



May 8, 2019

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Ave., SE
Room W12-140
Washington, DC 20590-0001

Re: Docket No. DOT-OST-2017-0069, Notice of Review of Guidance

On behalf of the more than 8,000 members of the American Road & Transportation Builders Association (ARTBA), I respectfully offer comments on the U.S. Department of Transportation's (USDOT) February 5 "Notice of Review of Guidance."

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 \$500 billion annually in U.S. economic activity and sustains more than 4 million American jobs.

USDOT guidance documents shape the environment in which ARTBA members do business. ARTBA's public sector members adopt, approve and fund transportation plans, programs and projects. ARTBA's private sector members plan, design, construct, maintain and provide supplies for transportation improvement projects in all modes, including those utilizing federal-aid funding.

ARTBA appreciates USDOT's offering this opportunity to review existing guidance documents and provide comments in key areas of concern for our members.

Disadvantaged Business Enterprise (DBE) Program

Compliance with the Disadvantaged Business Enterprise (DBE) Program, which has been in place for nearly 40 years, is a key task for transportation agencies and contractors on federal-aid transportation projects. The program's purposes include developing DBE firms and ensuring a level playing field in contracting for federal-aid projects. As with other regulatory requirements, the transportation construction industry seeks to comply with the DBE program rule while carrying out its core objective of delivering projects in an efficient, timely and safe manner. Moreover, the integrity of the DBE program is critical.

Over the years, ARTBA has worked to maintain an ongoing dialogue with USDOT on DBE policy issues, with sometimes mixed results. We do appreciate those USDOT officials who remain responsive to requests for meetings and presentations on current DBE issues. It would be even

more advantageous for both parties if future interactions would also include opportunities to collaborate on upcoming policy initiatives.

In reviewing current USDOT guidance relating to the DBE program, this submission identifies areas which can be improved, clarified, added or omitted. ARTBA is recommending ways in which the DBE program can be run more efficiently and effectively, especially for the benefit of the taxpayers and those emerging businesses for which the program was developed. Similarly, we point out specific aspects of the current DBE rule and guidance where the opposite often results. 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.

Our key sources for USDOT DBE guidance are “Official Questions and Answers (Q&A’s) Disadvantaged Business Enterprise Program Regulation (49 CFR 26),” dated April 25, 2018; and one of its addenda, “Procedures for Submitting Good Faith Efforts Information on Design-Bid-Build Contracts,” dated June 20, 2018.

There are four primary themes in our DBE-related comments: 1.) identification of provisions that diverge markedly from customary and efficient industry practices, which can add project costs and sometimes work to the detriment of DBE firms themselves, 2.) inconsistencies in USDOT’s adherence to its own DBE guidance document, which explicitly advises recipient-agencies to craft aspects of their DBE programs using “information about the real world of contracting in the recipient’s contracting area,” because “[r]ecipients know their own markets” [p. 61]; 3.) lack of meaningful consultation with the industry and other legitimate stakeholders about important policy changes; and 4.) failure to modernize the DBE guidance to reflect evolving business practices in the industry (especially those involving emerging technologies), with numerous Q&A sections dating back to the previous century. ARTBA hopes this guidance review process will result in improvements in all four of these areas.

Good Faith Effort and Submission of DBE Commitments

USDOT conducted a significant DBE rulemaking in 2012-14, issuing its final rule on October 2, 2014 (79 CFR 59565). A key and contentious issue was the department’s initial proposal to abolish the longstanding “responsibility” option, through which recipient-agencies could accept DBE utilization plans from bidders (often just the apparent low bidder) within a reasonable number of days after the bid on design-bid-build projects. Had the department stayed with its original position, as ARTBA and numerous other commenters noted, prime contractors and DBE subcontractors, among others, would have been overwhelmed with the mandate to gather or submit quotes for numerous projects at the same time, many/most/all of which would be for projects in which they would not eventually participate. The potential for added administrative costs was obvious. For example, at the time of the rulemaking, Illinois had a state “no cure” law similar to USDOT’s proposed provision. While Illinois’ law was in effect, fewer projects met the DBE goal and some DBE subcontractors overcommitted themselves during the bidding process, leading to their demise.

Ultimately, to the great relief of industry and many recipients, the department settled on a maximum 7-day window (later to be decreased to five days) for the submission of DBE commitments under the responsibility option. To the best of our knowledge, in a series of written, audio and video communications rolling out the DBE rule changes in late 2014 and early 2015, no one from USDOT averred recipients would now need to require all bidders to submit their DBE commitments in all circumstances. The practice among the states would continue to vary, in that some states only required this information from the lowest apparent bidder, others the lowest two bidders, and so forth.

In fact, in the publication of its final rule in 2014, USDOT described the responsibility option as follows: “We think it reasonable ultimately to limit the time to a maximum of 5 calendar days to protect program beneficiaries and overall program integrity.” In a related footnote, “Due to the definition of ‘days’ adopted in this final rule, bidders or offerors will have 5 calendar days (i.e., not business days) to submit the necessary information. Thus, if a bid is submitted on Thursday, the apparent low bidder would have until Tuesday to submit the information” [emphasis added].

It was therefore shocking and disappointing when the department issued a one-page guidance on June 20, 2018, ordering that on design-bid-build contracts, “all bidders... submit credible documentation of DBE commitments and/or good faith efforts either with their sealed bid, as a matter of responsiveness; or no later than five days after bid opening, as a matter of responsibility” [emphasis in original]. Department officials have since contended this revised guidance was not a change in policy, but a restated means of reviewing the performance of all bidders and their respective good faith efforts. Under that reasoning, the pronouncements made upon publication of the final rule were misleading and/or opaque—whether intentional or not. (On at least two occasions, a department official publicly stated or implied recipients could maintain current options for implementing the responsibility approach, if they abided by the newly-prescribed time limit.)

It is puzzling the department would let 1,357 days (or three years, eight months and 18 days) elapse between publication of its final rule and this supposed clarification of related, existing policy. (If it was part of longstanding policy, why not make that clear while rolling out the rule changes?) It is also disappointing that in 2018, the current administration – which is clearly dedicated to regulatory reform – would allow this “back door” approach to rulemaking. Had ARTBA and other stakeholders been given the opportunity to make public comments, we would have made a compelling argument this change in policy will add costs to many projects, in direct contravention of the administration’s regulatory reform principles. This situation is a perfect example of why the current leadership at USDOT is justified in undertaking this guidance review.

To be certain, implementation of this good faith effort guidance provision will increase project costs in a number of states. In the past, we have seen this draconian approach result in fewer bidders among prime contractors, DBE contractors’ quoting too few projects (for fear of

overcommitment) or too many (sometimes leading to their dissolution) and decreased achievement of DBE project goals. In 2013, ARTBA presented a survey of nearly 300 transportation construction contractors, who overwhelmingly anticipated the proposed new DBE regulations (such as one similar to the 2018 guidance) would increase the cost of projects because of added compliance burdens.

Moreover, department proponents of this approach ignore – and have no coherent response for – the fact that most DBE firms (which are small businesses, and often start-ups) do not have the capacity to provide quotes for numerous projects at the same time, as part of the same letting, especially given the likelihood they will participate in just a few of them, at best. Perhaps there is a theoretical world where fledgling DBE firms have this ability, but not in the “real world of contracting,” which the department’s guidance document purports to capture.

In both substance and process, this is not the right approach for USDOT. We urge the department to carefully consult with interested stakeholders and reverse this good faith effort “misguidance” for the reasons stated. ARTBA welcomes further discussion on this important issue.

Good Faith Effort Parameters

After nearly four decades, the DBE rule and guidance still do not provide objective descriptions of good faith efforts to be undertaken by prime contractors. USDOT should compile examples of successful good faith effort practices nationwide, which would function similarly to case law in the legal realm. At the same time, while the department advises that prime contractors need not accept DBE subcontractors’ prices which are “excessive or unreasonable,” the guidance has never provided insight as to how to define those terms.

ARTBA members noted examples of recipient-agencies in their market do not maintain current or accurate databases or lists of DBE firms actually ready, willing and able (as the rule states) to participate in a transportation project. These lists – if they exist at all – commonly include firms in disciplines unrelated to transportation or construction, not qualified or certified to work on a project for that agency, or out of business or unreachable. The related concept of “potential DBEs,” as used in assessing good faith effort or setting overall DBE goals in a jurisdiction, strains the limits of credulity.

For all these reasons, the guidance should direct recipients to compile and maintain information for legitimate and relevant DBE firms. The current rule also suggests a prime contractor use the services of community organizations and business assistance offices as part of its good faith effort. That role is more properly assigned to the recipient, for the benefit of all prime contractors and DBE firms.

Prompt Payment and Retainage

There have been ongoing concerns the USDOT guidance on prompt payment and retainage (pp. 4-9) does not reflect the “real world of contracting.” ARTBA members report one recent development at the state level, in which prime contractors have been prohibited from withholding funds for a DBE subcontractor’s pro-rated bond, as well as their state/local association dues. This prevents a common industry practice and puts affected DBE subcontractors at a disadvantage, in that their non-DBE counterparts are able to address surety protection and association membership as part of the contractual relationship with their prime contractor. To address this and related prompt payment issues, we suggest a collaborative effort with recipients and industry to better understand everyone’s respective views of the payment process.

Prime Contractor/DBE Subcontractor Relationship

In some notable cases, the DBE Q&A prohibits DBE credit for customary and efficient industry practices. Generally, the cost of equipment purchased or leased by a DBE subcontractor from a prime contractor does not count for DBE credit (p. 12). (Similarly, materials purchased from a prime contractor do not count either.) Given it is common for “primes and subs” to undertake these types of transactions, the rule and guidance actually put DBE firms at a disadvantage in this regard. Industry has long made the point that materials suppliers may be limited in a given geographic area, and as a result it may be necessary for a prime contractor, who is also the sole/dominant supplier there, to sell material to the DBE subcontractor. The department continues to ignore the realities of that circumstance, but should instead allow counting of the material for DBE credit.

The Q&A also directs prime contractors to consult with their recipient-agency about the appropriateness of their relationship with a DBE subcontractor. Unfortunately, the recipient’s assessment can count for little or nothing should law enforcement question the relationship at a future time. These agency assessments should constitute a safe harbor for the contracting parties should they follow the agency’s parameters.

Regular Dealers

In another issue addressed in the 2012-14 rulemaking, the department initially explored abolishing the regular dealer designation for DBE firms, then in the final rule mandated those firms’ status would be determined on a project-by-project basis.

The Q&A betrays a strong presumption that drop shipment of supplies or materials to a project site downgrades a DBE supplier’s status from regular dealer to that of expediter or broker. In that case, the prime contractor may not count any of the materials cost (other than the DBE firm’s commission) for DBE credit, and the practice also calls into question the subcontractor’s commercially useful function.

This viewpoint is outdated and shows unawareness of current business practices in the industry, in which emerging technologies and efficiencies continue to develop. The “case-by-case” approach is also excessively subjective and puts this determination in the hands of perhaps one agency official.

Moreover, in September 2018, the department conducted virtual listening sessions on the regular dealer issue, but limited the number of participants. While these events appeared to be common knowledge among many recipients and DBE-oriented organizations, USDOT did not invite certain key segments or representatives of the industry (ARTBA included). This suggests, at best, a careless approach to assessing this issue, and, at worst, an attempt to skew the results. Given the echo chamber in which DBE policy is often made, ARTBA is once again grateful for this opportunity to publicly address relevant department guidance. We hope USDOT can correct these previous procedural shortcomings and conduct a truly meaningful conversation on regular dealer issues, rather than one with select participants.

Commercially Useful Function

This section of the Q&A (pp. 40-42) again does not capture current industry practices and potential roles on a transportation improvement project. The material in this section dates back to 1999 and 2012. Technology and other developments have created new opportunities and potential responsibilities for subcontractors, DBE and otherwise. (One example of many is a social media coordinator for a major project, where public communications is vital.) The department should initiate a dialogue with industry to bring this section up to date.

Joint Checks

The use of joint checks is a common industry practice, regardless of a subcontractor or supplier’s status as a DBE. Many such firms welcome this method of payment. Yet the DBE Q&A deems the use of joint checks as a “‘red flag’ calling for further scrutiny.” Again, the department should make an effort to be better attuned to typical industry transactions and not approach this practice with a presumption of guilt.

Mentor-Protégé Programs

Nearly 20 years ago, the DBE Q&A recognized the use of mentor-protégé programs in DBE development. However, the guidance provides virtually no direction as to the permissible structure of such a program, instead giving responsibility to the private sector. Prime contractors may have little incentive to participate, especially considering the legal risk they may incur if law enforcement later accuses the parties of improper relationships.

A better approach would be directing recipients to initiate mentor-protégé programs in consultation with the industry in their market. Again, the department should compile permissible practices for all to see, and stand behind them as a legal safe harbor for program participants.

Fiscal Constraint Requirements

The Federal Highway Administration (FHWA) regulatory policy of “fiscal constraint” strictly limits state Transportation Improvement Plans (TIPs) and State Transportation Implementation Plans (STIPs) to current resources. In practical terms, fiscal constraint requirements discourage long-range planning by forcing states and local governments to forego long-term solutions in favor of stop-gap measures when there are uncertainties in long-term funding.

The FHWA guidance document, “Financial Planning and Fiscal Constraint for Transportation Plans and Programs Questions & Answers¹” should be repealed. In the alternative, the requirements should be modified to allow for the delay or cancellation of programmed projects. States and metropolitan planning organizations (MPOs) should be permitted a reasonable level of “over-programming” to assure that all available federal funding is utilized.

State and MPO plans should define workable solutions to projected needs and be used to define funding needs, regardless of current revenues. Repealing fiscal constraint requirements will allow recipients the flexibility to address their long-term transportation needs.

Categorical Exclusions

Under Section 1315 of the “Fixing America’s Surface Transportation” (FAST) Act (2015), FHWA, on behalf of the U.S. secretary of transportation, developed a programmatic agreement template for categorical exclusions (CEs). The FAST Act specifically states the template was to be developed for CEs listed in section 771.117(c) of title 23 in the Code of Federal Regulations (CFR), which are grouped by certain letter designations. For example, “c-list” CEs normally do not require any further National Environmental Policy Act (NEPA) approvals by FHWA, while “d-list” CEs require additional documentation to be sent to a federal agency, as outlined by an FHWA programmatic model dating to 1989².

The intent of the FAST Act provision was to provide a single, uniform process for processing CEs on the “c-list,” given there were no constraints associated with their use except for “unusual circumstance.” However, FHWA developed a template which reclassified and included three previous “d-list” CEs and their associated constraints. This has had the practical effect of imposing historical “d-list” constraints on the use of all “c-list” CEs, which are not required under federal regulations. Therefore, FHWA’s template is more restrictive and burdensome than the relevant federal rule for those projects with “c-list” CEs, requiring more case-by-case review by the agency. This was not the intent of the FAST Act language, nor the intent of programmatic agreements generally.

¹ Available at: https://www.fhwa.dot.gov/planning/guidfinconstr_qa.cfm.

² <https://www.environment.fhwa.dot.gov/projdev/docuaceda.asp>

FHWA should re-examine its template developed pursuant to the FAST Act and ensure true “c-list” CEs constitute their own designation so they may be used expeditiously at the project level.

“Buy America” Requirements

The Buy America law, dating to the early 1980’s, requires steel or iron components “permanently incorporated” in federal-aid highway projects be manufactured in the United States, subject to possible waivers and exemptions. Some interpretations of Buy America have required contractors to provide extensive documentation and certification for the smallest and least expensive project components. In these cases, the administrative costs and potential related delays can easily outweigh the slight economic benefits for domestic manufacturing interests.

In early 2012, ARTBA and some of our affiliated chapters expressed concern to FHWA about extreme interpretations of the Buy America rule by the agency’s division offices in certain states, who were insisting that contractors provide detailed documentation of the origin of small and inexpensive components, valued at literally pennies apiece. In many cases, these restrictive applications added costs and delays to the project.

In response to these concerns, FHWA issued a memo in December 2012 exempting manufactured products containing less than 90 percent steel or iron, as well as “miscellaneous steel or iron products,” such as screws, bolts and other minor items, from Buy America. FHWA’s clarification appeared to have quieted these outlying interpretations.

However, as a result of the litigation and an adverse court decision, FHWA rescinded its 2012 memo on January 6, 2016, instructing its division offices to interpret the provisions of Buy America as best they could until the agency provided further direction. ARTBA, our chapters and members were once again concerned about the potential for inconsistencies and misguided interpretations of the rule, which could lead to project cost increases and delays. In February 2016, ARTBA led a group of nine national trade associations in writing FHWA, asking the agency to undertake a formal rulemaking on this subject as soon as possible.

FHWA responded by proposing a waiver for Commercially Available Off-the-Shelf (COTS) Products with Steel or Iron Components later in 2016, but the waiver was never finalized. Codifying a waiver for these products would save on these compliance costs, while preserving and reaffirming the law’s coverage of core project materials and components, which ARTBA supports.

FHWA should revisit the proposed waiver of Buy America requirements for COTS items. FHWA has defined a COTS item as any manufactured product incorporating steel or iron components (with some exceptions) that:

- is available and sold to the public in the retail and wholesale market;

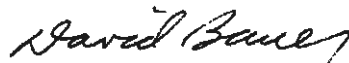
- is offered to a contracting agency, under a contract or subcontract at any tier, without modification, and in the same form in which it is sold in the retail or wholesale market; and
- is broadly used in the construction industry.

This waiver should not be intended to preempt or compromise project specifications or quality standards relating to these items. Exempting COTS items from Buy America requirements will preserve the law's protection of domestic manufacturing interests while not causing unnecessary project cost increases and delays relating to small, inexpensive components.

Conclusion

Thank you for considering ARTBA's views on potential improvements to numerous examples of USDOT guidance. We hope for a continuing dialogue on these issues, and stand ready to participate at any time.

Sincerely,



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