DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 23

[Docket No. OST–97–2550]

RIN 2105–AD51

Participation by Disadvantaged Business Enterprises in Airport Concessions

AGENCY: Office of the Secretary, DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM).

SUMMARY: This SNPRM seeks further comment on the issue of business size standards for the Department of Transportation's airport concession disadvantaged business enterprise (ACDBE) program. It also requests comment on issues such as additional measures to combat fraud and abuse in the program and to provide additional flexibility for airports in implementing the program.

DATES: *Comment Closing Date:* Comments should be submitted to the docket by June 20, 2005. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Comments should be sent to Docket Clerk, Attn: Docket No. OST–97–2550, Department of Transportation, 400 7th Street, SW., Room PL401, Washington, DC 20590. For the convenience of persons wishing to review the docket, it is requested that comments be sent in triplicate. Persons wishing their comments to be acknowledged should enclose a stamped, self-addressed postcard with their comments. The docket clerk will date stamp the postcard and return it to the sender. Comments may be reviewed at the above address from 9 a.m. through 5:30 p.m. Monday through Friday. Commenters may also submit their comments electronically. Instructions for electronic submission may be found at the following web address: *http://dms.dot.gov/submit/.* The public may also review docketed comments electronically. The following web address provides instructions and access to the DOT electronic docket: *http://dms.dot.gov/search/.*

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., Room 10424, Washington, DC 20590, phone numbers (202) 366–9310 (voice), (202) 366–9313 (fax), (202) 755–7687 (TTY), *bob.ashby@ost.dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION: In today's **Federal Register**, the Department of Transportation published a final rule revising 49 CFR Part 23, the regulation governing the airport concessions disadvantaged business enterprise (ACDBE) program. This SNPRM seeks comment on the issue of business size standards to be used in Part 23 and also asks for comment on two other matters concerning implementation of the program on which we have not previously sought comment.

Business Size Standards

Size standards in this ACDBE regulation are important for a number of reasons. They implement the statutory requirement that participants be small businesses. They provide a means to ensure that participation in DBE programs is not necessarily of indefinite duration: if a firm grows to exceed size standards, it ceases to be eligible for the program. They are calibrated to help meet the objectives of the program, including permitting ACDBE firms to compete in the airport concessions market.

In Part 26, businesses seeking DBE certification must, by statute, meet SBA size standards and an additional statutory $17.42 million dollar cap on average annual gross receipts. These requirements do not apply to Part 23, since the ACDBE statute gives the Secretary discretion to set size standards for concessions. For most airport concessions, the size standard under current Part 23 is $30 million average annual gross receipts.

In the 2000 SNPRM proposing revisions to Part 23, the Department suggested adjusting the size standards for inflation (*e.g.*, from $30 million to approximately $33 million) and to create new size standards for management contractors ($5 million) and car dealers (500 employees). Many airport comments supported a size standard higher than $33 million, especially for advertising, but did not suggest an alternative. One ACDBE suggested using a higher figure or an employee number. One airport suggested trying to match size standards more precisely to the types of businesses involved, while another thought it was confusing not to apply the Part 26 $17.42 million dollar cap to concessions. A consultant asked for more detail, especially with respect to the affiliation rule.

For parking management, one airport suggested $12 million rather than $5 million, while another said there was confusion between how these two figures were meant to be applied. Three airports and a car rental trade association supported the 500-employee standard for car dealers, while another large airport said it was too high.

In December 2002, the Department responded to a petition from an airport advertising firm to alter the size standards further (67 FR 76327; December 2, 2002). The petitioner argued that because some types of concessionaires pay higher concession or lease fees to airports than others, size standards should be adjusted to equalize the situation of these different businesses. The NPRM proposed two options for equalizing the size standards to take differing concession fees into accounts, one of which would have increased the size standard significantly for most categories of businesses and the other of which would have meant smaller increases for some types of businesses and modest decreases for others.

The Department seeks additional comment on certain size standard issues. One of these is the ''equity'' issue raised in the December 2002 NPRM. The Department received 50 comments on this NPRM. Most were from airport operators. A sizeable majority of the airport comments supported the proposal, particularly the option that would have raised the size standards significantly. Four ACDBE firms and associations also commented in favor of the proposal. Supporters generally believed that the proposed change would create a ''level playing field'' among types of ACDBEs. Some airports, including most of the large airports that responded, opposed the proposal or thought further study would be necessary. A state DOT and an individual commenter also took this position. These commenters' reservations about the proposal centered on concerns that the proposal would make some size standards unreasonably high, lead to other inequities among types of businesses, or were based on inadequate or incomplete data.

After reviewing the comments and thinking further about the proposal, we have concluded that we should not adopt either of the specific options we proposed. One could raise the basic size standard too high, and the other could result in excluding some presently certified firms by lowering some current size standards. Both are based on data that pertains to several categories of firms at large airports, but we have no data about other categories of firms or practices at smaller airports. We are also concerned that facially very different size standards for different categories of business could lead to perceptions of unfairness and difficult administrative

or legal decisions about the category in which a particular firm belongs.

However, the evident differences in concession or lease fees among types of businesses do raise a fairness issue. One way of addressing this issue would be to keep the existing size standards but to subtract from a firm's gross receipts the concession or lease fees it pays to the airport for the privilege of doing business. For example, suppose a concessionaire has annual gross receipts of $30 million. It pays 20 percent of its gross receipts ($6 million) to the airport in concession fees. Consequently, for purposes of calculating whether the firm meets the size standard, the firm's receipts for that year would be valued at $24 million. The Department seeks comment on this approach.

We also seek further comment on adjusting the dollar size standard—which has remained in place since 1992—for inflation. In the 2000 SNPRM, as noted above, we proposed an inflationary adjustment to $33 million for most ACDBEs, a proposal to which commenters did not object. However, we now seek comment on a different calculation, using a method similar to the one we use for inflationary adjustments to Part 26 size standards. Using this method, we calculate that the adjusted standards would be $40.57 million (in place of the former $30 million standard for most businesses) and $54.1 million (in place of the former $40 million standard) for car rental companies.

In arriving at these numbers, the DOT used a Department of Commerce price index to make a current inflation adjustment. The Department of Commerce's Bureau of Economic Analysis prepares constant dollar estimates of state and local government purchases of goods and services by deflating current dollar estimates by suitable price indicies. These indicies include purchases of durable and non-durable goods, and other services. Using these price deflators enables the Department to adjust dollar figures for past years' inflation. Given the nature of DOT's ACDBE Program, adjusting the gross receipts cap in the same manner in which inflation adjustments are made to the costs of state and local government purchases of goods and services is simple, accurate and fair.

The inflation rate on purchases by state and local governments for the current year is calculated by dividing the price deflator for the fourth quarter of 2003 (109.546) by 1992's third quarter price deflator (80.997). The third quarter of 1992 is used because that is when the Department established the current size limitations. The result of the calculation is 1.35247, which represents an inflation rate of 35.25% from the third quarter of 1992 through the fourth quarter of 2003. Multiplying the $30,000,000 figure by 1.35247 equals $40,574,100, which will be rounded off to the nearest $10,000, or $40,570,000. Multiplying the $40,000,000 figure by 1.35247 equals $54,098,800, which will be rounded off to the nearest $10,000, or $54,100,000.

We also seek comment on the alternative of making the size standard of Part 23 equivalent to that of Part 26, for the reasons of enhancing the narrow tailoring of Part 23 and to avoid potential confusion from having two different size standards for different parts of the Department's overall DBE program. This alternative would rely on SBA size standards, and might or might not include the gross receipts cap that Congress imposed in the highway/transit program DBE provision (currently calculated as $17.42 million, and subject to periodic inflationary adjustments).

One additional idea on which the Department believes is that of creating an employee number-based size standard, in place of the current dollar-based standards. Such an approach could make ACDBE size standards simpler and fairer. For example, using an employee number-based standard would apparently moot the issue raised in the 2002 NPRM concerning concession fees paid to airports. Likewise, using an employee number-based standard would eliminate questions about the relationship between the income of businesses located on airports and similar businesses located elsewhere.

There is a relatively limited number of types of businesses that perform as ACDBEs, offering the possibility of creating a set of employee number standards specific to these types of businesses relatively readily. In any case, the task would have a narrower scope than the Small Business Administration's recent efforts to establish employee number standards for the full range of small businesses. We seek comment on whether pursuing such an approach is desirable and, if so, what reasonable employee number standards might be for ACDBEs. Is it likely that employee numbers of concession businesses differ from those in other contexts? For example, is it likely that a restaurant or specialty retail store on an airport concourse will have a different number of employees from the same type of restaurant or store in a shopping mall?

If an employee number-based standard were proposed for Part 23, would it make more sense to apply the standard on an airport-by-airport basis or to the total employee numbers of a company that served multiple airports? For example, suppose a chain of retail stores seeking ACDBE certification has locations at six airports, and each location employees 10 people. If the size standard for the business were 50 employees, should the certifying office look at this business as one company with 60 employees, exceeding the size standard, or six stores with 10 workers per store, each of which individually meets the standard?

Additional Provisions To Combat Fraud and Abuse

As noted in the preamble to the final Part 23 rule issued today, the Department's Office of Inspector General has focused considerable effort and attention on the need to prevent fraud and abuse in the ACDBE program. Parts 23 and 26 already contain a number of provisions designed to prevent fraud and abuse. For example, the ownership and control certification standards (§§ 26.69–26.71) include detailed instructions to UCPs and recipients on how to address eligibility issues. Are there additional specific provisions the Department should add to address particular issues affecting the ownership and control of types of businesses or business arrangements common in the ACDBE program?

Likewise, the certification process contains various safeguards against fraud and abuse. Applicants must attest, under penalty of perjury, to the accuracy and truthfulness of information on their applications (§ 26.83(c)(7)(ii)). Certified DBEs must inform the recipient within 30 days of material changes in their circumstances that may affect their continued eligibility (§ 26.83(i)). Certified DBEs must also provide the recipient an annual ''affidavit of no change'' affirming that there have not been changes in their circumstances that would call into question their continued eligibility (§ 26.83(j)). This affidavit specifically covers matters of business size and PNW. All these provisions apply to ACDBEs under Part 23 as well as other DBEs under Part 26.

The Department seeks comment on whether there is other information that ACDBEs should report that would enable airports and the Department to better monitor the eligibility of ACDBEs as well as the ongoing performance of ACDBEs in the concession business. For example, are there additional reports that airports should receive concerning the actual performance by ACDBEs of the work for which credit toward

ACDBE goals is being claimed? Should there be additional reporting responsibilities for ''prime'' concessionaires as well as ACDBEs themselves? Should ACDBEs be required to report on the specific commercially useful functions they are performing on a given contract? Should they report, on an annual basis, their number of employees, revenue dollars, and PNW to the airport, UCP, or the FAA?

Additional Flexibility

The exemption and program waiver processes of § 26.15 also apply to Part 23 and the ACDBE program. These provisions are designed to permit airports and other recipients to depart from the specific requirements of DBE regulations when circumstances warrant. The Department seeks comment on whether there should be any additional provisions, either applying generally to Part 23 or applying to specific portions of Part 23, to give greater flexibility to airports and other participants in meeting ACDBE requirements. For example, are there categories of airports that should be excepted from one or more requirements of the rule? Should the $200,000 concessions revenue threshold for submitting overall goals be raised? If airports consistently meet overall goals over a given period of years, should they be excused from future goal setting submissions, at least as long as DBE participation continued at the level of their recent goals? We will consider suggestions for such provisions.

With respect to flexibility in goal setting, the Department wishes to raise for further comment the idea of establishing car rental goals on a national basis for car rental companies that have a nationwide presence. Under this concept, modeled on the handling of goals for transit vehicle manufacturers under Part 26, a national-scope car rental company would establish a national goal for ACDBE participation in its airport business, using the goal setting provisions of Part 23 and obtaining FAA approval for the nationwide goal. Then the car rental company would submit to each airport a certification that it had such an FAA-approved nationwide goal. This approach would reduce administrative burdens both on airports—who would not have to calculate car rental goals at all for national-scope car rental companies—and on the car rental companies themselves. It would also recognize that the car rental market is, in large measure, a national market. Local airports would not be able to set locally-derived goals for national-scope car rental companies under this concept, however. We also seek comment on whether, if the Department adopts this concept, there are other types of business to which it might reasonably apply (*e.g.*, hotels).

Regulatory Analyses and Notices

This SNPRM is nonsignificant for purposes of Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. The SNPRM continues the discussion of size standards, one issue from today's broader, but also nonsignificant, final rule to implement the ACDBE program. While the resolution of size standards issue may help certain individual businesses and harm others, we do not anticipate any across-the-board significant economic impacts from the clarification and further development of size standards. The other issues raised in the SNPRM are administrative in nature and should not have significant impacts on any regulated parties. The rule does not have Federalism impacts sufficient to warrant the preparation of a Federalism Assessment.

The Department certifies that this rule will not have a significant economic effect on a substantial number of small entities. The rule clearly affects small entities: ACDBEs are, by definition, small businesses. However, as mentioned above, the economic effect of the matters discussed in the SNPRM on these small entities is not likely to be significant. In other respects, compared to the existing rule, the matters discussed in the SNPRM should not have noticeable incremental economic effects on small businesses.

There are a number of other statutes and Executive Orders that apply to the rulemaking process that the Department considers in all rulemakings. However, none of them are relevant to this SNPRM. These include the Unfunded Mandates Reform Act (which does not apply to nondiscrimination/civil rights requirements), the National Environmental Policy Act, E.O. 12630 (concerning property rights), E.O. 12988 (concerning civil justice reform), and E.O. 13045 (protection of children from environmental risks).

Issued this 8th Day of March, 2005, at Washington, DC.

Norman Y. Mineta,

Secretary of Transportation.

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