

*New Federal Initiatives Project*

**The Disadvantaged Business Enterprise  
Program – Recent and Proposed Changes**

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## **The Disadvantaged Business Enterprise Program – Recent and Proposed Changes**

H.R. 915, the Federal Aviation Administration (FAA) Reauthorization Act of 2009, was introduced in the House by Rep. James Oberstar on February 9, 2009.<sup>1</sup> The bill was referred to the House Committee on Transportation and Infrastructure. On March 5, 2009, the full committee marked up the bill and ordered it reported out of committee, as amended, by voice vote. Among the changes agreed to by both sides was a package of amendments (i.e., a “manager’s amendment”) introduced by Rep. Oberstar that affect the agency’s airport contracting and concessions Disadvantaged Business Enterprise (DBE) programs.<sup>2</sup>

The airport contracting and concessions DBE programs, like other DoT DBE programs, are designed to provide business opportunities to small business concerns owned and controlled by socially and economically disadvantaged individuals. DoT presumes that members of certain groups are disadvantaged, including citizens or legal permanent residents who are also women, black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian-Pacific Americans, or other minorities as determined by the Small Business Administration (SBA).<sup>3</sup> Individuals who own and control their own businesses, but who do not fall into one of the above-listed predetermined categories, bear the burden of establishing their social and economic disadvantage before they may qualify for DBE status. Thus, for example, though DoT notes that people with disabilities have disproportionately low incomes and high rates of unemployment, and that many may be socially and economically disadvantaged, it will make case-by-case determinations as to whether an individual with a disability meets DBE eligibility criteria.

The presumption of disadvantage alone is not sufficient to qualify a business for DBE status. The applicant must also show that: (1) the firm is a small business, i.e., that its annual gross receipts do not exceed the cap set by SBA to qualify as a small business; (2) the disadvantaged owner’s personal net worth does not exceed a specified amount; (3) the business is not tied to another firm in such a way as to compromise its independence and control; and (4) the disadvantaged owner seeking certification possesses the power to direct or cause the direction of the management and policies of the firm.

The Oberstar manager’s amendment to H.R. 915 includes a provision (Section 137) that amends the airport contracting and concessions DBE program under 49 U.S.C. § 47113 to direct the Secretary of Transportation to adjust the personal net worth (PNW) cap for an individual business. To qualify as “economically disadvantaged” under current agency regulations, a business owner must have a PNW that does not exceed \$750,000, excluding the owner’s primary residence and the value of their ownership interest in the firm seeking DBE certification. According to an explanatory summary document accompanying the manager’s amendment, the new provision would allow individuals seeking DBE certification for airport contracting or concessions (ACDBE) to “exclude other assets that the individual can document, which 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), up to a maximum of \$3 million.”<sup>4</sup>

Supporters of the change argue that the effect of the provision is to “correct for the impact of inflation since the Small Business Administration established the personal net worth cap at \$750,000 in 1989”<sup>5</sup> for both programs. After the initial adjustment from 1989 to 2009 prices, the Secretary would then be required to adjust the PNW cap annually on June 30<sup>th</sup> of each year to account for any changes in the Consumer Price Index (published by the Secretary of Labor) within the preceding 12-month period.

Adjusting 1989 prices to those in 2009 would mean that the PNW cap would be raised to \$1.28 million<sup>6</sup> (excluding the value of the business owner’s primary residence and ownership interest in the business), raising questions as to whether an individual with a PNW of over a million dollars may fairly

be said to be “disadvantaged.” Critics urge scrutiny into whether the increase is actually aimed at alleviating a lack of qualified minority contractors at existing PNW cap levels, which in turn raises the question of whether minorities are truly underrepresented in airport contracting and concessions to begin with. Such critics call for a reassessment of when an individual business owner will be considered “disadvantaged” for DBE purposes when Congress takes up the bill for final passage. At a minimum, they argue that to ensure that the measure is used solely to adjust for inflation and not to increase the PNW cap in terms of real dollars, limiting language imposing a ceiling on the amount the Secretary of Transportation can raise the cap must be included before final passage. At present, while the explanatory summary of the manager’s amendment indicates that, even when adjusting for inflation, the Secretary of Transportation cannot raise the PNW cap to exceed \$3 million, nothing in the language of the proposed changes to 49 U.S.C. § 47113 imposes such a ceiling.

The adjustment for inflation is limited to DBE programs related to aviation (contracting and concessions) and does not appear to affect any other small business DBE concerns that may or may not contract with various other components of the Department of Transportation. The House Transportation and Infrastructure Committee held hearings on DoT’s oversight of its DBE program, including some mention of PNW caps by witnesses, on March 26, 2009.<sup>7</sup>

This proposal to adjust the personal net worth cap for inflation is similar to current DoT practice to adjust the size limits on small businesses participating in DoT’s airport contracting and airport concessions DBE programs for inflation. For example, on April 3, 2009, the agency promulgated a final rule amending its regulations<sup>8</sup> to adjust the size standards for its airport concessions disadvantaged business enterprise program and airport contracting program for inflation.<sup>9</sup> Under the statutes governing DoT’s DBE Program, firms are not considered small business concerns, and therefore are not eligible as DBEs, once their average annual receipts over the preceding three fiscal years reaches a specified dollar limit.<sup>10</sup> The final rule published by the agency this month is designed to compensate for any rise in the general level of prices between the third quarter of calendar year 2006 through the fourth quarter of calendar year 2008 using the Department of Commerce’s price index, prepared by the Bureau of Economic Analysis (BEA).<sup>11</sup>

Pursuant to regulations adopted in April 2007, DoT is required to publish size standards adjustments to the airport contracting and concessions gross receipts caps every two years. The April 3, 2009 rule represents the most recent adjustment. Notably, DoT waived the normal notice and comment requirements for promulgating the rule citing 5 U.S.C. § 553(b), which allows it to do so if it finds, for good cause, that such rules are impracticable, unnecessary, or contrary to the public interest.<sup>12</sup> In its view, “notice and comment for this rule is unnecessary and contrary to the public interest because it relates only to ministerial updates of business size standards and gross receipt caps to account for inflation, which does not change the standards or caps in real dollar terms.”<sup>13</sup> Critics of the proposed changes argue that the modification actually expands the number of individuals that qualify for special treatment under the program, and that notice and comment are essential. The rule was effective upon publication.

*\*Dominique Ludvigson is Counsel & Special Assistant at the U.S. Commission on Civil Rights. These comments do not necessarily represent the views of the Commission or of individual Commissioners.*

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<sup>1</sup> The bill would authorize appropriations for the FAA for fiscal years 2009 through 2012, improve aviation safety and capacity and provide funding for the national aviation system, among other broad purposes.

<sup>2</sup> The text of Oberstar’s Manager’s Amendment is available at [http://transportation.house.gov/Media/file/Full%20Committee/20090305/OBERST\\_HR\\_915.pdf](http://transportation.house.gov/Media/file/Full%20Committee/20090305/OBERST_HR_915.pdf).

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<sup>3</sup> 49 C.F.R. § 26.5(see(2)(i)-(vii) under definition of "socially and economically disadvantaged individual")

<sup>4</sup> H.R. 915, Summary of Manager's Amendment *available at* <http://transportation.house.gov/Media/file/Full%20Committee/20090305/HR%20915%20Managers%20Amendment%20Summary.pdf>.

<sup>5</sup> Manager's Amendment, Section 137 (proposed to be codified at 49 U.S.C. § 47113(e)).

<sup>6</sup> This figure was calculated using the Bureau of Labor and Statistics online CPI Inflation Calculator *at* [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm).

<sup>7</sup> Information about the hearing, including links to video and witness testimonies, is available at <http://transportation.house.gov/News/PRArticle.aspx?NewsID=868>.

<sup>8</sup> Affected regulations are 49 C.F.R. § 23.33 (airport concessions) and § 49 C.F.R. § 26.65 (airport contracting).

<sup>9</sup> 74 F.R. 15222, 2009 WL 872975 (April 3, 2009).

<sup>10</sup> *See* 49 U.S.C. 47113(a)(1)(B).

<sup>11</sup> In the explanation to its April 3, 2009 rule, DoT states that it uses the BEA estimate because, "Given the nature of the Department's DBE Program and ACDBE program, adjusting the gross receipts cap in the same manner in which inflation adjustments are made to the cost of state and local government purchases of goods and services is simple, accurate and fair." 74 F.R. 15223.

<sup>12</sup> 5 U.S.C. § 553(b)(3)(B).

<sup>13</sup> 74 F.R. 15223, Regulatory Analyses and Notices.

#### **Related Links:**

"Can the Federal Transportation DBE Program Be Narrowly Tailored to Remedy Discrimination?" by George R. La Noue, *Engage*, October 2007: [http://www.fed-soc.org/publications/pubID.715/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.715/pub_detail.asp)

"Narrow Tailoring the Federal Transportation DBE Program," by George R. La Noue, *Engage*, March 4, 2006: [http://www.fed-soc.org/publications/pubID.828/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.828/pub_detail.asp)