December 24, 2012

U.S. Department of Transportation
1200 New Jersey Avenue, SE
West Building Ground Floor
Room W12-140
Washington, DC 20590-0001

RE: Docket No. OST-2012-0147

Dear Docket Clerk:

On behalf of the more than 1,500 member organizations of the American Public Transportation Association (APTA), and the collective 5,000 (individual, business and private agency) members of the Conference of Minority Transportation Officials (COMTO), we write to provide comments on the Office of the Secretary's (OST) Disadvantaged Business Enterprise: Program Implementation Modifications Notice of Proposed Rulemaking (NPRM), published September 6, 2012, at 77 FR 54952.

About APTA

APTA is a non-profit international trade association of more than 1,500 public and private member organizations, including public transit systems; high-speed intercity passenger 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.

About COMTO

The mission of COMTO is to ensure a level playing field and maximum participation in the transportation industry for minority individuals, businesses, and communities of color through advocacy, information sharing, training, education, and professional development. COMTO has thirty-nine (39) chapters throughout the United States. Members include individuals, transportation agencies, academic institutions, industry non-profits and Historically Underutilized Businesses (HUBs). From highways and roads to mass transit systems; from subways to rail systems; and from port authorities to airports, COMTO members represent every facet of the transportation industry.

General Comment

APTA and COMTO appreciate the Department's efforts to guard against fraud and abuse in the DBE program while keeping the application process as easy and objective as possible to ensure consistency and avoid discouraging DBEs from entering the program. We understand that balancing

these competing interests is, at best, difficult and offer the comments below to assist in striking that delicate balance.

Personal Net Worth Form and Related Requirements

We agree with the proposal to cease use of SBA Form 413. In implementing the Department's draft form, we believe it is DOT that should develop the fillable form rather than leaving it to individual states and other entities. By developing the form centrally, the Department can guard against minor variations in data fields and other aspects of the form that would effectively stop a DBE firm from populating State B's form with a dataset developed via State A's form. Moreover, the Department can accomplish the task once more economically than the states and other entities can do so individually.

We caution the Department concerning the proposed additions to Section 26.67(b). The phrases "able to accumulate substantial wealth" and "unlimited growth potential" are not, even with the example provided in the draft text, sufficiently defined to promote consistency when the same information is reviewed by multiple states or other grantee entities. While we agree ownership of high value personal assets should prompt reviewers to ask additional questions when appropriate, the mere fact that an applicant's credit and reliability allows him or her to obtain highly leveraged, expensive personal property should not be used to exclude them from the program.

The NPRM proposes to add language concerning transfers from a DBE owner to the applicant firm. While this is extremely useful in keeping people from 'gaming' the system with a C corporation, the Department should also consider how best to ameliorate the skew created when the DBE firm is an S corporation. S corporation owners are already dissuaded from the manner of transfers this proposal was drafted to guard against and, in fact, often find their personal net worth exaggerated simply through their choice of corporate structures.

The NPRM seeks comment on whether non-interested spouses of DBE owners should be required to file financial disclosures. We do not believe a blanket requirement for spouses to file would be helpful. Where a spouse is not involved with or has no interest in the DBE business, such a requirement would be counter-productive and simply dissuade qualified DBE owners from applying for the program. Also, as the Department has noted, the complexity of property ownership rights and variability from state to state argue against a 'one size fits all' approach. This situation is quite different from a spouse who, as in the next question posed, has a role in or supports the business through credit support or otherwise. Interested spouses should file personal net worth statements.

Application Form

We support the proposed changes to the application form and note these changes are designed to support reciprocity. We believe, however, that DOT can and should do more. The Department should establish and maintain a nationwide database of application forms. While this would fall far short of the ideal – centralized, 50 state certification conducted by DOT itself – it would go far in easing the burden on applicants and reviewers alike. We believe this database could even include a status/history section so a reviewer could see at a glance where else an application has been reviewed and the status of those applications. Reciprocity is absolutely vital to the DBE program and this

database would provide a solid step in that direction, easing the burden on applicant firms while still guarding against fraud and abuse.

Additionally, we believe the Department should review its procedures for calculating sales and establishing thresholds. We fully support use of NAICS codes throughout the system and encourage the Department to work across government to establish the specialty NAICS codes necessary to fully take advantage of the system. While we recognize the Department cannot independently establish new NAICS codes, we believe it is incumbent upon DOT to forcefully advocate for refinements in that system. The current code limitations skew the DBE system by combining dissimilar services. As an example, manufacturers specializing in transit vehicle air conditioning systems are not specified and, as a result, these manufacturers are included in a far broader category. This makes it difficult to determine the availability of potential DBE sources or their presence or absence in this distinct market.

Finally, we believe DOT should review the method of counting value to account for significant differences between, for example, a supplier and a mere distributor, and to appropriately account for the significant differences between a DBE subcontractor (who typically completes 100 percent of the work required by a subcontract with its own forces) and a DBE prime contractor (who may reasonably subcontract away 40 percent or more of the work under any particular contract. Counting subcontracted work in this manner effectively relegates DBEs to subcontractor roles.

DBE Commitments/Awards and Payment Reporting Form

We believe this reporting requirement could be greatly simplified and the actual results made infinitely clearer by simply requiring reports of payments to date. Waiting for completion skews the reports and gives a false impression of progress. Waiting to report until a contract is complete does not allow the report to be used as a 'red flag' during the course of contracts – particularly those that take several years to complete.

Certification Provisions

Section 26.65 – Please see our comments above concerning the need to adjust gross receipts for DBEs who serve as prime contractors with substantial subcontractor participation.

Section 26.69 – In addition to our comments above, we believe this section must allow for priority where it is a reasonable, common business practice, such as in the case cited in the NPRM. The mere presence of debt or a senior equity interest that reflects a non-DBE partner's legitimate share of ownership should not be used as a reason to deny participation in the program. The proposed conditions, referencing prevailing market conditions, support this position concerning debt only.

Section 26.71 – We are concerned about the tone of this section. We support the Department's efforts to combat fraudulent 'spin-off' ventures that are simply facades for a non-minority business but this proposed section creates a strong presumption of misconduct. This would effectively discourage participation in the program where a DBE firm is supported by a non-DBE firm, contrary to mentor-protégé and similar concepts meant to encourage support and fostering of DBE businesses.

Section 26.73 – We oppose blanket elimination of "prequalification" as a procurement tool. DBE firms should be treated like others in this respect and the current language assures this. There is a place in sound procurement practice for prequalification.

However, we remain concerned that requiring a DBE, certified in State A, to be fully certified in State B prior to competing for work in State B could be counter-productive. The qualification and certification processes must remain separate and distinct. We encourage the Department to explore options that would allow DBE firms to partner and compete for work in states beyond their home state, even if they are not yet fully certified in the second state. The burden of certification serves as a barrier to some DBE firms seeking to enlarge their areas of operation when certification is a prerequisite to even proposing to serve as a subcontractor.

We believe our position that *prequalification*, when applied uniformly, is acceptable but that *pre-certification* inhibits DBEs' ability to compete, is consistent with the Department's intent and urge the Department to clarify as much.

Other Provisions

Section 26.53 – USDOT's proposal that recipients consider "DBE usage" as the indicator of responsiveness in *every* case may be appropriate for small short duration contracts, but for most contracts it would be counter-productive, greatly reducing opportunities for DBE firms, increasing bid preparation costs for DBE and non-DBE firms alike and increasing bidding risk for DBE firms.

Reducing Opportunities - Submission of all DBE quotes at the time of bid would reduce opportunities for smaller DBE firms. Whether for construction, or design & consulting, subcontractors are often in the best position to break work into smaller components for DBE firms to bid. These second tier subcontracting opportunities often take place during the course of the contract, closer to the time the work is to be performed. This provides opportunities for a more defined scope of work, more efficient bidding by subcontractors, and more opportunities for DBE firms. Requiring all DBEs to be identified *at the time of bid* would dramatically reduce these second tier subcontracting opportunities.

Similarly, many elements of a bid are not fully fleshed out at the time of bid. The intense bid submission process leaves some elements of the proposal with a "plug number" with details to be determined after bid and closer to the work. These are often elements to be performed at later points in the contract process and are the ones most likely to be bid to DBE firms. Forcing construction firms, or consultant/design firms to fully identify all of these elements *at the time of bid* would reduce opportunities for the smaller DBE firms going forward and would likely force bidders to utilize only the *large* DBEs with a proven track record. That runs contrary to the underlying principles of the DBE program itself.

Price escalation and Bidding Risk - Locking a small firm in to a price and scope of work a year or more before the work actually takes place, imposes significant risk of price escalation on the small DBE, especially if the bid relies on commodities with fluctuating prices, such as

steel, concrete and fuel. It also ties up bonding capacity to bid on other work and limits the ability of new entrants to the marketplace to obtain work opportunities.

Moreover, we strongly object to the proposal to submit all quotes received. This would likewise be counter-productive, particularly in states where bid documents are routinely released under sunshine laws. It would discourage ongoing, long-term partnerships between primes and subs that cannot be measured in a single contract. It would discourage participation on contracts covered by Part 26 in general by DBE and non-DBE firms, interfere with competition, and drive up prices paid by recipients.

These concerns apply to the proposed changes to Appendix A as well, since the Department has proposed to replicate these destructive proposals there.

We appreciate the opportunity to assist the Department in solving these important issues and would be happy to provide any additional information necessary to complete this process. For additional information, please contact James LaRusch, APTA's chief counsel and vice president corporate affairs, at (202) 496-4808 or jlarusch@apta.com or Julie Cunningham, COMTO President/CEO at (202) 857-8064 or jcunningham@comto.org.

Sincerely yours,

Michael P. Melaniphy
President & CEO
APTA

Julie A. Cunningham
President/CEO
COMTO