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VIA ELECTRONIC SUBMISSION

U.S. Department of Transportation
Docket Operations, M–30,
West Building
Ground Floor, Room W12–140
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

re: Docket No. DOT-OST-2025-0897, "Disadvantaged Business Enterprise Program and Disadvantaged Business Enterprise in Airport Concessions 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 its interim final rule (IFR) for implementation of the Disadvantaged Business Enterprise (DBE) program (90 Fed. Reg. 47969-47982, October 3, 2025). The IFR took effect upon publication in the *Federal Register* and addresses longtime presumptions of eligibility for the program based on race and gender. ARTBA's comments suggest ways in which the IFR can be further clarified.

Background

About three-quarters of ARTBA's 8,000 members are transportation construction contractors of all sizes and disciplines across the country, with representation from prime, specialty and subcontractors alike. A number of these firms participated in the DBE program until imposition of the IFR, which directed the reevaluation of all such certifications. Numerous state and local transportation agencies are also ARTBA members.

Compliance with the DBE program, which has been part of federal law for over 40 years, is a key task for transportation agencies and contractors on federal-aid highway and transit projects. As with other regulatory requirements, the transportation construction industry seeks to do so while carrying out its core objectives of delivering these projects in a safe, efficient, cost-effective, and timely manner.

While rooted in federal law, the DBE program is administered on the state level with oversight by U.S. DOT and its modal agencies. So while the program's stated purposes include removing barriers to the participation of these firms in federally-assisted contracts, it is also structured to allow for "appropriate flexibilities to recipients of federal financial assistance in establishing and providing opportunities to DBEs."

The IFR's major changes to the DBE program come against the background of record federal surface transportation funding from the Infrastructure Investment and Jobs Act (IIJA) of 2021. 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. It remains paramount for U.S. DOT and other federal agencies to minimize the regulatory burden associated with delivering federal-aid projects, so as to maximize opportunities for industry firms of all sizes and the resulting economic benefits, especially given inflationary trends of recent years.

Regulatory clarity is also critical. Uncertainty about the future of the DBE program, or how its revised regulations apply, may result in higher project costs, as contractors customarily "price" the risk of these vagaries into their bids or proposals.

Ultimately, ARTBA and its members seek to move projects forward expeditiously, as delays are another frequent cause of increased costs. As with any other area of compliance, the sooner any ambiguities regarding the DBE program and its revisions are resolved, the better.

ARTBA offers these comments on the DBE IFR within this context.

General Comments on the Interim Final Rule

Participants in the DBE program must meet a number of criteria relating to their individual profiles and businesses. Under the IFR, any individual seeking to demonstrate that he or she is a "socially and economically disadvantaged individual" – one of these requirements – must now make the same individualized showing of disadvantage, regardless of the individual's race or sex.

The substance of this policy change is not surprising to the industry, as on May 28 U.S. DOT jointly filed a proposed consent order with the plaintiffs in the high-profile case, *Mid-America Milling Company, LLC v. United States Department of Transportation*. While the order remains subject to the approval of Federal District Judge Gregory Van Tatenhove, U.S. DOT has stated that it now considers the DBE program's "use of race- and sex-based presumptions… unconstitutional," and wishes to carry out a policy under which the Department will no longer approve federal-aid projects that include "DBE contract goals where any DBE in that jurisdiction was determined to be eligible based on a race- or sex-based presumption."

With the consent order still pending, U.S. DOT has chosen to deploy an interim final rule implementing its terms, taking effect upon publication in the *Federal Register*, which was two days after its initial public release in pre-publication form. ARTBA will defer to appropriate policymakers in determining the merits of this approach. However, the IFR – and its urgency in implementation – have resulted in numerous practical questions from those tasked with compliance.

U.S. DOT issued a short guidance document with the IFR. Then, on October 24, the Department posted a more detailed set of "Frequently Asked Questions" (FAQs) in response to ARTBA and other parties seeking clarity as to revised requirements in contracting, certification, goal-setting and other areas.

Over the past four weeks, the response to the IFR among states has varied to some degree, with some undertaking program changes shortly after its release, and others appearing reticent to do so. ARTBA has spent considerable time conferring with our affiliated chapters and members of all types and sizes (including prime contractors, subcontractors, suppliers, design firms and pre-Oct. 3 DBEs) to better understand these variations and their implications.

While state transportation agencies take the lead in implementing the DBE program, there must still be a national baseline of consistency in its requirements and certification procedures. This is especially critical for prime contractors operating in multiple jurisdictions, smaller firms seeking interstate DBE certification, and others seeking to deliver projects. Predictability and efficiencies in the DBE program, as in other requirements associated with federal-aid contracting generally, can help ensure the most safe, timely and cost-effective delivery process possible.

Further Questions Regarding the Interim Final Rule

The initial FAQs were a step forward in promoting clarity and consistency, and ARTBA urges U.S. DOT to continue issuing such documents on a regular basis. However, ARTBA members have advised us of additional questions and scenarios requiring direction from U.S. DOT. We submit this sampling, while respectfully requesting U.S. DOT's review and response.

Compliance on Multiyear Projects

U.S. DOT has instructed recipients (i.e. state and local transportation agencies) not to count DBE participation towards project or overall goals, or otherwise implement program requirements, until its unified certification program (UCP) has completed reevaluation of DBE firms in the jurisdiction. There is no particular deadline for UCPs to conclude this process. Moreover, some states have already set ambitious timelines for this exercise, while others have not yet begun. By various accounts, the reevaluation process in some states could take one year or more.

At the same time, many existing and planned federal-aid projects will likely be procured and/or built across both the current "no counting of DBEs" period, and the post-reevaluation phase, at which time the project owner will impose a DBE goal. Larger, complex projects being planned, procured or built now will almost certainly extend well past the current DBE reevaluation phase, as they will take several years to complete.

These scenarios raise several concerns. Under past practice, DBE compliance has begun at or soon after the bid letting, during which the prime contractor seeks to assemble a competitive bid while meeting the project's DBE goal. A key aspect of this undertaking involves determining which tasks the bidder can self-perform, and which can be subcontracted, whether to a DBE or otherwise.

However, many current bidders, or those recently awarded a contract, face a dilemma. While pursuing a project with no DBE goal, as per the IFR, they also look ahead to a point when the owner may impose a goal before the job's completion. Accordingly…

- Should they seek to utilize pre-Oct. 3 DBE subcontractors in anticipation of having to meet an eventual DBE project goal, even though it is not presently required?
- What direction is their owner providing them on this point?
- What is the owner's standard for a responsive bid, given the IFR's new parameters?
- Is there in fact a "de facto DBE goal" for the project, essentially an expectation that the bidder will incorporate a certain amount of work for pre-Oct. 3 DBE firms, even though reevaluation has yet to be completed?
- Will the owner expect the prime contractor to backload the project's timeline with DBE participation once a goal is determined? This practice would likely affect the project's cost and efficiency in delivery.
- What will be the ramifications of this pause in DBE counting for the state's overall goal?

ARTBA urges U.S. DOT to provide further guidance on these questions, including the effect of future goal-setting in mid-project. Current bids should not be subject to de facto or unstated goals. In addition, DBE participation should be commensurate with the portion of the project to be built after imposition of the goal, not the value of the entire project. Immediate clarifications on these issues will enable prime contractors to bid as the IFR intends.

Preventing Delays in the Letting of Projects

As is well known in the transportation construction industry, project delays inevitably add costs, whether related to materials, labor or otherwise. In such a circumstance, federal and state investment will support less work than planned, limiting the resulting benefits in economic growth and mobility.

Accordingly, state transportation agencies should be discouraged from delaying or deferring the letting of projects to push them past their DBE reevaluation period, with the intention of procuring them once they can again apply DBE goals. This practice appears contrary to the IFR's purpose.

Resolving Inconsistent Timelines for DBE Reevaluation

U.S. DOT's recent FAQs state:

> DBEs that received certification from UCPs through interstate certification will have their certifications reevaluated by the UCPs in their jurisdiction of original certification. If such

DBEs are recertified by the UCP in their jurisdiction of original certification, they will be required to reapply for interstate certification with the UCPs for the jurisdictions in which they wish to be certified.

ARTBA is aware of some pre-Oct. 3 DBE firms waiting for the reevaluation process to begin in their "home" state, while other jurisdictions, in which they were previously certified, are moving ahead. There is concern that their delay in applying for recertification in those additional states will, at least, deprive them of opportunities once the DBE program is reactivated in there, and at worst endanger their prospects for recertification since they will be deemed to have "missed the deadline" while awaiting resolution in their original states.

U.S. DOT should revisit this provision to ensure DBE program applicants are not penalized for these state-by-state inconsistencies.

Facilitating Industry Outreach

Following previous DBE rulemakings by U.S. DOT (such as those in 2014 and 2024), ARTBA has hosted a member webinar with federal officials to detail the rule revisions and answer questions. The IFR's major policy changes make the need for industry outreach more important than ever. ARTBA is available to help facilitate this through virtual and live education events, as well as other venues.

Ongoing DBE Program Issues

While the IFR is limited to revising the presumptions of disadvantage for DBE certification, ARTBA urges U.S. DOT to collaborate with state agencies and industry on improving other aspects of the DBE program as currently codified. Many have vexed project participants for decades, while other inefficiencies have arisen more recently.

Pause the Data Collection Mandate

In the latter category, we strongly urge the Department to pause implementation of 49 CFR § 26.11(c), which took effect May 9, 2024, as part of a previous DBE rulemaking.

In seeking to undertake a "thorough assessment of the impact of the DBE Program," the previous administration mandated that bidders lists be used as the exclusive means of data collection for this purpose. Moreover, recipients were now to collect much more information from all contractors and subcontractors bidding on a project (whether successful or not), at the time of bid, for submission to a data portal to be hosted by U.S. DOT.

The Department, under both the previous and current administrations, has yet to issue guidance on this mandate, and it is our understanding that the referenced "data portal" has never been procured, let alone open to access by recipients. Nevertheless, some states began imposing this requirement on bidders as early as mid-2024. They are now piling up and storing unnecessary data, which is not only a waste of resources for all concerned, but a cybersecurity risk, especially given the proprietary financial information demanded under 26.11(c).

As an illustration, an ARTBA member in one of those states, a prime contractor, reported their bid submission for a $1 million project had to include 767 additional data points, with the possibility that any omissions or inaccuracies could be used to deem the bid non-responsive.

It is time to formally stay the mandate in 26.11(c), restoring contracting efficiencies in these states while U.S. DOT and Congress consider the DBE program's future.

Addressing Other DBE Policy Issues

ARTBA also recommends that U.S. DOT undertake dialogues with industry on the following issues, among others…

- The lack of meaningful parameters for "good faith effort."

- Determining a DBE firm's "commercially-useful function." Improved policies should alleviate needless disruptions of efficient industry business practices, like limiting interactions and transactions between prime contractors and DBE subcontractors, preventing meaningful mentoring of DBE firms, and exposing all parties to legal liability.

- Ending federal requirements for DBE-related information (including that mandated by 26.11(c)) to be submitted at bid time by both successful and unsuccessful bidders.

- Following the current DBE reevaluation period, focusing on the bureaucratic morass that has often disincentivized small businesses from participating in federal-aid transportation projects.

- Revising recent procedures for determining a DBE firm's status as a "regular-dealer," which has now become an unpredictable and burdensome "case-by-case" process.

ARTBA hopes to facilitate participation of interested members in these discussions.

Looking Ahead

In ARTBA's comprehensive recommendations for federal surface transportation reauthorization, we ask Congress to "[e]nsure that the statutory basis for the DBE program complies with current court rulings relating to its constitutionality and other critical legal issues," while considering appropriate reforms.

ARTBA looks forward to continuing engagement with U.S. DOT, Congress and other policymakers on the future of this program, with the objective of maximizing opportunities in federal-aid contracting for all who are interested.

Thank you for considering these views, including our priorities for further clarification of the DBE program's Interim Final Rule. Please contact the ARTBA team any time we can further assist with this matter.

Sincerely,

Richard A. Juliano, CAE
General Counsel