

December 21, 2012

United States Department of Transportation  
Docket Management Facility  
1200 New Jersey Avenue S.E.  
West Building, Ground Floor, Room W12-140  
Washington, D.C. 20590-0001

**Re: Docket ID Number DOT-OST-2012-0147, Disadvantaged Business Enterprise Program**

On behalf of the more than 5,000 members of the American Road and Transportation Builders Association (ARTBA), we respectfully offer comments on proposed revisions to the Disadvantaged Business Enterprise (DBE) program as implemented by the U.S. Department of Transportation (U.S. DOT or “the department”). These comments are offered in response to the Notice of Proposed Rulemaking (NPRM) published in the *Federal Register* on September 6, 2012.

ARTBA’s membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. Many of these are small and/or family-owned businesses. On the construction side, our membership includes prime contractors, sub-contractors and suppliers, some of which are DBE firms. Overall, our industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs. ARTBA’s membership structure includes nearly three dozen affiliated chapters, each of which is actively involved in the planning and implementing of the DBE program by the recipient agencies in their respective states or regions.

ARTBA and its members recognize the goals of the DBE program and the need to encourage the participation and utilization of disadvantaged businesses in the transportation construction industry. At the same time, the integrity of the program is critical. We were pleased to participate in the series of “DBE Roundtables” hosted by the U.S. DOT in the 2008-09 timeframe, as well as other meetings and forums like the Federal Highway Administration (FHWA) Office of Civil Rights’ “Transpo ’07 Summit,” in which ARTBA played a major role. We have long urged – and now feel the need to restate emphatically – that the U.S. DOT work actively with ARTBA and other industry groups to ensure that the transportation construction industry and its views are well-represented at DBE-related events organized around the country by the department.

In this submission, ARTBA’s objective is to recommend ways in which the DBE program can be run more efficiently and effectively, for the benefit of the taxpayers and those emerging businesses for which the program was developed. Similarly, we point out specific aspects of the U.S. DOT’s proposed program changes where the opposite would result. We are informed in our



comments by examples of collaborative efforts to structure and implement state-level DBE programs around the country, in which various ARTBA members and affiliated chapters have participated. We are describing numerous industry concerns in this submission, but it is by no means a comprehensive compilation of such concerns, based on our recent consultations with ARTBA contractor-members and chapters. Many of those entities are submitting separate comments and it is ARTBA's hope that the department fully considers the many issues they are raising as well as those herein.

### **General Comments**

Generally, the goals of the DBE program should be to attract certifiable DBE firms, to enable and assist them to grow and develop within the safe harbor of the DBE program, and to graduate them into the broader, unsheltered market as financially viable and technically proficient construction companies. The DBE program should use the rate at which DBE firms successfully graduate into the unsheltered construction market as its primary metric.

The periodic re-justification of the DBE program's compelling need does not justify the lack of a time limit on how long a DBE firm may remain certified. Longevity in the program is a function of a failure to "narrowly tailor" the program and/or the lack of business development and technical assistance.

The improvement of long-standing programmatic implementation issues should be the priority. These include how goals should be set, over-concentration of DBEs and reverse discrimination within the meaning of 49 CFR §26.7(a), the meaning of key terms such as "unreasonable" difference in price and "commercially useful function," making "good faith effort" less subjective, making certification databases more accurate and user friendly, and better measuring and reporting DBE capacity.

If anything, many aspects of the U.S. DOT's current proposal would have the exact opposite effect, making the program less efficient; piling on administrative costs for recipient agencies, prime contractors and DBE subcontractors alike; and increasing the taxpayers' price for transportation improvement projects. At the same time, these revisions would do little or nothing to provide more opportunities for actual or potential DBE subcontractors (and again might have the exact opposite effect).

The DBE program is not a theoretical endeavor. The purposes of this program must be pursued in a real world marketplace that can vary from state to state. Failing to consider the realities of this environment – or selectively interpreting them – may help achieve a tangential objective, but it will not lead to increased participation of disadvantaged businesses in the U.S. transportation construction market.

While, as noted above, ARTBA gladly participated in the series of "DBE Roundtables" in past years, there was to our knowledge no effort to collaborate with the transportation construction industry in developing the U.S. DOT's proposal, or to brief the industry about the possibility. (In contrast, many of the issues addressed in the department's 2010-11 DBE rulemaking were discussed in previous "DBE Roundtable" events.) The U.S. DOT refers to "stakeholder meetings" as a justification for proposing these changes, but ARTBA wishes to make clear that

none of these ideas were discussed in meetings to which we were a party, the most recent of which, in any event, took place nearly four years ago.

Similarly, much of the NPRM's tone is extremely disappointing. Intentionally or not, the document often toggles between disparaging the transportation contracting community (and many of the recipient agencies who have chosen to take a collaborative stance in implementing this program) and blithely dismissing legitimate issues raised by the industry when they are given the opportunity to do so. (For example, "DBE information is not some separate, foreign intrusion into the procurement process that needs to be handled at a different time from anything else that determines who wins a contract.") Moreover, it is evident and unfortunate that the promulgators of these proposed rules appear to maintain little or no understanding of the practical realities and business environment through which transportation contractors deliver the infrastructure improvements that continue to be so important to this nation.

One U.S. DOT official, now retired, who played a major role in the DBE regulatory process over the years, took the extraordinary step of submitting his own comments to the docket for this rulemaking. Therein, he dismissed prime contractors' submission of public comments as a "letter-writing campaign," belittled the industry's concerns as a "siren song," and demonstrated a prideful ignorance of the mechanics of the bid process itself. It is ARTBA's sincerest hope that his public comments do not betray any biases among the remaining U.S. DOT officials who are responsible for this rulemaking. Moreover, while we are quite concerned about the lack of understanding of the contracting process exhibited in this NPRM, we offer the following fact-based comments as a means of improving this level of understanding. ARTBA also commits, as always, to contribute to any further information-sharing opportunities which the U.S. DOT wishes to initiate.

### **Proposed Revisions to DBE Program-Related Forms**

#### ***Personal Net Worth (PNW) Form***

While prime contractors do not use these forms directly, their overall concern is certainty in the administrative and certification process for DBEs. Prime contractors maintain a major stake in these processes and greatly (or even exclusively) rely on the judgment of recipient agencies and unified certification programs (UCPs), who are in a far better position to conduct due diligence and make such certification decisions. Thus, ARTBA is generally supportive of any revisions to the PNW form that enhance certainty and clarity in the process.

ARTBA continues to believe that graduation from the DBE program should be an important metric to its success. In revising and implementing the DBE program's PNW cap, the department should consider whether the proposed changes would facilitate or impede the achievement of this objective.

### **Proposed Revisions to DBE Certification Provisions**

ARTBA takes a similar position on revisions to the certification process itself. In general, greater clarity and uniformity in the certification process across jurisdictions (building on the

process revisions set forth in the department's 2010-11 DBE rulemaking) would be advantageous.

The legal liability of prime contractors remains an acute concern. There have been cases where federal prosecutors and inspectors general have not considered state certification of a subcontractor as a DBE to be sufficient proof the certified company was, in fact, a *bona fide* DBE with the skills and expertise to work in a specific area on a project. As a result, some prime contractors have faced the presumption of fraud for subcontracting with a DBE who, though certified by a state, turned out not to be "properly" certified. The possibilities of criminal charges and substantial civil penalties have followed.

To avoid such a circumstance, many prime contractors have had no choice but to do the work that certifying agencies are supposed to have already done – namely, independently vetting every DBE to assure they are *bona fide*, are able to perform the work claimed in compliance with the DBE rule's "commercially useful function" requirement and do not have any responsibility issues. There is a substantial financial and human resource cost for this vetting process when prime contractors must duplicate responsibilities of the certifying agencies. As a safeguard, many prime contractors rely on the limited pool of DBE firms they have already vetted, and therefore offer fewer subcontracting opportunities to emerging, unknown or untried DBE firms. Moreover, the vetting effort translates into higher administrative and overhead costs that the prime contractor must then allocate across every project bid.

The review of a DBE's credentials and determination of its status are more efficiently and cost-effectively performed by the certifying agency than by each prime contractor. The agencies must also take full responsibility for and stand behind their certifications in all forums.

Greater reciprocity in certification makes this need even more urgent. So also do provisions in this rule (both existing and proposed) making it more difficult for a prime contractor to remove a DBE subcontractor for non- or sub-standard performance.

The prime contractor is responsible for assuring the DBE subcontractor is utilized in accordance with the certification that has been granted. The DBE rule should make clear that prime contractor cannot be assumed to have committed fraud for using a DBE in a manner consistent with the DBE's certification, even if that DBE is later found to have violated the terms of its certification unbeknownst to the prime contractor.

### **Proposed Revisions to “Other Provisions” of the DBE Program**

ARTBA and its members are very concerned about numerous proposals under this section.

#### ***Definitions – key terms (§26.5)***

The department references the Small Business Administration's standards for “disadvantaged individuals.” While not directly on point, some ARTBA members and chapters have reported confusion with the provision in the 2011 DBE rule revisions requiring states and localities to add a small business component to their DBE programs. ARTBA would urge the department to

review this provision with recipient agencies. As always, industry organizations in these states stand ready to assist in finding creative and efficient ways to implement it.

### ***Goal-setting by recipient agencies (§26.45)***

Step One – Determining Relative Availability of DBE Firms: In the landmark 1995 case of *Adarand Constructors, Inc. v. Peña*, the United States Supreme Court held that classifications relating to the DBE program must undergo a "strict scrutiny" analysis under the U.S. Constitution's equal protection clause. Under a strict scrutiny analysis, in order for the U.S. DOT to justify the classification of DBE firms versus non-DBE firms, it must demonstrate that: (1) the classification furthers a compelling government interest, and (2) that the program is "narrowly tailored" to advance that interest.

As a result of the *Adarand* decision and other legal challenges, the department developed new regulations which took effect in 1999, presumably in an effort to "narrowly tailor" the DBE program so it could survive future constitutional challenges. There is a key principle that courts have stressed when considering whether a governmental classification based on race is constitutional within the context of a DBE program. They have considered whether each individual state has achieved the maximum means of DBE participation through "race neutral" means.

In fact, after adoption of the 1999 rule, the department's Office of Small and Disadvantaged Business Utilization (OSDBU) drew a direct connection between *Adarand* and the DBE rule's goal-setting provisions in a policy statement that remains on the U.S. DOT website. "Recipients have flexibility to craft their own goal-setting mechanisms to reflect local conditions and use the best locally available data." (*The New DOT DBE Rule is Narrowly Tailored - Meeting the Adarand Test*, OSDBU website, retrieved 12/18/12)

In the current NPRM, the department is clearly contradicting its own published policy in this regard. Ultimately, ARTBA believes the NPRM's proposed changes to goal-setting disregard *Adarand* and other settled law in this area.

The department first proposes prohibiting the use of prequalified contractor or plan-holder lists as a means of determining availability of "ready, willing and able" DBEs in the local market. The department is further considering prohibiting the use of bidders lists for the same purpose.

In reality, prequalification lists are a race neutral means of assessing a firm's skills and ability to perform transportation construction-related work. Recipient agencies make pre-qualification determinations based on a neutral set of criteria that apply to all firms – whether or not socially or economically disadvantaged. By submitting to the pre-qualification process, a firm has shown at least threshold interest in performing transportation construction work for the recipient in question.

Similarly, firms appearing on recent lists of bidders and plan holders have shown interest – perhaps an even more current one – in working for the recipient.

ARTBA is not suggesting that recipients rely solely on pre-qualification lists for goal-setting. A DBE firm's appearance on such a list is no guarantee that the company is currently "ready, willing and able." Also, a pre-qualification list's categories may be too broad to be useful for this purpose. However, recipients should still have the option of using these lists as appropriate in the goal-setting process.

Prohibiting the use of pre-qualification lists will create particular problems wherever state law mandates the pre-qualification of subcontractors. In such cases, the apparent pool of DBE firms will be inflated (as will resulting goals) because prime contractors are only able to use the subgroup of DBE firms that are actually pre-qualified. From a legal standpoint, it is also questionable whether a firm lacking pre-qualification is capable of performing a commercially useful function.

Besides contradicting the OSDDBU's post-*Adarand* pronouncement that recipients can use "the best locally available data," the department's proposal ignores the fact that much of the other available data on DBEs is suspect, incomplete, out of date or irrelevant. DBE lists or directories may be useful if the information is current and complete (and, as noted above, the certifying agency stands behind its certification). During the certification process, the DBE's use of codes (from the North American Industry Classification System (NAICS) or otherwise) are not always clearly identified and thoroughly vetted by the certifying agency. In addition, these lists often make no distinction between general construction and heavy/highway/civil work, which are very separate disciplines. As a result, the presence of irrelevant firms on the list can affect DBE goal-setting. Conversely, firms interested in transportation construction work may be deluged by solicitations for general construction work or other disciplines for which they are not qualified.

The NPRM notes the department would continue to allow use of disparity studies. However, the methodology and accuracy of such studies are sometimes questionable, as is the practice in some states of continually using the same consultants to perform them over the years.

All of these potential shortcomings in other data sources suggest that recipient agencies should be allowed to continue using pre-qualification, bidders and plan holder lists in goal setting as they see fit. This flexibility has and will continue to comply with the holding in *Adarand*, as well as the U.S. DOT's own post-*Adarand* policy statement.

Step Two – Considering other available evidence of discrimination or its effects, and considering appropriate adjustment to the goal: As proposed in the NPRM, the department would take most or all of the discretion in this step out of the recipient's hands. The department proposes to limit, if not *de facto* abolish, recipients' abilities to adjust goals downward should the U.S. DOT believe, in a completely subjective judgment, that the adjustment is not "clearly warranted by the evidence" or if the recipient "employ[s] practices that serve no purpose other than to drive down the overall goal..."

The ominous tone in this section is disconcerting and presumably indicates a heavy-handed approach that the department would use with recipients on these matters. Moreover, the department would preserve its prerogative to change the state's overall goal if it chose to do so, for whatever reason. We endorse the statement within the comments submitted by ARTBA's affiliate, the Ohio Contractors Association, on this matter:

“We have very little faith that the federal government, when evaluating the subjective criteria stated in establishing a goal adjustment, has the ability to determine from a second tier of oversight whether the recipient has established an appropriate goal. If there is concern the goal may not be appropriate, then the evaluation process is overly subjective. We favor establishing the goal process definitively and abiding by the outcome rather than creating the opportunity for controversy.”

The question is whether the department will follow its own post-*Adarand* policy and allow the recipient agencies, who have first-hand knowledge of their respective markets, to develop appropriate overall goals. This is critical to the efficiency of the federal-aid transportation construction programs because unrealistic goals will only lead to more good faith effort waiver applications and the administrative costs and delays associated with them, while doing nothing to create opportunities for emerging DBE firms.

Public Comment Period: ARTBA opposes dispensing with the requirement that recipient agencies conduct a public comment period as part of their goal-setting process. While the NPRM proposes “consultation” with outside stakeholder groups as a substitute, and ARTBA’s chapters would be ready to participate in such events, their value is often suspect. Rather than being a productive exchange among participants, they too often devolve into speechmaking and other histrionics. The public comment period provides industry members and other individual stakeholders the opportunity to present their views in a thoughtful way within an extended window of time.

The department has championed opportunities for public comment on the development of its surface transportation policy priorities, the implementation of MAP-21 and many other areas. We urge the U.S. DOT to remain consistent with these other efforts and retain the requirement for public comments on DBE program goal-setting.

### ***Race-neutral DBE participation (§26.51)***

ARTBA has considerable concern about curtailing the use of race-neutral DBE participation, which would be a major shift in policy and contrary to much relevant case law. Besides the need to incentivize the use of DBE subcontractors as much as possible, the ideal approach of the DBE program should be race-neutral, yet resulting in the requisite opportunities for DBE firms. Ending race-neutral participation could also be especially problematic in states that do not use project-based DBE goals, as it could require major changes in how they structure goal-setting and compliance.

The proposal uses the rationale that ending race-neutral participation will conform with another section of the DBE rule, in which prime contractors are not to reject a DBE subcontractor’s quote in favor of a non-DBE quote unless the price difference is “unreasonable.” However, this raises a perennial DBE program-related dilemma in that the department has resisted defining or quantifying the term “unreasonable” anywhere in the DBE rule. One could argue, for example, that any price difference is unreasonable because it increases the cost of the project to the taxpayers. So the basis for this shift in policy on race neutral participation, while questionable in

itself, is also connected to another section of the DBE rule that has generated implementation issues of its own.

For all of these reasons, ARTBA opposes the U.S. DOT's proposal to curtail race-neutral participation as described.

***Good faith efforts under contract goals (§26.53 and Appendix A)***

NAICS Codes: The U.S. DOT proposes that prime contractors ensure their DBE subcontractors are certified under the appropriate NAICS code(s). As described above, this requirement places legal risk on the prime contractor when the certifying agency should be the entity responsible. Moreover, various DBE firms within ARTBA's membership report that particular NAICS codes do not accurately correspond with their specific categories of work, making compliance even more difficult for the prime contractor. With the department seeking to make NAICS codes more integral to implementation of the DBE program, it should work with the Census Bureau to make the codes more accurate as they apply to various disciplines in transportation construction.

Submission of DBE Information with Bids: In a major, sweeping mandate, the department is proposing that bidders submit all DBE information with their original bid submissions. The U.S. DOT asserts there is an "unfortunate trend" of recipients' using the "responsibility" provision of the DBE rule and allowing the apparent successful bidder a certain length of time after the bid opening to submit this information. The department claims this procedure "has the potential to facilitate bid-shopping or other questionable activities by prime contractors."

Many recipient agencies in states across the country believe it is most efficient to allow a certain number of days after the bid for the apparent low bidder to finalize its DBE utilization plan or present supporting material relating to a good faith effort submission (also addressed in this rulemaking and in ARTBA's comments below). This common practice does not represent some sort of widespread conspiracy by prime contractors to "game" the system or perpetuate discrimination. While a state's transportation construction industry is – hopefully – engaged as a sincere partner in developing and implementing its DBE program, the recipient agency is the party that administers the program consistent with state and federal law. These recipients are the ones who maintain (including in various comments submitted for this rulemaking) that the practice of allowing additional days for DBE compliance is appropriate while, generally, promoting maximum efficiency in project pricing and in many cases increasing opportunities for DBE subcontractors. Therefore, recipients should continue to have the option of utilizing the "responsibility" procurement option when appropriate.

ARTBA's members can cite a number of compelling reasons not to abolish this option, including but not limited to the following:

- States with electronic bidding would need to restructure their systems and retrain staff in order to accept this information at bid time. Recipient agencies, who are usually mandated to "do more with less" by their governors and state legislatures these days, would likely also have to add or redesignate staff and increase other administrative costs to organize and evaluate this blizzard of data.

- The proposal would spread the compliance burden to all bidders on a project rather than focusing it on the apparent successful bidder. Similarly, DBE firms would likely be asked to quote or submit proposals for numerous jobs, stretching or exceeding their own estimating capabilities. In Pennsylvania, for example, there may be 35 projects in a typical letting. With a normal complement of bidders, a given DBE might be asked for hundreds of timely, but accurate, quotes, each with variations designated by the bidders in question. A bid may involve up to 1,000 (one thousand) separate pay items to be quantified, and subcontractors commonly provide revisions to this information up until just a few minutes before bid submission.
- The project goal would often become the “ceiling” rather than the “floor” for DBE participation. Prime contractors would be bound to using the DBEs presented at bid and would have no incentive to add new ones during subsequent stages of the process.
- In states where the apparent successful bidder has additional time to present its DBE package, that prime contractor normally takes time post-bid to review project scope and may identify DBE subcontracting opportunities to help meet or exceed the project goal. The prime contractor will also use this time to verify the certification and bonding of prospective DBE subcontractors. Lacking time to do so, the prime contractor will be far less likely to subcontract with new and emerging DBE firms with which it has no or minimal experience.
- Similarly, prime contractors would need to add estimating staff to collect this information pre-bid. These additional costs would be reflected in higher bid prices and higher project costs for the taxpayers.
- Many smaller prime contractors, historically the backbone of the industry, would likely forego these extra costs by bidding on fewer projects, leading to fewer bidders and less competition on certain projects.
- Prime contractors and subcontractors (DBE and otherwise) in states without electronic bidding would face significant logistical challenges (and again additional costs) in sharing accurate and definitive information from remote locations up until bid submission time.
- During this post-bid period, prime contractors and non-DBE subcontractors may spend time breaking down subcontracts to identify additional, second tier subcontracting opportunities for DBEs.

To use a specific example of negative ramifications that could result from the department’s proposal, Illinois’ experience with its “no cure” provision, established in a 2009 state law, is instructive.

- The law prohibits prime contractors from “curing” deficiencies in their bids after submission. This includes changing the DBE compliance plan (with cost breakdowns) that has been submitted for the project.

- The number of Illinois Department of Transportation (IDOT) contracts meeting the DBE goal has fallen by four percent since imposition of this requirement.
- Prime contractors have bid on fewer projects because of the greater administrative costs.
- Some DBE firms have bid on fewer projects for fear of being over-committed.
- Other DBE firms have bid too aggressively, leading to some actually going out of business as a result.
- In the extremely busy environment leading to bid submissions, some overwhelmed DBE firms have limited their communications with prime contractors, yielding incomplete information and leading to adversarial relationships.
- The inflexibility of this provision has turned minor errors into major cost increases for the taxpayers. In one case, an apparent successful bidder believed it had met a project's DBE goal in part because of bid information received from a DBE subcontractor. IDOT later found an error in the DBE's submission but the prime contractor had not sought to modify the DBE goal accordingly, being unaware of the error until IDOT raised it. IDOT simply rejected the bid as non-responsive and awarded the project to the next lowest bidder, at an additional taxpayer cost of about \$750,000.

All of these experiences should make clear that the department's proposal would prevent post-bid activities intended to increase efficiency in the delivery of projects and which often increase the opportunities for DBEs on the project.

ARTBA does recognize that some recipients require DBE information with the original bids. Their reasons for doing so may be compelling, but no more so than those of the many states that require the information within a certain number of days after submission of bids. The U.S. DOT should not be mandating same-day information given the many legitimate and costly ramifications described above.

Finally, ARTBA takes issue with the language in the NPRM that implies "bid shopping" is the motivation or result of recipients' allowing additional time to submit DBE information. It is questionable how widespread the practice is, it is not condoned by the industry or its representative associations, and, when it does occur, it can actually be to the detriment of DBE or non-DBE subcontractors, or both. If the U.S. DOT chooses to employ such language in the future, then ARTBA requests that the department provide specific examples. Ultimately, there are better ways to address this concern than imposing a "one-size-MUST-fit-all" changing bidding procedures and adding untold costs in so many states.

#### Good Faith Effort Submissions:

*Timing* - Similar to the previous provision, the department proposes to require that all bidders not meeting the project goal submit their good faith efforts documentation with the bid, or only the apparent successful bidder submit its documentation (limited only to pre-bid efforts) within one

day of notification by the recipient agency. (The department will consider lengthening the latter requirement up to three days.)

ARTBA maintains the same concerns about undue administrative burdens and costs as in the previous section. Even a three-day submission period could be insufficient for an apparent successful bidder working to meet the goal. The U.S. DOT should continue to leave administration of bidding procedures to the discretion of the recipient agencies so they can address unique challenges in their local markets.

*Quotes* – Under the NPRM, bidders would need to provide all subcontractor quotes in their good faith effort submissions. While some states currently require this, once again it would not be productive to mandate it everywhere. Many subcontractors consider this information to be proprietary, and arguably the dissemination of this information will only increase the risk of the bid shopping about which the department is so concerned. (The quotes may also be subject to confidentiality and conflict of interest agreements.) ARTBA members are also wary that recipient agencies will not have the market context of the proffered data and thus it will be useless to – or misused in – its good faith effort determination.

*Good Faith Effort Documentation and Process* – The department proposes a seven-day deadline for submission of good faith effort documentation relating to replacing a DBE subcontractor for cause, under the threat of various penalties up to and including material breach of contract.

Interestingly, the NPRM is silent on any recipient responsibilities in the waiver process, whether occurring immediately post-bid or relating to replacing a DBE subcontractor. In reality, transportation agencies vary in their review processes for good faith effort waivers. Some states are not timely in their reviews, and/or simply respond that the prime contractor should “do better” in meeting the goal without any further insight. The good faith effort review process should be timely, open, fair and specific. Moreover, there is a trend in some states of rarely or never granting waivers, which is clearly contrary to case law in this area.

Delays in good faith effort determinations can similarly delay the schedule and costs for projects, and even disrupt the business activities of DBE firms who are part of the project’s DBE plan and are waiting for work to start.

The department clearly needs to spell out recipient responsibilities in the waiver process as part of this rulemaking.

*Project Goals:* As the NPRM notes, some states do not use project goals. This is a laudable race neutral approach to DBE participation. Accordingly, imposition of these proposed bidding/good faith effort mandates could lead to an overhaul of those states’ goal-setting methodologies, with associated administrative costs.

*“Appendix A” Factors:* The department restates and revises its listing of possible bidder/prime contractor actions that a recipient could view favorably in making a good faith effort determination. The NPRM is careful to state that Appendix A does not constitute a “checklist” for this purpose. ARTBA’s concerns with some of these subject areas are similar to some described previously:

*Market Research:* The department recommends that prime contractors do “market research” to identify and solicit available DBEs. This raises the previous concerns about the accuracy of NAICS codes and DBE directories. Including descriptions of DBEs’ work experience in those directories would be especially helpful. The more targeting a prime contractor can do, the more this research will yield potential business relationships.

*Timeframes and Schedules:* The department emphasizes the need for “flexible timeframes and delivery schedules in a manner that encourages and facilitates DBE participation.” ARTBA cautions that this provision is often unrealistic. Project schedules, which are often set by the owner and not the prime contractor, are structured to maximize efficiency and safety, while minimizing cost and inconvenience to the traveling public. Subcontracting, whether related to the DBE program or not, needs to comport with these critical objectives. The prime contractor assumes further risk in the scheduling when subject to liquidated damages for delays.

The recipient agencies and the industry are not in the business of producing \$5.00 cupcakes or some other luxury item that customers can do without during a delay of days, weeks or months. These transportation improvement projects are built on tight schedules precisely because they are so critical to commerce and quality of life, both locally and regionally. Interruptions to or delays in the construction schedule will be magnetized to all parties involved, most notably the taxpayers waiting to drive, ride or fly on the new or improved asset. With accelerated project delivery the focus of the Federal Highway Administration’s “Every Day Counts” and other programs, this Appendix A provision is a potential internal conflict in department policy.

One could also imply from this provision that facilitation of certain subcontracting opportunities takes priority over safety, whether for industry workers or the public. This is, of course, an absurd notion, but one that can reasonably be implied from an NPRM written with little apparent regard for industry realities.

*“Unreasonable” Quotes:* The NRPM restates that a prime contractor will not achieve if it rejects a DBE’s quote for not being the lowest received, unless it is “unreasonable.” This again raises a long-time concern of ARTBA members in that the rule does not define or quantify “unreasonable” to any extent. This is a key term in the rule that has become completely subjective and open to varying interpretations by recipients. It is a basic tenet of ARTBA’s DBE policy that the department better define this term of art. If the U.S. DOT continues to refrain from defining this term, ARTBA requests a clearly stated rationale for this refusal.

*Comparing Bids:* The department proposes requiring recipient agencies to compare the bid of the prime contractor seeking good faith effort with those of other bidders. (This assumes the implementation of the U.S. DOT’s proposed requirement to submit DBE information at bid time.) If other bidders were able to meet the project’s DBE goal, then the apparent successful bidder would be less likely to achieve good faith effort for not doing so.

ARTBA opposes this misguided provision. Estimating and bidding is a professional art at the core of the transportation construction industry. For completely legitimate reasons, bidders may present differing mixes of DBE participation in their respective bids. They may count the participation of DBEs differently, be concerned that a particular DBE is not reliable, question the certification of a certain DBE or not receive quotes from some DBEs because they are already committed to other bidders or work. Bidders may also subcontract different elements of a project depending on its own expertise. For all these reasons, it is hard to see how a recipient could draw an objective conclusion relating to good faith effort by comparing these bids.

*Review/Change by Modal Agencies:* In a startling revision from current practice, the department proposes that its agencies “have the discretion” to review and change good faith efforts determinations if they so choose. The NRPM delineates no guidance to its modal administrations for taking this action, so presumably it would be very subjective. ARTBA strongly opposes this change. Obviously the department has oversight responsibilities for the federal aid programs and must conduct a certain level of review of recipient decision-making. However, this proposal implies a totally subjective standard of review for overturning recipient decisions, which would be disruptive and costly to the contracting process (both in terms of administrative costs and project delays that will occur while this process takes place). The U.S. DOT should not take this heavy-handed step with recipient agencies unless a clear, objective process of engagement has taken place, involving the department, the recipient agency and the private sector firm(s) in question.

#### Replacement of DBE Subcontractors:

The department is proposing unduly harsh sanctions on prime contractors for replacing DBE subcontractors in certain circumstances. These include withholding payment from the prime contractor for work or materials originally contracted with the DBE, as well as declaring a material breach or termination of the contract itself. To avoid such penalties, the prime contractor is to receive prior written consent from the recipient agency, and fully document (to the satisfaction of the agency) its attempts to replace the non-performing DBE with another DBE.

Rather than singularly focusing on penalties for prime contractors in these situations, the NPRM should establish parameters for an open, timely process involving both the recipient agency and the prime contractor, in which both work expeditiously to make the needed change and keep the project moving forward. The agency should provide written permission or rejection for the replacement by a certain deadline, along with cooperation to rectify the situation in the latter case. The recipient agency should also bear the cost of any project delays emanating from this replacement process if the prime contractor is not at fault for the DBE’s failure to perform.

It may be difficult to simply replace a DBE subcontractor with one of like profile. While a prime contractor can open up the entire contract to identify DBE subcontracting opportunities, late in the project’s life almost all of the other work and supplies have been provided. The prime contractor will therefore need to seek another DBE subcontractor to perform the exact work as that which defaulted, but DBEs in that particular field may not be available. The threat of harsh

sanctions when a prime contractor is working through these issues (and attempting to do so collaboratively with the recipient agency) is simply unrealistic. Basing a material breach on this issue is likely to face a legal challenge as well. The department should not carry out this proposed provision.

### ***Counting DBE participation toward goals (§26.55)***

DBE trucking services: ARTBA generally supports the department's proposal to allow counting of a DBE subcontractor's leasing of trucks when using the DBE firm's drivers. It is noted, for example, that in jurisdictions that are requiring expensive retrofitting of diesel vehicles, it is becoming more difficult for a DBE of modest means to acquire and/or maintain such a fleet. Thus, this proposal actually has the potential to increase DBE opportunities in that sense. However, this policy change should not be used to "load up" on DBE participation by trucking firms to the detriment of other types of DBE firms.

"Regular dealer" vs. "transaction expediter/broker": This distinction is important, because 60 percent of the value of supplies provided by a regular dealer may be counted toward the project's DBE goal, while those from a broker may not. The department unilaterally revised its guidance on this issue, via new "question and answer" language, in 2011. ARTBA questions the rationale for this revised guidance, a related proposed revision to the rule and the prospective policy changes described (although not yet formally proposed) in this rulemaking.

The guidance from last year, in which regular dealer determinations are to be made on a "contract-by-contract basis," has greatly undermined the certainty of using regular dealers in a project's DBE plan. This lack of certainty is dangerous because, similar to what we have described above, prime contractors may be liable if prosecutors later believe that a DBE subcontractor was not performing a commercially useful function. Prime contractors should have certainty, backed by the certifying agency and before even the advertising of a contract, that particular DBE firms have been certified as regular dealers for particular lines of product.

In the NPRM, the department goes on to question the role of the "regular dealer" (or "middleman" as the U.S. DOT dubs him/her) in contemporary commerce. ARTBA believes this is misguided. It should be obvious that the DBE rule is not supposed to address practices in "contemporary commerce" as a whole, but rather the transportation construction industry specifically. Accordingly, we provide herein some real world feedback from the industry on this matter.

In today's transportation construction industry, the regular dealer often plays a key role in the construction process by facilitating bidding, purchase and delivery of materials to be utilized on a project. Frequently, the dealer obtains material from a variety of manufacturers to supply one complete facet of work to the contractor. At bid time, prime contractors can rely on dealers to research material specifications to meet project design and find the best product for the application, taking into account quality, pricing and availability. This allows for the most competitive pricing possible – and best pricing for the taxpayers. Prime contractors and subcontractors direct the release of materials on a moment's notice, based upon the progress of the work. Dealers must stand ready to deliver to a job site immediately. This effort often greatly

exceeds the manpower a prime or subcontractor can allocate to this aspect of a project and demonstrates the necessary role the dealer continues to fill in the industry.

The department's revised guidance also uses shipping method as a dispositive factor in the "regular dealer vs. broker" determination, even though it is not mentioned in the DBE rule. There is apparently an assumption that a DBE entity that directs or coordinates drop shipping to the project's job site is not a regular dealer, in which case there will be no DBE credit for the value of that material. As described above, a regular dealer performs a variety of commercially useful functions, and drop shipping may be a legitimate means of performing them. Therefore, ARTBA does not agree with this use of shipping method in the regular dealer determination.

### ***Ethics and conflicts of interest (§26.109)***

ARTBA supports efforts to enhance the integrity, transparency, efficiency and accessibility of the DBE program's certification and administrative processes for all parties involved.

### **Regulatory Analyses and Notices**

The department states the proposed DBE rule revision does not constitute a "significant regulatory action" and consists of "administrative changes to improve program implementation" rather than "significant policy-level initiatives." The U.S. DOT contends, among other points, the proposal does not create significant cost burdens, affect the economy adversely, materially alter the impact of grants or user fees, or raise novel legal or policy issues. Moreover, the proposal states the new rule would be "a streamlining of the provisions for implementing an existing program," and thus would actually "result in significant savings to state and local governments" due to the lessening of DBE fraud. The Department also contends the changes would have "little to no economic impact on program participants" and there would be "no substantial compliance cost imposed on state and local agencies..."

At best, these statements betray a fundamental lack of understanding (or perhaps misunderstanding) of these proposed revisions' ramifications, as delineated in these comments and those of many ARTBA members and chapters.

Thus, ARTBA strongly disagrees with the U.S. DOT's finding that the proposed changes do not constitute a "significant regulatory action." The changes proposed are broad and far-reaching. They will impact a sizable portion of ARTBA's contractor-members. By not deeming the changes to the DBE program a "significant regulatory action," the department deprives the regulated community of important procedural safeguards to which they are entitled by law. The department also avoids undertaking a number of mandatory steps to ensure that it adopts the least burdensome alternative for small business under requirements of the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA). Accordingly, ARTBA strongly disagrees with the department's determination that compliance with the RFA and SBREFA is not required.

In addition, there are additional procedures in place for consultation with state and local governments required during a rulemaking that appear not to have been applied in the development of the DBE program changes. Under "Executive Order 13132: Federalism,"

agencies are required to consult with state and local governments on regulations that will have significant impact. Such consultation can lead to better results, while strengthening the federal, state, and local government partnership in implementing the DBE program. Put simply, the proposed changes to the DBE program are too important not to be termed a “significant regulatory action.” The U.S. DOT’s incorrect assessment of the magnitude of the DBE program changes does not offer the regulated community sufficient protection, nor will it solicit the information necessary to be able to properly inform agency decision making.

### **Conclusion**

Much of the content of this NPRM – both in tone and substance – is very disappointing. It is also disconcerting that, unlike with previous DBE program proposals in the recent past, the department did not consult with the transportation construction industry or otherwise seek its input before publishing its NPRM. Following the conclusion of the comment period, ARTBA hopes for a further, meaningful dialogue with the U.S. DOT, state transportation officials and other stakeholder groups on these important matters.

In closing, if the U.S. DOT wishes to advance major reforms in the DBE program – as proposed in its NPRM – then the best way to pursue this objective is to initiate a dialogue between public and private sector practitioners about how they can be achieved. By contrast, as demonstrated in ARTBA’s comments, a unilateral approach will create unnecessary complications in the program, including the increased cost of transportation improvement projects. Furthermore, the key element in successfully navigating the DBE program’s complex and technical issues is to show genuine respect for all viewpoints and use constructive language in doing so. ARTBA stands ready to work with the department if it chooses to pursue such an important discussion in that way.

Thank you for considering these comments.

Sincerely,



T. Peter Ruane  
President & C.E.O