



December 20, 2012

Jo Anne Robinson
Office of General Law
U.S. Department of Transportation
1200 New Jersey Ave., S.E.
Washington, D.C. 20590

RE: Docket No. OST-2012-0147: Disadvantaged Business Enterprise: Program Implementation Modifications

Dear Ms. Robinson:

AGC members perform construction contracts for states and other recipients of US Department of Transportation (DOT) funding and are therefore directly impacted by the Disadvantaged Business Enterprise (DBE) program regulations. AGC believes that the September 6, 2012 Notice of Proposed Rule Making, OST-2012-0147 (NPRM), which recommends program implementation modifications, includes significant changes in the way the DBE program currently operates and these changes, if adopted, will have adverse impacts on prime contractors, DBE subcontractors, state DOTs and state transportation budgets and will undermine the program's overall objective.

AGC's overall comment is that the proposed changes continue the approach that DOT has traditionally taken in this program of focusing on compliance with achieving numerical goals rather than on business development. Many of the proposed changes are paperwork exercises that will significantly increase state DOT, prime contractor, and DBE workloads and will be costly for state DOTs to implement and for prime contractors to carry out. The proposed changes will make a program that is already difficult to administer and comply with much more onerous. These additional burdens and costs are unlikely to increase DBE participation. In addition, AGC believes the proposed changes in the certification process will prove to be an impediment to DBEs attempting to enter the program. Many of the proposed requirements on primes are a significant disincentive to working with DBEs and are therefore counter to the program's intent.

AGC believes that DOT should use this rulemaking or a future rulemaking as an opportunity to solicit ideas for moving the DBE program in a new direction. Instead of having the program focused exclusively on goals and what can and cannot be done in meeting those goals, AGC encourages DOT to explore creating opportunities for giving incentives to contractors and DOT funding recipients for DBE utilization such as banking DBE utilization credits and other possibilities. AGC believes an open dialogue should take place to examine new ways of expanding DBE contracting opportunities.

In the meantime we must deal with the proposal that is before us. It is unclear from the Federal Register Notice what justification DOT has in making many of the proposed changes. The notice fails to cite any data to support any of its contentions. In several places DOT claims "to know" that certain activities are the result of an underlying desire to not utilize DBEs. However, no specifics are cited. AGC believes these assertions are not correct and we strongly suggest that DOT not make such significant changes in the existing rules without having data to justify them.

The proposed rule does include two positive developments that AGC encourages be adopted. The NPRM suggests amending section 26.1 to include a statement saying that the purpose of the rule is to promote the use of all types of DBEs. In the discussion of this proposed change DOT states that the additional language is intended to emphasize that the DBE program is not just about construction. AGC believes that the history of this program has been concentrated on construction and applauds the intent of this amendment to expand DBE participation into other fields. AGC believes that section 26.1 should be made stronger by including in the language a statement specifying that recipients should avoid an overreliance of DBE utilization in construction.

AGC also welcomes DOT's proposal to change how trucking operations will be counted. Trucking has always been an avenue of entry into the construction industry and making it easier for DBEs to take advantage of this opportunity is a welcome change. Below are specific concerns in the proposed rule that AGC has identified.

DBE Commitment Forms

DOT proposes to alter the Uniform Report of DBE Commitments/Awards and Payments form, submitted by recipients, to include a breakdown of awards by race as well as gender. This proposed change goes counter to Congressional intent which has consistently maintained one goal for DBE utilization. Congress has identified socially and economically disadvantaged individuals as members of enumerated minority groups and women. In requiring that DBE utilization information be collected by race as well as gender, DOT is creating additional requirements beyond what Congress intended. These proposed changes in the form should not be adopted.

Setting Overall Goals

DOT proposes to change section 26.45 of the rules governing how a state goes about setting its annual goal for DBE participation. DOT proposes to not allow states to use a list of prequalified contractors as the basis for setting the annual goal and also asks for comments about eliminating the use of a bidders list of contractors that have attempted to or have been successful on DOT assisted contracts in the past. DOT instead would require states to develop their annual goal based on a directory of certified DBEs or on a disparity study. AGC believes the proposed changes do not comply with the Supreme Court's directive that this program should be based on the availability of ready, willing and able contractors (See Croson, 488 U.S. at 501-02 – “[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.”

DOT proposes to disallow the use of a state developed list of prequalified DBE contractors. However, AGC believes a list of prequalified DBEs is precisely what the Court contemplated in calling for the use of ready, willing and able contractors. Other sections of the regulation require the contractor to ensure that DBEs used to meet contract goals are performing a commercially useful function. Using a list of prequalified DBE contractors offers the best opportunity for ensuring that the commercially useful function requirement is potentially met.

AGC also opposes DOT's suggestion to not allow states to use bidders list of DBEs that have actively pursued DOT funded projects as a percent of the overall number of businesses that have pursued DOT funded projects for setting the annual goal. Setting goals based on DBEs that are actually interested in and qualified for working on DOT assisted projects is the most realistic way of establishing annual

DBE goals. Historical bidders lists are an effective way to measure the population of DBEs that are ready willing and able. AGC supports DOT's proposal to allow states to continue to use bidders lists for goal setting that are based on data collected from actual contracting data. AGC suggests that this data collection should be limited to the apparent low bidder who should submit post-award to the state DOT a list of all vendors and subcontractors that quoted the project. Annually, the state DOT should verify this information by requiring every bidder on every project to submit the same list, post-award.

Prohibiting the use of these sound methodologies will result in adverse outcomes during goal establishment. This will exacerbate the lack of a nexus between certification and “ready, willing and able.” Many DBEs obtain certification but never quote or pursue DOT assisted work. By not relying on lists that more accurately represents the ready, willing, and able DBEs, the availability and capacity of the DBE community that is likely to participate on these contracts will be grossly overstated. The resulting goal establishment will be unrealistic and there will be an explosion of Good Faith Effort (GFE) submissions and/or the use of DBEs that are not ready, willing, and able and associated project problems that result.

The bidder’s list is also an all-important tool for fulfilling contract goal requirements. These lists are the best source for prime contractors to use in identifying ready, willing and able DBEs. This is an important outreach effort that should not be limited.

DOT is apparently proposing that states be limited to relying either on a directory of DBE firms that have been certified to participate on DOT projects or a disparity study as the exclusive means for establishing a state’s annual goal. AGC believes that the limits the current regulations place on state DOT certification procedures renders the DBE directory meaningless. Since the existing rules prevent state DOTs from making a determination about whether a certified firm can perform a commercially useful function (i.e. ready, willing and able) or use any other qualifications basis in the certification process, the DBE directory is merely a listing of businesses that meet the proper ownership and control requirements but do not demonstrate any ability to compete for and complete DOT funded construction contracts. For this reason, State DBE directories are notoriously unreliable and result in grossly exaggerated annual goals. This certification methodology operates under the presumption that the DBEs listed in the directory are ready, willing and able. It forces contractors to presume the same. The proposed procedure would actually promote the use of DBE’s that are not ready, willing and able which results in contractual issues such as the inability to perform a commercially useful function. Contractors continually see directory lists that include DBEs that have never performed any construction. Relying on a directory of DBEs without determining whether they are ready, willing and able ignores the Court’s mandate.

DOT also suggests that in lieu of using a bidders list or prequalified list of contractors that states should base its goal setting on a disparity study. In the NPRM, DOT justifies this proposal based on the claim that, “We know from numerous disparity studies that have been conducted across the nation that discriminatory practices affecting minority and women owned small businesses continue to create barriers to accessing capital and bonding...” It is unclear what disparity studies DOT is referring to, when they were conducted and where. The accuracy of disparity studies has been found to be suspect in numerous court rulings. As the Federal Circuit Court pointed out in *Rothe Development Corporation case*, (US Court of Appeals for the Federal Circuit 2008-1017) the Federal Circuit reviewed “six disparity studies of state or local contracting, conducted by private research and consulting firms between 2002 and 2005 at the behest of state or local government in the cities of Dallas, Cincinnati, and New York, in Cuyahoga County, Ohio and Alameda County, California, and in the Commonwealth of Virginia,” and after doing so, found them “insufficient,” even when taken together, “to form the statistical core of the ‘strong basis in evidence’ required to uphold” the federal statute before the court. Even if the disparity studies used by

DOT were found to meet the Court's standards, as DOT points out in the proposal, these particular studies point to discrimination in the financing and bonding industries not in the contracting industry.

The peril of relying on disparity studies to justify race based goal setting, as DOT suggests here, was highlighted in a report of the US Civil Rights Commission in 2006 which pointed out the following:

In determining whether discrimination exists and, if so, what is the source and what a narrowly tailored remedy would be, disparity studies have largely been failures. They have often been rejected by courts and have been criticized by scholars and objective government examinations.

While there are variations in the methodology and quality of disparity studies, almost all have some common flaws. In their statistical sections:

- (1) They fail to measure availability in the terms Croson requires of comparing —qualified— willing and able— businesses performing —particular services—;
- (2) They frequently are based on obsolete or incomplete data;
- (3) They report data in ways that exaggerate disparities;
- (4) They do not test to see if there are nondiscriminatory explanations for disparities;
- (5) They make findings of discrimination without ever identifying a single instance of discrimination or even a general source.

In their anecdotal sections:

- (1) They base conclusions on samples that are not gathered according to scientific methods;
- (2) They base conclusions on very small percentages of the surveyed universe.
- (3) They fail to verify any of the allegations they report;
- (4) All allegations are made anonymously, so governments receiving the reports do not have the information to judge their credibility or take action to solve the problems raised.

Setting Project Goals

DOT also proposes to change 26.45(e)(3) of the rules that apply to the setting of project specific goals. The proposed change allows states to set project goals as a percentage based on the value of the federal share or the value of the entire project. AGC believes this language is confusing. DOT should clarify that where a goal is set for an entire project, the goal should still be limited to the Federal contribution to the project and not on the entire value of the project when all contributions are considered, including state and potentially private funding.

Setting Contract Goals

DOT does not propose any changes to the methodology used by states in establishing contract goals when they are necessary for a state to meet its overall annual goal. AGC encourages DOT to include in the rules a limitation on the application of contract goals to the portion of a project that is likely to be subcontracted. Currently contract goals are set on the overall estimate of the contract value rather than the subcontracting opportunities. This results in DBE utilization goals on contracts that are far in excess of what they should be relative to the availability of DBEs as a percent of the available pool of all subcontractors. This skews the results and leads to an overutilization of DBE subcontractors on that

project and a significant disadvantage to non-DBE subcontractors who are qualified and interested in competing for work on these projects but are excluded from these contracting opportunities.

Race Neutral Accomplishments

The proposed rule suggests altering section 26.51 to not give states credit in meeting the race neutral portion of their annual goal for DBE subcontractors that win a subcontract from the prime contractor without the prime contractor considering the subcontractor's DBE status. AGC opposes this change. This is exactly the type of race neutral selection that the courts have demanded and are the type of contracting procedures that this program is intended to achieve. The proposed rule says that there is no way to know whether the prime selected the subcontractor using a strict low bid process. This is irrelevant. The contractor should report all DBE participation on every contract with a DBE goal and every dollar awarded to DBEs, beyond what is necessary to meet the goal, should be credited to race neutral goal achievement.

In fact, on contracts without DBE goals, all DBE usage should be documented and applied to achievement of the state's race neutral goal. However, in circumstances where there is no contract goal, the contractor's relationship with the DBE should be no different than it is with any other subcontractor. By this AGC means that, because there is no contractual requirement being met by utilizing DBE subcontractors under these circumstances then there should be no restrictions on the type of assistance the prime is permitted to provide to the DBE. This relationship also should not be subject to a "commercially useful function" determination. In addition, should it become necessary to replace a DBE on a contract that has no goal there should be no requirement to make good faith efforts for the replacement subcontractor with another DBE. In this case, where a replacement is a non-DBE, then there would be no race neutral credit for the original attempt to use a DBE. AGC believes that by not attaching the DBE regulation requirements in this situation creates additional opportunities for DBEs to obtain subcontracting opportunities, to gain work experience, to develop business relationships with primes and to open the door for a mentor-protégé relationship. AGC believes this is a better approach to DBE development and is more in keeping with the intent of the program.

Meeting Contract Goal Requirements

DOT is proposing that all bidders on contracts that have a DBE participation goal be required to submit, with their bid, a list of the DBEs that will be used to meet the goal requirement. The list must include a description of the work each DBE will perform as well as the dollar amount. A written confirmation from each listed DBE must be included confirming the work and dollar amount that it will perform. This proposed change indicates a lack of understanding of the typical events and activities that occur on "bid day." DOT states that, "DBE information is not a separate, foreign intrusion into the procurement process that needs to be handled at a different time from anything else that determines who wins a contract." However, DOT's proposal would in fact be a significant, burdensome and costly intrusion into the procurement process.

AGC strongly opposes this proposed change and believes this onerous provision will have many negative unintended consequences, will undermine the bidding process and will result in fewer subcontracts being awarded to DBEs for the following reasons:

Bid process: The bidding process for construction projects is a highly intense period with short deadlines and last minute price quotes from suppliers and subcontractors. Highway

construction contracts are typically handled through a bid letting that is scheduled periodically that includes a long list of projects for which the state DOT is seeking quotes. The prime contractor may be bidding on several of the proposed solicitations. So during a short period of time one contractor may be putting together quotes for a number of projects.

As part of the process, the prime contractor receives quotes from a number of subcontractors both DBE and non-DBE, for portions of the project and material supplier quotes. The prime must evaluate each of these quotes to determine whether they meet the scope of work and schedule and what price is being offered. Many of these quotes are received in the last hour before the bid deadline. The scope and covenants of the quotes have a significant impact on the selection of any subcontractor and can have a significant effect on overall project costs. In an effort to meet DBE goal requirements the prime must consider these quotes with two separate objectives in mind: determining the best quotes and meeting the contract goal. DOT makes an incorrect assumption in the NPRM that subcontract opportunities are discrete elements of a project and that all subcontractors are quoting on the exact same scope of work. In fact each subcontractor submits a quote based on many factors and typically comparing quotes is not an apples to apples comparison. Subcontractors may include different scopes of work, different supplier arrangements and certainly different prices. Subcontractors, both DBE and non-DBE, present quotes based on their strengths as a company and they are not all the same.

Requiring the prime contractor to finalize its decision on bid day concerning the DBE subcontractors it will use and requiring that this selection be included with the bid along with a certification from the DBE is unreasonable. In addition, this requirement will adversely affect the DBE community. DBEs will be forced to complete their quotes in shorter timeframes to allow the prime contractors to collect all the information with the bid. DBEs will be flooded with requests from all prime contractors bidding the projects. DBEs will be forced to provide each and every prime with the necessary acknowledgements and commitments prior to submitting the bids. Current experience of the prime contractor community is that many DBEs have great difficulty in getting acknowledgments out to primes on whether they intend to bid or not. All of these administrative requirements will further collapse the time available to the DBE for the thoughtful preparation of good quality, responsive quotations to the prime contractor.

Fewer Subcontracts to DBEs: If contractors are locked into using the DBEs they submit with their bids they will closely scrutinize each quote submitted. If there is any uncertainty about the scope of work being submitted or the true cost of the quote or even the realistic ability of the DBE to fulfill the subcontract, the prime will be inclined to not select that DBE and include this solicitation as part of its GFE submittal. Certainly if the prime contractor has no experience working with a DBE that has submitted a quote, and there is no time to do the necessary due diligence to determine the DBEs ability to perform the contract and what is included in the quote, the prime is unlikely to use that DBE. This undermines the effort to include more DBEs in the program.

This level of scrutiny is the same for DBE and non-DBE quotes. The contractor seeks to clarify what is included in a subcontractor's quote before including it as part of its bid to the owner. The difference, however, is that if the prime determines that a non-DBE subcontractor's quote does not meet the prime's requirements it can be rejected at any time. However, in the case of a DBE quote, under the terms that are being proposed here by DOT, the prime does not have the flexibility to reject the DBE quote once it has been submitted as part of the bid. This

proposed requirement therefore undermines the effort to include more DBEs in the program. This puts a DBE subcontractor at a disadvantage because there may not be time for the DBE to clarify what is included in its quote. More experienced DBE contractors may be able to meet this scrutiny but the fledgling, less experienced DBE will be at a disadvantage.

DBEs that are quoting prices to primes are in great demand on bid day, particularly those with reputations for quality work. By definition these businesses are small emerging companies that may not have the staff or expertise to respond sufficiently on bid day to the many demands for quotes. In addition, DBEs also have to receive quotes from their suppliers and others before they can submit their quote to the prime. This is why a grace period after the apparent successful low bidder is determined is necessary to ensure that the quote is accurate. This is a good practice to protect the prime as well as the DBE. Because DBEs can find bid day to be a daunting challenge making it difficult to submit acceptable quotes to a multitude of prime contractors under very tight deadlines, some DBEs will only give a quote to the apparent low bidder after bid opening. Requiring submittal of DBE quotes with the bid will prevent DBEs from using this tactic and undermine the likelihood that they will be selected.

The bid listing process will also decrease bid opportunities for DBEs due to the increased administrative burden (refer to previous discussions on demands of bid day). There will likely be increased incidents of failure of DBEs on projects. These failures will be driven by the lack of time available for the prime contractors to clarify DBE quotations regarding potential errors or oversights in their quotation scope and pricing.

This process will favor only the larger DBE firms that have resources that can be devoted to meeting this explosion in administrative requirements at bid time. Ultimately, this process will serve to disadvantage the smaller DBE which is the direct opposite of the program's intent.

Increased Claims: The current rules will not allow any DBE that is included on the list to be replaced without the DOT's permission and it requires that good faith efforts be used to determine a replacement DBE. DOT specifies that an increased price from a replacement DBE is not necessarily a reason for not accepting their proposal.

Since in most cases the prime is operating under the terms of a fixed unit price contract, the increased cost of a replacement DBE has to be absorbed somewhere. If states are unwilling to offer a change order or some other mechanism to account for the increased cost, submission of a claim is the most likely outcome.

No Data to Support: It is unclear why DOT believes many of these changes are necessary. The Federal Register notice mentions in passing that this is an effort to reduce bid shopping, however, as pointed out above, this is an example of where there is no data included to support the contention that bid shopping is in fact a problem. Is this based on a few anecdotes from a select group of DBEs or did DOT undertake a sufficient data gathering approach to in fact document that bid shopping is a real problem. A change of this significance should not be made without appropriate data collection and documentation.

Good Faith Efforts: DOT proposes that bidders that do not meet the goal may be required to submit documentation of their "Good Faith Efforts" (GFE) with the bid. As an alternative the state can require only the apparent successful low bidder to submit GFE

documentation within one day of the bid opening. DOT states that “DBE information is not a separate, foreign intrusion into the procurement process that needs to be handled at a different time from anything else that determines who wins a contract.”

AGC believes, as pointed out above, that the DBE process is, in fact, “a foreign intrusion into the procurement process.” The procurement process is about providing the tax payer with the highest quality project at the lowest possible price. This has never been truer than it is today with growing transportation infrastructure needs and inadequate government revenue to meet those needs. The objective of the DBE program is counter to the primary objective of procurement process.

The good faith efforts changes proposed by DOT are unreasonable within the intense nature of the competitive bidding process used in transportation procurement. Prime contractors often do not know until they put together the final quote, after evaluating all of the quotes received from subs and suppliers, whether or not it has met the goal. Requiring the submittal of GFE documentation with the bid or even within 24 hours is unreasonable. Only the apparent low bidder should be required to submit this documentation and a longer grace period should be provided.

As part of the GFE submittal DOT proposes the inclusion of quotes from all subcontractors, both DBE and non-DBE, so that the state DOT can determine whether the prime should have selected a DBE quote. AGC believes that this concept is nothing more than the government practicing bid shopping. While the rule continues DOT’s policy, as required by the courts, that the prime contractor does not have to accept an unreasonably higher quote from a DBE, the rule gives the prime no guidance as to what that “magic number” is. This allows the government to act in an arbitrary and capricious manner to subjectively decide what is, and what is not, an unreasonable price differential.

Many states are moving to or already have instituted electronic bidding procedures where the prime fills out its bid in electronic format and submits it electronically. This has greatly reduced the paperwork that was previously included on bid day and has resulted in a more efficient bid evaluation process. If DOT’s proposal to require the prime contractor to submit all subcontractor quotes as part of its bid day GFE submittal is adopted, it will negate the opportunity and benefits of using electronic bidding.

DOT also proposes to alter the authority for making GFE determinations by giving this authority to the various Federal Operating Administrations allowing them to override decisions made by state DOT and other recipients. This is counter to the basic tenets of the program which is that these are state operated programs. The Federal Operating Administrations do not possess the first hand information necessary to make an accurate determination. Putting this type of scrutiny on the state will result in less flexibility in making GFE determinations and move the program more to a quota rather than a goal.

Replacing DBEs

DOT proposes more detailed good faith effort documentation requirements that the prime contractor must provide if it becomes necessary to replace a DBE subcontractor that is listed as being used to meet contract goal requirements. Waiting for DOT to approve the use of a replacement DBE or

granting permission to move forward without additional DBE participation can be time consuming and may impact the timely completion of the construction contract. In addition, prices quoted by replacement DBEs may be far in excess of the costs originally quoted. AGC believes that the contractor should be compensated for these delays and other additional costs when it becomes necessary to use replacement DBEs.

DOT does not propose any changes in the reasons that justify the prime contractor's decision to terminate a DBE listed as being used to meet contract goal requirements. AGC believes that DOT should include in the regulations that a determination by the prime contractor that a DBE will not be performing a commercially useful function should be grounds for the prime contractor to terminate a DBE subcontract. If the contractor is to be responsible for policing the DBEs that are working on its projects, than reasonable adjustments in contract payments should be allowed due to delays because of failure of the DBE to perform its subcontract or perform a commercially useful function.

DOT asks in the proposal whether it should apply these same good faith effort requirements when replacing a DBE that is not being used to meet a contract goal requirement or when DBEs are being used on projects that do not have contract goal requirements. AGC strongly objects to this overzealous expansion of the program. Efforts by contractors to utilize DBE subcontractors beyond what is required by contract goals should be applauded and encouraged. As pointed out previously the overall objective of the program should be DBE utilization without regard to goal requirements. These race neutral measures should be encouraged and celebrated. DOT's proposal to impose penalties on contractors for terminating DBE subcontractors, that are being utilized on a race neutral basis, when they are not performing the requirements of their subcontract, creates a wholly unequal playing field in which DBE subcontractors are being granted privileges that are not being given to non-DBE subs.

Counting Trucking Operations

DOT proposes to change its current requirements for how much of a DBE trucking company's involvement can be counted towards goal achievement. The proposal would give credit for a DBE that leases trucks equipped with drivers from a non-DBE entity up to the amount of transportation services provided by DBEs with their own trucks and drivers. DBEs that lease trucks from non-DBE entities but use their own employees as drivers would receive full credit for these transportation services. AGC supports the proposed change.

Rules Governing Determination of Ownership and Control

Clarity was needed in the rules regarding the ownership and control of the DBE firm. The proposed changes to sections 26.69 and 26.71 would establish guidelines that will preserve the integrity of the program. AGC supports these changes.

Certification

The certification process remains a major challenge as it is currently established. The program is fatally flawed due to the lack of a connection between certification and the requirement for DBEs to be "ready, willing, and able." As pointed out above, the existing rules prevent state DOTs and other recipients from making commercially useful function determinations or using any business related qualifications as a basis for DBE certification. Until this problem is addressed, the program will continue to be plagued with issues regarding unreasonable goals and continue to experience DBE defaults. Chronic

failure to perform subcontract requirements or to perform a commercially useful function should be considered a criterion for decertification. See comments on Section 26.87 below.

Increases in PNW and annual gross receipts are effective and compensate for the significant inflation that has occurred in construction inputs. It is anticipated that the DBE community may view the significant increase in documentation requirements for PNW to be intrusive.

AGC agrees with the criteria established in 26.87 to allow the removal of DBE certification. Extending authority to the recipients to be able to remove certification based on chronic issues with a DBE firm is a good change. Recipients will be able to prevent recurring program issues and potential adverse impacts to prime contractors and projects with this authority. As in any decision with such gravity, caution is advised. Procedures for decertification must allow for adequate due process to protect the DBE community from decisions being made based on opinions, conjecture, and rumor.

Failure to perform subcontract requirements should be included as a reason for decertification. Performance determinations should include timeliness, quality, adequate work force, adequate project supervision and payment of employees and suppliers.

Section 26.88 added much needed clarity in the event of the death of a DBE owner which AGC supports.

Commercially Useful Function

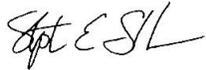
One area of the regulations that DOT does not address in this proposed rulemaking is the concept of “commercially useful function”. AGC has raised this issue with DOT in the past and it has never been adequately addressed. AGC still believes there is the need for clarification in the regulations. In order to count a DBE contractor’s participation on a project towards the contract goal, the DBE has to be deemed to be performing a “commercially useful function.” However, the contractor who has to make a decision to hire the DBE is not permitted to make a determination about whether a particular DBE will in fact be performing a “commercially useful function.” In fact, as has been pointed out, state DOTs are not permitted to make this determination as part of the certification process. AGC believes that a prudent contractor should be allowed to ascertain from a DBE firm, prior to signing a subcontract agreement, questions relating to its business operation. Questions relating to the DBEs experience, management of the job, work force, equipment ownership, potential subcontracting and other similar questions should be asked, and answered. The questions are not unlike questions asked of non-DBE subcontractors when they are being used for the first time. If the answer to these questions results in the contractor not believing that the DBE will perform a “commercially useful function” then the contractor should reject the subcontractor. The contractor should be allowed to include this determination and receive credit in its good faith effort submittal if it judges that the DBE will not perform a “commercially useful function.” DOT, however, says that a “commercially useful function” determination cannot be made by the contractor but rather by the government and this determination cannot be made upfront. This puts the contractor in a very untenable position when trying to make good faith efforts to meet contract goals. AGC also believes that recipients of DOT funding, as part of the certification process, should also be given this authority. AGC strongly urges DOT to address this concern in this current rulemaking.

Summary

AGC maintains that many of the provisions in the existing DBE regulations result in contradictory requirements that make compliance with the program difficult and which undermine its overall objective. The newly proposed changes make these contradictions and potentially compliance worse. Certifying DBEs based primarily on ownership and control of the business with little regard to the abilities and qualifications of these businesses results in unattainable goals and expectations. Requiring contractors to rely on these certifications without allowing the contractor to determine if in fact these businesses can perform their subcontract requirements presents an unfair and untenable situation. The proposed rule change, requiring these determinations to be made in a very tight time frame under the extreme uncertainties of bid day, is wholly unreasonable.

AGC urges DOT to not adopt the bulk of these proposed rule changes as spelled out in these comments and that instead AGC asks DOT to open a dialogue with all segments of the industry to find a more realistic approach to expanding participation of DBE businesses on not only DOT funded construction projects but in the totality of the transportation construction market.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen E. Sandherr".

Stephen E. Sandherr
Chief Executive Officer
The Associated General Contractors of America