



**DEPARTMENT OF TRANSPORTATION**

**Office of the Secretary**

**49 CFR Part 23**

**[Docket No. OST-2011-0101]**

**RIN 2105-AE10**

**Airport Concessions Disadvantaged Business Enterprise: Program Improvements**

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

**ACTION:** Final rule.

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**SUMMARY:** This final rule amends the Department of Transportation's Airport Concessions Disadvantaged Business Enterprise (ACDBE) regulation to conform it in several respects to the disadvantaged business enterprise (DBE) rule for highway, transit, and airport financial assistance programs. This rule also amends small business size limits to ensure that the opportunity for small businesses to participate in the ACDBE program remains unchanged after taking inflation into account. This final rule also provides an inflationary adjustment in the personal net worth (PNW) cap for owners of businesses seeking to participate in DOT's ACDBE program and suspends, until further notice, future use of the exemption of up to \$3 million in an owner's assets used as collateral for financing a concession.

**DATES:** This rule's amendments to 49 CFR 23.3 and 23.35 are effective [insert date of publication in the *Federal Register*]. This rule's amendments to 49 CFR 23.29, 23.33,

23.45, and 23.57 are effective [insert date 30 days from publication in the *Federal Register*]

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**SUPPLEMENTARY INFORMATION:** On January 28, 2011, the Department of Transportation published a Final Rule making several program improvements to the Department's DBE program rule (49 CFR Part 26) for financial assistance programs (76 FR 5083). On May 27, 2011, the Department issued a notice of proposed rulemaking (NPRM) that proposed conforming amendments to the Department's companion rule for the ACDBE program (49 CFR Part 23). The Department received a total of nine comments concerning the NPRM from three ACDBE firms, two consultants, one trade association, two airport recipients, and one individual.

In the preamble to the proposed rule, the Department explained that it was not necessary to propose conforming changes to Part 23 that would be parallel to all of the Part 26 changes. The NPRM noted Part 23 has existing provisions that already conform many of the amendments in Part 26. It cited as an example that it was not necessary to include a Part 23 provision parallel to the change to § 26.11 concerning the frequency of

reports, since § 23.27(b) already states the appropriate reporting frequency for Part 23 reports.

Additionally, the NPRM noted that there are many Part 26 amendments that apply automatically to Part 23 because certain sections in Part 23 incorporate provisions of Part 26. A list of these amendments was provided in the NPRM, with an explanation of their applicability to the ACDBE program, and are listed below again for reference:

- § 26.31: This amendment, requiring that the DBE directory include the list of each type of work for which a firm is eligible to be certified, applies to the ACDBE program as well.
- § 26.51: Applied in the ACDBE context, this amendment directs recipients that originally set all race-neutral goals to start setting race-conscious concession-specific goals if it appears that the race-neutral approach was not working.
- § 26.53: As applied to ACDBEs, this amended section sets forth the circumstances in which a prime concessionaire has good cause to terminate an ACDBE firm.
- § 26.71: Under this amended section, the types of work an ACDBE firm can perform must be described in terms of the most specific available NAICS code for that type of work.
- § 26.73: This amended section provides that certification of a firm may not be denied solely on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success.

- § 26.81: The requirements for Unified Certification Programs (UCPs) were amended to require the UCP to revise the print version of the Directory at least once a year.
- § 26.83: The amended procedures for making certification decisions apply in the ACDBE context. The amendments include a new subsection that addresses the procedure for a certification decision involving an application that was withdrawn and then resubmitted.
- § 26.84: This section was removed in the recently issued Part 26 Final Rule.
- § 26.85: This is a section describing the process of interstate certification for a DBE firm. This includes the information the applicant must provide to the other state (“State B”), what actions State B must take when it receives an application, and appropriate reasons for making a determination that there is good cause to believe that the home state’s, State A, certification of the firm is erroneous or should not apply in State B.

Today’s final rule also includes the inflationary adjustment of the size limits on small businesses participating in the ACDBE program. On April 3, 2009, the DOT adopted a final rule that required it to adjust the general ACDBE gross receipts caps for inflation every two years using the same method, and to publish a final rule to update the size standard numbers. This final rule updates the ACDBE gross receipts caps that were published on April 3, 2009, to reflect 2011 dollars through the fourth quarter of calendar year 2011.

## **Comments and Responses**

In an effort to ensure that the Part 26 changes made sense in the ACDBE context, the NPRM requested comments on the following as to whether there were terms or concepts in the Part 26 amendments that needed to be modified to conform to Part 23.

### **Improving Interstate Certification**

The Department received one comment from a trade association recommending the issuance of a guidance document to ensure that the objectives of improving interstate certification are achieved. In regards to the § 26.85 process, this same association was concerned that the process for interstate certification for an ACDBE firm would not be applied consistently. They strongly recommended that training be provided to address the special circumstances that arise in the ACDBE context and that a central agency should verify certifications where there were disparate results among different UCPs. The association also strongly recommended that key certification-related elements, such as the certification application and Personal Net Worth (PNW) forms list of requested items, be used without modification.

Another commenter believed that while improvement of interstate certification was a much needed initial step, DOT should adopt a program that recognized certifications nationally for ACDBE firms. This commenter identified several benefits for a national approach, including ease for a national prime concessionaire to solicit ACDBE participation in an airport concession regardless of geographic area, thereby increasing the availability and the participation of ACDBEs as sub-concessionaires. This commenter also noted that a national certification program would assist recipients in reporting car rental accomplishments, since any certified ACDBE utilized by the car rental companies (most of whom are national firms) could be included. The commenter continued by recommending that the rule be amended to allow a recipient to count the

participation of an ACDBE firm that is certified in the firm's home state regardless of where the concession is located.

### **DOT Response**

The Department agrees that standardizing forms and interpretations and providing and fostering training for UCP personnel that addresses airport concessions and ACDBE circumstances, can improve consistency in the review of ACDBE applications and in the interstate certification process. In support of these objectives, the Department noted in the final Part 26 rule that it plans to issue a follow-on NPRM that will address improvements in the certification application and PNW forms, which certification agencies then would be required to use without change. These changes would apply to the ACDBE program as well. However, the Department does not view having a central agency verify an ACDBE's certification status, after receiving disparate results among different UCPs, to be a practical solution. The purpose of the interstate certification process is to address the very issue of disagreements among certifying agencies in a consistent manner. Moreover, there is already an office to which a firm can appeal an ACDBE certification denial decision – the U.S. DOT's Departmental Office of Civil Rights.

The Department had previously requested comments on the issue of nationwide approaches to certification and had responded to those comments in the May 10, 2010, NPRM to Part 26 DBE program improvements (75 FR 25818 (2010)). The approach the Department finally adopted was to first take steps to make interstate certification easier under the current statewide approach to certification. The Department believes that this approach is a significant incremental step toward nationwide reciprocity, which would increase the likelihood of achieving the benefits identified for the ACDBE program.

Regarding the stated need for certification training, we note that there is a requirement in the recently enacted FAA Modernization and Reform Act of 2012 that the Department develop mandatory certification training. The Department is currently considering how best to implement this mandate. In doing so, we can build on existing certification training that the Department already provides through webinars, conferences, and workshops.

### **Fostering Small Business Participation**

Though the Department stated in the NPRM that it would not propose a parallel provision in Part 23 for amended § 26.39 on fostering small business participation, we asked for comments on whether additional small-business-related provisions are needed in the concessions context. The Department explained that its current focus was on applying this provision to Federally-assisted contracting and associated issues such as “unbundling.” Two commenters responded with strong support for including a small business element in the ACDBE program that would unbundle large concession opportunities. They believed that certain business practices presented barriers to equitable participation by ACDBEs. The prime concessionaire model, they said, did not permit small-to-medium size ACDBEs to compete successfully for prime contract opportunities, as large firms under this model would be allowed to dominate the national marketplace as prime concessionaires. Consequently, this would create a significant obstacle for smaller firms trying to penetrate the market. Another reason given for including a small business element was that ACDBEs faced the same difficulties as other small businesses, such as obtaining loans. The association commenter stated that if a small business element provision was adopted for the ACDBE program, it should allow

for a great deal of local flexibility in determining an airport's small business provisions, and that FAA should monitor recipients' programs to ensure that the new small business provision would not undermine the existing ACDBE program. This association also suggested that the FAA should review whether the SBA small business size standards are appropriate for ACDBEs and recommended that the FAA perform increased monitoring and enforcement of the good faith effort provisions. A commenter also suggested that FAA provide more guidance on this provision.

### **DOT Response**

The Department appreciates the comments that have been received on the question regarding additional small business-related provisions in the concessions context. The initial response from commenters indicates there may be barriers to ACDBEs in the concessions program that a small business element may help to alleviate. Although we are not issuing a small business program requirement for the ACDBE program at this time, we will consider these comments in deciding whether to proceed with a small business provision for the ACDBE program in the future. The Department also hopes to learn from airport recipients' implementation of the small business element requirement for the Part 26 program.

### **Adjusting the Personal Net Worth Cap**

To conform to the Part 26 inflationary adjustment in the personal net worth (PNW) cap, the NPRM proposed to amend § 23.35 by substituting \$1.32 million for the current \$750,00 as the personal net worth (PNW) standard. The NPRM explained that the Part 23 PNW provision is separate from the PNW provision in Part 26, so a specific

Part 23 amendment was needed to maintain consistency between the two regulations. The ACDBE commenters strongly supported the PNW increase, and they applauded the Department for increasing the current standard to promote growth among ACDBEs and providing greater access to capital from financial institutions and capital markets.

One commenter, however, disagreed with the use of the Consumer Price Index (CPI) for determining the PNW increase, saying that it presumes erroneously that an ACDBE owner has grown his or her personal worth at the same rate as a non-ACDBE. The commenter suggested instead that the Department conduct an independent analysis to arrive at a PNW amount. The commenter also suggested that there be a lower PNW limit for ACDBEs entering the program, and a higher PNW limit for ACDBEs that are growing and may eventually graduate from the program. Two commenters suggested that further rulemaking was needed to make automatic adjustments to the PNW for inflation. One suggestion was to make the adjustment at a regular interval of every two or three years.

The Department also received several comments on the issue of retirement assets. Two ACDBEs, an ACDBE consultant, and an association strongly supported a change in the rule to exempt retirement assets from the disadvantaged business owner's PNW. Two commenters believed that it would be poor policy to discourage owners from providing for their retirement. They suggested that, as a minimum, certain types of retirement assets, such as company sponsored 401(k), profit sharing, and pension plans, which have capped contributions and are regulated by federal law, should be excluded from the PNW.

## **DOT Response**

The Department has adopted the Part 26 inflationary adjustment of the PNW cap to \$1.32 million for the Part 23 program, with the inflationary adjustment based on the Department of Labor's consumer price index (CPI) calculator. In choosing the CPI, the Department explained in the final Part 26 rule that the CPI appeared to be the one approach that is most relevant to an individual's personal wealth. While no index is perfect, the more complex approaches suggested by some commenters, including the development of a DOT-specific index, do not appear practicable. In the Preamble to the final rule for Part 26, the Department announced that it was not ready at that time to decide the issue of retirement assets. We are still evaluating this matter.

### **PNW Third Exemption**

The NPRM also requested comments on whether the third exemption that is currently a part of the Part 23 PNW definition should be retained in the definition, deleted altogether, modified, or replaced with a different but more workable provision aimed to achieve a similar objective. This third exemption is an exemption from the PNW calculation for "other assets that the individual can document as necessary to obtain financing or a franchise agreement for the initiation or expansion of his or her ACDBE firm (or have in fact been encumbered to support existing financing for the individual's ACDBE business), to a maximum of \$3 million." The NPRM summarized the background and rationale for the third exemption, which was added in the 2005 ACDBE rule (see 70 FR 14497-14499 (March 22, 2005)) to respond to concerns of commenters that a PNW standard of \$750,000 could inhibit opportunities for business owners to enter the concessions field and expand existing businesses. The Department's decision to establish the third exemption was also made in order to preserve the underlying standard

PNW for both the Part 23 and Part 26 programs while responding to comments that a higher standard could be justified in some cases in the ACDBE context. The Department also noted in the NPRM that it is aware that the \$3 million exemption from PNW for assets used as collateral for a loan has been difficult to implement, and we asked for comments on how to improve the definition of this exemption so that if retained, the exemption could be implemented more effectively.

Three commenters supported retaining the third exemption, and one commenter opposed it. An association noted that the uniqueness of the ACDBE industry required that ACDBEs have the ability to maintain capital to finance growth, development and expansion. One commenter opposed the exemption because the commenter believed it could be used as a tool to hide assets. This commenter was also concerned that the practice of an ACDBE using its personal property as collateral was not parallel to non-ACDBE business practices. Another commenter said the definition was unclear and that implementation required clarification since there was inconsistent application by UCPs. This commenter noted that the number of applicants using the third exemption was minimal and questioned whether there was a need to retain it. Although we did not receive specific suggestions for improvement, most commenters on this issue desired more guidance.

Because of the very limited number of responses the Department received to its request for comment on this issue, the FAA engaged a consultant to gather additional information on the subject. (A copy of the consultant's report has been placed in the docket.) The consultant contacted all certifying agencies in the DOT database, ultimately receiving responses from 20 agencies which, among them, had received 16 requests for use of the third exemption over the time the provision had been in effect.

Thirteen requests were granted (three of which were approved after appeals to the Departmental Office of Civil Rights). Three requests were denied. There were differences among these agencies in terms of the documentation that they required, and most thought that there was a lack of clarity in the Department's requirement that called for additional guidance and training. Some of the ACDBE firms interviewed said that uncertainty about the application of the provision would deter them from seeking to use the third exemption. The ACDBEs interviewed saw value in the provision, but agreed that further clarification and guidance were needed.

### **DOT Response**

Current evidence indicates that the third exemption is not used frequently, and, when it is, it often appears to be the subject of considerable uncertainty and confusion on the part of ACDBEs and certifying agencies alike. It may be subject to misuse. We believe that further consideration is necessary to determine whether the provision should be retained, modified, or deleted. Further study, including gathering more in-depth information about how the provision has been used to date, would be helpful in making this determination.

However, we recognize that deciding what modifications in the provision, if any, would be needed to clarify the provision, or developing additional guidance to clarify the existing provision, are likely to take a good deal of time. Moreover, this rule's inflationary adjustment of the underlying PNW cap to \$1.32 million, which maintains the real dollar value of the previous \$750,000 cap, may have the effect of mitigating what the Department saw, in 2005, as the need for adopting a provision of this kind. On the other hand, it is possible, given the comments of some program participants, that a provision of

this kind can have continuing utility, especially with further clarification, guidance, and training.

For these reasons, the Department has decided neither to continue the existing provision in effect nor to delete it. Rather, the Department is suspending the effectiveness of the provision until further notice. It is important to note that this suspension of the third exemption is prospective, not retroactive. This means that, where a firm applies for ACDBE certification or an existing firm obtains financing, a loan, or a franchise agreement after the effective date of this rule change, the third exemption will not apply. In such cases, the only exemptions from the PNW calculation will be the equity the disadvantaged owner of a firm has in his or her primary personal residence and the individual's ownership interest in the ACDBE firm in question.

However, in cases where a recipient or certifying agency has already calculated a firm owner's PNW, based on the third exemption based on financing, a loan, or a franchise agreement obtained before the effective date of this change, that calculation will then be allowed to stand. This includes situations in which an original calculation of PNW including the third exemption was made in the context of a certification that is later reviewed. Of course, as the owner pays down a loan, the amount of the owner's assets supporting that loan, and thus the assets that can be exempted from the PNW calculation, will decline with the loan balance. In all cases involving the application of the third exemption, the FAA retains the discretion to examine documents to ensure that the third exemption is being used properly.

Meanwhile, the Department will continue to evaluate this issue and seek additional input from stakeholders before deciding whether ultimately to remove, modify, or replace the third exemption. The Department will also consider what guidance may be

helpful in helping recipients to use the third exemption, or a modification of it, if and when its effectiveness is reinstated.

### **Monitoring the Work of ACDBEs**

The NPRM proposed to adopt in § 23.29 the change that was made in § 26.37 concerning enhanced monitoring of the actual performance of work by DBEs. The NPRM explained that airports would be responsible for reviewing documents and actual on-site performance to ensure that ACDBEs were actually performing the work committed to them during the concession award process, and to certify that they have done so to the FAA. All comments received on this issue were in favor of increased monitoring. An association commenter suggested that the Department and FAA provide guidance on practices that airports might use to monitor effectively the work of ACDBEs, given available resources.

### **DOT Response**

The Department has adopted the proposed change for enhanced monitoring in § 23.29. The FAA also plans to make available to all sponsors a compilation of best practices in monitoring DBE and ACDBE programs. This includes monitoring the work of ACDBEs as a product of the post award compliance reviews that it conducts of airport recipients' DBE and ACDBE programs, and a review of documents obtained from other sources. The FAA plans to develop such a compilation and post the results on its website.

### **Adjusting a Recipient's Overall Goal**

The NPRM also asked for comment on the provision in § 23.45(i) concerning the requirement to submit an adjustment to a recipient's overall goal to the FAA if a new concession opportunity estimated to be \$200,000 or more in estimated average annual gross revenues arose at a time that fell between normal submission dates for overall goals. Section 23.45(i) currently requires the recipient to submit its adjustment at least six months before executing the concession agreement for the new concession opportunity. The NPRM asked whether this provision should be retained or changed. Both airport recipient commenters (a large hub and a small hub) and an association commenter objected to the six-month submission requirement to the FAA. All asserted that the six-month submission would impose an undue burden on airport recipients, as it would create long and unacceptable lead times for executing new concession agreements that could result in funding problems for the concessionaire. The small hub airport recipient commenter recommended instead, that FAA require only a one to two month submission time, whereas the large hub airport recipient commenter believed that it was unnecessary to submit an adjustment at all since existing procedures for developing a three-year overall goal accommodate the identification of projected new opportunities.

### **DOT Response**

The Department believes that many airport recipients may still require an adjustment to their overall goal when it has one or more new concession opportunities that, for whatever reason, were not projected in their three-year plan. Since these opportunities may be significant and may offer ACDBE opportunities, airports are required to conduct an analysis to determine ACDBE availability and whether their overall goal should be adjusted. The reasons for the current requirement for sponsors to

submit an adjusted goal at least six-months before executing the concession agreement were to encourage the sponsor to obtain approval from the FAA prior to the issuance of a new concession opportunity that may offer ACDBE opportunities and to provide the FAA a reasonable amount of time to review the airport's submission. In response to the concerns expressed by the two airport sponsors and the association commenter, the Department is making two changes. In place of requiring an adjusted goal submission at least six months before executing the concession agreement, the Department will require that an adjusted goal be submitted to the FAA no later than 90 days prior to the sponsor's issuance of the solicitation. These two changes, the trigger event and the change in the submission deadline to the FAA, should help a sponsor obtain FAA's prior approval of its adjusted overall goal and include any ACDBE participation in the new concession opportunity consistent with the sponsor's approved ACDBE goal. FAA anticipates that it can complete its review within 45 days of receiving the sponsor's adjusted overall goal submission, assuming FAA has received all necessary information and any follow-up clarifications from the sponsor in a timely manner.

### **Accountability for Meeting Overall Goals**

The NPRM proposed to revise § 23.57 to make its accountability provisions parallel to those of the recently amended § 26.47(c). The rationale for doing so is the same as for Part 26. The NPRM requested comments on whether any further modifications of the language of this provision would be useful for purposes of the ACDBE program. Two commenters supported the accountability provision, while two commenters opposed it. Opponents of the accountability provision believed that the inability of the recipient to meet the overall goal was often the result of factors that were

beyond their control. One small hub airport commenter said that revenue generation was not in the control of the airport and that its experience was that the concessionaire often did not meet its ACDBE goal, but had to show its good faith efforts instead. Another commenter said there were events and fluctuations, such as shifts in airline traffic, which were beyond the control of the operator and could impact achievement. This commenter added that there may not be new opportunities available to make up for shortfalls in the overall goal achievement. Another commenter who opposed the provision said it would produce an undue burden for airport recipients. The commenter said that it already had a process that worked to correct goal shortfalls. Two commenters suggested that the threshold for shortfall be clearly defined. The airport recipient commenters were concerned about being placed in a “non-compliant” status. Due to the seriousness of being considered “non-compliant,” one commenter suggested that recipients should be given the opportunity to make corrections before a non-compliance determination is made by the FAA. Another commenter suggested that it simply submit a report as part of its annual accomplishment report that would allow for a fuller explanation of why it was unable to meet its overall goals, rather than be judged “non-complaint”. One commenter suggested that the regulation list acceptable corrective actions and that recipients be allowed to modify their overall goal if the analysis supported the modification.

### **DOT Response**

We agree that achievement of concession goals may vary over time, in part because concession receipts are driven by events that are beyond an airport’s control. Factors of this kind may increase or decrease ACDBE achievements, compared to earlier projections. We do not believe, however, that these or other factors or any other factors

should override the obligation of airport recipients to examine their concessions program in good faith and to explain and attempt to correct for circumstances or policies that may lead to shortfalls in meeting overall ACDBE goals. This examination, for example, may lead to a recommendation to take advantage of contract changes to negotiate for increased ACDBE participation that may not have been contemplated before, to discuss with ACDBEs and other concessionaires potential new opportunities, or to plan for future ACDBE participation through an extensive and comprehensive outreach program. When shortfalls can rationally be attributed specifically to factors beyond an airport's control, the airport would still explain its shortfall by reference to such factors. A requirement to report the analysis and corrective action called for under § 23.57(b)(3) to the FAA is imposed only on the CORE 30 airports,<sup>1</sup> or other airports as designated by the FAA, in order to limit information collection burdens on other airports.

As we explained in the preamble to the final rule for Part 26, the accountability mechanism is designed to promote transparency and accountability, and it is not the same as a finding of non-compliance. An airport recipient would only be in non-compliance if it refuses to make an accountability assessment when it falls below its overall goal. We also addressed the issue of administrative burden in the previously mentioned preamble. We do not believe that any work needed to meet this requirement is "undue," because the steps of an accountability review for recipients who fail to meet their overall goal should be a regular part of their program review when a key business objective is not met. Therefore, we are retaining the proposed accountability provision.

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<sup>1</sup> The 30 CORE airports presently handle 63 percent of the country's passengers and 68 percent of its operations.

## **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 \$52,470,000, then it is not considered a small business eligible to be certified as an ACDBE. This final rule makes an inflationary adjustment to the size standards for eligibility as an ACDBE. This adjustment compensates for the rise in the general level of prices over time from the first quarter of calendar year 2009 through the fourth quarter of calendar year 2011. 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 2011 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 indices.<sup>2</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 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 calendar year 2011 (123.622) by calendar year 2009's first quarter price deflator (114.971). The result

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<sup>2</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.

of the calculation is 1.0752, which represents an inflation rate of 1.075 % from the first quarter of calendar year 2009. Multiplying the \$52,470,000 figure for small business enterprises by 1.0752 equals \$ 56,415,744, which will be rounded off to the nearest \$10,000, or \$56,420,000.

Therefore, under this final rule, if a firm's gross receipts, averaged over the firm's previous three fiscal years, exceeds \$56,420,000, then it exceeds the airport concessions small business size limit contained in § 23.33.

### **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 \$69,970,000. 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 2011 is calculated by dividing the price deflator for the fourth quarter of calendar year 2011 (123.622) by calendar year 2009's first quarter price deflator (114.971). The result of the calculation is 1.0752, which represents an inflation rate of 1.075 % from the first quarter of calendar year 2009. Multiplying the \$69,970,000 figure for car rental companies by 1.0752 equals \$75,231,744, which will be rounded off to the nearest \$10,000, or \$75,230,000.

Therefore, under this final rule, if a car rental company's gross receipts, averaged over the company's previous three fiscal years, exceeds \$75,230,000, then it exceeds the airport concessions car rental company size limit contained in § 23.33.

## **Regulatory Analyses and Notices**

### **Administrative Procedure Act**

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency may waive the normal notice and comment requirements if it finds that they are impracticable, unnecessary, or contrary to the public interest. The Department finds that notice and comment for the portion of the rule at § 23.33 relating to inflationary adjustment of size limits for ACDBE eligibility is unnecessary and contrary to the public interest because it relates only to ministerial updates of business size standards to account for inflation, which does not change the standards in real dollar terms. These updates will assist entities attempting to be part of the Department's ACDBE program and should not be unnecessarily delayed. Accordingly, the Department finds good cause under 5 U.S.C. 553(b) to waive notice and opportunity for public comment. Other provisions of the final rule were preceded by an opportunity for notice and comment.

In addition, under the Administrative Procedure Act (5 U.S.C. 553(d)), an agency may make a final rule effective immediately upon publication, as distinct from the normal 30 days following publication, if it relieves a restriction or otherwise for good cause. The Department is making the amendments to §§ 23.3 and 23.35 effective immediately. The amendment to § 23.3 suspends prospectively, until further notice, the "third exemption" from the definition of personal net worth. Failure to make this suspension effective immediately would create a clear incentive for potential applicants to hurry their applications to recipients in order to "beat the clock." The Department has good cause to make the change effective immediately to prevent this foreseeable result of the normal 30-day delay in the effective date of a final rule provision.

The amendment to § 23.35 harmonizes the personal net worth criterion of the ACDBE (49 CFR Part 23) with that of the DBE rule (49 CFR Part 26), which the Department adjusted for inflation in 2011. Both will now be \$1.32 million. This action relieves a restriction on the personal net worth that may be held by an ACDBE owner, which previously had been limited to \$750,000. The Department has good cause for making this change effective upon publication because failing to do would expose otherwise eligible firms to the denial of ACDBE certification on the basis of an about-to-change personal net worth criterion, potentially causing these firms to lose business opportunities. In addition, it makes sense to have this provision go into effect at the same time as the suspension of the third exemption.

**Executive Orders 12866 and 13422 and DOT Regulatory Policies and Procedures**

This is a non-significant regulation for purposes of Executive Orders 12866 13422 and the Department of Transportation's Regulatory Policies and Procedures. The provisions in the rule involve administrative modifications to several provisions of a long-existing and well-established program, designed to improve the program's implementation and to harmonize these provisions with parallel provisions in the January 2011 amendments to 49 CFR Part 26, the Department's DBE rule for financial assistance programs, which was itself a non-significant rulemaking. These portions of the rule do not alter the direction of the program, make major policy changes, or impose significant new costs or burdens.

One provision of the rule concerns a ministerial adjustment for inflation of a small business size standard that does not change the standard in real dollar terms. This provision will not impose burdens on any regulated parties. In addition, this provision would not create 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 for the rule.

### **Regulatory Flexibility Act**

A number of provisions of the rule reduce small business burdens or increase opportunities for small businesses. The personal net worth change would allow some small businesses to remain in the ACDBE program for a longer period of time. Small airport recipients would not be required to prepare or transmit reports concerning the reasons for overall goal shortfalls and corrective action steps to be taken as stated in § 23.57. Only a limited number of large airports would have to file these reports. These provisions of the rule do not make major policy changes that would cause recipients to expend significant resources on program modifications. With regard to the provision on inflationary adjustment of ACDBE size limits, we have evaluated the effects of this action on small entities and have determined that the only effect of this portion of the rule on small entities is to allow some small businesses to continue to participate in the ACDBE program by adjusting for inflation. For these reasons, the Department certifies that the rule does not have a significant economic effect on a substantial number of small entities.

### **Federalism**

A rule has implications for federalism under Executive Order 13132, *Federalism*, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under the Order and have determined that it does not have

significant implications for Federalism, since it merely makes administrative modifications to an existing program, and updates the dollar limits and size limits to define small businesses for the Department's ACDBE program. It does not change the relationship between the Department and State or local governments, preempt State law or State regulation, affect the States' ability to discharge traditional State governmental functions, or impose substantial direct compliance costs on those governments.

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

Since this rule pertains to a nondiscrimination requirement and affects only Federal financial assistance programs, the Unfunded Mandates Act does not apply.

### **Paperwork Reduction Act**

As required by the Paperwork Reduction Act of 1995, DOT has submitted the Information Collection Requests (ICRs) below to the Office of Management and Budget (OMB). Before OMB decides whether to approve these proposed collections of information and issue a control number, the public must be provided 30 days to comment. Organizations and individuals desiring to submit comments on the collections of information in this rule should direct them to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, Office of Information and Regulatory Affairs, Washington, DC 20503. OMB is required to make a decision concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the *Federal Register*. The Department's NPRM included the requisite PRA information. OMB did not submit comments to the rulemaking docket. As provided in 5 CFR 1320.11(h), the Department

will submit relevant material to OMB in order to receive an OMB control number for the information collections. The Department will publish a *Federal Register* notice concerning the assignment of a control number when that occurs.

We will respond to any OMB or public comments on the information collection requirements contained in this rule. The Department will not impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required.

For the information of interested persons we estimate that the total incremental annual burden hours for the information collection requirements in this rule is 13,101 hours.

The following is the incremental collection requirement in this rule:

Certification of Monitoring: (49 CFR § 23.29)

Each recipient would certify that it had conducted post-award monitoring of contracts which would be counted for ACDBE credit to ensure that ACDBEs had done the work for which credit was claimed. The certification is for the purpose of ensuring accountability for contract monitoring which the regulation already requires.

*Respondents:* 301 (i.e., airports with covered concessions).

*Frequency:* 1,311 non-car rental contracts to ACDBEs; 691 car rental concession contracts to ACDBEs, for a total of 2,002, or an average of 6.7 ACDBE contracts per airport.

*Estimated Burden Per Response:* ½ hour

*Estimated Total Annual Burden:* 1,001 hours.

Accountability Mechanism (49 CFR § 23.57)

If a recipient failed to meet its overall goal in a given year, it would have to determine the reason for its failure and establish corrective steps. Of the 301 airports

covered by this rule, 30 of the largest recipients would transmit this analysis to DOT if their overall goal was not achieved; smaller recipients would perform the analysis but would not be required to submit it to DOT. We estimate that about half of the recipients (150) would be subject to this requirement in a given year, and 20 of the 30 largest airports would have to submit their reports to the FAA in a given year.

*Respondents:* 150

*Estimated Average Burden Per Response:* 80 hours + 5 additional hours for recipients sending report to DOT. Total number of recipients sending report to DOT: 20.

*Estimated Total Annual Burden:* 12,100 hours.

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

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

**ISSUED THIS 7th DAY OF June, 2012 AT WASHINGTON D.C.**

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**Ray LaHood**

**Secretary of Transportation**

For the reasons set forth in the preamble, the Department of Transportation amends 49 CFR Part 23 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. In § 23.3, revise the definition of “personal net worth” to read as follows:

**§ 23.3 What do the terms used in this part mean?**

\* \* \* \* \*

*Personal net worth* means the net value of the assets of an individual remaining after total liabilities are deducted. An individual’s personal net worth (PNW) does not include the following:

- (1) The individual’s ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification;
- (2) The individual’s equity in his or her primary place of residence; and
- (3) Other assets that the individual can document are necessary to obtain financing or a franchise agreement for the initiation or expansion of his or her ACDBE firm (or have in fact been encumbered to support existing financing for the individual’s ACDBE business) to a maximum of \$3 million. The effectiveness of this paragraph (3) of this definition is suspended with respect to any application for ACDBE certification made or any financing or franchise

agreement obtained after [insert date of publication of this amendment in the *Federal Register*].

\* \* \* \* \*

3. Revise § 23.29 to read as follows:

**§ 23.29 What monitoring and compliance procedures must recipients follow?**

As a recipient, you must implement appropriate mechanisms to ensure compliance with the requirements of this part by all participants in the program. You must include in your concession program the specific provisions to be inserted into concession agreements and management contracts setting forth the enforcement mechanisms and other means you use to ensure compliance. These provisions must include a monitoring and enforcement mechanism to verify that the work committed to ACDBEs is actually performed by the ACDBEs. This mechanism must include a written certification that you have reviewed records of all contracts, leases, joint venture agreements, or other concession-related agreements and monitored the work on-site at your airport for this purpose. The monitoring to which this paragraph refers may be conducted in conjunction with monitoring of concession performance for other purposes.

4. 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 \$56.42 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: \$75.23 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.

5. In § 23.35, remove the number "\$750,000" and add in its place "\$1.32 million".

6. Revise § 23.45(i) to read as follows:

**§ 23.45 What are the requirements for submitting overall goal information to the FAA?**

\* \* \* \* \*

(i) If a new concession opportunity, the estimated average annual gross revenues of which are anticipated to be \$200,000 or greater, arises at a time that falls between normal submission dates for overall goals, you must submit an appropriate adjustment to your

overall goal to the FAA for approval no later than 90 days before issuing the solicitation for the new concession opportunity.

7. Revise § 23.57(b) and (c) to read as follows:

**§ 23.57 What happens if a recipient falls short of meeting its overall goals?**

\* \* \* \* \*

(b) If the awards and commitments shown on your Uniform Report of ACDBE Participation (found in Appendix A to this Part) at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your ACDBE program in good faith:

(1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;

(2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year;

(3) (i) If you are a CORE 30 airport or other airport designated by the FAA, you must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (b)(1) and (2) of this section to the FAA for approval. If the FAA approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

(ii) As an airport not meeting the criteria of paragraph (b)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to the FAA, on request, for their review.

(4) The FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.

(5) You may be regarded as being in noncompliance with this part, and therefore subject to the remedies in § 23.11 of this part and other applicable regulations, for failing to implement your ACDBE program in good faith if any of the following things occur:

(i) You do not submit your analysis and corrective actions to FAA in a timely manner as required under paragraph (b)(3) of this section;

(ii) FAA disapproves your analysis or corrective actions; or

(iii) You do not fully implement:

(A) The corrective actions to which you have committed, or

(B) Conditions that FAA has imposed following review of your analysis and corrective actions.

(c) If information coming to the attention of FAA demonstrates that current trends make it unlikely that you, as an airport, will achieve ACDBE awards and commitments that would be necessary to allow you to meet your overall goal at the end of the fiscal year, FAA may require you to make further good faith efforts, such as modifying your

race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

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