



August 16, 2021

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

Re: Docket No. DOT-OST-2021-0072, "Agency Requests for Approval of a New Information Collection(s): Disadvantaged Business Enterprise (DBE) Program Requirements"

The American Road & Transportation Builders Association (ARTBA) respectfully submits these comments to the U.S. Department of Transportation (U.S. DOT or "the Department") relating to its Disadvantaged Business Enterprise (DBE) program. ARTBA's membership includes transportation construction contractors of all sizes and disciplines across the country, with DBE and non-DBE prime, specialty and subcontractors among those represented.

Compliance with the DBE program, which has been federal law for nearly 40 years, is a key task for transportation agencies and contractors on federal-aid projects. The program's stated purposes include developing DBE firms and ensuring a "level playing field" in contracting for those projects. As with other regulatory requirements, the transportation construction industry seeks to comply with the DBE program rule while carrying out its core objectives of delivering projects in an efficient, cost-effective, timely and safe manner. Moreover, the integrity of the DBE program is critical, and we believe U.S. DOT should continually strive for improving the clarity of the rules through which it implements the program.

DBE policy remains a complicated matter, encompassing an ongoing dialogue among elected officials, federal and state agencies, the transportation construction industry and the DBE community. U.S. DOT's current information collection seeks to quantify the cost of compliance, primarily from the standpoint of state and local transportation agencies ("recipients"). While ARTBA's membership includes many such public agencies, our comments draw on the experiences of the contractors described above, within the framework published by U.S. DOT in the *Federal Register* on June 15, 2021. We look forward to addressing other DBE-related policy matters with the Department when possible.

We also submit these comments at a time when Congress is considering historic increases in federal transportation investment. The transportation construction industry stands ready to meet the challenge of putting this investment to work across the country, in all communities. However, administrative and regulatory burdens can only limit the associated economic benefits, such as creating and supporting jobs, and development of DBE firms and other small businesses. Therefore, this is a critical time to seek improvements of DBE policies as well as other federal regulatory issues.

The Department's *Federal Register* notice lists 17 aspects of the DBE program, about which U.S. DOT wishes to better understand their respective paperwork burdens. ARTBA offers its comments relating to nine (9) of these activities (sometimes combining more than one topic into a single subject area below). In many cases, our premise is that more accurate data-collection and more thorough administrative procedures by recipients can ameliorate risks to the industry later on. This will help keep project costs down and maximize economic benefits from these projects, including the development and growth of DBE firms.

Maintain Bidders Lists and Maintaining DBE Directories

While compiling bidders lists and DBE directories may be time-consuming for recipients, those agencies are in the best position to spare prime contractors of significant regulatory and paperwork burdens later in the process.

Unfortunately, the listing of certified DBE firms in a given jurisdiction does not always accurately reflect those actually "ready, willing and able" to participate in a federal-aid transportation project, to use the DBE rule's parlance. In attempting to draw on these directories to help formulate a DBE utilization plan for a project, a prime contractor may find that numerous firms are without accurate or complete contact information, are unresponsive to outreach or simply defunct, are listed with incorrect North American Industry Classification System (NAICS) codes and/or come from disciplines unrelated to transportation construction. (DBE office cleaning firms are a common example.) The inefficiencies caused by substandard DBE directories are numerous, but for purposes of these comments they can add significant time and effort to prime contractors' compliance efforts. (We also reference these issues in the section on good faith efforts below.)

Current DBE directories should reflect today's ease in assembling, organizing and updating information. The static, outdated DBE directory represents the relic of another age.

Monitoring the Performance of DBE Program Participants and Evaluating the DBE Certification Eligibility of Applicant Firms

Recipients should stand behind their DBE certifications, as well as their favorable determination of a DBE firm's commercially useful function (CUF) throughout the life of a project.

Regrettably, in actual practice within some jurisdictions, the prime contractor must stand in the shoes of the recipient, performing extensive and time-consuming due diligence on prospective DBE subcontractors while developing its utilization plan. When the prime contractor relies solely on the recipient's certification, it can still risk legal liability relating to CUF. Audits and investigations on this topic can take place during the latter stages – or even after completion – of a project. Government agencies initiating them usually do not accept reliance on a recipient's certification determination as a valid defense. As with other forms of risk, many contractors try to quantify this relative unknown (i.e. the possibility that a DBE subcontractor will be found lacking in CUF, despite the prime contractor's due diligence) and include it in their bid prices, meaning this can be a factor in increasing project costs. Ultimately, then, a greater investment of

time and care by recipients through the certification process will improve efficiencies and mitigate risk throughout the life of a project.

Addressing Overconcentration of DBEs in Certain Types of Work

In its *Federal Register* publication, U.S. DOT notes that its operating administrations “have never received submittals of overconcentration determinations from recipients.” Based on feedback from segments of our membership, ARTBA believes it is time to review this issue in many jurisdictions, where overconcentration in areas like trucking are well known. Better data in this regard will also inform U.S. DOT, recipients, industry and the DBE community in what should be a collaborative, strategic effort to develop new DBE firms within disciplines where they are needed.

Setting Overall Goals for DBE Participation in DOT-Assisted Contracts

DBE program goal-setting is another area where a more thoughtful, inclusive approach by recipients on the front end will yield a more successful program for all concerned. In contrast, goals based on faulty data or premises, or which are developed in an adversarial manner with industry, can spawn numerous inefficiencies on the project level. To cite the most notable example, unrealistic program goals often lead to flawed project goals, resulting in good faith effort waiver applications from prime contractors unable to meet the goal in their bids. We address the numerous issues with the good faith effort process elsewhere in these comments.

Unfortunately, goal-setting remains one of the most politically-charged aspects of the DBE program. In some jurisdictions, recipients raise the program goals in cycle after cycle, primarily based on political will to do so regardless of the lack of supporting evidence.

The most successful goal-setting procedures include contractors – usually through their state or regional association – in a collaborative way. They can provide insight into factors such as realistic DBE availability within certain disciplines, prime contractors’ abilities to subcontract certain types of work, and more.

Projecting Which Portions of Overall Goals of DBE Participation Will Be Met Through Race-Neutral Means and Which Portions Will Be Met Through Race-Conscious Means

ARTBA believes better data collection on race-neutral DBE participation in all projects will better inform goal-setting, alleviate pressure to use an exclusively race-conscious approach in achieving the DBE program’s objectives, and provide a more accurate portrait of the DBE community in a given jurisdiction. While it may be a lofty aim, the DBE program should continue striving towards a race-neutral approach that will still develop significant opportunities for emerging DBE firms.

Submitting Evidence of Having Made “Good Faith Efforts” To Secure DBE Participation in DOT-Assisted Contracts

Good Faith Efforts and Submission of DBE Commitments

For contractors, the greatest “paperwork” concern within this information collection relates to good faith effort documentation. Regrettably, it is both a perennial issue and one that has increased in severity during recent years.

U.S. DOT 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 participate. The potential for added administrative costs was obvious. For example, in Illinois (which at the time had a state law similar to U.S. DOT’s proposed provision), fewer projects met the DBE goal and some DBE subcontractors overcommitted themselves during the bid project, leading to their demise.

Ultimately, to the great relief of industry and many recipients, the Department settled on a maximum seven-day window (later to be decreased to five days) for DBE utilization plan submissions 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 U.S. DOT averred that recipients would now need to require all bidders to submit DBE utilization plans in all circumstances.

In fact, in the publication of its final rule in 2014, U.S. DOT 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 effort. 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, at least one Department official 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 (if not exasperating) why the Department 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 U.S. DOT would take this “back door” to rulemaking without an opportunity for public comment, which would show this change in policy will add costs to many projects.

This guidance provision is a prime example of “paperwork” requirements driving up industry administrative costs, along with project costs. 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) to increase the cost of projects.

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 remote possibility they will win most of those bids. Perhaps there is a utopian land where this is true, but not in the “real world of contracting,” to use the Department’s own words.

U.S. DOT has asked contractors to quantify their burden in complying with these good faith effort requirements. We cite just two examples, first from a contractor who stated:

I believe our average burden on [good faith efforts] to be approximately 168 hours and \$17,000 (based on 24 contracts bid in a year). This could be more depending upon how often we do not meet a goal and have to defend our good faith efforts. This could vary widely among respondents due to electronic vs. paper recordkeeping, experience of the worker and their familiarity with the program as well as possibly doing additional work that may not even be required due to ambiguity on the part of the [state DOT].

Another contractor described the following:

We estimate that we incur cost ranging from approximately \$8,000 to \$13,000 (relating to GFE documentation) on every federal-aid project that we bid with an estimated project value of approximately \$5 million. These costs include time spent by project estimators, clerical staff and company management. The time involved can vary based upon many factors including availability of relevant DBEs businesses for the project

scope, the complexity of the project and any unique aspects of the bid. The size of the project to be bid most certainly impacts the GFE costs incurred as well – e.g., GFE efforts on a \$100 million project are significantly more than those incurred on the \$5 million project example listed above. We believe that for every additional \$5 million in bid cost, the GFE effort increases approximately 5 percent. Thus, on a \$100 million project, our GFE costs could exceed \$25,000 for a single bid. We would also like to add that just because a contractor does not ultimately submit either (a) an actual bid on the project or (b) its complete GFE documentation to a recipient for evaluation does not mean that the contractor has not incurred GFE costs. Contractors often do not know that they can achieve the project’s DBE goal until bid day (or often after the bid date during the responsibility period). Thus, GFE costs are typically incurred from the very beginning of a contractor’s bid evaluation for a project, and can continue throughout the entire project duration (e.g., finding replacements for DBEs that cannot perform after project award).

Extrapolating these samples of time commitments and costs across all bidders in all states (especially when federal investment may be increasing markedly) shows the extraordinary collective burden of this mandate, which will limit economic growth from transportation investment while offering questionable benefits to DBE firms themselves.

In both substance and process, then, this is not the right approach for U.S. DOT. We urge the Department to carefully consult with interested stakeholders and reverse this good faith effort “misguidance” for the reasons stated.

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. U.S. DOT 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.

As noted above, some ARTBA members report that recipients in their respective markets 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. To reiterate, these lists commonly include firms in disciplines unrelated to transportation or construction, not qualified or certified to work on a project for that agency, or that are out of business or unreachable. Moreover, the related concept of “potential DBEs,” as used in some jurisdictions to assess good faith efforts or set program goals, strains the limits of credulity.

For all these reasons, the guidance should direct recipients to compile and maintain information limited to legitimate and relevant DBE firms. The current rule also suggests that 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.

Removing the Eligibility of a DBE Firm

From the prime contractor's standpoint, this issue ties together various forms of risk, as described above. Again, there is concern about recipients' ability to stand behind their DBE certifications. Currently, prime contractors risk sanctions when subcontracting with a properly certified DBE firm that is later removed from eligibility, judged to have not performed a commercially useful function, or believed to have undertaken work outside their stated NAICS code(s). In this case, prime contractors should be held harmless for relying on recipients' certifications, unless proven to have acted in bad faith. Improvements to the certification process, a subject area of this information collection, will help in this regard.

It should also be noted there is currently no mechanism to suspend a DBE firm from the program while conducting a review of their eligibility under due process. This would present a less extreme option than the "all or nothing" of maintaining or removing the firm's DBE status. It should also be crafted to lessen the risk for a prime contractor relying on the firm's previous certification.

Conclusion

Excessive administrative and paperwork burdens can carry significant ramifications for the DBE program's effectiveness. Unfortunately, they have been a hallmark for the program in recent years. While this information collection focuses primarily on public agencies, the burdens of all program participants – recipients, industry and DBE community – are interrelated. ARTBA hopes this information collection represents a step forward in improving implementation of the program during this critical period for the U.S. economy and transportation infrastructure investment. We appreciate U.S. DOT's review of these comments and ask that the Department continue with a collaborative effort addressing DBE program policies in the months ahead.

Sincerely,

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