

November 5, 2012

U.S. Department of Transportation
Docket Management Facility
Room W12-140
1200 New Jersey Avenue SE
Washington, DC 20590

Re: Docket No. FHWA-2012-0043 - RIN 2125-AF44

On behalf of the more than 5,000 members of the American Road and Transportation Builders Association (ARTBA), I respectfully offer comments on the Federal Highway Administration's (FHWA) September 4 Notice of Proposed Rulemaking (NPRM) concerning the procurement, management and administration of engineering and design-related services on federal-aid highway projects.

ARTBA's membership includes public agencies and private firms and organizations that own, plan and design, supply and construct transportation projects throughout the country. Our industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

After more than 1,000 days of extensions of the 2005 federal surface transportation law, an overwhelmingly bipartisan congressional majority and President Obama came together earlier this year to highlight upgrading the U.S. surface transportation infrastructure network as a national priority that transcends partisan boundaries. The enactment of the Moving Ahead for Progress in the 21st Century Act (MAP-21) provides a two-year window to stabilize the federal highway program and implement needed reforms that improve the efficiency and outcomes of the program. It is now incumbent on transportation officials at all levels of government and the private sector to deliver on MAP-21's promises. Even though the origins of engineering and design services NPRM are separate from MAP-21, the proposal would directly impact the ability to advance transportation projects and plans and, therefore, is intricately connected to the goals of the new surface transportation law.

One of the major achievements of MAP-21 was to clarify the relationships between transportation agencies at the federal, state and local levels. Under the new law, the clear responsibility of the federal government is to establish national transportation objectives and assure federal resources are directed toward those goals. At the same time, MAP-21 ensures state and local governments have sufficient flexibility to pursue national priorities in a manner unique to their individual needs and circumstances. These two roles are linked through the establishment of a new federal performance management process and increased transparency requirements that will ensure accountability from both parties. This strategic construct should serve as a foundation for all policy initiatives involving the federal-aid highway program,



including the engineering and design services NPRM.

ARTBA remains an ardent proponent of procuring engineering and design services for federal-aid transportation contracts through Qualifications Based Selection (QBS) procedures to assure high quality, state-of-the-art projects. ARTBA appreciates the open dialogue we have enjoyed with the Federal Highway Administration and the U.S. Department of Transportation's Office of Inspector General dating back to 2005 to preserve and enhance the QBS process for transportation improvements. We believe many aspects of the NPRM are a continuation of these past discussions and remain committed to working with the FHWA to ensure federal regulations in this area reflect the realities and challenges of the private sector engineering and design community.

One area of the NPRM that warrants comment, however, is the proposal to prohibit consultants serving in a management role from providing services in areas under its oversight. It is well established that in recent years all levels of government have been forced to deal with increasing budget constraints that have limited their financial and personnel resources. This pressure has forced transportation officials to seek new and innovative approaches to delivering needed transportation improvements. One method that has been used in many areas is increasingly partnering with the private sector to help in the management of transportation projects and programs.

Unfortunately, the NPRM proposal to constrain the role of the private sector in these instances could make this proven method of leveraging public sector resources less viable. To that end, ARTBA recommends deleting the following sentence from section 172.7(b)(5)(iii): "A consultant serving in a management role shall be precluded from providing services on projects, activities, or contracts under its oversight."

This proposed language would preclude a host of activities, ranging from environmental reviews to constructability assessments, which are routine to typical program management agreements between public agencies and the private sector. Similar to the intent of the program consolidation and environmental streamlining provisions of MAP-21, the inherent value of public-private program management agreements is to maximize available resources by seeking economies of scale in terms of expertise and resources. The NPRM's proposed one-size-fits-all prohibition would force public agencies to separately contract for these services and, thereby, dilute the efficiency advantages of these mutually beneficial arrangements.

We certainly recognize the need to ensure appropriate public interest protections for any and all activities involving public resources. In fact, it should be stipulated at the outset that protecting the public interest is a priority for all parties. The long-term viability of private sector firms in the transportation design and construction community is directly related to their proven ability to be good stewards of public resources and to provide value at a fair cost. Furthermore, it is inconceivable that a public agency would enter into a program management contract with a private sector firm without performing due diligence to ensure the scope of the agreement includes protections against any inappropriate conflicts of interest on the part of the private entity. That said, the first sentence of section 172.7(b)(5)(iii), repeated below for convenience, is an appropriate approach to protecting the public interest that would not be an impediment to the challenge of delivering needed transportation improvements with limited resources. This

sentence, which we believe is sufficient, reads as follows: “Use of consultants in management roles requires appropriate conflicts of interest standards as specified in subparagraph (b)(4) of this section and adequate contracting agency staffing to administer and monitor the management consultant contract (as specified in §172.9(d)).”

ARTBA strongly supports the ability of the federal government to establish national priorities with respect to federal transportation resources and to assure the various transportation programs are administered in a manner consistent with these objectives. At the same time, the wide array of transportation and budgetary challenges that exist among the states warrants a federal approach to implementation that emphasizes outcomes and flexibility over top-down management. With regard to the proposed NPRM, transparency and accountability are far more effective tools to protect the public interest than detailed prescriptions and prohibitions. We believe MAP-21 strikes an appropriate balance in this regard and urge the FHWA to follow this structure as it proceeds with the NPRM for engineering and design services.

Thank you for the opportunity to once again comment on issues of importance to the design and consulting community. ARTBA looks forward to continuing to work with FHWA to improve the nation’s highway and bridge infrastructure network so that it can support future economic growth and meet the needs of all Americans.

Sincerely,

A handwritten signature in black ink that reads "T. Peter Ruane". The signature is written in a cursive style with a large, stylized initial "T".

T. Peter Ruane
President & C.E.O