

BRIEF: COMTO RESPONSE TO USDOT CHANGES TO DBE AND ACDBE PROGRAMS

Below you will find a summary of COMTO's response to the USDOT Notice of Proposed Rulemaking (NPRM). Please review and feel free to tailor your responses based on your own firm's experience with the DBE and ACDBE Programs.

Pros of Proposed Rulemaking

- Regulations will upgrade and enhance state UCP data collection and reporting requirements. This information is essential to help clarify and highlight the diverse and extensive capabilities of DBE-certified minority firms. Majority prime contractors will often look to traditionally minority trades, rather than seeking out professional services or full-service engineering, architectural, and construction firms. Although many states already request some detailed information from their certified firms, this language would require UCP state certifying agencies to gather specifics about DBEs related to their services, thereby facilitating primes in their search for qualified DBE companies, particularly in historically underutilized trades and industries.
- We praise the provisions that would prohibit prime contractors from holding on to retainage until the job is complete. The sub should be returned its retainage held by the prime as soon as its work on the project is done, not after the prime's contract is complete, which can be years later. We believe it is indefensible to do otherwise.
- The proposed language related to small business size standards is exciting, reasonable, and finally fair. It appears that DBEs will continue to be required to use the three-year annual gross revenues to determine eligibility, but the ceiling will be raised to \$56.42 million in average annual receipts, in keeping with SBA standards, which FAA-funded project concessionaires have enjoyed since 2018. COMTO strongly supports this long overdue correction to the regulations.
- COMTO HQ has repeatedly heard concerns from its membership with regard to the Personal Net Worth (PNW) of the DBE owner. We are comfortable with the update to \$1.6 million, along with adjustments to the determining methodology. With this action, the USDOT DBE program appears to acknowledge the fact that DBE firms must have access to the resources needed for capacity building. The proposal would allow exclusion of the full balance of the owner's retirement accounts to encourage retirement savings. It would be adjusted or revised every five years without the need for regulatory protocols and also without any downward adjustments. We are in support of this change.

Areas of Concern of Proposed Rulemaking.

- Hesitancy about the \$670,000 agency/USDOT funds recipient cut-off for establishing a DBE program and all associated reporting requirements, changed upward from \$250,000. Although the OCR anticipates a quantifiable administrative cost and time savings, this also means that at least 80 transit agencies throughout the country would not be required to establish a DBE program or to report disadvantaged business utilization data. We do not necessarily agree, in that, while we understand the concern about burdensome or costly regulations, we believe that, based on current national demographics, every agency anywhere needs to play a role in leveling the playing field by building the program -- and the businesses will come.

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- The Prompt Payment and Retainage guidances in the proposals are a step in the right direction. Currently, primes are directed to pay their subs for completed work within 30 days. However, our experience is that there is little to no oversight, and primes often ignore this requirement, since accountability is lacking and no codified consequences for violations are in place. Indeed, the only time agencies may address prompt payment issues is if they receive a complaint from a DBE subcontractor. At that point, it can be late in the game and the sub is in financial distress. While a large prime would be able to sustain during the period of delayed payment from the owner, a small, disadvantaged subcontractor cannot. Although some agencies do have compliance monitoring mechanisms in place, all regulations related to prompt payment programs need to be enforced and strengthened, i.e., given some teeth.
- Provisions that address the increasingly more common Design/Build and/or Design/Build/Operate/Maintain (DBOM) projects are very provocative. COMTO would advocate that agencies unbundle these projects to give DBE prime contracting opportunities. However, transit agencies increasingly find these arrangements more convenient and delivery efficient, and their prevalence is the current reality. Because the time differentials between “design” and “build” and “operate” and “maintain” can be significant, bidding teams may not always know what their subcontracting needs will be from one stage to another. The USDOT proposes to replace commitments to DBE subs with a DBE Performance Plan (DPP).
- According to USDOT’s proposal, the DPP would replace the need for prime bidders to commit to specific DBEs at the time of the proposal or prior to final selection. To be considered responsive, a contractor’s DPP would have to include a commitment to meet the goal by providing details of the types of work and projected dollar amounts the contractor will solicit DBEs to perform. The DPP must also include an estimated time frame in which actual DB subcontracts would be executed. Once the contract is awarded, the contracting agency would have to provide ongoing monitoring and oversight of the contractor to evaluate its good faith efforts to comply with the DPP and schedule. The intentions here are good and the reasoning appears valid. However, we continue to emphasize the need for vigilance, including close oversight, enforced accountability, and tangible consequences.
- There is a double edge sword in some of the details of PNW: by eliminating marital resources from the PNW, minority firms can be at a disadvantage since spousal assets could assist in leveraging financing, insurance, bonding, etc. However, at the same time, non-minority woman-owned firms could conceivably live a lavish (and not disadvantaged) lifestyle while using the exclusion of her spouse’s assets on her PNW to her (dis)advantage. This remains a conundrum.
- In the section regarding Control (26.71(a)(3), the proposal states that a firm must have operations in the type of business it seeks to perform as a DBE before it applies for certification. The proposal further states that the new rule “would allow the certifier to evaluate the disadvantaged owner’s control of the firm based on demonstrable actions that the owner takes to run the business.” Second, the proposed rule “would help certifiers better allocate their resources by relieving them from the burden of evaluating applications from firms that are not conducting business and have the ability to bid on DBE contracts.” COMTO does have a serious issue with this language. Again, although the intentions are good, this is a strong disincentive and deterrent to entrepreneurship into innovative or non-traditional trades. A firm cannot have experience if it cannot get opportunities for experience to prove its capabilities.
- To add insult to injury, the proposal explicitly excludes ACDBEs from this requirement, stating “[T]he proposed rule would exclude firms that are applying for ACDBE certification (emphasis added) since many potential ACDBEs have no operations before obtaining a contract.” We confess that we are not able to comprehend the rationale for the disparate treatment of DBE

firms vs ACDBEs. Certainly, the OCR can understand that “many potential” DBEs may also have no operations before obtaining a contract. We strongly protest and challenge this proposal as being unfair to DBEs and giving deferential and preferential treatment to ACDBEs.

- We would be extremely remiss if we did not take note that the new regulations do not appear to address the difficulties DBE firms have in obtaining bonding and insurance. Barriers to bonding include personal assets, contract size, credit history, and sufficient proof of ability to perform. A 2019 article in the Times-Picayune entitled “Unequal Opportunity” stated the situation best: “..bonding has been a cruel Catch-22 for the owners of many disadvantaged businesses. These struggling firms either can't afford a bond or can't persuade bonding companies to guarantee their performance. But without a bond, they can't bid on many jobs in the public or private sector, limiting their growth and the effectiveness of disadvantaged business enterprise programs.”
- Closely linked with a mentor/protégé relationship is the Subcontractor Default Insurance (SDI). To explain, this means a general or prime contractor on a project could opt to take out an SDI policy to eliminate the need for performance bonds. This allows the contractor to choose DBE subcontractors who may not qualify for bonds but are otherwise qualified to perform the job. With this type of insurance, the prime is covered for any costs incurred if its subcontractors fail to complete the project as specified. An agency could score bid submissions, taking into account mentor/protégé agreement bonding assistance or the use of SDIs in the bid response.