

procedure for processing "9-1-1" calls. Such procedure must recognize when a "9-1-1" call is made and, at such time, must override any programming in the mobile unit that determines the handling of a non-911 call and permit the call to be handled by other analog carriers. This special procedure must incorporate any one or more of the 9-1-1 call system selection processes endorsed or approved by the Commission.

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 49 CFR Parts 23 and 26

[Docket OST-97-2550]

RIN 2105-AB92

#### Participation by Disadvantaged Business Enterprises in Department of Transportation Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule; correction.

**SUMMARY:** In its final disadvantaged business enterprise (DBE) rule, the Department intended to ensure the confidentiality of personal financial information submitted to recipients by owners of DBE firms. The Department inadvertently omitted the regulatory text language on this point. This correction document remedies this omission. In addition, this document corrects minor omissions concerning the threshold for Federal Transit Administration recipients to establish DBE programs and a requirement for transit vehicle manufacturers to have DBE programs, removes a potentially confusing word from the rule's provisions concerning DOT review of recipients' overall goals, clarifies language concerning the certification and personal net worth of airport concessionaires and others, and clarifies that a lease is viewed as a contract for purposes of the rule.

**DATES:** This rule is effective June 28, 1999.

**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) 366-9306 (voice), (202) 366-9313 (fax), (202) 755-7687 (TDD), bob.ashby@ost.dot.gov (email).

### SUPPLEMENTARY INFORMATION:

#### Privacy

In discussing the requirement of the DBE final rule that owners of DBE firms submit a statement of personal net worth, with supporting documentation, the Department addressed commenters' concerns about the confidentiality of the information. The preamble to the rule said the following:

One of the primary concerns of DBE firms commenting about submitting personal financial information is ensuring that the information remains confidential. In response to this concern, the rule explicitly requires that this material be kept confidential. It may be provided to a third party only with the written consent of the individual to whom the information pertains. This provision is specifically intended to preempt any contrary application of state or local law (e.g., a state freedom of information act that might be interpreted to require a state transportation agency to provide to a requesting party the personal income tax return of a DBE applicant who had provided the return as supporting documentation for his PNW statement). There is one exception to this confidentiality requirement. If there is a certification appeal in which the economic disadvantage of an individual is at issue (e.g., the recipient has determined that he or she is not economically disadvantaged and the individual seeks DOT review of the decision), the personal financial information would have to be provided to DOT as part of the administrative record. The Department would treat the information as confidential. (64 FR 5117; February 2, 1999).

Unfortunately, through editorial error on the Department's part, the regulatory text provision referred to was omitted from the final rule. We regret any confusion that this omission may have caused, and we are correcting the error by inserting the language in a new paragraph (a)(2)(iii) of § 26.67 of the rule.

#### FTA Requirements for DBE Programs

In § 26.21(a)(2) of the rule, the Department states that FTA recipients who receive more than \$250,000 in various forms of FTA assistance must have a DBE program. The phrase "exclusive of transit vehicle purchases" was inadvertently omitted from this paragraph. This omission has raised questions from some recipients, and we are reinserting the omitted language to avoid confusion. In addition, this provision did not make explicit that transit vehicle manufacturers must have DBE programs, so we are adding language to make this clear.

#### Review of Overall Goals

While operating administrations review recipients' overall goal submissions, recipients are not required to obtain prior concurrence by operating administrations with their overall goals (see § 26.45(f)(4)).

However, as the result of an editorial oversight, § 26.21(b)(1) of the rule makes a reference to overall goals being "approved" by operating administrations. Because prior concurrence is not required, this reference is incorrect and could be misleading. Therefore, we are removing it.

#### Concessionaires

In the February 2, 1999, final DBE rule, the Department removed all of former part 23 except the portion concerning airport concessionaires. The airport concession provisions were modified for consistency with the new 49 CFR part 26. In one respect, however, the amendment of the airport concessions provision failed to delete language concerning certification procedures that referred to the (now deleted) certification provisions of former part 23. While we have provided guidance to airports that they should follow part 26 procedures, we believe it would be useful to delete the language referring to former part 23's procedures. Therefore, this rule eliminates two paragraphs in § 23.95. Recipients should follow part 26 certification procedures for concessionaires as well as for other contractors.

Airports have expressed concern that the rule is unclear concerning the application to concessionaires of the \$750,000 personal net worth (PNW) cap and PNW statement requirements of § 26.67. The Department is currently working to complete a final rule concerning airport concessions. The PNW cap applicable to concessionaires is one of the matters being considered in this rulemaking. The PNW cap amount that the Department applies to concessionaires may or may not be \$750,000. Pending completion of the final rule on airport concessions, the Department believes it best to resolve the current uncertainty by making the \$750,000 cap amount and PNW statement requirement of § 26.67 inapplicable to airport concessionaires.

We are amending § 26.67(a)(2)(i) to specify that disadvantaged owners of airport concessionaires are not required to submit PNW statements. Consequently, the rebuttal of the presumption of economic disadvantage based on a PNW statement an individual is required to submit (see § 26.67(b)(1)) also does not apply to airport concessionaires.

#### Definition of "Contract"

The 49 CFR part 23 definition of "contract" specified that a lease was

viewed as a contract. The part 26 definition inadvertently omitted this sentence. To avoid any potential confusion on this point, this correction document adds a sentence on leases.

**Clarification Concerning Personal Net Worth Documentation**

The Department has received a number of questions and expressions of concern about the documentation it is appropriate for recipients to require in ascertaining the personal net worth of owners of DBE firms. The Department believes that it is important to clarify the rule to state that this documentation, and the PNW statement itself, should not be unduly lengthy, burdensome or intrusive.

The Department uses the Small Business Administration's implementation of its PNW requirements as a model for recipients' practices. SBA requires a two-page form, supported by two years' of personal and business tax returns. With respect to the information routinely collected from applicants or owners of currently certified DBEs for purposes of ascertaining PNW, the Department believes that recipients should not exceed the information sought by SBA in its programs. Consequently, while recipients are not required to use the SBA form verbatim, they should use a form of similar length and content. Recipients may appropriately collect and retain copies of two years' of the individuals personal and business tax returns.

On the other hand, the Department regards as unduly lengthy, burdensome, or intrusive such practices as using a form significantly longer or more complex than the SBA form (e.g., a multipage PNW form), requiring inventories of personal property or appraisals of real property. Such practices are contrary to part 26.

**Regulatory Analyses and Notices**

This set of amendments correcting part 26 is not a significant rule under Executive Order 12866 or the Department's Regulatory Policies and Procedures. The Department certifies that the amendments will not have significant economic impacts on a substantial number of small entities. This is because the amendments are technical corrections that will not impose costs on entities, regardless of their size. They do not have Federalism impacts sufficient to warrant the preparation of a Federalism impact statement. They do not impose information collection requirements.

These amendments relate to regulatory provisions that have already

been the subject of notice and comment (as part of the Department's May 1997 supplemental notice of proposed rulemaking concerning the DBE program).

Because the amendments merely correct accidental omissions from the regulatory text or remove a potentially confusing reference, we do not believe that additional notice and comment would be productive. Therefore, the Department has determined that further notice and comment would be impracticable, unnecessary, and contrary to the public interest. The Department has good cause to make the corrections effective immediately in order to avoid confusion and any adverse effects on DBEs or recipients from the absence of the omitted language.

**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, Government contracts, Grant programs—transportation, Highways and roads, Mass transportation, Minority businesses, Reporting and recordkeeping requirements.

Issued this 11th day of June, 1999, at Washington, D.C.

**Rodney E. Slater,**

*Secretary of Transportation.*

For the reasons set forth in the preamble, the Department amends 49 CFR parts 23 and 26 as follows:

**PART 23—[AMENDED]**

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.

**§ 23.95 [Amended]**

2. In § 23.95, remove and reserve paragraphs (f)(2) and (f)(3).

**PART 26—[AMENDED]**

3. 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.*; 49 U.S.C 1615, 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105-178, 112 Stat. 107, 113.

4. In the definition of the term "Contract" in § 26.5, add a sentence at

the end of the definition, to read as follows:

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

\* \* \* \* \*

*Contract* \* \* \* For purposes of this part, a lease is considered to be a contract.

\* \* \* \* \*

5. In § 26.21, revise paragraph (a)(2) to read as follows:

**§ 26.21 Who must have a DBE program?**

(a) \* \* \*

(2) FTA recipients that receive \$250,000 in FTA planning, capital, and/or operating assistance in a Federal fiscal year, exclusive of transit vehicle purchases, and transit vehicle manufacturers who must submit an overall goal under § 26.49;

\* \* \* \* \*

**§ 26.21 [Amended]**

5. In § 26.21(b)(1), in the parenthetical phrase, remove the words "and approved" following the word "reviewed".

**§ 26.45 [Amended]**

6. In § 26.45(c)(5), remove the words "Subject to the approval of the DOT operating administration, you" and add "You" in its place.

7. Amend § 26.67 as follows:

- a. Revise paragraph (a)(2)(i); and
- b. Redesignate paragraph (a)(2)(ii) as paragraph (a)(2)(iii), and add a new paragraph (a)(2)(ii), to read as follows:

**§ 26.67 What rules determine social and economic disadvantage?**

(a) \* \* \*

(2)(i) You must require each individual owner of a firm applying to participate as a DBE (except a firm applying to participate as a DBE airport concessionaire) whose ownership and control are relied upon for DBE certification to submit a signed, notarized statement of personal net worth, with appropriate supporting documentation. This statement and documentation must not be unduly lengthy, burdensome, or intrusive.

(ii) Notwithstanding any provision of state law, you must not release an individual's personal net worth statement nor any documentation supporting it to any third party without the written consent of the submitter. *Provided*, that you must transmit this information to DOT in any certification appeal proceeding under § 26.89 in which the disadvantaged status of the individual is in question.

\* \* \* \* \*