

July 9, 2010

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-2010-0118, Disadvantaged Business Enterprise:
Program Improvements**

On behalf of the 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 published in the *Federal Register* on May 10, 2010.

ARTBA’s membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than \$200 billion annually in U.S. economic activity and sustains more than 2.2 million American jobs.

ARTBA and its members recognize the goals of the DBE program and the need to encourage the participation and utilization of minority and women owned businesses in the transportation construction industry. At the same time, the integrity of the program is critical. We have been pleased to participate in the series of “DBE Roundtables” hosted by the U.S. DOT beginning over two years ago, as well as other meetings and forums. We urge the U.S. DOT to work actively with ARTBA and other industry groups to ensure that the transportation construction industry is well-represented at DBE-related events organized around the country by the department.

In this submission, ARTBA welcomes the opportunity to comment on the proposed DBE program changes. Our objective is to recommend ways in which the program can be run more efficiently and effectively, for the benefit of the taxpayers and those emerging transportation construction firms for which the program was developed. 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. As always, we would be pleased to discuss these experiences further with the department through additional “DBE Roundtables” and other opportunities.



Accountability for Recipients With Respect to Overall Goals

ARTBA shares the desire for accountability in the program. In examining this area, the Department should be fully aware of the interplay between the setting and achievement of program goals. ARTBA believes that if recipient agencies assess why they were unable to achieve a particular program goal in the prior fiscal year, they will often find that the goal was set at too high of level that does not reflect the mix of projects or other factors during that year.

There is a key relationship between program and project goals. On the project level, ARTBA recommends that the final rules require the recipient agencies to document the analysis they perform, which should assess the skill sets of the certified DBE community against the technical requirements of the project, and not just the project size. Many projects require large amounts of specialty work and specialty supplies which the local DBE community may not be able to provide. If the skill set is not available in the DBE community, the work should not be subject to DBE participation goals.

Another factor is the multi-year nature of many transportation improvement projects. In assessing a project, a recipient agency should consider the varying subcontracting opportunities from year to year in a project, rather than simply pro-rating a project goal evenly throughout its life.

ARTBA strongly believes involving contractors in the goal-setting process serves to improve implementation of the DBE program. In some states, contractor firms have successfully brought their expertise in market conditions, scope of specialty work, technical limitations and available capacity to the discussion about program and/or project goals with recipient agencies. ARTBA encourages this trend, as it results in more accurate and realistic goals for DBE participation. We support any efforts by the U.S. DOT to encourage this type of cooperation.

At the same time, more accurate goals, devised in the manner described, will likely alleviate the need for many good faith effort waivers.

Goal Submission

Within the transportation construction industry, there is a preference within many states to retain the annual development and submission of program goals. Among other advantages, in many cases this enables the program goal to be matched with the planned portfolio of work to be let over the coming year. Within the industry in other states, however, there has been openness to a three-year goal-setting schedule, which the department now allows.

This diversity of opinion shows that the frequency of goal-setting submissions should be left to the preference of the respective state transportation departments and other public agencies. The department should allow flexibility in the states' determining their respective goal-submission schedules, with the options perhaps including one-, two- or three-year intervals.

Improving Oversight

ARTBA sees this proposed improvement of oversight as a possible means, once again, of enhancing the DBE program's integrity. We would add that, ideally, agency staff assigned to this task should be as knowledgeable as possible about the transportation construction industry and its business practices.

Personal Net Worth

ARTBA strongly believes 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.

In revising and implementing the DBE program's personal net worth cap, USDOT should consider whether it is in fact creating additional barriers to achieving these objectives.

Interstate Certification and Related Issues

ARTBA supports the principle of certification reciprocity, especially in geographically neighboring jurisdictions, as a means of building capacity. This also maximizes a DBE firm's potential to grow and graduate out of the DBE program.

We also support the U.S. DOT's commitment to promoting reciprocity agreements between and among different agencies.

To facilitate certification, the application process should be simplified and uniform across the country so as not to impede a firm from entering the DBE program.

None of these principles, however, should be interpreted as intending to undermine the integrity of the DBE program as achieved through the certification process. We caution that state standards differ and the U.S. DOT should not mandate reciprocity amongst states. Doing so could, as the U.S. DOT acknowledges, create a culture of "forum shopping" by firms seeking the easiest state certification standards with the intent of later entering the market in a state with higher standards. Mandating reciprocity could increase the possibility of fraud in this manner.

It should be noted that non-DBE contractors typically must register and be pre-qualified in jurisdictions in which they work or seek to work. The agency appropriately has the authority to set limits on their ability to bid, and these rules vary from jurisdiction to jurisdiction.

Turning to the U.S. DOT's proposal of establishing a "rebuttable presumption" to the validity of another state's DBE certification, ARTBA would recommend giving the second state more than 30 days to approve or object to the application, a more realistic timeline with – once again – program integrity as the chief objective. The firm should also carry the burden of proof in this situation. Again, these recommendations are intended to enhance the integrity and implementation of the program.

Fostering Small Business Participation

The objectives of this section are admirable. ARTBA does caution against developing a system or program leading to multiple goals within the same program, and/or a program with discrete objectives to promote small businesses on the one hand and disadvantaged businesses on the other.

In Wisconsin, one of the states favorably cited by USDOT, small projects appropriate for small businesses are included in a separate letting, while mandatory subcontracting requirements are placed on certain bid items in large projects. However, these opportunities are not restricted to DBE firms or small businesses. Non-DBE contractors can and do bid on small break-out projects. Mandatory subcontracted bid items can be and are performed by non-DBE subcontractors. This ensures the integrity of the program, while increasing opportunities for DBEs who may or may not be small businesses.

On the issue of bonding, the Wisconsin experience is instructive once again. Prime contractors generally include DBE subcontractors within their performance bonds. This reduces project costs and expands DBE availability. In some cases, however, such as with a newer DBE or one with a record of performance issues, the prime contractor protects itself by requiring the DBE subcontractor to get bonding. In general, though, most prime contractors in Wisconsin seek to help DBE subcontractors to the degree allowed, and without unreasonable risk.

From the DBE subcontractor perspective in Wisconsin, then, they usually avoid the extra cost of bonding, and have no problem that high-risk competitors have to obtain their own bonding.

In difficult economic times, bonding can be a challenge for practically all contractors, although it cannot really be addressed through regulation. It is true that DBE firms who wish to bid as prime contractors often have a challenge in meeting the required bonding. In Wisconsin's case, as in many others, the state department of transportation works with banks to help make bonding available at affordable rates. U.S. DOT has undertaken a similar effort, which ARTBA supports.

Wisconsin Department of Transportation specifications also require a bidding prime contractor to offer advice to DBE subcontractors on getting bonded. However, the specifications do not require the prime contractors to obtain the bonding for the DBE subcontractor or pay for its cost.

ARTBA cautions against establishing any federal-level bonding rules that would inhibit a system like Wisconsin's, which, as has been described in these various respects, works well for all parties involved.

Terminations for Convenience and Substitution

This portion of the rule should protect the project's integrity and the public benefit derived from it. The rule should reflect customary business practices in the transportation construction industry and should not impede a prime contractor's ability to remove a non-performing or poorly-performing subcontractor for good cause.

Interpretation of the term “good cause” should derive from the DBE subcontractor’s ability (or inability) to perform work in a timely manner or as required by contract.

Moreover, any required reviews conducted by a recipient agency in this situation should be expeditious. If the recipient agency denies a prime contractor’s request to remove a DBE subcontractor, and the DBE firm fails to perform, then the prime contractor should be compensated by the agency for any additional costs.

In the case of incremental increases or change orders resulting from a substitution, the project goal should not be enhanced. An increased project goal could result in the prime contractor’s reassigning a subcontract in another area of the project from a non-DBE firm to a DBE firm. This scenario is contrary to the objectives of the DBE program.

Counting Issue

ARTBA continues to believe that current interpretation of this aspect of the DBE rule is contrary to the customary business practices of the transportation construction industry, harms DBE subcontractors in many cases, and can undermine the cost-effectiveness of projects. We are disappointed that the department has chosen not to revise its interpretation based on what it characterizes as a “plurality” of comments to last year’s advance notice of proposed rulemaking. We urge the department to revise its position.

As included in ARTBA’s comments submitted last year, we support “Option 3,” which would permit construction materials obtained by DBEs for a contract to be counted for DBE credit regardless of their non-DBE source. This improvement to the rule would allow DBE firms to operate in the marketplace in the same manner as non-DBE firms, removing a constraint from obtaining the best price and source in its purchasing. The current rule prohibits counting materials purchased by a DBE subcontractor from its non-DBE prime contractor toward the project’s overall DBE goals.

There are a vast number of legitimate scenarios in which normal business practices call for one company to purchase materials from another firm, which may happen to be the prime contractor on a given project. The current rule fails to recognize that geography may severely limit a DBE firm’s options of suppliers in a project’s area. In many cases, other public policy priorities may limit the availability of construction materials and natural resources to an even greater extent. For all of these reasons, the current rule can impede the growth of certain DBE firms whose supply options are limited, and who are thus a less attractive option for engagement by a prime contractor.

In implementing an amended rule under Option 3, agencies could address concerns of fraudulent behavior by verifying the prime contractor supplying materials to a DBE subcontractor is regularly engaged in doing so to both DBE and non-DBE customers.

ARTBA believes this change should only apply to the sale of construction materials (asphalt, aggregate, concrete, etc.) and should not generally extend to sales or leases of construction equipment. The counting of credit for sale or lease of equipment could raise concerns about a

DBE firm's ability to provide a commercially useful function independent of the prime contractor.

However, the U.S. DOT should recognize that equipment brought to the job by any contractor or subcontractor – DBE or non-DBE – may malfunction or otherwise require brief, temporary replacement on the job site. Normal business practice would allow, when possible, the prime contractor to temporarily lease the needed equipment to a subcontractor at a reasonable rate to ensure continuity of work at critical times. Under the current rule, when the subcontractor is a DBE firm, the value of that rental cannot count towards the overall project goal, creating an incentive for the DBE firm to rent elsewhere. This can work to the detriment of the overall project because of the additional time needed to do so, and can negatively affect the profitability of the DBE subcontractor, who may need to devote extra time or additional cost to the off-site rental. Again, concerns of fraud can be addressed if the prime contractor demonstrates it regularly supplies equipment to the marketplace at the same rates being charged to the DBE.

ARTBA also cautions that implementing Option 3 is not a justification for increasing project participation goals. Generally, there is no increase to actual work performed by a DBE firm under this recommendation. These material and supply purchases have already been occurring and have been counted towards overall project goals as the DBE firms have generally gone to sources permitted for counting purposes. Expanding the market choices to include a prime contractor or its affiliates simply bolsters competition, improves business practices and likely lowers project prices.

Certification-Related Provisions

Prime contractors seek DBE subcontractors who are reliable business partners. Accordingly, ARTBA believes there should be a wider discussion of what recipient agencies need to do to certify DBE firms. Prime contractors should use certified DBE firms because a recipient agency has concluded the DBE firm is ready, willing, and able. However, a key issue is that the prime contractor is expected to evaluate, through its own due diligence, whether the DBE can do the work bid, on time, and to the specifications. This can put the contractor into a high risk situation, since the rules severely constrain substitution, and agency payment for DBE delays or mistakes are often unrealistic.

We would encourage exploring certification tied to some experience level, as well as recipient agency review of DBE performance.

Thank you for considering these comments. ARTBA looks forward to a continued dialogue with the U.S. DOT, state transportation officials and other stakeholder groups on these important matters.

Sincerely,



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