



DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 26

RIN No. 2105-AE92

Disadvantaged Business Enterprise Program; Inflationary Adjustment

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

ACTION: Final rule.

SUMMARY: The United States Department of Transportation (DOT) is amending the small business size limit under its Disadvantaged Business Enterprise (DBE) program, also known as the gross receipts cap, to ensure that small businesses may continue to participate in the Department's DBE program after taking inflation into account. This final rule provides an inflation adjustment to the size limit on small businesses participating in the DBE program and implements a statutory change to the size standard pursuant to the Federal Aviation Administration (FAA) Authorization Act of 2018.

DATES: This rule is effective [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

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 section 1101(b) of the Fixing America's Surface Transportation (FAST) Act (Pub. L. No. 114-94, Dec. 4, 2015), and the statutory provision governing the DBE program as it relates to airport financial assistance programs is 49 U.S.C. 47113.

Under the Department's existing rules, to qualify as an eligible DBE firm, a firm's average annual gross receipts over the preceding three fiscal years cannot exceed a DOT-specific gross receipts cap. On April 2, 2007, in response to direction in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, August 10, 2005) to adjust this gross receipts cap annually for inflation, the Department published a final rule adjusting the gross receipts cap for its DBE program in 49 CFR part 26 from \$19,570,000 to \$20,410,000 (72 FR 15614). On April 3, 2009, the Department published another final rule adjusting the gross receipts cap for its DBE program from \$20,410,000 to \$22,410,000 (74 FR 15222). The Moving Ahead for Progress in the 21st Century (MAP-21) Act (Pub. L. 112-141, July 6, 2012) maintained the \$22,410,000 gross receipts cap amount set by the April 2009 final rule. On October 2, 2014, the Department issued a final rule that increased the gross receipts cap to \$23,980,000 (79 FR 59565). In 2015, The FAST Act maintained the \$23,980,000 gross receipts cap set by the October 2014 rule. Section 1101(b)(2)(A)(ii) of the FAST Act reaffirms the Secretary of Transportation's requirement to adjust this amount annually for inflation. Accordingly, this final rule adjusts the gross receipts cap for inflation by increasing the gross receipts cap applicable to firms for purposes of Federal Highway Administration (FHWA)– and Federal Transit Administration (FTA)–assisted work to \$26,290,000.

The Federal Aviation Administration (FAA) Reauthorization Act of 2018 (Pub. L. 115-254) removed the gross receipts cap for purposes of eligibility for FAA-assisted

work. Therefore, the revised rule reflects that the gross receipts cap does not apply for purposes of determining a firm's eligibility for FAA-assisted work.

II. Business Size Standards for the DBE Program

To make an inflation adjustment to the gross receipts figures, DOT uses the Department of Commerce's price index for State and local consumption expenditures (gross output of general government). The Bureau of Economic Analysis at the Department of Commerce prepares constant dollar estimates of State and local government purchases of goods and services by deflating current dollar estimates by suitable price indexes. These indexes include purchases of durable and non-durable goods, and other services. Using these price deflators enables the Department to adjust dollar figures for inflation from past years.

The current inflation rate on purchases by State and local governments is calculated by dividing the price deflator for the fourth quarter of 2019 (116.030) by 2015's fourth quarter price deflator (105.829). See Bureau of Economic Analysis Table 3.10.4, Price Indexes for Government Consumption Expenditures and General Government Gross Output (January 30, 2020). The result of the calculation is 1.09639, which represents an inflation rate of 10.9639% from the fourth quarter of 2015. Multiplying the FAST Act's \$23,980,000 standard for disadvantaged business enterprises in DOT financial assistance programs by 1.09639 equals \$26,291,465, which will be rounded off to the nearest \$10,000 is \$26,290,000. Therefore, if a firm's gross receipts averaged over the firm's previous three fiscal years exceeds \$26,290,000, it exceeds the small business size limit for participation in FHWA and FTA-assisted work under the Department's DBE program. The Department will adjust this amount for inflation on an annual basis. In subsequent years, the revised amount will be published on the Departmental Office of Civil Rights' website.

Regulatory Analyses and Notices

Under the Administrative Procedure Act (5 U.S.C. 553(b)(B)), an agency may waive notice and comment procedures if it finds good cause that such procedures are impracticable, unnecessary, or contrary to the public interest. The Department finds that notice and comment for this rule is unnecessary because it only relates 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. Accordingly, the Department finds good cause under 5 U.S.C. 553(b)(B) to waive notice and opportunity for public comment.

A. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs), Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and 49 CFR Part 5 (DOT Administrative Rulemaking, Guidance, and Enforcement Procedures)

This rule is not a significant regulatory action under Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review. It is also not significant within the meaning of DOT regulatory policies and procedures. This rule is issued in accordance with the Department's rulemaking procedures found in 49 CFR part 5 and DOT Order 2100.6.

The Department does not anticipate that this rulemaking will have an economic impact on regulated entities. The rule is a ministerial adjustment for inflation of a statutory small business size standard. It will not impose burdens on any regulated parties.

This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

B. Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), DOT has 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. The rule is a ministerial update to the size limits to define small businesses 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 DBE programs by adjusting for inflation, and to align the regulation with a change to the part 26 size standard for FAA-assisted work pursuant to the FAA Reauthorization Act of 2018. Therefore, the Department certifies that this rule would not have a significant economic impact on a substantial number of small entities.

C. Executive Order 13132 (Federalism)

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

D. Executive Order 13175 (Tribal Consultation)

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments). Because this rule will not significantly or uniquely affect the Indian tribal communities, and will not impose substantial direct compliance costs, the funding and consultation requirements of the Executive Order do not apply.

E. 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 \$148.1 million or more in any one year (2 U.S.C. 1532). 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 Reform Act does not apply.

F. 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.

G. 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.

H. National Environmental Policy Act

The agency has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321, *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, “Procedures for Considering Environmental Impacts” (44 FR 56420, October 1, 1979). Categorical exclusions are actions identified in an agency’s NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment or environmental impact statement. The purpose of this rulemaking is to make an inflation adjustment of the size limit on small businesses

participating in the DBE program. The agency does not anticipate any environmental impacts, and there are no extraordinary circumstances pertaining to this rulemaking.

List of Subjects in 49 CFR Part 26

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

For the reasons stated in the preamble, the Department of Transportation amends 49 CFR part 26 as follows:

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

1. The authority citation for part 26 is revised to read as follows:

Authority: 23 U.S.C. 324; 42 U.S.C. 2000d, et seq.; Sec. 1101(b), Pub. L. 114-94, 129 Stat. 1312, 1324; 49 U.S.C. 47113, 47123; Sec. 150, Pub. L. 115-254, 132 Stat. 3215.

2. In § 26.65, revise paragraph (b) to read as follows:

§ 26.65 What rules govern business size determinations?

* * * * *

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE for the purposes of Federal Highway Administration and Federal Transit Administration-assisted work 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 121.104), over the firm's previous three fiscal years, in excess of \$26.29 million.

The Department will adjust this amount for inflation on an annual basis. The adjusted amount will be published on the Department's website in subsequent years.

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Issued this 25th day of November, 2020, at Washington, D.C. under authority delegated in 49 CFR 1.27(a):

Steven G. Bradbury,
General Counsel.

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