

August 28, 2015

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

**Re: Docket ID Number FHWA-2015-0009, FHWA RIN 2125-AF61, Construction  
Manager/General Contractor Contracting**

On behalf of our 6,000 members, the American Road & Transportation Builders Association (ARTBA) respectfully offers these comments regarding the Federal Highway Administration's (FHWA's) notice of proposed rulemaking (NPRM) concerning construction manager/general contractor (CM/GC) contracting on federal-aid highway projects.

ARTBA's membership includes private and public sector members that are involved in the planning, designing, construction and maintenance of the nation's roadways, waterways, bridges, ports, airports, rail and transit systems. Our industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs. The transportation construction companies within ARTBA's ranks include those of every size, ownership structure and discipline. Many are also members of one or more of our 35 affiliated chapters across the country.

Numerous transportation contractors still prefer the low bid system and the guarantees of fairness that state public bidding laws provide. However, ARTBA's contractor member-firms embrace innovation and are always eager to advance the efficiency of transportation improvement projects, whether in terms of cost, time or safety. While ARTBA's membership includes firms, agencies and individuals representing all sectors of transportation construction, relatively few of them have first-hand familiarity with CM/GC. Accordingly, ARTBA has undertaken a member education effort on this method in recent years.

At this time, we are pleased to offer ARTBA's comments in response to FHWA's notice of proposed rulemaking for implementation of the CM/GC provisions included in the Moving Ahead for Progress in the 21<sup>st</sup> Century (MAP-21) Act, the federal surface transportation authorization law enacted in 2012. ARTBA's submission should not be construed as an "endorsement" or attempt to advocate for the use of CM/GC. We believe its use is best determined by state and local transportation officials working together with industry groups in their respective areas.



On many of the particulars of the CM/GC process, ARTBA defers to its affiliated chapters and member-firms with direct experience in either implementing CM/GC projects or shaping policy for its possible future use. We understand some of these entities are also submitting comments to FHWA and would urge the agency to consider them carefully. Moreover, as in the past, ARTBA would be pleased to help organize peer exchanges or other opportunities to discuss the pros and cons of the CM/GC method. As an example, ARTBA recently assisted with an expert panel at the annual meeting of the American Association of State Highway and Transportation Officials (AASHTO) Subcommittee on Construction, which explored Utah's experience with CM/GC projects from the federal, state and industry perspectives.

In consultation with interested ARTBA chapters and members, we offer the following feedback to FHWA's NPRM in the form of general comments and suggested clarifications.

### Uniqueness of Heavy/Highway Construction

It is important to note that the planning, design and construction of highway projects is a distinct discipline from the "vertical" construction industry, where versions of CM/GC (such as "construction manager at risk") have been commonly used over the years. In applying the "CM" method to heavy/highway construction, it is critical to preserve these types of distinctions and not simply assume that similarly-named methods are easily translated across very different construction disciplines.

As an example, highway contractors take great pride in putting their expertise to work by maximizing self-performance. In this way, the prime contractor can maximize its innovation and efficiency, enhancing the value for the project's owner-agency and the taxpayers. This can be somewhat different from customary practices in the vertical building industry, where the "construction manager" is often a broker of construction services by other firms. FHWA appears to be sensitive to this distinction by proposing a 30 percent self-performance requirement, similar to that found in other federal-aid highway contracting provisions. Some states require higher thresholds which, quite appropriately, the NPRM recognizes and would allow. ARTBA appreciates FHWA's attention to this issue as the agency finalizes and implements the CM/GC rule.

### Objectivity and Transparency

There continues to be concern within the transportation construction industry about the objectivity and transparency of the selection process when utilizing forms of alternative procurement. Because, as noted above, CM/GC's use on highway improvement projects is still relatively new in many parts of the country, there is a particular need to ensure the integrity of the process in this case. The NPRM is consistent with the provision in MAP-21 that gives flexibility to the contracting agency in determining factors for the selection of the CM/GC contractor (i.e. using "any combination of factors considered appropriate"). At the same time, FHWA notes its preference for various mechanisms such as interviews, which are intended to underscore that integrity. ARTBA supports objectivity and transparency as key objectives

should CM/GC be used. Proponents of CM/GC should understand these are critical values to enlisting the participation of the industry in this procurement method.

### Clarity, Risk and Timeliness

Transportation contractors are willing to accept risk in building projects, but they also price accordingly. Clarity in the CM/GC process, and all related documents, is important to this risk allocation. One example is the contracting agency's option to preclude a CM/GC contracting firm from bidding on the construction services contract if the agency and firm have been unable to agree on a price. This provision should be clearly delineated in the initial CM/GC procurement documents and elsewhere.

The NPRM also details numerous points at which the FHWA division administrator must review and approve the contracting agency's CM/GC procurement. Some of these proposed requirements are based on MAP-21 provisions, while others appear to emanate from FHWA's customary practices of federal-aid stewardship. ARTBA urges that these decisions be made as timely and clearly as possible. Delays in this series of approvals have the potential to disrupt, delay and add associated costs to a CM/GC project.

### Open Competition

ARTBA is pleased to see numerous references in the NPRM to the importance of open competition in the CM/GC process. There is no question that maximized competition, through which the contracting agency welcomes participation by all qualified firms of various sizes and ownership types, results in the greatest value for the taxpayer. As one prominent example, the NPRM emphasizes the importance of "free and open competition" in CM/GC selection procedures.

At the same time, however, FHWA's parent entity, the U.S. Department of Transportation, apparently intends to enable the use of geographic hiring preferences on federal-aid highway and transit projects. For many years, FHWA prohibited their use on federal-aid highway contracts because of significant – and completely justified – concerns that they would limit competition among contractors. As ARTBA has expressed through a separate rulemaking process, this should continue to be the Department's policy, particularly in these times of constrained transportation funding on all levels of government. Similarly, we agree with the approach in FHWA's NRPM on CM/GC contracting, in which open competition is explicitly cited as a paramount value. We respectfully suggest that all Department policy follow similar reasoning. As of now, however, anyone consulting the *Federal Register* would find one NPRM (for CM/GC) adhering to the principle of open competition, while another (for hiring preferences) seeking to undermine and elude it through various means. This internal conflict is inarguable and should be resolved in favor of the Department's longstanding, core value of maximizing competition, which is consistent with an equally longstanding provision of federal law.

## The CM/GC Process and DBE Compliance

The NPRM notes that the Disadvantaged Business Enterprise (DBE) program applies to federal-aid CM/GC projects, as it does to other federal-aid highway programs. The DBE program was initially authorized in an era when traditional “design-bid-build” contracting comprised nearly all federal-aid highway project procurement. Accordingly, FHWA developed DBE compliance procedures geared to that type of procurement. While that method still predominates, the use of alternative procurement has grown within certain states in recent years. At the same time, ARTBA has noted apparent regulatory gaps which FHWA division office and state transportation agency officials have filled with their own questionable interpretations of DBE requirements when outside the design-bid-build realm. Therefore, it is critical that FHWA provide clarity in exactly how DBE program compliance is to be harmonized with the CM/GC process as the latter evolves in use. Uncertainty in this regard merely invites various agencies, or individual officials, to inject their own, unrelated policy priorities into the procurement process.

It is noted that at the beginning of a federal-aid design-build highway project, existing policy does not require identification of all DBE subcontractors to be used over the life of that project. We agree with ARTBA chapters and members who would like to see this approach adapted within the CM/GC rule, along with other related provisions for which design-build policy may be an appropriate model.

### Conclusion

ARTBA looks forward to continued dialogue with FHWA, AASHTO and other industry groups on the use of CM/GC. We will also be working with our members and chapters to make sure they have the information and material necessary to discuss the issue with their state and local transportation agencies should there be interest in employing CM/GC in their respective markets. ARTBA appreciates the opportunity to comment on the proposed CM/GC rule and is available to further address this topic at any time.

Sincerely,



T. Peter Ruane  
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