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Dated: March 26, 2010.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

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<sup>1</sup> The Office of the Chief Counsel (also known as the Food and Drug Division, Office of the General Counsel, Department of Health and Human Services), while administratively within the Office of the Commissioner, is part of the Office of the General Counsel of the Department of Health and Human Services.

**DEPARTMENT OF TRANSPORTATION**

**Office of the Secretary**

**49 CFR Part 23**

[Docket No. OST-2010-0022]

RIN 2105-AD88

**Participation by Disadvantaged Business Enterprises in Airport Concessions**

**AGENCY:** Office of the Secretary (OST), DOT.

**ACTION:** Final rule.

**SUMMARY:** The Department of Transportation is removing the "sunset" provision from its rule governing the airport concessions disadvantaged business enterprise (ACDBE) program. The revised rule instead provides reviewing the program to ensure that it is being effectively implemented.

**DATES:** This rule is effective April 1, 2010.

**FOR FURTHER INFORMATION CONTACT:**

Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, Room W94-302, 202-366-9310, [bob.ashby@dot.gov](mailto:bob.ashby@dot.gov).

**SUPPLEMENTARY INFORMATION:** When the Department issued its final rule revising its ACDBE rule (49 CFR part 23) in 2005, the rule included at section 23.7 a "sunset" provision. This provision said, unless extended by the Department, the provisions of part 23 would terminate and become inoperative on April 21, 2010. The preamble to the rule explained the rationale for this provision as follows:

The Department is introducing a "sunset" provision into the final rule as a way of addressing the durational element of narrow tailoring. A narrowly-tailored rule is not intended to remain in effect indefinitely. Rather, the rule should be reviewed periodically to ensure that it continues to be needed and that it remains a constitutionally appropriate way of implementing its objectives. Consequently, this provision states that this rule will terminate and cease being operative in five years, unless the Department extends it. We intend, beginning four years from now, to review the rule to determine whether it should be extended, modified, or allowed to expire. Of course, the underlying DBE statute remains in place, and its requirements continue to apply regardless of the status of this regulation, absent future Congressional action. (70 FR 14502; March 22, 2005).

The Department believes that it is useful to begin reviewing the provisions of part 23 at this time, for the purpose of

determining of what, if any, modifications, are appropriate to improve its operations, in context of the "strict scrutiny" requirements of narrowly tailoring a program to meet a compelling need to combat discrimination and its effects.

Consequently, as part of the notice of proposed rulemaking (NPRM) for this final rule (73 FR 5551; February 3, 2010), the Department solicited comments from interested parties concerning any and all changes to part 23 they believe would be useful in helping the Department, airports, ACDBEs, and other airport-related businesses to achieve the ACDBE program's objectives. The Department will use the information we receive to assist us in determining whether to issue a proposed rule to modify the ACDBE regulation. In addition, the Department is planning to meet with stakeholders, at times and places to be determined, to discuss potential changes to part 23.

However, the Department does not believe it is appropriate to retain the "sunset" provision itself. The Department can, and will, review the provisions of the rule without this provision being in place. Moreover, as the preamble discussion for section 23.7 itself pointed out, the ACDBE program is mandated by statute. The Department does not believe that it would be meaningful to eliminate a regulation when its underlying statutory mandate remains applicable to airports and other participants. Doing so would simply cause confusion and disruption, making it more difficult for all parties concerned to carry out their responsibilities under the statute, which is not self-executing. A regulatory framework is necessary for rational implementation of the statute. Periodic program reviews by the Department, as well as consideration from time to time of the continuing need for the program by Congress, meet the durational element of narrow tailoring satisfactorily.

Moreover, the Department is convinced that programs like those in 49 CFR part 23 and its companion DBE rule, 49 CFR part 26, remain necessary to redress discrimination and its effects in airport programs and to ensure a level playing field for small businesses owned and controlled by socially and economically disadvantaged individuals. The extensive evidence provided to a March 2009 hearing of the House Transportation and Infrastructure Committee on this subject, and the findings of continuing need for DBE programs in the House-passed version of the Federal Aviation Administration

reauthorization bill (H.R. 915), as well as the Department's long-term experience in operating the program, support this conclusion.

For these reasons, the Department proposed to amend section 23.7 by removing the "sunset" language and substituting a requirement for program review. The Department received only one comment to the docket, from an advocacy organization that opposes any use of race-conscious measures to remedy discrimination and its continuing effects. The commenter suggested that the regulation should be allowed to go out of effect, since, in the commenter's view, there is no current justification for the use of race-conscious remedies in DOT programs. The Department does not agree with this commenter. Federal Courts have unanimously found that DOT's DBE rules are constitutional, and the information presented in the March 2009 House of Representatives hearing referenced above provides strong evidence of the continuing need for the DBE program in aviation and other transportation contexts.

We believe that the rationale for the proposed amendment to section 23.7 is sound, and we are, therefore, issuing this final rule deleting the "sunset" provision."

#### Regulatory Analyses and Notices

##### *Administrative Procedure Act*

Having considered the potentially high risk of disruption posed by the current "sunset" provision, the Department believes that the program review approach embodied in this rule provides a better way of achieving the objective of ensuring that the durational element of narrow tailoring is achieved. In order to ensure that all parties understand that the program and regulation will continue without interruption or uncertainty, the Department believes that it is important to remove the "sunset" provision and substitute the program review approach at this time.

In order to ensure that this amendment goes into effect before the April 21, 2010, date on which the existing sunset provision would terminate part 23, it is necessary for the amendment to become effective before that date. For this reason, the Department finds good cause, under section 553 of the Administrative Procedure Act, to make the rule effective immediately.

##### *Executive Order 12866 and Regulatory Flexibility Act*

The Department has determined that this action is not a significant regulatory action for purposes of Executive Order 12866 or the Department's regulatory policies and procedures. The rule does not impose any costs or burdens on grantees or other parties and simply keeps in place the opportunity for interested parties to participate in a program review. It makes no changes in the obligations of any party. For these reasons, the Department certifies that the rule does not have a significant economic impact on a substantial number of small entities.

##### *Paperwork Reduction Act*

This rule does not create any information collection requirements covered by the Paperwork Reduction Act.

##### List of Subjects in 49 CFR Part 23

Administrative practice and procedures, Airports, Civil rights, Government contracts, Grant programs—transportation, Minority business, Reporting and recordkeeping requirements.

Issued at Washington, DC, March 25, 2010.

**Ray LaHood,**

*Secretary of Transportation.*

■ For reasons discussed in the preamble, the Department of Transportation amends Title 49 of the Code of Federal Regulations, part 23, as follows:

■ 1. The authority citation for 49 CFR 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. Section 23.7 is revised to read as follows:

##### **§ 23.7 Program reviews.**

In 2010, and thereafter at the discretion of the Secretary, the Department will initiate a review of the ACDBE program to determine what, if any, modifications should be made to this part.

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