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U.S. Department of Transportation
1200 New Jersey Avenue SE
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Re: Docket No. DOT–OST–2022–0051, "Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications"

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 implementation of its Disadvantaged Business Enterprise (DBE) program (87 Fed. Reg. 43620-43685, July 21, 2022). 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 in federal law for over 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 a safe, efficient, cost-effective, and timely 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 for its implementation.

The passage of the Infrastructure Investment and Jobs Act (IIJA – also known as the Bipartisan Infrastructure Law) in 2021 greatly heightens both the opportunities and challenges for the industry and its DBEs as described above. The legislation featured an historic 38 increase in federal highway investment and 73 percent increase in federal transit investment between FY2021 and FY2022, followed by more modest but continued annual increases over the IIJA's remaining four years.

This markedly-increased federal investment should result in commensurate growth among DBE firms, provided that 1.) all parties to the DBE program – including federal agencies, state and local recipients, and the industry – remain committed to building the pool of DBE firms "ready, willing and able" to participate in transportation projects, and 2.) federal, state and local officials minimize the regulatory and bureaucratic barriers to doing so.

This rulemaking largely relates to that latter topic. ARTBA gladly endorses some of these proposed policy changes. However, other revisions would prove to be troublesome, in that they

may increase the cost of projects, which are already subject to unprecedented inflationary pressures, and/or unintentionally limit opportunities for DBE firms themselves.

Besides our shared priority of successfully utilizing the IIJA's transportation infrastructure investments, we note the current administration's emphasis on non-traditional recipients (such as localities) and the importance of their successful implementation of federal-aid projects. Many of these agencies will be deploying federal-aid dollars for the first time, and DBE compliance will be a major challenge for administrative reasons alone. This further underscores the need for U.S. DOT to minimize onerous regulatory hurdles and traps within the DBE rule.

We hope these comments will be part of an ongoing, full and frank dialogue with U.S. DOT and all parties to the DBE program.

DBE Supplier Credit (§ 26.55(e))

In this rulemaking, the area of primary concern for ARTBA and its members relates to the designation of regular dealer suppliers and associated issues.

First, we raise an important issue of process. The notice of proposed rulemaking (NRPM) references "stakeholder meetings" on this topic, which took place September 26-27, 2018. According to the Department, "[p]rime contractors, recipients, stakeholder associations, and DBEs… attended and many shared valuable information from their various perspectives." The NPRM goes on to cite these meetings multiple times as a source of authoritative information.

While our association does not necessarily disagree that participants in those meetings "shared valuable information," it is nonetheless true to the best of our knowledge that:

- ARTBA, which represents more transportation contracting firms than any other national association and has continuously engaged with the Department on DBE issues for decades, was not invited to these meetings;
- Notice of these meetings was never published in the *Federal Register*; and
- Lists of attendees, transcripts or other records of these meetings are not readily available on-line.

In contrast, a Department listening session during a previous DBE rulemaking on December 5, 2013, was well-publicized and well-attended, including ARTBA representatives who offered comments and heard first-hand those of other participants. So there is evidence that U.S. DOT officials had experience planning and holding an inclusive event of that kind.

In the current NPRM, the Department recounted its statement from the 2014 DBE rulemaking that "more analysis and discussion was needed to make informed policy decisions about how best to amend the regulations governing regular dealers and transaction facilitators…" However, in basing proposed rule revisions on content derived from undocumented, closed meetings, U.S. DOT is in danger of practicing "regulation by anecdote" as opposed to the data-

and fact-driven approach to which it aspired eight years ago. As described below, we implore the Department not to finalize revisions to the DBE rule until reviewing comprehensive, empirical data in this regard, as well as meaningful input from parties excluded in 2018.

Limiting DBE Supplier Goal Credit (87 Fed. Reg. 43632)

For the first time, the Department proposes to cap a prime contractor's DBE goal credit from expenditures made with DBE suppliers, including manufacturers, regular dealers, distributors (a new category), and transaction facilitators. The proposal would limit that credit to 50 percent of the project goal. This is a major and unfortunate revision which ARTBA opposes.

First, the proposed limitation is not data-driven. The NPRM includes no clear rationale for capping the credit at 50 percent, as opposed to some other number (or not at all, as now). Elsewhere in the NPRM, U.S. DOT describes the need for enhanced DBE utilization data in the Uniform Report. While being a worthwhile task, it is also a tacit admission that the Department does not have adequate empirical information to justify change in policy. Similarly, in preparing their own comments or feedback, a number of ARTBA affiliated chapters requested utilization data from their respective state departments of transportation, to assess how disruptive a 50 percent cap would be. Generally speaking, they found this information to be unavailable.

Second, the proposed cap would limit recipients' flexibility to set appropriate DBE goals for projects. The composition of federal-aid projects can vary widely in terms of work tasks to be subcontracted, items and materials needed, and so forth. In partnership with industry in their respective states or localities, recipients should maintain the ability to fashion appropriate goals, rather than being subject to a prescriptive approach from above.

Third, the pool of ready, willing and able DBE firms continues to be deficient in certain disciplines within certain markets. Imposing this 50 percent cap will not magically provide new opportunities for non-supplier DBE firms, particularly where they simply do not exist, or are already committed to other work, at the present time. If the Department truly wants to develop this aspect of DBE capacity, then it should work collaboratively with recipients, industry and the DBE community – all of whom are equally committed to this objective – on initiatives to do so.

Fourth, numerous DBE firms function as regular dealers based on long-term business plans and significant expertise. While one detects an air of skepticism from the Department when addressing this topic in its recent NPRMs, these DBE suppliers provide valuable services and are considered critical members of the transportation construction industry in many markets. The 50 percent cap will likely harm many of them, as prime contractors will have to seek other ways of fulfilling major percentages of project goals, sometimes having to submit good faith effort petitions while some DBE regular dealers sit on the sidelines.

Fifth, given the realities described above, more difficulties in meeting project goals will result in more of those good faith effort petitions from bidders. To the extent these are allowed (given that certain states maintain an unofficial – and legally-questionable – policy of not meaningfully

considering these types of petitions at all), this process can add time and administrative costs to projects, undercutting the value of the IIJA's record investments.

Finally, we argue that such a cap, if imposed, should be accompanied by a commensurate adjustment in project goals, so they reflect the true DBE capacity among firms that are not suppliers. (As discussed below, the cap should not include expenditures made with DBE manufacturers, who are a distinct group.)

Ultimately, for all these reasons, the 50 percent cap is arbitrary and capricious. The Department should not embed it within the DBE rule without procuring and analyzing extensive further data. Failure to do so will undermine the wide-ranging economic objectives of the IIJA by increasing the costs and delivery time of many federal-aid projects.

Evaluating a Supplier's Designation as a Regular Dealer (87 Fed. Reg. 43632-43633)

In 2014, the Department maintained the provision allowing 60 percent credit towards the contract goal for supplies procured from a regular dealer. However, U.S. DOT revised the rule to reflect its belief that counting decisions involving DBEs functioning as regular dealers "is by definition a 'contract-by-contract'' determination made by recipients after evaluating the work to be performed by the DBE on a particular contract." 79 Fed. Reg. 59588 (Oct. 2, 2014).

The current NPRM characterizes the regular dealer requirement as follows:

> (1) whether the DBE is an established business regularly engaged in the sale or lease of a product of the ''general character'' of that required under the contract; and
>
> (2) whether the DBE meets certain performance requirements in supplying the item.

In practical terms over the past eight years, the "project-by-project" approach has lessened the predictability for prime contractors seeking regular dealer partners on a project. Previously, certain DBEs were widely recognized as regular dealers and a prime contractor including them in a utilization plan could have confidence that the recipient would count them as such. Since 2014, prime contractors have maintained an acute need for recipients to make timely and accurate regular dealer determinations on individual projects.

Now, the Department proposes that recipients make a preemptive determination of a regular dealer's commercially useful function (CUF) when included in a DBE utilization plan submitted by a prime contractor (i.e. at the "pre-award/subcontractor approval stage"). Some ARTBA members point out that – along with the proposed 50 percent cap addressed above – this new provision could negatively impact DBE suppliers. A prime contractor could risk losing a low-bid contract should a recipient determine that a supplier's participation will not count towards the DBE goal, dropping the utilization plan below the required threshold. In many cases, then, prime contractors may choose to limit that risk by curtailing use of regular dealers in their DBE plans in the first place. Additionally, this change could delay the award of contracts while the

state agency conducts these CUF-capable reviews. Generally, project delays increase costs, especially in the current market with unprecedented effects on materials costs and availability.

Other aspects of the proposed rule revisions feature subjective terms that can undercut administrability. For example, a regular dealer's items must be "provided from the DBE's inventory, and when necessary, any minor quantities delivered from and by other sources are of the general character as those provided from the DBE's inventory." 87 Fed. Reg. 43673. Absent more exact definitions, the parties' interpretations of the terms "major portion," "minor quantities" and "general character" can certainly vary. Again, this will lessen predictability for prime contractors fashioning utilization plans as well as recipients making CUF determinations, and add to administrative costs.

Some ARTBA members also note that requiring a regular dealer to own and operate distribution equipment (often trucks) can actually make them non-competitive against other firms in the market. Common industry practice often maximizes efficiencies by the dealers' using third-party trucking equipment and services. The Department should be aware of this business reality when revising the rule.

Drop-Shipping and Delivery From Other Sources (87 Fed. Reg. 43633)

U.S. DOT, recipients, the industry and DBE suppliers have wrestled with the issue of drop shipping for many years, during which time related business practices have evolved because of improved technology, distribution methods, supply chains and even intervening events like the recent pandemic.

The proposed change allowing regular dealers to use drop-shipping for "minor quantities" of materials will further restrict the use of these vendors on projects by limiting their competitiveness with non-DBE firms, which can utilize drop shipping for any and all materials. Forcing a bona fide regular dealer to warehouse nearly all materials for sale to the prime contractor will increase their costs and decrease efficiencies on the project.

The Department proposes to add a new classification of DBE "distributor," under which the prime contractor could count 40% of the cost of materials or supplies toward the project goal. This addition will carry its own administrative challenges. Many such DBE firms will be reluctant to provide recipients or prime contractors access to their proprietary distributorship agreements, which the proposed rule requires to make an affirmative CUF determination for this type of vendor. Future guidance should provide workable solutions for this scenario.

Finally, the long-term dialogue on drop shipping has encompassed concerns over firms acting as brokers, whose items are not eligible for DBE credit. While ARTBA is not necessarily advocating for treatment of brokers to change, some members emphasize that characterizing such firms as merely "making phone calls" is not accurate. They often take financial risks, such as undertaking long-term trucking leases, and otherwise bring significant expertise to these tasks. We urge U.S.

DOT to continue learning about and assessing these business realities while finalizing any rule changes.

DBE Manufacturers (87 Fed. Reg. 43634)

The current and proposed rule rightly credits 100 percent of products supplied by a DBE manufacturer toward the project goal. However, some specific aspects of the proposed revisions need clarification. The new language states, "When a DBE makes minor modifications to the materials, supplies, articles, or equipment, the DBE is not a manufacturer." Without quantification, recipients will interpret the term "minor" in varying ways. Moreover, they should carry out this task during the DBE certification process, not during the project execution stage. Application of an appropriate North American Industry Classification System (NAICS) code to the firm's DBE certification is likely the best way to implement this proposed change.

Returning to the proposed 50 percent cap on fulfillment of a project's goal, products supplied by DBE manufacturers should not count against that limit. The existing rule and current NPRM reference many distinctions between manufacturers and suppliers, recognizing them in part through the full DBE credit for manufacturers' products, versus 60 percent for many suppliers. While both manufacturers and suppliers perform critical functions on projects, the former discipline is often more capital-intensive. While we oppose imposition of the 50 percent cap, we further urge that manufacturers be excluded from any version of it.

Suppliers of Specialty Items (87 Fed. Reg. 43634)

The rule revision allows counting parity between a regular dealer and "a DBE supplier of items that are not typically stocked due to their unique characteristics (e.g., limited shelf life or specialty items)." ARTBA supports this provision, as it appears to recognize the reality that a supplier cannot stock many items that are project-specific (perhaps dependent on a project's shop drawings) and/or require significant lead times, especially given current supply chain challenges.

Unified Certification Program (UCP) DBE Directories (§ 26.31)

The proposed rule would direct unified certification programs (UCPs) to enhance the information within their directories of DBE firms, allowing them to display other essential information about DBEs that attests to the firms' ability, availability, and capacity to perform work. ARTBA supports this initiative and recommends its expeditious implementation.

Few DBE-related topics have frustrated ARTBA's practitioners as much as the limited efficacy of these directories. They have noted the information within is often incomplete or out of date. Moreover, the directories commonly list certified DBE firms irrelevant to transportation construction (such as building cleaning services). At least one UCP has even indulged in the antithetical concept of "potential DBEs." Ultimately, all these inaccuracies can result in severe misunderstandings of a market's DBE capacity and program or project goals.

ARTBA also requests that the Department initiate a dialogue on NAICS codes related to transportation construction. Many are overly-broad and not useful as prime contractors assess potential DBE partners.

Reporting Requirements (§ 26.11 and Appendix B)

Bidders Lists (87 Fed. Reg. 43624-43625)

The proposed rule would create a centralized database of state bidders lists at U.S. DOT to be used for program evaluation and goal-setting.

We note that this initiative would appear to request additional data from bidders that they do not typically collect from DBE subcontractors or maintain in their records. The data points include the age, race and gender of the subcontracting firm's majority owners, and the firm's annual gross receipts. As the firms generally provide this information as part of the DBE certification process, we suggest that the recipients collect this data directly from the bidding or subcontracting DBE firms, while also making use of the DBE certification data available to them. Requiring such data from prime contractors would impose an additional administrative burden and cost on them.

Prompt Payment and Retainage (§ 26.29)

Pursuant to provisions in recent reauthorization legislation (including the IIJA), U.S. DOT proposes adding a specific reference to "the need for affirmative monitoring of subcontractor prompt payment and return of retainage by the recipient." As in the past, ARTBA urges U.S. DOT and recipients to fully engage with industry, who can enhance the public agencies' understanding of existing business practices and their rationale, when undertaking these tasks.

Good Faith Efforts Procedures for Contracts With DBE Goals (§ 26.53)

DBE Performance Plan (DPP) (87 Fed. Reg. 43630-43631)

The NPRM would formalize use of a DBE performance plan (DPP) on design-build projects. As Federal Highway Administration (FHWA) staff has discussed with ARTBA and its members several times, the DPP is intended to provide flexibility in meeting DBE goals on projects not fully designed at procurement. FHWA has characterized the DPP as open-ended and incorporating the type of work which the prime contractor plans to solicit from DBE firms.

Because we believe it will enhance DBE participation, ARTBA continues to support this initiative and notes that we endorsed it for inclusion in round 7 of FHWA's Every Day Counts (EDC-7) program. The agency's handbook, "Disadvantaged Business Enterprise Program: Administration and Oversight on Projects with Alternative Contracting & Procurement Methods," has been well-received, including during a session at ARTBA's annual Public Private Partnerships in Transportation Conference in July 2019.

In the context of the IIJA's large investment increases, the DPP concept and handbook carry particular relevance, as state agencies and industry consider options for delivering complex projects. Based on experiences of some of ARTBA's chapters, we would urge that recipients be made better aware of this valuable resource.

The rationale behind the DPP is compelling enough that ARTBA urges the Department to lead a dialogue about using a similar approach on design-bid-build projects. Again, this level of flexibility can help increase DBE participation generally.

Finally, we suggest that the DPP's level of detail be limited to identifying the value of work to be performed by scope on an annual basis, rather than on any smaller scale of time.

Terminations (87 Fed. Reg. 43631)

This provision would clarify that a prime contractor must request and receive written permission both to terminate and substitute for a non-performing DBE subcontractor or supplier.

It is imperative that recipients act in a timely manner within this process. ARTBA urges a directive to this effect in the final rule, given the critical nature of timeliness on projects. Terminations, regardless of their basis, are disruptive to a project, and a shared commitment to expediting this process will make a difference in keeping it on track.

ARTBA also suggests that U.S DOT and recipients consider the option of slight decreases in the project goal when there are no timely and feasible options to swap in another suitable DBE subcontractor or supplier.

Counting DBE Participation After Decertification (§ 26.87(j))

In this section, U.S. DOT proposes changing how additional work awarded to a previously-certified DBE firm would be counted. ARTBA prefers the current rule, which allows recipients to make individual determinations based on each situation's facts, and what is best for the project and program. We also challenge the NPRM's characterization of prime contractors' "taking advantage" of the current rule for convenience, which again appears based on unattributed anecdotes.

The proposed change would require recipients to approve additional work assignments that a prime contractor intends to award to such a firm on a project or force the prime to replace the previously-certified firm with a new DBE. The proposed change does not address the many situations where scope growth on a project will directly increase a DBE subcontractor's scope. Forcing a prime contractor to replace a subcontractor or supplier already performing that work will result in additional costs for the prime contractor, recipient and project. The additional administrative burden in seeking approval to count this additional work towards the DBE goal

will likely impact the project schedule, as these approvals will delay execution of change orders and prosecution of the work by the subcontractor or supplier.

The Department also proposes to disallow continued credit toward a contract goal if the DBE's ineligibility after signing of the subcontract is the result of a purchase by, or merger with, a non-DBE firm. In that situation, the prime contractor would be required to use good faith efforts to replace the DBE if additional credit is needed to meet the contract goal.

In reality, since DBEs are – by definition – independent business entities, prime contractors have no influence over their business decisions, including their sale. The proposed rule revision does not address the administrative and cost burden to replace this firm, nor does it reference whether the customary termination procedures will be required in this scenario.

Interstate Certification (§ 26.85)

As U.S. DOT seeks to facilitate the objective of interstate certification, ARTBA calls attention to some potential unintended consequences. While this proposed rule change could have benefits for DBE firms looking to expand their business into other parts of the country, there is the danger that these additional DBE certifications could balloon the aforementioned DBE directories while not providing the perceived and legitimate growth in DBE capacity, given that some firms are not immediately prepared to work in their new state(s). Some ARTBA members have suggested focusing on streamlined certification in states neighboring the DBE firm's home state, where there is arguably a greater likelihood the DBE can begin performing work expeditiously.

As always, ARTBA prioritizes the UCP's standing behind its DBE certifications, not only initially but through the life of the project and beyond. There are too many instances of a prime contractor relying on a certification and then being held responsible (and/or legally liable) for CUF deficiencies at a later date, even years after the successful closeout of a project. The industry needs interstate certification efforts to be fully reliable in this regard.

Monitoring Requirements (§ 26.37)

Due to recipients' oft-limited resources for performing CUF reviews (and associated scheduling challenges), many agencies commonly shift this responsibility to the prime contractor and also rely on them for related documentation. However, prime contractors can only make a point-in-time determination in this regard, and doing so requires them to bear significant risk if the DBE firm's status changes in the future. This is an example of risk that a contractor will "price" and incorporate into their bids, thereby increasing project costs. For these reasons, ARTBA suggests that the pending rule revisions prohibit recipients from requesting CUF review documentation from prime contractors.

Further, the proposed change appears to restrict counting of DBE participation until the recipient completes the CUF review. This restriction should not extend to the prime

contractor's ability to count DBE participation on a project reported by the prime contractor in good faith (i.e. when the DBEs performed a CUF and were paid accordingly). We suggest that the rule include clarification that the prime contractor will receive credit towards the DBE goal unless there is a documented non-compliance with the CUF requirements.

Lastly, the NPRM proposes requiring recipients to perform CUF reviews on DBE firms utilized by prime contractors for federal-aid projects without a DBE performance goal. This proposed change would add administrative monitoring and reporting requirements on projects where they do not currently exist, which could deter prime contractors from employing DBEs on those projects. We encourage U.S. DOT to reconsider this proposed change.

Conclusion

This NPRM on DBE program implementation comes at a critical time for the federal-aid transportation programs. In enacting the IIJA, President Biden and Congress have challenged U.S. DOT, state and local recipients, and all segments of the transportation construction industry to deliver a record number of projects safely and efficiently, while minimizing costs and time. There should also be an equally historic number of opportunities for DBE firms in the coming years.

ARTBA and its members are committed to making the DBE program work. As we do in these comments, our association will call attention to regulatory provisions, guidance or policies that compromise our shared values while doing little to facilitate DBEs' success. As we also do herein, ARTBA will support proposed changes that we expect to result in progress.

Gone are the days of debates about the very existence of the DBE program. Anyone who believes ARTBA still engages in such a debate is betraying themselves as a relic from another century. However, while we are committed to improving the program, U.S. DOT and its agencies must recognize the need to meaningfully engage with ARTBA, its members and other industry representatives. We hope exclusionary stakeholder meetings, anecdotally-based policymaking and other unpleasant surprises are behind us, in favor of straightforward, comprehensive exchanges of facts, experiences and proposals to make the DBE program better.

Thank you for considering these views and we look forward to further dialogue.

Sincerely,

Richard A. Juliano, CAE
General Counsel