



USET

SOVEREIGNTY PROTECTION FUND

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USET SPF Resolution No. 2023 SPF:004

RESPONSE TO THE DEPARTMENT OF TRANSPORTATION'S DISADVANTAGED BUSINESS ENTERPRISE AND AIRPORT CONCESSION DISADVANTAGED BUSINESS ENTERPRISE PROGRAM REGULATIONS PROPOSED RULEMAKING

- WHEREAS,** United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is an intertribal organization comprised of thirty-three (33) federally recognized Tribal Nations; and
- WHEREAS,** the actions taken by the USET SPF Board of Directors officially represent the intentions of each member Tribal Nation, as the Board of Directors comprises delegates from the member Tribal Nations' leadership; and
- WHEREAS,** Congress authorized the Disadvantaged Business Enterprise (DBE) program to remedy ongoing discrimination and the continuing effects of past discrimination in federally assisted highway, transit, airport, and highway safety financial assistance transportation contracting markets nationwide, and has reauthorized the program several times, most recently in P.L. 114-94, December 4, 2015; and
- WHEREAS,** some USET SPF member Tribal Nations wish to increase Tribal self-sufficiency, develop Tribal resources, improve Tribal economies, and create employment opportunities for Tribal citizens by participating in the Department of Transportation's (DOT) DBE program through Tribally-owned business enterprises; and
- WHEREAS,** DOT enacted regulations, found in 49 CFR 23 (for airport concessionaires) and 49 CFR 26 (for all other projects), intended to ensure that bona fide small firms, owned and controlled by socially and economically disadvantaged individuals and entities, are certified to participate as DBEs in DOT federally assisted programs; and
- WHEREAS,** a primary goal of 49 CFR Part 26 is to help remove barriers for the participation of DBEs in DOT-funded projects; and
- WHEREAS,** 49 CFR 26.73(h) allows for a firm that is owned by a Tribal Nation to be eligible for certification to participate in the DBE program; and
- WHEREAS,** states administering DOT-funded contracts under the DBE program have interpreted 49 CFR 26.73(h) to mean that even if a Tribal Nation is certified by the Small Business Administration (SBA) as a socially and economically disadvantaged entity, and even if the SBA certifies a Tribally-owned business as eligible to participate in SBA 8(a) programs, such Tribally-owned businesses will not qualify for the DOT's DBE program if the individual who controls the entity's day-to-day operations is not himself or herself socially and economically disadvantaged (even if the individual is a Tribal citizen); and

- WHEREAS,** the states' requirement that individual managers of Tribally-owned businesses be socially and economically disadvantaged individuals drastically reduces the pool of potential managers for Tribal businesses, curtails Tribal Nations' ability to ensure that management of their operations is handled by the most qualified candidates, and defeats the purposes of ending discrimination against Tribally-owned businesses and enabling Tribal Nations to achieve self-sufficiency; and
- WHEREAS,** the requirement that the individuals who control a Tribally-owned entity's day-to-day operations themselves be socially and economically disadvantaged, which applies to entities owned by Tribal Nations and Native Hawaiian organizations, does not apply to Alaska Native Corporations (ANCs) which, under 49 CFR 26.73(i), may qualify as DBEs under certain circumstances even if the individuals with day-to-day control are not socially and economically disadvantaged, as long as the ANC-owned entity qualifies for SBA 8(a) programs; and
- WHEREAS,** on February 8, 2018, the USET SPF Board of Directors passed USET SPF Resolution No. 2018 SPF:019 requesting Tribal Consultation with the DOT urging clarification that Tribally-owned firms qualify for the DOT Disadvantaged Business Program; and
- WHEREAS,** DOT's DBE and Airport Concession Disadvantaged Business Enterprise (ACDBE) provided a Notice of Proposed Rulemaking (NPRM) (issued on July 21, 2022) for amendments to the DBE program; and
- WHEREAS,** the Proposed Rule updates personal net worth and program size thresholds for inflation; modernizes rules for counting of material suppliers; formalizes COVID-19 flexibilities; adds new program elements to foster greater usage of DBEs and ACDBEs with concurrent, proactive monitoring and oversight; updates certification provisions with less prescriptive rules that give certifiers flexibility when determining eligibility; and makes technical corrections that have led to substantive misinterpretations of the rules by recipients, program applicants, and participants; and
- WHEREAS,** Subpart D—Certification Standards of the proposed rulemaking states, "the proposal also makes technical corrections to the portions of the section concerning Indian tribes and Alaskan Native Corporations. Overall, proposed § 26.63 simplifies and removes ambiguous language that exists within the current rule. It preserves common business practices while securing program integrity."; and
- WHEREAS,** 49 CFR § 26.63(c)(1) of the proposed rulemaking states, "1) Indian tribes and NHOs. A firm that is owned by an Indian tribe or Native Hawaiian organization (NHO), rather than by Indians or Native Hawaiians as individuals, is eligible if it meets all other certification requirements in this part. Such a firm must satisfy all requirements of this part."; and
- WHEREAS,** 49 CFR § 26.63(c)(2) of the proposed rulemaking states that ANCs are eligible for certification as a DBE, if they meet certain requirements, including prior certification "by the Small Business Administration under the 8(a) or small disadvantaged business program"; and

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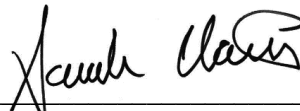
- WHEREAS,** the Department of Transportation has failed to provide a reasonable basis for the disparate and unequal treatment of otherwise similarly situated entities owned by Tribal Nations and ANCs; and
- WHEREAS,** the proposed rule remains unclear on whether or not the current deficiencies and inequalities relating to certification of Tribally-owned enterprises will be remedied and it is imperative that they are addressed; and
- WHEREAS,** in December 2010, the United States recognized the rights of its First Peoples through its support of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), whose provisions and principles support and promote the purposes of this resolution; therefore, be it
- RESOLVED** the USET SPF Board of Directors calls upon the United States Department of Transportation to immediately engage with USET SPF and its member Tribal Nations, and all other affected Tribal Nations nationwide, in consultation regarding the qualifications of Tribally-owned entities for the Disadvantaged Business Enterprise program, and to commit to addressing current deficiencies and inequalities relating to certification of Tribally-owned enterprises.

CERTIFICATION

This resolution was duly passed at the USET SPF Annual Meeting held on the Sovereign Territory of the Mashantucket Pequot Tribal Nation at which a quorum was present on October 13, 2022.



Chief Kirk E. Francis, Sr., President
United South and Eastern Tribes
Sovereignty Protection Fund



Vice Chairwoman Sarah Harris, Secretary
United South and Eastern Tribes
Sovereignty Protection Fund

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