

December 13, 2012

Dear Friend of the DBE Program:

As you may be aware, in early September 2012, the U.S. Department of Transportation (US DOT) issued a Notice of Proposed Rulemaking (NPRM) proposing various changes to the Disadvantaged Business Enterprise (DBE) Program. The NPRM (attached) is long and complex and proposes a myriad of changes to the rule. Most of the proposed changes are excellent and will do a great deal to assist DBEs and improve the program. Unfortunately some of the proposed changes are extremely problematic and will create a great deal of new paperwork for resource-strapped DBEs while likely doing little to actually increase program enforcement and integrity.

In monitoring the submissions on the NPRM, we have noticed that while many chapters of the Associated General Contractors and other representatives of the large contractors have commented on the rule, very few DBEs, DBE organizations, civil rights groups, or policy makers have made their views known. Unfortunately, many of the comments which have been submitted to date oppose the NPRM provisions that would assist DBEs and affirm provisions that would hurt DBEs. Unless DBEs, and their supporters in the advocacy and civil rights community and Congress make their views known, US DOT will have an unbalanced view of the impact of its proposed rule.

For this reason we are writing to provide you with the NPRM, a few important points about the NPRM and instructions about how to comment. It is crucial that US DOT hears your viewpoint on the NPRM and not just the voices of large prime contractors. Below, we have provided a few points that we believe are important. We hope you will include these points in your own submission to US DOT. We encourage you to add any additional points you believe to be important, if they are not mentioned below. Please note that comments on the NPRM are due **by 11:59pm on December 24, 2012**

Key Points Related to DBE NPRM Docket # OST-2012-0147

- **Paperwork and Disclosure Burden:** The NPRM proposes significantly increasing the paperwork burden on DBEs by requiring new disclosure requirements and longer, more complex forms. While we commend the move to require universal use of standardized application and personal net worth (PNW) forms without modification, the proposal to significantly increase the paperwork requirements for DBEs is unacceptable. Our organizations have heard many reports of firms that never get certified and firms that choose to leave the DBE program because the paperwork burden is too great. There is not sufficient evidence that those who are intent on defrauding the program will be persuaded to act honestly by imposing additional paperwork requirements on all DBEs. Instead, US DOT should aim for a net decrease in the time spent by DBEs to fill out application and PNW forms and a net decrease in the time required by Unified Certification Program (UCP) staff to review and verify the forms. As a result of such a change, UCP staff could focus on monitoring and enforcement of DBE program requirements. To this end, we urge US DOT to:

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1. Consider which new information and documentation is most needed by UCP certifiers and those at US DOT who must review certification appeals. Ensure that other paperwork requirements or disclosures are reduced or eliminated to result in an application process (and annual no change affidavit process) that represents a net decrease in time spent on paperwork by both DBEs and recipient certification staff. Spousal PNW forms or annual PNW forms should not be required. There are other far less burdensome ways to collect this information.

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2. Release the methodology used as the foundation for the paperwork time estimates included in the NPRM and all methodologies used to calculate paperwork time estimates for any final rule. □

3. Implement the suggestion of Robert C. Ashby (comment # OST-2012-0147-0048) to develop the “moral equivalent” of the 1040EZ tax reporting form for applications from smaller and less sophisticated DBEs, reserving the more complex forms for large operations. □

4. Collect and disseminate best practices for collecting and investigating allegations of fraud and program noncompliance. Additional paperwork requests should be targeted toward those firms that are suspected of seeking to defraud the program at the time a problem is detected, not imposed on the vast majority of DBEs who are honestly seeking to comply with all program requirements. □

- **Goals, “Good Faith Efforts”, and Bid Submission Requirements:** We strongly support US DOT’s proposal to require that all relevant DBE information be provided as a matter of responsiveness at the time of bid submission. The current practice of allowing each recipient

to decide whether DBE information should be collected as a matter of responsiveness or responsibility has led to abuses of the DBE program. We support permitting recipients the flexibility to decide whether they want to require all good faith efforts documentation at the time of bid submission, or require it only from the apparent successful bidder(s) within one day of bid opening. In addition to supporting this change we encourage US DOT to:

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1. Collect and disseminate best practices with respect to the review and treatment of good faith efforts documentation. For the good of both DBEs and non-DBEs alike, we agree that there can be no uniform checklist or one-size-fits-all approach to good faith efforts. Still, it would be helpful to recipients and firms to have a range of examples of excellent practices from diverse jurisdictions. □

2. Collect and disseminate best practices for effective program enforcement in other areas of the DBE program including goal setting, contract compliance, DBE outreach and training, efforts to help DBEs by forecasting changes in the recipients' upcoming contracting needs and efforts to decrease the overconcentration of DBEs in fields with lower profit margins and less opportunity for growth by assisting them to transition other areas of contracting where DBEs are less available and opportunities are greater.

3. Eliminate the requirement that recipients collect and maintain detailed bidder's lists. This requirement is ill-advised for all of the reasons set out in the NPRM. Eliminating the requirement would reduce paperwork for recipients, DBE firms, and non-DBE firms in the jurisdictions that collect this information.

4. Affirm that only "good faith efforts" made prior to bid submission should be considered in making a determination of whether a firm has made a "good faith effort."

- **Additional Issues for Consideration:** While we recognize and applaud the hard work that went into developing such an extensive NPRM, there were a few important subjects omitted. We strongly encourage the US DOT to address the following subjects in any new or supplemental NPRMs:

1. The US DOT should tackle the issue of bundling, the consolidation of two or more contracts into a solicitation of offers for a single contract. Our organizations acknowledge that the US DOT has requested comment on this subject in the past, and it is a difficult subject for rulemaking. However, a broad range of reports and testimony of small and disadvantaged firms

makes clear that bundling remains a major barrier to the participation in government contracting of small firms led by individuals of every race and gender. We urge the US DOT to develop a working group on this issue, consisting of federal, state and local government officials, DBEs, non-DBE firms, trade associations, and advocacy groups to work together to identify practical solutions to this problem and to put forth suggestions for guidance or regulations.

2. We urge the US DOT to follow the lead initiated by Congress several years ago and address the issue of bonding. Unfair bonding requirements hurt small firms of every race and gender. At a minimum, the USDOT should prohibit the use of excessive, unreasonable, or discriminatory bonding requirements by any recipient of federal transportation funding

3. We urge the US DOT to investigate additional ways to ensure that all individuals have equal access to the good jobs, career paths, and entrepreneurship opportunities created by federal transportation infrastructure investment. At a minimum, the US DOT should collect and share demographic data (i.e. race/ethnicity, gender, household income) about the workers and businesses that complete projects funded by federal transportation dollars. Of course, this must be accomplished in a way that provides composite data and protects the privacy of individual workers and firms. In addition, the US DOT should consider new and innovative efforts to ensure that no individual is disadvantaged—or confronts discrimination—when it comes to access to the employment and business opportunities afforded by federal transportation spending.

- **Stakeholder Process:** Finally, we strongly encourage US DOT to consider conducting additional stakeholder input sessions around the changes recommended by this rule. We especially urge you to conduct stakeholder discussions around the proposed increases in paperwork and disclosures the NPRM would impose on DBEs and the consequent increases in work load these changes would impose on UCP and other recipient staff.

Instructions for Submitting Comments

We urge you to make your voice heard by filing comments on the NPRM **by 11:59pm on December 24, 2012**

There are various ways that you can file comments listed in the beginning of the attached NPRM. For many, the easiest is to simply file comments online at regulations.gov. After you

open the

www.regulations.gov

website, type in the docket number,

OST-2012-0147.

This will bring you to a website where you can file your comments. Be sure to include the docket number in any submission you make.

Thank you so much for your willingness to make your voice heard on this important issue.