U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

June 7, 2001

Docket Clerk
Docket No. OST- 2000-7639
Department of Transportation
400 7th Street, SW., Room PL-401
Washington, DC 20590

RE: Participation by Disadvantaged Business Enterprises (DBEs) in Department of Transportation Financial Assistance Programs

Dear Docket Clerk:

The Chief Counsel for Advocacy of the U.S. Small Business Administration was created in 1976 to represent the views and interests of small business in Federal policy making activities.[1] The Chief Counsel participates in rulemakings and other Federal agency activities when she deems it necessary to ensure proper representation of small business interests. In addition, the Chief Counsel has a particular interest in ensuring that laws and regulations do not have an adverse impact on competition among businesses of differing sizes. Finally, the Chief Counsel monitors agencies' compliance with the Regulatory Flexibility Act (RFA)[2] and works with Federal agencies to ensure that their rulemakings are supported by analyses, available for public comment of the impact that their decisions will have on small businesses.

In this connection, I am writing regarding OST-2000-7639, Participation by Business Enterprise in Department of Transportation Financial Assistance Programs;

[1] Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634a-g, 637).
[2] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601-612).

Memorandum of Understanding with the Small Business Administration; Uniform Forms and Other Revisions. By this letter, I am requesting the postponement of any further action on the proposed regulation until such time as an Initial Regulatory Flexibility Analysis (IRFA) is prepared and published for comment.

In accordance with section 605 of the RFA, an agency may certify that "the rule will not have a significant economic impact on a substantial number of small entities," and provide a factual basis for the determination. If, on the other hand, a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an IRFA must be prepared and published for comment pursuant to section 603 of the RFA.

The Department of Transportation certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. This certification is not in compliance with the RFA. A certification must provide at a minimum, a factual basis for reaching a conclusion that the proposed regulation would not have a significant economic impact on a substantial number of small entities. The agency's certification does not provide a single justification for reaching the conclusion that there is no significant economic impact. Yet, the agency acknowledges that this is a significant rule. It states that "this document proposes substantive changes to several provisions, including: personal net worth prompt payment/ retainage, the size standard, proof of ethnicity, confidentiality, proof of economic disadvantage, and DBE credit for trucking firms." These "substantive changes" have an impact not only on the disadvantaged and women-owned business communities but also on the small business community, large

business community, and governmental recipients of the agency's financial assistance (e.g., states and local governments).

The agency should be commended for recognizing the many problems faced by small and disadvantaged businesses when large prime contractors fail to pay timely their sub-contractors. However, the proposed regulatory solution for *prompt payment/retainage* would appear to need further examination. **First**, the proposed regulation does not state whether the thirty-day period for prompt payment represents business days or calendar days. **Second**, the proposed regulation would require the prime contractor to pay his sub-contractors thirty days from receipt of each payment from the governmental recipient. The proposed regulations do not provide a mechanism for the sub-contractor to gain knowledge of this payment. There needs to be a way for the sub-contractor to acquire knowledge of prompt payment from the recipient to the prime to assure that timely payments are being made to sub-contractors. **Third,** the agency needs to provide the rationale for allowing the prime contractor to be able to hold payments from the recipient for thirty days prior to paying his sub-contractors. The prime contractor has already accepted the work of the sub-contractor as reflected by the invoice of the prime contractor to the recipient. The recipient's acceptance of this work is the payment to the prime contractor. It would seem that under this arrangement, the prime contractor should be required to pay the sub-contractor immediately upon receipt of the payment from the recipient. Are there less burdensome alternatives that would accommodate the needs and financial resources of the prime contractor, sub-contractor and recipients? These and other unanswered questions on this topic would clearly support the need for the agency to

perform an IRFA. It is the position of this office that the economic impact of this proposal is significant, and thus, an IRFA is required.

Another area of concern is with the requirement of ethnicity. The proposed rule would seem to change some of the elements for *proof of ethnicity*. Currently, the Code of Federal Regulations sets forth a legal requirement of a preponderance of evidence test (49 CFR 26.63-26.67). The proposed rule would require the applicant to submit a notarized statement as to ethnicity. This proposed change would seem to create a more liberal and flexible application process. If this assessment is correct, how many new small disadvantage businesses will apply and be accepted in the program? Can the marketplace accommodate a larger number of DBEs? These and additional questions should be answered as part of an IRFA.

The agency is seeking comment on a *proposed size standard* change that would not totally decertify a DBE if the business should exceed one of its approved size standard groups. The agency should be commended for seeking opportunities to foster the growth and development of small disadvantage businesses from sub-contractors to prime contractors. Such businesses should not be decertified in all size groups because they have been successful in one group. The statutory gross receipts cap that establishes whether the business is small or other than small should be the only benchmark for decertification.

This office stands ready to assist you in any way it can to bring your proposed regulation into compliance with the RFA. Should you have further questions regarding these

comments, please feel to contact Major Clark, Assistant Advocate for Procurement, at (202) 205-7150.

Sincerely,

Susan M. Walthall,
Acting Chief Counsel for the Office of Advocacy