

## II. Provisions of the Final Rule

This action delays the effective date of the December 3, 2008 final rule. The effective date of that rule, which would have been February 2, 2009, was delayed until April 3, 2009 (74 FR 5808) and is now delayed until December 31, 2009. Upon review and consideration of the new provisions of CHIPRA and the public comments we received during the reopened comment period, we believe that it may be necessary to revise a substantial portion of the December 3, 2008 final rule. Therefore, to inform future rulemaking on this issue, we are delaying the effective date a second time to give the public an additional opportunity to submit additional comments on the policy set forth in the December 3, 2008 final rule as well as the provisions of CHIPRA, discussed above. We anticipate that this time period will allow sufficient time for CMS to consider such comments and develop appropriate revisions to the delayed rule.

## IV. Waiver of Proposed Rulemaking and Delay in Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a notice such as this take effect, in accordance with section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). We also ordinarily provide a 30-day delay in the effective date of the provisions of a notice in accordance with section 553(d) of the APA (5 U.S.C. 553(d)). However, we can waive both the notice and comment procedure and the 30-day delay in effective date if the Secretary finds, for good cause, that it is impracticable, unnecessary or contrary to the public interest to follow the notice and comment procedure or to comply with the 30-day delay in the effective date, and incorporates a statement of the finding and the reasons in the notice.

This final rule delays the effective date of the December 3, 2008 final rule that was promulgated through notice and comment rulemaking, and does not make substantive changes to that final rule. Delay in the effective date and reopening of the comment period is necessary to ensure that the final rule, when effective, fully takes into account public comments, and conforms to recently enacted legislation. We do not believe that there will be any adverse impact or effect on the public from this delay in the effective date. Moreover, it would not be in the public interest for the underlying rule to go into effect, or to have uncertainty about whether it is

in effect, when the underlying rule does not conform to statutory requirements. In addition, it is not in the public interest to put into effect a rule that we intend to revise in a reasonable time frame after fully taking into account public comment and statutory changes. For the reasons stated above, we find that both notice and comment procedures and the 30-day delay in effective date for this final rule are unnecessary and contrary to the public interest. Therefore, we find there is good cause to waive notice and comment procedures and the 30-day delay in effective date for this final rule.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: March 25, 2009.

**Charlene Frizzera,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Approved: March 30, 2009.

**Charles E. Johnson,**

*Acting Secretary.*

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 49 CFR Parts 23 and 26

[Docket No. DOT-OST-2009-0074]

RIN 2105-AD79

#### Disadvantaged Business Enterprise Program; Inflationary Adjustment

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Final rule.

**SUMMARY:** Under the statutes governing the Department's Disadvantaged Business Enterprise (DBE) Program, firms are not considered small business concerns and are therefore ineligible as DBEs once their average annual receipts over the preceding three fiscal years reach specified dollar limits. The Department of Transportation is amending the size limits or gross receipts caps to ensure that the opportunity of small businesses to participate in the Department's DBE programs remains unchanged after taking inflation into account. This final rule provides 2009 inflation adjustment of size limits on small businesses participating in the DOT's Disadvantaged Business Enterprise programs.

**DATES:** This rule is effective April 3, 2009.

#### FOR FURTHER INFORMATION CONTACT:

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#### SUPPLEMENTARY INFORMATION:

##### Background

On April 2, 2007, the Department published a final rule revising 49 CFR part 23, the regulation governing the airport concessions disadvantaged business enterprise (ACDBE) program, to require that the Department adjust the general ACDBE gross receipts cap for inflation. That rule also adjusted the gross receipts cap for the Department's financial assistance programs in 49 CFR part 26. This final rule updates the gross receipts cap for the ACDBE program and the Department's financial assistance program for 2009.

##### The DBE Airport Concession and Contracting Programs

The DOT-assisted contracts DBE rule and airport concessions DBE rule are based on different statutes. Each statute applies to a distinct type of business that may seek DOT financial assistance. The ACDBE program is designed to give business opportunities to certain small business concerns that operate at airports and that are owned and controlled by socially and economically disadvantaged individuals. The ACDBE program is mandated by 49 U.S.C. 47107(e), originally enacted in 1987 and amended in 1992.

The DBE program for DOT-assisted contracts is a statutory program intended to ensure nondiscriminatory contracting opportunities for small business concerns owned and controlled by socially and economically disadvantaged individuals in the Department's highway, mass transit and airport financial assistance programs. The statutory provision governing the DBE program in the highway and mass transit financial assistance programs is 1101(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, August 10, 2005. The statutory provision governing the DBE program as it relates to the airport financial assistance programs is 49 U.S.C. 47113.

##### ACDBE Gross Receipts Size Standards

Under the current DOT rule, if the airport concessions firm's annual gross receipts average over the preceding three fiscal years exceed \$47,780,000,

then, it is not considered a small business eligible to be certified as an ACDBE. This final rule adjusts the size standards for eligibility as an ACDBE for inflation.

This adjustment compensates for the rise in the general level of prices over time from the third quarter of 2006 through the fourth quarter of 2008. In order to ensure that this adjustment is made on a timely basis in the future, the rule was amended to provide for a similar adjustment every two years, using the same method. At two year intervals, the Department is to publish a final rule to update the size standard numbers. This final rule updates the ACDBE gross receipts cap for 2009. It should be emphasized that this action does not increase the size standard for ACDBEs in real dollar terms. It simply maintains the status quo, adjusting to 2008 dollars.

In order to make an inflation adjustment to the gross receipts figures, the Department of Transportation uses a Department of Commerce price index. 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 indexes.<sup>1</sup> These indices 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 the Department's DBE Program and 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 2008 (140.964) by 2006's third quarter price deflator (128.352). The result of the calculation is 1.0982, which represents an inflation rate of 1.098% from the third quarter of 2006. Multiplying the \$47,780,000 figure for small business enterprises by 1.0982 equals \$52,471,996, which will be rounded off to the nearest \$10,000, or \$52,470,000.

Therefore, under this new rule, if a firm's gross receipts, averaged over the firm's previous three fiscal years, exceeds \$52,470,000, then it exceeds the

airport concessions small business size limit contained in part 23.

#### **ACDBE Car Rental Company Size Standards**

Under the existing rule, car rental companies are not eligible to participate in the ACDBE program if their average gross receipts over the three previous fiscal years exceed \$63,710,000. This final rule adjusts the size standard for car rental companies to reflect the effects of inflation on the real dollar value.

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 2008 (140.964) by 2006's third quarter price deflator (128.352). The result of the calculation is 1.0982, which represents an inflation rate of 1.098% from the third quarter of 2006. Multiplying the \$63,710,000 figure for car rental companies by 1.0982 equals \$69,966,322, which will be rounded off to the nearest \$10,000, or \$69,970,000.

Therefore, under this new rule, if a car rental company's gross receipts, averaged over the company's previous three fiscal years, exceeds \$69,970,000, then it exceeds the airport concessions car rental company size limit contained in part 23.

#### **Business Size Standards for the DBE DOT Financial Assistance Programs**

This rule also adjusts the gross receipts cap for the Department's financial assistance programs in 49 CFR part 26. Under the existing rule, if a firm's average annual gross receipts, as defined by Small Business Administration (SBA) regulations (see 13 CFR 121.402), over the preceding three fiscal years exceed \$20,410,000, then it cannot qualify as an eligible DBE firm. SAFETEA-LU Section 1101(b)(1)(a) instructs the Secretary of Transportation to adjust this amount annually for inflation.

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 2008 (140.964) by 2006's third quarter price deflator (128.352). The result of the calculation is 1.0982, which represents an inflation rate of 1.098% from the third quarter of 2005. Multiplying the \$20,410,000 figure for disadvantaged business enterprises in Department of Transportation financial assistance programs by 1.0982 equals \$22,414,262, which will be rounded off to the nearest \$10,000, or \$22,410,000.

Therefore, if a firm's gross receipts, averaged over the firm's previous three fiscal years, exceeds \$22,410,000, then it

exceeds the small business size limit for participation by disadvantaged business enterprises in Department of Transportation financial assistance programs contained in part 26.

#### **Regulatory Analyses and Notices**

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency may waive the normal notice and comment requirements if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest. The Department finds that notice and comment for this rule is unnecessary and contrary to the public interest because it relates only to ministerial updates of business size standards and gross receipts caps to account for inflation, which does not change the standards or caps in real dollar terms. These updates will assist entities attempting to be part of the Department's DBE program and should not be unnecessarily delayed. Accordingly, the Department finds good cause under 5 U.S.C. 553(b)(B) to waive notice and opportunity for public comment. The Department also finds good cause under 5 U.S.C. 553(d)(3) to make this rule effective upon publication.

#### **Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures**

This rule is nonsignificant for purposes of the Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. The rule is a ministerial adjustment for inflation of a statutory small business size standard that does not change the standard in real dollar terms. It will not impose burdens on any regulated parties. In addition, this rule would not create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

#### **Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), we have evaluated the effects of this action on small entities and have determined that the action will not have a significant economic impact on a substantial number of small entities. Therefore, the Department certifies that this rule would not have a significant economic impact on a substantial number of small entities.

The rule is a ministerial update to the dollar limits and size limits to define small businesses for the Department's Airport Concessions Disadvantaged

<sup>1</sup> See Bureau of Economic Analysis National Income and Product Account Table; Table 3.10.4 Price Indexes for Government Consumption Expenditures and General Government Gross Output.

Business Enterprise Program and for the Department's Financial Assistance Program for Disadvantaged Business Enterprises. The only effect of the rule on small entities is to allow some small businesses to continue to participate in the ACDBE and the DBE programs by adjusting for inflation. Therefore, the rule will not have a significant economic impact on a substantial number of small entities.

#### **Executive Order 13132 (Federalism Assessment)**

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the Department has determined that this action would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The Department has also determined that this action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

#### **Executive Order 13084**

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 ("Consultation and Coordination with Indian Tribal Governments"). Because this rule would not significantly or uniquely affect the Indian tribal communities, and would not impose substantial direct compliance costs, the funding and consultation requirements of the Executive Order do not apply.

#### **Unfunded Mandates Reform Act of 1995**

This rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4; 109 Stat. 48). This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$128.1 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the Department will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and tribal governments and the private sector. Additionally, the definition of "Federal Mandate" in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. Since this rule pertains to a

nondiscrimination requirement and affects only Federal financial assistance programs, the Unfunded Mandates Act does not apply.

#### **Executive Order 12372 (Intergovernmental Review)**

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

#### **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The Department has determined that this rule does not contain collection of information requirements for the purposes of the PRA.

#### **National Environmental Policy Act**

The Department has analyzed this rule for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347) and has determined that the inflationary adjustment for dollar limits and size limits used to define small businesses that can participate in the Department's Disadvantaged Business Enterprises programs, would not have any effect on the quality of the environment.

#### **Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

#### **List of Subjects**

##### *49 CFR Part 23*

Administrative practice and procedure, Airports, Civil rights, Concessions, Government contracts, Grant programs—transportation, Minority businesses, Reporting and recordkeeping requirements.

##### *49 CFR Part 26*

Administrative practice and procedure, Airports, Civil rights, Concessions, Government contracts, Grant programs—transportation, Highways and roads, Mass transportation, Minority business, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, the Department of Transportation amends 49 CFR parts 23 and 26 as follows:

#### **PART 23—PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS**

■ 1. The authority citation for part 23 continues to read as follows:

**Authority:** 49 U.S.C. 47107; 42 U.S.C. 2000d; 49 U.S.C. 322; Executive Order 12138.

■ 2. Revise § 23.33 to read as follows:

#### **§ 23.33 What size standards do recipients use to determine the eligibility of ACDBEs?**

(a) As a recipient, you must, except as provided in paragraph (b) of this section, treat a firm as a small business eligible to be certified as an ACDBE if its gross receipts, averaged over the firm's previous three fiscal years, do not exceed \$52.47 million.

(b) The following types of businesses have size standards that differ from the standard set forth in paragraph (a) of this section:

(1) Banks and financial institutions:

\$1 billion in assets;

(2) Car rental companies: \$69.97 million average annual gross receipts over the firm's three previous fiscal years, as adjusted by the Department for inflation every two years from April 3, 2009.

(3) Pay telephones: 1,500 employees;

(4) Automobile dealers: 350 employees.

(c) The Department adjusts the numbers in paragraphs (a) and (b)(2) of this section using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment. The Department publishes a **Federal Register** document informing the public of each adjustment.

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

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

**Authority:** 23 U.S.C. 324; 42 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.

■ 4. Revise § 26.65 to read as follows:

#### **§ 26.65 What rules govern business size determinations?**

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by

Small Business Administration (SBA) standards. As a recipient, you must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal

fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three fiscal years, in excess of \$22.41 million.

(c) The Department adjusts the number in paragraph (b) of this section annually using the Department of Commerce price deflators for purchases

by State and local governments as the basis for this adjustment.

Issued this 22nd day of March, 2009, at Washington, DC.

**Ray LaHood,**

*Secretary of Transportation.*

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