Dear Docket Clerk:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the American Bar Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The Section has reviewed the revisions proposed by the Department of Transportation (the "Department") to its regulations affecting disadvantaged business enterprise ("DBE") programs, as those proposed revisions are set out and discussed at 62 Fed. Reg. 29548 (May 30, 1997) and in your June 5, 1997 memorandum. The proposed regulation...
changes and additions are extensive, and the Section does not wish to imply, by the absence of specific comment, its agreement with those proposed regulations that are not specifically addressed herein below. With respect to certain of the proposed changes, the Section offers the following comments:

Section 26.29--Prompt Payment Mechanism

The Department suggests two optional steps to be taken in order to address perceived problems with delay in the payment of DBE subcontractors by prime contractors. The first mechanism is a proposed prompt payment clause obligating prime contractors to pay DBE subcontractors for work satisfactorily completed within a specific number of days (e.g., ten days) of each payment by the Recipient to the prime contractor. The proposal would allow the Recipients the leeway to specify penalties for the failure of a prime contractor to abide by this requirement. In addition, the Recipient would be allowed the option of requiring the prime contractor to get the written consent of the Recipient, based on good cause, for any delay in the payment of DBE subcontractors.

Although the proposed regulation apparently would leave it to the Recipients to define more precisely significant aspects of this prompt payment requirement (e.g., whether there has been "satisfactory performance" of the subcontract if the work is properly performed, but the subcontractor is so far behind schedule as to expose the prime contractor to additional delay or acceleration costs), the Section recommends that the Department provide greater clarity in describing the options available to Recipients. For example, in suggesting in subparagraph (b) that any delay in payment may take place only for good cause, and then only with the Recipient's prior written approval, does the Department suggest that the Recipient must concur in the prime contractor's determination that the subcontract performance has been unsatisfactory and justifies the withholding of some payment from the subcontractor? If this portion of the Regulations can be so interpreted, then it suggests a contracting scheme with considerable potential for conflict. If what is intended is to provide a means by which prime contractor payments to DBE subcontractors may be delayed "for good cause," and for reasons other than the subcontractor's unsatisfactory contract performance, then the intent of the regulation should be clarified. To allow the Recipient to second-guess the prime contractor's determination of unsatisfactory performance by its subcontractor poses many risks for the Recipient and for the prime contractor.

The suggestion of mandatory alternative dispute resolution procedures seems ill-advised, particularly if the Recipients are encouraged to require such ADR procedures only with respect to DBE subcontractors. "Payment disputes" between prime contractors and DBE subcontractors are typically "performance disputes." Often those performance disputes involve not only the DBE subcontractor but other subcontractors and perhaps the Recipient. To suggest a mechanism whereby, for example, the prime contractor might be required to submit a dispute with a DBE subcontractor to arbitration and then be required to litigate the same factual and legal issues with the Recipient or other subcontractors would expose the prime contractor to multiple disputes procedures and the attendant additional costs and delay in the resolution of the dispute. In addition, such a requirement would expose the prime contractor to the danger of inconsistent resolutions of the same factual and legal issues in the two different forums.

If the required ADR procedure is non-binding (e.g., a non-binding mediation attended by contractor and subcontractor principals), then the impact of this proposal would be less severe, and perhaps would encourage the informal resolution of many prime contractor/DBE subcontractor disputes. Providing for the same ADR procedure, whether binding or non-binding, for all subcontractors and the Recipient would accomplish the Department's goal without unfairly sacrificing the interests of the prime contractor.

We believe that the steps proposed by the Department with respect to the prompt payment issue should not be mandatory. We further recommend that the proposed steps be redefined in a manner consistent with the dangers and difficulties highlighted in these comments.

Section 26.41--Overall Goals

The SNPRM (Section 26.41(e)) asks for a comment on its goal setting standard: Should the goal-setting analysis be based primarily on present DBE capacity, or should it consider that the effects of discrimination may have suppressed the formation of DBE firms? In other words, should Recipients be required to increase their DBE goals if presented evidence to support a finding that DBE business formation has been suppressed?
We find the suggested "but for" analysis in the setting of DBE goals to be problematic. Although this "but for" analysis most likely would result in higher DBE participation goals, the notion that there "should be" more DBE firms in existence will not assist prime contractors in finding quality DBE subcontractors to meet those higher goals. In our view, such a program would merely add to the possibility of a successful legal attack on the proposed DBE program. In view of the Supreme Court's decision in *Adarand*, we encourage the Department to avoid rule making that would encourage further and successful attacks on efforts to assist DBE businesses.

**Section 26.47--Should DBE Prime Contractors Meet Contract Goals?**

If a DBE prime contractor is awarded a DOT contract, under the existing rule, the DBE prime contractor meets all DBE contract goals by virtue of its being a DBE. It matters not that the DBE prime contractor then subcontracts some significant portion of its work to non-DBE subcontractors. We find the suggestion that the DBE prime contractor should not be required to meet contract goals in its subcontracting efforts to be inconsistent with the comments of the Department with respect to Section 26.49 and the "back-subbing" issue. That is, in commenting that a DBE subcontractor should not be allowed to "back-sub" a portion of the work to a non-DBE prime contractor, the Department comments: "Whatever else it is, however, it is not work performed by a DBE. The Department believes it makes sense to count toward DBE goals only work that is actually performed by DBEs . . . ." This same rationale, we believe, argues in favor of a regulation requiring that DBE contract goals are satisfied only to the extent that a DBE entity actually performs the work, whether that entity is a DBE subcontractor or a DBE prime contractor. We neither follow nor agree with the strained logic in the Department's comment to the effect that requiring both DBE primes and non-DBE primes to meet the DBE requirements would be "simply maintaining the inequity." The Department might look at the experience of those public contracting authorities (e.g., the City of Atlanta) that have required DBE prime contractors to meet the same goals as non-DBE prime contractors.

The third alternative described in connection with this SNPRM seems worthy of consideration. Specifying that a DBE prime has to use its own forces for a sufficient percentage of the contract work in order to meet the contract goal, or to make up the difference by subcontracting work to other DBE firms, seems to be a more reasonable accommodation of the competing interests than the other two alternatives.

**Section 26.47--The Submittal Of DBE Goal Compliance Information**

The Section agrees that the time frame for finalizing bids typically is too short to make the "responsiveness approach" practical. We do agree, however, with the suggestion that the time after the bid opening in which a contractor could submit the required information should be limited, or that the Recipient should consider as evidence of the prime contractor's good faith effort only those actions taken by a contractor prior to bid opening.

**Section 26.47--Terminations For Convenience**

The Section agrees with the Department's determination and proposed rule that a prime contractor may terminate a DBE subcontractor for convenience, but that the prime contractor may not then turn around and perform the work with its own forces or subcontract the work to a non-DBE subcontractor, absent the prior written consent of the Recipient. We would add to this proposed rule, however, the following qualification: a prime contractor may terminate for convenience a DBE subcontractor and complete the work with its own forces or with a non-DBE subcontractor if, even without the participation of the DBE subcontractor, the prime contractor still meets its DBE contract goal or is unable, after making a good faith effort, to find a DBE substitute. We believe that any suggestion to the contrary oversteps the proper bounds of a DBE program and may even create a real disincentive for a prime contractor's going beyond the minimum DBE contract goal on a particular project.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Marcia G. Madsen
Chair
Section of Public Contract Law

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