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Docket No. DOT-OST-2025-0897

U.S. Department of Transportation
Office of the Secretary
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: AGC Comments on the U.S. Department of Transportation's Interim Final Rule on the Disadvantaged Business Enterprise (DBE) and Airport Concession DBE Programs (ACDBE).

Appendices:

- (1) AGC Key Elements for Programs to Assist Small and Emerging Construction Firms**
- (2) AGC Comments to Docket DOT-OST-2022-0051 DBE 1**

On behalf of the Associated General Contractors of America (AGC), thank you for the opportunity to comment on the U.S. Department of Transportation ("USDOT" or "the Department")'s [Interim Final Rule](#) (IFR) published October 3, 2025, modifying the *Disadvantaged Business Enterprise (DBE)* and *Airport Concession DBE (ACDBE)* programs.

AGC is the leading association for the construction industry, leading 87 chapters nationwide and representing more than 28,000 firms.¹ These firms, which include DBEs and non-DBEs, engage in the construction of highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, buildings, shopping centers, factories, industrial facilities, warehouses, multi-family housing projects, municipal utilities and other improvements to real property.

AGC supports the Department's commitment to ensuring that the DBE program remains lawful, effective, and sustainable in promoting opportunities for socially and economically disadvantaged businesses. The IFR makes substantial structural changes, requiring immediate reevaluation of all currently certified DBEs and eliminating class-based presumptions of disadvantage.

While AGC shares DOT's goal of program integrity, the IFR's immediate implementation, absence of transition guidance and lack of procedural clarity pose real risks of project disruption, administrative overload, and inconsistent treatment across states. Our comments seek to ensure that implementation is workable, predictable, and fair for recipients, contractors, and DBEs alike.

¹ Some of AGC's state and local chapters will submit their own comments. We recommend DOT review these comments closely as these chapters are extremely well positioned to speak on the issues faced by contractors in their area of responsibility.

AGC's recommendations focus on five objectives:

- I. **Protecting existing contracts** and clarifying which projects remain governed by pre-IFR DBE goals.
- II. **Requesting detailed federal guidance** on the DBE reevaluation process.
- III. **Reducing unnecessary and duplicative paperwork.**
- IV. **Growing DBE capacity** by reasonably aligning the DBE Program with the Federal Small Business Act.
- V. **Providing AGC's "Key Elements" framework** for supporting small and emerging construction firms as a model for practical implementation, reaffirming AGC's commitment to a lawful and effective DBE program.

These objectives were developed in cooperation with our members and our state and local chapters. Thank you for your consideration and please feel free to reach out with any questions or requests for additional information.

I. Protecting Existing Contracts To Avoid Project Delays

The IFR took effect immediately upon publication and did not address which public contracts can continue as executed and which contracts will be required to be amended and re-let. We appreciate that DOT recognized this and swiftly published a Frequently Asked Questions [document](#) to answer this critical question.

According to the document, contracts that have been let and executed prior to October 3, 2025 are not required to be modified, but all DBEs will need to recertify under 26.111. If a DBE is not recertified during this process, the recipient will be "required to take appropriate action to discontinue the effect of the unconstitutional certification." AGC understands this to mean that if a DBE is not recertified, the contracts can continue as executed, but that such work will not count towards a recipient's DBE goals. There is another possible reading of that sentence which would allow a recipient to terminate a contract if a DBE fails recertification. Question 3 of the FAQ document, in the Contracting Questions section, also says that "good cause for termination exists if a DBE loses its DBE certification after the reevaluation process."

Taken together, the possible interpretation of the "discontinue the effect" clause and the termination good cause language can appear to authorize recipients to cancel contracts already awarded and executed if the contractor fails recertification. This would be an unacceptable result.

One of AGC's major concerns with this IFR is the risk that existing projects will be delayed or cancelled. We understand that programs evolve and require management over time, but these decisions should be prospective and made with respect to work already completed. We don't believe the Department's intent is for this IFR to delay and possibly cancel existing contracts. If this understanding is correct, DOT should make that clear in a Final Rule. If it is not correct, DOT

should make that equally clear. Our strong recommendation is that any contract that has been let prior to the publication of the IFR should continue as advertised and that any contract let on October 3, 2025 or later should fully comply with the IFR.² This measure would protect the financial interests of contractors who have invested heavily in preparing competitive bids, the time and effort of Department staff required to implement changes, and the taxpayer, whose interests are best served by the efficient management of government contracts.

I. Requesting Guidance on the Reevaluation Process to Assist Prime Contractors and Firms Attempting to Recertify

Under this IFR, all existing DBEs must undergo recertification. For many small businesses, DBE status is the basis for continued viability and recertification amounts to an existential threat. For decades, the race- and sex-based presumptions served as the foundation for DBE status. Now, the IFR makes clear that “[a]ll applicants must demonstrate social and economic disadvantage (SED) affirmatively based on their own experiences and circumstances within American society, and without regard to race or sex.”

First, we recommend that the use of race and sex be permissible within an applicant’s personal narrative. The IFR cites the *Mid-America Milling* case along with *Students for Fair Admissions v. Harvard* as justification for the prohibition on the use of race or sex in a DBE application.³ In fact, these cases outlawed only the use of presumptions, while allowing for the use of race or sex in a narrowly tailored fashion.⁴ The use of race or sex discrimination in an applicant’s personal narrative is as narrowly tailored as it gets. This would be an ad-hoc determination of disadvantage by the DOT and may be able to withstand constitutional scrutiny without frustrating the goals of the program.

If DOT disagrees with that argument and maintains that race and sex are not to be mentioned at all within the personal narrative, we respectfully request guidance from DOT on what makes for a compelling narrative in their absence.

Without such guidance, Unified Certification Programs (UCPs) risk inconsistent application, administrative backlogs, and unintentional decertification of otherwise qualified firms.

AGC respectfully recommends that DOT provide:

² AGC commends the Arizona Department of Transportation (ADOT) for establishing the let date as the cut-off criterion in its October 2025 [guidance](#). A uniform national standard modeled on ADOT’s approach would provide consistency for all recipients and contractors.

³ See *Mid-America Milling Co. v. U.S. Dep’t of Transp.*, No. 3:23-cv-00072, 2024 WL 4267183 (Sept. 23, 2024) and 600 U.S. 181 (2023).

⁴ *Students for Fair Admissions*: “The Grutter Court also emphasized the equal protection principle that racial classifications, even when otherwise permissible, must be a “temporary matter,” and “must be limited in time.” *Id.*, at 342 (quoting Croson, 488 U. S., at 510 (plurality opinion of O’Connor, J.)).” From Millings doc #44: “There is no reason to believe that Grutter’s reasoning, adopted by a majority of the Supreme Court in *Students for Fair Admissions*, does not extend to all race-conscious programs.”

1. Uniform Documentation and Evidence Standards

The IFR requires “credible, contemporaneous documentation” but does not specify what qualifies. DOT should identify acceptable forms of evidence to ensure consistency among UCPs.

2. Contextual Consideration of Disadvantage

The removal of group-based presumptions has created uncertainty over whether personal narratives describing sex- or race-related barriers can still inform determinations of social disadvantage. DOT should clarify that such narratives may supplement objective documentation.

3. Federal Technical Assistance and Funding Support

To execute these changes efficiently, DOT should provide standardized forms and optional administrative funding. Many certification offices operate with limited staffing and may not be able to absorb this expanded workload without support.

4. Comprehensive Framework for DBE Goal Evaluation

DOT should provide a framework to explain how existing contract goals will be evaluated as work continues during the reevaluation of the DBE firms. For example, how will the Department evaluate work that is done by DBEs undergoing reevaluation? Will the contract goals be readjusted to match the new availability of remaining work and certified DBE firms? Will the prime contractor be responsible for finding new DBE firms or providing GFE? Will the original commitment amount be reduced by the amount of work completed during the reevaluation process? We are concerned that without a contractual adjustment of the goal, a prime contractor could be held responsible and penalized for not meeting their original commitment at the time of bid.

II. Unnecessary and Duplicative Paperwork (Bidders List)

The previous Administration imposed bid-stage reporting that is difficult to comply with in construction procurement and does not advance program integrity. Specifically, the 2024 Final Rule revised 49 C.F.R. § 26.11 to require prime bidders to submit all received (not selected) subcontractor quotes with their bid so recipients can populate their bidders lists - a dataset intended “to provide the Department with data for evaluating the extent to which the objectives of § 26.1 [DBE Program] are being achieved.”

In practice, collecting and verifying every bidders list document at bid time is extremely difficult and inherently duplicative because the same subcontractor often quotes multiple competing primes on the same project. As such, that same information is submitted multiple times for every single project. The Department’s federal database where this information is supposed to be submitted is not yet operational and directs recipients to collect the data now and upload it later once the system exists - further confirming that the paperwork burden lands on industry without a working intake system.

Accordingly, just as the IFR suspends DBE goal setting and counting and makes CUF reviews unnecessary during UCP re-evaluation, DOT should pause bidders list collection and submission until UCP re-evaluation is complete and the federal database is built and ready for use. We note the IFR already eliminates the requirement to collect race and sex of the majority owner for the purposes of bidders list entries; extending that same pause logic to the entire bid-time “all quotes” dump will avoid cost and confusion with no loss of accountability or intended function.

III. Growing DBE Capacity by Reasonably Aligning the DBE Program with the Federal Small Business Act

Through decades of regulation the DBE program has unintentionally penalized successful DBEs and limited their growth potential. Instead of making it easier for prime contractors to utilize specialty DBE firms, it has made it more difficult. Because of the administrative burden associated with being a DBE and doing federal work, many DBEs have reported that they opted to work with the private sector instead. AGC supports extending the NAICS Code size measurement for DBEs from a three-year average of annual gross revenues to a five-year average in alignment with the federal small business program and Small Business Act. The current definition limits the ability of DBEs to grow their companies into sustainable, long-term businesses. The three-year average discounts the fact that a DBE could have one year above the NAICS Code size threshold that can force DBEs out of the program prematurely or require a DBE to sell off a part of their business. When this occurs, the capacity of certified DBEs in a state dwindles, making it difficult to achieve DBE goals, which undermines the very intent of the DBE program.

The five-year average, on the other hand, better reflects the ups and downs of annual transportation construction funding, to which DBEs are subject. When Congress, for example, approves emergency supplemental funding to respond to natural disasters, a particular market can see an incredible influx of transportation construction work for which DBEs are needed, not only to meet various statutory requirements, but also to help rebuild a community as fast as possible.

Under the five-year average, one or even two years of above size measurement growth may not cause a DBE to be removed from the program before it is ready. Instead, it allows a DBE to plan better and make its own decision as to whether it needs to remain in the program or not. Because, after a DBE is no longer in the program, it then competes against not only other small contractors, but also multibillion-dollar contractors for which it may not yet be ready to engage in such a level of competition.

As evidenced above, AGC supports better alignment of the DBE program with the federal small business program under the Small Business Act. However, AGC warns USDOT against a wholesale substitution of the existing rules for DBE size determination with that of the U.S. Small Business Administration’s (SBA) without careful consideration and study.

AGC believes that USDOT should ensure that DBE availability and capacity in an area does not diminish, which would undermine efforts to achieve programmatic goals. The current DBE statutory size standard cap of \$31.84 million can be misleading, since specialty contractors are often

limited to a lower threshold as NAICS codes for specialty contractors are generally capped at \$19 million gross annual revenue. Likewise, a State DOT may prequalify a DBE at a higher threshold, creating the impression that the DBE has the capacity to take on new construction work when they are actually facing a lower threshold because of the NAICS codes. Further, DBE contractors work as prime contractors on some transportation construction contracts and specialty contractors (i.e., subcontractors) on others, creating an administrative burden to track the various NAICS codes and their associated size thresholds to ensure the DBE's continued participation in the program.

That is why AGC supports aligning the DBE statutory size standard—currently capped at \$31.84 million gross annual revenue—with NAICS code 237310 (Highway, Street, and Bridge Construction) that sets a \$45 million cap and is revised for industry trends and inflation at least every five years by the SBA.

AGC supports maintaining just this one singular code and its accompanying threshold to avoid administrative confusion that could lead to DBEs being prematurely removed from the program. This flexibility would maximize a DBE's opportunity to bid on and win federally assisted transportation construction contracts.

Such a change is not unprecedented. In fact, Congress enacted this approach in section 150 of the Federal Aviation Administration Act of 2018 for the model DBE program and chose to continue it most recently with the FAA Reauthorization Act of 2024.

As it stands, however, NAICS codes for the specialty construction sector were designed for vertical building construction, not transportation construction contractors. These codes do not account for the fact that in transportation construction, jobsites can span many miles and require more heavy equipment than for constructing a building. For example, to face a cap of \$19 million can be especially challenging for a structural steel contractor that specializes in bridge work, as steel remains at elevated prices, is a ubiquitous material in bridges and whose placement requires significant investment in heavy equipment.

Instead of allowing room for DBE contractors to grow, the program is further handicapping their success. Instead of making it easier for prime contractors to utilize specialty DBE firms, it is making it more difficult. Finally, it is making it harder for states to meet or even exceed their DBE goals by limiting the work these DBE firms are able to perform. AGC looks forward to working with Congress and USDOT to address the unintended consequences of the use of NAICS codes in transportation construction.

Our comment from 2022 (Appendix II) highlights further changes that DOT can make to align the program with the Federal Small Business Act.

IV. AGC Supports Implementation of “Key Elements” Framework to Help Small and Emerging Firms.

AGC supports the Department's development of a clear and workable implementation strategy for the Interim Final Rule and offers its *Key Elements for Programs to Assist Small and Emerging Construction Firms* as a resource for consideration. The document is included with this comment as Appendix I.

This framework reflects the collective experience of AGC member firms, including DBE and non-DBE construction companies, and identifies practical measures that have proven effective in helping small and disadvantaged firms participate successfully in various construction programs.

The *Key Elements* framework was developed to provide industry-informed guidance on how to improve program delivery, enhance compliance efficiency, and expand opportunities for small and emerging firms. While not prescriptive, it presents concepts taken from real-world examples from states and cities that are already applying these principles effectively. AGC believes the Key Elements framework could inform DOT's efforts to clarify expectations and strengthen implementation consistency across recipients.

Core Concepts from the Key Elements Framework:

1. **Provide Resources to Small Businesses** – Current resources are inadequate and lack flexibility. Small business assistance should be in the form of flexible direct federal grants and low interest loans to help these companies grow and compete.
2. **Provide Common Sense and Flexibility in Supporting Emerging Firms** – Current rules of programs, like the DBE program, create challenges for both prime contractors and small businesses when working together—sometimes even restricting collaboration due to legal constraints. Both should have the flexibility to engage in mentorship, education, investment, and technical assistance without unnecessary barriers. For example, prime contractors should be able to share construction equipment with emerging firms in emergency situations. Providing common sense support without unnecessary barriers allows businesses to strengthen their capabilities and enhance competition within the construction industry. For example, both prime contractors and small businesses should have access to incentives, such as tax benefits or financial support, that encourages collaboration.
3. **Uniform Standards Across Small Business Programs** – The graduation requirements for emerging firms should align with established SBA standards, using average annual revenue as a classification metric. The program should be designed to ensure businesses remain viable and competitive beyond their graduation from the program.
4. **Reduce Administrative Burdens on Prime and Emerging Contractors** – Construction has long been a well-regulated industry, ensuring that workers are safe, and the environment is protected. These businesses should not be burdened or distracted by inconsistent and onerous regulations and reporting requirements. Administrative requirements and regulations should align and allow for reciprocity as much as practicable. For example, initial certification, interstate certification, etc.

5. **Eliminate Excessive Penalties for Noncompliance** – Under current programs, the risk of noncompliance serves as a deterrence to program participation for many businesses. Federal, state and local governments continue to introduce new compliance requirements, shifting focus away from construction work and placing an undue burden on businesses. Failure to comply can result in costly penalties and unfavorable performance evaluations, which may impact future contracting opportunities. These dynamics are fostering uncertainty and discouraging prime contractors from engaging with emerging firms. Implementing a "Good Faith" standard will help reduce the risk of noncompliance.

Conclusion

AGC appreciates the Department's continued engagement with industry stakeholders as it implements the October 3, 2025, Interim Final Rule. AGC's goal is to ensure that the rule's implementation provides clarity, continuity, and fairness for recipients, contractors, and DBEs during this period of transition.

By focusing on five core objectives: protecting existing contracts, providing clear guidance on reevaluation, reducing unnecessary paperwork, growing DBE capacity, and utilizing AGC's Key Elements framework, DOT can help ensure that federal-aid projects continue without disruption and that small and disadvantaged firms receive consistent and transparent treatment under the new requirements.

Thank you again for your consideration and please reach out with any questions or requests for additional information.

Very Respectfully,



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Preamble:

If existing contract preference programs are altered or replaced due to legal challenges rendering them unlawful, any new or revised program should incorporate key elements that support small and emerging construction firms. Construction firms face significant challenges, and it is in the best interest of the industry to maintain a strong and competitive pool of small and emerging firms. Below is a list of key elements and successful examples of programs and practices. The intent of this document is not to endorse every aspect of these programs, but rather to highlight specific elements that align with the five key elements.

List of Key Elements:

1. Provide Resources to Small Businesses
2. Provide Practicality and Flexibility in Supporting Emerging Firms
3. Uniform Standards Across Small Business Programs
4. Reduce Administrative Burdens on Prime and Emerging Contractors
5. Eliminate Excessive Penalties for Noncompliance

Key Elements of Programs to Assist Small and Emerging Construction Firms:

While this is a non-exhaustive list, here are examples for each key element.

1. **Provide Resources to Small Businesses** – Current resources are inadequate and lack flexibility. Small business assistance should be in the form of flexible direct federal grants and low interest loans to help these companies grow and compete.

A. Example: U.S. Small Business Administration SBA 7(a) Loan Program - 13 CFR Part 120

1. The SBA 7(a) Loan Program is offered by the U.S. Small Business Administration (SBA), designed to provide financial assistance to small businesses. This program helps small and emerging construction firms secure working capital, purchase equipment, refinance debt, or acquire commercial real estate, ensuring they have the financial resources needed to grow and compete. [SBA 7\(a\) Loan Program](#)

B. Example: San Francisco Bonding and Financial Assistance Program (Section 14B.16)

1. San Francisco provides financial assistance, including guarantees for private bonding companies and financial institutions, to encourage them to provide required bonding and financing to eligible small businesses. This includes access to a bonding assistance training program. The San Francisco Bonding and Financial Assistance Program offers up to 40%

bond guarantees and construction loan guarantees up to \$1,000,000 to eligible small businesses.

C. Example: Minnesota Department of Transportation (MnDOT) provides the following:

1. **Micro Grants:** Grants for certified small businesses to help increase business capacity. Businesses may use grant funds on eligible business expenses. [Micro Grant - Civil Rights - MnDOT](#)
2. **Working Capital Loan Fund:** Loans for Disadvantaged Business Enterprises or Targeted Group Businesses. DBEs and TGBs must have been awarded a Minnesota Department of Transportation contract or must be bidding on a project. Loan funds may be used for financial training, support or assistance. [Working Capital Loan Fund - Civil Rights - MnDOT](#) NOTE: New loans are currently unavailable.
 - i. Fast Track Working Capital Loan
 - ii. MnDOT Working Capital Loan

D. Example: New Jersey Economic Development Authority (NJEDA) – Small Business Improvement Grant

1. The NJEDA offers grants to small businesses to reimburse up to 50% of costs associated with building improvements and purchasing new equipment. This grant supports small contractors in expanding capacity and upgrading equipment necessary for construction projects. [NJEDA Small Business Improvement Grant](#)

E. Example: Louisiana Economic Development – Small and Emerging Business Development (SEBD) Program

1. The SEBD Program, administered by Louisiana Economic Development (LED), provides developmental assistance to Louisiana-based small businesses that are certified as "small and emerging." The program offers training, legal and accounting services, marketing, and business planning support. Small businesses can receive direct one-on-one business development assistance and access to a reimbursement-based performance-based assistance program for project implementation costs. [Small and Emerging Business Development Program – LED](#)
2. **Provide Common Sense and Flexibility in Supporting Emerging Firms** – Current rules of programs, like the DBE program, create challenges for both prime contractors and small businesses when working together—sometimes even restricting collaboration due to legal constraints. Both should have the flexibility to engage in mentorship, education, investment, and technical assistance without unnecessary barriers. For example, prime contractors should be able to share construction equipment with

emerging firms in emergency situations. Providing common sense support without unnecessary barriers allows businesses to strengthen their capabilities and enhance competition within the construction industry. For example, both prime contractors and small businesses should have access to incentives, such as tax benefits or financial support, that encourages collaboration.

A. Example: SBA’s Mentor-Protégé Program - 13 CFR § 125.9.

1. Through the SBA Mentor-Protégé Program, mentors provide business and technical support, offering guidance on bidding strategies, regulatory compliance, and effective project execution. Additionally, the program helps small firms access essential resources such as bonding, financing, and supply chain management, strengthening their ability to compete and succeed in the federal marketplace. Joint ventures enable small firms to bid on larger federal projects, expanding their opportunities in government contracting. [SBA’s Mentor-Protégé Program](#)

B. Example: San Francisco Administrative Code Chapter Section 14B.8(A) - LBE Subcontracting Participation Requirements and Section 14B.15(A) - Reporting and Review

1. The ordinance states that the San Francisco Mayor shall establish Race & Gender-neutral citywide goals for participation by small and micro local businesses in contracting. These goals are supported by the use of bid discounts, set-aside contracts, and Local Business Enterprise (LBE) subcontracting participation requirements.

C. Example: San Francisco Administrative Code Chapter 14B.7(K) - Micro-LBE Set-Aside Program

1. Public Work/Construction Contracts: Not less than 50% of eligible contracts must be set aside for Micro-LBEs. Services/Commodities Contracts: Not less than 25% of eligible contracts must be set aside for Micro-LBEs.

D. Example: San Francisco Administrative Code Chapter 14B.8(A) - LBE Subcontracting Participation Requirements

1. The Director sets LBE subcontracting participation goals based on:
 - i. The extent of subcontracting opportunities in the contract.
 - ii. The availability and capacity of certified LBE subcontractors.
 - iii. If the LBE participation goal is set below 20%, the Director must provide a written justification

E. Example: San Francisco has established a Mentor-Protégé Program (MPP)

1. The MPP encourages partnerships between experienced contractors and LBEs, offering training, networking, and mentoring. Participating mentors receive bid discounts or good faith outreach requirement waivers.

F. Example: San Francisco CMD Construction Loan Program

1. The San Francisco Bonding and Financial Assistance Program, administered by the Contract Monitoring Division (CMD), includes:
 - i. Loan Guarantee Program to support small and emerging contractors in securing financing for public works projects. Key Features of the Construction Loan Program
 - ii. The program provides financial assistance by guaranteeing construction loans for eligible small contractors and subcontractors.
 - iii. It aims to reduce financial barriers for Local Business Enterprises (LBEs) that struggle to secure funding from traditional lenders

G. Example: SBA's San Francisco Mentor-Protégé Program

1. SBA's Mentor-Protégé Program is reflected in the San Francisco MPP Expansion Program, which provides up to a 1% bid discount and waives outreach requirements for participating mentors.

H. Example: MnDOT Mentor-Protégé Program

1. The Mentor-Protégé Program is one of the programs and services provided by OCR Small Business Development in partnership with the [Minnesota Unified Certification Program \(MnUCP\)](#). The program furthers the development of certified Disadvantaged Business Enterprise (DBE) firms by providing training and assistance from other firms. [Mentor Protégé Program - Civil Rights - MnDOT](#) With mentorship, the small businesses may:
 - Move into nontraditional areas of work
 - Compete in the marketplace outside the DBE program
 - Develop their capacity to compete on projects
 - Types of help provided: Common types of assistance that a mentor may provide a protégé include:
 - Business planning
 - Bidding and estimating
 - Record keeping
 - Technical assistance
 - Capital formation

- Financial counseling
- Bonding
- Equipment use
- Mentor-Protégé agreements will vary based on the needs of the businesses involved.

2. **Networking/Meet-and-greet**

MnDOT provides meet-and-greets and networking events to support certified small businesses in establishing and strengthening industry relationships. [Small Business Training Programs - Civil Rights - MnDOT](#)

- Learn about specific contracts
- Connect with primes and pitch your business
- Connect with other contractors

I. **Example: Louisiana Economic Development – Small and Emerging Business Development (SEBD) Program**

1. The SEBD program certifies firms based on size and economic status and provides access to one-on-one business development services, financial planning, and project-based reimbursement support. SEBD allows businesses to choose the type of support they need, such as legal, marketing, accounting, or training services, making it adaptable to individual business goals. [Louisiana SEBD Program](#)

3. **Uniform Standards Across Small Business Programs** – The graduation requirements for emerging firms should align with established SBA standards, using average annual revenue as a classification metric. The program should be designed to ensure businesses remain viable and competitive beyond their graduation from the program.

A. **Example: SBA’s Mentor-Protégé program - Title 13 Part 125.9 of the Code of Federal Regulations (CFR)**

1. In 2020, the SBA consolidated all mentor-protégé programs run by federal agencies into a single program. Among the benefits of this was removing the need for businesses to choose between two mentor-protégé programs, streamlining the new program while keeping the same benefits as the two former programs, and requires less SBA involvement for joint ventures.

B. **Example: Business Size Criteria for LBE Certification (Section 14B.3)**

1. San Francisco has standardized revenue-based classification metrics for micro, small, and SBA-certified LBEs. This ensures firms can remain viable beyond their graduation from the program. The Micro-LBE and Small-LBE classification system aligns with SBA standards to maintain uniformity in business program criteria.

C. Example: Minnesota Unified Certification Program (MNUCP)

1. In response to federal law, the MNUCP is the Minnesota Unified Certification Program comprised of a group of state and local agencies who work together to certify DBE's. The program streamlines the Disadvantaged Business Enterprise (DBE) certification process by providing a single, statewide certification recognized by all federal and state agencies in Minnesota. Its purpose is to ensure fair access to federally funded transportation contracts for small businesses owned by socially and economically disadvantaged individuals. [MNUCP - About the MNUCP](#)

D. Example: Missouri Procurement Technical Assistance Center (PTAC)

1. Missouri PTAC provides a uniform framework for small business engagement in public procurement by using standardized eligibility and training requirements. This ensures that emerging firms have access to consistent support and expectations across local and state projects. [Missouri Procurement Technical Assistance Center \(PTAC\)](#)

E. Example: Utah Procurement Technical Assistance Center (PTAC)

1. The Utah PTAC helps small businesses become procurement-ready through standardized training and technical assistance. The program maintains consistency by aligning its procedures with state and federal acquisition guidelines. This alignment reduces variation in contracting requirements and helps firms compete for public work more efficiently across different jurisdictions. [Utah Procurement Technical Assistance Center \(PTAC\)](#)

F. Example: California Department of General Services – Small Business Certification

1. California's certification process for small businesses is based on consistent financial thresholds and operating standards across all state agencies. The program streamlines recognition by using shared eligibility standards and automatic inclusion in state contract search tools, allowing emerging contractors to access opportunities without navigating multiple certification tracks. [California Department of General Services – Small Business Certification](#)
4. **Reduce Administrative Burdens on Prime and Emerging Contractors** – Construction has long been a well-regulated industry, ensuring that workers are safe, and the environment is protected. These businesses should not be burdened or distracted by inconsistent and onerous regulations and reporting requirements. Administrative requirements and regulations should align and allow for reciprocity as much as practicable. For example, initial certification, interstate certification, etc.

A. Example: LBE Subcontracting Requirements & Administrative Flexibility (San Francisco Administrative Code Chapter - Section 14B.8)

1. The ordinance allows waivers of LBE subcontracting requirements when necessary and requires agencies to use good faith efforts to solicit bids from diverse small businesses. This ensures fair contracting without unnecessary administrative burdens. The Micro-LBE Set-Aside Program streamlines the process by setting aside smaller contracts exclusively for micro businesses, eliminating extensive subcontracting requirements for those contracts.

B. Example: Minnesota Unified Certification Program (MNUCP)

1. This program simplifies the DBE certification process by offering a single, statewide certification that is recognized by all federal and state agencies in Minnesota. Its goal is to promote equitable access to federally funded transportation contracts for small businesses owned by socially and economically disadvantaged individuals. [MNUCP - About the MNUCP](#)

C. Example: Oregon Buys Procurement System

1. The Oregon Buys platform offers a centralized, digital procurement system that simplifies bidding, document submission, and vendor registration for small businesses. This reduces time-consuming paperwork and allows contractors to manage all transactions through one system, improving efficiency for both primes and emerging subcontractors. [Oregon Buys Procurement System](#)

D. Example: Georgia Department of Administrative Services – Team Georgia Marketplace

1. Georgia’s centralized eProcurement platform streamlines how contractors do business with the state. The system enables electronic submission of bids, contract tracking, and vendor registration through one uniform interface, reducing administrative burdens and improving transparency. [Georgia Department of Administrative Services – Team Georgia Marketplace](#)

E. Example: North Carolina Interactive Purchasing System (IPS)

1. North Carolina’s IPS offers small businesses a single, simplified platform for accessing bidding opportunities. It reduces the complexity of navigating multiple agency portals by consolidating notices and solicitations, making it easier for emerging firms to find and respond to contracting opportunities. [North Carolina Interactive Purchasing System \(IPS\)](#)

5. **Eliminate Excessive Penalties for Noncompliance** – Under current programs, the risk of noncompliance serves as a deterrence to many businesses. Federal, state and local governments continue to introduce new compliance requirements, shifting focus away from construction work and placing an undue burden on businesses. Failure to comply can result in costly penalties and unfavorable performance evaluations, which may impact future contracting opportunities. These dynamics are fostering uncertainty and discouraging prime contractors from engaging with emerging firms. Implementing a "Good Faith" standard will help reduce the risk of noncompliance.

A. Enforcement and Good Faith Effort in Compliance (San Francisco Administrative Code Chapter - Section 14B.17)

1. The ordinance includes a "Good Faith Effort" clause, protecting firms from excessive penalties if they can prove they took reasonable steps to comply. Firms demonstrating proactive compliance efforts may avoid penalties, such as debarment or payment withholdings. The "Good Faith Effort" Clause in Section 14B.17(F) prevents penalties for businesses that have shown a genuine attempt to comply with the rules

B. Example: MnDOT Good faith efforts toward meeting a DBE, TGB or Vet goal

1. Program regulations governing the DBE, TGB and Vet Programs require that a bidder must meet the project goal or make adequate good faith efforts toward meeting the goal. Bidders who fail to meet the requirements are deemed non-responsible. Program regulation allows the bidder the opportunity for an administrative reconsideration of the determination. The administrative reconsideration is an informal hearing before a Reconsideration Panel which acts as the MnDOT official. The panel is comprised of independent MnDOT personnel who were not involved in the determination that the contractor was a non-responsible bidder. The Reconsideration Panel reviews the good faith efforts of the bidder. [Small Business Program Information - Civil Rights - MnDOT](#)

C. Example: Texas Department of Transportation (TxDOT) – DBE Program Good Faith Effort Guidelines

1. TxDOT evaluates good faith efforts when DBE participation goals are not met, allowing prime contractors to avoid penalties if they demonstrate reasonable and documented attempts to include DBEs. TxDOT provides guidance on acceptable actions and allows for administrative reconsideration of initial determinations. [TxDOT DBE Program](#)

D. Example: Ohio Department of Transportation (ODOT) – Prompt Payment and Good Faith Efforts Policy

1. ODOT enforces a good faith efforts policy to ensure that prime contractors are not unduly penalized if they can demonstrate substantive outreach and

engagement with DBE firms. This includes allowing documentation of emails, meetings, and solicitations to be considered in compliance evaluations. [ODOT Business and Economic Opportunity](#)

E. Example: Arizona Procurement Code – Cooperative Purchasing and Grace Period Policies

1. Arizona’s procurement regulations include cooperative purchasing agreements and grace period allowances that protect small businesses from contract penalties related to clerical errors or first-time noncompliance. These policies reduce punitive consequences for emerging firms navigating complex systems and encourage sustained participation in public projects. [Arizona Procurement Code – Cooperative Purchasing and Grace Period Policies](#)



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October 31, 2022

Mr. Marc D. Pentino
Departmental Office of Civil Rights
Office of the Secretary
U.S. Department of Transportation
1200 New Jersey Avenue SE
Washington, D.C. 20590

RE: Docket Number DOT-OST-2022-0051 Notice of Proposed Rulemaking: Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications

Dear Mr. Pentino:

On behalf of the Associated General Contractors of America (AGC), the leading association in the construction industry representing more than 27,000 firms, including America's leading general contractors, specialty-contracting firms, and suppliers, we appreciate the opportunity to comment on the U.S. Department of Transportation ("USDOT" or "the Department")'s *Notice of Proposed Rulemaking: Disadvantaged Business Enterprise (DBE) and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications*.

The DBE program plays a pivotal role in fostering diversity and inclusion in the construction industry by ensuring that certified small businesses owned and controlled by socially and economically disadvantaged individuals can compete for federally funded highway, public transit, and airport projects. The program was originally established by regulation in 1980. In the years since, Congress included provisions in certain transportation laws that established goals for a certain amount of federal funding to be expended through DBEs.

In the comments below, AGC provides its input regarding:

- I. **AGC Supports USDOT's Efforts to Help Grow DBE Capacity by Reasonably Aligning the DBE Program with the Federal Small Business Act**
 - A. AGC Support for Changing the Measurement for the NAICS Code Size Calculations from Three to Five Years under Section 26.65(a) to Help Ensure Sufficient DBE Capacity
 - B. AGC Supports Better Alignment with the Federal Small Business Act Definition of "Small Business Concern" to the Extent it Does Not Shrink the Number of DBEs in the Program
- II. **AGC Supports Increasing the Personal Net Worth Cap and Other Reforms**
- III. **AGC Supports Reforms to Streamline the Interstate Certification Process**
- IV. **AGC Requests Flexibility for Contractors and States on DBE Supplier Credits and Drop-Shipping for Supplier Credits**
 - A. DBE Supplier Credit Versus DBE Contractor Credit
 - B. Drop-Shipping for DBE Supplier Credit

- V. AGC Requests Flexibility for Ownership & Control Requirements
- VI. AGC Supports the Intent of Simplifying the Factors for Rebutting Economic Disadvantage
- VII. AGC is Concerned about Unintended Consequences to Reforms made to Decertification & Summary Suspension
- VIII. AGC Supports Virtual On-Site Visits for Renewals But Not for Initial Certification

I. AGC Supports USDOT's Efforts to Help Grow DBE Capacity by Reasonably Aligning the DBE Program with the Federal *Small Business Act*

A. AGC Support for Changing the Measurement for the NAICS Code Size Calculations from Three to Five Years under Section 26.65(a) to Help Ensure Sufficient DBE Capacity

AGC supports extending the NAICS Code size measurement for DBEs from a three-year average of annual gross revenues to a five-year average in alignment with the federal small business program and *Small Business Act*. The current definition limits the ability of DBEs to grow their companies into sustainable, long-term businesses. The three-year average discounts the fact that a DBE could have one year above the NAICS Code size threshold that can force DBEs out of the program prematurely or require a DBE to sell off a part of their business. When this occurs, the capacity of certified DBEs in a state dwindles, making it difficult to achieve DBE goals, which undermines the very intent of the DBE program.

The five-year average, on the other hand, better reflects the ups and downs of annual transportation construction funding, to which DBEs are subject. When Congress, for example, approves emergency supplemental funding to respond to natural disasters, a particular market can see an incredible influx of transportation construction work for which DBEs are needed, not only to meet various statutory requirements, but also to help rebuild a community as fast as possible.

Under the five-year average, one or even two years of above size measurement growth may not cause a DBE to be removed from the program before it is ready. Instead, it allows a DBE to better plan and make its own decision as to whether it needs to remain in the program or not. Because, after a DBE is no longer in the program, it then competes against not only other small contractors, but also multi-billion-dollar contractors for which it may not yet be ready to engage in such a level of competition.

B. AGC Supports Better Alignment with the Federal *Small Business Act* Definition of "Small Business Concern" to the Extent it Does Not Shrink the Number of DBEs in the Program

As evidenced above, AGC supports better alignment of the DBE program with the federal small business program under the *Small Business Act*. However, AGC warns USDOT against a wholesale substitution of the existing rules for DBE size determination with that of the U.S. Small Business Administration's (SBA) without careful consideration and study.

AGC believes that USDOT should ensure that DBE availability and capacity in an area does not diminish, which would undermine efforts to achieve programmatic goals. That is why AGC supports aligning the DBE statutory size standard—currently capped at \$28.48 million gross annual revenue—with NAICS code 237310 (Highway, Street, and Bridge Construction) that sets a \$39.5 million cap and is revised for industry trends and inflation at least every five years by the SBA.

The current cap can be misleading. When Congress and other stakeholders reference the current cap of \$28.48 million, they usually do not make reference to, or understand, that specialty contractors are often limited to a lower threshold because of the NAICS codes. Likewise, a State DOT may prequalify a DBE at a higher threshold creating the impression that the DBE has the capacity to take on new construction work when they are actually facing a lower threshold because of the NAICS codes.

That is why rather than limiting DBEs to certain sub-sizes as specialty contractors—as NAICS codes for specialty contractors are generally capped at a \$16.5 million gross annual revenue threshold—AGC supports maintaining just the one singular code and its accompanying threshold to avoid administrative confusion that could lead to DBEs being prematurely removed from the program. Also, DBE contractors can work as prime contractors (prime) on some transportation construction contracts and specialty contractors (i.e., subcontractors) on others. That flexibility maximizes their opportunity to bid on and win federally assisted transportation construction contracts.

Such a change is not unprecedented. In fact, Congress enacted this approach in section 150 of the Federal Aviation Administration Act of 2018 for the mode's DBE program.

As it stands, however, NAICS codes for the specialty construction sector were designed for vertical building construction, not transportation construction contractors. These codes do not account for the fact that in transportation construction, jobsites can span many miles and require more heavy equipment than for constructing a building. For example, to face a cap of \$16.5 million can be especially challenging for a structural steel contractor that specializes in bridge work, as steel remains at elevated prices, is a ubiquitous material in bridges and whose placement requires significant investment in heavy equipment.

Instead of allowing room for DBE contractors to grow, the program is further handicapping their success. Instead of making it easier for prime contractors to utilize specialty DBE firms, it is making it more difficult. Finally, it is making it harder for states to meet or even exceed their DBE goals by limiting the work these DBE firms are able to perform. AGC looks forward to working with Congress and USDOT to address the unintended consequences of the use of NAICS codes in transportation construction.

II. AGC Supports Increasing the Personal Net Worth Cap and other Reforms

While AGC appreciates efforts by USDOT to maintain the integrity of the DBE program and prevent fraud – too often it feels like the DBE program is punishing DBE owners for success. AGC supports the Department's proposed changes that would raise the personal net worth (PNW) limit from \$1.32 million to \$1.6 million. AGC believes the current PNW cap is stunting the growth and success of DBEs.

In addition, AGC supports the Department's proposal that would allow the PNW cap to be adjusted in a timelier manner in the future and avoid a long and drawn-out formal rulemaking. The current cap has not been increased in 10 years, which does not account for inflation. Likewise, the current process of going through a formal rulemaking to simply increase the cap is burdensome and time-consuming.

In addition, AGC supports the exclusion of retirement assets from the PNW calculation. This change will allow DBE firms to grow without inadvertently punishing the owner for planning for retirement.

III. AGC Supports Reforms to Streamline the Interstate Certification Process

AGC supports efforts to streamline the interstate certification process. Prior to being eligible to participate in a state's DBE program, a company must go through a rigorous certification process. The company bears the "burden of demonstrating to you, by a preponderance of evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control" (49 CFR 26.61). Federal regulations (49 CFR 26 Subparts D and E) set forth the standards and procedures for making a certification decision for an applicant company by a state certification agency.

While federal regulations allow for a state certification agency to accept another state's certification of a DBE, there is discretion given to a state certification agency in terms of accepting that certification (49 CFR 26.85) and the process for doing so is also rigorous. The lack of direct reciprocity for states' DBE certifications artificially limits the ability of DBEs to expand their businesses. Moreover, it hinders the ability for a prime contractor to address any capacity constraints in a state that impacts its ability to meet DBE goals.

For example, one AGC DBE firm trying to get certified in another state was required to send in their *original* DBE application from nearly thirty years ago in addition to over 3,000 pages of documentation, even though they had already gone through this rigorous certification in their home state. Most small businesses do not have the time and resources to go through this rigorous process multiple times. By streamlining this process, USDOT will provide DBE firms more time and resources to focus on the success of their business instead of duplicative administrative paperwork.

AGC does recommend that State DOTs that see an influx of certified DBEs ensure that these DBEs have the capacity to take on additional projects before making any decisions about raising their DBE contract goals. Just because a DBE is now registered in a state does not guarantee that they have the capacity to take on additional work, or that work might be limited to a few projects depending upon lettings.

IV. AGC Requests Flexibility for Contractors and States on DBE Supplier Credits and Drop-Shipping for Supplier Credits

A. DBE Supplier Credit Versus DBE Contractor Credit

Under the current DBE regulations, DBE contract goals can be met with DBE suppliers making up as high as 60 percent of the value of the contract. The Department proposes to limit the total allowable expenditures with DBE suppliers to no more than 50 percent of the contract goal.

AGC is a construction contractor-led organization that also includes suppliers and other professional service providers among its membership. AGC appreciates the Department's objective to try to ensure that DBE contract goals, and the overall state's goals, are not primarily met through DBE suppliers at the expense of DBE contractors. However, some states and contractors are already struggling to meet their DBE goals and we believe this could make the problem worse.

AGC believes that there should be flexibility for states and contractors on this issue to ensure maximum DBE participation. While we understand the concern of prime contractors reaching DBE contract goals through simply identifying DBE suppliers to utilize, we have concerns this could be too rigid. For example, there are constraints in some geographically large states where there are not enough

DBE contractors in the state or DBE contractors are unable to work in a region of that state. In that case it makes sense to allow the prime contractor to reach the DBE contract goals through a DBE supplier without taking away from a DBE contractor.

The nuances of this issue get more complicated when you examine the types of suppliers that exist. For example, one AGC firm reported differences between traditional DBE suppliers of standard products and specialty DBE suppliers, such as ready-mix concrete suppliers. To help illuminate this, take for example two companies: DBE Company 1 (a specialty supplier in ready-mix concrete) versus DBE Company 2 (a traditional DBE supplier for pipe). To make delivery, DBE Company 1 made the investment in and completely owns a product specific ready-mix concrete truck. Whereas Company 2 need only buy a stake—and may not be the majority owner—in a standard body truck to deliver pipe. Company 1 has contract specifications tied to their trucks; delivery and discharge times tied to their trucks; and must deliver a product to meet certain water and cement ratios. Company 1 must also use their trucks to mix concrete and add admixtures to concrete in their truck.

Meanwhile, Company 2 is simply investing in a standardized truck—and, again, may not be the majority owner—to pick up and deliver pipe. It is unfair to the prime contractor and Company 1, to be broadly classified with those simply delivering pipe like Company 2. In this case, AGC believes that Company 1's DBE calculation should always be 100 percent for ready-mix concrete supply because it is using specified vehicles to mix and deliver a product to the project within a certain specification for the project.

The Department should provide states with the flexibility to make these determinations. For example, state DOTs could issue pre-solicitation notices for market research on DBE contractor availability for an upcoming project. Based on the information it receives from DBE contractors, the state DOT can decide as to whether the DBE supplier cap of 50% of the contract value is feasible, or, if not, a 60% DBE supplier cap on the value of the contract is necessary to help ensure maximum DBE participation.

B. Drop-Shipping for DBE Supplier Credit

We understand DBE suppliers concerns about the current prohibition on drop-shipping materials from the manufacturer to the desired location and how that puts them on an unlevel playing field with non-DBE suppliers. We also agree with the Department's concern that a firm could receive DBE credit for such a limited role.

To address this, the Department is proposing to allow materials or supplies purchased from a DBE distributor that neither maintains sufficient inventory nor uses its own distribution equipment for the products in question to receive credit for 40 percent of the cost of materials, including transportation costs.

A recent survey of AGC members found that 93 percent of construction companies are experiencing long lead times and/or allocations (less-than-full shipments) for construction materials.¹ Infrastructure project costs continue to climb amid rising construction materials prices and shortages. Material price increases have doubled or even tripled in some cases.² The construction industry is facing material

¹<https://www.agc.org/sites/default/files/users/user33405/Buy%20America/2022%20Materials%20Survey%20Results%20Data.pdf>

² https://www.agc.org/sites/default/files/users/user21902/Construction%20Inflation%20Alert%20Cover_Jul2022_V4.pdf

challenges that reach far and wide. Supply chain disruptions from the pandemic have inflated the cost of construction materials and made project delivery schedules and product availability more uncertain. Given the current supply chain constraints the Department should take careful consideration before any changes made around suppliers.

We ask the Department to provide flexibility to states and contractors on this issue and allow for higher credit in some instances. AGC believes that DBE suppliers have to overcome the hurdle of drop shipping restrictions that their non-DBE competitors do not have, thus making the bar for success even more difficult for DBE suppliers than non-DBE suppliers. Non-DBEs can drop ship and avoid high handling and transportation costs. In some states where there are limited DBE contractors, utilizing a DBE drop-shipper may help a prime contractor meet the DBE contract goal and the state to achieve their overall DBE goal without hurting DBE contractors who would otherwise perform work on another project. DBE suppliers should not be forced to play by a separate set of rules than non-DBE suppliers.

V. AGC Requests Flexibility for Ownership & Control Requirements

AGC has concerns that current control requirements are overly prescriptive. For example, some DBE firms reported having to turn down qualified candidates for their board of directors in order to meet federal requirements surrounding the makeup of the board. When it comes to relying on a board, DBE firms would prefer to have the most qualified candidates to assist them with running a business. The current regulations control how the DBE runs the company instead of giving them the resources and flexibility to find the expertise that they need.

AGC also believes that the program needs additional flexibility to assist DBEs to be successful. For example, many DBE firms have expressed frustrations with being unable to rent equipment or seek business advice from a prime contractor willing to help. In the case of renting equipment, the DBE firm could be forced to buy the equipment or track down the availability of renting it elsewhere. Again, we understand the need to prevent fraud and bad actors, however these restrictions are making it harder for DBE firms to be successful. Similar to the SBA program, the Department should consider the establishment of mentor-protégé program that allows for true business development between DBE and non-DBE contractors.

AGC believes the replacement of the “real, substantial, and continuing” capital contributions and ownership are well-intended but believe the “reasonable economic sense” to be too open to interpretation.

VI. AGC Supports the Intent of Simplifying the Factors for Rebutting Economic Disadvantage

AGC supports the intent of simplifying the “ability to accumulate substantial wealth” factors for rebutting economic disadvantage. AGC agrees with the Department’s decision to eliminate the six factors which are very subjective and leave a lot of room for interpretation by the certifier. However, we do have concerns that a “reasonable person” standard could also be too vague and open for interpretation therefore limiting the DBE participation. Specifically, we have concerns that without proper clarification, this could lead to a more stringent standard than what exists currently and in fact inhibit new entrants into the DBE program. While we support and appreciate efforts to preserve the integrity of the program, AGC would ask that the Department ensures that this standard is made clear.

VII. AGC is Concerned about Unintended Consequences to Reforms made to Decertification & Summary Suspension

AGC has concerns with the Department's proposal surrounding DBE participation after decertification. Specifically, the decision to disallow continued credit toward a contract goal if the DBE's ineligibility after the subcontract is signed is the result of a purchase by, or merger with, a non-DBE firm.

AGC believes that this change unfairly punishes the prime and is completely out of the prime contractor's control. AGC believes that since they were a DBE at the time of the bid and signing of the contract that the DBE credit should be honored. Likewise, when a firm purchases another firm, they are purchasing everything that comes with it - including all construction work that the firm has committed to. This rule change could also make it very difficult for prime contractors utilizing an alternative delivery method to utilize a DBE firm. In addition, depending on the timing of the contract, it can be very difficult for a prime to find a replacement and can increase the cost of the project.

AGC appreciates the Department's efforts to provide greater clarity on summary suspensions. We believe that summary suspensions are a harsh measure that can put a firm out of business, especially a small business.

AGC does not support the change to notification by email rather than certified mail. A suspension is a very serious measure, and the Department should not risk the chance that the email could get blocked by a filter or sent to a spam folder. We believe that for a serious measure like a suspension that the Department should continue to notify contractors by certified mail.

VIII. AGC Supports Virtual On-Site Visits for Renewals But Not for Initial Certification

AGC has concerns about the Department's proposal to make permanent virtual on-site visits and should instead only utilize this method for renewals. AGC believes that for the initial certification it is important for the visit to be done in person. In a virtual visit it is hard to fully understand how the firm is conducting business without visiting the active jobsite. AGC believes that a physical in-person visit will help preserve the integrity of the DBE program.

We thank you again for the opportunity to comment on this important matter. We look forward to collaborating with the Department to ensure the continued success of the DBE program.

Sincerely,



James V. Christianson
Vice President, Government Relations