

April 1, 2011

Docket Management Facility  
U.S. Department of Transportation  
1200 New Jersey Avenue, S.E.  
Washington, D.C. 20590-0001

**Re: Docket No. DOT-OST-2011-0025, Regulatory Review of Existing DOT Regulations**

To Whom It May Concern:

The American Road & Transportation Builders Association (ARTBA), now in its 109<sup>th</sup> year of service, provides federal representation for more than 5,000 members drawn from all business sectors of the U.S. transportation construction industry. ARTBA's membership includes private firms and organizations as well as public agencies 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 was very pleased to participate in the public meeting on March 14, 2011, during which the U.S. Department of Transportation (U.S. DOT or "the Department") received oral comments on regulatory provisions under its purview. We are equally pleased to submit these written comments and look forward to continued work with the Department on these important matters. The common theme is ARTBA's desire to maximize efficiency, minimize cost and preserve safety in the planning and construction of transportation improvement projects, objectives we know the Department shares.

Disadvantaged Business Enterprise (DBE) Program  
(49 CFR Part 26)

ARTBA and the Department have maintained a virtually continuous dialogue about implementation of the Disadvantaged Business Enterprise (DBE) Program over the program's nearly 30 years of existence. In recent years, ARTBA has submitted detailed comments as part of the Department's DBE rulemaking process, and several representatives of the association have participated in the Department's "DBE roundtable meetings." Most recently, we provided the transportation construction industry's viewpoint on a number of DBE program implementation issues through written comments submitted to the Department on July 9, 2010 (Docket ID Number DOT-OST-2010-0118). The program's impact is significant enough that ARTBA believes there are some overarching areas of concern to highlight as part of the current regulatory review process.

First, the DBE program's rules often diverge from the transportation construction industry's customary business practices, thus undermining efforts to provide the most efficient,



cost-effective projects for the taxpayers. At the same time, however, these aspects of the DBE program have little or no demonstrable benefit for the disadvantaged businesses for whose benefit the program was created – and, many would argue, actually harm the competitiveness of emerging DBE firms. One example is when a prime contractor is also a major materials supplier in a given area. This is a fairly common situation in that many contractors are vertically integrated. Since local ordinances or other environmental regulations often limit the number of plants or quarries in a given region, it may be the case that the prime contractor is one of the few suppliers in a geographic area for those construction materials. Normally, a DBE subcontractor would not hesitate to purchase materials from the prime contractor if it made business sense and the price was right.

Yet the DBE program, as currently implemented, does not allow the cost of those materials to be counted towards the project's DBE goal. Therefore, even if the prime contractor is offering a favorable price and sales terms, there is a strong incentive for the DBE subcontractor to turn away from what may be the most efficient option, which benefits the project's owner and the taxpayers, and instead purchase more expensive materials to help meet the DBE goal.

The Department did address this issue in the most recent DBE rulemaking (76 FR 5083) and indicated it did not intend to change this interpretation of the rule. So, again, this is an example of a significant divergence between the DBE program's implementation and the most efficient practices of the industry.

We would ask for the Department to revisit this issue and make more of an effort to take the industry's customary business practices and efficiency into account as you implement this aspect of the DBE rule. An improved interpretation of the rule would permit construction materials obtained by DBEs to be counted for DBE credit regardless of their non-DBE source. In turn, this 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 their purchasing. Expanding the market choices to include purchase of materials from a prime contractor or its affiliates simply bolsters competition, improves business practices and likely lowers project costs.

The Department and industry share a common concern over DBE capacity – that is, the number of DBEs who are ready, willing and able to participate in transportation construction projects. With many states attempting to implement ambitious DBE program goals, lack of capacity becomes a major obstacle for prime contractors to surmount as they seek to build the best project possible while complying with a challenging array of regulations. These transportation builders are also most willing to help build capacity in the local DBE community in an appropriate manner. In fact, many ARTBA chapters offer discounted memberships to emerging DBE firms, and hold regular events so prime contractors and DBEs can meet and explore future business relationships. However, the program is often implemented in a way to discourage the assistance of prime contractors. Obviously, sham DBEs and “fronts” are unacceptable, but there is often severe disincentive for the prime contractors to assist – appropriately – in encouraging the success of these fledgling businesses. We see this as undermining the core purpose of the DBE program and hope that the Department will continue to work with ARTBA to correct this inconsistency. We would like to see DBE regulations and their implementation strike a balance that enables established industry professionals to provide appropriate assistance to emerging firms, hopefully helping them to achieve sustained success in their business.

Hours of Service Rules for Commercial Motor Vehicle Operators  
(49 CFR Parts 385, 386, 390, and 395)

Throughout various Federal Motor Carrier Safety Administration (FMCSA) comment periods (starting in 2000) addressing the hours of service rule for commercial motor vehicle operators, ARTBA has argued the revised rule should not apply to drivers in the transportation construction industry. In the most recent rulemaking (75 FR 82170), FMCSA proposed to revise these regulations again, but without contemplating an exemption for the transportation construction industry. In comments submitted to FMCSA (Docket No. FMCSA-2004-19608-4095) and at the present time, ARTBA believes the rationale for this exemption remains strong and worthy of the agency's consideration. The effect would be increased efficiency in the construction of transportation improvement projects, while still preserving the safety of all involved.

Transportation construction industry drivers are not long-haul operators who consistently spend many consecutive hours on the road in a given day. They are short-haul drivers who typically travel less than 20 miles one way. Many of our drivers spend substantial amounts of time off the road during the work day, loading and unloading materials or equipment, which allows for short breaks. Others may be responsible for positioning a piece of mobile equipment at the beginning of the work day, but may not be back behind the wheel until day's end, so that their daily drive time is actually minimal. Generally, transportation construction industry commercial drivers do not operate in a manner that leads to concerns over fatigue that are the focus of the hours of service rule. Further, we are unaware of any conclusive data to demonstrate that driver fatigue and ancillary health issues are a significant problem in our industry.

Moreover, transportation project owners, the driving public and commercial shippers are expecting more timeliness and efficiency in the construction of these projects, as well as less disruption to traffic. Transportation construction firms will often work very long hours to complete these projects expeditiously, especially in regions of the country where seasonal weather is a factor. While windows of 10-11 hours of drive time and 13-16 hours of on-duty time may seem adequate, in fact they often disrupt the efficient deployment of professionals and resources on the construction job site, without a demonstrable increase in safety.

In recent years, the transportation construction industry and many public-sector transportation agencies have been eager partners in utilizing accelerated construction techniques to increase efficiency, maximize the safety of motorists and workers, and minimize the inconvenience to the traveling public. This often involves total closure of a bridge or stretch of highway in order to allow the contractor to undertake an intense effort to replace or renovate it within a very short time frame – sometimes over a single weekend. Similarly, natural or man-made disasters may require contractors to be extremely resourceful under even more challenging time frames, in order for them to repair or replace critical infrastructure assets that have been damaged.

The industry is proud to be at the cutting edge of these emerging techniques. However, in these circumstances, the hours of service rule makes the job more difficult by limiting the availability of certain key personnel to discharge job duties relating to commercial motor vehicles. The rule may also disrupt the timely delivery of materials to the construction site. For these reasons, the

rule may increase the project's cost (in terms of additional personnel required) without a requisite enhancement of safety for all concerned.

Therefore, ARTBA reiterates its desire that FMCSA develop an exemption relating to the drive-time and on-duty limits for transportation construction industry drivers. Any standard tailored for the transportation construction industry should be based on clear facts that establish the degree to which – if at all – fatigue for these drivers is a factor that could lead to an increase in deaths and injuries on the nation's roadways.

It should be noted that other classes of industries are exempt from the general rule or enjoy certain exceptions, including agriculture. A transportation construction industry exemption could be fashioned in a similar manner. Moreover, the existing rule includes a 24-hour restart provision (as opposed to 34 hours under the general rule) for commercial motor vehicle drivers of construction materials and equipment. So the rule already contemplates a unique place for our industry and it would be possible to carefully craft a wider, viable exemption in a similar vein. Such an exemption would address drive time and on-duty limits for our sector while preserving safety.

ARTBA is committed to a continuing dialogue with FMCSA and other entities – both in the public and private sectors – on these important issues, again with safety as everyone's priority.

#### Use of Proprietary Products in Highway Construction (23 CFR Part 635.411)

Another area of concern to ARTBA is the Federal Highway Administration (FHWA) rule (23 CFR 635.411) imposing broad restrictions against the use of proprietary methods, materials, and equipment on federal-aid highway projects. For years, ARTBA has written about, and discussed with policy makers, the negative impacts of this regulation with respect to the development and timely deployment of innovations in highway construction. The time has come to act and revise the regulation to allow states the flexibility and authority to use cutting edge technologies that will improve the safety, durability, and performance of our road and bridge network.

In 2007, ARTBA joined with the American Association of State Highway & Transportation Officials (AASHTO) and the Associated General Contractors (AGC) in adopting a policy statement outlining shared concerns with this regulation and urging specific reforms. Those reforms would allow states to utilize proprietary products on federal-aid projects based on the documented analysis and professional judgment of qualified state transportation officials that the products will contribute to goals identified in the state's strategic highway safety plan and that no equally suitable alternative item exists. That remains our recommendation, and we urge FHWA to modify the regulation accordingly.

We note that AASHTO has called for reform of the proprietary products regulation in its own testimony for this regulatory review and in its official recommendations to Congress for reauthorization of the federal-aid highway program. AASHTO's reauthorization proposal cites numerous examples of innovative products that states have been prevented from using in federal-aid projects because of the proprietary products rule, even though state officials believed those

products would have prevented crashes or saved lives and prevented injuries when crashes did occur.

In 2010, at the urging of FHWA Administrator Victor Mendez, ARTBA formed a task force with AASHTO and AGC to recommend policies that would accelerate the delivery of highway projects. The group made four primary recommendations, one of which was the better use of patented and proprietary products. The task force recommended that FHWA encourage innovation by relying on states to make decisions about the use of such products, rather than putting the burden on states to prove the products' need and efficacy to FHWA.

We believe 23 CFR 635.411, as currently written and implemented, is a serious obstacle to innovation in the highway marketplace. We appreciate this opportunity to reiterate ARTBA's support for reform of the regulation, as outlined above.

#### Approval Process for Federal-Aid Transportation Projects

Finally, while we understand that U.S. DOT's current regulatory review is limited to those regulations which fall directly under the Department's purview, we would be remiss if we did not underscore the need for reforming the current approval process for federal-aid transportation projects. With projects taking up to two decades to complete in some cases, the Department must do everything it can to reduce delay in the project planning and delivery processes, including working with natural resource agencies to ensure timely completion of environmental reviews. ARTBA is also participating in a regulatory review with the U.S. Environmental Protection Agency where we are addressing project delivery process reforms as well.

Again, ARTBA is grateful for the opportunity to submit comments on these important matters. We are committed to a productive working relationship with U.S. DOT and other entities to ensure that these regulations are reviewed and reformed to maximize efficiency and safety for all concerned, especially for the benefit of our mutual customers, the taxpayers. We are available for further discussion at any time.

Sincerely,



T. Peter Ruane  
President & C.E.O