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In response to USDOT Docket Number OST-2012-0147 issued September 2, 2012, Diversity Matters 2 US, LLC (“**DM2US**”), an independent consulting firm specializing in DBE participation and Buy America compliance, respectfully submits the following comments:

DM2US respectfully requests to attend and actively participate in the DOT’s and or Office of Small and Disadvantaged Business Utilization stakeholder meetings that bring together prime contractors, DBEs and state and local government representatives to discuss ways of improving administration of the DBE program. During my 20-year career, I have managed more than \$200 million in subcontract awards and payments to DBE, MBE and WBE subcontractors and provided DBE and Buy America training to more than 500 transit officials worldwide.

The comments stated below may contain excerpts from the author’s previous written statements to USDOT, FTA, FTA Recipients, APTA, and/or other transit-related and/or supplier diversity-focused organizations.

Forms

[Personal Net Worth \(“PNW”\) Form and Related Requirements of 49 CFR 26.67](#)

Adding a specified Adjusted Gross Income cap requirement is worth consideration. However, “to give recipients a tool to exclude from the program someone who.....is what a **reasonable** person would consider to be a **wealthy individual**” is unacceptable. Individual certification analysts in Kansas or New York will vary in their personal interpretation of “reasonable” and “wealthy” when assessing DBE applicants residing in Manhattan or Hornell, NY.

Application Form

DM2US agrees with APTA and COMTO that DOT should “*should develop the fillable form rather than leaving it to individual states and other entities.*” DOT should standardize the DBE certification application form (especially the PNW form) and all other attachments in a format that’s “**screen-fillable,**” and can be saved, edited, and updated by a DBE applicant and subsequently submitted electronically directly to DOT or DOT’s Recipients. DOT could issue DBE applicants a 7-digit applicant ID number. Any DOT Recipient could then read-access (but not write-access) the DBE applicant’s documents and download them to their state UCP’s applicant database. Keep in mind DOT would merely receive and “host” the DBE’s electronic application for Recipients to access; DOT would not process the application. If USDOT is unable to implement this DBE applicant database, it should still create and standardize the DBE certification application form in a format that’s “screen-fillable” that can be saved, edited, and updated by a DBE applicant and subsequently submitted electronically directly to DOT’s Recipients.

DOT could take advantage of this one-stop shop DBE application by statistically compiling pertinent data (e.g., diversity/number of NAICS Codes and corresponding gross receipts, ethnicity/gender, duties of DBE/non-DBE owners and key management, etc.)

In this day of electronic mail and scanning of documents, Recipients should electronically receive and accept all required application documents, including electronic signatures from DBE owners.

DOT’s DBE application **form** must require DBEs to specifically state their **NAICS Codes** and affirm the “**counting values**” for each (i.e., 100% for Manufacturers, 60% for Regular Dealers, Fees & Commissions for Brokers). **DBEs, prime contractors, and even some DOT Recipients continue to misrepresent and overstate** the actual DBE “counting values”

DM2US agrees with DOT that requiring “*an assessment of the amount of time the majority owner and key officers, directors, managers, and key personnel devote to firm activities such as bidding and estimating, supervising field operations, and managing staff or crew*” will help DOT Recipients determine whether the DBE applicant truly manages and controls their firm.

DBE Commitments/Awards and Payment Reporting Form

DM2US agrees with APTA and COMTO that the DBE Commitments/Awards and Payment “*reporting requirement could be greatly simplified and the actual results made infinitely clearer by simply requiring reports of payments to date. Waiting for completion skews the reports and gives a false impression of progress.*”

Transit Vehicle Manufacturers (“TVMs”) should submit a different reporting form than DOT’s Recipients. The amount of DBE participation provided by **TVMs** will change year to year because winning contracts and building vehicles is a **very cyclical business**. Many DOT Recipients issue railcar contracts to TVMs requiring (anticipating) that the first cars shall be placed into revenue service 18-30 months after Notice to Proceed. Due to the lengthy and complex phase of prototype and pilot car design-build stage, compounded with the long lead times for major components (e.g., carshells, propulsion, trucks, etc.), DBE participation intrinsically follows design activity at the beginning stages of “TVM” contracts. .

DOT’s proposed “Actual Payments to DBEs for Completed Contracts” will continue the existing practice of skewing actual DBE participation. DOT should **change the TVM semi-annual DBE report from** the current policy of reporting **only those contracts completed** (i.e., paid in full) back to the past DOT practice of TVMs reporting **actual payments to date** (i.e., all payments to all suppliers including partial/progress payments).

In order for the DOT and TVMs to accurately assess DBE participation performance, the dollar amounts reported must be timely and accurate on an “apples to apples” basis. The **current policy** of *not* reporting any (progress) payments until the prime contract is “completed” (i.e., paid in full) **significantly skews** the visibility and accuracy of DBE participation percentages reported by TVMs and subsequently assessed by DOT.

One of the more successful railcar TVMs (in terms of DBE participation) raised this point during FTA’s July 17th, 2012 DBE Program Plan webinar. It’s very common for TVMs to award prime contracts that span the entire lifetime of their TVM contract. For example, if a TVM delivers 10 railcars per month over a DOT Recipient’s 60-month contract agreement, it’s common for that TVM to issue a 5-year prime contract to suppliers who’d deliver 10 carsets of equipment on a “just in time” production schedule. The TVM would then issue 60 separate monthly progress payments to those prime contractors.

Actual Payments to DBEs for Completed Contracts

Please see listed below a spreadsheet demonstrating how *actual* DBE participation percentages can be significantly skewed under current DOT reporting policy.

DOORs Reporting Cycle	TVM’s Payment to all Primes	TVM’s Payment to DBE Primes only	TVM’s Actual % DBE Payments	DOT’s current calculation % of TVM’s DBE Payments
10/1/12-3/31/13	\$500,000	\$40,000	8.0%	0.0%
4/1/13-9/30/13	\$600,000	\$70,000	11.7%	0.0%
10/1/13-3/31/14	\$700,000	\$80,000	11.4%	0.0%
4/1/14-9/30/14	\$800,000	\$70,000	8.8%	0.0%
10/1/14-3/31/15	\$900,000	\$70,000	7.8%	0.0%
4/1/15-9/30/15	\$400,000	\$50,000	12.5%	0.0%
10/1/15-3/31/16	\$300,000	\$30,000	10.0%	0.0%
4/1/16-9/30/16	\$200,000	\$30,000	15.0%	0.0%
10/1/16-3/31/17	\$200,000	\$10,000	5.0%	0.0%
4/1/17-9/30/17	\$400,000	\$50,000	12.5%	125.0%
Award Value	\$5,000,000	\$500,000	10.0%	

Since it’s *not* economically feasible for prime contractors (including DBEs) to deliver their products over a 5 year span but not get paid anything until the 60th month, we don’t understand the logic of DOT’s current “all or nothing” payment reporting policy. In order for TVMs and the DOT to accurately assess who “walks the talk” (i.e. what TVMs actually pay their DBEs compared to all suppliers), DM2US respectfully requests DOT to revert back to the past practice of reporting their **actual payments to date**.

Certification-Related Provisions

Sec. 26.65 What rules govern business size determinations?

Please simplify the calculations for everyone by rounding up the proposed \$23.98 million average annual gross receipts by 83/1,000^{ths} of 1% to \$24 million.

Sec. 26.69 What rules govern determinations of ownership?

If the spouse of a DBE owner has no ownership in that DBE firm, that spouse should not be required to submit any financial or other proprietary documents.

Sec. 26.71 What rules govern determinations concerning control?

Although it should be considered a "red flag" in determining management and control, DBE owners **paying their top level manager(s) a higher salary** than what they pay themselves should not in itself be a reason to deny an applicant.

Sec. 26.73 What are other rules affecting certification?

DM2US applauds DOT for proposing to **eliminate the existing practice of non-applicable pre-certification**. We agree with DOT's statement that "*whether a firm is prequalified is irrelevant to certification concerns such as **size, disadvantage, ownership and control**. It is important for certifiers to analyze **only the factors relevant to DBE eligibility** and not incorporate other recipient business requirements in decisions pertaining to an applicant's qualification for the program.*" Eliminating this expensive and time-consuming barrier is the strongest improvement within this NPRM.

Sec. 26.83 What procedures do recipients follow in making certification decisions?

DOT should **not require DBE owners be "in the field"** in order to be deemed running their business. With today's ready and available technology, owners can manage their business from their office or home.

DM2US agrees with APTA and COMTO that "*it is incumbent upon DOT to forcefully advocate for refinements the NAICS Code system.*" Some Recipients proactively make the effort to compare NAICS codes and their corresponding workscopes to the products/services needed to build their railcars when establishing DBE goals. However, **NAICS codes do not necessarily mean any or all DBEs** within a certain NAICS code **actually possess the capability to perform** on a railcar or bus contract. For example, there are several DBE suppliers of HVAC equipment for homes and office buildings located throughout the country. However, there are *no* DBE suppliers of HVAC equipment for railcars or buses that are *technically* approved/qualified by any DOT Recipient in the USA. While some FTA officials and DOT Recipients may accept this fact when measuring a TVM's annual FY DBE goal or project-specific goal, others ignore this reality and blindly rule that "if DBEs match an NAICS Code, then that workscope is 100% eligible for DBE participation." DOT and the NAICS Association (<http://www.naics.com/search.htm>) must work together to **develop transit-industry-specific NAICS Codes**.

DOT must go beyond merely "cautioning" Recipients against **prolonging the seemingly never-ending application process** while the DBE continues losing opportunities. Unfortunately, some Recipients perpetual prolong the application process (especially with out-of-state applicants) by repeatedly requesting additional data from DBE applicants (often including copies of data previously submitted) resulting in **DBEs simply "giving up"** in frustration and ultimately losing contracting opportunities. Unless a Recipient uncovers new and relevant data resulting upon their review of the applicant's submittal, DOT should limit Recipients to one comprehensive request for all missing/incomplete/questionable data.

Recipients should be required to notify DBE applicants in writing within **15 days** after receiving an application clearly stating **whether the application is complete** and ready for evaluation. A Recipient's internal application review and decision-making process is a major roadblock for DBE applicants because the **90-day "decision clock" never starts** ticking until "receiving from the applicant firm *all* information required." *All* information includes the Recipient's review of all of the DBE's application documentation, the Recipient's "desk audit," and the Recipient's on-site visit.

DBEs sometimes wait several months for Recipients to schedule an on-site visit following their initial desk audit. Recipients sometimes tell DBEs that, due to a lack of funding and/or travel authorization restrictions, the on-site visit is postponed until further notice. In essence, the 90-day clock might not begin ticking until several months after a DBE submits their application. Meanwhile, legitimate DBEs lose contracting opportunities because they lack certification. It's a lose-lose Catch-22 because Recipients will only "count" *certified* DBEs toward a prime bidder's bid submittal DBE goal but Recipients can't/won't certify DBE applicants *pending* certification in sufficient time to meet a bid due date.

If DOT actually instituted a "If State B fails to respond within **30 days**, the Department would regard the firm as being certified" concept, Recipients would quickly adapt to a much-needed "**speak now or forever hold your peace**" instead of failing to respond while DBE applicants suffer indefinitely.

Some Recipients believe their own internal DBE application approval process is more thorough than an out-of-state DBE applicant's home state Recipient's process and therefore they fear that the out-of-state DBE applicant may have slipped through the path of least resistance. If lax certification practices are truly a concern, then perhaps the DOT should **standardize a minimum set of application review procedures** that **all Recipients must follow** to insure no illegitimate applicants slip through the system.

Nationwide DBE reciprocity is possible but unlikely due to territorial concerns. Since gathering 50 states' worth of Recipients' DBE managers for discussion, resolution and training is unlikely, perhaps each of the 10 DOT Regional Administrators could work within their own geographic areas to standardize DBE application processing procedures. **10 regional DBE certification UCPs** may fall short of national reciprocity but it's an attainable compromise that's 5 times easier for DBEs than pursuing 50 certifications.

If you surveyed the larger Recipients across the country and asked them to name the most thorough out-of-state Recipients administering DBE certification, you're likely to narrow it down to a short list. The DOT could then **observe the best Recipients** to see what makes them successful. The New York MTA DBE certification process appears to be well-respected throughout at least the Northeast US (and likely nationwide). Although a "one state fits all (states)" scenario may be too large of a pill for Recipients to swallow today, perhaps a DBE's initial certification should be reciprocal within their DOT regional area for 3 years and then reciprocated on a national basis after 6 years.

26.83 (h) and (i)

This NPRM states "*once a firm is certified, it remains certified unless and until it voluntarily withdraws from the program or is decertified*" and that "*Recipients are reminded that certifications do not lapse.*" DM2US supports DOT's clarification that Recipients' DBE certifications last indefinitely (presuming no change).

Recipients should **not conduct unannounced on-site reviews** of DBE applicants or certified firms. Preparing all of the necessary documentation for a thorough on-site visit is time-consuming and stressful enough on DBE owners without this proposed "Gotcha" factor. What happens if a "Surprise" on-site visit occurs when a DBE owner is off-site across the country conducting business or on vacation? DBE owners often (rightfully) do not share their highly confidential data (e.g., payroll, bank loans, other financial data, etc.) with their staff that's typically inspected during a Recipient's on-site visit. If the Recipient cannot gather all the necessary data due to the owner's absence on a particular day, isn't that wasting taxpayer money? Since many DBEs are small businesses that might not be running a full production schedule, unannounced visits to a supplier during a shut-down or set-up period would waste time and money without answering the underlying question. The only exception should be when a Recipient receives a written complaint alleging a "front" or fraud (e.g., DBE or its customer "over-counting" DBEs workscope) exists.

Sec. 26.86 What rules govern recipients' denials of initial requests for certification?

When a firm is denied certification, DOT should require Recipients to establish no more than 6 months for a DBE to re-apply. Forcing DBEs to wait a full calendar year before re-application is unduly harsh, especially when pertaining to paperwork issues.

Sec. 26.87 What procedures does a recipient use to remove a DBE's eligibility?

Recipient's **new staff members should not be allowed to remove a certified DBE's eligibility simply because they form a different opinion** than their predecessor. This would be similar to a DBE successfully operating a business through an approved bank loan and then a new bank employee decides to cancel the loan, even though the DBE entrepreneur has always submitted timely payments. Recipient's new staff members should be required to obtain prior written permission from their DOT Operating Regional Administrator based upon previously unknown circumstance if they wish to change their predecessor's decision to certify a DBE. If DOT approves this proposed "second bite at the apple," 99% of the certified DBEs targeted will be Caucasian females.

DM2US supports and applauds DOT's suggestion to **decertify a DBE for** exhibiting a pattern of conduct indicating its involvement in **attempts to subvert the intent or requirements**. "Over-counting" actual DBE workscope value by DBEs, their non-DBE prime contractors and (sadly) some Recipients still plagues the industry, especially in large metropolitan areas where "all politics are local."

If a DBE firm is facing **suspension or debarment** charges, its certification should immediately be temporarily removed until they're cleared of those charges. If a DBE firm is suspended or debarred, its certification should immediately be removed until, at a minimum, suspension or debarment is removed. If a DBE's suspension or debarment is directly attributed to DOT's DBE program, that DBE's ineligibility for certification should be permanent. If a non-DBE Prime contractor knowingly and willfully participates in the activity involving a DBE's suspension or debarment, that non-DBE Prime contractor (or DOT Recipient) should be prohibited from participating on DOT-funded bids and contracts for at least one full DOT fiscal year.

Sec. 26.88 Summary Suspension of Certification

If a DBE owner dies and his/her heir is a member of a group rebuttably presumed to be socially and economically disadvantaged, that heir (i.e., new owner) should remain certified if they re-apply as a new applicant firm within 6 months of the previous owner's death.

Sec. 26.89 What is the process for certification appeals to the Department of Transportation?

We support DOT requiring DBE appellants to *"provide a full and specific statement as to why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this part the recipient did not properly apply."*

DM2US's review of dozens of Recipients' **DBE directories reveals no common format**. Some directories sort alphabetically only by company name, others only numerically by NAICS code, and others only by workscope alphabetically (most useful of the 3). Even worse, some Recipients publish/post their DBE directories in only.pdf or .jpg format. This cumbersome format makes it impossible for anyone to sort and customize a list of potential DBEs that match their subcontracting needs. The DOT should consider requiring all Recipients to develop an on-line user-friendly DBE database similar to the New York State BizNet UCP Directory (<http://biznet.nysucp.net>) that enables any user to sort and customize a potential DBE subcontractor list to meet their specific needs. More states have converted to this user-friendly type of database in recent years but many states still have a long way to go.

Other Provisions

Sec. 26.5 Definitions

We support DOT's revised definitions for "Native Americans," "Alaska Native" and "enrolled members of a federally or state-recognized Indian tribe."

Sec. 26.11 What records do recipients keep and report?

Unless a Recipient wishes to track and report the percentage of DBEs winning/completing contracts within their database as part of a disparity study, this new report seems unduly burdensome.

Sec. 26.21 Who must have a DBE program?

Where funds are comingled among DOT agencies (e.g., FTA and FHWA), DOT Recipients should request and obtain specific written clarification from the DOT agencies involved prior to issuing RFPs/RFQs so that prime bidders clearly understand the contractual DBE requirements at both the DOT agency and DOT Recipient levels.

Sec. 26.45 How do Recipients Set Overall Goals?

Disallowing the use of **pre-qualified contractor lists** to establish availability of ready, willing, and (most importantly) *able* firms **significantly and deliberately skews** the accurate real world supplier base, especially as it pertains to major components (e.g., carshell, chassis, propulsion, trucks, brakes, etc.). DOT Recipients' technical management staff (i.e., engineering, testing, manufacturing, safety, systems integration, and project and program managers) must technically pre-qualify major component suppliers to insure the performance/reliability of public transit vehicles and the safety of their passengers. Any supplier, including DBEs, can submit a technical proposal to a DOT Recipient for their approval and subsequent addition to the pre-qualified contractor list. DOT Recipients require TVMs to list only pre-qualified major system suppliers in their proposals (otherwise, the TVM is deemed non-compliant and subsequently disqualified). Those firms should automatically be included in the TVM's **Bidder's List**.

Although pre-qualified contractor and/or Bidder's lists should not be relied upon exclusively as a source to identify "ready, willing and able" firms, they must remain a key component to fairly and accurately measure availability and to calculate individual contract goals and TVM annual DBE goals to FTA.

TVMs appear inconsistent in their efforts, methodologies, and end results in compiling Bidder's Lists. DBE and non-DBE suppliers are sometimes reluctant to provide their sales. Since many suppliers may be a parent or subsidiary of another organization, it's difficult to accurately define the sales number and the business start date Recipients are requesting. Many suppliers refuse to release information they deem proprietary, including, sales figures.

Since the USA represents only 5% of the global passenger railcar market, there are relatively few "ready, willing and able" suppliers of major components (e.g., carshell, propulsion, trucks, brakes, etc.) that qualify. Bus and cutaway van manufacturers face similar limitations in sourcing technically-qualified major suppliers. If **DOT** wishes to compile an accurate and legitimate Bidder's List, they could **schedule a mandatory meeting** of the **Program/Project Managers** from the **top 20 DOT Recipients** and **top 10 TVMs** within each vehicle industry (i.e., railcar, bus, cutaways). Purchasing managers and DBE Liaison Officers should actively participate in this meeting and be prepared to provide measurable data regarding those DBEs they believe can provide the larger components (i.e., a win-win for all parties).

On DOT-funded **new** passenger transit vehicle contracts, DOT Recipients cannot establish project-specific DBE goals without prior approval from DOT. DOT Recipients are essentially bypassed on these **new** vehicle contracts because the TVM reports their DBE participation exclusively to the appropriate DOT Operating Administration. However, on DOT-funded **overhaul** passenger transit vehicle contracts, Recipients establish project-specific DBE goals. The TVM reports their DBE participation exclusively to the Recipient, who, in turn, includes/claims the TVM's DBE participation "as their own" in the Recipient's DBE report to DOT.

Over the past 20 years, there continues to be a **major problem** regarding how Recipients establish project-specific DBE goals on DOT-funded **overhaul** vehicle contracts because **Recipients are not required to identify "ready, willing, and able" DBE workscopes** and their corresponding dollar values on a project-specific basis. In other words, DOT Recipients aren't held to same standards DOT requires of the TVMs selling vehicles to the Recipients. Instead, many larger metropolitan area DOT Recipients establish an unrealistic project-specific DBE goal percentage based upon an internal policy (e.g., all contracts exceeding \$1 million have a 20% DBE of total contract price) knowing the potential TVM Bidders likely won't risk the political ramifications of challenging their potential customer's unrealistic DBE contract goal.

These **overhaul** vehicle contracts often equal a significant portion of a Recipient's overall DOT-funded contracts (i.e., overhauled railcars cost \$500,000-\$750,000 each multiplied by perhaps hundreds of cars in a single procurement). Allowing Recipients to continue setting project-specific contract goals without justifying "ready, willing, and able" DBE workscope dollar values increases the costs and "over-counting" of DBEs' commercially useful functions.

In order to avoid confusion over a perpetually moving target, **contract goals should not be based upon a percentage of the federal share** because that percentage (and/or dollar amount) will likely change (perhaps several times) throughout the lifetime of a contract based upon federal, state and local election results and corresponding budget adjustments. DM2US recommends keeping the existing policy in place – DOT funding rules apply regardless of the funding percentage.

DM2US supports **eliminating** the public comment period associated with **publication of the proposed goal** and, instead, require posting proposed goals on the Recipients' websites. However, the same policy should be applied to TVMs. Several DM2US TVM clients and colleagues state that advertising DBE goals in general circulation and other media yields almost no results. Recipients and TVMs should **post a concise list of available workscopes, an on-line Vendor application and a clear method for contacting** the DBELO and/or Purchasing/Procurement Manager. Perhaps DOT and/or OSDBU can merge this data into their DBE-focused websites.

Although actual, direct consultation with minority/women's and general contractors' groups, community organizations and other officials/organizations should be required to assist in determining the availability of DBEs, these **outside agencies should not** "stand in the shoes" of the DOT Recipient and **evaluate the Prime Bidder's/Contractor's efforts** to establish a level playing field. If these outside agencies are now allowed to play the role of judge and jury of Prime Bidders, then they should be allowed to also pass judgment on DOT Recipients. Furthermore, since DBE participation on FTA-funded new vehicles is reported from a TVM solely to FTA, neither the Recipient procuring the vehicles nor the community agencies provide much support to TVM Prime Bidders/Contractors because there's little, if any, local economic impact.

When capturing data on successful and unsuccessful DBE and non-DBE firms, we must clarify that, solely from a FTA Office of Civil Rights ("**OCR**") reporting aspect, TVMs are *not* considered to be "Prime Contractors." FTA OCR deems "Prime Contractors" as any and all suppliers awarded a contract from the TVM (whether it's \$1,000,000 or \$10). Furthermore, FTA OCR deems "Subcontractors" as any and all suppliers awarded a contract from the TVM's "Prime Contractors."

Outside of FTA OCR, the transit industry (including DOT Recipients' program/project managers, TVMs and every level of the supply chain) generally considers the TVM to be the Prime Contractor and the TVM's suppliers to be Subcontractors. FTA OCR's "shifting down" of the established supply chain causes confusion at several levels.

Sec. 26.49 How are overall goals established for transit vehicle manufacturers?

The most practical way for a Recipient to accurately measure the number of capable DBE firms within certain NAICS codes on a railcar contract bid is for **DBE Liaison Officers to work with** their Procurement, Engineering (or those **individuals who technically approve suppliers**), and Program Management to closely examine the bid specification and reach a consensus in determining which DBEs are *technically* qualified to perform the work. Many Recipients' DBE Liaison Officers do not discuss what DBE goals they believe are attainable with their own Procurement, Engineering and Program Management departments prior to their bid specification's release. It's time to re-build and strengthen this very important relationship. Recipients need to bring together their engineering, procurement, new bids, contract management and DBE departments in order to agree on what is a reasonable, attainable DBE goal for each specific contract. Anticipated prime bidders and experienced, eligible DBEs could also be involved in the goal setting process. Once a sensible DBE goal is established, prime bidders should make a sincere commitment to meet and exceed that goal.

One of the inherent problems of the DBE rule from TVM perspective is that roughly **80% of the total vehicle materials are "major" components** or subsystems (e.g., propulsion, brakes, carshell, bus chassis, etc.) TVMs are more "systems integrators" than they are manufacturers because they procure most of their components from other large non-DBE firms. It's impractical and unrealistic, if not impossible, for Recipients or TVMs to *technically* unbundle many of a railcar's major components from an engineering perspective. For example, would the DOT expect a Recipient's engineering and/ or program management team to unbundle its railcar HVAC unit so that the condenser is outsourced separately from the compressor while others bid on the metal fabrication or hardware or wiring – and then have others bid to build the HVAC unit? Would any transit industry person buy an HVAC system for their own home in that manner? Would it be cost-efficient?

Many Recipients require prime contractors to subcontract only to those major subsystem suppliers that are **technically qualified** to meet the Recipient's specific *technical* specifications (e.g., propulsion, auxiliary power, braking system, etc.). Generally, DBEs do not meet these major subsystem technical specifications. If you surveyed the 10 largest Recipients and asked their program/project managers to send a list of their "*technically approved*" major system railcar component suppliers, you'd find very few, *if any*, DBEs on that list. It's *not* that DBEs aren't capable of providing major components on a railcar – in fact, some already are and many more may be capable if given the opportunity. However, in order to produce multi-million dollar major railcar components, a company's sales level (i.e., 26.65 term "gross receipts") needed to offset the set-up and manufacturing costs (e.g., equipment, facilities, material, labor, engineering, insurance, etc.) would almost certainly cause a DBE to lose its eligibility. In other words, DBEs that build their business up to compete as a prime contractor can subsequently be penalized by their success.

A prime contractor's ability to obtain second-tier DBE participation on the railcar major subsystems is limited by the amount they derive from non-DBE major system suppliers. If these non-DBE suppliers are single- or sole-source-approved by the Recipient in the bid specification, the prime has no control over those suppliers' level of **second-tier DBE participation**. Hence, many non-DBE major system suppliers offer minimal or no second-tier DBE participation, especially on a *responsive* approach contract. However, if there is more than one non-DBE supplier *technically* qualified by the Recipient, the prime contractor should strongly consider the potential non-DBE subcontractor's second-tier DBE participation as an important supplier evaluative criterion.

Since the 20 largest TVMs provide more DBE participation than most of Recipients they build vehicles for, those **TVMs should** (be forced to) have representation at future **stakeholder meetings** with DOT.

In most cases, TVMs don't selectively choose which contracting opportunities will and will not be included for DBEs. As stated in 26.45, DOT Recipients' program/project managers technically qualify major system suppliers. If DOT's "sole purpose is to level the playing field and ensure DBE firms have the opportunity to fairly compete for all contracts non-DBEs have access to," then DOT should significantly **increase or entirely remove the sales threshold on DBEs**. The roadblocks to obtaining technical qualification for major components isn't race or gender – it's business size. Large components require large firms with significant sales to cover significant capital investment.

TVM's annual DBE goals should continue to be based upon **subcontracted materials and work performed outside the USA**. DOT Recipients program/project managers often require the TVM meet very specific work experience and technical requirements.

TVM should be required to **continue submitting semi-annual DBE award/payments** reports during periods with no DOT-funded contracts. It takes a TVM little time to generate a **"zero dollars" report**, eliminates the potential temptation to not report "near zero" reports, and prevents TVMs from falling off DOT's radar screen. In exchange, DOT's Operating Administrations should not penalize TVMs or require a shortfall analysis on a "zero dollars" report.

DOT should change the phrase "the DBE firm must be certified in the state where it performs the work" to **"the DBE firm must be certified in its 'home state'** (i.e., the primary location or facility headquarters where the DBE performs a majority of its work." As long as a DBE is currently DBE-certified in its home state, TVMs must be able to count home state-certified DBEs regardless of where that DBE performs the work.

Sec. 26.51 What means do recipients use to meet overall goals?

In order to remove an individual's **subjectivity in determining "reasonable" and "unreasonable" price** when comparing DBEs and non-DBEs within a strict low bid system, DOT should require its Recipients to clearly define in their bid specifications and contracts a specific "reasonable" price differential percentage in comparison to the **lowest responsive and responsible bid price** (e.g., 5% above the lowest bid received).

If "reasonable" price difference is not clearly defined by DOT Recipients, then TVMs and Recipients may likely disagree after the TVMs' bids are under the Recipient's evaluation. For example, if a Recipient's individual DBE Compliance Officer defines "reasonable" as 10% of the average price quote, that price could equal 20% above the lowest quote. Will DOT Recipients pay that same price differential to TVM Bidders? For example, if TVM Proposer "A" bidding \$210 million commits to meet a DOT Recipient's 20% DBE goal while TVM Proposer "B" bidding \$190 million commits to meet only 10% DBE and provides acceptable Good Faith Efforts, is it "reasonable" for the DOT Recipient to pay \$20 million more to the higher-priced TVM Bidder for same vehicles? Transit vehicle procurements, whether "low bid" or "best value," are highly competitive and often contain profit margins of less than 5%. Bid price is a DOT Recipient's most important evaluation factor of TVM proposals. If DOT and its Recipients require TVMs to accept "reasonably" higher price quotes from DBEs, then does DOT agree its **Recipients must be willing to pay that same "reasonably" higher price to TVM Bidders**? Since this ongoing "Do as I say – not as I do" approach will likely not change, the least DOT and its Recipients can do is clearly define the "reasonable" price premium TVMs must pay from DBE bidders.

We must note that **DBEs are not always higher-priced than non-DBEs**, especially when quoting materials that aren't major components. DBEs are often competitive on wire harnesses, metal fabrications, hardware, training manuals, safety equipment and electro-mechanical subassemblies. TVMs must step beyond their open door policy by actively and earnestly researching, qualifying, assisting and sourcing DBE suppliers so they can establish a successful business relationship.

[Sec. 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?](#)

Since **Good Faith Efforts are a judgment call**, then a Prime Bidder whose Good Faith Efforts are rejected by a DOT Recipient must have the right to appeal the decision to USDOT, especially when price is the reason (see example in 26.51).

DM2US supports requiring DBEs' NAICS Codes match the workscope listed by Bidders but we need to take further steps. DOT should **require** all of its certifying Recipients to specifically **list** each and every **NAICS Code and** (more importantly) the corresponding **"counting values"** (i.e., 100% manufacturer, 60% regular dealer, fees & commissions broker) **on** all DBE certifications.

DOT and the NAICS Association should work together to create additional **NAICS Codes specific to the railcar** and bus industries. Although there are plenty of DBEs "ready, willing and able" to manufacture air conditioning units for buildings, there are none technically approved by any DOT Recipient to manufacture air conditioning units for railcars and buses.

DM2US strongly supports the text contained within section 26.53 of the APTA/COMTO letter as it clearly explains how the "responsiveness" approach results in reducing DBE opportunities, price escalation and bidding risk (for DBE subcontractors).

DM2US prefers the "responsibility" over "responsiveness" approach on transit vehicle contracts simply because (when administered and enforced properly) **more DBE suppliers** (especially smaller businesses) are able to **participate after the initial Pilot vehicles are built** by the TVM and accepted by the DOT Recipients. Once the design modifications and change orders are finalized on the Pilot cars, TVMs can accurately define the final workscopes conducive to DBE participation. The FTA's current "TVM Annual DBE Goal" program successfully operates in this manner.

This NPRM's explanation of "responsibility" (i.e., after bid submission but prior to Recipient's award to Contractor) is not realistic in the TVM industry and essentially has the same effect as the "responsiveness" approach on TVM bids and contracts. TVMs typically submit (i.e., guarantee) **only a few well-established DBEs with huge dollar amounts** knowing their specific workscopes will be negotiated after Pilot cars are accepted. The net effect is **smaller DBEs** (whose workscopes aren't defined at the bid stage) **are shut out** from participating because the TVM is cornered into awarding those later workscopes "up-front" to larger DBEs.

The **"responsibility" approach works** when administered and enforced properly. DOT Recipients should continuously monitor the successful Bidder (now Contractor) throughout the contract duration to insure appropriate DBE participation progress is maintained.

The **"responsiveness"** approach **eliminates** most, if not all, **second-tier DBE** participation. Non-DBE major component suppliers are often willing to commit to a specific DBE subcontractor percentage but cannot commit to specific DBE suppliers until after the successful TVM Bidder is awarded a contract and subsequently issues an initial subcontract to the non-DBE major component supplier (plus the inevitable change orders on Pilot cars). Although DOT and its Recipients may prefer the **"responsiveness"** approach, it has consistently and significantly **destroyed opportunities** for smaller DBEs during my past 20 years in the public transportation industry.

DM2US **strongly opposes** requiring Bidders/Offerors to provide **copies of each DBE and non-DBE subcontractor's quotes** received (in situations where it picked the non-DBE to do work that a DBE had sought) because this data is extremely confidential and vendor selection is based on several other factors besides price.

Although we agree Good Faith Efforts should be required at the time of bid submission by all Proposers not meeting the DBE goal, we emphasize that **Good Faith Efforts** are a **significant additional task** during the procurement process. Legitimate Good Faith Efforts requires hundreds of additional man-hours to compile all of the documentation needed to confirm compliance.

On FTA-funded **overhaul** vehicle contracts (where there *is* a contract-specific DBE goal), **DOT Recipients already require** most, if not all, the DBE-related requirements listed in this NPRM.

On FTA-funded new vehicle contracts (where there is *not* a contract-specific DBE goal), all DBE-related documentation should remain strictly between the TVM and the FTA. DOT Recipients should *not* receive copies of TVM subcontracts to DBEs because the Recipient could inadvertently (or otherwise) "claim" the TVM's subcontract amount to DBEs "as their own."

Sec. 26.55 How is DBE participation counted toward goals?

Instead of this NPRM's proposal to change "counting decisions" from a "generic" to a contact-by-contract" basis, we recommend DOT maintain the current language (which is clearly written) and instead, add language stating that, non-DBE Contractors and their DBE suppliers wishing to "count" a higher percentage than what's listed on the DBE's certificate must request prior written approval from the appropriate Recipient on a case-by-case basis. As we stated in 26.53, DOT should **require** all certifying **Recipients to specifically list all NAICS Codes and** (more importantly) the corresponding "**counting values**" (i.e., 100% manufacturer, 60% regular dealer, fees & commissions broker) **on all DBE certifications**. The current "counting" value system works if it's administered properly by DOT Recipients, Bidders/Contractors and DBEs.

If DOT's intent is to diminish a Bidder's/Contractor's incentive to use DBE "middlemen" (presumably intended to increase use of DBE manufacturers), then **DOT should require its Recipient's to use the same "ready, willing and able DBEs vs. all suppliers" methodology** used when setting (tri-)annual DBE goals **on all individual DOT-funded contracts** where project-specific DBE goals are established. When DOT Recipients establish project-specific DBE goals that are deemed unattainable by Bidders using sincere DBE participation efforts, those Bidders/Contractors meet these higher DBE goals only by arranging DBE "middlemen" to "distribute" OEM major components and passing those cost premiums onto DOT Recipients and taxpayers.

Sec. 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

DM2US supports DOT's suggestions requiring objectivity and eliminating (any and all) conflict of interest among any Recipient regarding certification or other program decisions (e.g., contract award, termination, sanctions, good faith efforts approval/denial, counting values, etc.)

[Appendix A – Good Faith Efforts](#)

As we stated in 26.53, DM2US strongly opposes requiring Bidders/Offerors provide **copies of all DBE and non-DBE subcontractor's quotes** because this data is extremely confidential and vendor selection is based on several other factors besides price. If this “provide all quotes” rule is passed, will DOT and its Recipients sign a Prime Bidder's non-disclosure agreement?

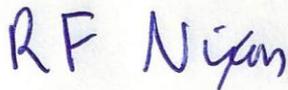
How can DOT Recipients arbitrarily and objectively determine a DBE's price to a Prime Bidder is not “substantially higher” without defining that cost premium in its bid spec? Should DOT Recipients pay a higher-priced Prime Bidder/Contractor (who meets the DBE goal in its bid) the additional cost differential above the lowest-priced Prime Bidder/Contractor (who commits to a percentage less than the DBE goal and provides Good Faith Efforts)? If yes, how much more should Recipients to pay to higher-priced Prime Bidders/Contractors offering higher DBE participation? If no, why are Prime Bidders/Contractors expected to pay a higher price for DBE participation when DOT's Recipients aren't held to the same standard?

Closing Statement

When you consider the transit industry's ultimate customer base (i.e., the ridership), minorities and women represent a significant portion (if not a majority) of the market. Therefore, it stands to reason that minorities and women must also be a significant part of the industry's supplier base. Supplier diversity provides a tremendous value to *everyone* and must succeed at every level. DM2US thanks the DOT for their outstanding continuous efforts toward improving the DBE program and this opportunity to submit comments.

Please contact DM2US whenever we may be of assistance and we welcome the opportunity to participate in future stakeholder meetings.

Respectfully yours,

A handwritten signature in blue ink that reads "RF Nixon". The signature is written in a cursive, slightly slanted style.

Bob Nixon, President
Diversity Matters 2 US, LLC

About DM2US

Diversity Matters 2 US, LLC (“**DM2US**”) is an independent consulting firm specializing in DBE participation and Buy America compliance. DM2US's DBE services include maximizing networking/bidding opportunities, organizational team training on supplier diversity, assisting DBEs through the certification application process, analyzing bid specification documents, verifying prime contractor's DBE participation including 2nd-tier, evaluating “Good Faith Efforts” documentation, validating DBE “Counting Value” and “Commercially Useful Function,” preparing DBE reports for submittal to Recipients and USDOT, and evaluating Pre-Bid/Post-Award compliance issues including prompt payment and change orders. DM2US's clients include FTA Recipients, TVMs, DBE/non-DBE public transit major system suppliers, and DBE/non-DBE construction and manufacturing prime contractors.