



October 24, 2022

The Honorable Peter Buttigieg
Secretary
U.S. Department of Transportation
1200 New Jersey Ave. SE
Washington, DC 20590

RE: Docket No. DOT-OST-2022-0051, Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications Notice of Proposed Rulemaking

Dear Secretary Buttigieg:

On behalf of the American Council of Engineering Companies (ACEC) – the national voice of America’s engineering industry – I am writing to express our support for the U.S. Department of Transportation (USDOT) updates to the requirements for participation in the disadvantaged business enterprise (DBE) program and to offer a few suggestions for modifications to the proposed rule.

Founded in 1906, ACEC is a national federation of 52 state and regional organizations representing more than 5,600 engineering firms and 600,000+ engineers, surveyors, architects, and other specialists nationwide. ACEC member firms drive the design of America’s infrastructure and built environment. A substantial number of ACEC member firms participate in the DBE program, and the proposed updates will preserve the viability of the program and continue to provide qualifying firms with important business opportunities.

Personal Net Worth

The proposed increase in the personal net worth (PNW) cap from \$1.32 million to \$1.6 million and the exclusion of retirement assets from the PNW calculation have received strong support from ACEC members. Raising the cap to reflect inflationary increases is long overdue. Excluding the owner’s retirement assets from the PNW calculation is appropriate because they should not be considered a source of capital for the business.

In addition, we strongly support USDOT’s plan to update the PNW cap on a more regular basis going forward. These updates will allow engineering firms to continue to qualify for the DBE program without being artificially excluded due to inflation. ACEC suggests that USDOT update the PNW cap every three years instead of every five years, as proposed, to better reflect changing economic conditions.

Business Size

ACEC supports the proposed changes to align the business size standards under the DBE rules with Small Business Administration size standards for the relevant NAICS codes. This will

promote consistency and ease compliance. We also support using a five-year averaging period for calculating gross receipts but recognize the statutory requirements for maintaining the three-year period.

Several of our member firms have noted that DBEs serving as a prime contractor will often have significantly higher gross receipts because of the role in managing subconsultants and other subcontractors on a project. They have suggested that USDOT consider allowing firms to calculate net receipts, or at least exclude revenue passed through to subcontractors, when determining business size. This would allow more DBEs to successfully perform as prime contractors without prematurely exceeding the business size limits that may not actually reflect firm growth.

Evidence and Rebuttal of Economic Disadvantage

We heard from several member firms with concerns regarding the proposed changes to the criteria for reviewing a firm owner's ability to accumulate substantial wealth in §26.67. They indicated that a shift to a much more subjective standard could create unequal treatment depending on the views of the certifying official. The current objective criteria, while sometimes misapplied, at least create a more predictable and balanced standard.

If USDOT decides to retain the six criteria in some form, we would recommend that the \$6 million cap on total assets be adjusted upward for inflation. As with the PNW cap, this figure can often change due to economic factors outside the owner's control, e.g. appreciating real estate values or retirement savings accounts.

Ownership and Control

ACEC supports the proposed changes regarding business ownership in §26.69 and control in §26.71. These reforms reflect common governance and management structures and should facilitate more reasonable certification reviews.

We do note some confusion among some of our member firms with respect to situations involving multiple Socially and Economically Disadvantaged Owners (SEDOs). In the proposed rule, the first sentences of §26.69 governing determinations of ownership and §26.71 governing determinations of control include references to SEDOs (plural) and allow for conditions of multiple owners. However, most of the rest of the rule uses a singular SEDO or references "the" SEDO. We would ask USDOT to carefully review the context and usage of the term SEDO and ensure that the rules are clear concerning determinations of ownership and control by multiple individuals.

Interstate Certification

We strongly support the changes to the interstate certification process in §26.85 and applaud the Department for taking this important step. Applying for DBE certification and renewal of certification is time-consuming and costly to small businesses. Many of our member firms compete for work in multiple states, and the current system is extremely burdensome because of differing deadlines, documentation requirements, and delays in processing renewals. The proposed rule would significantly reduce those burdens and facilitate more consistency and uniformity, which will also produce efficiency and cost savings for the certifying states.

DOT-Assisted Contracts

Some state DOTs use only state funds on certain preliminary engineering and design contracts, and thus do not utilize the federal DBE program on those contracts. In some cases, the expenditures on the preconstruction portion are credited as part of the non-federal match on federally funded construction projects. In order to ensure that the goals of the DBE program are advanced on all projects that include federal funds at any phase, we suggest that the definition for “DOT-assisted contract” in §26.5 could be amended to include contracts for any phase of a project funded in whole or part with DOT financial assistance.

ACEC is pleased to support the proposed rule and would appreciate consideration of the suggested modifications we have outlined in this comment letter. Thank you and please let us know how we can assist in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Linda Bauer Darr". The signature is written in black ink and is centered on the page.

Linda Bauer Darr
President & CEO