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Background

On February 2, 1999, the Department published a final rule revising its Disadvantaged Business Enterprise (DBE) program. The new regulations (49 CFR part 26) replaced 49 CFR part 23, except for the airport concessions regulations. Airport concessions are being discussed in a separate rule. The NPRM on airport concessions was issued December 12, 2002 (67 FR 76327). Its final rule is pending. In drafting the 1999 final rule, the Department considered many sources, including the results of a government-wide review of affirmative action programs, requirements set forth in the Supreme Court's decision in *Adarand v. Peña* (515 U.S. 200 (1995)), extensive Congressional debate during the reauthorization of the DBE program, and over 900 comments. Because of the enormity of the 1999 revisions, there were several requirements, such as the establishment of a uniform certification form, that were reserved for a later date. Additionally, after administering the program since 1999 it is evident that clarification of some provisions and revisions to other provisions would be useful.

I. Interim Final Rule Regarding Threshold Requirements and Other Changes

The Department published an IFR in the **Federal Register** on November 15, 2000 (65 FR 68949). The IFR addressed threshold requirements for Federal Transit Administration recipients and

Federal Aviation Administration recipients to establish DBE programs and submit overall goals. In addition, the IFR corrected and clarified misleading language in 49 CFR part 26. The IFR also provided examples of ways to collect information required for bidders lists, and clarified that in order to verify whether a DBE firm actually performed the work they were committed to, both commitments and attainments must be tracked and reported. Finally, the IFR corrected potentially misleading language regarding evidence that must be considered when setting overall goals. The Department received only four comments on this IFR that are addressed below.

A. Substantive Changes

DBE Programs

Section 26.21(a)(2) of the rule states that Federal Transit Administration (FTA) recipients who receive \$250,000 or more in a fiscal year in various forms of FTA assistance must have a DBE program. Similarly, subsection (a)(3) requires Federal Aviation Administration (FAA) recipients who receive grants of \$250,000 or more in a fiscal year for airport planning and development to have a DBE program. The IFR changed the threshold to \$250,000 in contracting opportunities. The change requires FTA recipients who project awarding more than \$250,000 in prime contracts in a Federal fiscal year from FTA assistance to have a DBE program. Similarly, FAA recipients who project awarding more than \$250,000 in prime contracts in a fiscal year from grants for airport planning and development are required to submit a plan. Prime contracts include contracts for goods as well as contracts for services.

The Department made these changes to decrease the administrative burden on transit authorities and small airports. Many of these transit authorities and small airports receive more than \$250,000 in FTA or FAA funds, but have only a small amount of funding available for actual contracting opportunities. For example, FAA grants funding for land acquisition projects. While many of these grants exceed \$250,000, the value of contracting opportunities covered by the DBE program (e.g., real estate appraisal and survey) frequently is well below \$250,000. The major portion of grant funds is generally for the land purchase itself, which is not a "DOT-assisted contract" under the definition of § 26.5.

We only received two comments on this provision, both supporting the

change. It was suggested, however, that DOT monitor the number of recipients and Federal contracts affected by this change to ensure that the purpose of the DBE program is not compromised. We believe that this change will only affect a small number of our recipients and monitoring the way in which recipients carry out provisions of the rule is a normal function of FTA and FAA.

One commenter requested that we extend the \$250,000 threshold to transit vehicle manufacturers (TVMs). We do not believe that any TVMs would benefit from the \$250,000 threshold. The cost of just one vehicle would exceed \$250,000; therefore, any change would be meaningless.

Therefore, we are adopting the provisions of the IFR without change. FTA and FAA recipients who reasonably anticipate awarding \$250,000 or less in prime contracts in a fiscal year are not required to submit a DBE plan. This change affects new recipients or recipients who do not have a DBE program. The rule also reduces burdens on recipients who already have DBE programs. If such a recipient anticipates awarding \$250,000 or less in prime contracts it does not have to submit a DBE overall goal for that year.

Goal Setting

Section 26.45 requires recipients to submit new goals on August 1 of each year. The IFR revised this section to exempt FTA or FAA recipients with existing DBE programs from setting updated overall goals when they do not project awarding prime contracts exceeding \$250,000 (excluding vehicle transit purchases) in the year in which the updated goal would apply.

Under this provision, if a recipient is administering a DBE program, but is an FAA or FTA recipient who anticipates awarding \$250,000 or less in prime contracts in a Federal fiscal year, the recipient is not required to develop overall goals for that fiscal year. The recipient's existing DBE program must remain in effect, however, even though they are not required to develop goals. For example, the recipient is still required to perform certification functions such as processing applications and obtaining no-change affidavits. If the recipient expects to award prime contracts exceeding \$250,000 in the following fiscal year, it must timely publish the proposed goal and submit the goal to the applicable DOT Operating Administration by August 1. Although not required, a FAA or FTA recipient who anticipates awarding \$250,000 or less in prime contracts may submit a goal for that fiscal year. If a recipient chooses to