights

Melvin Byne, Disadvantage Business Enterprise Liaison Officer and Staff Assistant, Office of Civil Rights

Brad Patty, Investigator, Office of Civil Rights

Federal Highway Administration

Camille Robinson, Civil Rights Realty Specialist

The DMP Group

Maxine Marshall, Lead Reviewer

Dana Lucas, Reviewer

Khalique Davis, Reviewer

Following the site visit, a draft report was compiled and transmitted to KYTC for comments. Next, a final report incorporating KYTC's responses and identifying the remaining open corrective actions was produced.

5.3 Stakeholder Interviews

Nine DBEs listed in the KUCP DBE directory, and five firms that had been denied certification or were awaiting certification decisions were contacted for an interview to learn about their experiences with the certification process.

The interview questions included:

1. *Is your firm currently certified in the state UCP?*
2. *How did you learn about the UCP?*
3. *Did the UCP acknowledge receipt of your application?*
4. *Did the UCP communicate the status of your firm's certification application review?*
5. *Was an on-site visit conducted with your firm?*
6. *Approximately how long did your firm's certification review and approval process take?*
7. *Have you visited the UCP DBE Directory website to verify the accuracy of your firm's profile and the types of work your firm has been certified to perform?*
8. *Are you familiar with the requirements for continued certification eligibility (such as annual updates, notification of change, personal net worth statement, current tax returns, etc.)?*
9. *Do you have any concern(s) about the UCP or the certification process?*

Seven of the 14 firms contacted were interviewed. One firm declined to be interviewed, and six were unresponsive. The firms all had a similar experience in that they received notification from KUCP that their applications had been received and were being processed. Interviewees all confirmed the application process took less than 90 days regardless of whether the firm was denied or certified.

Interviewees stated that KUCP staff conducted onsite visits, during which time they interviewed applicant firm staff and toured facilities documenting the visit with notes and photographs.

All firms that were certified reported they reviewed the KUCP DBE directory to confirm they were listed, except for one. Those firms denied certification reported they received notification from KUCP indicating the reason for the denial with reference to the clause in the regulation. One firm felt KUCP's stated cause for denial was unjustified. Firms that were denied certification were all aware of their right to appeal but elected to forgo the appeals process.

Some interviewees expressed an interest in seeing the application process simplified, especially when reapplying. Two firms felt that more time should be allotted for responding to KUCP's request for additional information. One firm who had completed a paper application expressed an interest in seeing the process go to an online format.

Stakeholder Groups

The following three stakeholder organizations were contacted for an interview to gain insight into how KUCP worked with external organizations and the small minority and women-owned business community.

- The Japanese American Society of Kentucky
- Louisville Black Chamber of Commerce
- Urban League of Lexington-Fayette County

The interview questions included:

1. *Is your organization and membership familiar with the state Unified Certification Program (UCP) and the certifying authorities?*
2. *Are any of your members currently certified in the UCP?*
3. *Are any of your members currently applying for DBE certification with the UCP?*
4. *Has your organization ever contacted KUCP regarding DBE certification requirements?*
5. *Has your organization referred firms interested in DBE certification to the state UCP?*
6. *Is your organization made aware of contracting/subcontracting opportunities on the agency's contracts? If so, how?*
7. *Does your organization include UCP information in its membership outreach literature?*
8. *Has your organization participated in any outreach activities organized by the state UCP?*
9. *Has the state UCP participated in any outreach activities organized by your organization?*
10. *What is your organization members' view of the state UCP?*
11. *Have members of your organization seen an increase in work as a result of becoming certified?*
12. *What is your agency's view of the effectiveness of the UCP?*
13. *Do you have any concern(s) about the UCP or the certification process?*
14. *Have any members of your organization ever worked on an FTA-assisted project for this grantee?*

Two stakeholders responded to the interview request. The organizations had little familiarity with KUCP and the federal requirements for the Unified Certification Program. The organizations could not confirm but believed that some of their members were certified by KUCP. The organizations not had received information from KUCP about the certification process for DBEs. The organizations could not provide a perspective on the effectiveness of the program due to a limited of awareness of the program. One organization expressed an interest in seeing KUCP provide them additional information on the certification process, contracting opportunities with the State and training for DBEs on how to get certified.

6. Findings and Advisory Comments

This chapter details the findings for each area pertinent to the DBE regulations (49 CFR Part 26) outlined in the Scope and Methodology section above. For each area, an overview of the relevant regulations and a discussion of the regulations as they apply to KUCP is provided below. Corrective actions and a timetable to correct deficiencies for each of the requirements and sub-requirements are also presented below.

For the purposes of this section, the term “UCP” refers to the certifying members and/or other certification committees/entities associated with the KYTC’s Unified Certification Program.

Findings are expressed in terms of “deficiency” or “no deficiency.” Findings of deficiency denote policies or practices that are contrary to the DBE regulations or matters for which FTA requires additional reporting to determine whether DBE compliance issues exist.

Findings of deficiency always require corrective action and/or additional reporting, and will always be expressed as:

- A statement concerning the policy or practice in question at the time of the review.
- A statement concerning the DBE requirements being violated or potentially being violated.
- A statement concerning the required corrective action to resolve the issue.

Advisory comments are statements detailing recommended changes to existing policies or practices. The recommendations are designed to ensure effective DBE programmatic practices or otherwise assist the entity in achieving or maintaining compliance.

6.1 Group Membership

A) Burden of Proof

Basic Requirement (49 CFR Part 26.61)

There is a rebuttable presumption that members of the designated groups identified in 26.67(a) are socially and economically disadvantaged. Individuals must submit a signed, notarized statement that they are a member of one of the groups in 26.67. Individuals who are not presumed to be members of these groups and individuals for which the presumption has been rebutted, have the burden of proving by a preponderance of the evidence that they are socially and economically disadvantaged. The UCP must ensure that its review process comports with this standard.

Discussion

During this compliance review, no deficiencies were found with this requirement. The KUCP Agreement, as well as KYTC’s DBE Program Plan dated November 2016, indicated that KUCP would follow the certification standards of Subpart D of Part 26 to determine the eligibility of firms to participate as DBEs in USDOT-assisted contracts. Specifically, the DBE

Program Plan stated that a firm must meet all certification eligibility standards, including group membership, and that decisions will be based on the facts as a whole. In addition, the DBE Program Plan stated that

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 E¹ concerning group membership or individual disadvantage, business size, ownership and control.

KUCP rebuttably presumed that members of the designated groups identified in 49 CFR Part 26.67(a) were socially and economically disadvantaged.

B) Additional Evidence of Group Membership

Basic Requirement (49 CFR Part 26.63)

If a UCP has a well-founded reason to question the individual's claim of membership in that group, it must require the individual to present additional evidence that he or she is a member of the group. The UCP must provide the individual with a written explanation of its reasons for questioning his or her group membership. The UCP must take special care to ensure that it does not impose a disproportionate burden on members of any particular designated group.

Discussion

During this compliance review, no deficiencies were found with this requirement.

KYTC's DBE Program Plan stated:

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 Office for Civil Rights and Small Business Development (OCR SBD) to collect additional information. In such cases, the OCR SBD must inform the applicant, in writing, of the reasons for seeking additional documentary evidence.

KUCP's certification staff indicated that if, after reviewing the applicant's signed and notarized statement of membership in a presumptively disadvantaged group and other available documentation, they had a well-founded reason to question the applicant's claim of membership, KYTC notified the applicant of the requirements to prove by preponderance of the evidence that he or she was a member of the group and requested the applicant to present additional evidence that he or she was a member of the group and an explanation of the reasons additional information is being requested.

A review of the applicant files indicated that the Transportation Cabinet had not identified a reason to question the applicants claim of membership.

¹ 49 CFR 26.61

6.2 Business Size

Basic Requirement (49 CFR Part 26.65)

A UCP must apply current Small Business Administration (SBA) business size standard(s) found in 13 CFR Part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts. A firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts over the firm's previous three fiscal years, in excess of \$23.98 million.

Discussion

During this compliance review no, deficiencies were found with this requirement.

The KUCP Agreement incorporated the requirements of 49 Part 26 by reference. KYTC's DBE Program Plan addressed the specific requirements contained in Part 26.65 regarding SBA business size standards in 13 CFR Part 121 and DBE size standards of \$23.98 million for evaluating eligibility for the DBE program. In addition, the files reviewed contained the most recent three years' business tax returns which were used to determine if the firm met the business size requirements.

6.3 Social and Economic Disadvantage

A) Presumption of Disadvantage

Basic Requirement (49 CFR Part 26.67 (a)(1))

There is a rebuttable presumption that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. The UCP must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

Discussion

During this compliance review, no deficiencies were found with this requirement.

As stated in the KUCP Agreement, the UCP required that all applicants use the model certification application provided by USDOT, and applicants were to submit a completed, signed, and notarized certification application package that included a statement that each presumptively disadvantaged owner was, in fact, socially and economically disadvantaged.

All the files reviewed contained the USDOT form and a signed and notarized statement that the presumptively disadvantaged owner was, in fact, socially and economically disadvantaged.

B) Personal Net Worth

Basic Requirement (49 CFR Part 26.67 (a)(2))

A UCP must require each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification to certify that he or she has a personal net worth that does not exceed \$1.32 million. All applicants must use the USDOT Personal Net Worth (PNW) form in Appendix G without change or revision. Moreover, the UCP must assess the PNW in the manner prescribed by 26.67.

Discussion

During this compliance review no deficiencies were found with this requirement.

As stated in KYTC's DBE Program Plan, applicants were required to submit a signed and notarized statement of personal net worth (PNW) and personal income tax returns for the past three years at the time the application for certification is made. In order to accurately determine an individual's personal net worth, the owners could, on a case-by-case basis, be required to provide additional financial information.

All files reviewed contained a PNW statement and personal income tax information that adequately substantiated the claims made on the PNW statement.

C) Rebutting the Presumption of Disadvantage

Basic Requirement (49 CFR Part 26.67)

A UCP may rebut the presumption of disadvantage if the PNW statement of wealth exceeds \$1.32 million or the applicant's assets would lead a reasonable person to believe the applicant is not economically disadvantaged.

Discussion

During this compliance review, no deficiencies were found with this requirement.

As stated in KYTC's DBE Program Plan,

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.

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.

All files reviewed indicated that KYTC had obtained certification from each individual owner of the applicant firm that he or she had a PNW that did not exceed \$1.32 million. The files also contained a signed and notarized PNW statement and personal income tax information that substantiated the claims on the PNW statement.

D) Individual Determinations of Social and Economic Disadvantage

Basic Requirement (49 CFR Part 26.67 (d))

Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged may apply for DBE certification. UCPs must 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.

Discussion

During this compliance review, no deficiencies were found with this requirement.

KYTC's DBE Program Plan stated that the KYTC will 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. Applicants have the burden of demonstrating by a preponderance of the evidence that they are socially and economically disadvantaged.

The applicant files reviewed and certified contained documentation, including partnership agreements and salaries, that the individuals whose ownership and control were relied upon for DBE certification were socially and economically disadvantaged. Several of files reviewed of denied or removed firms, were denied because evidence of ownership and control by the socially and economically disadvantaged person could not be substantiated.

6.4 Ownership

Basic Requirement (49 CFR Part 26.69)

In determining whether the socially and economically disadvantaged participants in a firm own the firm, UCPs must consider all the facts in the record, viewed as a whole. To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

Discussion

During this compliance review, no deficiencies were found with this requirement.

KYTC's DBE Program Plan defined ownership as 51 percent owned by socially and economically disadvantaged individuals. The Plan also detailed procedures for reviewing documented proof of contributions from all owners to acquire ownership in the applicant firm, including contributions of securities; capital; expertise; assets gained through divorce, inheritance, or death; marital assets; gifts; or transfers.

The applicant files reviewed contained documentation that the applicant firms that were certified were owned at least 51 percent by socially and economically disadvantaged individuals. The files included documentation of the contribution of capital, copies of securities or stocks, and gifting and/or transfer of assets for the applicant firm.

6.5 Control

Basic Requirement (49 CFR Part 26.71)

In determining whether socially and economically disadvantaged owners control a firm, UCPs must consider all the facts in the record, viewed as a whole. Only an independent business can be certified as DBE and the UCP must scrutinize relationships with non-DBE firms in areas such as personnel, facilities, equipment, financial and/or bonding support, and other resources.

Discussion

During this compliance review, no deficiencies were found with this requirement.

KYTC's DBE Program Plan defined independence in accordance with the regulations. Included in KYTC's definition of independence was an explanation of unallowed restrictions on control that limit the customary discretion of the socially and economically disadvantaged owner to operate the firm through corporate charter provisions, by-law provisions, contracts, or any other formal and informal devices. KYTC indicated that it scrutinized documentation provided with the application and through interviews with applicant staff to ensure firms were independent from any non-DBE firm and that firm owners possessed the power to direct or cause the direction of management and policies of the firm, including day-to-day and long-term decision making. In addition, KYTC indicated it scrutinized documentation and information during the on-site visit with the applicants' staff to ensure that socially and economically disadvantaged owners had an overall understanding of, and possessed the technical and managerial competence for, the type of business in which the firm engaged.

The applicant files reviewed contained documentation that the applicant firm was independent and controlled by socially and economically disadvantaged owners. The file documentation included the firm's bylaws, articles of incorporation, board minutes, resumes, salaries, certifications and licenses, and completed On-Site Review form.

6.6 Other Rules Affecting Certification

Basic Requirement (49 CFR Part 26.73)

UCPs must not consider commercially-useful function issues in any way in making decisions about whether to certify a firm as a DBE. The UCP may consider 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. DBE firms and firms seeking DBE certification shall cooperate fully with UCP requests for information relevant to the certification process.

Discussion

During this compliance review, no deficiencies were found with this requirement.

The KUCP Agreement and KYTC's DBE Program Plan incorporated by reference the regulations of 49 CFR Part 26. In the files reviewed, there was no documentation relating to commercially useful function issues or documentation that showed a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program. In addition, KUCP staff indicated that the certified applicant firms reviewed cooperated fully with KUCP's requests for information relevant to the certification process.

6.7 UCP Requirements

A) UCP Agreement

Basic Requirement (49 CFR Part 26.81)

All DOT recipients in a state must participate in a UCP. Recipients must sign an agreement establishing the UCP for the state and submit the agreement to the Secretary for approval.

Discussion

During this compliance review, deficiencies were found with this requirement.

The KUCP was established under an Agreement between KYTC and the recipients of USDOT funding and was approved by USDOT in 2002. Subsequent to this Agreement, the UCP revised the Agreement in 2012 and again in 2018. It was unclear if the 2012 Agreement had been approved by the USDOT. The 2018 Agreement stated in the opening paragraph that the Agreement was between KYTC and the recipients of USDOT FHWA funding and did not include all required DOT recipients as signatories on the Agreement.

The Review Team identified FTA recipients in Kentucky that were not included as signatories in the Agreement or otherwise identified during the site visit that should be included as UCP participants and signatories to the Agreement. These FTA recipients included the following:

- City of Ashland,
- City of Bowling Green,
- City of Owensboro, and the
- City of Henderson.

Despite not being identified, the website for the City of Henderson transit services, Henderson Area Rapid Transit (HART), indicated that HART participated in the Kentucky Transportation Cabinet's Uniform Certification Program. At the time of the site visit, the 2018 Agreement was pending signature by all UCP participants and USDOT approval.

KYTC was the only certifying partner of the UCP.

Corrective Actions and Schedule

Within 60 days of the issuance of the final report, KYUCP must submit to the FTA Office of Civil Rights:

- An updated Agreement that includes signatures of all KUCP participating agencies
- Documentation that the Agreement had been submitted to USDOT for approval

B) UCP Directory

Basic Requirement (49 CFR Part 23.31, 26.31, and 26.81(g))

UCPs must maintain a unified DBE directory containing, for all firms certified by the UCP, the information required by 26.31. The directory must include if the firm is an ACDBE, a DBE, or both. The listing shall include for each firm its address, phone number, and types of work the firm has been certified to perform as a DBE. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

Discussion

During this compliance review, no deficiencies were found with this requirement. Advisory comments, however, were made regarding this requirement.

KUCP maintained an online directory of all firms certified by the KUCP that included all of the information required by 49 CFR Part 26.31. The DBE Program Plan stated that KYTC would update the directory monthly. However, KYTC updated its directory in “real time” as firm information was added, changed, or removed.

In addition, the KUCP Agreement and DBE Program Plan stated:

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.

However, during the review, a link to the directory was not found on several of the UCP partner websites, such as the Lexington Transit Authority (Lextran) and the Transit Authority of Northern Kentucky (TANK), as stipulated in the 2012 UCP Agreement.

Advisory Comment

KUCP was advised to follow its written procedures and ensure that all UCP Partners have a link to the online DBE directory on the KYTC website. KUCP was also advised to consider developing Standard Operating Procedures (SOPs) for maintaining its DBE directory, to include a description of who is responsible for updating the directory, what events would trigger an update, and the timeframe for making the updates, (e.g., within 5 or 7 business days of the change).

6.8 UCP Procedures

A) Uniform Application

Basic Requirement (49 CFR Part 26.83 (c)(2))

UCPs must use the application form provided in Appendix F of the regulations without change or revision. However, the UCP may provide in its DBE program, with the approval of the concerned operating administration, for supplementing the form by requesting additional information not inconsistent with the DBE regulations.

Discussion

During this compliance review, no deficiencies were found with this requirement. An advisory comment, however, was made regarding this requirement.

KUCP used the current USDOT Uniform Certification Application provided in Appendix F of 49 CFR Part 26. The application form and instructions were available for download from the KYTC website. Applicants could also apply directly online. The online application was consistent with the application available for download.

Neither KYTC's DBE Program Plan nor the KUCP Agreement addressed the requirement to use the current USDOT Uniform Certification Application.

Advisory Comment

KYTC was advised to update its DBE Program Plan and KUCP Agreement to include the requirement to use the current USDOT Uniform Certification Application.

B) On-Site Visits

Basic Requirement (49 CFR Part 26.83(c)(1))

UCPs must perform an on-site visit to the offices of the firm. The UCP must interview the principal officers of the firm and review their resumes and/or work histories. The UCP must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in the UCP's jurisdiction or local area.

Discussion

During this compliance review, no deficiencies were found with this requirement.

The certification procedures contained in the DBE Program Plan stated:

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 certifying staff utilized the *KYTC: Small Business Development Branch DBE Program On-Site Review Form* to guide and document the on-site review of the applicant firm. Certifying staff indicated they would perform on-site visits to job sites if there are such sites on which the firm is working at the time of application. The certification procedures also stated that certifying staff may also perform periodic on-site reviews through its on-going monitoring of certified DBE firms doing work with KYTC or upon receipt of a third-party complaint concerning the eligibility of any firm certified by the KUCP.

C) 30-Day Notification

Basic Requirement (49 CFR Part 26.83(l))

The UCP must advise each applicant within 30 days from receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

Discussion

During this compliance review, no deficiencies were found with this requirement. An advisory comment, however, was made regarding the requirement.

The certification procedures contained in the DBE Program Plan did not include a requirement to send a notice to the applicant within 30-days of receipt of the application. However, during the site visit, the certification staff indicated that they were sending notices/letters within 30-days as a matter of practice. All applicant files reviewed included a notice or letter to the applicant within 30 days (usually within 7 days) indicating whether the application was complete and suitable for evaluation, and if not, what additional information or action was required.

Advisory Comment

KYTC was advised to address the requirement in its certification procedures to send a 30-day notice to the applicant firm confirming receipt of the application and indicating whether the application was complete and suitable for evaluation, or if not, what additional information or actions were required.

D) 90-Day Determinations

Basic Requirement (49 CFR Part 26.83 (k))

The UCP makes decisions on applications for certification within 90 days of receiving from the applicant firm all information required under the DBE regulations. The UCP may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension.

Discussion

During this compliance review, no deficiencies were found with this requirement.

KYTC's DBE Program Plan stated:

The Cabinet shall determine the eligibility of firms applying for DBE certification within 90 days receipt of a signed, notarized and 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.

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.

All applicant files reviewed during the site visit included documentation confirming KUCP made certification decisions within 90 days of receiving a completed UCP certification application in accordance with the regulations. During the three-year period from 2016-2018 most certification decisions were made within 60 days.

E) Annual Updates

Basic Requirement (49 CFR Part 26.83(h)-(j))

Once the UCP has certified a DBE, it shall remain certified until and unless the UCP removes its certification. The UCP may not require DBEs to reapply for certification or undergo a recertification process. The certified DBE must provide to the UCP, every year on the anniversary of the date of its certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths.

Discussion

During this compliance review, no deficiencies were found with this requirement.

KYTC's DBE Program plan stated:

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.

All active applicant files reviewed during the site visit included a copy of a notice to the firm regarding the requirement to submit an affidavit if the firm intends to continue its certification. In addition, applicant files contained annual No Change Affidavits and related documentation submitted by DBEs in accordance with the regulations. KYTC processed over 200 No Change Affidavits each year.

6.9 Interstate Certification

Basic Requirement (49 CFR Part 26.85)

This section applies with respect to any firm that is currently certified in its home state. When a firm currently certified in its home State ("State A") applies to another State ("State B") for DBE certification, State B may, at its discretion, accept State A's certification and certify the firm, without further procedures. In any situation in which State B chooses not to accept State A's certification of a firm, as the applicant firm, you must provide the information in paragraphs (c)(1) through (4) of Part 26.85 to State B.

Discussion

During this compliance review, no deficiencies were found with this requirement. An advisory comment, however, was made regarding the requirement.

The KUCP Agreement stated that KUCP required out-of-state firms applying for certification in Kentucky to first be certified as a DBE by their home state. Onsite reviews from out-of-state applicants were accepted from the home state UCP. KUCP coordinated with the interstate applicant firm's home state UCP to obtain any additional information needed to make certification decisions. Interstate certification decisions were rendered within 60 days of receipt of all required documentation. All other aspects of the certification process for out-of-state firms followed the KYTC DBE Program Plan, 49 CFR Parts 23 and 26, and 600 KAR 4:010.

Interstate certification files reviewed during the site visit contained a copy of the complete home state file, including the Uniform Certification Application, the supporting documentation and the site visit from the applicant's home state. Documentation of the initial request for the applicant file, sent to the home state, were included in the files along with any request for additional documentation.

KYTC had a Reciprocity Agreement with the Indiana Department of Transportation (IDOT), which allowed each state to use the other state's certified DBEs to meet their own DOT DBE goals. While the reciprocity agreement was presented at meetings to all of the KYTC and INDOT recipients/partners, such as airports and transit authorities, the Agreement itself appeared to be limited to FHWA-funded projects administered by KYTC and INDOT, the states' primary transportation agencies. The Agreement stated under item 4. Reciprocity: The

Parties agree that Indiana and Kentucky DBEs certified in their respective home states shall be eligible to work as a certified DBE contractor or subcontractor on any job let by the non-home state's primary transportation agency without seeking further DBE certification on federally funded transportation projects.

Advisory Comment

KYTC was advised to include all recipients of USDOT funding as participants in the Reciprocity Agreement with INDOT, if that is the intent of the Agreement.

6.10 Denials of Certification

A) Initial Request Denials

Basic Requirement (49 CFR Part 26.86)

When a UCP denies a request by a firm that is not currently certified to be certified as a DBE, the UCP must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that support each reason for the denial. When a firm is denied certification, the UCP must establish a timeframe of no more than 12 months before the firm may reapply for certification.

Discussion

During this compliance review, deficiencies were found with this requirement.

KYTC's DBE Program Plan details procedures for DBE certification denials. A formal notice of denial setting forth the reason for the denial was sent to the applicant. The denial could be appealed by the applicant firm within 30 days of the receipt of the notice. In addition, KYTC implemented new legislation in June 2018 to allow applicants to reapply within six months of denial, as opposed to 12 months as previously stated in the DBE Program Plan. Accordingly, the DBE Program Plan was revised to state the following:

An applicant firm shall not reapply for certification for six (6) months 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 six (6) months 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.

KYTC provided a list of applicants denied within the previous three years. The files for these applicants included a denial letter that explained the reason for the denial, cited the specific regulation, referenced the evidence in the record that supported the reason for the denial, and advised the firm owner of his or her right to appeal and how to appeal. Letters of denial or did not notified applicants of the timeframe before they could reapply.

Corrective Actions and Schedule

Within 60 days of the issuance of the final report, KYUCP must submit to the FTA Office of Civil Rights:

- Confirmation that applicant firms denied certification are notified of their ability to reapply for certification after six months (e.g., standard denial letter template that includes the 6-month reapplication notice).
- Updated procedures that include notifying an applicant firm of the ability to reapply within six months of certification denial or removal.

B) Removing Existing Certification

Basic Requirement (49 CFR Part 26.87)

If a UCP determines that there is reasonable cause to believe that the firm is ineligible, the UCP must provide written notice to the firm that the UCP proposes to find the firm ineligible, setting forth the reasons for the proposed determination. When the UCP notifies the firm that there is reasonable cause to remove its certification, the UCP must allow the firm an opportunity for an informal hearing. Following the final decision, the UCP must provide written notice of the final decision and a rationale for that decision.

Discussion

During this compliance review, no deficiencies were found with this requirement.

The KUCP Agreement and KYTC's DBE Program Plan referenced and incorporated the requirements of 49 Part 26.87. In accordance with the Plan, at the time of the preliminary determination that removal proceedings may be appropriate and at least forty-five days prior to submittal of the information supporting removal to the KUCP Certification Committee, the KUCP issued notice to the firm of the intent to remove the firm. A firm that received a Notice of Intent to Remove could request an informal hearing before the Certification Committee to present information to support continued participation in the DBE Program. According to KYTC's procedures, the effective date of removal was the date the notice of removal is received by or attempted to be delivered to the firm, provided the firm does not appeal the removal.

KYTC provided a list of applicants decertified within the previous three years. The files for the firms included a Notice of Intent to Remove consistent with KYTC's procedures.

C) Mandatory Summary Suspension

Basic Requirement (49 CFR 26.88(a))

The UCP must immediately suspend a DBE's certification without adhering to the requirements in §26.87(d) when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.

Discussion

During this compliance review, no deficiencies were found with this requirement. An advisory comment, however, is made regarding this requirement.

KUCP certification procedures did not specifically address the requirement for mandatory summary suspension, as described in 49 CFR 26.88(a). However, based on discussions with certification staff during the site visit, if KUCP became aware an owner whose ownership and control of the firm were necessary to a firm's certification died or was incarcerated, then KUCP would immediately suspend the DBE's certification without adhering to the requirements in §26.87(d).

Advisory Comment

KUCP was advised to update its certification procedures to include a requirement to immediately suspend a DBE's certification without adhering to the requirements in §26.87(d) when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.

D) Optional Summary Suspension

Basic Requirement (49 CFR 26.88(b))

The UCP may immediately suspend a DBE's certification without adhering to the requirements in §26.87(d) when there is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified, or when the DBE fails to notify the recipient or UCP in writing of any material change in circumstances as required by §26.83(i) of this part or fails to timely file an affidavit of no change under §26.83(j).

Discussion

During this compliance review, no deficiencies were found with this requirement.

KUCP's certification staff were aware of the optional summary suspension regulation at 49 CFR 26.88(b), however, KUCP's certification procedures did not state that KUCP would immediately suspend a DBE, as allowed. Instead, KUCP's certification procedures stated the following for 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

KYTC indicated it did not have reason to suspend a DBE firm in the last three years.

E) Appeals to USDOT

Basic Requirement (*49 CFR Part 26.89*)

When the Department receives an appeal and requests a copy of the administrative record, the UCP must provide the administrative record, including a hearing transcript, within 20 days of the Department's request.

Discussion

During this compliance review, no deficiencies were found with this requirement.

The KUCP Agreement and KYTC's DBE Program Plan incorporated the regulations of 49 CFR Part 26.89. According to its DBE Program Plan, firms could appeal adverse decisions within 90 days of KUCP's notice of determination to USDOT. Within 20 days of receipt of notification from the USDOT that an appeal has been filed, KYTC provided USDOT with a complete record of all administrative proceedings including all supporting and requested documentation, files and application forms.

In the files reviewed, there was a denial letter informing the firm of the reason for denial and advising the firm that the denial could be appealed to the USDOT.

6.11 Compliance and Enforcement

A) DBE Enforcement Actions

Basic Requirement (*49 CFR Part 26.107*)

If a firm does not meet the eligibility criteria of subpart D and attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against the firm under 49 CFR Part 29.

Discussion

During this compliance review, no deficiencies were found with this requirement.

KYTC's DBE Program Plan referenced the regulations in 49 CFR Part 26.107 and incorporated the requirements regarding what enforcement actions apply to firms participating in the DBE program.

KYTC indicated it did not have reason to debar or suspend a DBE firm in the last three years.

B) Confidentiality

Basic Requirement (49 CFR Part 26.83(g) and 26.109 (a))

Notwithstanding any provision of Federal or state law, UCPs must not release 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 DBE certification and supporting documentation.

Discussion

During this compliance review, no deficiencies were found with this requirement.

The KUCP Agreement stated each recipient under the 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).

In addition, KYTC's DBE Program Plan stated the following:

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

C) Cooperation

Basic Requirement (49 CFR Part 26.109 (c))

All participants in the Department's DBE program are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information (49 CFR Part 26.73 (c.)). DBE firms and firms seeking DBE certification shall cooperate fully with the UCP's requests (and DOT requests) for information relevant to the

certification process. Failure or refusal to provide such information is grounds for a denial or removal of certification.

Discussion

During this compliance review, no deficiencies were found with this requirement.

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

In addition, the Compliance and Enforcement of KYTC's DBE Program Plan stated

The Commonwealth of Kentucky acknowledges that the Cabinet will 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 or FAA 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.

6.12 Record Keeping

Basic Requirement (49 CFR 26.11(d))

The UCP must maintain records documenting a firm's compliance with the DBE requirements. At a minimum, the UCP must keep a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews. Other certification or compliance related records must be retained for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the recipient's financial assistance agreement, whichever is longer.

Discussion

During this compliance review, no deficiencies were found with this requirement.

KYTC's DBE Plan incorporated the requirements contained in Part 26.11 regarding maintaining records documenting firms' compliance with the DBE requirements, including monthly, quarterly, extraordinary and annual reports.

A review of 15 certification files, including files of firms certified within the past year, firms certified for longer than one year, firms who had been denied, firms that had been decertified, and firms applying from out of state, revealed that KUCP maintained materially complete certification records, as required.

6.13 Submitting Reports to USDOT

Basic Requirement (*49 CFR 26.11(e)*)

Each year, the State department of transportation in each UCP must report to USDOT the number of certified DBEs in its DBE Directory that are minority female, non-minority female, and male.

Discussion

During this compliance review, no deficiencies were found with this requirement.

KYTC provided documentation confirming it submitted the required annual reports on the number of certified DBEs owned by minority females, non-minority females, and males for FY2016, FY2017, and FY2018.

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7. Summary of Files Review and Findings

While on-site, the review team requested and reviewed at least two of each type of file listed below. (e.g., two certification files for DBEs that have been certified for less than one year, two certification files for DBEs that have been certified for more than one year, two certification files for firms that have been removed or decertified, and two certification files for firms that were denied DBE certification. The results of the file review are reported in the following tables.

File Type	Firm Name	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification <1 year	Paramount Safety	Y	Y	Y	n/a	Y	N	n/a	n/a
		Cert. Decision	SBA Size	Inter. Cert.	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N	Y	Y	n/a	n/a	n/a
						Concession Business	ACDBE Size Standards	PNW Excl.	ACDBE Dir.
File Type	Firm Name	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Existing Certification >1 year	Benson Group, LLC	Y	Y	Y	Y	Y	N	n/a	n/a
		Cert. Decision	SBA Size	Inter. Cert.	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N	Y	Y	n/a	n/a	n/a
File Type	Firm Name	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal/Decertification	SP Drilling	Y	Y	Y	Y	Y	N	n/a	n/a
		Cert. Decision	SBA Size	Inter. Cert.	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	Y	Y	Y	Y	Y	Y
File Type	Firm Name	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification Denial	Charlies Electrical	Y	Y	Y	n/a	Y	N	Y	N
		Cert. Decision	SBA Size	Inter. Cert.	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N	Y	Y	n/a	n/a	Y

File Type	Firm Name	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification <1 year	Inspired Strategies, LLC	Y	Y	Y	n/a	Y	n/a	n/a	n/a
		Cert. Decision	SBA Size	Inter. Cert.	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	n	Y	Y	n/a	n/a	n/a
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal/Decertification	All Painting	Y	Y	Y	N	Y	N	n/a	n/a
		Cert. Decision	SBA Size	Inter. Cert.	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N	Y	Y	y	Y	Y
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification Denial	DC Management	Y	Y	Y	n/a	Y	N	Y	N
		Cert. Decision	SBA Size	Inter. Cert.	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	Y	Y	Y	n/a	n/a	n/a
File Type	Firm Name	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Interstate	Five23 Group, Inc.	Y	Y	Y	Y	y	n/a	n/a	n/a
		Cert. Decision	SBA Size	Inter. Cert.	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	Y	Y	y	n/a	n/a	n/a
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Interstate	Abator Information Systems, Inc.	Y	Y	Y	Y	y	n/a	n/a	n/a
		Cert. Decision	SBA Size	Inter. Cert.	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	Y	Y	Y	n/a	n/a	n/a

		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification Denial	Tinsely Family Concessions, Inc.	Y	Y	Y	n/a	Y	N	Y	Y
		Cert. Decision	SBA Size	Inter. Cert.	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	Y	Y	Y	n/a	Y	Y

Requirement of 49 CFR Part 26	Ref.	Site Visit Finding	Deficiencies	Corrective Action(s)	Response Days/Date
1. Burden of Proof	26.61	ND			
2. Group Membership	26.63	ND			
3. Business Size	26.65	ND			
4. Social/Economic Disadvantage		ND			
A) Presumption of Disadvantage	26.67				
B) Personal Net Worth	26.67				
C) Individual Determination	26.67				
5. Ownership	26.69	ND			
6. Control	26.71	ND			
7. Other Certification Rules	26.73	ND			
8. UCP Requirements					
A) UCP Agreement	26.81	D	The 2018 Agreement did not specifically identify the UCP partners and was pending signature by all UCP partners and approval by USDOT.	KYUCP must submit to the FTA Office of Civil Rights: <ul style="list-style-type: none"> An updated Agreement that includes signatures of all KUCP participating agencies Documentation that the Agreement had been submitted to USDOT for approval 	Within 60 days of the issuance of the final report.
B) UCP Directory	26.31	AC			

Requirement of 49 CFR Part 26	Ref.	Site Visit Finding	Deficiencies	Corrective Action(s)	Response Days/Date
9. UCP Procedures					
A) On-Site Visits	26.83	ND			
B) Uniform Application	26.83	ND			
C) 30-Day Notification	26.83	AC			
D) 90-Day Processing	26.83	ND			
E) Annual Updates	26.83	ND			
10. Interstate Certification	26.85	AC			
11. Denials					
A) Initial Request	26.86	D	KYTC's Notice of Denials and removal letters did not notified applicants of the six- month timeframe before they could reapply.	KYUCP must submit to the FTA Office of Civil Rights: <ul style="list-style-type: none"> • Confirmation that applicant firms denied certification are notified of their ability to reapply for certification after six months (e.g., standard denial letter template that includes the 6-month reapplication notice). • Updated procedures that include notifying an applicant firm of the ability to reapply within six months of certification denial or removal 	Within 60 days of the issuance of the final report
B) Remove Existing	26.87	ND			
C) Mandatory Summary Suspension	26.88(a)	AC			
D) Optional Summary Suspension	26.88(b)	ND			
C) Appeals	26.89	ND			
12. Compliance/and Enforcement					
A) DBE Enforcement Actions	26.107	ND			

Requirement of 49 CFR Part 26	Ref.	Site Visit Finding	Deficiencies	Corrective Action(s)	Response Days/Date
B) Confidentiality	26.109	ND			
C) Cooperation	26.109	ND			
13. Record Keeping	26.11(d)	ND			
14. Submitting Report to USDOT	26.11€	ND			

Findings at the time of the site visit: ND = No Deficiencies Found; D = Deficiency; NA = Not Applicable;
AC = Advisory Comment

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ATTACHMENT A – FTA NOTIFICATION LETTER TO KYTC



U.S. Department
Of Transportation
**Federal Transit
Administration**

Headquarters

East Building, 5th Floor, TCR
1200 New Jersey Ave., SE
Washington, D.C. 20590

November 1, 2018

Greg Thomas
Secretary
Kentucky Transportation Cabinet
200 Mero Street
Frankfort, KY 40622

Dear Mr. Thomas:

The Federal Transit Administration (FTA) Office of Civil Rights is responsible for ensuring compliance with 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs" by its grant recipients and subrecipients. As part of its ongoing oversight efforts, the FTA Office of Civil Rights conducts a number of on-site DBE compliance reviews of these grant recipients. For this reason, the Kentucky Transportation Cabinet (KTC) has been selected for a review of its Unified Certification Program (UCP) to take place January 8-10, 2019.

The purpose of this review will be to determine whether KTC is honoring its commitment, as represented by certification to FTA, to comply with the all applicable provisions of 49 CFR Part 26.

The review process includes data collection before the on-site visit, an opening conference, an on-site review of DBE certification procedures (including, but not limited to discussions to clarify items previously reviewed, work-site visits, and interviews with staff), interviews with UCP certifying and non-certifying members, DBE applicants, DBE certified firms, firms that were denied DBE certification, and other stakeholders, on-site visits to selected DBE offices and an exit conference. The reviewers will complete the on-site portion of the review within a three-day period. FTA has engaged the services of The DMP Group, LLC (DMP) of Washington, D.C. to conduct this compliance review. The DMP and FTA representatives will participate in the opening and exit conferences, with FTA participating in person or by telephone.

We request your attendance at an opening conference scheduled for **Tuesday, January 8, 2019 at 9:00 a.m. EST**, to introduce the DMP team and FTA representatives to KTC. Attendees should include you and other key staff. During the opening conference, the review team members will present an overview of the on-site activities.

Because review team members will spend considerable time on site during the week, please provide them with temporary identification and a workspace within or near your offices for the duration of their visit. The review team will need adequate working space and the use of privately controlled offices with internet access to conduct interviews and review documents. Please let us know if you will designate a member of your staff to serve as KTC's liaison with

the review team and to coordinate the on-site review and address questions that may arise during the visit.

So that we may properly prepare for the site visit, we request that you provide the information described in Enclosure 1, which consists of items that the review team must receive within 21 days of the date of this letter. Please forward electronic (softcopy) versions of these materials to the following contact person, who is available to discuss material transmission options with you:

Donald G. Lucas
The DMP Group, LLC
2233 Wisconsin Avenue NW, Suite 228
(202) 726-2630
donald.lucas@thedmpgroup.com

We request the exit conference be scheduled for **Thursday, January 10, 2019 at 11:00 a.m. EST**, to afford an opportunity for the reviewers to discuss their observations with you and your agency. We request that you and other key staff attend the exit conference.

The FTA Office of Civil Rights will make findings and will provide a Draft Report. You will have an opportunity to correct any factual inconsistencies before FTA finalizes the report. The Draft and Final Report, when issued to KTC, will be considered public documents subject to release under the Freedom of Information Act, upon request.

KTC representatives are welcome to accompany the review team during the on-site activities, if you so choose. If you have any questions or concerns before the opening conference, please contact me at 202-366-1671, or via e-mail at *john.day@dot.gov*.

Thank you in advance for your assistance and cooperation as we undertake this process. We look forward to working with your staff.

Sincerely,



John Day
Program Manager for Policy
and Technical Assistance

cc: Yvette G. Taylor, Regional Administrator, FTA Region IV
Dee Foster, Regional Civil Rights Officer, FTA Region IV
Jamir A. Davis, Executive Director, Office of Civil Rights, KTC
Eric Perez, Executive Director, Office of Transportation Delivery, KTC

Kentucky Transportation Cabinet
Unified Certification Program Compliance Review

Enclosure 1

You must submit the following information to the DMP Group, LLC contact person within 21 calendar days from the date of this letter.

1. Current DBE Program Plan (which should include KTC's organization chart).
2. Current Memorandum of Understanding or similar documents (i.e., current Unified Certification Program Agreement) forming the Unified Certification Program (UCP), which should be signed by all members of the UCP.
3. A narrative that describes the KTC individuals and resources dedicated to implementing the DBE UCP requirements, handling DBE UCP inquiries, and educating KTC staff on DBE UCP. The narrative should include an organization chart showing KTC's DBE UCP staff and a budget showing funds allocated to the DBE UCP.
4. Agreement between the State of Kentucky and the State of Indiana describing the terms of the Indiana-Kentucky DBE Exchange, and information on the current status of the Exchange including: Kentucky DBE participation on Indiana FTA-assisted projects, Indiana DBE participation on Kentucky FTA-assisted projects, a description of how DBE participation under the Exchange is monitored and counted toward each States' DBE goal attainment.
5. The certification criteria/guidelines used in determining DBE eligibility.
6. Standard Operating Procedures or similar documents that explain the DBE certification process and are uniformly applied to all UCP certifying entities, including copies of the application used during certification, annual affidavits/updates, and personal net worth, etc.
7. Documents or forms used during DBE certification site visits.
8. Written procedures for updating the UCP DBE Directory.
9. List of all firms certified, denied, and decertified or removed by the UCP in FYs 2016-current. The list must include:
 - a) the firm's city and state
 - b) the firm's ethnicity
 - c) the firm's gender
 - d) the date of site visit
 - e) the reasons for denial and/or decertification (e.g., size, PNW, control, etc.)
 - f) whether the denial decision was appealed to the UCP or USDOT
 - g) The result of the appeal.

Kentucky Transportation Cabinet
Unified Certification Program Compliance Review

10. Explanation of KTC's UCP appeals process(es). List the individuals involved in the appeals process and how they are selected.
11. Any third-party complaints or lawsuits regarding DBE firms certified by KTC and actions taken to resolve the matter.
12. Any Freedom of Information or similar request for certification information.
13. Any enforcement action against a DBE firm (e.g., suspension, debarment, etc.) regarding certification.
14. The UCP ethnicity and gender breakdown required by 49 C.F.R. 26.11(e) for the last two years.
15. Other pertinent information determined by KTC staff to further demonstrate its UCP operations and procedures.

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ATTACHMENT B – KYTC’S RESPONSE TO DRAFT REPORT

From: Sizemore, Niki N (KYTC) [REDACTED] **On Behalf Of** Thomas, Greg (KYTC)
Sent: Tuesday, April 30, 2019 3:54 PM
To: Day, John (FTA) [REDACTED]
Subject: RE: Draft Report: Kentucky Transportation Cabinet UCP Review

Mr. Day,

After careful review of the draft report, we only found one or two factual errors. The figures in the FFY2018 FTA Formula Funding Table at the bottom of page 10 of the report, needs to be revised. See the correct funding table below. We also found what seems to be another factual error. The report states that the "Asian American Chamber of Commerce of St. Louis" was contacted during the review to see if they were familiar with the KUCP. This seems like a factual error, because the city of St. Louis is nearly 300 miles away and would not be familiar with the KUCP. Those are the only two issues that we noticed.

Original FFY 2018 FTA Formula Funding Table↓

FTA Formula Program	Amount
Section 5311	\$19,820,082
Section 5303 and 5304	\$631,427
Section 5309	\$1,716,298
Section 5310 (rural)	\$3,600,000
Section 5310 (urban)	\$253,749
Total	\$26,021,556

Revised FFY 2018 FTA Formula Funding Table ↓

FTA Formula Program	Amount
Section 5311	\$19,820,082
Section 5303 and 5304	\$915,987
Section 5339	\$3,500,000
Section 5310 (rural)	\$1,716,298
Section 5310 (small urban)	\$420,279
Section 5310 (Lex. Urban, 55%)	\$128,039
Total	\$26,372,646

We look forward to the final report and are ready to submit our corrective actions as soon as it is issued. It has been a pleasure working with your team throughout the review. Please let us know if you have any questions. Thank you.

Greg Thomas



U.S. Department
of Transportation
**Federal Transit
Administration**

Headquarters

5th Floor – East Bldg., TCR
1200 New Jersey Avenue, SE
Washington, DC 20590

May 23, 2019

Greg Thomas
Secretary
Kentucky Transportation Cabinet
200 Mero Street
Frankfort, KY 40622

RE: Unified Certification Program (UCP) Compliance Review Final Report

Dear Secretary Thomas:

This letter concerns the Federal Transit Administration's (FTA) Disadvantaged Business Enterprise (DBE) Review of the Kentucky Transportation Cabinet's (KYTC) Unified Certification Program conducted from January 8-10, 2019. Enclosed is a copy of the Final Report, which will be posted on FTA's website on our DBE page. As of the date of this letter, the Final Report is a public document and is subject to dissemination under the Freedom of Information Act of 1974.

FTA's Office of Civil Rights is responsible for ensuring compliance with 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs" by its grant recipients and subrecipients. As part of our ongoing oversight efforts, FTA conducts a number of onsite compliance reviews to ensure compliance with the applicable provisions of 49 CFR Part 26. FTA utilizes the findings from these reviews to provide technical assistance to transit agencies in order to achieve compliance with 49 CFR Part 26.

Unless otherwise noted, all corrective actions identified in the Final Report must be undertaken within 60 days of the date of this letter. Once we have reviewed your submissions, we will request either clarification or additional corrective action, or will close out the finding if your response sufficiently addresses the DBE requirements. Please submit your responses to me at john.day@dot.gov.

We appreciate the cooperation and assistance that you and your staff have provided us during this review, and we are confident KYTC will take steps to correct the deficiencies. If you have any questions about this matter, please contact Ed Birce at 202-366-1943 or via email at guljed.birce@dot.gov.

Sincerely,

John Day
Program Manager for Policy
and Technical Assistance

cc: Yvette G. Taylor, Regional Administrator, FTA Region 4
Dee Foster, Regional Civil Rights Officer, FTA Region 4
Jamir A. Davis, Executive Director, Office of Civil Rights, KYTC
Eric Perez, Executive Director, Office of Transportation Delivery, KYTC