



July 9, 2010

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

RE: Docket Number OST-2010-0118

Dear Docket Clerk:

On behalf of the more than 1,500 member organizations of the American Public Transportation Association (APTA), I write to provide comments on the Office of the Secretary's (OST) Notice of Proposed Rulemaking on the Disadvantaged Business Enterprise: Program Improvements published May 10, 2010, at 75 FR 25815.

About APTA

APTA is a non-profit international trade association of approximately 1,500 public and private member organizations, including public transit systems; high-speed rail agencies; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation. More than ninety percent of Americans who use public transportation are served by APTA member transit systems.

Specific Issues

Accountability for Recipients With Respect to Overall Goals

While we believe accountability is an indispensable aspect of the DBE program and that analysis and documentation are necessary means of achieving accountability, DOT's proposal is not sufficiently developed for incorporation into the regulation. The proposal fails to consider or account for de minimis shortfalls, presuming instead that any failure to meet goals "means that the measures... have not fully created that level playing field." There are myriad reasons why a public

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agency's efforts could fall slightly short of its goal that have nothing to do with the efficacy of its efforts, not the least of which is the Department's bifurcated rule which places states in the U.S. Ninth Circuit under a different regime than the rest of the country and allows little room for any but race-neutral means of reaching an agency's goals in those states. Moreover, the proposal fails to describe in even the most basic terms what these reports would look like, how DOT would review and respond to these reports, or how DOT would ensure proposed corrective measures are put into practice. We believe the Department should work with the DBE firms, non-DBE prime contractors, agencies, and state authorities to craft a more complete proposal to accomplish these important goals.

~~While we believe good faith implementation is an indispensable aspect of the DBE program, DOT's proposal to require a formal report whenever an annual goal is not met threatens to create the very "impermissible quota system" the Department seeks to avoid.~~

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~~In explaining the proposal, the NPRM notes an “overall goal is the recipient’s estimate of the ‘level playing field’ amount of DBE participation” in the absence of discriminatory effects. The Department must acknowledge that this estimate is just that—an estimate. Additionally, the assumption that failing “to meet the overall goals means that the measures... have not fully created that level playing field” presumes too much. There are myriad reasons why a public agency’s efforts could fall slightly short of its goal that have nothing to do with the efficacy of its efforts, not the least of which is the Department’s bifurcated rule which places states in the U.S. Ninth Circuit under a different regime than the rest of the country and allows little room for any but race-neutral means of reaching an agency’s goals in those states. Penalizing public agencies that fail to achieve that estimate, even if by the slightest amount, by requiring creation, editing, submission, and review of a formal report essentially converts that estimate to a quota. DOT should abandon its efforts to create this burdensome reporting requirement absent actual evidence of bad faith.~~

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Goal Submission

The concept of varying year-to-year projections of DBE participation over a three year reporting period would, as recognized by the Department, undercut the purpose of establishing the three year reporting period and is inconsistent with the transit program. It should not be employed to public transportation agencies.

Improving Oversight

The NPRM proposes to require written certification that grantees are complying with their obligations under the program. We do not believe the proposed certification adds value to the program and, in fact, runs contrary to the purpose of 49 USC 5323(n). That statutory provision encourages consolidation of certifications into a single, annual submission. The proposed certification would be imposed on “any contract with DBE participation” creating thousands of pages of redundant certifications without improving the DBE program.

Personal Net Worth

APTA supports the concept of adjusting the program’s personal net worth limitation for inflation and that the Consumer Price Index is a useful, objective tool for doing so. Additionally, we believe the limitation should be adjusted and announced on an annual basis and that DOT allow for temporary disqualification and automatic reinstatement when a program participant’s personal net worth surpasses the current limitation but falls within that of the next year. In those cases, it would be an undue burden on small business owners to require a complete new application and review.

The NPRM also solicits opinions on the propriety of excluded retirement savings from the calculation of personal net worth. We support excluding bona fide retirement instruments such as 401(K) plans, IRAs, and Keogh plans from the calculation and encourage the

Department to exclude 529 plans that provide for a child's future education as well. The standard for exclusion should be that the plans are essentially illiquid. We do not believe the other instruments mentioned in the NPRM – “stocks and bonds, certificates of deposit or savings plans” or life insurance with an immediate cash value – are appropriately included in this category since they are easily liquidated without extraordinary tax consequences.

Interstate Certification and Related Issues

We believe the proposed “rebuttable presumption” that a DBE qualified in one jurisdiction should be qualified in another provides little assistance to DBE firms and avoids the issue that has long stood in the way of reciprocity. Currently, a DBE firm certified in state A may submit bids and proposals noting that they have applied for certification in state B. Our DBE members report second state certification rarely exceeds 30 days now so the rebuttable presumption would not necessarily improve opportunities. The program would be better served by striving for consistency in the rules, application, and approval processes of the various states. Although a national program is likely beyond DOT’s resources, requiring use of common forms is not. Certifying entities currently ask for the same information but the applications are different. A common format, posted in a database accessible to other certifying authorities, would eliminate the need for DBEs to spend many hours reconstituting common information into varying formats, and allow state B authorities to begin the certification process without delay by simply accessing a secure database to retrieve basic information.

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~~We believe the proposed “rebuttable presumption” that a DBE qualified in one jurisdiction should be qualified in another places a substantial burden on state authorities responsible for the various Unified Certification Programs (UCP) and avoid the issue that has long stood in the way of reciprocity. Instead of devising methods to placing burdens of proof on states or business owners or placing tight time restrictions on state officials, we believe DOT would be better served by striving for consistency in the rules, application, and approval processes of the various states. The alternative currently proposed would doubtlessly serve to exacerbate the current barriers to reciprocity, resulting in firms being caught in the difficult position of being certified in “State B” for 30 days, then disqualified because “State A” is an “easy grader” and “State B” is not.~~

Fostering Small Business Participation

We do not believe creating a sub-program for small business within the DBE program would be useful. The proposal should be abandoned and DOT should place greater emphasis on collecting and sharing best practices. The proposed sub-program would simply further complicate DBE plans, distort the intent of creating a level playing field to remedy the effects of discrimination, and drain precious resources to administrative exercises that offer no incremental improvement of the program.

Terminations and Substitutions of DBE Subcontractors

APTA supports the proposal to require agency concurrence when prime contractors seek to supplant DBE subcontractors and to require good cause for doing so. We believe that the first listed 'good cause' – that the DBE fails or refuses to execute a written contract should reference a "reasonable" written contract. Bond and other requirements added to subcontract requirements after the bidding process that would raise a DBE's costs without raising the DBE's compensation are potential examples of when an offered contract could be found unreasonable.

Counting Issue

Value added by DBEs should be the only measure of DBE participation. As we noted in our response to the April 2009 Advance Notice of Proposed Rulemaking (ANPRM), the practice of counting materials obtained from one large supplier but not from another could interfere with competition. Allowing recipients to make case-by-case exceptions would place an additional, unnecessary burden on recipients. Counting materials obtained from all non-DBE sources simply masks the true participation level. We believe the fourth option offered in that ANPRM, counting only the value added by a DBE firm, is the simplest, most transparent, and most enforceable option. Although goals and reported participation rates would likely go down, actual participation by DBEs would not be reduced.

Certification-Related Provisions

The proposal to require on-site reviews every three to five years to ensure continuing eligibility would create an immense burden on state authorities responsible for UCPs. While states should be allowed and encouraged to conduct on-site reviews when evidence suggests a DBE's circumstances may have changed such to warrant review, the best source of continuing eligibility information are agency personnel conducting on-site contract monitoring. DOT should encourage states to collect input from these recurring contacts with DBEs and only resort to on-site reviews of the DBE itself when reasonably indicated. Differentiating between these different on-site review functions would also provide clarity to the program.

We appreciate the opportunity to assist the Department in this important endeavor. For additional information, please contact James LaRusch, APTA's chief counsel and vice president corporate affairs, at (202) 496-4808 or jlarsch@apta.com.

Sincerely yours,

William Millar
President

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