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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 49 CFR Part 26

[Docket No. OST-2010-0021]

RIN 2105-AD76

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

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

**ACTION:** Final rule.

**SUMMARY:** This final rule changes the Department of Transportation (Department) regulation concerning how often recipients of DOT financial assistance are required to submit to the appropriate DOT operating administration for approval the methodology and process used to establish their overall disadvantaged business enterprise (DBE) goal for federally funded contracting opportunities. Under the rule, recipients will submit overall goals for review every three years, rather than annually.

**DATES:** *Effective Date:* This rule is effective March 5, 2010.

**FOR FURTHER INFORMATION CONTACT:**

Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W94-302, Washington, DC 20590, 202 366-9310, [Bob.Ashby@dot.gov](mailto:Bob.Ashby@dot.gov).

**SUPPLEMENTARY INFORMATION:** On April 8, 2009, the Department published in the **Federal Register** at 74 FR 15910, a notice of proposed rulemaking (NPRM) inviting public comment on a proposal to establish a staggered three-year schedule for the submission by DOT recipients subject to the regulations at 49 CFR part 26 of their overall goal for DBE participation on DOT-assisted contracts. Recipients are currently required to make a DBE goal submission each year on August 1st. This proposed rule change was modeled largely on the comparable provision in the airport concessions DBE rule in Part 23 of this Title, with which the Department has had successful experience.

The Department received approximately 27 comments from state departments of transportation, airports, transit authorities, DBEs, contractor

associations, and transportation consultants. This final rule responds to the substantive concerns raised in the comments from those who supported or opposed the adoption of the proposed rule.

The majority of commenters supported the proposed rule change as long as recipients are either required to conduct annual reviews to account for changes that may warrant a modification of the overall goal or are simply allowed to make adjustments to the overall goal during the three-year period based on changed circumstances without necessarily requiring annual reviews. Some of the circumstances or conditions that may indicate the need for an adjustment include, but are not limited to, the collection of new data, a significant change in the recipient's DOT assisted contracting program (e.g., new contracting opportunities presented by the availability of new or different grant opportunities), a marked increase or decrease in the availability of DBEs in the recipient's contracting market, or a significant change in the legal standards governing the DBE program. Some supporters also thought it advisable to give recipients the flexibility to request a waiver to set their own schedule or to submit an overall goal that covers a one-, two-, or three-year period as appropriate due to the nature of the recipient's contracting program. The ability to maintain the status quo—i.e., set annual overall goals—was an approach strongly endorsed by some airports, some representatives of the aviation industry, and some representatives of general contractors.

The commenters opposed to the proposed rule change raised several concerns about moving to a three-year cycle: (1) The difficulty in estimating a DBE goal beyond one year given the changes in the political landscape or changes in the kind of projects that are funded; (2) locking in goals for three years undermines the ability to assess market conditions and DBE availability; (3) requiring annual reviews during the three-year period defeats the purpose of reducing the administrative burden associated with the annual goal setting process since an annual review will likely result in the need for an adjustment and thereby trigger the annual goal setting process; and (4) it fails to achieve a level playing field or ensure narrow tailoring.

Having considered the comments, the Department believes going to a system of staggered three-year overall DBE goal submissions would not compromise the ability of recipients to implement a narrowly tailored program and would

enable recipients to improve the data collection, analysis, and consultation required to establish an overall goal that truly aims to reflect the level of DBE participation one would expect absent the effects of discrimination. Since the DBE program rules were substantially revised in 1999, generally we have not seen huge variances in the annual DBE goal submissions made by recipients over the last ten years. Thus, we do not assume that requiring an annual review would necessarily lead to annual adjustments resulting from a process that mimics the current yearly process. That said, we do not think it necessary to mandate annual reviews. Instead, we believe recipients or operating administrations should be allowed, based on changed circumstances, to initiate mid-course reviews as needed to determine if adjustments to the overall goal are warranted. Also, we do not think it prudent to allow each recipient to establish a different schedule for submission. Such a series of exceptions would likely swallow the rule. It also would make it much more difficult for operating administrations to manage reviews and oversee compliance. However, in those cases where a recipient believes its situation differs from other similarly situated recipients, the existing program waiver process offers the recipient the opportunity to seek an exception. These program waivers, unlike the general program waiver provisions of 49 CFR 26.15, could be granted by an operating administration and would not have to be approved by the Secretary.

Under the final rule, each operating administration is required to establish a schedule for submissions to be posted on its Web site. The schedules are intended to be posted no later than 30 days after the effective date of this rule. During the transition to this new system, specific notice of the deadline for overall goal submissions and the consequences of failing to meet the deadline should be provided to recipients. The schedules established by the operating administrations should include each year a proportionate or representative number of recipients from all regions of the country (e.g., north, south, east, and west). During the transition to the new scheduling system, recipients should continue using or operating under the goals last approved by the operating administration.

### Regulatory Analyses and Notices

#### *Executive Order 12866 and Regulatory Flexibility Act*

The Department has determined that this action is not a significant regulatory

action for purposes of Executive Order 12866 or the Department's regulatory policies and procedures. The rule would not impose any costs or burdens on grantees or other parties. It would reduce burdens on recipients by reducing the frequency of goal submissions to the Department. For these reasons, the Department certifies that the rule would not have a significant economic impact on a substantial number of small entities.

#### *Paperwork Reduction Act*

This rule does not create any information collection requirements covered by the Paperwork Reduction Act.

#### **List of Subjects in 49 CFR Part 26**

Administrative practice and procedures, Airports, Civil rights, Government contracts, Grant programs—transportation, Minority business, Reporting and recordkeeping requirements.

Issued this 20th day of January 2010, at Washington, DC.

**Ray LaHood,**

*Secretary of Transportation.*

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

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

■ 1. The authority for 49 CFR 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.

#### **Subpart C—Goals, Good Faith Efforts, and Counting**

■ 2. Revise § 26.45(e) and (f) to read as follows:

##### **§ 26.45 How do recipients set overall goals?**

\* \* \* \* \*

(e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal as follows:

(1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming three fiscal years.

(2) If you are an FTA or FAA recipient, as a percentage of all FTA or FAA funds (exclusive of FTA funds to

be used for the purchase of transit vehicles) that you will expend in FTA- or FAA-assisted contracts in the three forthcoming fiscal years.

(3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects.

(f)(1) If you set overall goals on a fiscal year basis, you must submit them to the applicable DOT operating administration by August 1 at three-year intervals, based on a schedule established by the FHWA, FTA, or FAA, as applicable, and posted on that agency's Web site. You must submit to the operating administration for approval any significant adjustment you make to your goal during the three-year period based on changed circumstances. The operating administration may direct you to undertake a review of your goal if necessary to ensure that the goal continues to fit your circumstances appropriately.

(2) If you are an FHWA, FTA, or FAA recipient and set your overall goal on a project or grant basis, you must submit the goal for review at a time determined by the FHWA, FTA, or FAA Administrator.

(3) Timely submission and operating administration approval of your overall goal is a condition of eligibility for DOT financial assistance.

(4) If you fail to establish and implement goals as provided in this section, you are not in compliance with this part. If you establish and implement goals in a way different from that provided in this part, you are not in compliance with this part. If you fail to comply with this requirement, you are not eligible to receive DOT financial assistance.

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## **DEPARTMENT OF TRANSPORTATION**

### **Pipeline and Hazardous Materials Safety Administration**

#### **49 CFR Parts 192 and 195**

[Docket No. PHMSA–2007–27954; Amdt. Nos. 192–112 and 195–93]

**RIN 2137–AE28**

#### **Pipeline Safety: Control Room Management/Human Factors, Correction**

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA); DOT.

**ACTION:** Final rule; correction.

**SUMMARY:** PHMSA is correcting a Final Rule that appeared in the **Federal Register** on December 3, 2009. That final rule amended the Federal Pipeline Safety Regulations to address human factors and other aspects of control room management for pipelines where controllers use supervisory control and data acquisition (SCADA) systems, but contained errors regarding certain dates, both in the preamble and the amendments. This document corrects those errors.

**DATES:** *Effective Date:* February 3, 2010. *Applicability Date:* This correction is applicable beginning February 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** For technical information contact Byron Coy at (609) 989–2180 or by e-mail at [Byron.Coy@dot.gov](mailto:Byron.Coy@dot.gov). For legal information contact Benjamin Fred at (202) 366–4400 or by e-mail at [Benjamin.Fred@dot.gov](mailto:Benjamin.Fred@dot.gov). All materials in the docket may be accessed electronically at <http://www.regulations.gov>. General information about PHMSA may be found at <http://phmsa.dot.gov>.

**SUPPLEMENTARY INFORMATION:** On December 3, 2009, PHMSA published a final rule in the **Federal Register** (74 FR 63310) entitled “Pipeline Safety: Control Room Management/Human Factors.” This final rule contained several errors regarding certain compliance dates. The final rule became effective on February 1, 2010, and the corrected dates detailed in this final rule correction are applicable as of February 1, 2010.

On page 63311 of the preamble to the December 3 rule, in the first column in the **DATES** section, the compliance date is corrected to read “Compliance Date: An operator must develop control room management procedures by August 1, 2011, and implement the procedures by February 1, 2013.”

■ Therefore, in accordance with the reasons stated in the preamble, PHMSA