

Before the FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
) Amendment of Part 90 of the)
PR Docket No. 93-61)
Commission's Rules to Adopt)
Regulations for Automatic Vehicle)
Monitoring Systems)
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)

SECOND REPORT AND ORDER

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By the Commission:

TABLE OF CONTENTS

I. INTRODUCTION 1
II. EXECUTIVE SUMMARY 2
III. BACKGROUND 3
IV. COMPETITIVE BIDDING FOR MULTILATERATION LICENSES
SECOND REPORT AND ORDER
A. Auctionability of the LMS Frequency Band 8
B. Competitive Bidding Design and Procedures
1. Applicability of the Part 1 Competitive Bidding Rules 11
2. Reserve Price or Minimum Opening Bids 14
3. Competitive Bidding Design 15

C. Treatment of Designated Entities

1. Eligibility for Small Business Provisions 17

 a. Small Business Size Standards 18

 b. Attribution of Gross Revenues 21

2. Sufficiency of Designated Entity Provisions 28

D. Partitioning and Disaggregation and Unjust Enrichment Provisions . 32

V. CONCLUSION 42

VI. PROCEDURAL MATTERS 43

 A. Final Regulatory Flexibility Analysis 43

 B. Initial Paperwork Reduction Act of 1995 Analysis 44

 C. Ordering Clauses 46

 D. Contacts for Further Information 49

APPENDIX A -- PARTIES FILING COMMENTS AND REPLY COMMENTS

APPENDIX B -- REGULATORY FLEXIBILITY ACT

APPENDIX C -- FINAL RULES

I. INTRODUCTION

1. In this *Second Report and Order*, we adopt rules and procedures governing competitive bidding for multilateration Location and Monitoring Service (LMS) frequencies. As proposed in the *LMS Further Notice*,¹ we conclude that the LMS auction should be

¹ Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, PR Docket No. 93-61, 12 FCC Rcd 13942 (1997) ("*LMS Further Notice*").

conducted pursuant to the recently adopted Part 1 general competitive bidding rules.² In addition, we establish small business definitions for multilateration LMS.

II. EXECUTIVE SUMMARY

2. In our decision today, we take a number of steps to simplify and streamline competitive bidding for LMS systems. What follows is a synopsis of the major aspects of our decision.

- We adopt the general competitive bidding rules and procedures of Part 1 for the LMS auction.
- As noted in the *Part 1 Third Report and Order*, the Wireless Telecommunications Bureau has delegated authority to determine the appropriate auction design and auction procedures.
- We adopt bidding credits for eligible small businesses. "Small businesses" with revenues not to exceed \$15 million are eligible for a 25 percent bidding credit, and "very small businesses" with average annual gross revenues not to exceed \$3 million are eligible for a 35 percent bidding credit.
- LMS licensees will be allowed to partition their geographic licenses and disaggregate portions of their spectrum.
- A qualified small business that applies to partition or disaggregate its license to a non-small business entity will be required to repay any benefits it received from special small business provisions as a condition of approval.

III. BACKGROUND

² See generally Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (modified by Erratum, DA 98-419 (rel. March 2, 1998)) ("*Part 1 Third Report and Order*").

3. In the *LMS Report and Order*, we established rules governing the licensing of the LMS in the 902-928 MHz frequency band.³ LMS refers to advanced radio technologies designed to support the nation's transportation infrastructure and to facilitate the growth of Intelligent Transportation Systems.⁴ We created a new Subpart M in Part 90 of the Commission's Rules for Transportation Infrastructure Radio Services, which included LMS and like services.

4. The Commission defined two types of LMS systems -- multilateration and non-multilateration. Multilateration LMS systems are designed to locate vehicles or other objects by measuring the difference in time of arrival, or difference in phase, of signals transmitted from a unit to a number of fixed points, or from a number of fixed points to the unit to be located. Such systems generally use spread-spectrum technology to locate vehicles throughout a wide geographic area. Multilateration technology is used, for example, by trucking companies to track individual vehicles, by municipalities to pinpoint the location of their buses, and by private entrepreneurs developing subscriber-based services for recovery of stolen vehicles.⁵ The Commission defined non-multilateration systems as LMS systems that employ any technology other than multilateration technology. The Commission noted that unlike a multilateration system, which determines the location of a vehicle or object over a wide area, a typical non-multilateration system uses narrowband technology whereby an electronic device placed in a vehicle transfers information to and from that vehicle when the vehicle passes near one of the system's stations. Examples of non-multilateration LMS systems include automated toll collection devices and systems used by railway companies to monitor the location of railroad cars.⁶

5. LMS operates in the 902-928 MHz frequency band.⁷ The band is allocated for primary use by Federal Government radiolocation systems. Next in order of priority are Industrial, Scientific and Medical devices. Federal Government fixed and mobile and LMS systems are secondary to both of these uses. The remaining uses of the 902-928 MHz band

³ Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Report and Order*, PR Docket No. 93-61, 10 FCC Rcd 4695 (1995) ("*LMS Report and Order*").

⁴ The term "Intelligent Transportation System," or "Intelligent Vehicle Highway System," refers to the collection of advanced radio technologies that, among other things, is intended to improve the efficiency and safety of our nation's highways. *LMS Report and Order* at 4698, ¶ 5 n.9.

⁵ *LMS Report and Order*, 10 FCC Rcd at 4697-98, 4703, ¶ 14.

⁶ *Id.*

⁷ The definition of LMS also includes existing Automatic Vehicle Monitoring operations below 512 MHz. Unlike other LMS operations, LMS systems below 512 MHz may neither offer service to the public nor provide service on a commercial basis. See *LMS Report and Order*, 10 FCC Rcd at 4738, ¶ 86.

include licensed amateur radio operations and unlicensed Part 15 equipment, both of which are secondary to all other uses of the band. Part 15 low power devices include, but are not limited to, those used for automatic meter reading, inventory control, package tracking and shipping control, alarm services, local area networks, internet access and cordless telephones. The amateur radio service is used by technically inclined private citizens to engage in self-training, information exchange and radio experimentation. In the *LMS Report and Order*, the Commission recognized the important contribution to the public provided by Part 15 technologies and amateur radio operators and sought to develop a band plan that would maximize the ability of these services to coexist with LMS systems.⁸

6. The Commission adopted the *LMS Report and Order* with an eye toward minimizing potential interference within and among the various users of the 902-928 MHz band. The Commission's band plan accordingly permits secondary operations across the entire band by users of unlicensed Part 15 devices and amateur licensees. At the same time, the band plan separates non-multilateration from multilateration LMS systems in all but one subband so as to avert interference. The *LMS Report and Order* also established limitations on LMS systems' interconnection with the public switched network and set forth a number of technical requirements intended to ensure successful coexistence of all the services authorized to operate in the band. We have also resolved issues raised by petitioners on reconsideration.⁹

7. Background. In the *LMS Further Notice*, the Commission sought comment on, *inter alia*, the appropriate competitive bidding methodology and procedures for LMS, establishment of small business definitions, whether the gross revenues of all controlling interests and affiliates should be attributed to the small business, sufficiency of small business provisions to promote participation, whether licensees should be allowed to partition their licenses and disaggregate portions of their spectrum, and the appropriate form of unjust enrichment provisions. Comments and reply comments were filed by two commenters: Teletrac, Inc. ("Teletrac") and Comtrak.

IV. COMPETITIVE BIDDING FOR MULTILATERATION LMS LICENSES

⁸ *LMS Report and Order*, 10 FCC Rcd at 4714, ¶ 34.

⁹ See Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Order on Reconsideration*, PR Docket No. 93-61, 11 FCC Rcd 16905 (1996) ("*Order on Reconsideration*"); see also *LMS Further Notice*, 12 FCC Rcd at 13942. Specifically, the *Order on Reconsideration* resolved issues regarding incumbent LMS licensees that were afforded grandfathered status. These issues involved interference testing, accommodation of secondary uses in the 902-928 MHz band, emission masks, frequency tolerance, type acceptance and site relocation with respect to grandfathered licenses, as well as extension of the construction deadline applicable to grandfathered licensees. The *LMS Further Notice* clarified issues such as interconnection limitations, operational parameters for nonmultilateration systems, treatment of other users of the 902-928 MHz band, the structure of the spectrum allocation plan, geographic service areas, and the licensing of wideband forward links.

SECOND REPORT AND ORDER**A. Auctionability of the LMS Frequency Bands**

8. Background. In the *LMS Report and Order*, the Commission decided to use competitive bidding to select from among mutually exclusive applications for multilateration LMS licenses.¹⁰ The Commission reached this decision based on its conclusion that the statutory criteria for use of competitive bidding, set forth in Section 309(j) of the Communications Act, were satisfied.¹¹ More specifically, the Commission found that (1) its decision to offer multilateration LMS licenses on an exclusive basis makes it likely that mutually exclusive applications for such licenses will be filed; (2) multilateration LMS licenses will be used principally to offer for-profit, subscriber-based services; and (3) the use of competitive bidding for these licenses will promote the public interest objectives set forth in Section 309(j)(3).¹²

9. Discussion. Since release of the *LMS Report and Order*, Congress enacted the Balanced Budget Act of 1997 which extended and expanded the Commission's auction authority.¹³ Section 309(j)(2) of the Communications Act formerly stated that mutually exclusive applications for initial licenses or construction permits were auctionable if the principal use of the spectrum was for subscription-based services and competitive bidding would promote the expressed objectives. As amended by the Budget Act, Section 309(j) of the Communications Act provides that, "If . . . mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2) the Commission *shall* grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection."¹⁴ Therefore, as noted, the Budget Act provides that all licenses and construction permits for which mutually exclusive applications are accepted, with certain exceptions not relevant here, shall be granted by means of competitive bidding.¹⁵ We therefore believe that we lack discretion to resolve mutually exclusive LMS license applications by any means other than competitive bidding.

¹⁰ *LMS Report and Order*, 10 FCC Rcd at 4725-26, ¶¶ 54-57.

¹¹ *Id.*

¹² *Id.*

¹³ See Balanced Budget Act of 1997, P.L. 105-33, § 3002, 111 Stat. 251 (1997) ("Budget Act") (amending 47 U.S.C. § 309(j)).

¹⁴ 47 U.S.C. § 309(j)(1) (as amended by the Budget Act, § 3002) (emphasis added).

¹⁵ See 47 U.S.C. §§ 309(j)(1), 309(j)(2) (as amended by Balanced Budget Act, § 3002).

Accordingly, we find that the Budget Act's amendments to Section 309(j) of the Act direct us to assign licenses for multilateration LMS by competitive bidding.

10. In the *LMS Further Notice*, we reaffirmed our spectrum plan comprising three blocks of spectrum allocated for multilateration LMS systems: (1) 904.000-909.750 MHz and 927.750-928.000 MHz; (2) 919.750-921.750 MHz and 927.500-927.750 MHz; and (3) 921.750-927.250 MHz and 927.250-927.500 MHz.¹⁶ One license will be awarded for each of these spectrum blocks in each of 176 Economic Areas (EAs). Thus, there are a total of 528 multilateration LMS licenses to be auctioned.

B. Competitive Bidding Design and Procedures

1. Applicability of the Part 1 Competitive Bidding Rules

11. Background. In the *LMS Further Notice*, the Commission tentatively concluded that the LMS auction will follow the general competitive bidding procedures of Part 1, Subpart Q.¹⁷

12. Discussion. We will adopt our proposal to follow the competitive bidding procedures contained in Subpart Q of Part 1 of the Commission's Rules, as amended by the Part 1 proceedings, unless specifically indicated otherwise. Commenters support the use of these rules for the LMS spectrum auction.¹⁸

13. Recently, we adopted the *Part 1 Third Report and Order*, which streamlines and simplifies our uniform competitive bidding provisions based on our experience in 16 prior auctions and allows us to conduct future auctions in a more consistent, efficient, and effective manner.¹⁹ As proposed in the *LMS Further Notice*, the general competitive bidding rules found in Subpart Q of Part 1 of the Commission's rules, including provisions adopted in the *Part 1 Third Report and Order*, will serve as the auction rules for LMS. Consistent with this, matters such as the appropriate competitive bidding design for the auction of LMS stations, as

¹⁶ *LMS Further Notice*, 12 FCC Rcd at 13969, ¶ 73.

¹⁷ *Id.* at 13970, ¶ 74.

¹⁸ Comtrak Comments at 2; Teletrac Comments at 15.

¹⁹ See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 63 Fed Reg 2315 (1997) ("*Part 1 Third Report and Order*").

well as minimum opening bids and reserve prices, will be determined by the Wireless Telecommunications Bureau ("Bureau") pursuant to its delegated authority.²⁰ In this *Order*, we adopt service-specific provisions applicable to designated entities bidding in the LMS auction (see Section IV.C.1, *infra*).

2. Reserve Price or Minimum Opening Bids

14. Discussion. Commenters argue that the public interest will not be served if the Commission establishes reserve prices in the LMS auction.²¹ Commenters argue it will be difficult, if not impossible, for the Commission to establish a reserve price level that will accurately reflect the market's initial valuation of LMS spectrum.²² However, as we noted in the *Part 1 Third Report and Order*, the Budget Act establishes a presumption in favor of a required minimum opening bid or reserve price.²³ In addition, in the Part 1 proceeding, we gave authority to the Bureau to establish a minimum opening bid and/or reserve price in future auctions.²⁴ Accordingly, the Bureau will establish a minimum opening bid and/or reserve price for the LMS auction, unless, after comment is sought, it is determined that a minimum opening bid or reserve price would not be in the public interest.²⁵

3. Competitive Bidding Design

15. Background. In the *LMS Further Notice*, we proposed to adopt for the LMS auction the simultaneous multiple round competitive bidding design used in the Personal Communications Service (PCS) auctions.²⁶ We noted that multiple round bidding should provide more information to bidders during the auction about the values of the licenses than

²⁰ See, e.g., *Part 1 Third Report and Order*, 13 FCC Rcd at 448-49, 454, ¶¶ 125, 139; see also, 47 C.F.R. §§ 0.131(c), 0.331, and 0.332.

²¹ Teletrac Comments at 4-10; Comtrak Reply Comments at 2-3.

²² Teletrac Comments at 6; Comtrak Reply Comments at 2.

²³ *Part 1 Third Report and Order*, 13 FCC Rcd at 454, ¶ 139. Section 3002(a)(1)(C)(iii) of the Budget Act provides that the Commission must "prescribe methods by which a reasonable reserve price will be required, or a minimum opening bid will be established, to obtain any license or permit being assigned . . . unless . . . such a reserve price or minimum opening bid is not in the public interest." Budget Act, § 3002(a)(1)(C)(iii).

²⁴ See *Part 1 Third Report and Order*, 13 FCC Rcd at 454-56, ¶¶ 138-41.

²⁵ *Id.*

²⁶ *LMS Further Notice*, 12 FCC Rcd at 13970, ¶ 74.

single round bidding.²⁷ However, we have also held open the possibility of using other competitive bidding designs based on other factors.²⁸

16. Discussion. Commenters support the use of simultaneous, multiple-round competitive bidding.²⁹ Comtrak believes that simultaneous, multiple-round competitive bidding is cost-efficient and agrees with the Commission that such a bidding design will provide auction participants with information that will help them value the available spectrum and shape their bidding strategy accordingly.³⁰ Both commenters also believe that the LMS auction is not the appropriate setting to experiment with combinatorial bidding.³¹ We agree with commenters that a simultaneous multiple round auction design generally provides more information to bidders than single round bidding during the auction about the values of the licenses.³² Consistent with our approach in the *Part 1 Third Report and Order*, we leave to the Bureau to determine the appropriate auction design and make such an announcement by Public Notice. Moreover, although the Commission is preparing to design and test a combinatorial bidding system in accordance with the Budget Act,³³ the Commission does not have sufficient information at this time to determine how this relatively new bidding methodology can improve its spectrum auction program.³⁴ The Commission has announced it will seek comment on a number of issues relating to combinatorial bidding and address this issue once the record is complete.³⁵ While we believe the simultaneous multiple-round auction is an effective methodology for auctioning LMS licenses, the Bureau has the discretion to select

²⁷ *Id.*

²⁸ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2360, ¶¶ 68-69 (1994) ("*Competitive Bidding Second Report and Order*"), *on recon.*, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) ("*Competitive Bidding Second Memorandum Opinion and Order*").

²⁹ Teletrac Comments at 3; Comtrak Comments at 3.

³⁰ Comtrak Comments at 3.

³¹ Teletrac Comments at 3-4; Comtrak Reply Comments at 2.

³² *LMS Further Notice*, 12 FCC Rcd at 13970, ¶ 74.

³³ See Budget Act, P.L. 105-33, 111 Stat. 251 (1997); 47 U.S.C. § 309(j)(3)(i).

³⁴ *Part 1 Third Report and Order*, 13 FCC Rcd at 453-44, ¶ 137.

³⁵ *Id.*

other auction designs, based on its experience, if other designs are warranted (e.g., for auction or reauction).³⁶

C. Treatment of Designated Entities

1. Eligibility for Small Business Provisions

17. In authorizing the Commission to use competitive bidding, Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."³⁷ The statute requires the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" in order to achieve this Congressional goal.³⁸ In addition, Section 309(j)(3)(B) provides that in establishing eligibility criteria and bidding methodologies the Commission shall promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."³⁹ In the *LMS Further Notice*, we acknowledged that we have consistently established "small business" definitions on a service-by-service basis, and proposed to establish a similar definition for the multilateration LMS.⁴⁰ We also sought comment on the sufficiency of small business provisions to encourage participation by minority- and women-owned businesses and rural telephone companies (see Section IV.C.2, *infra*).

a. Small Business Size Standards

³⁶ See *Amendment of Part 1 of the Commissions Rules -- Competitive Bidding Proceeding, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, WT Docket 97-82, 12 FCC Rcd 5686, 5697, ¶ 16 (1997) ("Part 1 Notice").

³⁷ 47 U.S.C. § 309(j)(4)(D).

³⁸ *Id.* Under the tax certificate program, the Commission issued tax certificates pursuant to the Internal Revenue Code, 26 U.S.C. § 1071 to: (1) initial non-controlling investors in minority- and women-owned applicants upon the sale of their interests; and (2) licensees who assigned or transferred control of their licenses to minority- and/or women-owned entities. The certificates enabled the investors and licensees meeting the criteria to defer the gain realized upon the sale. In early 1995, Congress repealed 26 U.S.C. § 1071. See Pub. L. No. 104-7, § 2, 109 Stat. 93, 93-94 (1995).

³⁹ 47 U.S.C. § 309(j)(3)(B).

⁴⁰ *LMS Further Notice*, 12 FCC Rcd at 13970, ¶ 75; see also *Part 1 Third Report and Order*, 13 FCC Rcd at 387, ¶ 16.

18. Background. In the *LMS Further Notice*, we sought comment on what small business provisions should be offered to multilateration LMS small business entities to "remove entry barriers so as to ensure the participation of small businesses in the auction and in the provision of service."⁴¹ We also proposed that, if small business provisions are adopted, the unjust enrichment provisions set forth in Part 1, Subpart Q should apply.⁴²

19. Discussion. Commenters favor establishing a small business definition for the multilateration LMS.⁴³ Comtrak recommends that the Commission adopt two small business categories in the LMS auction: (1) a "small business" category, for businesses with average gross revenues of not to exceed \$10 million; and (2) a "very small business" category, for businesses with average gross revenues of not to exceed \$3 million.⁴⁴ Comtrak suggests that the Commission base these categories on the average gross revenues of the business for the three years preceding the filing of the entity's application.⁴⁵ Comtrak recommends bidding credits of 25 percent for small businesses and 35 percent for very small businesses.⁴⁶

20. We will define a small business as an entity with average annual gross revenues for the preceding three years not to exceed \$15 million. We will also define an additional category of small businesses -- very small businesses. A very small business is an entity with average annual gross revenues for the preceding three years not to exceed \$3 million. These definitions match those adopted for the 800 MHz Specialized Mobile Radio, 900 MHz Specialized Mobile Radio and Phase II 220 MHz services, which have been approved by the Small Business Administration.⁴⁷ We will adopt tiered bidding credits for these small business definitions, consistent with levels adopted in the Part 1 proceeding. As we stated in the Part 1

⁴¹ *LMS Further Notice*, 12 FCC Rcd at 13970, ¶ 75.

⁴² *Id.*

⁴³ Teletrac Comments at 15; Comtrak Comments at 5.

⁴⁴ Comtrak Comments at 4.

⁴⁵ *Id.*

⁴⁶ *Id.* at 6.

⁴⁷ See, e.g., Letter to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, re: Approval of Small Business Size Standards -- Competitive Bidding Rules for 800 MHz Specialized Mobile Radio Services (October 27, 1997). See also Letter to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (January 6, 1998) (Approval of Small Business Size Standards for the Phase II 220 MHz Services); Letter to Michele C. Farquhar, Acting Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (July 24, 1996) (Approval of Small Business Size Standards for the 900 MHz Specialized Mobile Radio Services).

proceeding, we believe that bidding credits alone will enable small businesses to successfully compete in future auctions.⁴⁸ Accordingly, small businesses will receive a 25 percent bidding credit. Very small businesses will receive a 35 percent bidding credit. Bidding credits for small businesses are not cumulative. As noted in the Part 1 proceeding, we believe that this approach will provide adequate opportunities for small businesses of varying sizes to participate in spectrum auctions.⁴⁹ We believe that the tiered bidding credits we adopt for LMS are reasonable in light of our decision to suspend installment payments for services auctioned in the immediate future, and expect that they will enable small businesses to obtain spectrum licenses through our auction program.

b. *Attribution of Gross Revenues*

21. Background. In the *LMS Further Notice*, we tentatively concluded that for LMS we would attribute the gross revenues of all controlling principals in the small business applicant as well as its affiliates.⁵⁰ In the *Part 1 Third Report and Order*, the Commission proposed to adopt a "controlling interest" standard, similar to the standard adopted for the Local Multipoint Distribution Service (LMDS),⁵¹ as the general attribution rule for all future auctions.⁵² Under this standard, eligibility for small business provisions would be determined by attributing the gross revenues of controlling interests in the applicant which are defined to include those that exercise "*de jure*" and "*de facto*" control and their affiliates.

22. Discussion. Comtrak argues that the Commission should rely solely on gross revenues, and not the number of employees, to determine an entity's eligibility for small incentives.⁵³ Comtrak generally supports the idea that a third party's gross revenues may be

⁴⁸ *Id.* The use of tiered bidding credits was successful in enabling small businesses to participate in the 800 MHz Specialized Mobile Radio auction that ended on December 8, 1997 and the Local Multipoint Distribution Service auction that ended on March 25, 1998.

⁴⁹ See *Part 1 Third Report and Order*, 13 FCC Rcd at 403-04, ¶ 47.

⁵⁰ *LMS Further Notice*, 12 FCC Rcd at 13970-71, ¶ 76.

⁵¹ See, e.g., In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order* (rel. November 21, 1996); Rule Making To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services -- Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making*, ¶ 352 (rel. March 13, 1997) ("*LMDS Second Report and Order*").

⁵² *Part 1 Third Report and Order*, 13 FCC Rcd at 477-78, ¶ 185-86.

⁵³ Comtrak Comments at 5.

attributed to a small business applicant when the party exercises *de jure* or *de facto* control over the applicant.⁵⁴ Comtrak advocates a standard of control that reflects the fact that small businesses must raise capital from a variety of investors, some of which do not necessarily exercise control over the small business applicant.⁵⁵

23. We will adopt, with a slight modification, our tentative conclusion to attribute the gross revenues of the applicant, its controlling principals and their affiliates. Specifically, we refer to "controlling interests" rather than "controlling principals." In addition, we provide a definition of "controlling interest" to clarify the application of the attribution rule in determining whether an entity qualifies to bid as a small business. In calculating gross revenues for purposes of small business eligibility, applicants will be required to count the gross revenues of the controlling interests of the applicant and their affiliates. This approach is consistent with our proposal in the *Part 1 Second Further Notice*,⁵⁶ and is similar to the attribution rules we have employed for the recent LMDS and 800 MHz Specialized Mobile Radio auction proceedings.⁵⁷

24. A "controlling interest" includes individuals or entities with *de jure* and *de facto* control of the applicant. *De jure* control is 50.1% of the voting stock of a corporation or, in the case of a partnership, the general partners. *De facto* control is determined on a case-by-case basis, and includes the criteria set forth in *Ellis Thompson*.⁵⁸ We recently sought comment in the *Part 1 Second Further Notice* on whether we should impose a minimum equity requirement (e.g., fifteen percent) on any person or entity identified as a controlling interest.⁵⁹

⁵⁴ *Id.* at 7.

⁵⁵ *Id.*

⁵⁶ *See Part 1 Third Report and Order*, 13 FCC Rcd at 477-78, ¶¶ 185-87.

⁵⁷ *See* Amendment of Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, CC Docket No. 92-297, 12 FCC Rcd 12545, 12692-93 (1997); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, FCC 97-223, *Second Report and Order*, PR Docket No. 93-144, 12 FCC Rcd 19079, 19169 (1997).

⁵⁸ *See Ellis Thompson Corp.*, 76 Rad. Reg. 2d (P & F) 1125, 1127-28 (1994) ("*Ellis Thompson*"), in which the Commission identified the following factors used to determine control of a business: (1) use of facilities and equipment; (2) control of day-to-day operations; (3) control of policy decisions; (4) personnel responsibilities; (5) control of financial obligations; and (6) receipt of monies and profits. *See also Intermountain Microwave*, 24 Rad. Reg. (P & F) 983 (1963); Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 309(d) of the Communications Act of 1934*, 43 FED. COMM. L.J. 277 (1991).

⁵⁹ *See Part 1 Third Report and Order*, 13 FCC Rcd at 478, ¶ 186.

The "controlling interest" definition also provides specific guidance on calculation of various types of ownership interests. For purposes of calculating equity held in an applicant, the definition provides for full dilution of certain stock interests, warrants, and convertible debentures.⁶⁰ In addition, the definition provides for attribution of partnership and other ownership interests, including stock interests held in trust, non-voting stock, and indirect ownership through intervening corporations. Once principals or entities with a controlling interest are determined under the definition, only the revenues of those principals or entities and their affiliates will be counted for small business eligibility.

25. When an applicant cannot identify controlling interests under the definition, the revenues of all interest holders in the applicant and their affiliates will be counted. For example, if a company is owned by four entities, each of which has twenty-five percent voting equity and no shareholders' agreement or voting trust gives any one of them control of the company, the revenues of all four entities must be counted. Treating such a corporation in this way is similar to our treatment of a general partnership—all general partners are considered to have a controlling interest. This rule, we believe, looks to substance over form in assessing eligibility for small business status.

26. We note that our intent here is to provide flexibility that will enable legitimate small businesses to attract passive financing in a highly competitive and evolving telecommunications marketplace.⁶¹ We believe that this controlling interest threshold will function effectively to ensure that only those entities truly meriting small business status are eligible for small business provisions. In particular, we believe that the *de jure* and *de facto* concepts of control used to determine controlling interest in an applicant and the application of our affiliation rules will effectively prevent larger firms from illegitimately seeking status as a small business. Moreover, as we discussed in the *Part 1 Third Report and Order*, we believe that requiring detailed ownership information will ensure that applicants claiming small business status qualify for such status, and ensure compliance by all applicants with spectrum cap limits.⁶² Therefore, we emphasize that bidders will be subject to the ownership disclosure requirements set forth in Section 1.2112 of our rules.⁶³

⁶⁰ See 47 C.F.R. § 1.2110(b)(4)(v); cf. 47 C.F.R. § 24.709(b)(7).

⁶¹ We note, however, that in seeking comment regarding the auction of initial licenses for certain broadcast stations, the Commission has proposed stricter attribution standards and eligibility requirements for applicants seeking to qualify for minority-based provisions. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *Notice of Proposed Rulemaking*, MM Docket No. 97-234, 12 FCC Rcd 22363, 22399-401 (1997).

⁶² *Part 1 Third Report and Order*, 13 FCC Rcd at 417-18, ¶ 73.

⁶³ See 47 C.F.R. § 1.2112.

27. Comtrak argues that the Commission's definition of "affiliate" does not provide clear guidance on whether an institutional investor and its affiliates should be considered affiliates of the small business for purposes of attributing gross revenues.⁶⁴ Comtrak suggests providing a clear definition of what constitutes control, including examples of the kinds of financial investments that will cause an investor or its affiliates to become affiliates of the small business applicant.⁶⁵ Teletrac supports greater clarity in the rules but believes that further definitional pronouncements will not provide sufficient clarity.⁶⁶ Teletrac instead suggests administrative procedures in order to provide preliminary determinations of affiliation status before the auction begins.⁶⁷ In the Part 1 proceeding, we examined our affiliation rules and adopted a uniform definition of the term "affiliate" for all future auctions.⁶⁸ We have found that this definition, which also contains detailed discussion and examples of relevant terms such as "control" and "identity of interest," has proven workable and is broad enough to address a wide variety of business structures.⁶⁹ In particular, this definition has helped to ensure that businesses seeking small business status are truly small.⁷⁰ This definition also allows entities themselves to make an appropriate preliminary determination of affiliation status without the assistance of administrative procedures. Therefore, we believe that the definition adequately addresses the concerns of the commenters. As a result, any change to the definition is not warranted.

2. *Sufficiency of Designated Entity Provisions*

28. Background. In the *LMS Further Notice*, the Commission solicited comments on whether small business provisions should be offered to multilateration LMS small business entities to further the Commission's goal of ensuring the participation of small businesses in the LMS auction and in the provision of multilateration LMS service.⁷¹

⁶⁴ *Id.* at 8.

⁶⁵ *Id.*

⁶⁶ Teletrac Reply Comments at 2.

⁶⁷ Teletrac Comments at 15; *see also* Teletrac Reply Comments at 2-3.

⁶⁸ *See Part 1 Third Report and Order*, 13 FCC Rcd at 392, ¶¶ 26-27.

⁶⁹ *Id.* at ¶ 27.

⁷⁰ *Id.*

⁷¹ *LMS Further Notice*, 12 FCC Rcd at 13970, ¶ 75.

29. Discussion. Comtrak asserts that to facilitate the participation of small businesses, the Commission should modify its build-out deadlines to allow all LMS licensees to satisfy their construction requirements by providing coverage to one-third of the EA's population within five years of initial license grant and two-thirds of the population within ten years.⁷² In the alternative, Comtrak requests that small business LMS licensees be granted the proposed extended build-out period.⁷³ Comtrak states that construction requirements have a direct impact on the level of competition in the industry.⁷⁴ Unless an auction winner were an incumbent LMS provider, Comtrak asserts, it would be almost impossible for the auction winner to meet the one year deadline for more than a few EAs without raising a prohibitive amount of initial capital.⁷⁵ Thus, Comtrak claims that the current construction rules favor incumbents and reduce potential competition from new entrants.⁷⁶ On the other hand, Teletrac indicates support for strict enforcement of the one-year construction deadline.⁷⁷ Teletrac asserts that forcing EA licensees to either construct or return licensed spectrum within one year would deter speculation, and would limit delays before LMS service is made available to the public.⁷⁸

30. We believe that it is appropriate to extend the amount of time for LMS auction winners to satisfy their construction requirements. The one-year requirement adopted in the *LMS Report and Order* and then retained in the *LMS Further Notice* was based on our rules for site-licensed systems. We are not persuaded that a one-year requirement is necessary to deter speculators. We agree with Comtrak that a one year build-out period is too short for all multilateration LMS licensees, not just for small businesses. In addition, although LMS auction winners will have the exclusive right to provide multilateration LMS service within their licensed EA, the frequency spectrum will still be shared with other services. In fact, the 902-928 MHz band is already heavily used by other licensed and unlicensed services for a wide variety of purposes. Consequently, even if a multilateration LMS licensee fails to build-out its system, the possibility that the spectrum will go under-utilized is negligible. Further, location services are being developed using alternative technologies, such as Global

⁷² Comtrak Reply Comments at 6.

⁷³ *Id.*

⁷⁴ *Id.* at 7.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Teletrac Comments at 10-13.

⁷⁸ *Id.*

Positioning Satellite (GPS) systems, suggesting that service to the public will not be greatly delayed by allowing LMS licensees the option of constructing over a longer period. Thus, we modify our construction requirements for all multilateration LMS licensees. We will require that multilateration LMS EA-licensees construct and place in operation a sufficient number of base stations that utilize multilateration technology to provide multilateration location service to one-third of the EA's population within five years of initial license grant, and two thirds of the population within ten years. In demonstrating compliance with the construction and coverage requirements, we will allow licensees to individually determine an appropriate field strength for reliable service, taking into account the technologies employed in their system design and other relevant technical factors. At the five- and ten-year benchmarks, licensees will be required to file with the Commission a map and other supporting documentation showing compliance with the coverage requirements.

31. We received no comments on whether small business provisions are sufficient to ensure the opportunity for businesses owned by minorities and women and rural telephone companies to participate in the provision of spectrum-based services. We remain committed to meeting the statutory objectives of promoting economic opportunity and competition, avoiding excessive concentration of licenses, and ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Commenters submitted no suggestions, evidence, or data to support race- or gender-based auction provisions. Therefore, we conclude that we do not have a sufficient record to support such special provisions at this time under the current standard of judicial review. We believe the bidding credits for small businesses, as detailed above, will provide small businesses with a meaningful opportunity to obtain LMS licenses. Moreover, many minority- and women-owned entities are small businesses and will therefore qualify for special provisions. As noted in the *Part 1 Third Report and Order*, we have commenced a series of studies to examine barriers encountered by minorities and women in the auctions process and have planned other studies to examine the experiences of small, minority- and women-owned businesses in the auctions process.⁷⁹ We also believe that our standardization, through the *Part 1 Third Report and Order*, of the rules regarding eligible entities, unjust enrichment, and bidding credits will assist small, minority- and women-owned businesses because the resulting predictability will facilitate the business planning and capital fundraising process.⁸⁰

D. Partitioning and Disaggregation and Unjust Enrichment Provisions

⁷⁹ *Part 1 Third Report and Order*, 13 FCC Rcd at 386, ¶ 15 and n. 36, citing, e.g., *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business (Report)*, FCC 97-164 (rel. May 8, 1997).

⁸⁰ See *Part 1 Third Report and Order*, 13 FCC Rcd at 386, ¶ 14.

32. **Background.** Partitioning and disaggregation are methods of subdividing the operating authority for a market area. Licensees that partition create a geographic subdivision of their market area, whereas licensees that disaggregate subdivide spectrum over their entire market area. The Commission has previously adopted or proposed to adopt partitioning and disaggregation rules for many of the Commercial Mobile Radio Services (CMRS). For example, we initially authorized licensees in the broadband Personal Communications Service (PCS), the Wireless Communications Service (WCS), and the 800 MHz and 900 MHz Specialized Mobile Radio (SMR) services to partition their license areas or disaggregate their spectrum.⁸¹ We extended our partitioning provisions to include winners of our upcoming auction of geographic area paging licenses and sought comment on allowing disaggregation for paging licensees.⁸² We have also proposed the adoption of partitioning and disaggregation authority for licensees in the Cellular Radiotelephone Service, the General Wireless Communications Service (GWCS), the narrowband PCS service,⁸³ and the 220-222 MHz service.⁸⁴

33. Consistent with these actions, in the *LMS Further Notice* we proposed to allow multilateration LMS licensees to partition their geographic license area and disaggregate portions of their spectrum.⁸⁵ Further, we tentatively concluded that a qualified small business

⁸¹ See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, *Report and Order*, 11 FCC Rcd 21831, 21843 and 21847-48, ¶¶ 13 and 24 (1996) ("*Partitioning and Disaggregation Report and Order*"); Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, *Report and Order*, 12 FCC Rcd 10785, 10834-39 (1997) ("*Wireless Communications Service Report and Order*"); and Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Second Report and Order*, 12 FCC Rcd 19079, 19134, 19137 and 19139, ¶¶ 156, 165 and 174 (1997) ("*800 MHz SMR Second Report and Order*").

⁸² Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732, 2817 and 2824, ¶¶ 192 and 212 (1997).

⁸³ See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21831 (1996); Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12972, 13014-18 (1997).

⁸⁴ See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Implementation of Section 309(j) of the Communications Act--Competitive Bidding, *Third Report and Order; Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943, 11074, ¶ 308 (1997). In the 220-222 MHz service, we decided to allow partitioning of 220 MHz Phase II geographic licenses and sought comment on rules to implement that authority. 12 FCC Rcd at 11074, 11080, ¶ 308, ¶ 322. We also sought comment on whether partitioning of 220 MHz Phase I nationwide licenses should be permitted in a manner similar to the rules for partitioning we have adopted for broadband PCS licensees. Finally, we sought comment on whether all Phase I and Phase II 220 MHz licensees should be permitted to disaggregate their license spectrum. 12 FCC Rcd at 11080, ¶ 322.

⁸⁵ *LMS Further Notice*, 12 FCC Rcd at 13971, ¶ 77.

that applies to partition or disaggregate its license to a non-small business entity should be required to repay any benefits it received from special small business provisions.⁸⁶ We sought comment on the type of unjust enrichment requirements that should be placed as a condition for approval of an application to partition or disaggregate a license, and on how such unjust enrichment amounts should be calculated.⁸⁷ Finally, we tentatively concluded that if a small business licensee partitions or disaggregates to another qualified small business that would not qualify for the same level of bidding credit, the transferring licensee should be required to repay a portion of the benefit it received.⁸⁸

34. Discussion. We adopt our proposal to allow multilateration LMS licensees to partition their geographic license areas and disaggregate portions of their spectrum in the same general manner as for licensees in other CMRS services where we have adopted partitioning and disaggregation. We will permit multilateration LMS licensees to partition or disaggregate to any party eligible to be a multilateration LMS licensee. Further, we will permit partitioning along any service area defined by the parties. We conclude that these decisions will permit marketplace forces to determine the most suitable service areas, and will further the goal of regulatory parity among CMRS services.

35. Comtrak, the only party that commented on these issues, supports our proposal to allow partitioning and disaggregation.⁸⁹ Comtrak states that partitioning and disaggregation will allow small business auction winners to customize their LMS systems in a manner that will best address their business plans.⁹⁰ We agree that this will allow auction winners to customize their LMS systems and will help remove entry barriers for small businesses.⁹¹

36. To ensure that partitioning and disaggregation do not result in circumvention of our LMS construction requirements, we adopt the dual construction requirements for partitioning and the construction certification procedure for disaggregation used in the

⁸⁶ *LMS Further Notice*, 12 FCC Rcd at 13971, ¶ 78.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Comtrak Comments at 6-7.

⁹⁰ Comtrak Comments at 6.

⁹¹ See *Partitioning and Disaggregation Report and Order*, 11 FCC Rcd at 21831 (1996); *Wireless Communications Service Report and Order*, 12 FCC Rcd at 10834-39 (1997); and *800 MHz SMR Second Report and Order*, 12 FCC Rcd 19079, 19127-53 (1997).

broadband PCS service.⁹² Under the first option for partitioning, we will require that the partitionee certify that it will meet the same coverage requirements as the original licensee for its partitioned market. If the partitionee fails to meet its coverage requirement, the license for the partitioned area will automatically cancel without further Commission action. Under the second option, the original licensee certifies that it has already met or will meet its coverage requirement. Further, we will require parties seeking Commission approval of an LMS disaggregation agreement to include a certification as to which party will be responsible for meeting the construction requirements.

37. As discussed above, we will permit partitioning along any service area defined by the parties. To this end, the Commission requires sufficient information to maintain our licensing records. Therefore, consistent with our treatment of the WCS and 800 MHz and 900 MHz SMR services, partitioning applicants will be required to submit, as separate attachments to the partial assignment application, a description of the partitioned service area and a calculation of the population of the partitioned service area and licensed market. The partitioned service area must be defined by coordinate points at every three degrees along the partitioned service area agreed to by both parties, unless county lines are followed. These geographical coordinates must be specified in degrees, minutes and seconds to the nearest second of latitude and longitude, and must be based upon the 1927 North American Datum (NAD27). Applicants also may supply geographical coordinates based on 1983 North American Datum (NAD83) in addition to those required based on NAD27. This coordinate data should be supplied as an attachment to the partial assignment application, and maps need not be supplied. In cases where county lines are being utilized, applicants need only list the specific counties that make up the newly partitioned area.⁹³

38. We find that it is unnecessary to require a party that wishes to disaggregate to retain a minimum amount of spectrum. Consistent with our treatment of the broadband PCS, WCS and 800 MHz and 900 MHz SMR services, we will allow disaggregating parties to negotiate channelization plans among themselves as a part of their disaggregation agreements.⁹⁴ Likewise, we find that it is unnecessary to adopt a limit on the maximum amount of spectrum that licensees may disaggregate. It is more appropriate for the marketplace to determine the amount of spectrum that should be disaggregated. LMS licensees shall be permitted to

⁹² See *Partitioning and Disaggregation Report and Order*, 11 FCC Rcd at 21857, 21865, ¶¶ 42 and 63 (1996).

⁹³ See *Wireless Communications Service Report and Order*, 12 FCC Rcd at 10837, ¶ 98 (1997); and *800 MHz SMR Second Report and Order*, 12 FCC Rcd at 19137, ¶ 166 (1997).

⁹⁴ See *Partitioning and Disaggregation Report and Order*, 11 FCC Rcd at 21860, ¶ 49 (1996); *Wireless Communications Service Report and Order*, 12 FCC Rcd at 10837, ¶ 99 (1997); and *800 MHz SMR Second Report and Order*, 12 FCC Rcd at 19141-42, ¶ 183 (1997).

disaggregate spectrum without limitation on the overall size of the disaggregation as long as such disaggregation is otherwise consistent with our rules.

39. Consistent with our treatment of the broadband PCS, WCS and 800 MHz and 900 MHz SMR services, we will permit combined partitioning and disaggregation.⁹⁵ This will allow LMS licensees the flexibility to design the types of agreements they desire, and will advance the goals of providing competitive service offerings, encouraging new market entrants and ensuring quality service to the public. In the event that there is a conflict in the application of the partitioning and disaggregation rules, the partitioning rules should prevail.

40. Regarding possible unjust enrichment through partitioning or disaggregation, we adopt our tentative conclusion that when a small business entity applies to partition its license or disaggregate spectrum, unjust enrichment rules must exist in order to ensure that non-small business entities cannot take indirect advantage of our small business incentives. Comtrak agrees with this principal and suggests that we adopt unjust enrichment rules patterned on those adopted for the 800 MHz SMR auction.⁹⁶

41. We no longer need to establish a separate unjust enrichment requirement for approving partitioning and disaggregation in LMS because we have adopted a uniform requirement in Part 1, Subpart Q of our rules for all services.⁹⁷ Accordingly, we will use the Part 1 unjust enrichment provisions for LMS.⁹⁸ These rules are similar to unjust enrichment rules adopted for the 800 MHz Specialized Mobile Radio auction for determining the actual proportion of bidding credit to be refunded and, consistent with Comtrak's suggestions, reduce the amount of unjust enrichment payments due on transfer based upon the amount of time the initial license has been held. In addition, when a combination of partitioning and disaggregation is proposed, we will use both the population of the partitioned area and the amount of spectrum disaggregated to make these *pro rata* calculations.⁹⁹

⁹⁵ See *Partitioning and Disaggregation Report and Order*, 11 FCC Rcd at 21866, ¶ 66 (1996); *Wireless Communications Service Report and Order*, 12 FCC Rcd at 10839, ¶ 102 (1997); and *800 MHz SMR Second Report and Order*, 12 FCC Rcd at 19150, ¶ 217 (1997).

⁹⁶ Comtrak Comments at 7.

⁹⁷ See *Part 1 Third Report and Order*, 13 FCC Rcd at 405-06, ¶ 50.

⁹⁸ See C.F.R. §§ 1.2111(e)(1)-(2).

⁹⁹ For example, if an LMS licensee that availed itself of a bidding credit and a non-qualifying partitionee/disaggragatee were to agree on a 20 percent disaggregation of spectrum over 30 percent of the population of the licensed service area, an unjust enrichment payment of six percent (.20 x .30) of the bidding credit would be required.

V. CONCLUSION

42. The actions we take in this *Second Report and Order* will ensure that competitive bidding for LMS licenses is conducted under the recently streamlined procedures adopted in Part 1, Subpart Q, and consistent with our procedures for all auctionable services. In addition, we establish small business definitions, adopt bidding credits, and approve partitioning and disaggregation provisions for multilateration LMS. We believe that these steps will facilitate the rapid deployment of LMS and will ensure the participation of small businesses in the auction process.

VI. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

43. The Final Regulatory Flexibility analysis, pursuant to the Regulatory Flexibility Act, see 5 U.S.C. Section 604, is contained in Appendix B.

B. Initial Paperwork Reduction Act of 1995 Analysis

44. This *Second Report and Order* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and other Federal Agencies to take this opportunity to comment on the information collections contained in this *Second Report and Order*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days after publication of the *Second Report and Order* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

45. In addition to filing comments on the information collections contained in this *Second Report and Order* with the Secretary, a copy of any comments on the information collections should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov.

C. Ordering Clauses

46. Accordingly, IT IS ORDERED that Part 90 of the Commission's Rules IS AMENDED as specified in Appendix C, effective 60 days after publication in the Federal Register. IT IS FURTHER ORDERED that Section 90.365(d) of the Commission's Rules IS AMENDED as specified in Appendix C, effective 170 days after publication in the Federal Register.

47. Authority for issuance of this *Second Report and Order* is contained in Sections 4(i), 257, 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(r), and 309(j).

48. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Second Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

D. Contacts for Further Information

49. For further information concerning this *Second Report and Order*, contact Kenneth Burnley at (202) 418-0660 (Auctions and Industry Analysis Division, Wireless Telecommunications Bureau). For additional information concerning the information collections contained in this *Second Report and Order* contact Judy Boley at 202-418-0214, or via the Internet at jboley@fcc.gov.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

PARTIES FILING COMMENTS AND REPLY COMMENTS

Comments

1. Teletrac, Inc. (Teletrac)
2. Comtrak

Reply Comments

1. Teletrac, Inc. (Teletrac)
2. Comtrak

APPENDIX BFinal Regulatory Flexibility Analysis
Second Report and Order

As required by the Regulatory Flexibility Act (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Memorandum Opinion and Order and Further Notice of Proposed Rule Making*.² The Commission sought written public comment on the proposals in the *Further Notice*, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and objectives of, the *Second Report and Order* in WT Docket No. 93-61:

The provisions adopted in the *Second Report and Order* enhance the efficiency of the competitive bidding process and promote use of the 902-928 band for the multilateration Location and Monitoring Service (LMS). The adopted provisions are intended to establish a system of competitive bidding for choosing among certain applications for initial licenses, and to carry out statutory mandates that certain designated entities, including small businesses, are afforded an opportunity to participate in the competitive bidding process and in the provision of multilateration LMS services. The adopted provisions are based on the competitive bidding authority of Section 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(j), which authorized the Commission to use auctions to select from among mutually exclusive initial applications in certain services, including multilateration LMS.

B. Summary of significant issues raised by public comments in response to the IRFA:

There were no comments filed directly in response to the IRFA; however, the Commission received 2 comments in response to the *Further Notice*. This FRFA analyzes the

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, PR Docket No. 93-61, 12 FCC Rcd 13942, 13981 (1997) ("*Further Notice*").

³ See 5 U.S.C. § 604.

modifications adopted in response to those comments, and their possible economic impact on small entities. See detailed discussion in Section E, *infra*.

C. Description and estimate of the number of small entities to which rules will apply:

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by our rules.⁴ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁶ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁷ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁸ Nationwide, as of 1992, there were approximately 275,801 small organizations.⁹ "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."¹⁰ As of 1992, there were approximately 85,006 such jurisdictions in the United States.¹¹ This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.¹² The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities. Below, we further describe

⁴ 5 U.S.C. § 603(b)(3).

⁵ *Id.* § 601(6).

⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

⁷ Small Business Act, 15 U.S.C. § 632 (1996).

⁸ 5 U.S.C. § 601(4).

⁹ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

¹⁰ 5 U.S.C. § 601(5).

¹¹ U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

¹² *Id.*

and estimate the number of small entity licensees and regulatees that may be affected by the rules.

The SBA has developed a definition of small entities applicable to LMS licensees. Therefore, the applicable definition under SBA rules of a small entity is the definition under the rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons.¹³ According to the Bureau of the Census, only twelve radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.¹⁴ Therefore, using such data, even if all twelve of these firms were LMS companies, nearly all such carriers were small businesses under the SBA's definition. As a practical matter, there are only a handful of existing LMS licensees -- those being those licensed under the former Automatic Vehicle Monitoring service.

In the *Second Report and Order*, the Commission has adopted more refined definitions for small business categories. The definition of a "small business" is an entity with average annual gross revenues for the preceding three years not to exceed \$15 million. The definition of a "very small business" is an entity with average annual gross revenues for the preceding three years not to exceed \$3 million. We are seeking SBA approval for these new LMS size standards.¹⁵

As noted in the *Second Report and Order*, there are 528 licenses to be awarded in the upcoming auction. New entrants could obtain multilateration LMS licenses through the competitive bidding procedure, and take the opportunity to partition and/or disaggregate a license or obtain an additional license through partitioning or disaggregation. Additionally, entities that are neither incumbent licensees nor geographic area licensees could enter the market by obtaining a multilateration LMS license through partitioning or disaggregation. The Commission cannot estimate how many licensees or potential licensees could take the opportunity to partition and/or disaggregate a license or obtain a license through partitioning and/or disaggregation, because it has not yet determined the size or number of multilateration LMS licenses that will be granted in the future.

Therefore, the number of small entities that will be affected is unknown. Given the fact that no reliable estimate of the total number of future multilateration LMS licensees can be made, the Commission assumes for purposes of this FRFA that all of the licenses will be

¹³ 13 C.F.R. § 121.201, SIC code 4812.

¹⁴ *1992 Census, Series UC92-S-1*, at Table 5, SIC code 4812.

¹⁵ See also *Second Report and Order*, *supra* at n. 47.

awarded to small businesses. It is also possible that a significant number of the potential licensees who could take the opportunity to partition and/or disaggregate a license or who could obtain a license through partitioning and/or disaggregation will be small entities.

D. Summary of the projected reporting, recordkeeping, and other compliance requirements:

The rules and provisions adopted in the *Second Report and Order* include the possibility of new reporting and recordkeeping requirements for a number of small business entities, as follows:

1. Competitive Bidding Applications. LMS license applicants will be subject to reporting and recordkeeping requirements to comply with the competitive bidding rules. Specifically, applicants will apply for LMS licenses by filing a short-form application (FCC Form 175), and will file a long-form application (FCC Form 601) at the conclusion of the auction. Additionally, entities seeking treatment as small businesses will need to submit information pertaining to the gross revenues of the small business applicant and its affiliates and certain investors in the applicant. Such entities will also need to maintain supporting documentation at their principal place of business.

2. Construction Requirements. The proposals in the *Second Report and Order* include reporting and recordkeeping requirements for new LMS licensees to establish compliance with the coverage requirements.¹⁶ This includes, for example, the requirement that licensees file with the Commission a map and other supporting documentation at the five- and ten-year construction benchmarks.

3. Geographic Partitioning and Spectrum Disaggregation. The proposals in the *Second Report and Order* include reporting and recordkeeping requirements for small businesses seeking licenses through the proposed partitioning and disaggregation rules. The information requirements would be used to determine whether the licensee is a qualifying entity to obtain partitioned or disaggregated spectrum. This information will be a one-time filing by any applicant requesting such a license. The information will be submitted on the FCC Forms 490 (or 430 and/or 603 filed as one package under cover of the Form 490) which are currently in use and have already received OMB clearance. The Commission estimates that the average burden on the applicant is three hours for the information necessary to complete these forms. The Commission estimates that 75 percent of the respondents, which may include small businesses, will contract out the burden of responding. The Commission estimates that it will take approximately 30 minutes to coordinate information with those contractors. The

¹⁶ See *Second Report and Order*, *supra* at ¶ 30.

remaining 25 percent of respondents, which may include small businesses, are estimated to employ in-house staff to provide the information. Applicants, including small businesses, filing the package under cover of FCC Form 490 electronically will incur a \$2.30 per minute on-line charge. On-line time would amount to no more than 30 minutes. The Commission estimates that 75 percent of the applicants may file electronically. The Commission estimates that applicants contracting out the information would use an attorney or engineer, with an average cost of \$200 per hour, to prepare the information.

E. Steps taken to minimize significant economic impact on small entities, and significant alternatives considered:

The *Second Report and Order* adopts certain provisions for smaller entities designed to ensure that such entities have the opportunity to participate in the competitive bidding process and in the provision of multilateration LMS services. These proposals will affect small businesses that avail themselves of these provisions, including small businesses currently holding multilateration LMS licenses that choose to partition and/or disaggregate and small businesses that may acquire licenses through partitioning and/or disaggregation. The small business definitions are intended to accommodate the broadest cross section of small businesses because it will include, at a minimum, all entities recognized as small businesses in the LMS contexts for which we have either adopted or proposed small businesses definitions. The Commission anticipates that most LMS licensees will fit the definition of small business or very small business.

1. Small Business Definitions and Bidding Credits

Commenters favor establishing a "small business" definition for the multilateration LMS.¹⁷ Comtrak recommends that the Commission adopt two small business categories in the LMS auction: (1) a "small business" category, for businesses with average gross revenues of over \$3 million but not to exceed \$10 million; and (2) a "very small business" category, for businesses with average gross revenues not to exceed \$3 million.¹⁸ Comtrak suggests that these categories be based on the gross revenues of the business for the three years preceding the filing of the entity's application.¹⁹ Comtrak also argues that the Commission should avoid the Small Business Administration's definition of a small business and, as it has done in previous auctions, rely solely on gross revenues, and not the number of employees, for the

¹⁷ Teletrac Comments at 15; Comtrak Comments at 5.

¹⁸ Comtrak Comments at 4.

¹⁹ *Id.*

purpose of determining an entity's eligibility for small incentives.²⁰ Comtrak also recommends bidding credits of 25 percent for small businesses and 35 percent for very small businesses.²¹ These provisions were adopted.

2. Attribution of Gross Revenues and Affiliates

Comtrak suggests that the Commission establish a clear definition of what constitutes control, including examples of the kinds of financial investments that will cause an investor or its affiliates to become affiliates of the small business applicant.²² Teletrac urges the Commission to augment the Part 1, Subpart Q rules with administrative procedures to provide preliminary determinations of affiliation status before the auction begins.²³ Teletrac argues that even the most carefully crafted rules cannot anticipate every form of control and business relationship.²⁴

The Commission adopted a "controlling interest" standard as the general attribution rule for all future auctions. The Commission has found that these definitions, which also contain detailed discussions and examples of relevant terms such as "control" and "identity of interest," has proven workable and is broad enough to address a wide variety of business structures. The Commission believes that these definitions are consistent with its proposals in the *Part 1 Third Report and Order*.²⁵

The Commission rejected Teletrac's suggestion that the Commission augment the Part 1 rules with administrative procedures to provide applicants with preliminary determinations of affiliation status before the auction begins. The Commission believes such procedures are administratively inefficient and would unnecessarily delay the auction of LMS spectrum.²⁶

3. Partitioning and Disaggregation

²⁰ *Id.* at 5.

²¹ *Id.* at 6.

²² *Id.*

²³ *Id.*

²⁴ Teletrac Comments at 16.

²⁵ *Id.*

²⁶ See also *Second Report and Order*, *supra* at ¶ 27.

With respect to partitioning and disaggregation, the Commission concludes that unjust enrichment provisions should apply when a licensee has benefitted from the small business provisions in the auction rules and applies to partition or disaggregate a portion of the geographic license area to another entity that would not qualify for such benefits. The alternative to applying the unjust enrichment provisions would be to allow an entity who had benefitted from the special bidding provisions for small businesses to become unjustly enriched by partition or disaggregating a portion of their license area to parties that do not qualify for such benefits.

F. Report to Congress:

The Commission shall send a copy of the *Second Report and Order*, including this FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. See 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Second Report and Order*, including FRFA, to the Chief Counsel for advocacy of the Small Business Administration. A copy of the *Second Report and Order* and this FRFA (or summary thereof) will be published in the *Federal Register*. See 5 U.S.C. § 604(b).

APPENDIX C - FINAL RULES

Chapter I of Title 47 of the Code of Federal Regulations, Part 90 is amended as follows:

Part 90 - Private Land Mobile Radio Services

1. The authority citation for Part 90 continues to read as follows:

Authority: Secs. 4, 251-2, 303, 309, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251-2, 303, 309 and 332, unless otherwise noted.

2. Section 90.155 is amended by revising paragraph (d) to read as follows:

§ 90.155 Time in which station must be placed in operation.

* * * * *

(d) Multilateration LMS EA-licensees, authorized in accordance with Section 90.353, must construct and place in operation a sufficient number of base stations that utilize multilateration technology (see paragraph (e) of this section) to provide multilateration location service to one-third of the EA's population within five years of initial license grant, and two thirds of the population within ten years. In demonstrating compliance with the construction and coverage requirements, the Commission will allow licensees to individually determine an appropriate field strength for reliable service, taking into account the technologies employed in their system design and other relevant technical factors. At the five and ten year benchmarks, licensees will be required to file a map and other supporting documentation showing compliance with the coverage requirements.

3. Section 90.365 is added to read as follows:

Sec. 90.365 Partitioned licenses and disaggregated spectrum.

(a) Eligibility--(1) Parties seeking approval for partitioning and disaggregation shall request an authorization for partial assignment of a license pursuant to Section 90.153.

(2) Multilateration LMS licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum at any time following the grant of their licenses. Multilateration LMS licensees may partition or disaggregate to any party that is also eligible to be a multilateration LMS licensee. Partitioning is permitted along any service area

defined by the parties, and spectrum may be disaggregated in any amount. The Commission will also consider requests for partial assignment of licenses that propose combinations of partitioning and disaggregation.

(b) Technical Requirements--In the case of partitioning, requests for authorization for partial assignment of a license must include, as attachments, a description of the partitioned service area, and a calculation of the population of the partitioned service area and the licensed geographic service area. The partitioned service area shall be defined by coordinate points at every three degrees along the partitioned service area unless county lines are followed. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude and must be based upon the 1927 North American Datum (NAD27). Applicants may supply geographical coordinates based on 1983 North American Datum (NAD83) in addition to those required based on NAD27. In the case where county lines are utilized, applicants need only list the specific area(s) (through use of county names) that constitute the partitioned area.

(c) License term. The license term for a partitioned license area, and for disaggregated spectrum shall be the remainder of the original licensee's license term.

(d) Construction requirements--(1) Requirements for partitioning.

(i) Parties seeking authority to partition must meet one of the following construction requirements:

(A) The partitionee may certify that it will satisfy the applicable construction requirements for the partitioned license area; or

(B) The original licensee may certify that it has or will meet the construction requirement for the entire license area.

(ii) Applications requesting authority to partition must include a certification by each party as to which of the above construction options they select.

(iii) Failure by any partitionee to meet its respective construction requirements will result in the automatic cancellation of the partitioned or disaggregated license without further Commission action.

(2) Requirements for disaggregation. Parties seeking authority to disaggregate must submit with their partial assignment application a certification signed by both parties stating which of the parties will be responsible for meeting the construction requirement for the licensed market. Parties may agree to share responsibility for meeting the construction requirements. Parties that accept responsibility for meeting the construction requirements and later fail to do so will be subject to license forfeiture without further Commission action.

4. Part 90 is amended by adding a new subpart X to read as follows:

Subpart X -- Competitive Bidding Procedures

§ 90.1101 Location and Monitoring Service subject to competitive bidding.

Mutually exclusive initial applications for multilateration Location and Monitoring Service licenses are subject to competitive bidding procedures. The procedures set forth in Part 1, subpart Q of this chapter will apply unless otherwise provided in this part.

§ 90.1103 Designated entities.

(a) This section addresses certain issues concerning designated entities in the Location and Monitoring Service (LMS) subject to competitive bidding. Issues that are not addressed in this section are governed by the designated entity provisions in Part 1, Subpart Q of this chapter.

(b) Eligibility for small business provisions.

(1) A small business is an entity that, together with its affiliates and controlling interests, has average gross revenues not to exceed \$15 million for the preceding three years.

(2) A very small business is an entity that, together with its affiliates and controlling interests, has average gross revenues not to exceed \$3 million for the preceding three years.

(3) For purposes of determining whether an entity meets either of the definitions set forth in paragraph (b)(1) or (b)(2) of this section, the gross revenues of the entity, its affiliates, and controlling interests shall be considered on a cumulative basis and aggregated.

(4) Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(5) A consortium of small businesses (or a consortium of very small businesses) is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition in paragraph (b)(1) of this section (or each of which individually satisfies the definition in paragraph (b)(2) of this section). Where an applicant or licensee is a consortium of small businesses (or very small

businesses), the gross revenues of each small business (or very small business) shall not be aggregated.

(c) Controlling interest.

(1) For purposes of this section, controlling interest includes individuals or entities with de jure and de facto control of the applicant. De jure control is greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, the general partner. De facto control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains de facto control of the applicant:

(A) the entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) the entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) the entity plays an integral role in management decisions.

(2) Calculation of certain interests.

(A) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(B) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(C) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(D) Non-voting stock shall be attributed as an interest in the issuing entity.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(F) Officers and directors of an entity shall be considered to have an attributable interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have an attributable interest in the licensee or applicant.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have an attributable interest in such applicant or licensee if such person, or its affiliate pursuant to § 1.2110(b)(4) of this chapter, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence

- (i) The nature or types of services offered by such an applicant or licensee;
- (ii) The terms upon which such services are offered; or
- (iii) The prices charged for such services.

(I) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have an attributable interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

- (i) The nature or types of services offered by such an applicant or licensee;
- (ii) The terms upon which such services are offered; or
- (iii) The prices charged for such services.

(d) A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 90.1103(b)(1) or § 90.1103(b)(5) of this subpart may use the bidding credit specified in § 1.2110(e)(2)(ii) of this chapter. A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in § 90.1103(b)(2) or § 90.1103(b)(5) of this subpart may use the bidding credit specified in accordance to § 1.2110(e)(2)(i) of this chapter.

