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October 14, 2013

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

Re: 49 CFR Part 26  
(Docket No. OST-2012-0147)  
Disadvantaged Business Enterprise Program Implementation Modifications  
September 18, 2013

Dear Sirs and Madams,

First, on behalf of the Minnesota Utility Contractors Association (MUCA) and its over 125 members in underground utility construction, we look forward to working with U.S. Department of Transportation (US DOT), and our local Minnesota Department of Transportation (MnDOT), in forming a viable and reliable Disadvantaged Business Enterprise (DBE) program. We believe this program has not been working *as it was intended* due to several factors, many of which will be outlined below in responding specifically to the three questions posed in the NPRM. We seek to offer practical solutions.

The following is MUCA's Statement of Beliefs:

- MUCA Members *want* to see this program work as intended. We believe diversity in business benefits our industry and our communities across the nation.
- MUCA believes that a lack of guidance and an inconsistent approach have led to program-wide mistrust from all stakeholders.
- MUCA believes that, specifically for Minnesota and its underground utility construction industry in particular, the mission and the goals set as a part of its DBE program are unworkable to "reflect the demographics of the State of Minnesota", as the U.S. Commission on Civil Rights on Disparity Studies <sup>(2)</sup> (see Appendix A) demonstrates "reflecting demographics" is not a proper, statistically defensible, valid, or reliable measure.
- MUCA believes the **intent** of the program is "to increase DBE participation in the construction and transportation industry." We agree and want to help!

1. *What are the specific, quantifiable costs and benefits associated with completing or reviewing the proposed forms (Personal Net Worth, Certification Application, Uniform Report on Awards/Commitments; DBE Payment Data) from the perspective of a certifying entity, an applicant firm, or a recipient (where applicable).*

While the NPRM outlines several enhancements and more stringent activities in determining certification of a DBE with the intention of preventing fraud, which we applaud and see as a benefit, the fact that the NPRM also allows for “no such thing as recertification” means that the entire process is open for scrutiny. We ask you consider the following:

- Outside of an annual affidavit, if there is no continual monitoring of DBE firms, their income relative to work performed, and their ability to stand on their own as a viable firm – how can stakeholders trust the process and the DBE program’s **intent** to act as an aid in increasing DBE participation?
- The prescriptions recommended (submission of DBE details, requiring all DBE utilization information at the time of bid, etc.) will require a significant increase in cost for the prime contractors in the form of administration, which in turn will punish the primes, the DBE’s and the taxpayers. We believe this should be done by the DBE’s and DOT.
- The **intent** of the DBE program should be to have organizations “graduate” out of the program. After 30 years of this program, where can one find a list of the successful firms, or shining examples of businesses that have used the DBE program to grow their business and are now operating as equally competitive entities?

Case-in-point: A Minnesota Office of Civil Rights decision first awarding, and then denying a bid, which was overturned by the courts, cost another MUCA Member \$225,000 in lost revenue.

**Question:** Is the **intent** of the program to cause harm to the very companies that are engaged in helping US DOT meet its objective?

**Recommendation 1:** US DOT should implement a comprehensive annual tracking system, as opposed to “an annual affidavit of no change” to ensure DBE’s are prepared to operate at the level necessary (and help them if they’re not) and ensure the process **does not cause harm** to those who are making an effort to help DBE’s succeed.

**Recommendation 2:** US DOT should develop comprehensive, standardized DBE program guidance and sufficient training for all States DOT’s (as noted in the Office of the Inspector General Audit Report<sup>(1)</sup>, dated April 2013) to avoid subjective decisions and so as to **not cause harm** to those who are trying to help DBE’s succeed.

2. *What are the specific, quantifiable costs and benefits associated with requiring certified DBE’s to submit additional documents with the annual no change affidavit from the perspective of a certifying entity and a certified DBE?.*

As the NPRM noted, “The Department is not changing the long-standing practice of annual affidavits of no change, and we believe this requirement is crucial to keep recipients current on the status of certified firms.” According to the Office of the Inspector General Audit Report, April 2013 <sup>(1)</sup>, it states “DBE cases represent 29% of active procurement and grant fraud” and also, “of the 6 states visited, less than 20% of the 7,689 certified firms actually received work on federally funded projects.”

**Question:** After 30 years, experiencing more fraud than you have actual participation, when will the US DOT recognize this program, as designed and implemented, is a grand failure costing American taxpayers millions, perhaps billions in waste, while not succeeding in its mission?

**Case-in-point:** From the Office of the Inspector General Audit Report, April 2013, “Weaknesses in the Department’s Disadvantaged Business Enterprise Program Limit Achievements of Its Objectives” <sup>(1)</sup>, (page 19, **No Change Affidavits**) wherein it states, “States certification staff frequently do not enforce the requirement that certified DBE firms submit annual affidavits of no change, which disclose whether there have been any changes that would affect the firms’ ability to continue to meet DBE eligibility requirements. We determined 74 of the 121 DBE firms’ certification files in our 6 sample states were missing some or all of these required affidavits. From the statistical sample of 121 DBEs’ certification files, we identified 20 firms that did not submit required annual affidavits in fiscal year 2009. Yet these firms received DBE contract awards and payments totaling nearly \$4.4 million during that year.”

**Recommendation 3:** As the DBE's are Certified by DOT, the administrative burden of the program should also be borne by DOT and DBE's, ensuring all DBE's are certified and also annually tracking their progress, financially, in submitting bids, in personal net worth, and as a business enterprise. If DBE's do not comply, they are removed from the program. While utilization reporting from primes may be used, DOT owns the ultimate responsibility for the program's success and therefore should accept the responsibility in the administration portion of tracking DBE progress. DBE's, as business owners, also want to track their success.

**Benefits:** Reduced fraud, increased accountability, reliability and specifically ***increased trust*** in the program by all stakeholders. Plus, by setting clear expectations, this offers DOT an opportunity to **help DBE's succeed!**

**Recommendation 4:** US DOT, as the responsible entity to ensure the DBE program objectives are met, should do more to provide DBE's with training, assistance and performance measures to ensure they are a viable resource for the market, are able to identify opportunities, and take responsibility in the motivation and development of the growth of their companies, with an eye towards graduating from the program.

**Benefits:** Success!! DBE's graduate from the program as *intended* and are now competing as an equal in the construction and transportation industry.

- 3. What are the specific, quantifiable costs and benefits associated with requiring good faith efforts documentation when bids are due and requiring additional documents (i.e. DBE and non-DBE quotes, DBE subcontracts) from the perspective of a prime contractor, a DBE and the recipient letting the contract?*

The biggest misconception is the bidding process and that there is "ample time" to advertise, receive and select DBE participants. Most often you just have days. MUCA Members' experience has been that no matter how much effort a company puts into the Good Faith Efforts (GFE), the company that comes up with the target goal will get the bid. This in effect turns a "goal" into a quota. The entire process is suspect, completely subjective and does not encourage trust from all stakeholders.

MUCA believes that a reduction in the time frame for contractors to submit DBE information and requiring the goal be met at the time of bid letting creates more problems than would be solved. Unless we start rewarding and understanding what goes into a GFE, we are doing nothing to support or foster a competitive environment. It may also have unintended consequences of bid-shopping, which in some cases can result in poor quality, unfair competition, and insolvencies.

Case-in-point: A MUCA Member, who employs a number of minorities and women, had cited hard financial times as the reason for self-performing some items. The reviewer disagreed with the reconsideration panel that the prime's decision to self-perform work that could have been subcontracted to DBE's was reasonable. "This is not a sufficient reason to self-perform at the expense of meeting the DBE goal."

**Question**: Is the *intent* of the program to **cause harm to minorities and women working for prime contractors**?

**Recommendation 5**: US DOT, and the State DOT's, as the responsible entities for managing the program and making it work, and who should have a comprehensive process of recording, tracking and updating DBE certifications, including capacities (financial and other), availability, and category, should work with the primes in identifying qualified DBE's to perform the varying scope of work identified in the project. This would require a keen understanding of the construction and transportation industry exist within DOT and OCR. However, as the primes KNOW the market in which they operate and the DBE firms that are familiar to them, they should be allowed self-perform portions of the bid, especially if it means an overall reduction in public project cost – without punishment or subjective judgment from DOT.

**Benefits**: It would prepare DBE's for a competitive marketplace. It would help the DBE's gain exposure for their capacity. It would allow primes the opportunity to confirm available and qualified DBE's, and work with DOT to ensure a reasonable goal is established (creating trust). It may provide an opportunity, for additional training by DOT to help DBE's on identifying opportunities. It would save the taxpayer dollars on public projects.

### ***In Closing***

MUCA wants to see the DBE program work *as intended*. We believe that the "eye is off the prize" as throughout the program and specifically in MnDOT's mission, we see minimal efforts in **intentionally growing the pool of DBE's**. It appears that the program, as currently managed, is more focused on providing dollars, as opposed to providing *real* opportunities for DBE's. We submit that by increasing the pool, a lot of the issues that currently plague the program would be solved. Unlike the current situation, it would have to go beyond simply "helping DBE's get through the Certification process."

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Most assuredly, DOT by seeking a narrowly tailored disparity study and by accepting responsibility to track DBE's, by capacity, by availability, by meaningful categories and specifically by industry, would create a more reliable, viable program and generate trust by removing doubts about goal establishment and offer a statistically defensible, transparent method.

DOT also being engaged in helping DBE's succeed through training, identifying opportunities, and helping them be a viable resource for the industry would generate trust, and have the added benefit of increasing the pool (as more DBE's graduate from the program, more will be interested in participating).

Finally, developing comprehensive standardized DBE program guidance and sufficient training for those that make judgments (both in certifying DBE's and in awarding GFE's) would also garner trust from all stakeholders that the process is transparent, reliable and defensible.

The question is what do you want, and what are you willing to do to get it? If US DOT's ultimate goal is to increase DBE participation in the transportation and construction industry, MUCA believes the recommendations noted in this document and the attached Appendix, are the keys to success.

Our only other suggestion, would be to give industry Associations the same amount wasted via fraud in the program in any given year (say \$4.4 million) and we'll develop a comprehensive DBE certification and training program that works to benefit our specific industries – outside of government intervention. I have seen this approach work in the energy industry; it can work for construction and transportation as well.

Thank you for the opportunity to respond and for your attentive consideration.

Warmest regards,



Stephanie Menning, CAE, IOM  
Executive Director, MUCA

Enclosed: MUCA Appendix A

CC: Martha Kenley, National DBE Director  
Commissioner Charles Zelle, MnDOT  
Kim Collins, Office of Civil Rights Director, MnDOT  
Commissioner Kevin Lindsey, Mn Dept. of Human Rights

## Appendix A

As noted in the U.S. Commission on Civil Rights, "Disparity Studies As Evidence of Discrimination in Federal Contracting" Briefing Report of May 2006":

- "Early disparity studies counted minority-owned firms as a proportion of all firms. They assumed without discrimination minority-owned enterprises would receive a proportion of all procurement dollars equal to their frequency compared to all other firms. Courts, however, rejected such methods as simplistic because many firms were not qualified to conduct business for the federal government. Thus, courts demanded approaches counting only qualified firms. Researchers then attempted to determine how many firms are ready, willing and able to do business with the government, but soon recognized that even qualified businesses have substantially different capacities." – Comments by Dr. Ian Ayres, William K. Townsend Professor, Yale Law School, consultant on the design of the Dept. of Commerce's 1998 and 1999 bench mark studies.
- Also, Dr. Constance F. Citro, director, Committee on National Statistics, National Academy of Sciences, supervised a recently completed evaluation of disparities in federal contracting with women-owned businesses and worked on a project about measuring racial discrimination. "In contracting, the availability share for a group such as women-owned small businesses varies across industries and other characteristics of the firms. Therefore, one must use disparity ratios that are computed with meaningful categories and not merely simple counts or percentages of utilization. In addition, researchers must address many methodological issues to obtain statistically defensible, valid, and reliable measures of disparities." She went on to state, "...disparity studies are a reasonable first step to identify situations in which discriminatory practices or behavior disadvantage certain types of businesses in government contracting. However, she added that observed disparities do not establish discrimination. To identify discrimination, the researcher must examine various aspects of contracting, for example, earlier casual effects such as the processes by which pools of ready, willing and able bidders are **developed.**"
- Dr. George LaNoue, professor, University of Maryland, Baltimore County, who has compiled a library and database of minority- and women-owned business programs containing research related to more than 160 disparity studies, which is known as the Project on Civil Rights and Public Contracts comments noted, "Echoing other panelists concerns, Dr. LaNoue estimated that about 50 percent of state and local disparity studies use simple counts of businesses and are inadequate because they do not measure availability properly. He dismissed the results of another 30 percent because the studies did

- not factor in the capacity of firms to fulfill contracts; and 18 percent because they fail to examine disparities by industry.”
- The report concludes: “The panelists discussed the continuing need to conduct and improve disparity studies because the existing research relies on data which are now a decade or more old. The discussants referred to state and local disparity studies and the key national compilations of information mentioned above in articulating appropriate social science standards of new research.
  - Its MUCA’s belief that DOT does not have an accurate accounting of qualified DBE’s to perform underground utility construction work. Ready, willing and able –does not **guarantee** *knowledge, skills and abilities* to perform work specific to installation of gas lines, electric lines, cable, telecomm, fiber optic, sewer, wastewater or stormwater facilities. All of which require a specific technical aptitude (i.e. certification training).
  - The above bullet point consigns DBE participation for MUCA Members to utilizing smaller components of construction, which is not cost-effective, is inefficient and in general does not help DOT meet its goal of *increasing* participation – specifically in the “construction and transportation industry”.
  - Based on the above US Commission on Civil Rights report, MUCA believes that the goals established by both the US DOT and MnDOT are not based on statistically defensible or reliable methods.
- **Recommendation One:** US DOT should focus its efforts on **increasing the pool** of DBE participants in the transportation and construction industry.
- **Recommendation Two:** US DOT should seek narrowly tailored disparity studies – specifically noted by industry (i.e. underground utility construction, highway heavy, commercial building, etc.), by capacity, by availability and by meaningful categories.
- **Recommendation Three:** US DOT should develop comprehensive, standardized DBE program guidance and sufficient training (as noted in the Office of the Inspector General Audit Report, dated April 2013).
- **Recommendation Four:** US DOT should direct all state’s DOT’s to focus their efforts on **increasing the pool** of DBE’s, and helping them grow their business, as opposed to the burdensome reporting, subjective good faith efforts, and a punitive approach to the program.



References:

<sup>1</sup>Office of the Inspector General Audit Report, April 2013

<http://www.wcoeusa.org/images/DOTDBEProgramReport.pdf>

<sup>2</sup> U.S. Commission on Civil Rights, "Disparity Studies as Evidence of Discrimination in Federal Contracting" Briefing Report of May 2006

<http://www.usccr.gov/pubs/DisparityStudies5-2006.pdf>