

**AGREEMENT
BY AND BETWEEN
THE INDIANA DEPARTMENT OF TRANSPORTATION
AND
THE KENTUCKY TRANSPORTATION CABINET
CONCERNING
RECIPROCITY OF DBE CERTIFICATIONS**

Indiana EDS/SCM No. A249-21-ON210114

This AGREEMENT, made and entered into by and between the STATE OF INDIANA, acting by and through the INDIANA DEPARTMENT OF TRANSPORTATION (“INDOT”), and the COMMONWEALTH OF KENTUCKY, acting by and through the KENTUCKY TRANSPORTATION CABINET (“KYTC”), is executed pursuant to the terms and conditions set forth herein and shall be effective as of the date of approval by the Office of the Indiana Attorney General (“Effective Date”). INDOT and KYTC are jointly referred to herein as the “Parties” and each individually as a “Party.”

WITNESSETH

WHEREAS, INDOT is the agency responsible for Indiana’s certification of disadvantaged business enterprise (“DBE”) firms and the operation of Indiana’s DBE Program under the Unified Certification Program (“UCP”) in accordance with the requirements of 49 CFR Part 26 in the State of Indiana, and KYTC is the agency responsible for Kentucky’s certification of DBE firms and the operation of Kentucky’s DBE Program under the UCP in accordance with the requirements of 49 CFR Part 26 in the Commonwealth of Kentucky; and

WHEREAS, INDOT and KYTC agree to help remove any potential barriers to the participation of eligible certified DBE firms by establishing a Reciprocal DBE Certification Program; and

WHEREAS, pursuant to 49 CFR §26.81(e) and (f), INDOT and KYTC may, at their discretion, accept the certification of any other UCP, enter into written reciprocity agreements with other UCPs, or grant reciprocity to another jurisdiction’s certification decisions; and

WHEREAS, the Parties agree that reciprocal acceptance of certification of DBE firms in their respective states is mutually beneficial in their efforts to achieve the objectives of the

DBE Program as they are stated in 49 CFR §26.1, achieve each state's DBE participation goals, and to facilitate the completion of significant transportation projects.

NOW THEREFORE, in consideration of the promises and covenants herein contained and other good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, and intending to be legally bound, the Parties hereby agree as follows:

1. **Purpose.** The purpose of this Agreement is to:
 - a. Remove regulatory and administrative barriers which discourage participation by certified DBE firms in significant federally-funded transportation projects;
 - b. Increase opportunities for DBE firms;
 - c. Increase the utilization of certified DBE firms on federally-funded transportation infrastructure, construction, and maintenance projects in the State of Indiana and the Commonwealth of Kentucky by allowing unimpeded certification reciprocity between the states' primary transportation agencies;
 - d. Work cooperatively with sister recipient agencies to assist in the achievement of their respective DBE participation goals; and
 - e. Reduce the cost of construction projects by increasing price competition amongst contractors.
2. **Term.** This Agreement shall be effective July 1, 2021 and shall terminate June 30, 2025, unless terminated early as provided herein. This Agreement may be amended in writing at the pleasure of the Parties. Following the completion of the initial four-year term of this Agreement, the Parties may, by mutual written agreement, extend the term for a period mutually agreed upon by the Parties, but not to exceed four total years.
3. **Early Termination.** This Agreement may be terminated by either Party for any reason upon 45 days written notice to the other Party. Such notice shall be delivered by certified mail.

If a DBE firm is utilizing this Agreement in its non-home state and is in the process of providing services on any project when this Agreement is terminated or expires under its own terms, the DBE firm shall be allowed to continue to work in its non-home state until the project(s) on which is it providing services ends.

4. Reciprocity.

- a. 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.
- b. Each Party to this Agreement shall retain primacy over the administration of its DBE certification decisions. Each Party to this Agreement shall have the authority to cite, discipline, or remove DBEs working in the state where the project is executed in accordance with its required performance standards. As out-of-state DBEs will not be certified other than in their home state, only the home state may remove the firm's DBE certification. DBEs operating under this Agreement are subject to all policies, statutes, and regulations, including the DBE regulations under 49 CFR Part 26, governing the execution of construction contracts of the state in which the work occurs.
- c. Each Party retains the right to make all final determinations concerning the DBE eligibility of firms in its own state.
- d. This Agreement does not grant interstate certification to DBEs. DBEs working under this Agreement will only be listed in the DBE Directory of their home state.
- e. Each Party retains the right to consider a bidder's use of the reciprocity exchange as one component of a thorough good faith efforts analysis.
- f. This Agreement does not amend, alter, or affect the power of either Party to remove the certification of a DBE in accordance with 49 CFR §26.87. Further, within its own discretion, each Party to this Agreement shall be responsible for pursuing necessary discipline, sanctions, or removals (as well as any resulting administrative proceedings or litigation) against DBEs certified by that Party. Each Party shall bear all costs associated with such proceedings that occur in regard to DBEs certified by that Party.
- g. If a DBE certified in both Indiana and Kentucky has its certification removed for cause by one of the Parties, the DBE may not use this Agreement to retain its eligibility to work as a certified DBE contractor or subcontractor in the state that removed its certification.

- 5. Notification.** The Parties each agree to notify the other monthly with a list of DBE firms involved in any completed investigation, as well as any DBE firm that has been

suspended or removed from the home state's certification list. The Parties also agree to notify the other as soon as practicable when a DBE is subject to a complaint pursuant to 49 CFR §26.103 or 49 CFR §26.87 and when a DBE firm has been suspended pursuant to 49 CFR §26.88.

6. **Procurement.** Certified DBEs seeking work under this Agreement must comply with the procurement and bidding requirements of the state in which the project is executed.
7. **Prequalification.** The Parties agree and acknowledge that issues related to prequalification are a separate matter not addressed by this Agreement. However, each DBE firm must be prequalified pursuant to the requirements of the state where a project is located.
8. **Compliance.**
 - a. In addition to federal standards, DBEs must comply with all applicable local and state guidance, statutes, regulations, and policies applicable to the work performed in the state in which the project is executed. Sanctions for non-compliance shall be at the discretion of the agency in the state in which the work is executed.
 - b. DBEs shall comply with the policies and procedures of the state in which the project is executed. Work performed by DBEs shall be monitored in accordance with 49 CFR Part 26, Subpart F.
 - c. Each state shall have the authority to remove underperforming DBEs who fail to meet the state's regulatory performance standards from a project. For any project, a DBE may be removed from the project in accordance with the performance standards and requirements of each participating agency.
9. **Administration of Agreement.** The Parties recognize that the success of this Agreement is dependent upon cooperation and communication between the Parties. To facilitate the success of this Agreement, the Parties shall meet no less than bi-monthly at a predetermined date and time to be determined by the Parties.
 - a. The meeting shall be attended by representatives of each state's DBE Program with knowledge of the operation of the DBE Program and authorized to make decisions with regard to the administration of their respective DBE Programs;
 - b. Attendees must include the DBE liaisons or their designee;

- c. Attendees shall include those persons responsible for certification, monitoring, and communications;
 - d. Federal Highway Administration (“FHWA”) representatives shall be extended an invitation; and
 - e. The meeting agenda will be set by the DBE Liaisons with input for other attendees.
10. **Communication.** The Parties shall share all documents and any updates thereto, pertaining to the operation of its respective program that may impact implementation of this Agreement. At a minimum, the communication shall include:
- a. A monthly report listing DBEs utilizing the benefits of this Agreement;
 - b. State regulations supplementing 49 CFR Part 26;
 - c. Communications pertaining to issues related to potential decertification;
 - d. Updated DBE Program Directory, as soon as practicable, including names of DBE firms removed, suspended, decertified, and withdrawals;
 - e. All communications with representatives of FHWA regarding the execution and operation of this Agreement;
 - f. All information concerning an investigation of inadequate performance, wrongdoing, malfeasance, or other misconduct by a DBE working under this Agreement; and
 - g. The results of the routine monitoring of DBE performance.
11. **Notice to Parties.** The Parties agree the following, or their successors, are the designated persons for each Party:
- a. To INDOT:

Elizabeth Kiefner Crawford
Director, Economic Opportunity Division
100 North Senate Avenue, Suite N758 - Economic Opportunity
Indianapolis, Indiana 46204
Phone: (317) 650-1689
Email: ekiefner1@indot.in.gov

And with copy to:

Chief Legal Counsel and Deputy Commissioner
Indiana Department of Transportation
100 North Senate Avenue, Suite N758
Indianapolis, IN 46204
Phone: (317) 232-5012
E-Mail: hkennedy@indot.in.gov

b. To KYTC:

Melvin Bynes
Executive Director, Office for Civil Rights and Small Business Development
200 Mero Street, 6th Floor West
Frankfort, Kentucky 40622
Phone: (502) 564-3601
Email: melvin.bynes2@ky.gov

12. **Drafting.** No Party shall be deemed to be the primary drafter of this Agreement, and the terms of this Agreement shall not be construed against any Party as the drafter of this Agreement. Each Party is equally responsible for this Agreement's terms and conditions.
13. **Sovereignty.** The Parties have entered into this Agreement as sovereign entities and not as principal and agent or as a joint venture. Nothing herein shall be construed as consent by either state to suit in the courts of the other state, or waiver of that state's sovereign immunity or rights under the Eleventh Article of Amendment to the Constitution of the United States.
14. **Third Party Claims.** This Agreement does not grant any rights to any party except INDOT/State of Indiana and KYTC/Commonwealth of Kentucky. Nothing in this Agreement shall be deemed to create or give rise to any right of action in, or any liability to, any third party claiming to have suffered a loss, damage, or injury by virtue of any alleged failure by either Party hereto to comply with the terms of this Agreement.
15. **Compliance with Laws.** The Parties agree to comply with all applicable laws of their respective states and with all federal laws.
16. **DBE Requirements and Nondiscrimination Assurances.** Pursuant to the Civil Rights Act of 1964, the Parties shall not discriminate against any employee or applicant for employment, to be employed in the performance of work under this Agreement,

with respect to hire, tenure, terms, conditions, or privileges of employment or any matter directly or indirectly related to employment, because of race, color, religion, sex, disability, national origin, age, or status as a veteran. The Parties shall ensure that consultants incorporate similar requirements in all of their contracts for any of the work prescribed herein and will require all consultants' subcontractors for any part of such work to incorporate such requirements in all subcontracts for such work.

17. **Funding Cancellation.** If either Party makes a written determination that funds are not appropriated or otherwise available to support continuation of performance of this Agreement, this Agreement shall be terminated and cancelled. A determination by the Director of the Indiana State Budget Agency or the Secretary of KYTC that funds are not appropriated or otherwise available to support continuation of performance shall be final and conclusive.
18. **Hold Harmless.** The Parties agree to exculpate and hold harmless each other and their officials and employees from any liability due to loss, damage, injuries, or other casualties of whatever kind, to the person or property of anyone arising out of, or resulting from the performance of, this Agreement or the work connected therewith, or from the installation, existence, use, maintenance, condition, repairs, alteration or removal of any equipment or material, to the extent such liability is caused by the negligence of either Party, including any claims arising out of the Worker's Compensation Act or any other law, ordinance, order or decree. The Parties shall **not** provide indemnification to each other or to any other party.
19. **Unified Certification Program.** It is the intention of the Parties that this Agreement grant UCPs organized under 49 CFR §26.81 the discretion to utilize DBEs certified and in good standing pursuant to 49 CFR Parts 23 or 26 for credit toward their individual goals.
20. **USDOT Approval Upon Execution.** Following execution of this Agreement, the Parties shall seek its approval by the United States Department of Transportation.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

Agreement to Use Electronic Signatures

I agree, and it is my intent, to sign this Agreement by accessing State of Indiana Supplier Portal using the secure password assigned to me and by electronically submitting this Agreement to the State of Indiana. I understand that my signing and submitting this Agreement in this fashion is the legal equivalent of having placed my handwritten signature on the submitted Agreement and this affirmation. I understand and agree that by electronically signing and submitting this Agreement in this fashion I am affirming to the truth of the information contained therein. I understand that this Agreement will not become binding on the State until it has been approved by the Department of Administration, the State Budget Agency, and the Office of the Attorney General, which approvals will be posted on the Active Contracts Database: https://fs.gmis.in.gov/psp/guest/SUPPLIER/ERP/c/SOI_CUSTOM_APPS.SOI_PUBLIC_CNTRCTS.GBL

In Witness Whereof, the State of Indiana, acting by and through the Indiana Department of Transportation, and the Commonwealth of Kentucky, acting by and through the Kentucky Transportation Cabinet have, through their duly authorized representatives, entered into this Agreement. The Parties, having read and understood the foregoing terms of this Agreement, do by their respective signatures dated below agree to the terms thereof.

COMMONWEALTH OF KENTUCKY



James P. Gray II, Secretary
Kentucky Transportation Cabinet

Date: 5/27/2021

Approved as to Form and Legality:

DocuSigned by:


Office of Legal Services
Kentucky Transportation Cabinet

5/25/2021
Date: _____

STATE OF INDIANA



_____(FOR)

Joseph McGuinness, Commissioner
Indiana Department of Transportation

Date: 6/07/2021

APPROVALS

Office of Management and Budget

_____(FOR)
Zachary Q. Jackson, Director

Date: _____

Department of Administration

_____(FOR)
Leslie A. Crane Commissioner

Date: _____

Approved as to Form and Legality:
Office of the Attorney General

_____(FOR)
Theodore E. Rokita, Attorney General

Date: _____

Agency Fiscal Approval

STIND/00000000000000000000054138: **Approved**

Agency Fiscal Approval

Approved

✓ **Wiedyk, Chad Kenneth - 800**
Agency Fiscal Approval for SCM
06/07/21 - 12:54 PM

IDOA Approval

STIND/00000000000000000000054138: **Approved**

IDOA Legal Approval

Approved

✓ **Redding, Sandra-061-Procq**
IDOA Legal Approval for SCM
06/07/21 - 2:20 PM

→

Approved

✓ **Tammera J. Glickman**
Inserted Approver
06/08/21 - 8:02 AM

SBA Approval

STIND/00000000000000000000054138: **Approved**

SBA Approval

Approved

✓ **Olusola Egunyomi - 00057**
SBA Analyst Approval for SCM
06/08/21 - 2:14 PM

Attorney General Approval

STIND/00000000000000000000054138: **Approved**

Attorney General Approval

Approved

✓ **Leisher, Jean-046**
Deputy Atty General Appr SCM
06/08/21 - 2:28 PM

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Approved

✓ **Heidi Adair**
Inserted Approver
06/08/21 - 2:49 PM