



**American
Public Transportation
Association**



**LATINOS
IN TRANSIT**

December 20, 2023

The Honorable Peter Buttigieg
1200 New Jersey Avenue, SE
West Building
Washington, D.C. 20590

Re: DOT Final Rule Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications (DOT-OST-2022-0051)

Dear Secretary Buttigieg:

We are a coalition of trade associations that represents tens of thousands government entities and businesses of all sizes, including minority and women-owned businesses. Our members collectively employ millions of American workers in all 50 states, the District of Columbia, and Puerto Rico.

We write to you today regarding the Department of Transportation's (DOT) Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications Notice of Proposed Rulemaking, and strongly urge you to bifurcate and expeditiously finalize the portion of the final rule dealing with the Disadvantaged Business Enterprise (DBE) personal net worth cap (PNW cap).

The PNW cap, which has not been updated for over a decade, acts as an artificial barrier for experienced and qualified DBE firms who have exceeded the current threshold, preventing them from participating in historic investments made by the Infrastructure Investment and Jobs Act (IIJA).

Bifurcating and finalizing the PNW cap proposal prior to finalizing the DBE rulemaking is within the Department's authority, is non-controversial, and nonsignificant under Executive Order 12866,¹ because increasing the PNW cap has quantifiable positive impact on the DBE and small disadvantage businesses. Moreover, finalizing the PNW cap proposal is unlikely to have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. In fact, having more DBEs competing for projects will have a positive impact on the economy and help to mitigate supply chain and project delivery challenges including human capital.

Members of our coalition² are working hard to install, upgrade, or replace the public works infrastructure of the United States and deliver on the \$1.2 trillion investment of the IIJA. Our industries will be defined by the opportunities that we provide for minority and women-owned businesses to share in this historic funding. To that end, our coalition members support DOT's DBE program. While the program is not perfect, it has been a solid tool for bringing parties to the table and providing opportunities to minority and women-owned businesses that would otherwise not materialize. Some of our members, however, are not able to participate in the myriad DOT infrastructure investments because the PNW cap has not kept up with the increases in inflation or wages.

On July 21, 2022, the DOT proposed major revisions to the DBE rule, including raising the PNW cap to \$1.6 million.³ While many of us applauded the effort (and wholeheartedly supported the proposal to exclude retirement assets in the

¹ [Executive Order 12866](#), 58 Fed. Reg. 51735 (October 4, 1993)

² American Public Transportation Association ("APTA"), Conference of Minority Transportation Officials ("COMTO"), Women's Transportation Seminar ("WTS"), and Latinos in Transit ("LIT") (collectively "Coalition Members").

³ DOT, Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications (DBE NPRM), 87 Fed. Reg. 43620, 43669 (July 21, 2022).



**American
Public Transportation
Association**



**LATINOS
IN TRANSIT**

calculation for determining net worth), we also strongly recommended that the PNW cap be increased well beyond the \$1.6 million proposed, as the proposed amount did not fully reflect the impact of inflation since 2011.⁴

The delay in finalizing the DBE regulation, including increasing the PNW cap, has meant that many DBEs are missing the opportunity to participate in this Administration’s promise to fully deliver infrastructure investment to the American people. This is because many DBE businesses have exceeded the obsolete PNW threshold, making them ineligible to participate as a DBE on infrastructure projects. Moreover, we often hear from our members there is no incentive for prime contractors to utilize minority and women-owned businesses if they are not in the DBE program. While this is short-sighted and certainly an unintended consequence of the program, the reality is our members are often told that prime firms only want to do business with DBEs to fulfill the Department’s DBE regulations. This approach harms those minority and women-owned businesses who are no longer eligible to participate in the DBE program because of the outdated PNW threshold, as they are often passed over for contracting opportunities.

This Administration, on the other hand, has valued the participation of minority and women-owned businesses in this economy. In Executive Order 13985, President Biden ordered federal agencies to pursue a commonsense approach to advancing equity for all.⁵ Executive Order 13985 specifically states that “advancing equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies (agencies) must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity.”

In January 2022, DOT published its “Equity Action Plan,” noting that “[t]his Equity Action Plan is a major milestone for the Department of Transportation that represents a shift in how we view and deliver transportation programs.”⁶ The plan states “[w]e’ve also made clear how equity and civil rights compliance belong in our discretionary grant programs, consistent with the law, acting to ensure that federal dollars are available to support projects that will tangibly benefit underserved and overburdened communities. We are strengthening our Disadvantaged Business Enterprise Program, to ensure that business opportunities in transportation and infrastructure reach women- and minority-owned small businesses.”⁷

The Equity Action Plan includes four goals: wealth creation, the power of communities, interventions, and expanded access. Under the “wealth creation” goal, DOT acknowledges that “[r]equirements and resource constraints create incentives for agencies to purchase from large, established businesses. Filling high-volume contracts can lower costs but often excludes new entrants and small businesses seeking to grow capacity.”⁸ By not raising the PNW cap expeditiously, DOT has inadvertently excluded many minority and women-owned business from IIIA-funded projects.

Bifurcating the PNW cap from the DBE final rule and issuing it separately would go a long way toward including minority and women-owned businesses in crucial infrastructure projects. Under the Administrative Procedure Act (“APA”), “each agency” is required to “give an interested person the right to petition for the **issuance**, amendment, or repeal of a rule.” DOT is an “agency” as defined by the APA, the coalition and its individual members qualify as persons under the APA, and the DBE rule is a “rule” under the APA. Moreover, DOT has the authority to issue the PNW cap separately because it is not controversial and the action itself is nonsignificant under Executive Order 12866 as noted earlier. If the PNW cap requires further upward adjustments after the rule is made final, this adjustment would certainly be welcomed and less arduous.

⁴ See [APTA, Comments on DOT’s DBE NPRM](#) and WTS, Comments on DOT’s DBE NPRM (October 31, 2022), at 8 and 3, respectively. Moreover, many of our members believe DOT should explore establishing regional caps that would consider cost of living and doing business, and other regional factors. In addition to excluding retirement assets, APTA also recommended that DOT exclude household contents from the PNW calculation.

⁵ [Executive Order 13985](#), 86 Fed. Reg. 7009 (January 25, 2021).

⁶ DOT, [Equity Action Plan](#) (January 2022).

⁷ *Id.* at 2.

⁸ *Id.* at 7.



**American
Public Transportation
Association**



**Advancing women
Advancing transportation**



**LATINOS
IN TRANSIT**

While we understand there are many steps to complete a rule, it has been over a year and a half since DOT issued the DBE NPRM, and each year, month, and day that goes by represents minority or women-owned businesses being excluded from competing for infrastructure dollars. DBEs typically hold certifications across many states and jurisdictions and the unfortunate impact of not finalizing a higher PNW cap is felt nationwide.

We would like to see 2024 deliver on the promise of “building capital, expanding business networks, and attaining new skills and experience through expanded US DOT contracts” for minority and women-owned small business who otherwise qualify as DBEs but for the outdated PNW cap.

Paul P. Skoutelas

Paul P. Skoutelas
President and CEO, APTA

April Rai

April Rai
President and CEO, COMTO

Sara M. Stickler

Sara Stickler
President and CEO, WTS, Intl.

Alva Carrasco

Alva Carrasco
President, Latinos In Transit