

**DEPARTMENT OF TRANSPORTATION****Office of the Secretary****49 CFR Part 26**

[Docket OST-2000-7640]

RIN 2105-AC89

**Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs; Threshold Requirements and Other Technical Revisions****AGENCY:** Office of the Secretary, DOT.**ACTION:** Interim final rule; request for comments.

**SUMMARY:** This interim final rule revises the Department's regulations for its Disadvantaged Business Enterprise (DBE) program. This document changes threshold requirements for Federal Transit Administration recipients and Federal Aviation Administration recipients to establish DBE programs and submit overall goals. In addition, this document corrects and clarifies misleading language in the DBE final rule. This correction document adds examples of ways to collect information required for bidders lists. This document adds language clarifying that in order to verify whether a DBE firm actually performed the work they were committed, both commitments and attainments must be tracked and reported. Finally, this document corrects potentially misleading language regarding evidence that must be considered when setting overall goals.

**EFFECTIVE DATE:** This interim final rule is effective November 15, 2000.

Comments concerning this document are due no later than January 2, 2001.

**ADDRESSES:** Interested persons should send comments to Docket Clerk, Docket No. OST-2000-7640, Department of Transportation, 400 7th Street, SW, Room PL-401, Washington, DC 20590. We request that, in order to minimize burdens on the docket clerk's staff, commenters send three copies of their comments to the docket. Commenters wishing to have their submissions acknowledged should include a stamped, self-addressed postcard with their comments. The docket clerk will date stamp the postcard and return it to the commenter. Comments will be available for inspection at the above address from 10 a.m. to 5 p.m., Monday through Friday. Comments also may be sent electronically to the Dockets Management System (DMS) at the following Internet address: <http://dms.dot.gov/> at any time. Commenters who wish to file comments

electronically should follow the instructions on the DMS web site.

**FOR FURTHER INFORMATION CONTACT:** Laura Aguilar, Attorney, Office of General Counsel for Environmental, Civil Rights, and General Law, Department of Transportation, 400 Seventh Street, SW, Room 10102, Washington, DC 20590; Telephone: (202) 366-0365.

**SUPPLEMENTARY INFORMATION:****1. Substantive Changes***DBE Programs*

In Section 26.21(a)(2) of the rule, the Department states that Federal Transit Administration (FTA) recipients who receive \$250,000 in a fiscal year in various forms of FTA assistance must have a DBE program. Similarly, subsection (a)(3) requires Federal Aviation Administration (FAA) recipients who receive grants of \$250,000 or more in a fiscal year for airport planning and development to have a DBE program. The Department is changing the threshold to \$250,000 in contracting opportunities. The change requires FTA recipients who project awarding more than \$250,000 in prime contracts in a Federal fiscal year from FTA assistance to have a DBE program. Similarly, FAA recipients who project awarding more than \$250,000 in prime contracts in a fiscal year from grants for airport planning and development are required to submit a plan. Prime contracts include goods as well as contracts for services.

The Department is making these changes to decrease the administrative burden on small airport and transit authorities. Many of these transit authorities and small airports receive more than \$250,000 in FTA or FAA funds but only have a small amount of funding for actual contracting opportunities. For example, FAA grants funds for land acquisition projects. While many of these grants exceed \$250,000, the value of contracting opportunities covered by the DBE program (e.g., real estate appraisal and survey) is frequently well below \$250,000. The major portion of the grant funds is generally for the land purchase itself, which is not a "DOT-assisted contract" under the definition of section 26.5.

Therefore, FTA and FAA recipients who reasonably anticipate awarding \$250,000 or less in prime contracts in a fiscal year are not required to submit a DBE plan. This change affects new recipients or recipients who do not have a DBE program. The rule would also reduce burdens on recipients who already have DBE programs. If such a

recipient anticipates awarding \$250,000 or less in prime contracts it would not have to submit a DBE overall goal for that year.

*Goal Setting*

Section 26.45 requires recipients to submit new goals on August 1 of each year. Section 26.45 is being revised to exempt FTA or FAA recipients with existing DBE programs from setting updated overall goals when they do not project awarding prime contracts exceeding \$250,000 (excluding vehicle transit purchases).

If a recipient is administering a DBE program, but is a FAA or FTA recipient who anticipates awarding \$250,000 or less in prime contracts in a Federal fiscal year, the recipient is not required to develop overall goals for that fiscal year. However, the recipient's existing DBE program must remain in effect. For example, the recipient would still perform certification functions such as processing applications and obtaining no-change affidavits. If the recipient expects to award prime contracts exceeding \$250,000 in the following fiscal year, it would be required to timely publish the proposed goal and submit the goal to the applicable DOT Operating Administration by August 1. Although not required, a FAA or FTA recipient who anticipates awarding \$250,000 or less in prime contracts may submit a goal for that fiscal year. However, if a recipient chooses to submit a goal, it must meet all the requirements set forth in § 26.45. Of course, recipients must still seek to meet the objectives of § 26.1 of this part.

Many recipients may have already submitted their fiscal year 2001 goal to the applicable Operating Administration. If you are a recipient who submitted your goal, but under the revisions to this part are not required to submit a goal, your Operating Administration will contact you to ask whether you wish to have your goal in effect.

**2. Technical Changes***Clarification Concerning Bidders Lists*

Section 26.11(c) requires recipients to create and maintain a bidders list containing information about DBE and non-DBE contractors and subcontractors who seek work on a recipient's Federally-assisted contracts. The Department has received a number of questions regarding the appropriate method to collect the required information. Recipients have also expressed concern with collecting the annual gross receipts of firms, saying

that firms have sometimes been reluctant to share this information.

In discussing this requirement in the DBE final rule, the Department recognized the difficulty in identifying subcontractors, particularly non-DBEs and all subcontractors that were unsuccessful in their attempts to obtain contracts. Consequently, the Department did not impose any procedural requirements for how the data is collected. The Department still believes that a recipient's data collection process should remain flexible. However, we are amending § 26.11(c) to emphasize the purpose of the bidders list and by providing examples of ways in which recipients may choose to collect the required data.

The Department is amending § 26.11(c)(1) to state that the purpose of maintaining a bidders list is to provide the most accurate data possible about the universe of DBE and non-DBE contractors and subcontractors who seek to perform work under a recipient's Federally-assisted contracts, for use in setting overall goals. We are also adding language stating that a recipient may collect the required data from all bidders, before or after the bid due date. They may also choose to conduct a survey that will result in a statistically sound estimate of the universe of DBE contractors and non-DBE contractors and subcontractors who seek to perform work under the recipient's Federally-assisted contracts. Additionally, we are clarifying that the data need not come from the same source. For example, a recipient may collect name and address information from all bidders, while conducting a survey with respect to age and gross receipts information. The Department believes that the approach should remain flexible so that recipients can choose the least burdensome and intrusive method.

With regard to a firm's annual gross receipts, we are amending the language in § 26.11(c) to clarify that recipients are not required to collect the exact dollar figure from the bidders. Recipients may ask a firm to indicate into what gross receipts bracket they fit (*e.g.*, less than \$500,000; \$500,000–\$1 million; \$1–2 million; \$2–5 million; *etc.*) rather than requesting an exact figure from the firms. We note that this information on the size of a firm, as well as information collected about the firm's age, should be helpful to recipients in formulating narrowly tailored overall goals.

#### *Clarification Concerning Monitoring and Counting DBE Participation*

Section 26.37(b) requires recipients to have a mechanism to verify that the work committed to DBEs at contract

award is actually performed by the DBEs. The language in the final rule states that recipients must provide for a running tally of actual DBE attainments. The preamble to the rule states, "Under the final rule, recipients would keep a running tally of the extent to which, on each contract, performance had matched promises." Verifying whether a DBE actually performed the work to which they were committed, necessarily requires the recipient to track both commitments and attainments.

We are rewording the language in § 26.37(b) to state that a recipient's DBE program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs. In addition, we are adding a new paragraph (c) to clarify that a recipient's mechanism for providing a running tally of actual DBE attainments must include a means of comparing the attainments to commitments. We are also clarifying that both awards or commitments and attainments must be contained in a recipient's reports of DBE participation to the Department. In the forthcoming DOT uniform reporting form, we will provide a format for these reports.

Section 26.37(b) requires the mechanism providing for a running tally of actual DBE attainments to include a provision ensuring that the DBE participation is credited toward overall or contract goals only when payments are actually made to DBE firms. Since this requirement is already stated in § 26.55(h), we are removing it from § 26.37(b). Furthermore, we believe the wording of § 26.55(h) is confusing and we are, therefore, revising it. The point of the revised language is to emphasize that actual payment of committed funds to DBEs is a key element in determining whether a prime contractor has met its contract obligations.

#### *Clarification Concerning Goal Setting*

In setting overall goals, step 2 requires that recipients examine all evidence available in the jurisdiction to determine what adjustment, if any, is needed to the base figure. Sec. 26.45(d)(1) specifies information that must be considered when adjusting the base figure. Sec. 26.45(d)(2) lists additional information to be considered, but uses the language "you may also consider." The permissive language may be misleading. A narrowly tailored program requires that all relevant information be considered. We are merely clarifying that if the information is available, then it must be considered. Therefore, to avoid misleading language, we are changing the wording in § 26.45(d)(2) to say, "if available, you

must consider evidence from related fields that affect the opportunities for DBEs to form, grow and compete."

### **3. Interim Final Rule**

This rule is being published as an interim final rule, without prior notice and opportunity to comment. The Department believes there is good cause for finding that providing prior notice and comment in connection with this rulemaking action is impracticable, unnecessary and contrary to the public interest since it concerns actions required to be taken on or around August 1, 2000. See 5 U.S.C. 553(b)(B).

The Department believes it is important to expedite these revisions in order to benefit DOT recipients this year. Under the DBE regulations, recipients who set their goals on a fiscal year basis are required to submit their goals on or around August 1 each year. In order to reduce administrative burdens on FTA and FAA entities receiving \$250,000 or less in contracting opportunities, the rule must be effective as soon as possible, since August 1 has passed and recipients are still in the process of formulating goals and programs. Therefore, the Department finds good cause that compliance with notice and comment procedures in adoption of this interim final rule would be impractical, unnecessary and contrary to the public interest. See 5 U.S.C. 553(b)(B). For the same reasons, pursuant to 5 U.S.C. 553(d), it is determined that there is good cause for the interim final rule to become effective immediately upon publication. In addition, this interim final rule relieves a restriction.

All comments received will be filed in the docket. The docket is available for public inspection before and after the comment closing date. All comments received on or before the comment closing date will be considered before taking final action on this rulemaking. Comments filed late will be considered as far as possible without incurring expense or delay. The provisions of this interim final rule may be changed in light of comments received.

### **Regulatory Analyses and Notices**

These revisions to part 26 are not a significant rule under Executive Order 12866 or the Department's regulatory policies and procedures. While the Regulatory Flexibility Act does not, as such, apply to rules that do not involve a notice of proposed rulemaking, the Department has determined that the revisions will not have significant economic impacts on a substantial number of small entities. In fact, these revisions decrease costs to some small

entities. Further, these revisions do not have Federalism impacts sufficient to warrant the preparation of a Federalism impact statement.

**List of Subjects in 49 CFR Part 26**

Administrative practice and procedure, Airports, Civil rights, Government contracts, Grant—programs—transportation, Mass transportation, and Minority businesses.

Issued this 6th Day of November, 2000, at Washington, DC.

**Rodney E. Slater,**  
*Secretary of Transportation.*

For the reasons set forth in the preamble, the Department amends 49 CFR part 26 as follows:

**PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS**

1. The authority citation for 49 CFR part 26 continues to read as follows:

**Authority:** 23 U.S.C. 324; 41 U.S.C. 2000d, *et seq.*; 49 U.S.C. 1615, 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105–178, 112 Stat. 107, 113.

2. In § 26.11, revise paragraph (c) to read as follows:

**§ 26.11 What records do recipients keep and report?**

\* \* \* \* \*

(c) You must create and maintain a bidders list.

(1) The purpose of this list is to provide you as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on your Federally-assisted contracts for use in helping you set your overall goals.

(2) You must obtain the following information about DBE and non-DBE contractors and subcontractors who seek to work on your Federally-assisted contracts:

- (i) Firm name;
- (ii) Firm address;
- (iii) Firm’s status as a DBE or non-DBE;
- (iv) Age of the firm; and
- (v) The annual gross receipts of the firm. You may obtain this information by asking each firm to indicate into what gross receipts bracket they fit (*e.g.*, less than \$500,000; \$500,000–\$1 million; \$1–2 million; \$2–5 million; *etc.*) rather than requesting an exact figure from the firm.

(3) You may acquire the information for your bidders list in a variety of ways. For example, you can collect the data from all bidders, before or after the bid

due date. You can conduct a survey that will result in statistically sound estimate of the universe of DBE and non-DBE contractors and subcontractors who seek to work on your Federally-assisted contracts. You may combine different data collection approaches (*e.g.*, collect name and address information from all bidders, while conducting a survey with respect to age and gross receipts information).

3. In § 26.21, revise paragraphs (a)(2) and (a)(3) to read as follows:

**§ 26.21 Who must have a DBE program?**

(a) \* \* \*  
(2) FTA recipients receiving planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) exceeding \$250,000 in FTA funds in a Federal fiscal year;

(3) FAA recipients receiving grants for airport planning or development who will award prime contracts exceeding \$250,000 in FAA funds in a Federal fiscal year.

\* \* \* \* \*

4. In § 26.37, revise paragraph (b), and add paragraph (c) to read as follows:

**§ 26.37 What are a recipient’s responsibilities for monitoring the performance of other program participants?**

\* \* \* \* \*

(b) Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs.

(c) This mechanism must provide for a running tally of actual DBE attainments (*e.g.*, payments actually made to DBE firms), including a means of comparing these attainments to commitments. In your reports of DBE participation to the Department, you must display both commitments and attainments.

5. Amend § 26.45 as follows:  
a. Revise paragraph (a); and  
b. In paragraph (d) (2) at the beginning of the sentence, remove “You may also consider available” and substitute “If available, you must consider” in its place. The revised text reads as follows:

**§ 26.45 How do recipients set overall goals?**

(a)(1) Except as provided in paragraph (a)(2) of this section, you must set an overall goal for DBE participation in your DOT-assisted contracts.

(2) If you are a FTA or FAA recipient who reasonably anticipates awarding (excluding transit vehicle purchases) \$250,000 or less in FTA or FAA funds in prime contracts in a Federal fiscal year, you are not required to develop

overall goals for FTA or FAA respectively for that fiscal year. However, if you have an existing DBE program, it must remain in effect and you must seek to fulfill the objectives outlined in § 26.1.

\* \* \* \* \*

6. In § 26.55, revise paragraph (h) to read as follows:

**§ 26.55 How is DBE participation counted toward goals?**

\* \* \* \* \*

(h) Do not count the participation of a DBE subcontractor toward a contractor’s final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

**§ 26.89 [Amended]**

7. In § 26.89(a)(3), remove “Room 2401” and add “Room 5414” in its place.

[FR Doc. 00–29100 Filed 11–14–00; 8:45 am]

BILLING CODE 4910–62–U

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 622**

[Docket No. 991008273–0070–02; I.D. 110900A]

**Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Trip Limit Reduction**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Trip limit reduction.

**SUMMARY:** NMFS reduces the commercial trip limit in the fishery for king mackerel in the northern Florida west coast subzone to 500 lb (227 kg) of king mackerel per day in or from the exclusive economic zone (EEZ). This trip limit reduction is necessary to protect the overfished Gulf king mackerel resource.

**DATES:** This rule is effective 12:01 a.m., local time, November 12, 2000, through June 30, 2001, unless changed by further notification in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Mark Godcharles, telephone 727–570–5305, fax 727–570–5583, e-mail: Mark.Godcharles@noaa.gov.

**SUPPLEMENTARY INFORMATION:** The fishery for coastal migratory pelagic fish