

commodity data on a sub-trade basis pursuant to § 355.703(d) of this chapter.

Bryant L. VanBrakle,
Secretary.

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Parts 23 and 26

[Docket OST-97-2550]

RIN 2105-AD51

Disadvantaged Business Enterprise Program

AGENCY: Office of the Secretary, DOT.
ACTION: Final rule.

SUMMARY: This document adjusts the dollar limits and size limits used to define small businesses for the Department of Transportation's Airport Concessions Disadvantaged Business Enterprise (ACDBE) program. The Department of Transportation amends these size limits in order to ensure that the opportunity of small businesses to participate in the ACDBE program remains unchanged after taking inflation into account. This document, as required by statute, also adjusts the dollar limits used to define small businesses for the Department of Transportation's Disadvantaged Business Enterprise (DBE) program, which applies to State and local highway, transit, and airport recipients of DOT financial assistance. This document also corrects a reference error in a previous final rule. Finally, this document makes minor changes to the language of a previous rule in order to accurately explain the role of administrative guidance material.

DATES: This rule is effective May 2, 2007.

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) 3669313 (fax), (202) 755-7687 (TTY), bob.ashby@dot.gov (e-mail).

SUPPLEMENTARY INFORMATION:

Background

On March 22, 2005, the Department published a final rule revising 49 CFR Part 23—the regulation governing the airport concessions disadvantaged business enterprise (ACDBE) program.

On the same day, the Department published a supplemental notice of proposed rulemaking (SNPRM) on the business size standards for eligibility in the ACDBE program as well as on two other matters concerning implementation of the program. This final rule addresses the issues raised in the SNPRM and the comments made in response to the SNPRM.

The DBE Airport Concessions 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 planning and airport development financial assistance programs is 49 U.S.C. 47113.

ACDBE Gross Receipts Size Standards

The ACDBE program is designed to help small business concerns, owned and controlled by socially and economically disadvantaged individuals, become self-sufficient and able to compete with non-disadvantaged firms. Under the current DOT rule, if the airport concessions firm's annual gross receipts averaged over the preceding three fiscal years exceed \$30 million, then it is not considered a small business eligible to be certified as an ACDBE. The Department notes that the existing size standards have not been adjusted for inflation since June 1, 1992. This final rule adjusts the size standards for eligibility as an ACDBE.

A number of comments submitted to the Department supported adjusting the

gross receipts size limit for inflation. One comment suggested that the Department consider distinct size standards for each type of concession. A number of comments also suggested that an employee based size standard is inappropriate because businesses may operate using different business model configurations with different numbers of employees. These comments also point out that verifying the number of employees is more complex than verifying gross receipts, which are recorded in tax returns.

This final rule adjusts the general ACDBE gross receipts cap for inflation. This rule only applies an employee based size standard if the business operates pay telephones or if the business is an automobile dealer. The Department views a general gross receipts size limit that is adjusted for inflation as the most efficient and fair way to establish size limits for the ACDBE program. The adjustment compensates for the rise in the general level of prices over time from the second quarter of 1992 to the third quarter of 2006. In order to ensure that this adjustment is made on a more timely basis in the future, the rule provides for a similar adjustment every two years, using the same methods. At two year intervals, the Department will publish a final rule to update the size standard numbers.

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 2006 dollars. A number of comments opposed the idea of making Part 23 and Part 26 size standards identical because the capitalization requirements for airport concessions are much higher. The Department agrees and will not harmonize the standards.

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. 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 third quarter of 2006 (128.352) by 1992's second quarter price deflator (80.583). The result of the calculation is 1.5928, which represents an inflation rate of 59.28% from the second quarter of 1992. Multiplying the \$30,000,000 figure for small business enterprises by 1.5928 equals \$47,784,000, which will be rounded off to the nearest \$10,000, or \$47,780,000.

Therefore, under the new rule, if a firm's gross receipts, averaged over the firm's previous three fiscal years, exceeds \$47,780,000, 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 \$40 million. 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 third quarter of 2006 (128.352) by 1992's second quarter price deflator (80.583). The result of the calculation is 1.5928, which represents an inflation rate of 59.28% from the second quarter of 1992. Multiplying the \$40,000,000 figure for car rental companies by 1.5928 equals \$63,712,000, which will be rounded off to the nearest \$10,000, or \$63,710,000.

Therefore, under the new rule, if a car rental company's gross receipts, averaged over the company's previous three fiscal years, exceeds \$63,710,000, then it exceeds the airport concessions car rental company size limit contained in Part 23.

A number of comments also supported establishing car rental goals on a nationwide basis for car rental agencies with a nationwide presence. The Department recognizes that a number of issues need to be considered before such a rule can be published. The Department will continue to consider developing a future rulemaking on nationwide car rental company goals. The Department will also continue to look for input from stakeholders when drafting any future rule on this subject.

ACDBE Banks and Financial Institutions Size Standards

A number of comments said that financial industry regulators (*e.g.*, the Federal Reserve Board of Governors, the Federal Deposit Insurance Corporation, the Office of the Comptroller of Currency, and the Office of Thrift Supervision) and the banking industry itself consider banks with less than \$1 billion in assets to be "small" institutions. These comments went on to point out that the assets needed to operate any financial institution are high, even for the smallest banks, because of compliance burdens and technology expenses. In its comments, the American Bankers Association discussed the difference in efficiency between banks with less than \$1 billion in assets and banks with over \$1 billion in assets. A December 5, 2006 report from the American Bankers Association stated that the largest minority bank has assets of \$638 million. The report also states that 61% of all black owned banks have assets under \$100 million.

The existing rule imposes a \$275 million asset limit for banks and financial institutions. This final rule increases the dollar amount of assets that a bank or financial institution may have while still remaining eligible to participate in the ACDBE program; the new limit is \$750 million. The new size standard will more closely approach the "small" bank and financial institution standards referenced in the comments while accommodating the size of actual minority financial institutions. The new standard will also reflect the size differences between most minority banks and the banking industry generally.

ACDBE Automobile Dealer Size Standards

Finally, the current rule has no unique size standard for automobile dealers. Some comments suggested that the size standard for automobile dealers selling vehicles to car rental concessionaires at airports should be based on the number of employees working for a dealer. The comments recommend an employee based size standard because automobile dealers who process sales of fleets of cars to car rental companies ("fleet dealers") generate high gross sales, with the result that few, if any, fleet dealers would qualify as small businesses, under the existing standard. A number of commenters recommended that a 500-employee size standard be created for car dealers, which, in their view, would ensure that all potential DBE car dealers would qualify as small businesses.

The Department believes that commenters made a persuasive case for replacing the current gross receipts standard with an employee-based standard. However, we are concerned that using the suggested 500 employee standard would go too far in the other direction, encompassing all but a few of all car dealers in the industry (2005 statistics from the National Association of Automobile Dealers, for example, state that the average number of employees of a dealer was 53). We believe that a small business standard should not be so inclusive that the distinction between smaller and larger businesses is erased. At the same time, we realize that "fleet dealers," who sell large numbers of cars to car rental companies and other fleet purchasers, are likely to have more employees than the typical retail dealer. Consequently, we are establishing a 200 employee standard for purposes of this rule.

Fraud, Abuse, and Administrative Burdens in the ACDBE Program

In the NPRM, the Department asked for comment on ways to better monitor the eligibility of ACDBEs as well as the ongoing performance of ACDBEs in the concession business. A number of comments responded to this inquiry. These comments suggested creating additional reporting requirements, detailed annual reviews, and more detailed initial review of certification applications. Some comments voiced concern with the administrative burdens from the monitoring and goal setting that is already required by the ACDBE program, pointing out that this burden is especially significant for small hub airports. The Department has reviewed the current administrative requirements of the rule and will not change the process in this final rule. The ACDBE program carefully balances the benefits of administrative requirements that are designed to eliminate fraud and abuse with the burdens associated with those requirements, and we do not believe that further regulatory provisions are needed at this time.

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. The existing DBE business size limits became effective on August 10, 2005 with the passage of SAFETEA-LU. Under the existing rule, if a firm's average annual gross receipts over the preceding three fiscal years exceed \$19,570,000, 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 rule will provide for annual calculations to make this adjustment, with future adjustments made by final rule.

The inflation rate on purchases by State and local governments for the current year is calculated by dividing the price deflator for the third quarter of 2006 (128.352) by 2005's third quarter price deflator (123.079). The result of the calculation is 1.0428, which represents an inflation rate of 4.28% from the third quarter of 2005.

Multiplying the \$19,570,000 figure for disadvantaged business enterprises in Department of Transportation financial assistance programs by 1.0428 equals \$20,407,596, which will be rounded off to the nearest \$10,000, or \$20,410,000.

Therefore, if a firm's gross receipts, averaged over the firm's previous three fiscal years, exceeds \$20,410,000, then it exceeds the small business size limit for participation by disadvantaged business enterprises in Department of Transportation financial assistance programs contained in the statutes and in Part 26.

Corrections

This rule corrects an error in the definition section of the original ACDBE rule. In the first publication of the rule, the definition of "small business concern" incorrectly referred to § 23.23 for the applicable size standards. The definition of a "small business concern" now refers readers to § 23.33 for additional information on the size standards necessary to qualify as a "small business concern." In addition, we are amending sec. 23.11 to add an omitted reference to sec. 26.109, concerning confidentiality of DBE information.

Guidance Documents Issued by the Department of Transportation

The changes to § 26.9 of 49 CFR Part 26 are intended to clarify the role of guidance documents in the Department's Disadvantaged Business Enterprise (DBE) programs. Guidance documents do not have the same binding authority as a final "legislative" rule; however, guidance documents do express the Department's official view of the meaning and application of our rules. Consequently, we are deleting the word "binding."

The change also clarifies that this provision applies to guidance issued by individual operating administrations as well as by the Office of the Secretary of Transportation (OST) or DOT as a whole. For example, guidance could not purport to express the official views of

FHWA, FTA, or FAA if it did not comply with this provision. This provision also applies to any guidance or instructional material prepared by an outside party (e.g., a trade association) that is endorsed in any way or used in training sessions sponsored by DOT or any of its modal administrations. Section 26.9, as originally drafted, was intended to have this effect. However, because some questions have been raised about whether the language of the section effectively covers modal-specific, as distinct from Department-wide, guidance we are making the language of this section even more specific.

For the same reasons, this rule makes a parallel change to § 23.13 of 49 CFR Part 23. We also note that the review mechanism specified in these sections would be the method through which the Department would comply with provisions of the recently-issued Executive Order 13422 and OMB Bulletin on Good Guidance Practices for any guidance issued by the Department that would be considered to be significant guidance.

Regulatory Analyses and Notices

This rule is non-significant for purposes of Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. The rule is an essentially 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. This rule does not have Federalism impacts sufficient to warrant consultation with state and local officials. The rule does not impose information collection requirements subject to the Paperwork Reduction Act.

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 and modifying the size standards as measured by average annual gross receipts, total asset amounts, and total number of employees. Therefore, I certify that the rule will not have a significant economic impact on a substantial number of small entities. Since this rule pertains to a nondiscrimination requirement and affects only Federal financial assistance programs, the Unfunded Mandates Act does not apply.

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: 42 U.S.C. 200d *et seq.*; 49 U.S.C. 47107 and 47123; Executive Order 12138, 3 CFR, 1979 Comp., p. 393.

■ 2. Amend § 23.3 by revising the definition of "Small business concern" to read as follows:

§ 23.3 What do the terms in this part mean?

* * *

Small business concern means a for profit business that does not exceed the size standards of § 23.33 of this part.

* * * * *

§ 23.11 [Amended]

■ 3. Amend § 23.11 by removing "26.107" and adding in its place "sec. 26.109".

■ 4. Amend § 23.13 by revising paragraphs (a) and (b) to read as follows:

§ 23.13 How does the Department issue guidance, interpretations, exemptions, and waivers pertaining to this part?

(a) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 23 and issued after April 21, 2005, express the official positions and views of the Department of Transportation or the Federal Aviation Administration.

(b) The Secretary of Transportation, Office of the Secretary of Transportation, and the FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or the FAA, only if they are issued over the signature of the

Secretary of Transportation or if they contain the following statement:

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 23.

■ 5. 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 \$47.78 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: \$750 million in assets;

(2) Car rental companies: \$63.71 million average annual gross receipts over the firm's three previous fiscal years;

(3) Companies providing pay telephones: 1,500 employees;

(4) Automobile dealers: 200 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. These adjustments are made every two years from May 2, 2007. The Department publishes a final rule informing the public of each adjustment.

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

■ 1. The authority citation for 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.

■ 2. Revise § 26.9 to read as follows:

§ 26.9 How does the Department issue guidance and interpretations under this part?

(a) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after March 4, 1999 express the official positions and views of the Department of Transportation or any of its operating administrations.

(b) The Secretary of Transportation, Office of the Secretary of

Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or any of its operating administrations, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 26.

■ 3. 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 \$20.41 million.

(c) The Department adjusts the number in paragraph (b) 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 issues a final rule by August 10 of each year making this adjustment.

Issued this 20 day of March 2007, at Washington DC.

Mary E. Peters,

Secretary of Transportation.

[FR Doc. E7–6054 Filed 3–30–07; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 061121304–7053–02; I.D. 112006B]

RIN 0648–AT87

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Gulf Red Snapper Management Measures

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

ACTION: Temporary rule; interim measures.

SUMMARY: This final rule implements interim measures to reduce overfishing of Gulf red snapper. This final rule reduces the commercial and recreational quotas for red snapper, reduces the commercial minimum size limit for red snapper, reduces the recreational bag limit for Gulf red snapper, prohibits the retention of red snapper under the bag limit for captain and crew of a vessel operating as a charter vessel or headboat, and establishes a target level of reduction of shrimp trawl bycatch mortality of red snapper. The intended effect is to reduce overfishing of red snapper in the Gulf of Mexico.

DATES: This final rule is effective May 2, 2007 through September 29, 2007, except for amendments to § 622.37, which are effective April 2, 2007 through September 29, 2007.

ADDRESSES: Copies of documents supporting this final rule, including a final environmental impact statement (FEIS), a Record of Decision (ROD), and a final regulatory flexibility analysis (FRFA), may be obtained from Peter Hood, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

FOR FURTHER INFORMATION CONTACT: Peter Hood, telephone: 727–551–5784, fax: 727–824–5308, e-mail: peter.hood@noaa.gov.

SUPPLEMENTARY INFORMATION: The red snapper fishery of the Gulf of Mexico is managed under the Fishery Management Plan (FMP) for the Reef Fish Fishery of the Gulf of Mexico, and the shrimp fishery is managed under the FMP for the Shrimp Fishery of the Gulf of Mexico. The FMPs were prepared by the Gulf of Mexico Fishery Management Council (Council) and are implemented under the authority of the Magnuson-