

Reno-Tahoe Airport Authority
Airport Concession
Disadvantaged Business Enterprise
(ACDBE) Program

AIRPORT CONCESSION

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

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AIRPORT CONCESSION

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

I. POLICY (Sections 23.23)

The Reno-Tahoe Airport Authority (“RTAA”) has established an Airport Concession Disadvantaged Business Enterprise (“ACDBE”) program (the “Program”) in accordance with regulations of the U.S. Department of Transportation (DOT), 49 Code of Federal Regulations (C.F.R.) Part 23, effective April 21, 2005, as may be amended (the “Regulations”). RTAA is a primary airport and the recipient of federal airport funds authorized for airport development after January 1988 that was authorized under Title 49 of the United States Code. RTAA has signed an assurance that it will comply with 49 CFR Part 23.

It is the policy of RTAA to ensure nondiscrimination on the basis of race, color, sex or national origin in the award and administration of concession-related contracting opportunities at the Reno-Tahoe International Airport (the “Airport”). Moreover, it is the policy of RTAA to ensure that ACDBEs, as defined in Part 23, have an equal opportunity to receive and participate in concession opportunities. It is the RTAA’s policy to:

1. Ensure nondiscrimination in the award and administration of opportunities for concession by airports receiving DOT financial assistance; and
2. Create a level playing field on which ACDBEs can compete fairly for opportunities for concessions; and
3. Ensure that RTAA’s ACDBE program is narrowly tailored in accordance with applicable law; and
4. Ensure that only firms that fully meet Part 23’s eligibility standards are permitted to participate as ACDBEs at the Airport; and
5. Help remove barriers to the participation of ACDBEs in opportunities for concessions at our airport.

The Reno-Tahoe Airport Authority Board of Trustees (“Board”) is responsible for establishing the ACDBE policy of RTAA. The President/CEO of RTAA, Ms. Krys Bart, is responsible for ensuring the RTAA’s adherence to this policy. Ms. Bart has designated the Executive Vice President/COO, Ms. Marily Mora, as the ACDBE Liaison Officer (the “ACDBELO”). As the ACDBELO, Ms. Mora is responsible for implementing all aspects of the ACDBE/DBE program, as provided in Section I (D) below. The Program’s implementation is accorded the same priority as compliance with all other legal obligations incurred by RTAA in its financial assistance agreements with the Department of Transportation. Ms. Mora performs these duties in coordination with the President/CEO. It is the expectation of the Board and the President/CEO that all RTAA

personnel shall adhere to the spirit, as well as the provisions and procedures of this Program.

RTAA has disseminated this policy statement to the Board and all of the components of the organization. RTAA has also distributed this statement to ACDBE and non-ACDBE concessionaire communities in RTAA's area. RTAA has conducted an ACDBE Stakeholders Meeting where the policy as part of the draft Program was disseminated, placed a PDF file of the draft Program, including this statement, on the RTAA's website, and mailed it directly to other interested parties as requested. The complete ACDBE Program and the overall ACDBE goal analysis are also available for review at the office of RTAA's ACDBELO, 2001 East Plumb Lane, Reno, NV 89502.

This policy will be submitted to the Federal Aviation Administration for approval pursuant to the Regulations. This policy will be modified by RTAA to the extent required to obtain such approval.

EFFECTIVE DATE: October 1, 2008

Krys T. Bart, A.A.E.
President/CEO, Reno-Tahoe Airport Authority

A. Objectives (Section 23.1)

The objectives of this Program are the following:

1. To ensure nondiscrimination in RTAA's award and administration of opportunities for concessions at the Airport;
2. To create a level playing field on which ACDBEs can compete fairly for opportunities for concessions at the Airport;
3. To ensure that only firms meeting the eligibility requirements of this Program are permitted to participate as ACDBEs at the Airport;
4. To remove barriers to participation of ACDBEs in opportunities for concessions at the Airport;
5. To provide appropriate flexibility to RTAA in establishing and providing opportunities for ACDBEs at the Airport;
6. To administer the Program in close coordination with the various divisions and departments within RTAA so as to facilitate the successful implementation of this Program.

B. Compliance and Enforcement (23.11)

RTAA is subject to the compliance and enforcement actions detailed in 49 CFR Part 26.101, Part 101.03(b) and 26.105 as referred to in 49 CFR Part 23.11. These sections of the regulations include the following formal enforcement or appropriate program sanctions except where prevented from doing so because a Federal court has issued a final order in which the court found that the requirement is unconstitutional:

1. Suspension or termination of Federal funds;
2. Refusal to approve projects, grants or contracts until deficiencies are remedied;
and
3. Actions consistent with 49 U.S.C 47106(d), 47111(d) and 47122.

RTAA is also subject to compliance reviews by the FAA at any time, including reviews of paperwork and on-site reviews, as appropriate. Additionally, the Office of Civil Rights may direct the operating administration to initiate a compliance review based on complaints received.

C. Applicability (Sections 23.5 and 23.21)

RTAA, a recipient of federal financial assistance from the Federal Aviation Administration (“FAA”) of the United States Department of Transportation, is required to implement an ACDBE Program in accordance with the Regulations, which are incorporated herein by this reference. The Program outlined herein applies to all Airport concessions, management agreements and other agreements covered by the Regulations (collectively “concession-related contracts”). In the event of any conflicts or inconsistencies between the Regulations and this Program, the Regulations shall prevail.

D. DEFINITIONS (Section 23.3)

Any terms used in this Program that are defined in 49 C.F.R. 23.3 or elsewhere in the Regulations shall have the meaning set forth in the Regulations. Some of the most common terms are defined below:

1. Airport Concession Disadvantaged Business Enterprise (ACDBE)

A concession that is a for-profit, small business concern: 1) that is at least fifty-one percent (51%) owned by one or more individuals who are both socially and economically disadvantaged, or, in the case of a corporation, in which fifty-one percent (51%) of the stock is owned by one or more socially and economically disadvantaged individuals; and 2) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

2. Car Dealership

An establishment primarily engaged in the retail sale of new and/or used automobiles. Car dealerships frequently maintain repair departments and carry stocks of replacement parts, tires, batteries, and automotive accessories. Such establishments also frequently sell pick-up trucks and vans at retail. In the standard industrial classification system, car dealerships are categorized NAICS code 441110.

3. Concession

One or more of the types of for-profit businesses listed as follows: 1) a business located on the Airport that is engaged in the sale of consumer goods or services to the public under an agreement with RTAA, another concessionaire, or the owner or lessee of a terminal, if other than RTAA; 2) a business conducting one or more of the

following covered activities, even if does not maintain an office, store, or other business location on the Airport, as long as the activities take place on the Airport: management contracts and subcontracts, a web-based or other electronic business in a terminal or which passengers can access at the terminal, an advertising business that provides advertising displays or messages to the public on the Airport, or a business that provides goods and services to concessionaires. The conduct of an aeronautical activity is not considered a concession.

4. Concessionaire

A firm that owns and controls a concession or a portion of a concession.

5. Direct Ownership Arrangement

A joint venture, partnership, sublease, licensee, franchise, or other arrangement in which a firm owns and controls a concession.

6. Local Geographic Preference

Any requirement that gives an ACDBE located in one place (e.g., RTAA's local area) an advantage over ACDBEs from other places in obtaining business as, or with, a concession at the Airport.

7. Indian Tribe

Any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native Corporation (as defined in the Regulations), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides.

8. Management Contract or Subcontract

An agreement with RTAA or another management contractor under which a firm directs or operates one or more business activities, the assets of which are owned, leased, or otherwise controlled by RTAA. The business activity operated or directed by the managing agent must be other than an aeronautical activity, be located at the Airport, and be engaged in the sale of consumer goods or provision of services to the public.

9. Material Amendment

A significant change to the basic rights or obligations of the parties to a concession agreement. Examples of material amendments include an extension to the term not provided for in the original agreement (including, without limitation, the grant of additional options to renew) or a substantial increase in the scope of the concession privilege.

10. Native Hawaiian

Any individual whose ancestors were natives, prior to 1778, of the area that now comprises the State of Hawaii.

11. Native Hawaiian Organization

Any community service organization serving Native Hawaiians in the State of Hawaii that is a not-for-profit organization chartered by the State of Hawaii, and is controlled by Native Hawaiians.

12. Personal Net Worth

The net value of the assets of an individual remaining, after total liabilities are deducted. An individual's personal net worth does not include the following: the individual's ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification; the individual's equity in his or her primary place of residence; and other assets that the individual can document 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), to a maximum of \$3 million. An individual's personal net worth includes only his or her share of assets held jointly or as community property with the individual's spouse.

13. Small Business Concern

A for-profit business that does not exceed the size standards of 49 CFR 23.23.

14. Socially and Economically Disadvantaged Individuals

Any individual who is a citizen (or lawfully admitted permanent resident) of the United States and:

- a. Any individual determined by RTAA to be a socially and economically disadvantaged individual on a case-by-case basis.

b. Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

1. Black Americans (including persons having origins in any of the Black racial groups of Africa);
2. Hispanic-American (including persons of Central or South American, Cuban, Dominican, Mexican, Puerto Rican, or other Spanish or Portuguese culture or origin, regardless of race);
3. Native-American (including persons who are Aleuts, American Indians, Eskimos, or Native Hawaiians);
4. Asian-Pacific American (including persons whose origins are from Brunei, Burma (Myanmar), Cambodia (Kampuchea), China, the Commonwealth of the Northern Marianas Islands, the Federated States of Micronesia, Fiji, Guam, Hong Kong, Indonesia, Japan, Juvalu, Kirbati, Korea, Laos, Macao, Malaysia, Nauru, the Philippines, Samoa, Taiwan, Thailand, Tonga, the U.S. Trust Territories of the Pacific Islands (Republic of Pilau), or Vietnam);
5. Subcontinent Asian American (including persons whose origins are from Bangladesh, Bhutan, India, the Maldives Islands, Nepal, Pakistan, or Sri Lanka);
6. Woman; or
7. A member of any additional group whose members are designated as socially and economically disadvantaged by the Small Business Administration, at such time as the Small Business Administration's designation becomes effective.

15. Race-Neutral

A measure or program that is, or can be, used to assist all small businesses, without making distinctions or classifications on the basis of race or gender.

16. Race-Conscious

A measure or program that is specifically focused on assisting only ACDBEs, including women-owned ACDBEs. For the purpose of the

Regulations, race-conscious measures include gender-conscious measures.

E. Prohibited Discrimination (Section 23.9)

RTAA will never exclude any person from participating in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any concession-related contracts on the basis of race, color, sex, or national origin.

In administering this Program, RTAA will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing the accomplishment of the objectives of this Program with respect to individuals of a particular race, color, sex, or national origin.

The following nondiscrimination language will be included in all concession-related contracts RTAA executes with any firm after April 21, 2005:

This agreement is subject to the requirements of the US Department of Transportation's Regulations 49 CFR Part 23. The concessionaire or contractor agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement, management contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR Part 23.

The concessionaire or contractor agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR Part 23 that it enters into and cause those businesses to similarly include the statements in further agreements.

No material amendment to a concession-related contract that was executed by RTAA prior to April 21, 2005 shall be entered into by RTAA without complying with the requirements of Section 23.71.

F. Active Participants Directory (Section 23.23(a))

RTAA shall refer interested persons to the Nevada Unified Certification Program (UCP) database for a list of all firms eligible to participate as ACDBEs in this Program. The UCP database includes every firm's name, address, phone number, type of work the firm has been certified to perform as an ACDBE. The UCP database is revised on a monthly basis with updated information for contractors and the public to access at the following URL address: <http://www.nevadadbe.com> .

II. ADMINISTRATIVE REQUIREMENTS

A. Dissemination of Policy Statement (Section 23.23)

RTAA shall issue a signed and dated Policy Statement throughout RTAA and to the business community, including ACDBEs and non-ACDBEs that perform work on concession-related contracting opportunities. The entire Program will be available from RTAA's website at <http://www.renoairport.com> and hard copies will be made available to the public upon request.

B. Duties of the ACDBE Liaison Officer (Sections 23.23)

Pursuant to 49 CFR 23.23, the Program shall be administered by the Airport Concession Disadvantaged Business Enterprise Liaison Officer ("ACDBELO") who shall be appointed by and have direct access to the President/CEO of RTAA on ACDBE issues. The ACDBELO will be the primary person responsible for implementing all aspects of this Program, and will work closely with all other divisions of RTAA, including Legal, Properties, and others who are responsible for making decisions relative to RTAA's concession-related contracting opportunities.

The ACDBELO's specific duties and responsibilities are attached as Exhibit A and incorporated herein.

Ms. Marily Mora has been appointed the ACDBELO, whose contact information is as follows:

By Mail:

Ms. Marily Mora
Executive Vice President/COO
Reno-Tahoe Airport Authority
P.O. Box 12490
Reno, NV 89510

By telephone:

(775) 328-6400

By e-mail:

mmora@renoairport.com

C. Over-Concentration (Sections 23.25(c))

If the ACDBELO determines that ACDBE participation is over-concentrated in certain types of work or contracting opportunities, the ACDBELO will develop appropriate measures to address the over-concentration. The ACDBELO will seek approval of such measures from the FAA and, at that time, the measures will become a part of this Program. Currently, RTAA is unaware of any types of work or contracting opportunities that have an over-concentration of ACDBE participation.

D. Record Retention and Report (Section 23.27)

RTAA will retain sufficient basic information regarding its program implementation, and the award and performance of agreements and contracts to enable the FAA to determine its compliance with 49 CFR Part 23. RTAA will retain this data for a minimum of three (3) years following the end of the concession agreement or other covered contract. Additionally, RTAA will submit an annual report of ACDBE participation to the FAA Regional Civil Rights Office via their electronic reporting system, DOORS.

III. DETERMINING, ACHIEVING GOALS AND COUNTING OVERALL ACDBE PARTICIPATION (Sections 23.41-23.61)

The Board shall establish separate overall three-year goals for the participation of ACDBEs in rental car and non-rental car concession-related contracting opportunities pursuant to the Regulations. The overall goal of RTAA for rental car concessions shall be expressed as a percentage of the total value of vehicles and other goods and services purchased by the rental car concessions. The overall goal of RTAA for non-rental car concessions shall be expressed as a percentage of their total gross receipts. RTAA's overall goals represent the amount of ready, willing and able ACDBEs that are available to participate in contracting opportunities and are reflective of the amount of ACDBE participation RTAA would expect absent the effects of discrimination. RTAA intends to meet the goals to the maximum extent feasible through the race-neutral measures described in Section III (d) (1) below. Where race-neutral measures are inadequate to meet an overall goal, RTAA will use race-conscious measures which may include establishing specific contract goals for particular projects with subcontracting opportunities. RTAA shall require all businesses subject to ACDBE goals at the Airport (except rental car companies) to make a good faith effort to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with ACDBEs.

A. Methodology for Setting Overall ACDBE Goals (Section 23.51)

The ACDBELO, in conjunction with the Properties Manager and other appropriate RTAA staff, will conduct a thorough analysis of the relevant contracting markets in which RTAA will solicit participation from all firms in applicable industries for the fiscal year. This analysis will include a description of geographical boundaries of the

solicitations, the types of work to be contracted and any other indicators that RTAA determines to be relevant in defining its contracting markets for the fiscal year. The ACDBELO will then determine the total available businesses according to the relevant contracting markets. The ACDBELO may consult a variety of sources including, but not limited to, RTAA's Active Participants List, the US Census County Business Patterns Database and relevant disparity studies.

The ACDBELO will conduct a similar analysis to determine the ACDBEs that are available to participate in the projected contracts for the fiscal year. This analysis will include a description of the available ACDBEs relevant to the geographical boundaries of the solicitations, the types of work to be contracted, and many other factors deemed relevant. RTAA may consult a variety of sources including, but not limited to, the Nevada UCP database, RTAA's Active Participants List, the US Census County Business Patterns Database, and relevant disparity studies.

To develop the base figure, the ACDBELO will compare the available ACDBEs in the relevant contracting market to the available businesses in the relevant contracting markets. This calculation may include a weighting factor according to contracting expenditure patterns.

RTAA will develop the overall goal for non-rental car concessions based upon the availability of ACDBEs as a percentage of all non-rental car concessions gross receipts. For rental car concessions, the overall goal will be based on the availability of ACDBEs expressed as a percentage of vehicles and other goods and services purchase values.

B. Projection of Percentage of Overall Goals to Be Achieved Through Race-Neutral and Race-Conscious Measures

It is RTAA's intent to meet the overall goals to the maximum extent feasible through race-neutral measures. Where race-neutral means are inadequate to meet an overall goal, RTAA will use race-conscious means which may include establishing specific contract goals for particular projects with subcontracting opportunities.

Once an overall goal is proposed, the ACDBELO will analyze and project whether RTAA's program of race-neutral measures is sufficient to achieve the goal. If not, then race-conscious means will be used. When deciding whether the overall goal must be reached through establishing race-conscious methods, the ACDBELO shall analyze the actual achievement of the overall goal through race-neutral methods in the current and previous two years. When establishing race-conscious methods during the current fiscal year, the ACDBELO shall monitor the progress towards achieving the overall goal and increase, decrease or discontinue the use of race-conscious methods accordingly. The ACDBELO shall monitor and adjust the use of contract-specific goals in accordance with 49 CFR 26.51-51 (see 49 CFR 23.25(e) (1) (iv)).

C. Publishing and Adopting the ACDBE Goals and Methodology Report

1. ACDBE Goals and Methodology Report

The ACDBELO will prepare an ACDBE Goals and Methodology Report for concession-related contracts. The report shall document the analysis and methodology, as well as the proposed goals and estimates to be achieved through race-neutral measures. Once approved, the ACDBE Program will be posted on RTAA 's website and will be available for pick-up at the RTAA headquarters located at 2001 East Plumb Lane, Reno, NV 89502.

D. Achieving the Overall Goals (Section 23.25)

RTAA shall achieve the overall goals for ACDBE participation through a combination of race-neutral measures and race-conscious measures, such as the establishment of contract goals for concession-related contracting opportunities. RTAA shall not use quotas or set-asides for ACDBE participation in the Program, which are prohibited by Section 23.61, or any local geographic preference, which is prohibited by Section 23.79.

1. Race-Neutral Methods

RTAA intends to use race-neutral methods to the maximum extent feasible to achieve its overall goal. ACDBE participation that is obtained on contracts that have no specific ACDBE goal or where ACDBE's status in awarding a contract is not considered shall be considered race-neutral ACDBE participation. In addition, RTAA uses and will continue to use the following measures:

- a. Structuring concession activities so as to encourage and facilitate the participation of ACDBEs when practical; and
- b. Ensuring that competitors for concession opportunities are informed during pre-solicitation meetings about how RTAA's ACDBE Program will affect the procurement process; and
- c. Providing technical assistance in orienting small businesses to concession and management opportunities at the Airport through the Internet and facilitating introductions to RTAA's and other U.S. DOT recipients' contracting activities, through various Small Business Conferences and small and minority business organizations located in the Reno-Tahoe area; and
- d. Providing outreach and communications programs on contract procedures and contract opportunities in concert with pre-proposal conferences to ensure the inclusion of ACDBEs; and

- e. Ensuring the distribution of the Nevada UCP Database to the widest feasible universe of potential concessionaires and management services contractors by listing the Nevada Department of Transportation website location in the RFPs/RFQs; and
- f. Providing business development assistance, as needed, through referrals to the Nevada Small Business Development Center and other assistance agencies.

2. Race-Conscious Methods; Contract Goals

Unless RTAA determines that other race-conscious methods should be used, RTAA shall establish contract-specific ACDBE participation goals when race-neutral measures, standing alone, are not projected to be sufficient to meet an overall goal. The goals shall be established by RTAA and substantiated by information furnished by the ACDBELO. The contract-specific goal shall apply to the percentage of ACDBE participation calculated based on purchases of vehicles or other goods and services for rental car concessions, and based on total gross receipts for non-rental car concessions, and shall be set forth in the RFQ/RFP solicitation's ACDBE Provisions. RTAA is not required to establish a contract-specific goal for every contracting opportunity, especially when race-neutral means are sufficient to achieve the overall goal. For each contract the factors outlined below will be considered to determine whether a contract-specific goal should be established for the particular contract and, if so, what the percentage goal shall be:

- a. The projected portion of the overall goals that will be met by establishing contract-specific goals;
- b. The progress toward achieving the overall goals;
- c. The full range of activities in the proposed contract;
- d. The availability of ACDBEs for the types of work involved in the performance of the proposed contract;
- e. The unique conditions of the contract that might affect the ability of the concession-related firm to coordinate, utilize or incorporate other concession-related firms into the project;
- f. If the objective of the contract-specific goal is to obtain ACDBE participation through a direct ownership arrangement with an ACDBE, the goal will be calculated as a percentage of the total estimated annual gross receipts from the concession; and

- g. If the goal applies to purchases and/or leases of goods and services, the goal will be calculated by dividing the estimated dollar value of such purchases and/or leases from ACDBEs by the total estimated dollar value of all purchases to be made by the concessionaire; and
- h. Concessions (except car rental companies), notwithstanding any of the above, shall make good faith efforts to explore all available options to meet goals to the maximum extent practicable, through direct ownership arrangements with ACDBEs; and
- i. Any other relevant criteria.

E. Awarding Contracts with Contract-Specific Goals

Any proposed contractor that fails to demonstrate that it achieved the contract-specific ACDBE participation goal and fails to demonstrate that it made sufficient good faith efforts to do so shall not be deemed “responsive” and, therefore, shall be ineligible for award of the contract.

F. Eligibility of Proposals for Contract Award

The ACDBELO shall evaluate all proposals to determine whether the Proposers submitted all of the information required by 49 C.F.R. 26.53(b). Proposers who also meet the contract-specific ACDBE goal or demonstrates sufficient good faith efforts (a “responsive” Proposer) shall be eligible for the contract award. Should the ACDBELO determine that additional information is needed to evaluate a Proposer’s submission with regard to the ACDBE requirements, the ACDBELO shall request said Proposer to submit the required information; or may contact the listed ACDBEs directly.

G. Evaluation of ACDBE Certification Status

RTAA shall require that any ACDBEs listed by Proposers for participation in the contract be certified as eligible ACDBEs by the Nevada UCP. The ACDBELO shall review the Proposer’s ACDBE Report to confirm each firm’s certification status. RTAA will accept ACDBE certifications according to the Agreement for Interlocal Uniform Certification of Disadvantaged Business Enterprises in the State of Nevada as authorized by the Reno-Tahoe Airport Authority Board of Trustees in Board Memo # 00(11)-128.

H. Determination of Amount of ACDBE Participation

The ACDBELO shall review the percentage of total estimated gross receipts (or the total estimated value of the purchases of vehicles and other goods and services for car rental concessions) reported on the Proposer’s ACDBE Report for accuracy and shall compare it to the contract-specific goal established for the contract.

I. Determination of Good Faith Efforts

If the amount of ACDBE participation does not meet the contract-specific goal, the ACDBELO shall review the good faith efforts report submitted by the Proposer. The ACDBELO shall determine whether the Proposer has made a good faith effort to meet the contract-specific goal in accordance with 49 CFR Part 23.25(e)1(iii) and (iv), and 49 CFR Part 26.53, which are incorporated herein.

J. Proposer's Right to Administrative Reconsideration

In the event that the ACDBELO determines that the Proposer under review has not met the contract-specific goal and has not demonstrated good faith efforts, the ACDBELO will notify the Proposer in writing. The notification shall include the reasons for the determination and that the Proposer has the right, within the time period provided in the notification, to submit further written documentation or appear before the DBE Review Committee for reconsideration. The DBE Review Committee shall provide the Proposer with a written decision on reconsideration, explaining the basis for its determination.

In the event that the DBE Review Committee finds that the Proposer has not met the contract goal or demonstrated good faith efforts, the ACDBELO will recommend that said Proposer be found not responsive and evaluate the other Proposers to determine eligibility for contract award.

K. ACDBE Substitution

RTAA will require that a prime concessionaire not terminate for convenience an ACDBE listed in the ACDBE Report and then perform the work of the terminated ACDBE by itself or by an affiliate without written prior consent of RTAA. When an ACDBE is terminated or fails to complete its work on the contract for any reason, the prime concessionaire must make good faith efforts to find another ACDBE to substitute for the original ACDBE. These good faith efforts shall be directed at finding another ACDBE to perform the same estimated gross receipts (or in the case of a rental car concession, to sell the same dollar amount of vehicles and other goods and services) under the contract as the ACDBE that was terminated to the extent needed to meet the established contract goal. RTAA will include in each prime concessionaire contract a provision for appropriate administrative remedies or default that RTAA will invoke if the prime concessionaire fails to comply with these requirements, including the right to terminate the contract.

L. Recommendation for Award

Following the recommendation of the Proposer, the ACDBELO shall prepare a report on the Proposer's compliance with the ACDBE requirements for review by the President/CEO and for presentation to the Board at the time the contract award is considered. The decision of the Board on the award of contract, if such a decision is

made, shall be final and binding on all parties, subject to the execution of the contract as approved by the RTAA Attorney.

M. Counting and Tracking ACDBE Participation (Sections 23.53 and 23.55)

ACDBE participation for rental car concessions will only be counted in accordance with the requirements of Section 23.53 of the Regulations. In doing so, RTAA will count the entire amount of cost charged by an ACDBE for repairing vehicles and the fee or commission charged by an ACDBE to manage a car rental concession as long as the costs and fees are reasonable and not excessive as compared with fees customarily allowed for similar services. RTAA will not count any fees paid by a manufacturer to a car dealership for reimbursement of work performed under the manufacturer's warranty. Finally, for car rental concessions, RTAA will count the participation of ACDBEs providing goods and services towards RTAA's rental car concession goals.

ACDBE participation for non-car rental concessions will only be counted when it results from a "commercially useful function," as defined in 49 CFR 26.55(c), except that the requirements of 26.55(c) (3) do not apply to concessions. The total dollar value of gross receipts an ACDBE earns under a concession agreement and the total dollar value of a management contract or subcontract with an ACDBE shall be counted towards the goal. However, if the ACDBE enters into a subconcession agreement or subcontract with a non-ACDBE, then none of the gross receipts earned by the non-ACDBE will be counted.

When an ACDBE performs as a subconcessionaire or a subcontractor for a non-ACDBE, only the portion of the gross receipts earned by the ACDBE under its subagreement will be counted. Moreover, when an ACDBE performs as a participant in a joint venture, only the portion of the gross receipts equal to the distinct, clearly defined portion of the work of the concession that the ACDBE performs with its own forces will be counted toward the ACDBE goals. The FAA has issued guidance for counting ACDBE participation in joint venture agreements. RTAA will count such participation in strict accordance with the guidance. The guidance is included as Attachment 3.

The entire amount of fees or commissions charged by an ACDBE firm for a bona fide service will be counted, provided that RTAA determines that it is reasonable and not excessive as compared with fees customarily allowed for similar services. The total cost of goods obtained from an ACDBE manufacturer and the total cost of goods purchased or leased from an ACDBE "regular dealer," as defined in 49 CFR 26.55(e)(2)(ii), will be counted towards the ACDBE goals.

Goods purchased from an ACDBE which is neither a manufacturer nor a regular dealer will only be counted as follows:

- a. The entire amount of fees or commissions charged for assistance in the procurement of the goods will be counted, provided that it is reasonable and not excessive as compared with

fees customarily allowed for similar services. No portion of the cost of the goods themselves will be counted;

b. The entire amount of fees or transportation charges for the delivery of goods required for a concession will be counted, provided that it is reasonable and not excessive as compared with fees customarily allowed for similar services.

c. If a firm has not been certified as an ACDBE in accordance with the requirements of the Regulations, that firm's participation will not be counted toward ACDBE goals.

d. Work performed or gross receipts earned by a firm after its eligibility has been removed will not count toward ACDBE goals, unless the ACDBE firm is decertified because one or more of its disadvantaged owners do not meet the personal net worth criterion or the firm exceeds business size standards of the Regulations during the performance of a contract or other agreement, for the remainder of the term of the contract or other agreement (but not extensions or renewals).

e. Costs incurred in connection with the renovation, repair or construction of a concession facility will not be counted.

f. The ACDBE participation of car rental companies will not be counted toward the non-rental car concession goals.

IV. REQUIRED CONTRACT PROVISIONS (Section 23.29)

RTAA will include in all concession-related contracts the language required by Section I(D) above, as well as the reporting requirements, enforcement mechanisms and other means RTAA will require to ensure compliance (for specific provisions, see Exhibit B).

RTAA has two full-time staff members who will devote the time necessary to monitor and enforce this Program.

V. CERTIFICATION STANDARDS AND PROCEDURES

A. Unified Certification Program (Sections 23.31, 23.39 and 26.61-91)

RTAA is signatory to the Agreement for Uniform Certification of Nevada's statewide Unified Certification Program. Reno-Tahoe Airport Authority's Board of Trustees approved RTAA's participation with the Nevada UCP on November 9, 2000, Memo #00(11)-128, authorizing the President/CEO to sign on behalf of the Board pursuant to

an agreement for a Unified Certification Program with other jurisdictions in Nevada, as approved by the U.S. DOT on November 26, 2002. RTAA utilizes the Nevada UCP database to find ACDBE certified firms, located at the following url: <http://www.nevadadbe.com> As signatory to the Nevada UCP as a certifying agency, RTAA accepts the ACDBE certifications of the Nevada UCP certifying agencies, whose procedures are detailed in the Nevada UCP Exhibit A, covering the certification requirements of 49 CFR Part 26.61-91 Subpart D.

VI. MONITORING AND RECORDKEEPING

A. Active Participants List (Section 23.51(c) (2))

RTAA will require all concession-related contractors proposing on concession-related opportunities to return, at the time of proposal due date (options apply as to the time this information is required so long as it is prior to the award of the contract), the following information about the contract participants:

- Firm name
- Firm address and telephone number
- Firm's status as an ACDBE or non-ACDBE
- Age of the firm
- Type of work
- Estimated gross receipts of the firm or estimated total contract value

RTAA will use this information to maintain and update its Active Participants List (23.51(c) (2)). This list will be augmented by any concession expressing an interest in doing business at the Airport.

RTAA will also take the following measures to ensure nondiscriminatory participation of ACDBEs in non-concession and other covered activities (23.25(a)):

1. The signing of non-discriminatory clauses in lessee's contracts; and
2. RTAA will seek ACDBE participation in all types of concession activities, rather than concentrating participation in one category or a few categories to the exclusion of others; and
3. RTAA's overall goal methodology and description of race-neutral measures that will be taken to meet the goals are described in Section III (D) (1) of this plan. The goals set are consistent with the requirements of Subpart D (23.25(b and d)); and
4. If RTAA projects that race-neutral measures, standing alone, are not sufficient to meet an overall goal, RTAA will use race-conscious measures as described in Section III (D) (2) and (23.25(e)); and

5. RTAA will require businesses subject to ACDBE goals at the Airport (except car rental companies) to make good faith efforts to explore all available options to meet goals, to the maximum extent practicable through direct ownership arrangements with ACDBEs.

B. Reporting and Monitoring Participation of ACDBEs (Sections 23.27 and 23.29)

RTAA will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26.107:

1. RTAA will consider similar action under its own legal authority, including responsibility determination in future contracts. Exhibit B lists the regulation, provisions and contract remedies available to us in the event of non-compliance with the ACDBE regulation by a participant in our procurement activity.
2. RTAA will also implement a monitoring and enforcement mechanism to ensure that work committed to ACDBEs at contract award is actually performed by the ACDBE. This mechanism will provide for a running tally of actual ACDBE attainments (e.g. payment actually made to ACDBE firms), including a means of comparing these attainments to commitments. This will be accomplished by the following mechanisms, level of efforts and resources:
 - a. RTAA may perform interim audits of ACDBE participation. The audit will review gross receipts earned by or payments for goods and services and management agreements to ACDBEs to ensure that the actual amount equals or exceeds the dollar amounts stated in the report of proposed ACDBE participation.
 - b. RTAA will also review the quarterly reports submitted by the concessionaires (see Exhibit B) to ensure that the ACDBE participation levels remain in compliance with the contract requirements. This information will be used to provide the statistical data for the achievement reports described below. If RTAA determines that the concessionaires are not complying with the contract requirements regarding this program, RTAA will implement the contract remedies specified below.

It is the contractor's responsibility to maintain records and documents for three (3) years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of RTAA or U.S. DOT. This reporting requirement is also extended to any certified ACDBE.

In RTAA's reports of ACDBE participation to DOT, RTAA will show both commitments and attainments, as required by the DOT Reporting form.

C. Reporting to U.S. DOT (Sections 23.21 and 23.27)

RTAA will continue to report ACDBE participation and overall goal setting methods to the FAA as directed. Statistical data will be maintained as prescribed on an annual basis to provide reports to the FAA reflecting the ACDBE participation on the RTAA's concession-related contracting. These reports will provide information on RTAA's achievements in attaining ACDBE participation through race neutral and race conscious methods.

D. Contract Remedies (Section 23.29)

RTAA will monitor compliance of its contractors on concession-related contracts with the requirements of the Regulations and the Program. RTAA may impose such contract remedies as are available under the contract and under federal, state and local law and regulations for non-compliance. Such remedies may include, but are not limited to termination of the contract in whole or in part.

VII. PUBLIC PARTICIPATION AND OUTREACH EFFORTS (Section 23.43)

RTAA's activities managing public participation and outreach efforts are directed at assisting RTAA to solicit public input to set overall ACDBE participation goals.

In establishing overall ACDBE goals, RTAA will provide for public participation. This will include:

- a. Prior to finalizing the ACDBE Goals and Methodology Report RTAA will consult with other FAA grantees, minority and women's business groups, community organizations, trade associations representing concessionaires currently located at the Airport, existing concessionaires, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for ACDBEs, and RTAA's efforts to establish a level playing field for the participation of ACDBEs.
- b. In conjunction with RTAA's activities to meet its overall ACDBE goal, RTAA will implement various public participation and outreach activities designed to broaden awareness of the ACDBE Program of the RTAA. The measures described in Section 23.25, focusing on race-neutral means will be actively pursued, and RTAA will encourage its contractors to make similar outreach efforts to include ACDBE participation in concession-related contracting opportunities. RTAA will continue to refer ACDBEs to the Unified Certification Program for assistance in understanding ACDBE eligibility requirements and completing applications. RTAA will also

familiarize potential contractors with RTAA procurement procedures and requirements, and to otherwise develop effective programs to further the inclusion of ACDBEs in RTAA's contracting activities.

Airport Concession Disadvantaged Business Enterprise Liaison Officer's (ACDBELO) Duties and Responsibilities

In accordance with Sections 23.23(a) and 26.23 of 49 Code of Federal Regulations and Section II.B of this Program, the specific duties and responsibilities of the ACDBELO shall include, but not be limited to the following:

1. Analyzing and assessing the available resources and evidence for the establishment and achievement of overall three-year ACDBE goals for concession-related contracts;
2. Developing, monitoring and evaluating the ACDBE Program, and preparing supplemental written procedures and guidelines to implement the Program;
3. Conducting race-neutral measures to facilitate the participation of small business concerns, including ACDBEs, through outreach and other community programs, training and business development programs, restructuring contracting opportunities, or other race-neutral means;
4. Participating in the contract proposal and award processes, including recommending specific contract goals where appropriate, reviewing contract specifications, attending pre-proposal conferences, and evaluating proposals for Proposer responsiveness, responsibility and good faith efforts;
5. Monitoring specific contract performance and actual ACDBE participation and contract payments;
6. Monitoring overall ACDBE participation, adjusting overall goals and means of achievement, assessing areas of over-concentration of ACDBE participation and reporting to the President/CEO, the Board of Trustees of the Reno-Tahoe Airport Authority , as needed;
7. Participating in the statewide Unified Certification Program in accordance with 49 C.F.R. § 26.81;
8. Assisting the RTAA's DBE Program Review Committee;
9. Participating in the Airport Minority Advisory Council annual conferences and other organizations working on common issues pertaining to the Program issues, subject to Airport budget constraints; and
10. Maintaining all appropriate records and documentation of the Program.

ACDBE PROGRAM
REQUIRED CONTRACT PROVISIONS

I. All Concession Contracts

All concession contracts and or leases shall contain the following provision:

This agreement is subject to the requirements of the US Department of Transportation's Regulations 49 CFR Part 23. The concessionaire or contractor agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement, management contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR Part 23.

The concessionaire or contractor agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR Part 23 that it enters into and cause those businesses to similarly include the statements in further agreements.

Concessionaire shall provide a monthly report of ACDBE participation in the format prescribed by the Authority within 30 days of the end of each month. In addition, tenant shall provide all information and reports required by the Authority and shall permit access to its books, records, accounts, other sources of information and its facilities as may be determined by the Authority to be pertinent to ascertain compliance with the regulations or directives.

II. Contracts with Race-Conscious Goals

Listed below are the specific provisions that will be inserted into concession agreements with race-conscious goals:

- (a) Concessionaire has advised the RTAA that it will use the ACDBEs listed on attached Exhibit "xxx" in providing the services described thereon. Concessionaire agrees that within 60 days after the expiration of each calendar quarter during the term of this Agreement, it will provide a report to RTAA, in a form acceptable to RTAA, describing the gross receipts of

each such ACDBE described on attached Exhibit “xxx “ (and each substitute ACDBE obtained pursuant to paragraph (c) below), or in the case of a rental car concession, the dollar value of vehicles and other goods and services purchased by the Concessionaire from each such ACDBE, in each case calculated in accordance with the requirements of 49 CFR Part 23.

- (b) Concessionaire agrees that it will also submit within the same period described in (a) above a report to RTAA, in a form acceptable to RTAA, describing the Concessionaire’s total gross receipts for the entire contract, or in the case of a rental car concession, the total dollar value of vehicles and other goods and services purchased by the Concessionaire.
- (c) Concessionaire will have no right to terminate an ACDBE for convenience without RTAA’s prior written consent. If an ACDBE is terminated by the Concessionaire with RTAA’s consent or because of the ACDBE’s default, then the Concessionaire must make a good faith effort, in accordance with the requirements of 49 CFR part 23.25(e)1(iii) and (iv), and 49 CFR part 26.53, to find another ACDBE to substitute for the original ACDBE to perform the same estimated gross receipts (or in the case of a rental car concession, to sell the same amount of vehicles and other goods and services) under the contract as the ACDBE that was terminated.
- (d) The Concessionaire’s breach of its obligations under (a), (b) or (c) above shall be a Default by Concessionaire under Section “yyy” (the default provisions) and shall entitle RTAA to exercise all of its contractual and legal remedies, including termination of this Agreement.

PROPOSED ACDBE OVERALL CONCESSION GOALS

FY2009 - FY2011

Reno-Tahoe International Airport

Reno, Nevada

Airport Sponsor: Reno-Tahoe Airport Authority

Goal Period:	FY 2009	From: October 1, 2008 Thru: September 30, 2009
	FY 2010	From: October 1, 2009 Thru: September 30, 2010
	FY 2011	From: October 1, 2010 Thru: September 30, 2011

ACDBE Goal for Car Rental Concessions: FY 2009: 0.0%
FY 2010: 0.0%
FY 2011: 0.0%

ACDBE Goal for Terminal Concessions: FY 2009: 8.2%
FY 2010: 8.2%
FY 2011: 8.2%

Attachment 2

Regulations: 49 CFR Part 23

A copy of 49 CFR Part 23, Participation of Disadvantaged Business Enterprises in Airport Concessions, is attached.



Federal Register

**Tuesday,
March 22, 2005**

Part II

Department of Transportation

Office of the Secretary

49 CFR Part 23

**Participation by Disadvantaged Business
Enterprises in Airport Concessions; Final
Rule and Proposed Rule**

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****49 CFR Part 23**

[Docket No. OST-97-2550]

RIN 2105-AC91

Participation by Disadvantaged Business Enterprises in Airport Concessions**AGENCY:** Office of the Secretary, DOT.**ACTION:** Final rule.

SUMMARY: This rule revises and updates the Department's regulation concerning participation by airport concessionaire disadvantaged business enterprises (ACDBEs) in the concessions activities of airports receiving Federal financial assistance from the airport improvement program (AIP) of the Federal Aviation Administration (FAA). It makes the ACDBE concessions rule parallel in many important respects to the Department's DBE regulation for Federally-assisted contracts. It also addresses issues such as goal-setting, personal net worth and business size standards, and counting ACDBE participation by car rental companies.

DATES: *Effective Date:* This rule is effective April 21, 2005.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., Room 10424, Washington, DC 20590, phone numbers (202) 366-9310 (voice), (202) 366-9313 (fax), (202) 755-7687 (TTY), bob.ashby@ost.dot.gov (e-mail); and Michael Freilich, National External Program Manager, Office of Civil Rights, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. Phone numbers 202-267-7551 (voice), 202-267-5565 (fax).

SUPPLEMENTARY INFORMATION:**Background**

This final rule revises and updates the Department's regulation to ensure nondiscrimination in the provision of opportunities for disadvantaged business enterprises in airport concessions (49 CFR Part 23). The regulation is mandated by 49 U.S.C. 47107(e), originally enacted in 1987 and amended in 1992. The current language of this section is the following:

(e) Written Assurances of Opportunities for Small Business Concerns. (1) The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the

Secretary receives written assurances, satisfactory to the Secretary, that the airport owner or operator will take necessary action to ensure, to the maximum extent practicable, that at least 10 percent of all business at the airport selling consumer products or providing consumer services to the public are small business concerns (as defined by regulations of the Secretary) owned and controlled by a socially and economically disadvantaged individual (as defined in section 47113(a) of this title).

(2) An airport owner or operator may meet the percentage goal of paragraph (1) of this subsection by including any business operated through a management contract or subcontract. The dollar amount of a management contract or subcontract with a disadvantaged business enterprise shall be added to the total participation by disadvantaged business enterprises in airport concessions and to the base from which the airport's percentage goal is calculated. The dollar amount of the management contract or subcontract with a non-disadvantaged business enterprise and the gross revenue of business activities to which the management contract or subcontract pertains may not be added to this base.

(3) Except as provided in paragraph (4) of this subsection, an airport owner or operator may meet the percentage goal of paragraph (1) of this subsection by including the purchase from disadvantaged business enterprises of goods and services used in businesses conducted at the airport, but the owner or operator and the businesses conducted at the airport shall make good faith efforts to explore all available options to achieve, to the maximum extent practicable, compliance with the goal through direct ownership arrangements, including joint ventures and franchises.

(4)(A) In complying with paragraph (1) of this subsection, an airport owner or operator shall include the revenues of car rental firms in the base from which the percentage goal in paragraph (1) is calculated.

(B) An airport owner or operator may require a car rental firm to meet a requirement under paragraph (1) of this subsection by purchasing or leasing goods or services from a disadvantaged business enterprise. If an owner or operator requires such a purchase or lease, a car rental firm shall be permitted to meet the requirement by including purchases or leases of vehicles from any vendor that qualifies as a small business concern owned and controlled by a socially and economically disadvantaged individual.

(C) This subsection does not require a car rental firm to change its corporate structure or to provide for direct ownership arrangement to meet the requirement of this subsection.

(5) This subsection does not preempt—
(A) A State or local law, regulation, or policy enacted by the governing body of an airport owner or operator or;

(B) The authority of a State or local government or airport owner or operator to adopt or enforce a law, regulation, or policy related to disadvantaged business enterprises.

(6) An airport owner or operator may provide opportunities for a small business

concern owned and controlled by a socially and economically disadvantaged individual to participate through direct contractual agreement with that concern.

(7) An air carrier that provides passenger or property-carrying services or another business that conduct aeronautical activities at an airport may not be included in the percentage goal of paragraph (1) * * *.

The present version of Part 23 was issued in 1992 (57 FR 18410, April 30, 1992) and amended in 1999 (64 FR 5126, February 2, 1999). There have been three proposed rules to revise Part 23: in 1993 (58 FR 52050, October 8, 1993), 1997 (62 FR 24548, May 30, 1997), and 2000 (65 FR 54454; September 8, 2000). This final rule responds to comments on the most recent of these proposals.

In the 2000 proposal, the Department suggested making the DBE concessions rule a subpart of 49 CFR Part 26, the DBE rule for DOT-assisted contracts. However, the DOT-assisted contracts and concessions rules are based on different statutes. They apply to different kinds of businesses, and concern distinct types of relationships between recipients of DOT financial assistance and businesses. There are a number of substantive differences between the two regulatory schemes (e.g., business size standards). For these reasons, the Department has decided to keep the two regulations separate. ACDBEs will continue to be governed by Part 23, as revised by this issuance, and DOT-assisted contracts DBE provisions will remain in Part 26. Keeping the regulatory provisions separate should help to avoid confusion.

The Supreme Court's decision in *Adarand v. Peña*, which established the requirement that race-conscious affirmative action programs meet the "strict scrutiny" standard of review, was rendered in 1995. In 1999, when the Department made major changes to Part 26 in order to meet *Adarand* requirements, we did not issue a comprehensive revision of the airport concessions DBE requirements. Consequently, one of the most important functions of this final rule is to ensure that the airport concessions requirements of Part 23 meet *Adarand* requirements.

In 2003-04, the Department's Office of Inspector General (IG) issued two reports that addressed fraud and abuse problems in the Department's DBE program. Many of the IG's recommendations focused on the need for more effective oversight of the DBE program by state and local recipients and by DOT operating administrations. However, some of the IG's recommendations directly concerned

regulatory provisions governing the airport concessions DBE program. Probably the two most significant IG recommendations were that the Department expeditiously complete this rulemaking and that it include a specific personal net worth standard for owners of ACDBEs. The Department takes the IG's findings and recommendations very seriously, and we believe that the prevention of fraud and abuse in all portions of the DBE program is a very high priority. This final rule, like the 2000 proposed rule, includes a specific personal net worth standard. The accompanying supplemental notice of proposed rulemaking asks for comment on additional steps the Department might take to prevent fraud and abuse.

Major Issues

The Department identified the following issues as the most important in developing this final rule: Small business size standards, personal net worth standards, counting of ACDBE participation by car rental companies, and the goal-setting process. The bulk of comments on the 2000 NPRM concerned these issues. This portion of the preamble describes each of these issues, notes how the Department proposed to resolve it in the 2000 NPRM, summarizes comments on it, and provides a rationale for the Department's decision.

1. Small Business Size Standards

Size standards in this ACDBE regulation are important for a number of reasons. They implement the statutory requirement that participants be small businesses. They provide a means to ensure that a firm's participation in DBE programs is not necessarily of indefinite duration: if a firm grows to exceed size standards, it ceases to be eligible for the program. They are calibrated to help meet the objectives of the program, including permitting ACDBE firms to compete in the airport concessions market.

In Part 26, businesses seeking DBE certification must, by statute, meet SBA size standards and an additional cap on average annual gross receipts, currently set at \$17.42 million and subject to periodic adjustments for inflation. These requirements do not apply to Part 23, since the ACDBE statute gives the Secretary discretion to set size standards for concessions. For most airport concessions, the size standard under current Part 23 is \$30 million average annual gross receipts. The proper business size standard for the ACDBE program has been the subject of comment on all the Part 23 NPRMs that the Department has issued. For the

reasons stated in the supplemental notice of proposed rulemaking (SNPRM) that we are publishing in today's **Federal Register**, the Department is seeking additional comment on a number of size-related issues.

In the interim, we will maintain the status quo with respect to Part 23 size standards, with the two exceptions discussed below. First, since goods and services purchased by concessionaires from ACDBE businesses can count toward ACDBE goals, we think it is important to clarify in the regulatory text our understanding of the application of the rule's size standards to ACDBE goods and services providers. For certification purposes, a firm that provides goods and services to airport concessionaires is an ACDBE if, assuming it meets other eligibility criteria, it meets the size standards for ACDBE concessionaires. A firm that provides restaurant equipment to a restaurant at the airport, for purposes of Part 23, must meet the general Part 23 size standard, rather than the smaller SBA or Part 26 standards, to be an eligible ACDBE, so that the restaurant and the airport can count the purchase toward DBE goals.

Second, with respect to banks, the Department received a petition for rulemaking from a financial institution saying that organizations in its position were unable to compete against much larger institutions (*i.e.*, in the hundred billion dollars in assets range) at the current size standard of \$150 million in assets. The petitioner had been certified by an airport sponsor as an MBE (in a local MBE program) and a DBE with assets of \$275 million. However, because this exceeded the \$150 million standard, the petitioner was subsequently decertified. We believe that the petitioner has a fair point, with respect to the competitive disadvantages it faces against far larger institutions. Consequently, we will increase the banks and financial institutions size standards to \$275 million, which will allow DBE financial institutions to participate at a level that is more competitive.

We also note that the SBA business size standards no longer use an employee number standard for car dealers, but rather use a gross receipts standard. We believe that this approach, consistent with the way the Department approaches most business size standards in this rule, is sensible. Consequently, we are using the \$30 million gross receipts standard for car dealers as well as for other concession-related businesses, rather than the previous employee number standard.

2. Personal Net Worth

In order to meet narrow tailoring requirements, it is essential that a DBE program not be overinclusive. The statutory scope of the ACDBE program is to ensure nondiscrimination for airport concession businesses owned and controlled by individuals who are socially and economically disadvantaged. To prevent the program from becoming overinclusive, the ACDBE program should ensure that persons who are not disadvantaged do not have the opportunity to participate.

By statute, persons in certain designated groups are presumed to be socially and economically disadvantaged. The Department has always held this presumption to be rebuttable. That is, if a member of a designated group is shown to be non-disadvantaged, he or she would no longer be able to participate as an ACDBE owner. (Likewise, a person who is not presumed to be disadvantaged could participate if he demonstrated, on an individual basis, that he is socially and economically disadvantaged.) This rebuttable presumption feature of the existing rule is intended to provide a safeguard against the program becoming overinclusive, since a UCP (or recipient in a state where a UCP is not yet in effect)—on its own or in response to a complaint—has the authority to determine that an individual should no longer be regarded as disadvantaged.

The Department has recognized, however, that in the absence of a specific criterion for determining whether the presumption of disadvantage has been rebutted, there are difficult problems of proof and judgment when an issue is raised concerning the application of the presumption to an individual. For this reason, in the 1999 revision to Part 26, the Department adopted a numerical standard for this purpose. The absence of such a specific numerical standard in Part 23 has caused confusion. As noted above, the Department's Office of Inspector General (OIG) has recommended that Part 23 include a PNW numerical standard.

The Department agrees that Part 23 should include a PNW numerical standard. The question confronting the Department in this rulemaking is what that standard should be. In the 2000 NPRM, we proposed a \$2 million PNW standard. This was higher than the \$750,000 standard of Part 26 in recognition of the generally accepted proposition that airport concession businesses are more capital intensive, higher cash flow businesses than many businesses working under Part 26. The

owners of concessions therefore need more assets in order to enter and thrive.

There were a variety of comments on the PNW proposal. Many of the airport commenters generally said that we should not impose "onerous" requirements on ACDBEs or airports in the PNW area. They did not provide any specifics, however. Some airports supported the proposed \$2 million cap, while an airport trade association and other airports said that \$2 million or an unspecified higher standard would be appropriate. However, other airports and a union said that the \$2 million proposal was too high. Generally, these comments said that a cap at this level or higher would undermine the reason for having a PNW standard, allow persons into the program that were too rich, and lead to overinclusiveness problems. One of these commenters suggested a \$1 million standard and another suggested \$750,000. Another comment said that whatever the PNW level was, it should be the same for concessions and DOT-assisted contracts.

Many comments from ACDBEs and from an ACDBE trade association, as well as some airports, said that the final rule should not include any PNW standard or that the cap should be significantly higher (*e.g.*, \$3–10 million). Their main argument, which some comments fleshed out with real-world examples, is that in order to finance business expansion in a capital-intensive field like concessions, lenders required very high asset levels on the part of owners. If a business could not expand without its owners accumulating enough assets to exceed the \$2 million cap, the ACDBE program would create a glass ceiling.

Some comments suggested ways of limiting the adverse effects of PNW. These included (1) making PNW a rebuttable presumption; (2) establishing a sliding scale for PNW, relative to the projected gross sales of the business; (3) having a two-tier (*e.g.*, entry and retention) standard; (4) establishing some system that would reflect the individual situations of businesses and owners, and (5) excluding from the PNW calculation assets encumbered (*e.g.*, as collateral for a loan) for business purposes. A number of commenters also favored grandfathering existing concessionaires, so they did not lose their certification and contracts because of a new PNW standard coming into being.

Since the 2000 SNPRM, Federal courts have decided a number of cases upholding Part 26 as being narrowly tailored. The existence of the \$750,000 PNW cap in Part 26 was one of the factors leading to these successful

defenses of the regulation. This strengthens the Department's belief that a PNW cap of this kind is appropriate to add to Part 23.

The Department has concluded that \$750,000 is an appropriate standard for PNW. It is consistent with the Part 26 standard, and it has been approved by the courts in that context. Having only one PNW standard will avoid confusion between the Part 23 and Part 26 portions of the Department's DBE program. It will avoid concerns about overinclusiveness in the program by ensuring that persons who would fairly be perceived as too wealthy for a program aimed at assisting "disadvantaged" individuals do not participate. It responds to the concerns about confusion and fraud that were the basis for the OIG's recommendation.

At the same time, the Department is sensitive to the concern of commenters that a PNW standard at this level could inhibit opportunities for business owners to enter the concessions field and expand existing businesses.

We do not believe that having a substantially higher PNW standard across the board is the best way to respond to this concern: too high a standard would undermine the rationale for having a PNW standard in the first place. It could lead to concerns about overinclusiveness and to the perception that the program was not appropriately focused on disadvantaged individuals.

In calculating PNW, Part 26 makes reasonable exclusions for the business owner's equity in his or her owner's primary residence and the business applying for certification. In the different business context of concessions, the Department will add a third exclusion. Assets that the owner/applicant can demonstrate are necessary to obtain financing to enter or expand a concessions business at an airport subject to Part 23 (*e.g.*, by producing letters from banks to that effect) would also be excluded from the PNW calculation, as would assets that have in fact been encumbered to support existing financing for the applicant's business. This provision would extend only to "recourse" assets (*i.e.*, those that were encumbered or to be encumbered in order to obtain financing, as in a case where an asset is used a collateral for a loan).

For example, if the owner/applicant for ACDBE certification to operate a fast food franchise at an airport could document that MegaBurger Corporation requires the franchisee to have \$X in assets before it will grant the franchise, that amount would be excluded from the PNW calculation. Likewise, if the owner of an ACDBE retail or service

business who wished to expand operations to another airport could document that a number of financial institutions required \$Y in personal assets to back a loan needed for the expansion, \$Y would be excluded from the PNW calculation. Airports/UCPs would be responsible for verifying the documentation pertinent to this exclusion.

Without unduly expanding the well-accepted \$750,000 standard, this approach will take into account individual circumstances and avoid the "glass ceiling" effect of an across-the-board PNW standard about which commenters were concerned. There will be additional information that owners will have to obtain and recipients and UCPs will have to evaluate, but we believe that this is justified in the interest of a narrowly tailored regulation that remains fair and flexible regulation that achieves the objectives of nondiscrimination and opening business opportunities to ACDBEs.

To prevent the eligibility standards from becoming too open-ended, resulting in the participation of individuals so wealthy that it would be difficult to justify their inclusion in a program aimed at disadvantaged individuals, we are adding a \$3 million cap on this third exclusion. This figure is consistent with many comments concerning the appropriate extent of a PNW threshold. That is, an applicant could present documentation to the certifying authority that he or she required a certain amount of assets to open or expand a concessions business. If that amount exceeded \$3 million, the amount of the individual's net worth above \$3 million would be added to the PNW calculation.

Here is an example of how these provisions would work. A hypothetical business owner, Ms. T, has a gross PNW of \$4.6 million. The equity in her primary residence is \$400,000. Her equity in the business is \$500,000. She produces adequate documentation from at least two financial institutions that they will require \$3.6 million in assets to support their granting the loan necessary to open a concession business at a particular airport. (Ms. T's documentation would also need to justify the need for a loan of the amount referenced in the letters from the financial institutions, documenting the build-out costs and other capital investment needed to begin operating the concession.)

Because \$3.6 million exceeds the \$3 million cap on the third exclusion from the PNW calculation, \$600,000 would count toward that calculation. In this case, her net PNW would be \$700,000

(\$4.6 million—\$3 million—\$400,000—\$500,000). This amount is less than the PNW threshold, so Ms. T would be an eligible ACDBE owner. However, if her gross PNW were \$5 million, then her net PNW, after subtracting all three exclusions, would be \$1.1 million, putting her over the PNW threshold and making her ineligible to be an ACDBE owner.

Certifying authorities need to carefully evaluate accounting mechanisms that applicants may use to try to circumvent the PNW threshold. For example, if within two years prior to or following an application for certification, an applicant transfers assets (*e.g.*, to a family member or to a trust), the certifying authority should regard those assets as continuing to count against the applicant's PNW.

Because we often receive questions on this point, we want to emphasize that PNW is calculated separately for each individual who the applicant business claims to be a disadvantaged owner and controller of the business. In a situation where there is more than one disadvantaged individual involved in a business, PNW is not aggregated for the owners. It remains an individual-by-individual calculation. It is never necessary to obtain PNW statements from people who do not claim to be disadvantaged individuals for purposes of ownership or control (*e.g.*, a white male who is a participant in the company).

3. Counting ACDBE Credit for Car Rental Companies

The issue of how to assign DBE credit to car rental companies is the longest-running, most divisive issue in the history of Part 23. Briefly stated, the issue concerns situations in which a car rental company purchases an often large number of cars (a "fleet purchase") from a motor vehicle manufacturer. Typically, the vehicles themselves are transported directly ("drop-shipped") from the manufacturer (*e.g.*, Ford or General Motors) to the car rental company's airport facility, never physically touching the property of a car dealer. However, usually because of state laws that require vehicles to be purchased from a car dealer, the transactions are invoiced through a dealer, who receives a small fee for processing the paperwork.

If the dealer in this situation is an ACDBE, how much ACDBE credit is it appropriate for the car rental company to claim? Is it the entire value of the vehicle (many thousands of dollars) or merely the transaction fee that the dealer receives (perhaps \$50–200)? Under normal DBE counting principles,

such as those of § 26.55, the answer is clearly the latter. A DBE whose commercially useful function is limited to processing or expediting a transaction, and who does not meet the rule's definition of a regular dealer with respect to the items in question, receives only its fee or commission for the work it actually does. Even if it is acting as a regular dealer, credit is limited to 60 percent of the value of the goods purchased.

However, subsection (e)(4)(B) of the ACDBE statute provides that "a car rental firm shall be permitted to meet the [ACDBE goal] requirement by including purchases or leases of vehicles from any vendor that qualifies as" an ACDBE. Car rental industry commenters have argued strongly, in response to the 2000 SNPRM and its predecessors, that this provision means that airports must count the entire value of cars purchased via ACDBE car dealers, however contrary such a result would be to the way DBE credit is counted in any other context.

Prior to the 2000 SNPRM, trade associations for ACDBEs and car rental companies made a joint recommendation to DOT to resolve the issue. They proposed that, of the first 10 percent of an airport's concession-specific goal for a car rental company, 70 percent could be achieved by counting the full value of cars purchased through ACDBE dealers, with the remaining 30 percent accounted for by other purchases of goods and services from ACDBEs. However, for any increment of an airport's concession-specific goal over 10 percent, the car rental company could achieve all of that increment through counting the full value of cars purchased through ACDBE car dealers. The 2000 SNPRM proposed to adopt the recommendation, except for the provision calling for being able to meet all of the portion of a goal exceeding 10 percent via counting the full price of cars purchased through ACDBE car dealers.

Comments to the 2000 SNPRM took a variety of positions on the proposal. Three airports and an airport trade association opposed permitting car rental vehicle purchases to count toward goals. Another airport said that airports should get DBE participation by subcontracting with DBEs that directly own a concession. The airport trade association and four airports opposed the "10 per cent" provision of the trade associations' recommendation, which the Department had not included in the SNPRM. A car rental trade association, on the other hand, insisted that the Department must accept all provisions

of the recommendation, including the 10 percent provision, and the ACDBE trade association that had joined in the recommendation continued to support it.

In the SNPRM, the Department also proposed a two-goal structure, with separate overall goals for car rental companies and all other concessionaires, respectively. As discussed later in this preamble, the Department is adopting this proposal. This provision has the important benefit of preventing the often very large gross receipts of car rental companies and potentially very high DBE participation dollar amounts resulting from counting the full value of vehicles in toward DBE goals from overwhelming DBE goals and participation in other areas of concessions. Having this separate goal for car rental companies therefore significantly reduces the possibility of skewing the program and limiting opportunities to other DBEs as the result of permitting car rental companies to count the full value of vehicles purchased through ACDBE car dealers.

For this reason, and in order to avoid any possibility of conflict with the statute, the Department has decided that the final rule will permit car rental companies to count the full value of vehicle purchases from ACDBE car dealers. We are not adopting the trade associations' recommendation. While we appreciate the associations' efforts to find a compromise resolution to this issue, we believe that there is no sound basis for mandating the proposed 70/30 division or for the use of the statute's aspirational 10 percent goal to play an operational role in determining how ACDBE credit is counted. In fact, we believe the use of the 10 percent goal in this way is inconsistent with a narrowly tailored ACDBE program.

Nevertheless, the Department is concerned that this resolution of the issue could have adverse effects on ACDBEs who seek to sell services or goods other than vehicles to car rental companies. Consequently, airports would require car rental companies to document to the airport the good faith efforts they have made to obtain participation from ACDBE vendors of goods and services (other than car dealers). Airports would not set a numerical goal for the use of these vendors, and there are many ways that car rental companies could show good faith efforts to this end. One of these might be for a car rental company, as suggested by the trade associations' recommendation, to obtain 30 percent of its ACDBE credit from the use of ACDBE vendors of goods and services.

4. Overall Goals

In Part 26, the Department established a data-driven overall goal-setting mechanism that directed recipients, including airports, to establish a goal estimating the amount of DBE participation that they would expect if there were a "level playing field" in contracting, free from the effects of discrimination. Recipients were also required to estimate how much of that goal could be achieved through race-neutral means. Recipients were permitted to use race-conscious means, such as contract goals, only to obtain that part of their overall goal they could not achieve through race-neutral means. The rule made clear that recipients were not to be penalized for not making their overall goal, and that the statutory 10 percent goal was an "aspirational" goal that did not affect the operation of recipients' DBE programs. Since Part 26 was issued, every Federal court that has considered the question has determined that this goal setting mechanism is consistent with narrow tailoring requirements of constitutional law.

The 2000 SNPRM for Part 23 essentially proposed to adopt, in a somewhat shortened form, the Part 26 goal-setting concepts. In addition, the SNPRM proposed a two-goal structure for concessions. That is, airports would set one overall goal for car rental companies and another overall goal for all other concessions. The purpose of this structure was to ensure that the much larger dollar volumes and much broader counting rules involved in the car rental industry at many airports did not so skew the airport's goal that other types of DBE businesses could not benefit from the program. The Department also sought comment on the idea of having a nationwide goal for major car rental companies, somewhat analogous to the transit vehicle manufacturer goal provision of Part 26.

Six airports, an ACDBE trade association, and an ACDBE favored, and one airport and a consultant opposed, separate goals for car rental and non-car rental activities. A car rental association gave qualified support to the idea, but commented that it thought that each airport would need to make a separate compelling need finding with respect to car rentals. Five airports supported and one opposed allowing an option for national car rental goals; ACDBE and car rental industry trade associations expressed doubt that the idea was workable. Another large airport suggested separate goals for goods and services on one hand, and direct ownership arrangements for car rental companies on the other.

An airport trade association and nine airports asked for greater guidance and clarification on how the goal-setting system would work in the concessions area, saying that such factors as the absence of data comparable to the DOT-assisted contracting world and the difficulty of integrating goods and services, management contracts, and direct ownership arrangements under the same overall goal made implementation very burdensome and confusing. Three of these commenters plus an ACDBE trade association said the same point applied to the race neutral/race conscious split in the concessions context. One airport supported the NPRM as written.

One airport wanted to use set-asides for car rentals. An airport trade association wanted airports to be able to set goals based on the number of concessions without going through a wavier procedure, and one airport supported the waiver process. A car rental industry trade association argued that race-neutral methods must be used chronologically before race-conscious methods could be used.

The Department believes that it is very important to include the two-goal structure in the final rule. We agree that it does, to an extent, increase the administrative workload of airports. However, it recognizes the differences between the car rental industry and other types of concessions, a difference that is meaningful in the context of a narrowly tailored regulation. Most important, in light of the statutory provision concerning the counting of vehicle purchases as a means of meeting car rental companies' ACDBE goals, it avoids a distortion resulting from the very large dollar amounts of participation attributed to ACDBE car dealers that could otherwise skew an airport's ACDBE program. Having a separate goal for non-car rental activities will ensure that retail businesses, management contractors, and other concessionaires will have the opportunity to compete on a level playing field not only vis-à-vis non-ACDBE firms, but also vis-à-vis firms in a very different industry where ACDBE participation is counted very differently. Having a separate goal for car rental companies does not, in our view, require a localized finding of discrimination pertaining specifically to the car rental industries. There is a national determination of compelling need for the entire program, and a division of overall goals into two segments for administrative purposes does not call for additional findings of need for the program.

Particularly given that courts have found that Part 26, including its goal-setting mechanism, meets narrow tailoring requirements, the Department believes it is essential to conform the Part 23 goal-setting provisions as closely as possible to those of Part 26. These requirements are spelled out in greater detail here than in the 2000 SNPRM, which should assist airports in complying with them. We also give airports from 1-3 years to establish new goals, which should allow them time to complete the work involved. Of course, by this time, airports have had five years' experience in working with Part 26 goals, and so using a parallel mechanism in Part 23 should be an easier and more familiar exercise than it might have seemed in 2000. We would also call airports' attention to the goal-setting "Tips" on the Department's DBE Web site (<http://osdbuweb.dot.gov/business/dbe/tips.html>). The Department plans to develop a revised version of these Tips specifically pertaining to airport concessions in the near future.

Because the Department believes it would be difficult to devise an overall goal based on the number of concession businesses or contracts, as distinct from the receipts of concession firms, the final rule does not include the provision allowing recipients to seek waivers to establish a goal on that basis, as the 2000 SNPRM proposed. However, airports can use the program waiver provision of § 23.13 to request authority to use a goal-setting mechanism that differs from that of Subpart D of Part 23.

While the idea of a transit vehicle manufacturer-like nationwide goal for large car rental companies remains intriguing, the Department is not sure that this approach is feasible. Therefore, rather than include such a provision in the final rule, we are asking for further comment on this subject in the SNPRM. Set-asides and quotas are not an appropriate part of a narrowly tailored rule, and Part 23 prohibits airports from using these measures.

The argument that recipients must, in a chronological sense, use race-neutral methods before they can use race-conscious methods has been raised in litigation under Part 26. It has not prevailed. Nor does it make sense as policy. Airports are required to give priority to the use of race-neutral means, meaning that they must achieve as much as possible of their overall goals through race-neutral means. The utility of race-neutral means, or the necessity of race-conscious means, is likely to vary throughout the year as different sorts of business opportunities occur. For example, obtaining ACDBE

participation in one business opportunity in February of a certain year may require race-conscious measures, while an excellent race-neutral opportunity may occur in November of that year.

Section-by-Section Analysis

This portion of the preamble discusses, in turn, each section of the final rule, providing, as appropriate, responses to comments, additional information about the Department's rationale for adopting individual provisions, and the Department's intent for how the provisions should be interpreted and implemented.

Section 23.1 *What Are the Objectives of This Part?*

The objectives of this program are very similar to those stated for Part 26. Extensive information has been developed over the years, which may be found in such sources as disparity studies of which the Department is aware and data presented to Congress (e.g., in the context of the floor discussion of the 1998 reauthorization of the DBE program for Federal Highway Administration and Federal Transit Administration financial assistance) that supports the proposition that there is not a level playing field for small disadvantaged businesses in the U.S. The legislative history of the original ACDBE statute itself shows that Congress was very concerned that DBE firms had the "fair" (i.e., nondiscriminatory) access to concession opportunities (see 133 Congressional Record 25986-87; October 1, 1987).

Under Part 26, many airports have had to continue race-conscious methods to achieve their overall goals, which are in turn a measure of the level of DBE participation they could expect absent the effects of discrimination. There is no reason to believe, and no one has submitted any information to the Department's rulemakings to suggest, that airport concession programs are exempt from the effects of discrimination to which other public sector business activities at airports and elsewhere are subject. Race-conscious methods continue to be a necessary part of a narrowly tailored strategy to ensure nondiscrimination in concessions.

Section 23.3 *What Do the Terms Used in This Part Mean?*

Most of the comment on this section concerned the issue of whether advertising firms should be included in the definition of "concession." A substantial number of letters from mostly small-to-medium sized airports supported including advertising

companies. One large airport opposed doing so. Three of the comments favoring advertising suggested limitations. One said that only billboards on public access roads to the terminal or other facilities for travelers should count. Another said only inter-terminal ads should count. The third said that only companies "primarily" in the business of advertising in terminals should be viewed as concessions (as opposed, for instance, to telecommunications or internet companies whose terminal ads were tangential to their main business).

While the existing Part 23 does not explicitly address the issue, many airports have certified advertising firms as DBEs for many years. Advertising appears to be a field in which DBE firms have had some success. It is also a field in which small businesses, including ACDBEs, must often compete against very large corporations. The level playing field that Part 23 attempts to provide is of considerable importance to firms in that position.

Like management contractors and some providers of telecommunications services, advertising firms often do not have stores located on the airport. Nevertheless, firms of these kinds provide important services to members of the public who use the airport. These firms have the objective of selling products to the public, and their existence at airports provides services to the public. They have financial relationships with the airport similar to those of more traditional food and retail concessions. We do not believe it would be sound policy, or required by law, to oust advertising firms from the ACDBE program. Consequently, to avoid confusion, we have explicitly included such firms in the "concession" definition. We do not think it would be useful to limit their participation to a particular advertising location on the airport, such as terminals or billboards along access roads; the legal and policy situation of one such location is not readily distinguishable from others.

Consistent with the 1992 amendment to the statute, the definition of "concession" now specifically includes firms with management contracts or subcontracts and businesses that provide goods and services to other concessionaires. Of course, businesses of this kind must be certified as ACDBEs in order to generate ACDBE credit in this program.

The definition of an ACDBE is consistent with that of Part 26. With some exceptions, the certification provisions of Part 26 apply to ACDBEs. Some comments addressed the provision of certification standards

stating that an ACDBE must be an existing business. Four large airports opposed this requirement (one suggested that a firm could be certified based on its business plan). Their main rationale was that the requirement would be a barrier to new businesses. One large airport supported the requirement. We believe that it is important to retain this requirement, in order to ensure that only genuinely eligible businesses are certified as ACDBEs. When a business is still in the process of formation, it is all the more difficult to determine whether disadvantaged individuals really own and control it. It is difficult to make a site visit to a business plan. Given the increased emphasis on preventing DBE fraud, we believe that the existing business requirement is essential. At the same time, as under Part 26, it is not appropriate to refuse to certify a business solely because it is a new business, but it must exist.

A car rental association continued to advocate the position, which it had taken in comments on previous proposed rules, that so-called "dealers in development" (i.e., dealers participating in manufacturers' development programs that did not fully meet Part 23 ownership and control criteria, such as 51 percent ownership by disadvantaged individuals) should be certified as ACDBEs. In the preambles to its 1997 and 2000 proposals, the Department had explained at some length why we concluded that a business that did not meet generally applicable DBE ownership and control criteria should not be certified as an ACDBE. Nothing in the comments in the docket for this rulemaking has provided a persuasive reason to change the Department's position.

Concession businesses must serve the public on the airport. Airport and ACDBE trade associations, one business, and nine airports supported the consequent concept that businesses on airport property that do not primarily serve travelers should not be counted as concessions. One commenter suggested waiving this requirement for small airports in Alaska. We agree that businesses that do not primarily serve the public should not be viewed as concessions. If one or more small businesses or airports in Alaska wish to seek a waiver from this provision, they may apply under the provisions of § 23.13.

One commenter asked whether management contracts included contracts for the management of hotels on the airport. While it is not necessary to include this level of detail in the regulatory text, we see no reason to

believe that hotel management contracts would be treated differently from any other kind of management contracts. In evaluating whether a management contractor provides a commercially useful function and the amount of ACDBE credit that should be given for the contractor's work, an airport should scrutinize carefully the actual tasks performed by the ACDBE as an entity to make sure that they are consistent with the credit claimed.

One large airport suggested that the joint venture definition not require that the DBE partner perform an independent part of the work, arguing that concessions joint ventures did not operate in this way. We have become aware that some concessions joint ventures indeed do not involve an ACDBE performing an independent part of the work; some of these have been the focus of fraud investigations by the Department's Inspector General and other law enforcement organizations. If the ADCBE participant is not required to perform independently a distinct portion of the joint venture's work, it becomes very easy for a prime concessionaire seeking to circumvent ACDBE requirements by having an ACDBE "silent partner" on its payroll. We believe that changing this provision would adversely affect the integrity of the program. Because joint ventures have become a problematic part of the ACDBE program, the Department is drafting additional guidance on the subject, which we intend to post on the DOT DBE Web site as soon as it is available.

We also note that UCPs and airports should not certify joint ventures themselves as ACDBEs, and the definition makes this point explicit. By definition, a joint venture is an association of an ACDBE and another firm to carry out a single business enterprise. As noted in Part 26 (§ 26.73(e)), "[a]n eligible DBE firm must be owned by individuals who are socially and economically disadvantaged * * * [A] firm that is not owned by such individuals, but instead is owned by another firm—even a DBE firm—cannot be an eligible DBE." Even if a joint venture is more than 51 percent owned by a ACDBE firm, therefore, the joint venture—because it is owned by other firms, not directly by disadvantaged individuals—cannot be an eligible ACDBE firm. (This same point applies to DBEs under Part 26.) We note that, given the counting rule for joint ventures in Parts 23 and 26, this fact should not make any difference in the way that ACDBE credit is counted. Credit toward DBE goals is awarded under both rules only for the distinct,

clearly defined portion of the work of the joint venture performed by the DBE or ACDBE participant, regardless of the certification status of the joint venture entity. In reviewing currently certified firms (see § 23.31(c)), airports and UCPs should remove joint venture entities (though not certified DBE firms that participate in joint ventures) from their directories, consistent with this direction.

The other definitions are consistent with those in Part 26 and have not changed substantively from the 2000 SNPRM. They were not the source of additional comment. We have added, for administrative purposes, definitions of small, medium, large hub, and non-hub primary airports.

Section 23.5 To Whom Does This Part Apply?

This section recites that Part 23 applies to airports that have received FAA financial assistance for airport development since January 1988, when the Department's airport concessions DBE rules first went into effect. Note that, under § 23.21, not all airports covered by Part 23 are required to have an ACDBE program.

Section 23.7 How Long Do the Provisions of This Part Remain in Effect?

The Department is introducing a "sunset" provision into the final rule as a way of addressing the durational element of narrow tailoring. A narrowly-tailored rule is not intended to remain in effect indefinitely. Rather, the rule should be reviewed periodically to ensure that it continues to be needed and that it remains a constitutionally appropriate way of implementing its objectives. Consequently, this provision states that this rule will terminate and cease being operative in five years, unless the Department extends it. We intend, beginning four years from now, to review the rule to determine whether it should be extended, modified, or allowed to expire. Of course, the underlying DBE statute remains in place, and its requirements continue to apply regardless of the status of this regulation, absent future Congressional action.

Section 23.9 What Are the Nondiscrimination and Assurance Requirements of This Part for Recipients?

This section cross references the nondiscrimination requirements of Part 26 and provides the text of assurances that airports must include in concession agreements and management contracts in the future. The section does not

require airports to revise existing contracts to include the assurance text.

Section 23.11 What Compliance and Enforcement Provisions Are Used Under This Part?

This section recites that standard FAA/DOT enforcement procedures—the same ones used for Part 26—apply to Part 23.

Section 23.13 How Does the Department Issue Guidance, Interpretations, Exemptions, and Waivers Pertaining to This Part?

This section parallels Part 26, § 26.15, concerning guidance, interpretations, exemptions and waivers. Program participants should note that guidance provided concerning existing Part 23 should not be relied upon in the future, given the many changes made in this final rule. The Department will issue new or revised guidance concerning the revised Part 23.

Section 23.21 Who Must Submit an ACDBE Program to FAA, and When?

The basic trigger for the requirement to have an ACDBE program is being a primary airport and receiving FAA financial assistance. Other categories of airports (e.g., non-primary or general aviation airports) do not have to submit an ACDBE program. Airports that currently have a DBE program under the existing Part 23 must update their programs to meet the requirements of this new rule. They will do so on the same three-year staggered schedule provided for submission of ACDBE goals (i.e., next January for large and medium hubs, next year for small hubs, and the following year for non-hub primary airports).

Until FAA approves revised programs, airports will continue to use their existing concessions DBE programs. Airports should review their programs immediately to ensure that they do not contain any provisions that are contrary to this part, however. For example, this part prohibits the use of set-asides. If an airport's current program provides for the use of set-asides, that provision should be deleted at once, even though the airport's revised program is not due to be submitted to FAA until one to three years from now.

Section 23.23 What Administrative Provisions Must Be in a Recipient's ACDBE Program?

Section 23.25 What Measures Must Recipients Include in Their ACDBE Programs To Ensure Nondiscriminatory Participation of ACDBEs in Concessions?

Section 23.23 provides a structure for a recipient's ACDBE program that is parallel to that for Part 26 DBE programs. Indeed, where an airport must have both an ACDBE program and a DBE program, the administrative provisions can be combined to a considerable degree.

Section 23.25 requires goal-setting as provided in Subpart D of Part 26, the use of race-neutral measures by airports themselves to obtain DBE participation, and the use of race-conscious measures like concession-specific goals when race-neutral measures standing alone are not sufficient to meet overall goals. Airports are expected to include the race-neutral and, if needed, race-conscious measures they will implement in the ACDBE programs they submit to the FAA. The section notes that concession opportunities are to be sought in all areas of the concession industry, so that different kinds of businesses have the chance to participate. It is not appropriate to have a single area of concessions or a few firms so dominating ACDBE participation that others lack a realistic opportunity to help meet the overall goal.

Section 23.25(f) is a new paragraph incorporating the last clause of subsection (e)(3) of the statute. Paragraph (f) provides that an airport's ACDBE program "must require businesses subject to ACDBE goals at the airport (except car rental companies) make good faith efforts to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with DBEs." Both in the statute and in paragraph (f), this requirement operates in the context of the ability of airport businesses to meet ACDBE goals through the purchase of goods and services from ACDBE vendors. While meeting goals through the purchase of goods and services is authorized, it is important for ACDBE goals to encourage the participation of ACDBEs in a variety of ways. It is a healthier situation for ACDBE programs, for example, if ACDBE participation a business or airport comes not only through goods and services purchases but also through individual concessions run by ACDBEs.

The parenthetical "except car rental companies" reflects another provision

of the statute (subsection (e)(4)(C)), which provides that car rental firms are not required to change their corporate structure to provide for direct ownership arrangements. This means, for example, that car rental companies that operate corporation-owned stores cannot be required to obtain ACDBE participation through such means as subleases or joint ventures. This limitation does not apply to non-car rental concession businesses, however. Even if a non-car rental business (e.g., a news and gift shop company) normally operates corporation-owned stores, direct ownership arrangements with ACDBEs that might alter or create an exception to the firm's normal way of doing business are among the options the business must make good faith efforts to explore under this provision.

Section 23.27 What Information Do Recipients Have To Retain and Report About Implementation of Its ACDBE Program?

Recipients must save compliance information for three years. Beginning March 1, 2006, recipients will submit a report of ACDBE participation (see Appendix A). The report is a modification of the Part 26 reporting form that the Department issued in June 2003, with instructions adapted for purposes of the ACDBE program.

Section 23.29 What Monitoring and Compliance Procedures Must Recipients Follow?

Ensuring that participants in the ACDBE program comply with the requirements of this rule and preventing fraudulent activities in the program are among the most important responsibilities of recipients. It is not enough merely to set goals and award concessions; airports must make sure that promised ACDBE participation really occurs after award and that participants are not able to circumvent the requirements of the program to the detriment of actual ACDBE participation. Each ACDBE program must include the monitoring and compliance measures the airport will use, including levels of effort and resources devoted to this task. For example, the program would describe the frequency of reviews of records, on-site reviews of concession workplaces, etc., to determine whether ACDBEs are actually performing the work for which credit is being claimed and that participants are not circumventing program requirements. This kind of oversight is crucial to combating ACDBE fraud, and FAA will closely scrutinize this aspect of ACDBE programs to ensure that levels of effort are sufficient.

In addition, if an airport includes additional provisions beyond what Part 23 requires (see § 23.77), FAA has a responsibility to review such provisions and work with airports to ensure that additional provisions do not create policy or legal problems. FAA will reject program submissions that are inconsistent with Part 26.

Subpart C—Certification of ACDBEs

Certification under Part 23 basically follows the model of Part 26, with the exception of those areas—such as size standards, discussed above—in which the Department recognizes differences in the ACDBE and DOT-assisted contracts marketplaces. Firms certified under Part 26 are eligible under Part 23 as well, provided they can control the firm with respect to the concession activities involved. Part 26 certification standards and procedures—even if not specifically referenced in Part 23—are intended to apply to the ACDBE program except where otherwise provided.

Section 23.39 mentions a number of other differences between Part 23 and Part 26 certification. These differences are self-explanatory, for the most part. The reason for not applying Part 26's special provision for Alaska Native Corporation-owned firms is that the statute requiring this provision in DOT-assisted contracts does not apply in the ACDBE context, since this context does not involve DOT-assisted contracts.

The eligibility of joint ventures has been a continuing problem under the DBE program, including both eligibility and operational issues that have called the legitimacy of joint venture arrangements into question. The Inspector General has pointed to situations in which joint ventures or similar arrangements appear to have been used as a subterfuge by firms seeking to evade or defraud the program. The rule's definition of joint ventures makes explicit that these entities should not be certified as DBEs in their own right. As noted above, the Department is planning to make available additional guidance concerning the use of joint ventures in the ACDBE program, including certification issues pertaining to joint ventures.

When the rule says that suppliers of goods and services to concessionaires are to be evaluated for certification as ACDBEs according to the provisions of this part (§ 23.39(i)), we mean that Part 23 provisions (e.g., concerning personal net worth and business size) are to be used for this purpose. Firms that provide goods and services to concessionaires are not subject to the

somewhat different certification provisions of Part 26.

In certain respects, particularly with respect to personal net worth, this rule changes the eligibility criteria for ACDBEs. Consequently, airports or UCPs, are required to review the eligibility of currently certified firms. These reviews must take place within three years of the most recent certification of the firm, or a year from the rule's effective date, whichever comes later. Any firm that loses eligibility because of the new PNW requirements would be able to complete work on an existing contract or other concession agreement, with its participation counted toward ACDBE goals. Options, extensions, renewals, etc., of the firm's participation beyond the termination of the agreement in force at the time of the firm's decertification would not count as DBE participation, however.

We emphasize that Part 26 standards do apply to certifications under Part 23 for most aspects of ownership and control. For example, absentee ownership of firms raises the same control issues in a Part 23 context as it does in a Part 26 context (*see* § 26.71(j)). Also, as the definition of "concession" now explicitly provides, recipients should not certify holding companies as ACDBEs. Holding companies do not perform concession activities. While holding companies may play a narrow role in DBE and ACDBE firms (*see* § 26.73(e)), the holding companies themselves are not certified in this role. Recipients should pay careful attention to affiliation relationships between and among holding companies and their concession subsidiaries. It is likely that, when a concession that is owned by a holding company seeks certification, the concession is affiliated with both the holding company itself and other subsidiaries of the holding company. These relationships can have important effects on the ability of the applicant firm to meet size standards.

Recipients should also pay close attention to affiliation relationships that may arise in joint venture arrangements. If one participant in a joint venture—or other business arrangement—exerts too much control over the business decisions and operational activities of another, then there may be an affiliation relationship between the two and/or an issue of whether the second firm is sufficiently independent to be certified.

On-site reviews are a key part of the concession certification process. The Department realizes that, particularly for a concession that does not yet have a location established on an airport, it may be difficult to identify a "job site"

at which to conduct such a review. In this case, recipients could conduct the on-site review solely at the firm's headquarters or other principal place of doing business.

At the time that this rule is being issued, not all states have approved unified certification programs (UCPs). Until a UCP is approved and in operation for a given state, individual airports in that state continue to have responsibility for certifying ACDBEs. Once a UCP is approved and in operation in a state, certification of ACDBEs becomes the responsibility of the UCP, rather than of individual airports.

Section 23.41 What Is the Basic Overall Goal Requirement for Recipients?

Having overall goals is a basic requirement of airports' ACDBE programs, without which airports are not eligible for FAA financial assistance. Overall goals cover periods of three years, rather than one year as in the case of Part 26, in recognition of the longer time frames involved in concession relationships between businesses and airports. As discussed above, recipients are required to have two separate overall goals: One for car rentals, and one for all concessions other than car rentals.

There is an important exception to this general rule, designed to reduce administrative burdens on airports that have little or no concessions activity. If an airport has less than \$200,000 in concessions revenue (averaged over three years), in either the car rental or non-car rental category, then the airport does not have to submit an overall goal in that category. The Department believes that requiring airports that have little or no concession revenues to pursue the overall-goal setting process is likely to be unproductive, if not altogether futile. At the same time, this provision focuses ACDBE goal-setting efforts on those airports where these efforts are most likely to result in meaningful ACDBE participation. Airports that did not have to set an overall goal for one or both categories would still be required to pursue race-neutral means to provide opportunities for ACDBEs in their concessions activities.

This determination is made separately for each of the two overall goal categories. For example, suppose Airport X has had non-car rental concession revenues of \$150,000, \$200,000, and \$175,000 in 2002, 2003, and 2004, respectively. Under this rule, it would not have to submit a non-car rental overall goal in 2005, because the average of its non-car rental revenues

over the preceding three years was less than \$200,000. On the other hand, if Airport X's average car rental concession revenues were \$300,000 for the same period, it would have to submit an overall goal for car rentals in 2005.

Based on recent FAA data, virtually all larger airports (large and medium hubs) would have to submit both overall goals. These airports account for the vast majority of all concession revenues in both the car rental and non-car rental categories. Among intermediate-size airports (small hubs), all but five of 69 would have to submit car rental goals, and 50 of the 69 would have to submit non-car rental goals. Among 390 small airports (non-hubs), 309 would not have to submit car rental goals and 233 would not have to submit non-car rental goals. Many of these small airports (165 with respect to car rentals, and 92 with respect to non-car rental concessions) report no concession revenues in those categories.

As under Part 26, goals must be for DBEs in general, as opposed to group-specific goals for one or another subgroup of DBEs. Also as under Part 26, airports can apply for a program waiver of this provision if, based on evidence (*e.g.*, from a disparity study) showing underutilization only of certain groups, they believe that use of group-specific goals is necessary to achieve the objectives of a narrowly-tailored program.

Section 23.43 What Are the Consultation Requirements in the Development of Recipients' Overall Goals?

Section 23.45 What Are the Requirements for Submitting Overall Goal Information to the FAA?

The process of setting overall goals includes consultation with stakeholders in the ACDBE program. A public comment period, as such, is not required, however. In the Department's experience with Part 26's requirement for a comment period, few comments have been received by most recipients. We do not believe that such a requirement would be productive in the concessions context, which is even more specialized and less likely to be the subject of meaningful comment from anyone except stakeholders, who are covered by the consultation requirement.

The rule requires recipients to submit overall goals every three years. In order to give smaller airports more time to work with the goal-setting process, we are establishing the following schedule for submitting new overall goals and

new ACDBE programs: January 2006 for large and medium hubs, October 2006 for small hubs, and the October 2007 for smaller primary airports. Revised goals are then due October 2008, 2009, and 2010, respectively, and every three years thereafter. If an airport changes status (e.g., a small hub increases in size to become a medium hub), it will stay on the original schedule. This will also mean that FAA will not have to focus on reviewing goals from all airports in any one year, making its review process more efficient. In the time before an airport has its first new goals under this rule approved by FAA, it must continue using its existing goals.

Some airport commenters asked for additional flexibility in terms of submission dates for goals (e.g., with respect to airports' fiscal years, which differ from the Federal fiscal year in some cases). In our view, it is not as necessary to tie the submission of concessions goals to fiscal years as it may be for Part 26 goals, since the latter are more dependent on contracting under a particular fiscal year's Federal funds. However, if an airport has difficulty with the standard goal submission dates in the final rule, it can ask FAA for a program waiver to establish a different date for its submissions.

Section 23.47 What Is the Base for a Recipient's Goal for Concessions Other Than Car Rentals?

Section 23.49 What Is the Base for a Recipient's Goal for Car Rentals?

Section 23.47 concerns the base for the first of the two overall goals that airports must set. The base for this goal includes the gross receipts of all concessions at the airport, with three important exceptions. First, as the title of the section indicates, the receipts of car rental concessions are not counted in the base for this goal. Secondly, companies' receipts that are not generated from concession activities do not become part of the base. In the example provided in the regulatory text, the receipts generated by a restaurant in the terminal are added to the base, while the receipts of the same food service company's flight catering activities are not.

The third exception is statutory, required by the plain language of 49 U.S.C. 47107(e)(2). Under this statutory provision, the dollar amount of the management contract or subcontract with an ACDBE and the gross receipts of a business activity to which such a management contract or subcontract pertains are added to the base for this goal, while the dollar amount of the

management contract or subcontract with a non-ACDBE firm and the gross receipts of business activities to which such a management or subcontract pertains are not.

Section 23.49 concerns the second of the two goals, that for car rentals. It is straightforward: the base for this goal includes the total gross receipts of car rental operations at your airport, and nothing else. In setting car rental goals, airports may take into account the way in which car rental participation is counted, so that goals remain proportional to the type of participation submitted by the car rental companies.

Section 23.51 How Are a Recipient's Overall Goals Expressed and Calculated?

This section concerns the very important subject of airports' calculation of overall goals. It applies to both the overall goal for car rentals and the overall goal for other concession activities. It is designed to parallel the goal-setting mechanism of Part 26, which has withstood a number of legal challenges.

We recognize that, particularly for some large airports, it is possible that the market area for many types of concessions could be nationwide in scope. Even some of the smaller airports may have national or regional market areas in some or all of their concession categories. As the Department develops goal-setting guidance for airports, we will explore, in cooperation with the Census Bureau and airports, whether it would be possible to establish national availability estimates in particular categories. If this approach proves feasible, it would allow the Department to go ahead and set availability estimates in a number of industry categories, which could allow concerned airports to simply use those estimates with whatever weights are appropriate for each airport.

We are aware of the concern some airport commenters expressed about the utility of existing data to set goals for concessions. In this context, it is important to remember that what the rules call for is the best available data. The rules do not demand perfect data. It is likely true that Census data and the NAICS codes do not specify what firms are willing to work in the airport context. This, of course, is also true in the DOT-assisted contracting context. For example, the NAICS codes do not tell us which florists are willing to be florists at airports. By the same token, the codes do not indicate which heavy construction firms are willing to perform heavy construction at airports. Despite this, we still use the NAICS

codes to provide an indication of availability in the construction context, and we can use the same codes in the florist context as well.

Looking at the Census Bureau's County Business Patterns database, it appears that the primary codes most likely to be useful to airports will probably be 44 (Retail Trade) and 72 (Accommodation and food services). Both of these categories break down into 6 digit codes in most (even small) metropolitan areas and counties. For instance, 44 includes tape, CD and pre-recorded music stores (451220), florists (453110), and gift, novelty and souvenir stores (453220). NAICS code 72 includes, among other things, cafeterias (722212), full-service restaurants (722110) and drinking places (alcoholic beverages) (722410).

We would point out that even some specialized types of business that operate as concessions have NAICS codes of their own (e.g., 812113 for nail salons and 454210 for vending machine operators). Even shoeshine kiosks, which do not have a specific NAICS code, can be included a broader category of "other personal services." The fact of the matter is that these categories are probably more specific than the categories available for construction and other activities frequently used under Part 26. We see no reason that the Census databases and NAICS codes cannot be used for goal-setting under Part 23.

One potential problem that we would ask airports and UCPs to address is the potential under-representation of ACDBEs in directories. That is, program participants have expressed concern that, because concession opportunities occur less frequently than Part 26 contracting opportunities, and because certification offices may have been more focused on Part 26 contracting, fewer ACDBEs may appear on some certification lists. This could lead, in turn, to Step 1 relative availability calculations being unrealistically low. The Department recommends that airports and UCPs conduct outreach activities to encourage potential ACDBEs to seek certification. Airports could also augment their counts of available DBEs with firms in local MBE/WBE directories and Part 26 DBE directories (i.e., with respect to firms on those lists in concession-relevant NAICS codes), or trade association lists. Moreover, to the extent they have evidence of ACDBE under-representation in directories, airports could use this evidence as part of a Step 2 adjustment.

The regulatory text does not use the term "bidders list" that Part 26 uses.

Rather, Part 23 uses the term "active participants list." This is because "bidding," in the sense the term is used in DOT-assisted contracting, is often not used in the concessions context. In any case, the idea is to identify interested firms and build a list from that source. It is likely that many airports may have a strong sense of those firms that are likely to be interested in seeking concession opportunities. Their information comes from a number of sources, such as past experience with firms that have run concessions or sought concession contracts or leases, knowledge about the universe of firms in certain areas of retail and food and beverage service that tend to be interested in participating in airport concessions, and attendance lists from informational and outreach meetings about upcoming concessions opportunities. While these sources do not represent bidders lists in the traditional sense, they appear feasible to develop and can provide a good source of availability data.

When the rule says that an airport can use the goal of another recipient as the basis for Step 1 of its goal-setting exercise, it should be noted that this concept is not necessarily limited to other airports in the same geographical area. For instance, suppose a large airport on the East Coast and a large airport on the West Coast both have a national market area for certain types of concessions. With appropriate adjustments for differences in local market areas and the airports' concession programs, these two airports might be able to use the same analysis in setting their goals.

Section 23.53 How Do Car Rental Companies Count ACDBE Participation Toward Their Goals?

Section 23.55 How Do Recipients Count ACDBE Participation Toward Goals for Items Other Than Car Rentals?

Section 23.53 addresses the issue of counting ACDBE participation for car rental companies, which is discussed at length under "major issues" above. Section 23.55 is the counting provision for other types of concessions, and it generally follows the counting provisions of Part 26. For example, when an ACDBE enters into a sub-concession agreement or lease with a non-ACDBE, the part of the work performed by the non-ACDBE is not counted toward goals. One exception to this pattern concerns regular dealers. Under Part 26, recipients may count toward goals only 60 percent of the value of goods purchased from DBE regular dealers. Under this section,

however, recipients may count 100 percent of the value of items purchased from an ACDBE regular dealer. This difference is based on the greater role that goods and services purchases play in the concessions context and a lesser concern that overuse of goods and services purchases will distort opportunities for other contractors. In response to a question from a commenter, goods and services purchased from ACDBEs by management contractors would also count toward goals, assuming that the goods and services are used for the management contractor's operations at the airport. This section also includes a few provisions peculiar to the concessions context, such as a provision directing that so-called "build out" costs of a concession not be counted toward ACDBE goals.

We wish to emphasize the provision of this section concerning counting the participation of ACDBE participants in joint ventures. Credit may be counted only for the independent, distinct portion of the work performed by the ACDBE with its own forces.

It is very important to avoid overcounting the value of the ACDBE's participation. For example, suppose a joint venture asserts that the portion of its work performed by the ACDBE participant involves the performance of professional or back office services. The joint venture claims credit amounting to 30 percent of its gross receipts for this function. If the business sought similar legal, accounting, payroll, personnel administration, etc. services from an outside firm, would the fees paid the outside firm amount to around 30 percent of its gross receipts? If not, then it is likely the joint venture is overvaluing the contribution of the ACDBE participant, and the airport should not count all the DBE credit requested.

As a policy matter, we believe it is preferable for ACDBE joint venture participants to actually have a defined role in the revenue-generating activities of the business (e.g., the joint venture runs four food service locations in the airport, and the ACDBE is directly responsible for one of them). There is a greater likelihood of confusion, counting, and other administrative difficulties, as well as of abuse, when ACDBE participation is claimed for joint ventures in which the ACDBE participant has only a vaguely defined role in the entity as a whole.

Section 23.57 What Happens if a Recipient Falls Short of Meeting Its Overall Goals?

Section 23.59 What Is the Role of the Statutory 10 Percent Goal in the ACDBE Program?

Section 23.61 Can Recipients Use Quotas or Set-Asides as Part of Their ACDBE Programs?

These three sections emphasize that recipients are not penalized for failing to meet their overall goals (i.e., failure to "hit the number"), that the statutory 10 percent goal is an aspirational goal that does not play an operational role in airports' ACDBE programs, and that the use of quotas and set-asides is forbidden. All three provisions are taken from Part 26 (except that the prohibition on the use of set-asides has been strengthened), where they have been part of the narrowly tailored approach to the DBE program that the Federal courts have approved.

Section 23.71 Does a Recipient Have To Change Existing Concession Agreements?

This section emphasizes that the changes in Part 23 do not require airports to change or abrogate existing concession agreements with private businesses. A few commenters had asked for reassurance on this point. However, airports must take advantage of opportunities that arise at the time of the renewal, modification, or extension of existing concession agreements to obtain a modified amount of ACDBE participation in the renewed or amended agreement.

Section 23.73 What Requirements Apply to Privately Owned or Leased Terminal Buildings?

This provision is virtually identical to the version in the 1997 and 2000 proposals. We did not receive any comments on it.

Section 23.75 Can Recipients Enter Into Long-Term, Exclusive Agreements With Concessionaires?

This provision continues the long-standing requirement that long-term, exclusive leases are prohibited, except where the airport obtains FAA approval. The section includes a procedure for obtaining such approval, including a list of information FAA needs before it can grant this approval. ACDBE participation is a key part of this information. Comments on the various proposed versions of this section generally favored requiring opportunities for DBE participation as part of a long-term, exclusive lease arrangement. Consistent with the

Department's prior proposals, only FAA approval under this section will be needed for long-term exclusive leases. DOT approval through an exemption process will no longer be required.

One airport suggested making 10 years rather than 5 years the criterion for a long-term exclusive lease subject to this section. We have not adopted this comment because doing so would reduce the degree of oversight FAA can exercise under the rule to make sure that long-term concession agreements include adequate ACDBE participation.

FAA is currently working on revised guidance concerning long-term exclusive lease issues. FAA will issue this guidance, on the DOT DBE web site among other places, as soon as it is ready.

Section 23.77 Does This Part Preempt Local Requirements?

This section restates the statutory provision that the regulation does not automatically preempt all local requirements. However, local laws, regulations, and policies may not directly conflict with this regulation, and airports would have to take steps to avoid situations where a local requirement conflicts with a Federal requirement. It should be noted also that this provision refers to substantive DBE and similar requirements of local entities, and it in no way avoids the need to comply with Federal requirements for confidentiality (e.g., with respect to information submitted in response to PNW requirements).

A car rental trade association asked the Department to prohibit airports from having requirements involving such measures as bid preferences, preferences for the allocation of space, or good faith efforts pertaining to direct ownership arrangements. We have not adopted specific prohibitions, but have instead specified what is required of airports. Airports will be expected to comply with these Federal requirements and not impose any conflicting requirements.

The Department is concerned, however, that additional or more stringent local or state requirements that go beyond the provisions of Part 23 could implicate the Federal ACDBE program in matters of questionable constitutionality. We are adding a provision directing airports to attach copies of any provisions additional to those needed to carry out Part 23 requirements to their ACDBE program submissions. FAA will review these provisions, and FAA will not approve an ACDBE program if there are "go-beyond" provisions that are inconsistent with this rule. In any case, even where FAA has reviewed a state or local

provision and determined that it does not conflict with Part 23, there should be a clear firewall between the ACDBE program and such additional state or local requirements. There must be a separate program document for them, and the Federal and state/local additional programs, respectively, must be administered in a clearly distinct manner.

Section 23.79 Does This Part Permit Recipients To Use Local Geographic Preferences?

The 2000 SNPRM proposed that, in some cases, airports could use local geographic preferences in selecting concessionaires if they obtained a program waiver from the FAA. On further reflection, the Department has decided that the disadvantages of local preferences that we noted in the SNPRM, such as the elimination of the benefits of wider competition for business opportunities and the possible loss of opportunities for DBEs who are not located in the locality served by an airport, are important enough to warrant prohibiting local preferences altogether. The ACDBE program is a national program, and at least some concession markets are national markets. In this context, a local preference program is out of place. It is also out of character with a narrowly tailored program, in that it would limit selections of ACDBEs to something less than their actual availability in the marketplace. Among commenters, one airport favored local preferences and a car rental trade association opposed them; there was not widespread interest or support for retaining local preferences, in any case.

Regulatory Analyses and Notices

This rule is nonsignificant for purposes of Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. While the rule is of considerable interest to the airport community and businesses that work on airports, it is essentially an update of a long standing, continuing program that does not break new policy ground in most areas. It does not impose significant new costs on airports or businesses. The rule does not have Federalism impacts sufficient to warrant the preparation of a Federalism Assessment.

The Department certifies that this rule will not have a significant economic effect on a substantial number of small entities. The rule clearly affects small entities: ACDBEs are, by definition, small businesses. However, the economic effect of the rule on these small entities is not likely to be significant. Until the Department takes

action based on the accompanying SNPRM, there are no changes from the current rule with respect to business size standards. The personal net worth standard may affect some existing ACDBE owners, but these effects are significantly mitigated by "grandfathering" of existing contracts and, more importantly, by the exclusion of documented needs to hold assets to support business growth. In other respects, compared to the existing rule, the new rule is not expected to have noticeable incremental economic effects on small businesses.

A number of provisions of this rule involve information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA). With some modifications, these information collection requirements of the rule continue existing Part 23 requirements, major elements of the ACDBE program that airports and concessionaires have been implementing since at least 1992. Overall, the Department believes the overall burden of these requirements will remain the same or shrink. These requirements are the following:

- Firms applying for DBE certification must provide information (including PNW data) to recipients/uniform certification programs (UCPs) to allow them to make eligibility decisions. Currently certified firms must provide information to recipients/UCPs to allow them to review the firms' continuing eligibility.
- When firms bid on concession opportunities that have concession-specific goals, they must document their ACDBE participation and/or the good faith efforts they have made to meet the contract goals.
- Recipients must calculate overall goals and transmit them to the FAA for approval. There are two sets of overall goals: One for car rentals and one for non-car rental concessions. Many smaller airports will not have to submit overall goals.
- Recipients must have a revised ACDBE program approved by the FAA. This is a one-time requirement.
- Recipients must retain ACDBE data for three years and submit an annual report to the FAA.

The Department estimates that these program elements will result in a total of approximately 41,000 annual burden hours to recipients and contractors, plus an additional 44,000 burden hours in the first year for the revision and submission of ACDBE programs.

Both as the result of comments and what the Department learns as it implements the ACDBE program under Part 23, it is possible for the

Department's information needs and the way we meet them to change. Sometimes the way we collect information can be changed informally (e.g., by guidance telling recipients they need not repeat information that does not change significantly from year to year). In other circumstances, a technical amendment to the regulation may be needed. In any case, the Department will remain sensitive to situations in which modifying information collection requirements becomes appropriate.

As required by the PRA, the Department has submitted an information collection approval request to OMB. You should direct comments to the Office of Information and Regulatory Affairs (OIRA), OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Transportation. Because mail service to OIRA is very difficult because of security measures, it is preferable for interested persons to fax comments to OMB. The fax number for this purpose is 202-395-6974. You may also transmit copies of your comments to the Department's docket for this rulemaking.

The Department considers comments by the public on information collections for several purposes:

- Evaluating the necessity of information collections for the proper performance of the Department's functions, including whether the information has practical utility.
- Evaluating the accuracy of the Department's estimate of the burden of the information collections, including the validity of the methods and assumptions used.
- Enhancing the quality, usefulness, and clarity of the information to be collected.
- Minimizing the burden of the collection of information on respondents, including through the use of electronic and other methods.

The Department points out that all the information collection elements discussed in this section of the preamble have not only been part of the Department's ACDBE program for many years, but have also been the subject of extensive public comment following the 1993, 1997, and 2000 proposed rules on this subject. Among the many comments received in response to these notices were a number addressing administrative burden issues surrounding these program elements. In this final rule, the Department has responded to these comments.

OMB is required to make a decision concerning information collections

within 30–60 days of the publication of this notice. Therefore, for best effect, comments should be received by DOT/OMB within 30 days of publication. Following receipt of OMB approval, the Department will publish a **Federal Register** notice containing the applicable OMB approval numbers.

There are a number of other statutes and Executive Orders that apply to the rulemaking process that the Department considers in all rulemakings. However, none of them are relevant to this rule. These include the Unfunded Mandates Reform Act (which does not apply to nondiscrimination/civil rights requirements), the National Environmental Policy Act, E.O. 12630 (concerning property rights), E.O. 12988 (concerning civil justice reform), and E.O. 13045 (protection of children from environmental risks).

Issued this 8th day of March, 2005, at Washington, DC.

Norman Y. Mineta,
Secretary of Transportation.

■ For the reasons stated in the preamble, the Department takes the following actions:

- 1. Revise part 23 to read as follows:

PART 23—PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS

Subpart A—General

Sec.

- 23.1 What are the objectives of this part?
 23.3 What do the terms used in this part mean?
 23.5 To whom does this part apply?
 23.7 How long do the provisions of this part remain in effect?
 23.9 What are the nondiscrimination and assurance requirements of this part for recipients?
 23.11 What compliance and enforcement provisions are used under this part?
 23.13 How does the Department issue guidance, interpretations, exemptions, and waivers pertaining to this part?

Subpart B—ACDBE programs

- 23.21 Who must submit an ACDBE program to FAA, and when?
 23.23 What administrative provisions must be in a recipient's ACDBE program?
 23.25 What measures must recipients include in their ACDBE programs to ensure nondiscriminatory participation of ACDBEs in concessions?
 23.27 What information does a recipient have to retain and report about implementation of its ACDBE program?
 23.29 What monitoring and compliance procedures must recipients follow?

Subpart C—Certification of ACDBEs

- 23.31 What certification standards and procedures do recipients use to certify ACDBEs?

- 23.33 What size standards do recipients use to determine the eligibility of ACDBEs?
 23.35 What is the personal net worth standard for disadvantaged owners of ACDBEs?
 23.37 Are firms certified under 49 CFR part 26 eligible to participate as ACDBEs?
 23.39 What other certification requirements apply in the case of ACDBEs?

Subpart D—Goals, Good Faith Efforts, and Counting

- 23.41 What is the basic overall goal requirement for recipients?
 23.43 What are the consultation requirements in the development of recipients' overall goals?
 23.45 What are the requirements for submitting overall goal information to the FAA?
 23.47 What is the base for a recipient's goals for concessions other than car rentals?
 23.49 What is the base for a recipient's goals for car rentals?
 23.51 How are a recipient's overall goals expressed and calculated?
 23.53 How do car rental companies count ACDBE participation toward their goals?
 23.55 How do recipients count ACDBE participation toward goals for items other than car rentals?
 23.57 What happens if a recipient falls short of meeting its overall goals?
 23.59 What is the role of the statutory 10 percent goal in the ACDBE program?
 23.61 Can recipients use quotas or set-asides as part of their ACDBE programs?

Subpart E—Other Provisions

- 23.71 Does a recipient have to change existing concession agreements?
 23.73 What requirements apply to privately-owned or leased terminal buildings?
 23.75 Can recipients enter into long-term, exclusive agreements with concessionaires?
 23.77 Does this part preempt local requirements?
 23.79 Does this part permit recipients to use local geographic preferences?
 Appendix A to Part 23—Uniform Report of ACDBE Participation

Authority: 49 U.S.C. 47107; 42 U.S.C. 2000d; 49 U.S.C. 322; Executive Order 12138.

Subpart A—General

§ 23.1 What are the objectives of this part?

This part seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of opportunities for concessions by airports receiving DOT financial assistance;
 (b) To create a level playing field on which ACDBEs can compete fairly for opportunities for concessions;
 (c) To ensure that the Department's ACDBE program is narrowly tailored in accordance with applicable law;

(d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as ACDBEs;

(e) To help remove barriers to the participation of ACDBEs in opportunities for concessions at airports receiving DOT financial assistance; and

(f) To provide appropriate flexibility to airports receiving DOT financial assistance in establishing and providing opportunities for ACDBEs.

§ 23.3 What do the terms used in this part mean?

Administrator means the Administrator of the Federal Aviation Administration (FAA).

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121, except that the provisions of SBA regulations concerning affiliation in the context of joint ventures (13 CFR § 121.103(f)) do not apply to this part.

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

(i) One concern controls or has the power to control the other; or

(ii) A third party or parties controls or has the power to control both; or

(iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the ACDBE program.

Airport Concession Disadvantaged Business Enterprise (ACDBE) means a concession that is a for-profit small business concern —

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*)

Car dealership means an establishment primarily engaged in the retail sale of new and/or used automobiles. Car dealerships frequently maintain repair departments and carry stocks of replacement parts, tires, batteries, and automotive accessories. Such establishments also frequently sell pickup trucks and vans at retail. In the standard industrial classification system, car dealerships are categorized in NAICS code 441110.

Concession means one or more of the types of for-profit businesses listed in paragraph (1) or (2) of this definition:

(1) A business, located on an airport subject to this part, that is engaged in the sale of consumer goods or services to the public under an agreement with the recipient, another concessionaire, or the owner or lessee of a terminal, if other than the recipient.

(2) A business conducting one or more of the following covered activities, even if it does not maintain an office, store, or other business location on an airport subject to this part, as long as the activities take place on the airport: Management contracts and subcontracts, a web-based or other electronic business in a terminal or which passengers can access at the terminal, an advertising business that provides advertising displays or messages to the public on the airport, or a business that provides goods and services to concessionaires.

Example to paragraph (2): A supplier of goods or a management contractor maintains its office or primary place of business off the airport. However the supplier provides goods to a retail establishment in the airport; or the management contractor operates the parking facility on the airport. These businesses are considered concessions for purposes of this part.

(3) For purposes of this subpart, a business is not considered to be "located on the airport" solely because it picks up and/or delivers customers under a permit, license, or other agreement. For example, providers of taxi, limousine, car rental, or hotel services are not considered to be located on the airport just because they send shuttles onto airport grounds to pick up passengers or drop them off. A business is considered to be "located on the airport," however, if it has an on-airport facility. Such facilities include in the case of a taxi operator, a dispatcher; in the case of a limousine, a booth selling tickets to the public; in the case of a car rental company, a counter at which its services are sold to the public or a ready return facility; and in the case of a hotel operator, a hotel located anywhere on airport property.

(4) Any business meeting the definition of concession is covered by

this subpart, regardless of the name given to the agreement with the recipient, concessionaire, or airport terminal owner or lessee. A concession may be operated under various types of agreements, including but not limited to the following:

(i) Leases.

(ii) Subleases.

(iii) Permits.

(iv) Contracts or subcontracts.

(v) Other instruments or arrangements.

(5) The conduct of an aeronautical activity is not considered a concession for purposes of this subpart.

Aeronautical activities include scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight carrying capacities; fixed base operators; flight schools; recreational service providers (*e.g.*, sky-diving, parachute-jumping, flying guides); and air tour services.

(6) Other examples of entities that do not meet the definition of a concession include flight kitchens and in-flight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, telephone and electric service to the airport facility, holding companies, and skycap services under contract with an air carrier or airport.

Concessionaire means a firm that owns and controls a concession or a portion of a concession.

Department (DOT) means the U.S. Department of Transportation, including the Office of the Secretary and the Federal Aviation Administration (FAA).

Direct ownership arrangement means a joint venture, partnership, sublease, licensee, franchise, or other arrangement in which a firm owns and controls a concession.

Good faith efforts means efforts to achieve an ACDBE goal or other requirement of this part that, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to meet the program requirement.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, father-in-law, brother-in-law, sister-in-law, or registered domestic partner.

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is

recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of "tribally-owned concern" in this section.

Joint venture means an association of an ACDBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the ACDBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest. Joint venture entities are not certified as ACDBEs.

Large hub primary airport means a commercial service airport that has a number of passenger boardings equal to at least one percent of all passenger boardings in the United States.

Management contract or subcontract means an agreement with a recipient or another management contractor under which a firm directs or operates one or more business activities, the assets of which are owned, leased, or otherwise controlled by the recipient. The managing agent generally receives, as compensation, a flat fee or a percentage of the gross receipts or profit from the business activity. For purposes of this subpart, the business activity operated or directed by the managing agent must be other than an aeronautical activity, be located at an airport subject to this subpart, and be engaged in the sale of consumer goods or provision of services to the public.

Material amendment means a significant change to the basic rights or obligations of the parties to a concession agreement. Examples of material amendments include an extension to the term not provided for in the original agreement or a substantial increase in the scope of the concession privilege. Examples of nonmaterial amendments include a change in the name of the concessionaire or a change to the payment due dates.

Medium hub primary airport means a commercial service airport that has a number of passenger boardings equal to at least 0.25 percent of all passenger boardings in the United States but less than one percent of such passenger boardings.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area that now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii that is a not-for-profit

organization chartered by the State of Hawaii, and is controlled by Native Hawaiians

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

Nonhub primary airport means a commercial service airport that has more than 10,000 passenger boardings each year but less than 0.05 percent of all passenger boardings in the United States.

Part 26 means 49 CFR part 26, the Department of Transportation's disadvantaged business enterprise regulation for DOT-assisted contracts.

Personal net worth means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include the following: The individual's ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification; the individual's equity in his or her primary place of residence; and other assets that the individual can document 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), to a maximum of \$3 million. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Primary airport means a commercial service airport that the Secretary determines to have more than 10,000 passengers enplaned annually.

Primary industry classification means the North American Industrial Classification System (NAICS) code designation that best describes the primary business of a firm. The NAICS Manual is available through the National Technical Information Service (NTIS) of the U.S. Department of Commerce (Springfield, VA, 22261). NTIS also makes materials available through its Web site (<http://www.ntis.gov/naics>).

Primary recipient means a recipient to which DOT financial assistance is extended through the programs of the FAA and which passes some or all of it on to another recipient.

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will

determine the principal place of business for ACDBE program purposes.

Race-conscious means a measure or program that is focused specifically on assisting only ACDBEs, including women-owned ACDBEs. For the purposes of this part, race-conscious measures include gender-conscious measures.

Race-neutral means a measure or program that is, or can be, used to assist all small businesses, without making distinctions or classifications on the basis of race or gender.

Secretary means the Secretary of Transportation or his/her designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to ACDBE firms.

Small Business Administration or SBA means the United States Small Business Administration.

Small business concern means a for-profit business that does not exceed the size standards of § 23.23 of this part.

Small hub airport means a publicly owned commercial service airport that has a number of passenger boardings equal to at least 0.05 percent of all passenger boardings in the United States but less than 0.25 percent of such passenger boardings.

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is—

(1) Any individual determined by a recipient to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands,

Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Recipient means any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

You refers to a recipient, unless a statement in the text of this part or the context requires otherwise (*i.e.*, "You must do XYZ" means that recipients must do XYZ).

§ 23.5 To whom does this part apply?

If you are a recipient that has received a grant for airport development at any time after January 1988 that was authorized under Title 49 of the United States Code, this part applies to you.

§ 23.7 How long do the provisions of this part remain in effect?

Unless extended by the Department, the provisions of this rule will terminate and become inoperative on April 21, 2010.

§ 23.9 What are the nondiscrimination and assurance requirements of this part for recipients?

(a) As a recipient, you must meet the non-discrimination requirements provided in part 26, § 26.7 with respect to the award and performance of any concession agreement, management contract or subcontract, purchase or lease agreement, or other agreement covered by this subpart.

(b) You must also take all necessary and reasonable steps to ensure nondiscrimination in the award and administration of contracts and agreements covered by this part.

(c) You must include the following assurances in all concession agreements and management contracts you execute with any firm after April 21, 2005:

(1) "This agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR part 23. The concessionaire or contractor agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection

with the award or performance of any concession agreement, management contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR part 23.

(2) "The concessionaire or contractor agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR part 23, that it enters and cause those businesses to similarly include the statements in further agreements."

§ 23.11 What compliance and enforcement provisions are used under this part?

The compliance and enforcement provisions of part 26 (§§ 26.101 and 26.105 through 26.107) apply to this part in the same way that they apply to FAA recipients and programs under part 26.

§ 23.13 How does the Department issue guidance, interpretations, exemptions, and waivers pertaining to this part?

(a) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 23 and issued after April 21, 2005 have definitive, binding effect in implementing the provisions of this part and constitute the official position of the Department of Transportation.

(b) Written interpretations and guidance are valid and binding, and constitute the official position of the Department of Transportation, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 23.

(c) You may apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation or the FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.

(d) You can apply for a waiver of any provision of subpart B or D of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract

goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate an ACDBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of subpart B or D of this part. To receive a program waiver, you must follow these procedures:

(1) You must apply through the FAA. The application must include a specific program proposal and address how you will meet the criteria of paragraph (d)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the ACDBE community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.

(2) Your application must show that—

(i) There is a reasonable basis to conclude that you could achieve a level of ACDBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or D of this part;

(ii) Conditions at your airport are appropriate for implementing the proposal;

(iii) Your proposal would prevent discrimination against any individual or group in access to concession opportunities or other benefits of the program; and

(iv) Your proposal is consistent with applicable law and FAA program requirements.

(3) The FAA Administrator has the authority to approve your application. If the Administrator grants your application, you may administer your ACDBE program as provided in your proposal, subject to the following conditions:

(i) ACDBE eligibility is determined as provided in subpart C of this part, and ACDBE participation is counted as provided in §§ 23.53 through 23.55.

(ii) Your level of ACDBE participation continues to be consistent with the objectives of this part;

(iii) There is a reasonable limitation on the duration of the your modified program; and

(iv) Any other conditions the Administrator makes on the grant of the waiver.

(4) The Administrator may end a program waiver at any time and require you to comply with this part's provisions. The Administrator may also extend the waiver, if he or she determines that all requirements of this section continue to be met. Any such extension shall be for no longer than

period originally set for the duration of the program waiver.

Subpart B—ACDBE Programs

§ 23.21 Who must submit an ACDBE program to FAA, and when?

(a) Except as provided in paragraph (e) of this section, if you are a primary airport that has or was required to have a concessions DBE program prior to April 21, 2005, you must submit a revised ACDBE program meeting the requirements of this part to the appropriate FAA regional office for approval.

(1) You must submit this revised program on the same schedule provided for your first submission of overall goals in § 23.45(a) of this part.

(2) Timely submission and FAA approval of your revised ACDBE program is a condition of eligibility for FAA financial assistance.

(3) Until your new ACDBE program is submitted and approved, you must continue to implement your concessions DBE program that was in effect before the effective date of this amendment to part 23, except with respect to any provision that is contrary to this part.

(b) If you are a primary airport that does not now have a DBE concessions program, and you apply for a grant of FAA funds for airport planning and development under 49 U.S.C. 47107 *et seq.*, you must submit an ACDBE program to the FAA at the time of your application. Timely submission and FAA approval of your ACDBE program are conditions of eligibility for FAA financial assistance.

(c) If you are the owner of more than one airport that is required to have an ACDBE program, you may implement one plan for all your locations. If you do so, you must establish a separate ACDBE goal for each location.

(d) If you make any significant changes to your ACDBE program at any time, you must provide the amended program to the FAA for approval before implementing the changes.

(e) If you are a non-primary airport, non-commercial service airport, a general aviation airport, reliever airport, or any other airport that does not have scheduled commercial service, you are not required to have an ACDBE program. However, you must take appropriate outreach steps to encourage available ACDBEs to participate as concessionaires whenever there is a concession opportunity.

§ 23.23 What administrative provisions must be in a recipient's ACDBE program?

(a) If, as a recipient that must have an ACDBE program, the program must

include provisions for a policy statement, liaison officer, and directory, as provided in part 26, §§ 26.23, 26.25, and 26.31, as well as certification of ACDBEs as provided by Subpart C of this part. You must include a statement in your program committing you to operating your ACDBE program in a nondiscriminatory manner.

(b) You may combine your provisions for implementing these requirements under this part and part 26 (e.g., a single policy statement can cover both Federally-assisted airport contracts and concessions; the same individual can act as the liaison officer for both part 23 and part 26 matters).

§ 23.25 What measures must recipients include in their ACDBE programs to ensure nondiscriminatory participation of ACDBEs in concessions?

(a) You must include in your ACDBE program a narrative description of the types of measures you intend to make to ensure nondiscriminatory participation of ACDBEs in concession and other covered activities.

(b) Your ACDBE program must provide for setting goals consistent with the requirements of Subpart D of this part.

(c) Your ACDBE program must provide for seeking ACDBE participation in all types of concession activities, rather than concentrating participation in one category or a few categories to the exclusion of others.

(d) Your ACDBE program must include race-neutral measures that you will take. You must maximize the use of race-neutral measures, obtaining as much as possible of the ACDBE participation needed to meet overall goals through such measures. These are responsibilities that you directly undertake as a recipient, in addition to the efforts that concessionaires make, to obtain ACDBE participation. The following are examples of race-neutral measures you can implement:

(1) Locating and identifying ACDBEs and other small businesses who may be interested in participating as concessionaires under this part;

(2) Notifying ACDBEs of concession opportunities and encouraging them to compete, when appropriate;

(3) When practical, structuring concession activities so as to encourage and facilitate the participation of ACDBEs

(4) Providing technical assistance to ACDBEs in overcoming limitations, such as inability to obtain bonding or financing;

(5) Ensuring that competitors for concession opportunities are informed during pre-solicitation meetings about

how the recipient's ACDBE program will affect the procurement process;

(6) Providing information concerning the availability of ACDBE firms to competitors to assist them in obtaining ACDBE participation; and

(7) Establishing a business development program (*see* part 26, § 26.35); technical assistance program; or taking other steps to foster ACDBE participation in concessions.

(e) Your ACDBE program must also provide for the use of race-conscious measures when race-neutral measures, standing alone, are not projected to be sufficient to meet an overall goal. The following are examples of race-conscious measures you can implement:

(1) Establishing concession-specific goals for particular concession opportunities.

(i) If the objective of the concession-specific goal is to obtain ACDBE participation through a direct ownership arrangement with a ACDBE, calculate the goal as a percentage of the total estimated annual gross receipts from the concession.

(ii) If the goal applies to purchases and/or leases of goods and services, calculate the goal by dividing the estimated dollar value of such purchases and/or leases from ACDBEs by the total estimated dollar value of all purchases to be made by the concessionaire.

(iii) To be eligible to be awarded the concession, competitors must make good faith efforts to meet this goal. A competitor may do so either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so.

(iv) The administrative procedures applicable to contract goals in part 26, § 26.51–53, apply with respect to concession-specific goals.

(2) Negotiation with a potential concessionaire to include ACDBE participation, through direct ownership arrangements or measures, in the operation of the concession.

(3) With the prior approval of FAA, other methods that take a competitor's ability to provide ACDBE participation into account in awarding a concession.

(f) Your ACDBE program must require businesses subject to ACDBE goals at the airport (except car rental companies) to make good faith efforts to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with DBEs.

(g) As provided in § 23.61 of this part, you must not use set-asides and quotas as means of obtaining ACDBE participation.

§ 23.27 What information does a recipient have to retain and report about implementation of its ACDBE program?

(a) As a recipient, you must retain sufficient basic information about your program implementation, your certification of ACDBEs, and the award and performance of agreements and contracts to enable the FAA to determine your compliance with this part. You must retain this data for a minimum of three years following the end of the concession agreement or other covered contract.

(b) Beginning March 1, 2006, you must submit an annual report on ACDBE participation using the form found in appendix A to this part. You must submit the report to the appropriate FAA Regional Civil Rights Office.

§ 23.29 What monitoring and compliance procedures must recipients follow?

As a recipient, you must implement appropriate mechanisms to ensure compliance with the requirements of this part by all participants in the program. You must include in your concession program the specific provisions to be inserted into concession agreements and management contracts, the enforcement mechanisms, and other means you use to ensure compliance. These provisions must include a monitoring and enforcement mechanism to verify that the work committed to ACDBEs is actually performed by the ACDBEs. Your program must describe in detail the level of effort and resources devoted to monitoring and enforcement.

Subpart C—Certification and Eligibility of ACDBEs

§ 23.31 What certification standards and procedures do recipients use to certify ACDBEs?

(a) As a recipient, you must use, except as provided in this subpart, the procedures and standards of part 26, §§ 26.61–91 for certification of ACDBEs to participate in your concessions program. Your ACDBE program must incorporate the use of these standards and procedures and must provide that certification decisions for ACDBEs will be made by the Unified Certification Program (UCP) in your state (see part 26, § 26.81).

(b) The UCP's directory of eligible DBEs must specify whether a firm is certified as a DBE for purposes of part 26, an ACDBE for purposes of part 23, or both.

(c) As an airport or UCP, you must review the eligibility of currently certified ACDBE firms to make sure that

they meet the eligibility standards of this part.

(1) You must complete these reviews as soon as possible, but in no case later than April 21, 2006 or three years from the anniversary date of each firm's most recent certification, whichever is later.

(2) You must direct all currently certified ACDBEs to submit to you by April 21, 2006, a personal net worth statement, a certification of disadvantage, and an affidavit of no change.

§ 23.33 What size standards do recipients use to determine the eligibility of ACDBEs?

(a) As a recipient, you must, except as provided in paragraph (b) of this section, treat a firm as a small business eligible to be certified as an ACDBE if its gross receipts, averaged over the firm's previous three fiscal years, do not exceed \$30 million.

(b) The following types of businesses have size standards that differ from the standard set forth in paragraph (a) of this section:

(1) Banks and financial institutions: \$275 million in assets;

(2) Car rental companies: \$40 million average annual gross receipts over the firm's three previous fiscal years;

(3) Pay telephones: 1,500 employees.

§ 23.35 What is the personal net worth standard for disadvantaged owners of ACDBEs?

The personal net worth standard used in determining eligibility for purposes of this part is \$750,000. Any individual who has a personal net worth exceeding this amount is not a socially and economically disadvantaged individual for purposes of this part, even if the individual is a member of a group otherwise presumed to be disadvantaged.

§ 23.37 Are firms certified under 49 CFR part 26 eligible to participate as ACDBEs?

(a) You must presume that a firm that is certified as a DBE under part 26 is eligible to participate as an ACDBE. By meeting the size, disadvantage (including personal net worth), ownership and control standards of part 26, the firm will have also met the eligibility standards for part 23.

(b) However, before certifying such a firm, you must ensure that the disadvantaged owners of a DBE certified under part 26 are able to control the firm with respect to its activity in the concessions program. In addition, you are not required to certify a part 26 DBE as a part 23 ACDBE if the firm does not do work relevant to the airport's concessions program.

§ 23.39 What other certification requirements apply in the case of ACDBEs?

(a) The provisions of part 26, §§ 26.83 (c)(2) through (c)(6) do not apply to certifications for purposes of this part. Instead, in determining whether a firm is an eligible ACDBE, you must take the following steps:

(1) Obtain the resumes or work histories of the principal owners of the firm and personally interview these individuals;

(2) Analyze the ownership of stock of the firm, if it is a corporation;

(3) Analyze the bonding and financial capacity of the firm;

(4) Determine the work history of the firm, including any concession contracts or other contracts it may have received;

(5) Obtain or compile a list of the licenses of the firm and its key personnel to perform the concession contracts or other contracts it wishes to receive;

(6) Obtain a statement from the firm of the type(s) of concession(s) it prefers to operate or the type(s) of other contract(s) it prefers to perform.

(b) In reviewing the affidavit required by part 26, § 26.83(j), you must ensure that the ACDBE firm meets the applicable size standard in § 23.33.

(c) For purposes of this part, the term prime contractor in part 26, § 26.87(i) includes a firm holding a prime contract with an airport concessionaire to provide goods or services to the concessionaire or a firm holding a prime concession agreement with a recipient.

(d) With respect to firms owned by Alaska Native Corporations (ANCs), the provisions of part 26, § 26.73(i) do not apply under this part. The eligibility of ANC-owned firms for purposes of this part is governed by § 26.73(h).

(e) When you remove a concessionaire's eligibility after the concessionaire has entered a concession agreement, because the firm exceeded the small business size standard or because an owner has exceeded the personal net worth standard, and the firm in all other respects remains an eligible DBE, you may continue to count the concessionaire's participation toward DBE goals during the remainder of the current concession agreement. However, you must not count the concessionaire's participation toward DBE goals beyond the termination date for the concession agreement in effect at the time of the decertification (e.g., in a case where the agreement is renewed or extended, or an option for continued participation beyond the current term of the agreement is exercised).

(f) When UCPs are established in a state (see part 26, § 26.81), the UCP, rather than individual recipients,

certifies firms for the ACDBE concession program.

(g) You must use the Uniform Application Form found in appendix F to part 26. However, you must instruct applicants to take the following additional steps:

(1) In the space available in section 2(B)(7) of the form, the applicant must state that it is applying for certification as an ACDBE.

(2) With respect to section 4(C) of the form, the applicant must provide information on an attached page concerning the address/location, ownership/lease status, current value of property or lease, and fees/lease payments paid to the airport.

(3) The applicant need not complete section 4(I) and (J). However, the applicant must provide information on an attached page concerning any other airport concession businesses the applicant firm or any affiliate owns and/or operates, including name, location, type of concession, and start date of concession.

(h) Car rental companies and private terminal owners or lessees are not authorized to certify firms as ACDBEs. As a car rental company or private terminal owner or lessee, you must obtain ACDBE participation from firms which a recipient or UCPs have certified as ACDBEs.

(i) You must use the certification standards of this part to determine the ACDBE eligibility of firms that provide goods and services to concessionaires.

Subpart D—Goals, Good Faith Efforts, and Counting

§ 23.41 What is the basic overall goal requirement for recipients?

(a) If you are a recipient who must implement an ACDBE program, you must, except as provided in paragraph (b) of this section, establish two separate overall ACDBE goals. The first is for car rentals; the second is for concessions other than car rentals.

(b) If your annual car rental concession revenues, averaged over the three-years preceding the date on which you are required to submit overall goals, do not exceed \$200,000, you are not required to submit a car rental overall goal. If your annual revenues for concessions other than car rentals, averaged over the three years preceding the date on which you are required to submit overall goals, do not exceed \$200,000, you are not required to submit a non-car rental overall goal.

(c) Each overall goal must cover a three-year period. You must review your goals annually to make sure they continue to fit your circumstances

appropriately. You must report to the FAA any significant adjustments that you make to your goal in the time before your next scheduled submission.

(d) Your goals established under this part must provide for participation by all certified ACDBEs and may not be subdivided into group-specific goals.

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

§ 23.43 What are the consultation requirements in the development of recipients' overall goals?

(a) As a recipient, you must consult with stakeholders before submitting your overall goals to FAA.

(b) Stakeholders with whom you must consult include, but are not limited to, minority and women's business groups, community organizations, trade associations representing concessionaires currently located at the airport, as well as existing concessionaires themselves, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for ACDBEs, and the recipient's efforts to increase participation of ACDBEs.

§ 23.45 What are the requirements for submitting overall goal information to the FAA?

(a) You must submit your overall goals to the appropriate FAA Regional Civil Rights Office for approval. Your first set of overall goals meeting the requirements of this subpart are due on the following schedule:

(1) If you are a large or medium hub primary airport on April 21, 2005, by January 1, 2006. You must make your next submissions by October 1, 2008.

(2) If you are a small hub primary airport on April 21, 2005, by October 1, 2006.

(3) If you are a nonhub primary airport on April 21, 2005, by October 1, 2007.

(b) You must then submit new goals every three years after the date that applies to you.

(c) Timely submission and FAA approval of your overall goals is a condition of eligibility for FAA financial assistance.

(d) In the time before you make your first submission under paragraph (a) of

this section, you must continue to use the overall goals that have been approved by the FAA before the effective date of this part.

(e) Your overall goal submission must include a description of the method used to calculate your goals and the data you relied on. You must "show your work" to enable the FAA to understand how you concluded your goals were appropriate. This means that you must provide to the FAA the data, calculations, assumptions, and reasoning used in establishing your goals.

(f) Your submission must include your projection of the portions of your overall goals you propose to meet through use of race-neutral and race-conscious means, respectively, and the basis for making this projection (see § 23.51(d)(5))

(g) FAA may approve or disapprove the way you calculated your goal, including your race-neutral/race-conscious "split," as part of its review of your plan or goal submission. Except as provided in paragraph (h) of this section, the FAA does not approve or disapprove the goal itself (*i.e.*, the number).

(h) If the FAA determines that your goals have not been correctly calculated or the justification is inadequate, the FAA may, after consulting with you, adjust your overall goal or race-conscious/race-neutral "split." The adjusted goal represents the FAA's determination of an appropriate overall goal for ACDBE participation in the recipient's concession program, based on relevant data and analysis. The adjusted goal is binding on you.

(i) If a new concession opportunity the estimated average annual gross revenues of which are anticipated to be \$200,000 or greater arises at a time that falls between normal submission dates for overall goals, you must submit an appropriate adjustment to your overall goal to the FAA for approval at least six months before executing the concession agreement for the new concession opportunity.

§ 23.47 What is the base for a recipient's goal for concessions other than car rentals?

(a) As a recipient, the base for your goal includes the total gross receipts of concessions, except as otherwise provided in this section.

(b) This base does not include the gross receipts of car rental operations.

(c) The dollar amount of a management contract or subcontract with a non-ACDBE and the gross receipts of business activities to which a management or subcontract with a

non-ACDBE pertains are not added to this base.

(d) This base does not include any portion of a firm's estimated gross receipts that will not be generated from a concession.

Example to paragraph (d): A firm operates a restaurant in the airport terminal which serves the traveling public and, under the same lease agreement, provides in-flight catering service to air carriers. The projected gross receipts from the restaurant are included in the overall goal calculation, while the gross receipts to be earned by the in-flight catering services are not.

§ 23.49 What is the base for a recipient's goal for car rentals?

Except in the case where you use the alternative goal approach of § 23.51(c)(5)(ii), the base for your goal is the total gross receipts of car rental operations at your airport. You do not include gross receipts of other concessions in this base.

§ 23.51 How are a recipient's overall goals expressed and calculated?

(a) Your objective in setting a goal is to estimate the percentage of the base calculated under §§ 23.47–23.49 that would be performed by ACDBEs in the absence of discrimination and its effects.

(1) This percentage is the estimated ACDBE participation that would occur if there were a "level playing field" for firms to work as concessionaires for your airport.

(2) In conducting this goal setting process, you are determining the extent, if any, to which the firms in your market area have suffered discrimination or its effects in connection with concession opportunities or related business opportunities.

(3) You must complete the goal-setting process separately for each of the two overall goals identified in § 23.41 of this part.

(b)(1) Each overall concessions goal must be based on demonstrable evidence of the availability of ready, willing and able ACDBEs relative to all businesses ready, willing and able to participate in your ACDBE program (hereafter, the "relative availability of ACDBEs").

(2) You cannot simply rely on the 10 percent national aspirational goal, your previous overall goal, or past ACDBE participation rates in your program without reference to the relative availability of ACDBEs in your market.

(3) Your market area is defined by the geographical area in which the substantial majority of firms which seek to do concessions business with the airport are located and the geographical area in which the firms which receive

the substantial majority of concessions-related revenues are located. Your market area may be different for different types of concessions.

(c) *Step 1.* You must begin your goal setting process by determining a base figure for the relative availability of ACDBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining the evidence available to you. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the FAA.

(1) *Use DBE Directories and Census Bureau Data.* Determine the number of ready, willing and able ACDBEs in your market area from your ACDBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, willing and able businesses available in your market area that perform work in the same NAICS codes. (Information about the CBP data base may be obtained from the Census Bureau at their Web site, <http://www.census.gov/epcd/cbp/view/cbpview.html>.) Divide the number of ACDBEs by the number of all businesses to derive a base figure for the relative availability of ACDBEs in your market area.

(2) *Use an Active Participants List.* Determine the number of ACDBEs that have participated or attempted to participate in your airport concessions program in previous years. Determine the number of all businesses that have participated or attempted to participate in your airport concession program in previous years. Divide the number of ACDBEs who have participated or attempted to participate by the number for all businesses to derive a base figure for the relative availability of ACDBEs in your market area.

(3) *Use data from a disparity study.* Use a percentage figure derived from data in a valid, applicable disparity study.

(4) *Use the goal of another recipient.* If another airport or other DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.

(5) *Alternative methods.* (i) You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to

ultimately attain a goal that is rationally related to the relative availability of ACDBEs in your market area.

(ii) In the case of a car rental goal, where it appears that all or most of the goal is likely to be met through the purchases by car rental companies of vehicles or other goods or services from ACDBEs, one permissible alternative is to structure the goal entirely in terms of purchases of goods and services. In this case, you would calculate your car rental overall goal by dividing the estimated dollar value of such purchases from ACDBEs by the total estimated dollar value of all purchases to be made by car rental companies.

(d) *Step 2.* Once you have calculated a base figure, you must examine all relevant evidence reasonably available in your jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.

(1) There are many types of evidence that must be considered when adjusting the base figure. These include, but are not limited to:

(i) The current capacity of ACDBEs to perform work in your concessions program, as measured by the volume of work ACDBEs have performed in recent years; and

(ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure.

(2) If your base figure is the goal of another recipient, you must adjust it for differences in your market area and your concessions program.

(3) If available, you must consider evidence from related fields that affect the opportunities for ACDBEs to form, grow and compete. These include, but are not limited to:

(i) Statistical disparities in the ability of ACDBEs to get the financing, bonding and insurance required to participate in your program;

(ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for ACDBEs to perform in your program.

(4) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination, or the effects of an ongoing ACDBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

(5) Among the information you submit with your overall goal (see 23.45(e)), you must include description

of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, as well as the adjustments you made to the base figure and the evidence relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and an explanation of how you used that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see §§ 26.51(c)).

(e) You are not required to obtain prior FAA concurrence with your overall goal (*i.e.*, with the number itself). However, if the FAA's review suggests that your overall goal has not been correctly calculated, or that your method for calculating goals is inadequate, the FAA may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you.

(f) If you need additional time to collect data or take other steps to develop an approach to setting overall goals, you may request the approval of the FAA Administrator for an interim goal and/or goal-setting mechanism. Such a mechanism must:

(1) Reflect the relative availability of ACDBEs in your local market area to the maximum extent feasible given the data available to you; and

(2) Avoid imposing undue burdens on non-ACDBEs.

§ 23.53 How do car rental companies count ACDBE participation toward their goals?

(a) As a car rental company, you may, in meeting the goal the airport has set for you, include purchases or leases of vehicles from any vendor that is a certified ACDBE.

(b) As a car rental company, if you choose to meet the goal the airport has set for you by including purchases or leases of vehicles from an ACDBE vendor, you must also submit to the recipient documentation of the good faith efforts you have made to obtain ACDBE participation from other ACDBE providers of goods and services.

(c) While this part does not require you to obtain ACDBE participation through direct ownership arrangements, you may count such participation toward the goal the airport has set for you.

(d) The following special rules apply to counting participation related to car rental operations:

(1) Count the entire amount of the cost charged by an ACDBE for repairing

vehicles, provided that it is reasonable and not excessive as compared with fees customarily allowed for similar services.

(2) Count the entire amount of the fee or commission charged by a ACDBE to manage a car rental concession under an agreement with the concessionaire toward ACDBE goals, provided that it is reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) Do not count any portion of a fee paid by a manufacturer to a car dealership for reimbursement of work performed under the manufacturer's warranty.

(e) For other goods and services, count participation toward ACDBE goals as provided in part 26, § 26.55 and § 23.55 of this part. In the event of any conflict between these two sections, § 23.55 controls.

(f) If you have a national or regional contract, count a pro-rated share of the amount of that contract toward the goals of each airport covered by the contract. Use the proportion of your applicable gross receipts as the basis for making this pro-rated assignment of ACDBE participation.

Example to paragraph (f): Car Rental Company X signs a regional contract with an ACDBE car dealer to supply cars to all five airports in a state. The five airports each account for 20 percent of X's gross receipts in the state. Twenty percent of the value of the cars purchased through the ACDBE car dealer would count toward the goal of each airport.

§ 23.55 How do recipients count ACDBE participation toward goals for items other than car rentals?

(a) You count only ACDBE participation that results from a commercially useful function. For purposes of this part, the term commercially useful function has the same meaning as in part 26, § 26.55(c), except that the requirements of § 26.55(c)(3) do not apply to concessions.

(b) Count the total dollar value of gross receipts an ACDBE earns under a concession agreement and the total dollar value of a management contract or subcontract with an ACDBE toward the goal. However, if the ACDBE enters into a subconcession agreement or subcontract with a non-ACDBE, do not count any of the gross receipts earned by the non-ACDBE.

(c) When an ACDBE performs as a subconcessionaire or subcontractor for a non-ACDBE, count only the portion of the gross receipts earned by the ACDBE under its subagreement.

(d) When an ACDBE performs as a participant in a joint venture, count a portion of the gross receipts equal to the

distinct, clearly defined portion of the work of the concession that the ACDBE performs with its own forces toward ACDBE goals.

(e) Count the entire amount of fees or commissions charged by an ACDBE firm for a *bona fide* service, provided that, as the recipient, you determine this amount to be reasonable and not excessive as compared with fees customarily allowed for similar services. Such services may include, but are not limited to, professional, technical, consultant, legal, security systems, advertising, building cleaning and maintenance, computer programming, or managerial.

(f) Count 100 percent of the cost of goods obtained from an ACDBE manufacturer. For purposes of this part, the term manufacturer has the same meaning as in part 26, § 26.55(e)(1)(ii).

(g) Count 100 percent of the cost of goods purchased or leased from a ACDBE regular dealer. For purposes of this part, the term "regular dealer" has the same meaning as in part 26, § 26.55(e)(2)(ii).

(h) Count credit toward ACDBE goals for goods purchased from an ACDBE which is neither a manufacturer nor a regular dealer as follows:

(1) Count the entire amount of fees or commissions charged for assistance in the procurement of the goods, provided that this amount is reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the goods themselves.

(2) Count the entire amount of fees or transportation charges for the delivery of goods required for a concession, provided that this amount is reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of goods themselves.

(i) If a firm has not been certified as an ACDBE in accordance with the standards in this part, do not count the firm's participation toward ACDBE goals.

(j) Do not count the work performed or gross receipts earned by a firm after its eligibility has been removed toward ACDBE goals. However, if an ACDBE firm certified on April 21, 2005 is decertified because one or more of its disadvantaged owners do not meet the personal net worth criterion or the firm exceeds business size standards of this part during the performance of a contract or other agreement, the firm's participation may continue to be counted toward ACDBE goals for the remainder of the term of the contract or other agreement (but not extensions or

renewals of such contracts or agreements).

(k) Do not count costs incurred in connection with the renovation, repair, or construction of a concession facility (sometimes referred to as the "build-out").

(l) Do not count the ACDBE participation of car rental companies toward your ACDBE achievements toward this goal.

§ 23.57 What happens if a recipient falls short of meeting its overall goals?

(a) You cannot be penalized, or treated by the Department as being in noncompliance with this part, simply because your ACDBE participation falls short of your overall goals. You can be penalized or treated as being in noncompliance only if you have failed to administer your ACDBE program in good faith.

(b) If your ACDBE participation falls short of your overall goals, FAA may require you to submit to the FAA a statement of the reasons why you were unable to meet it and the steps you are taking to meet your overall goals or to adjust them based on changed circumstances.

(c) In response to your submission, FAA may require you to implement appropriate remedial measures,

§ 23.59 What is the role of the statutory 10 percent goal in the ACDBE program?

(a) The statute authorizing the ACDBE program provides that, except to the extent the Secretary determines otherwise, not less than 10 percent of concession businesses are to be ACDBEs.

(b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in airport concessions.

(c) The national 10 percent aspirational goal does not authorize or require recipients to set overall or concession-specific goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

§ 23.61 Can recipients use quotas or set-asides as part of their ACDBE programs?

You must not use quotas or set-asides for ACDBE participation in your program.

Subpart E—Other Provisions

§ 23.71 Does a recipient have to change existing concession agreements?

Nothing in this part requires you to modify or abrogate an existing

concession agreement (one executed before April 21, 2005) during its term. When an extension or option to renew such an agreement is exercised, or when a material amendment is made, you must assess potential for ACDBE participation and may, if permitted by the agreement, use any means authorized by this part to obtain a modified amount of ACDBE participation in the renewed or amended agreement.

§ 23.73 What requirements apply to privately-owned or leased terminal buildings?

(a) If you are a recipient who is required to implement an ACDBE program on whose airport there is a privately-owned or leased terminal building that has concessions, or any portion of such a building, this section applies to you.

(b) You must pass through the applicable requirements of this part to the private terminal owner or lessee via your agreement with the owner or lessee or by other means. You must ensure that the terminal owner or lessee complies with the requirements of this part.

(c) If your airport is a primary airport, you must obtain from the terminal owner or lessee the goals and other elements of the ACDBE program required under this part. You must incorporate this information into your concession plan and submit it to the FAA in accordance with this part.

(d) If the terminal building is at a non-primary commercial service airport or general aviation airport or reliever airport, you must ensure that the owner complies with the requirements in § 23.21(e).

§ 23.75 Can recipients enter into long-term, exclusive agreements with concessionaires?

(a) Except as provided in paragraph (b) of this section, you must not enter into long-term, exclusive agreements for concessions. For purposes of this section, a long-term agreement is one having a term longer than five years.

(b) You may enter into a long-term, exclusive concession agreement only under the following conditions:

(1) Special local circumstances exist that make it important to enter such agreement, and

(2) The responsible FAA regional office approves your plan for meeting the standards of paragraph (c) of this section.

(c) In order to obtain FAA approval of a long-term-exclusive concession agreement, you must submit the following information to the FAA regional office:

(1) A description of the special local circumstances that warrant a long-term, exclusive agreement.

(2) A copy of the draft and final leasing and subleasing or other agreements. This long-term, exclusive agreement must provide that:

(i) A number of ACDBEs that reasonably reflects their availability in your market area, in the absence of discrimination, to do the types of work required will participate as concessionaires throughout the term of the agreement and account for at a percentage of the estimated annual gross receipts equivalent to a level set in accordance with §§ 23.47 through 23.49 of this part.

(ii) You will review the extent of ACDBE participation before the exercise of each renewal option to consider whether an increase or decrease in ACDBE participation is warranted.

(iii) An ACDBE concessionaire that is unable to perform successfully will be replaced by another ACDBE concessionaire, if the remaining term of the agreement makes this feasible. In the event that such action is not feasible, you will require the concessionaire to make good faith efforts during the remaining term of the agreement to encourage ACDBEs to compete for the purchases and/or leases of goods and services to be made by the concessionaire.

(3) Assurances that any ACDBE participant will be in an acceptable form, such as a sublease, joint venture, or partnership.

(4) Documentation that ACDBE participants are properly certified.

(5) A description of the type of business or businesses to be operated (e.g., location, storage and delivery space, "back-of-the-house facilities" such as kitchens, window display space, advertising space, and other amenities that will increase the ACDBE's chance to succeed).

(6) Information on the investment required on the part of the ACDBE and any unusual management or financial arrangements between the prime concessionaire and ACDBE.

(7) Information on the estimated gross receipts and net profit to be earned by the ACDBE.

§ 23.77 Does this part preempt local requirements?

(a) In the event that a State or local law, regulation, or policy differs from the requirements of this part, the recipient must, as a condition of remaining eligible to receive Federal financial assistance from the DOT, take such steps as may be necessary to

comply with the requirements of this part.

(b) You must clearly identify any State or local law, regulation, or policy pertaining to minority, women's, or disadvantaged business enterprise concerning airport concessions that adds to, goes beyond, or imposes more stringent requirements than the provisions of this part. FAA will determine whether such a law, regulation, or policy conflicts with this part, in which case the requirements of this part will govern.

(c) If not deemed in conflict by the FAA, you must write and administer such a State or local law, policy, or regulation separately from the ACDBE program.

(d) You must provide copies of any such provisions and the legal authority supporting them to the FAA with your ACDBE program submission. FAA will not approve an ACDBE program if there are such provisions that conflict with the provisions of this part.

(e) However, nothing in this part preempts any State or local law, regulation, or policy enacted by the governing body of a recipient, or the authority of any State or local government or recipient to adopt or enforce any law, regulation, or policy relating to ACDBEs, as long as the law, regulation, or policy does not conflict with this part.

§ 23.79 Does this part permit recipients to use local geographic preferences?

No. As a recipient you must not use a local geographic preference. For purposes of this section, a local geographic preference is any requirement that gives an ACDBE located in one place (e.g., your local area) an advantage over ACDBEs from other places in obtaining business as, or with, a concession at your airport.

Appendix A to Part 23—Uniform Report of ACDBE Participation

Instructions for Uniform Report of ACDBE Participation

1. Insert name of airport receiving FAA financial assistance and AIP number.
2. Provide the name and contact information (phone, fax, e-mail) for the

person FAA should contact with questions about the report.

3a. Provide the annual reporting period to which the report pertains (e.g., October 2005–September 2006).

3b. Provide the date on which the report is submitted to FAA.

4. This block and blocks 5 and 6 concern *non-car rental* goals and participation only. In this block, provide the overall non-car rental percentage goal and the race-conscious (RC) and race-neutral (RN) components of it. The RC and RN percentages should add up to the overall percentage goal.

5. For purposes of this block and blocks 6, 8, and 9, the participation categories listed at the left of the block are the following: "Prime Concessions" are concessions who have a direct relationship with the airport (e.g., a company who has a lease agreement directly with the airport to operate a concession). A "subconcession" is a firm that has a sublease or other agreement with a prime concessionaire, rather than with the airport itself, to operate a concession at the airport. A "management contract" is an agreement between the airport and a firm to manage a portion of the airport's facilities or operations (e.g., manage the parking facilities). "Goods/services" refers to those goods and services purchased by the airport itself or by concessionaires and management contractors from certified DBEs.

Block 5 concerns *all* non-car rental concession activity covered by 49 CFR part 23 during the reporting period, both new or continuing.

In Column A, enter the total concession gross revenues for concessionaires (prime and sub) and purchases of goods and services (ACDBE and non-ACDBE combined) at the airport. In Column B, enter the number of lease agreements, contracts, etc. in effect or taking place during the reporting period in each participation category for all concessionaires and purchases of goods and services (ACDBE and non-ACDBE combined).

Because, by statute, non-ACDBE management contracts do not count as part of the base for ACDBE goals, the cells for total management contract participation and ACDBE participation as a percentage of total management contracting dollars are not intended to be filled in blocks 5, 6, 8, and 9.

In Column C, enter the total gross revenues in each participation category (ACDBEs) only. In Column D, enter the number of lease agreements, contracts, etc., in effect or entered into during the reporting period in each participation category for all concessionaires and purchases of goods and services (ACDBEs only).

Columns E and F are subsets of Column C: break out the total gross revenues listed in Column C into the portions that are attributable to race-conscious and race-neutral measures, respectively. Column G is a percentage calculation. It answers the question, what percentage of the numbers in Column A is represented by the corresponding numbers in Column C?

6. The numbers in this Block concern only *new* non-car rental concession opportunities that arose during the current reporting period. In other words, the information requested in Block 6 is a subset of that requested in Block 5. Otherwise, this Block is filled out in the same way as Block 5.

7. Blocks 7–9 concern car rental goals and participation. In Block 7, provide the overall car rental percentage goal and the race-conscious (RC) and race-neutral (RN) components of it. The RC and RN percentages should add up to the overall percentage goal.

8. Block 8 is parallel to Block 5, except that it is for car rentals. The instructions for filling it out are the same as for Block 5.

9. Block 9 is parallel to Block 6, except that it is for car rentals. The information requested in Block 9 is a subset of that requested in Block 8. The instructions for filling it out are the same as for Block 6.

10. Block 10 instructs recipients to bring forward the cumulative ACDBE participation figures from Blocks 5 and 8, breaking down these figures by race and gender categories. Participation by non-minority women-owned firms should be listed in the "non-minority women" column. Participation by firms owned by minority women should be listed in the appropriate minority group column. The "other" column should be used to reflect participation by individuals who are not a member of a presumptively disadvantaged group who have been found disadvantaged on a case-by-case basis.

11. This block instructs recipients to attach five information items for each ACDBE firm participating in its program during the reporting period. If the firm's participation numbers are reflected in Blocks 5–6 and/or 8–9, the requested information about that firm should be attached in response to this item.

Uniform Report of ACDBE Participation

1. Name of Recipient and AIP Number:
2. Contact Information:
- 3a. Reporting Period:
- 3b. Date of Report:
4. Current Non-Car Rental ACDBE Goal: Race Conscious Goal ___% Race Neutral Goal ___% Overall Goal ___%

5. Non-car rental Cumulative ACDBE participation	A Total dollars (everyone)	B Total number (everyone)	C Total to ACDBEs (dollars)	D Total to ACDBEs (number)	E RC to ACDBEs (dollars)	F RN to ACDBEs (dollars)	G % of dollars to ACDBEs
Prime Concessions. Subconcessions. Management Contracts Goods/Services. Totals.	XXXXXXX	XXXXXXX	.....	.....	.....	.....	XXXXXX

6. Non-Car rental New ACDBE participation this period	A Total dollars (everyone)	B Total number (everyone)	C Total to ACDBEs (dollars)	D Total to ACDBEs (number)	E RC to ACDBEs (dollars)	F RN to ACDBEs (dollars)	G % of dollars to ACDBEs
Prime Concessions. Subconcessions. Management Contracts Goods/Services. Totals.	XXXXXXX	XXXXXXX	.....	.....	.....	XXXXXX	.....

7. Current Car Rental ACDBE Goal: Race
Conscious Goal ___% Race Neutral Goal
___% Overall Goal ___%

8. Car rental Cumulative ACDBE participation	A Total dollars (everyone)	B Total number (everyone)	C Total to ACDBEs (dollars)	D Total to ACDBEs (number)	E RC to ACDBEs (dollars)	F RN to ACDBEs (dollars)	G % of dollars to ACDBEs
Prime Concessions. Subconcessions. Goods/Services. Totals.							

9. Car rental New ACDBE participation this period	A Total dollars (everyone)	B Total number (everyone)	C Total to ACDBEs (dollars)	D Total to ACDBEs (number)	E RC to ACDBEs (dollars)	F RN to ACDBEs (dollars)	G % of dollars to ACDBEs
Prime Concessions. Subconcessions. Goods/Services. Totals.							

10. Cumulative ACDBE participation by race/gender	A Black Americans	B Hispanic Americans	C Asian-Pa- cific Ameri- cans	D Asian-In- dian Ameri- cans	E Native Americans	F Non-minor- ity Women	G Other	H Totals
Car Rental. Non-Car Rental. Totals.								

11. On an attachment, list the following information for each ACDBE firm participating in your program during the period of this report: (1) Firm name; (2) Type of business; (3) Beginning and expiration dates of agreement, including options to renew; (4) Dates that material amendments have been or will be made to agreement (if known); (5) Estimated gross receipts for the firm during this reporting period.

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BILLING CODE 4910-62-P

Attachment 3

**AIRPORT CONCESSIONS DISADVANTAGED BUSINESS ENTERPRISE
JOINT VENTURE GUIDANCE**

A copy of the ACDBE Joint Venture Guidance issued by the FAA is attached.



U.S. Department
of Transportation
**Federal Aviation
Administration**

July 17, 2008

Dear Airport Sponsor:

As you may already know, the Federal Aviation Administration (FAA) staff has been working diligently with colleagues in other parts of the Department of Transportation (DOT) to develop guidance for airport sponsors regarding the difficult issue of how to credit the participation of Airport Concession Disadvantaged Business Enterprise (ACDBE) joint venture participants.

49 CFR Part 23, the DOT's ACDBE rule, requires FAA-assisted airports to set goals for the use of ACDBEs. As a result, airports frequently receive proposals from large national concessions companies to meet ACDBE goals by establishing a joint venture with a small local ACDBE. These arrangements are often complex and it can be difficult for airports to determine how much credit toward a goal should be counted for the ACDBE firm's participation.

Ever since Part 23 was revised in March 2005, airports and other stakeholders have been asking for guidance in this area. FAA has remained determined to develop a product that is practical and balanced in terms of ACDBE program requirements, legal necessities, and business realities. In developing this guidance we held two national level stakeholder meetings where we solicited comments on a draft of the guidance document. We received valuable input from airports, trade associations, attorneys, national concessionaires, ACDBEs, and consultants.

We heard you, we have worked with you, and we are now proud to issue the final guidance. The final guidance reflects the best thinking of FAA and DOT civil rights and legal professionals, our expert ACDBE program consultants, as well as input from our stakeholders. This product consists of the main guidance document and three attachments: (1) a model ACDBE joint venture information form (to be submitted to airports for review with the joint venture agreement), (2) samples (how to calculate the ACDBE joint venture participant's portion of the work), and (3) a flowchart (outlining the ACDBE joint venture review process).

I hope that the attached guidance will assist you in enhanced oversight and effectiveness of your ACDBE program. This guidance is posted on our web site (http://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/), where we have also posted the model ACDBE joint venture information form in Microsoft Word format.

If you have any questions, please contact your regional FAA DBE Program Manager (see http://www.faa.gov/about/office_org/headquarters_offices/acr/about/field/).

Sincerely,

Fanny Rivera
Assistant Administrator for Civil Rights
and FAA Diversity Advocate

Enclosure

**AIRPORT CONCESSIONS
DISADVANTAGED
BUSINESS ENTERPRISE**

**JOINT
VENTURE
GUIDANCE**

**U.S. Department of Transportation
Federal Aviation Administration**

As guidance, this document sets forth the interpretations of the Department of Transportation of its existing legal authorities and the Department's recommendations for carrying out the airport concessions disadvantaged business enterprise (ACDBE) program. This guidance does not create new legal mandates independent of the Department's statutory and regulatory authorities, but is intended to inform interested parties and the public of the way in which the Department understands and will implement those authorities. Regulated parties may consult the Federal Aviation Administration with respect to alternative means of compliance with ACDBE joint venture requirements.

The General Counsel of the Department of Transportation has reviewed this document and has approved it as consistent with the language and intent of 49 CFR Part 23.

**AIRPORT CONCESSIONS DISADVANTAGED BUSINESS ENTERPRISE
JOINT VENTURE GUIDANCE
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ACDBE JOINT VENTURE GUIDANCE

Section 1 – General

1.0 What is the purpose of this Joint Venture Guidance?

The purpose of this joint venture (JV) guidance is to provide information and direction to airports, Airport Concessionaire Disadvantaged Business Enterprise (ACDBE) program staff, ACDBEs and various stakeholders on the structure, implementation, and counting of joint venture arrangements in the ACDBE Program.

The Federal Aviation Administration (FAA) is responsible for overseeing airport compliance with the ACDBE program found in 49 CFR Part 23. Airports have a vested interest in ensuring that the appropriate ACDBE participation is counted and that there is effective structuring and monitoring of joint ventures and joint venture participation by ACDBEs in the concession activities of airports. FAA and the Department of Transportation (the Department) support and provide guidance to airports, ACDBEs, and various stakeholders to effectively administer their overall ACDBE program.

In developing this guidance, the views of various stakeholders were solicited and considered. Whenever possible, FAA considered the representations made by stakeholders regarding “usual practices” or “standard practices.” However, it should be noted that accommodation for certain practices was not possible where the practice conflicted with requirements of the regulation and/or objectives of the program. Some business, accounting, and tax practices that may be completely legitimate in the business world between two or more firms may not be appropriate under the Department’s ACDBE regulation, 49 CFR Part 23, which was revised and updated in the Federal Register on March 22, 2005.

1.1 Why is Joint Venture Guidance necessary?

The preamble to 49 CFR Part 23 states “We have become aware that some concessions joint ventures indeed do not involve an ACDBE performing an independent part of the work; some of these have been the focus of fraud investigations by the Department’s Office of Inspector General and other law enforcement organizations. If the ACDBE participant is not required to perform independently a distinct portion of the joint venture’s work, it becomes very easy for a prime concessionaire seeking to circumvent ACDBE requirements by having an ACDBE silent partner on its payroll. We believe that changing this provision would adversely affect the integrity of the program. Because joint ventures have become a problematic part of the ACDBE program, the Department is drafting additional guidance on the subject.”

Airports, ACDBEs, consultants and other stakeholders are obligated to develop, approve, monitor, and count ACDBE participation in joint venture agreements in accordance with current rules and guidelines. However, as noted above, joint ventures present unique challenges in the Part 23 concessions program. The Department is concerned that airport owners/operators, ACDBEs, non-ACDBEs, and consultants may be interpreting and applying the current regulations in an inconsistent as well as an incorrect manner. Many have requested guidance to assist them in implementing the ACDBE program. This guidance is designed to assist in the effective structuring, monitoring and counting of joint ventures and joint venture participation by ACDBEs in the concessions activities of airports receiving Federal financial assistance from the Airport Improvement Program of the FAA. This guidance does not implement new regulations or requirements but merely clarifies existing requirements.

1.2 What does 49 CFR Part 23 say about joint ventures as an option for ACDBE participation?

The Department’s revised final rule for 49 CFR Part 23 (Participation of Disadvantaged Business Enterprises in Airport Concessions) was issued on March 22, 2005, making the rule parallel in many respects to the Department’s DBE regulation for federally-assisted contracts. The preamble states, in part, that the “objectives of this program are very similar to those stated for Part 26. Extensive information has been developed over the years . . . that supports the proposition that there is not a level playing field for small disadvantaged businesses in the U.S. The legislative history of the original ACDBE statute itself shows that Congress was very

concerned that DBE firms had fair (i.e., nondiscriminatory) access to concession opportunities.” The program requires goal-setting by airports to obtain ACDBE participation. These goals can be met in a variety of ways, including direct ownership arrangements by ACDBE firms in airport concessions as well as through the purchase of goods and services by concessionaires from ACDBE vendors. The airport owner or operator must require businesses subject to ACDBE goals at the airport (except car rental companies) to make good faith efforts to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with ACDBEs, including joint ventures and franchises.

Some stakeholders may have interpreted this to mean that all direct ownership arrangements, including joint ventures, are equally effective in achieving meaningful ACDBE participation and that one method should not be preferred over another. In fact, each opportunity represents unique challenges and one method may be better suited for a particular structure than another.

It should be noted that, prior to considering the best structure for participation, airports are encouraged to carefully evaluate (on a case-by-case basis) proposed bid requests, requests for proposals, and other types of solicitations to ensure that it is practical for ACDBE participation to be met in a reasonable manner.

49 CFR § 23.25(e)(1)(iv) states as follows:

The administrative procedures applicable to contract goals in part 26, § 26.51–53, apply with respect to concession-specific goals.

49 CFR § 26.51(e)(2) states as follows:

You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.

Airports are encouraged to consider, in the development and implementation of their ACDBE plan, the best method of ACDBE participation, including the potential for “unbundling” contracts to create separate and smaller opportunities for direct contracting, thus creating an environment where small and disadvantaged firms could be more competitive. In some instances, a joint venture scenario may be difficult to implement while a subcontract or other arrangement may be a better vehicle to achieve ACDBE participation. In other cases, a joint venture may represent the best opportunity for implementing a workable arrangement. We encourage airports to promote joint venture opportunities whereby ACDBEs would partner with former ACDBEs (e.g., those which have exceeded PNW and/or size standards). This may create a more even bargaining position and may also provide a much needed transitional role for the former ACDBE. Of course, there would be no ACDBE credit given for the former ACDBE, only for the currently certified ACDBE participant in the joint venture. The former ACDBE might serve as a mentor to a less experienced ACDBE. The initial determination by the airport as to the best form of business structure (i.e., JV, subcontract, management contract, etc.) identified in its solicitation for requests and/or proposals from interested parties may reduce difficulties in counting ACDBE participation for accomplishment reporting purposes.

Section 2 – Definitions

2.1 What is a joint venture?

For purposes of the ACDBE program, a joint venture is defined as an “association of an ACDBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the ACDBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.” Much of the remainder of this document will be directed toward further explaining many of the components of this “joint venture” definition.

2.2 What does an “association” of an ACDBE firm and one or more other firms mean?

In accordance with the objectives of the ACDBE regulations, joint ventures are intended to have **a business structure set forth in a signed written agreement** that **clearly and specifically** defines the participation of each party in the contribution of property, capital, efforts, skills and knowledge.

Any legal structure that meets federal and state legal requirements may be used to form a joint venture provided that, for purposes of counting ACDBE participation, the requirements of 49 CFR Part 23 are met. The joint venture should operate in accordance with a written agreement. Please note that any business structure that meets the Part 23 definition of “joint venture” will be considered a joint venture for purposes of counting ACDBE participation, regardless of the name attributed to the business structure in the written agreement.

Some of the important components that should be included in the written agreement are noted below:

- **Identification of the participants in the Joint Venture.** The JV participants must be firms, including sole proprietorships, not individuals. In addition, the ACDBE participant must be certified as an ACDBE in the type of business operated by the joint venture, and in the State where the airport is located, in order for the participation to count towards ACDBE goals.
- **Identification of the single, for-profit business enterprise to be undertaken by the joint venture.** See Section 2.3 for further explanation.
- **Term of the joint venture agreement and factors effecting the term** (e.g., concession contract extensions or termination, sale of interest, etc.).
- **Capital to be contributed by each party** (initial contributions and future needs should be addressed).
- **Accounting methods and distribution of profits/losses.**
- **Management of the joint venture’s business**, including overall management (e.g., participation on a management committee or management board) and day-to-day management responsibilities.

- **Administrative matters**, including joint venture office locations, recordkeeping requirements, identification of an auditor, fiscal year, addresses for notices, transfer of interests, etc.
- **Dissolution**, including events/conditions upon which the joint venture may be dissolved and terminated, and assets distributed.

2.3 May a “single, for-profit business enterprise” have more than one contract or business location at an airport.

While a joint venture must be a single business entity, it may have more than one contract with a given airport or more than one business location at the airport. It is the joint venture as an entity, and not the individual participants in the joint venture, that should have the contractual relationship(s) with the airport. The specifics of the participation in each contract should be clearly stated in the joint venture agreement to enable the airport to separately monitor all of the elements of the joint venture entity’s participation in each. The participants in the joint venture which are requesting ACDBE credit should be required to disclose any other business relationships currently in existence between or among the parties (e.g., joint ventures at other airports). In the event that other relationships exist, the airport and/or Unified Certification Program (UCP) should review the ACDBE participants’ eligibility for certification, to ensure continuing independence and control of the ACDBE firm in the operation of its business.

2.4 What does “the parties combine their property, capital, efforts, skills and knowledge” mean?

Each party in a joint venture should bring real and substantial value to the joint venture enterprise. The parties should each contribute both tangible and intangible assets. If property is contributed, the joint venture agreement should clearly state at the outset its value; which is usually assessed based on liquidation value, replacement cost, or “value in use” methods. The parties should contribute capital commensurate with their ownership interest, knowledge and skills relative to the portion of the joint venture’s business for which they are responsible, and efforts to the success of the venture. The skill set (a combination of experience, core competencies, unique talent, etc.) provided by each party should add value to the joint venture relationship that is objectively apparent. This skill set should be specifically addressed in the

joint venture agreement, and verified by the airport during its initial review and periodically thereafter.

2.5 What does “the ACDBE is responsible for a distinct, clearly defined portion of the work of the contract” mean?

In this context, “distinct” means separate and distinguishable from the work of the non-ACDBE. “Clearly defined” means that there is no guesswork involved in determining the nature of the work assigned to the ACDBE. In order to be considered a distinct, clearly defined portion of the work, it is necessary to fully understand exactly what the work will entail, including an estimate of the time and resource requirements for each major task. For example, if the ACDBE’s portion of the work is only described as “advise about ” or “participate in” a portion of the work, the work would likely not be considered distinct or clearly defined because it is not clear what work the ACDBE will accomplish. Much more detail would be necessary in order to determine the portion of the work to be attributed to the ACDBE. Of course, the work of the contract also includes the role of the ACDBE in the overall management of the business (e.g., as a participant on a management committee or some other governing board) as well as participation in the day-to-day management of the business.

2.6 What does “whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest” mean?

The ACDBE’s participation in each of these five areas should be proportionate to the claimed ownership. This is further discussed in Section 3.2.

Section 3 – Joint Venture Review

3.1 What reviews should the airport make?

The airport should review the joint venture agreement and supporting documents submitted by a joint venture entity to determine whether, in fact, the arrangement meets all the requirements of the regulation (49 CFR Parts 23 and 26) and what portion(s), if any, is eligible to be counted towards ACDBE participation. Pursuant to 49 CFR § 26.109, all participants in the DBE program, including, but not limited to, DBE firms and applicants for DBE certification, are required to cooperate fully and promptly with recipient certification reviews, investigations, and

other requests for information. Based on the review, the airport will assign a value to the ACDBE participation which may be counted towards the ACDBE goal provided that the joint venture operates in accordance with the submitted agreement. (See Attachment 3 – JV Review Process for a flowchart describing the recommended process for the review.) The airport should provide a written letter outlining any areas of concern and allow a reasonable amount of time for the applicant to respond and/or make reasonable adjustments where applicable. In accordance with 49 CFR § 23.29, airports must implement appropriate mechanisms to ensure compliance with the requirements of this part by all participants in the program. An airport must include in its concession program the specific provisions to be inserted into concession agreements and management contracts, the enforcement mechanisms, and other means to be used to ensure continued compliance. These provisions must include a monitoring and enforcement mechanism to verify that the work committed to ACDBEs is actually performed by the ACDBEs. In order to make this evaluation, the airport should review the entire set of circumstances involved in performing the contract and not rely on a single factor for making a compliance determination. The airport’s ACDBE program should describe in detail the level of effort and resources devoted to consistent monitoring and enforcement.

3.2 How does the airport determine if the ACDBE’s capital contribution, control, management, risks, and profits are commensurate with its ownership interest in the joint venture?

An airport is responsible for reviewing joint venture agreements to ensure that capital contribution, control, management, risks, profits, ownership, and work to be performed by the ACDBE are clearly addressed. The parties involved in the joint venture and seeking to count ACDBE participation towards the ACDBE goal for the contract have the obligation to demonstrate to the airport that the ACDBE capital contribution, control, management, risks, and profits are commensurate with its ownership interest. (We recommend that, as with respect to other certification and counting matters, airports apply a “preponderance of the evidence” standard in evaluating whether the joint venture has made this demonstration.) The airport may follow up with questions and request written explanations. The airport may require the joint venture to submit information, including a summary of the agreement and supporting documentation, for review. (A sample form that may be used to accomplish this is included as Attachment 1.) The firm seeking to count ACDBE participation in a joint venture has the burden of demonstrating to the airport, by a preponderance of the evidence, that it meets the

requirements of the regulation with respect to being an eligible joint venture for counting purposes.

The following are tips for reviewing the various required areas for participation:

- **Capital contribution** – The capital to be contributed by each party should be clearly specified in the joint venture agreement. The agreement should specify the initial capital contributions to be made by each party and how future capital contributions will be allocated. The ACDBE’s portion of the initial and future capital contributions should be equal to its ownership percentage. A subsequent section of this guidance will discuss issues relating to **how** the capital is contributed (i.e., cash contributions or financing provided by the non-ACDBE joint venture participant).
- **Control** – The ACDBE participant(s) in the joint venture should have control in proportion to their ownership interest and proportionate control of the governance of the joint venture. Each joint venture partner should assume full responsibility for executing each element of the work assigned to it. Usually, a joint venture will have a management committee (referred to by various names, including “Executive Committee” or “Board”) that controls the overall business. The ACDBE participant(s) is usually a minority participant, owning less than 50% of the business. In this case, the ACDBE(s) can be out-voted on most of the business decisions made by the committee. This really means that for the most part, the joint venture is controlled by the party owning 51% or more of the business, usually not the ACDBE. However, the agreement should provide for control by the ACDBE of the activities for which it is responsible. This can be accomplished through direct control of their assigned role or establishment of a separate management committee or subcommittee in which the ACDBE has majority vote for issues involving facilities or responsibilities which it controls. In addition, there should be some major decisions requiring a unanimous vote to substantiate some level of control attributable to the ACDBE (e.g., items related to expansion, borrowing, lending money, etc.).
- **Management** – The ACDBE participant must share in the management of the joint venture. The agreement should address the issue of the overall management, or governance, of the business of the joint venture and the day-to-day management of the joint venture’s operation. The ACDBE participant should participate in the overall management, decision making, and day-to-day operations, including decisions

on the hiring and firing of management personnel (and if appropriate non-management personnel) for the joint venture to be eligible for ACDBE credit. This can be accomplished through a “Management Committee,” as described under “control,” though this is not the only acceptable mechanism. Under a management committee structure, the committee is responsible for managing and directing the business of the joint venture. Each participant is represented on the management committee and votes according to its ownership interest in the venture. Each participant on the management committee not only has a right, but an obligation to receive and consider the views of the ACDBE participant. The agreement should specify the frequency of the management committee meetings, and formal agendas and meeting minutes should be prepared. In addition, the agreement should provide for the day-to-day management of the joint venture and specify the roles and responsibilities of each participant. The issue of day-to-day roles and responsibilities assigned to the ACDBE participant is further discussed in Section 4.

- **Risks** – Each of the participants in the joint venture must share in the risks of the business in proportion to their ownership interest. These risks include financial, legal, operational, etc. The agreement should include provisions for proportional sharing in profits as well as losses (see section 3.4). However, a monthly distribution of actual profits or monthly payment of a management fee, as defined in the agreement, consistent with industry standards, is permissible.
- **Profits** – Each of the participants must also share in the profits and losses in proportion to the ownership interest. Accounting methods and the timing of distribution should be included in the agreement and reviewed for reasonableness by the airport. There should be no provisions in the agreement which have the effect of creating separate profit centers to siphon profits before each participant’s share is calculated. For example, requirements to purchase goods and/or services from one of the participants that results in controlling profits remaining for distribution to the joint venture participants are not acceptable. However, purchasing goods and/or services from one of the participants may be acceptable if the terms are spelled out and the cost of the goods reflects the actual cost of the product plus any processing/handling costs and reasonable overhead expenses. Airports should carefully examine all accounting mechanisms to ensure that the distribution process is reasonable.

3.3 Can the non-ACDBE joint venture participant loan capital to the ACDBE joint venture participant?

Yes, with some restrictions and adequate documentation of the loan agreement. The airport should review the loan agreement (and related financial documents) to ensure that the arrangement does not limit the ACDBEs participation in the venture (e.g., by limiting risk, control, etc.).

The agreement should specify the amount of capital to be contributed by each joint venture participant. Capital contributions may include, for example, capital investment in facilities, inventory, security deposit, assets, working capital and first month's rent. It is preferable that each participant provides its own capital contributions or obtains a loan from an independent third-party source. To assist the ACDBE with third-party sourcing for capital, the non-ACDBE participant may provide and is encouraged to support the ACDBE participant with technical assistance in preparing financial reports and presentations to commercial banks and financial institutions for the purpose of obtaining financing. We realize that it may not be possible in some cases for small ACDBE firms to obtain independent financing given the unique nature of the airport environment. In this case, the non-ACDBE participant may provide financing to the ACDBE participant upon the following conditions:

- The terms and conditions of such a loan should be comparable to prevailing market conditions offered by commercial lenders for similar type projects (e.g., in terms of such factors as duration, rate, fees, etc.).
- The loan should be evidenced by a promissory note or loan agreement clearly stating the terms and conditions of the loan, including: due date and payment method, interest rate, prepayment, defaults, and collateral.
- The note should be a full recourse note. The note should be personally guaranteed by the ACDBE and/or secured by assets outside of the ownership interest or future profits of the joint venture. Otherwise the business risk is reduced or eliminated for the ACDBE.
- The loan should not be for 100% of the capital requirement. The ACDBE should invest capital from its own resources or through a third-party arms-length loan at market conditions. Generally, 10%–20% of the capital required (including all

capital contributions made to the joint venture, e.g., start-up capital, pre-opening expenses, facility construction, operating capital, reinvestment, etc.) is recommended as a benchmark to be provided by the ACDBE from its own resources or through a third-party as previously referenced.

- The term of the loan should not be longer than the term of the contract under which the joint venture operates (excluding options or extensions).
- There must not be provisions in the loan agreement which have the effect of limiting the ACDBEs ability to control its business or independently perform its designated role in the joint venture's business. Of course, this does not preclude a lender from including provisions in a loan agreement designed to preserve property that may have been pledged as collateral.

Some hold the view that the ACDBE participant should never borrow from the non-ACDBE participant as it leads to questions of independence and control by the ACDBE. However, we realize that the lack of access to capital is a real and substantial barrier to ACDBE participation in airport concessions. It may be difficult to obtain a loan for a joint venture business where the loan applicant has limited control over the business. Prohibiting such loans may limit the ability of ACDBEs to participate in joint venture businesses. However, in the event that it is necessary for the ACDBE to obtain a loan from the non-ACDBE joint venture participant, airports should ensure that the overall loan arrangement is consistent with the principle that the ACDBE participant brings his or her own property, capital, efforts, skills, and knowledge to the firm. Specifically, the financial arrangement should not be structured in a way that negatively affects the ACDBE's ownership and control under the DBE regulations. In addition, there should be safeguards that explicitly state that disagreements over operating the business should not be a basis for adverse action or penalties under the loan agreement.

3.4 How should profits and losses be calculated and divided?

The joint venture agreement should provide details on how profits and losses will be calculated and divided between the participants. The profit or loss of the joint venture should be distributed between the participants in proportion to their interest in the joint venture. Any funds or other forms of payment (including draws) that are taken from the joint venture assets, profits, distributions, etc., should be documented and accounted for in order for the airport to determine the amount of benefit each participant has received from the business during the year. The joint venture agreement should specify the timing of the distributions. We do not view as consistent with the regulatory requirement for commensurate sharing of risks and profits any provision in an agreement that calls for a party: (1) to be entitled to a distribution of money regardless of the profitability of the joint venture, or (2) to have a debt that is a portion of a joint venture participant's risk in the joint venture forgiven by another party.

3.5 Are service and management fees acceptable?

Yes, subject to some restrictions. The joint venture agreement should state, if applicable, "management fees" or "service/administrative fees" to be paid to the various participants, dependent upon a participant's contribution to the "indirect" management of the operation (i.e., corporate overhead or corporate support services). The fees charged should be reasonable, and not used as a method of draining profits of the joint venture to the benefit of a particular participant. In addition, management fees are not to be used in place of a "draw" arrangement. Service and management fees should represent a recovery of costs and not profit to the non-ACDBE if it is the provider of the service. The agreement should specifically address how the costs for such services are derived, the ability of the ACDBE to participate in the selection of the service provider, and a vehicle for monitoring and/or auditing such costs.

3.6 Can the ACDBE or joint venture purchase inventory, supplies, services, etc., from the non-ACDBE?

The agreement should not mandate that the ACDBE participant or joint venture purchase inventory, supplies, or services from the non-ACDBE participant. The ACDBE should always have the option of obtaining goods and services on an arms-length, market price basis from any

source. However, a joint venture agreement may allow such purchases from a non-ACDBE participant. This may be advantageous when, for example, the non-ACDBE participant can obtain the goods or services at a lower rate/price than the ACDBE participant. In such a case, however, we believe it would be inconsistent with the nature of a joint venture as defined in Part 23 for the non-ACDBE to charge a markup for these goods and services. The joint venture agreement should specifically address how the costs for such products and services are derived and provide a vehicle for monitoring and/or auditing such costs.

Unless the operation is a franchise, the ACDBE participant or joint venture should have the option to purchase products and services from an unrelated third party on a market price/arms-length basis. In the case of a franchise, the joint venture should have the same option providing it does not conflict with the franchise agreement requirements.

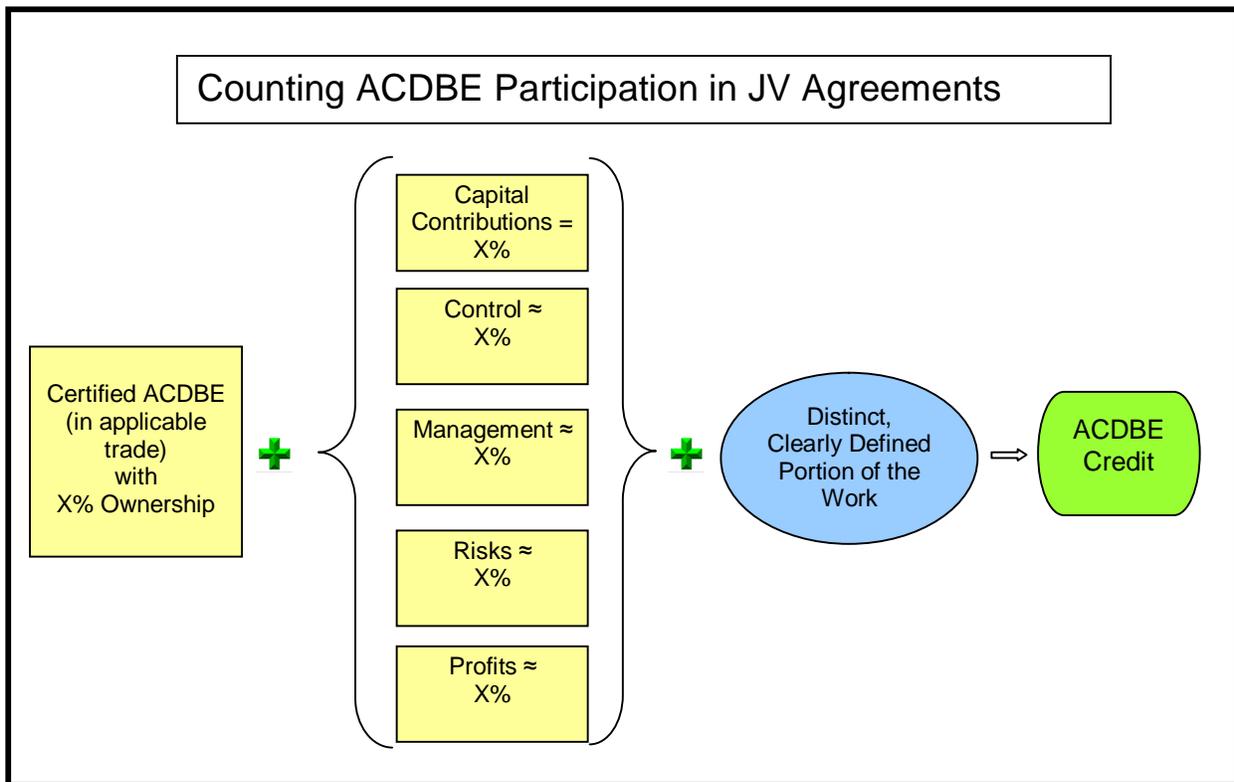
Section 4 – Counting ACDBE joint venture participation towards ACDBE goals

4.1 How is ACDBE participation in a joint venture counted towards ACDBE goals?

49 CFR § 23.55(d) states as follows:

When an ACDBE performs as a participant in a joint venture, count a portion of the gross receipts equal to the distinct, clearly defined portion of the work of the concession that the ACDBE performs with its own forces toward ACDBE goals.

The definition of a joint venture states that the ACDBEs share in the capital contribution, control, management, risks, and profits of the joint venture is commensurate with its ownership interest. Therefore, before the airport considers the ACDBE credit to be given, the airport will have a good idea of the credit that is desired, since it should be commensurate with ownership percentage. For example, if the ACDBE ownership in a joint venture is stated as 25%, it is likely that the joint venture participants are seeking to count the ACDBE participation at 25%. The airport should look at the roles and responsibilities of the ACDBE and determine if the claimed ownership appears reasonably proportionate to the “distinct, clearly defined portion of the work performed by the ACDBE.” (Note: The phrase “with its own forces” is addressed in the following section.) Some slight variations may occur due to the fact that the measurement is somewhat subjective in certain categories (e.g., overall management and portion of the work). The key factor is the reasonableness of the claimed participation after reviewing all of the elements of the joint venture.



As illustrated in the chart above, the review of joint venture agreements is comprised of: (1) confirming that the ACDBE participant is a certified ACDBE in the applicable trade; (2) making a determination that the agreement meets the definition of a joint venture under the regulation, and; (3) determining the appropriate credit based on the “distinct, clearly defined portion of the work performed by the ACDBE.” Once the airport has reviewed the joint venture agreement to ensure that it meets the definition of a joint venture in accordance with the regulation (i.e., in terms of the various areas being commensurate with ownership interest) the airport should proceed to a review of the distinct, clearly defined portion of the work assigned to the ACDBE in order to determine how to count ACDBE participation towards the ACDBE goal.

The following are tips for accomplishing this review:

1. The assigned role of the ACDBE should be distinct and clearly defined. Analyze the written description of the roles and responsibilities of each participant. The description of the work to be performed by the ACDBE should be clear. Descriptions that are vague are not acceptable. For example, phrases such as “participate in the budgeting process,” “assist with

hiring,” “work with managers to improve customer service” do not alone provide any basis for awarding credit since none of these represent a “distinct, clearly defined” portion of the work. ACDBE credit should not be given for tasks which are vaguely worded and cannot be monitored.

2. A comprehensive role in the complete operation of a separate location under the contract is easier to count.

The preamble to 49 CFR Part 23, revised in 2005, states as follows:

“As a policy matter, we believe it is preferable for ACDBE joint venture participants to actually have a defined role in the revenue-generating activities of the business (e.g., the joint venture runs four food service locations in the airport, and the ACDBE is directly responsible for one of them). There is a greater likelihood of confusion, counting, and other administrative difficulties, as well as of abuse, when ACDBE participation is claimed for joint ventures in which the ACDBE participant has only a vaguely defined role in the entity as a whole.”

Clearly, joint ventures structured so that the ACDBE actually has a role in the operation of the business are preferable for counting purposes to those in which the ACDBE is assigned a vague role in the overall operation. The determination of credit is much simpler and easier to document in such a case. In addition, monitoring the participation also becomes less cumbersome. In the event that an operating role is assigned, credit can be counted at the level of gross receipts earned by the operations managed by the ACDBE. This is not to say that managerial or “back office” functions cannot be credited. However, if the role of the ACDBE participant can’t be quantified or qualified, it can’t be counted.

3. Roles, especially minor roles, relating to the performance of an activity in support of the overall operation may present challenges. In the event that the ACDBE is assigned a distinct, clearly defined role that does not involve managing a revenue-generating activity, but is rather a task for which gross revenues cannot be directly correlated, it is difficult to determine the credit to be assigned. If the role assigned involves activities that occur on an ongoing basis, and with regard to a core function, crediting participation is easier. However, if the role of the ACDBE occurs on an “as-needed” basis and is a minor function, it is very difficult to predict, in advance, the level of the ACDBE participation and therefore difficult

to determine credit for ACDBE participation at time of review. The ACDBE must perform a commercially useful function. Assuming that the role assigned is one that is required on an ongoing, predictable basis, it will be necessary to determine how much credit, if any, should be assigned to the role. In order to make a determination, the airport should have an understanding of the tasks involved in managing and operating the business as well as the level of difficulty and relative importance of each task. The airport should break down the business into major components and determine if the claimed ownership percentage would reasonably appear to correspond with the assigned task(s). It is the obligation of the firm seeking ACDBE credit to clearly present the information necessary and provide additional information and/or documentation as requested for a determination to be made. If the airport cannot make a reasonable judgment that the ACDBE performs a distinct, clearly defined portion of the work proportionate to its ownership interest, it may reject the joint venture for ACDBE credit or count a smaller percentage than claimed toward ACDBE participation. Please note once again that if the role of the ACDBE participant in the joint venture operation can't be quantified, it can't be counted.

4.2 How can the value of the ACDBE role be determined?

There are a number of steps that should be taken to assist in determining the value of ACDBE participation.

First, the airport may examine the typical business practice of each of the firms participating in the joint venture to determine if their assigned roles appear logical. For example, if the non-ACDBE firm is a retail firm with operations at 50 other airports and the ACDBE firm has 5 years of experience operating a candy store in the local mall, it would seem unreasonable to assign the buying of merchandise to the ACDBE participant since the larger firm would almost certainly have greater skills, knowledge and purchasing power than the ACDBE.

The airport may also look at how the non-ACDBE participant performs the role(s) assigned to the ACDBE operator at its other operations. For example, if the ACDBE is assigned to recruit minority employees, the airport should request information regarding how this is performed at other locations in which the non-ACDBE operates without an ACDBE

participant and request documentation regarding the cost (and the value) of performing that task without the ACDBE participant. Further, the airport could develop a chart of tasks to provide a framework for assigning credit. Attachment 2 will provide examples of how this may be accomplished. Since each business operation is unique and often complex, the value of specific tasks may vary from operation to operation. The role of each participant should be evaluated in the light of the specific business opportunity being performed. Ultimately, it is the joint venture participants who should provide information which would lead a reasonable person to conclude that the roles of each party justify the claimed ACDBE participation credit.

4.3 What does “performs with its own forces” mean?

If persons employed directly by the ACDBE perform the tasks associated with its participation in the joint venture, then the ACDBE is clearly performing that work with its own forces. For purposes of counting ACDBE joint venture participation, however, we view work performed by employees of the joint venture entity or a non-ACDBE participant in the joint venture as performed by the ACDBE’s “own forces” IF the ACDBE has the power to control those employees with respect to the performance of the ACDBE’s role.

Ideally, the “distinct clearly defined” portion of the work performed by the ACDBE participant in a joint venture would be performed by the ACDBE’s own employees. This provides a clearer view of the management and control over the element of work attributed to the ACDBE.

However, in some circumstances it may be advantageous for the joint venture or the non-ACDBE to employ the staff in order to provide comparable compensation and benefits to all employees. In the event that some employees are employees of the joint venture or the non-ACDBE, the ACDBE portion of the work can be considered as being performed “with its own forces” if the ACDBE has the power to control staff with regard to the performance of the work for which the ACDBE is responsible, analogous to the utilization of contract employees.

There should be a higher burden of proof that the ACDBE controls the employees performing its designated portion of the work in instances when the employees are employees of the joint venture and an even higher burden of proof when the employees are employees of the non-ACDBE. Conversely, simply having the employees on the payroll of the ACDBE firm does not

remove the burden of proving that the ACDBE actually controls those employees. There should exist a reporting relationship between the staff responsible for the ACDBE portion of the work and the ACDBE. The ACDBE should have the power to hire and fire staff responsible for performing its share of the work without the approval of the non-ACDBE participant. One factor to be considered in evaluating the amount of participation to be counted is the evaluation of resources necessary to perform the ACDBE's assigned role. For example, if the joint venture employs 5 managers, 2 administrative/support staff members and 100 hourly employees, and the ACDBE has no employees reporting to it in the performance of its assigned role, then it would be very difficult to show that the role is a substantial one and, therefore, little, if any, credit might be counted towards ACDBE participation.

4.4 What if the level of participation by the ACDBE changes?

If it is determined that the ACDBE has not performed its role in accordance with the joint venture agreement in a given year, and has in fact participated less than expected, participation may be counted at less than originally approved for that year. In the event that the reduced level of participation is planned to continue, the airport should request that the joint venture participants amend their agreement to reflect the new level of participation.

If it is determined that the ACDBE has not performed its role in accordance with the joint venture agreement in a given year, and has in fact participated more than expected, participation may be counted at the originally approved level, but not higher. In the event that the increased level of participation is planned to continue, the airport should request that the joint venture participants amend their agreement to reflect the new, ongoing level of participation.

Section 5 – Monitoring ACDBE participation in joint ventures

5.1 What is needed in terms of monitoring the joint venture?

It is the responsibility of the airport to monitor the operation of the joint venture to ensure that the joint venture is operating as intended and approved, and that the ACDBE participant's participation is real and meaningful. Should the airport find that this is not the case, the airport could find the joint venture in default of its contract. In addition, if the ACDBE is found to have

relinquished an element of control in the joint venture, the airport should immediately review the firm's certification eligibility or refer the matter to the certifying authority, and where appropriate, initiate decertification of the firm in accordance with § 26.87. The airport should develop a formal monitoring program that includes, at a minimum, the following elements:

- Annual verification of the status of the ACDBEs certification eligibility
- Periodic (not less than annual) review of the managing entity's meeting minutes and reports
- On-site visits to the operation
- Periodic interviews with the joint venture participants, managers, and employees
- Review of any documentation, including financial reports and agreements, necessary to ensure compliance with the agreement

5.2 What is included in the airport's agreement with the joint venture?

In addition to the items specifically stated in 49 CFR § 23.9, the airport should include in its agreement with the joint venture firm a requirement for regular or periodic submission of reports and other forms of communications between the non-ACDBE participant and the ACDBE participant. The agreement should require the joint venture to submit agendas, minutes, and attendance rosters from the managing entity's meetings; financial reports; and other information deemed appropriate by the airport. The agreement with the joint venture should also provide for sanctions for failing to operate in accordance with the joint venture agreement. The sanctions should be similar to those imposed for other defaults under the contract.

5.3 What annual updates and changes are required?

There are no annual updates required for joint venture agreements. However, changes to the agreement should be submitted for review prior to implementation. Also, once certified, the ACDBE participant in the joint venture must comply with 49 CFR Part 23, including but not limited to § 23.31. These requirements include annually submitting an affidavit or declaration that there have been no changes in the ACDBE participant's circumstances affecting its certification eligibility. At any time there is a change in circumstances affecting the ACDBE participant's ability to meet size, disadvantaged status, ownership or control requirements, or a

material change in the information provided in the application, the ACDBE participant must submit this information to the airport. Similarly, proposed material changes in the joint venture agreement, including management responsibilities among the participants, ownership, or control, should be submitted to the airport. In such cases, the airport should review and respond to the proposed changes within a reasonable period of time.

Section 6 – Additional information

6.1 Can a joint venture be certified as an ACDBE?

No. Joint venture entities, themselves, are not certified as ACDBEs. In order to count towards ACDBE participation, one or more of the **joint venture participants** must be a certified ACDBE. Even if the joint venture is more than 51% owned by an ACDBE firm, it is not certified as an ACDBE because, by definition, a joint venture is an association of firms, not individuals. The regulation states as follows:

§ 26.73(e) An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm -- even a DBE firm -- cannot be an eligible DBE.

Therefore, a joint venture cannot be certified as an ACDBE.

With regard to certification, the regulation provides for an exception to the above as follows:

§ 26.73(e)(1) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, you may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

However, this would not apply to joint ventures since the ACDBE participant in a joint venture must be certified in order to count towards ACDBE participation in a joint venture and holding companies are not certified; only the subsidiary can be certified. Therefore, a holding company cannot be an ACDBE participant in a joint venture.

6.2 Does the ACDBE participant in a joint venture have to be certified in a specific type of work?

Yes. ACDBE firms must be certified in the type of work to be undertaken by the joint venture (e.g., an ACDBE participant in a retail joint venture must be certified as an ACDBE retail operator). An ACDBE firm is required to share in the management and control of the operation. In order to do so, the ACDBE should be capable of participating at this level. In addition, the ACDBE should have involvement in the broader areas of the operation which would enable them to gain operating experience for the purpose of competing independently for operations in the future. The implementation of joint ventures which promote participation in the provision of services not related to the overall management of the operation does not support the objectives of the program. Certified firms may request that a trade be added to their certification.

49 CFR Part 23 states as follows:

§ 23.31(a) As a recipient, you must use, except as provided in this subpart, the procedures and standards of part 26, §§ 26.61–91 for certification of ACDBEs to participate in your concessions program. Your ACDBE program must incorporate the use of these standards and procedures and must provide that certification decisions for ACDBEs will be made by the Unified Certification Program (UCP) in your state (see part 26, § 26.81).

49 CFR Part 26 states as follows:

§ 26.71(n) You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You may not, in this situation, require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

In an effort to ensure that appropriate time is allowed for firms to be certified as ACDBEs, airports should set their deadlines and requirements keeping this in mind. Non-ACDBE joint venture participants and potential ACDBE joint venture participants should be cautious about investing capital in a project before the appropriate certification is issued by the certifying agency and the joint venture agreement is approved for counting by the airport. In the event that the potential ACDBE participant is not certified or the joint venture is not approved for counting,

and as a result, the joint venture is not executed, the return of capital is a business/contract issue between the parties and not subject to reimbursement by or assistance from the airport.

A stated overarching objective of the DBE and ACDBE programs is to ensure that only firms that fully meet the eligibility standards are permitted to participate in the program (see § 23.1 and § 26.1). Airports should be cautious when reviewing joint venture agreements to ensure that the ACDBE's participation in the joint venture does not result in the sacrifice of independence or loss of control of the ACDBE. If the ACDBE loses its independence or control over its business as a result of the joint venture, the ACDBE's certification eligibility is compromised. Any suspected loss of control or independence should be referred to the certifying agency, which shall institute decertification proceedings, if appropriate, consistent with § 26.87.

6.3 Should the joint venture agreement provide for the dissolution of the joint venture in the event that the ACDBE participant ceases to be an eligible ACDBE?

No. 49 CFR Part 23 states as follows:

§ 23.39 (e) When you remove a concessionaire's eligibility after the concessionaire has entered a concession agreement, because the firm exceeded the small business size standard or because an owner has exceeded the personal net worth standard, and the firm in all other respects remains an eligible ACDBE, you may continue to count the concessionaire's participation toward ACDBE goals during the remainder of the current concession agreement. However, you must not count the concessionaire's participation toward ACDBE goals beyond the termination date for the concession agreement in effect at the time of the decertification (e.g. , in a case where the agreement is renewed or extended, or an option for continued participation beyond the current term of the agreement is exercised).

Given the fact that the participation of the ACDBE would continue to count in the above circumstance, the agreement should not permit the dissolution of the joint venture agreement in this event. However, if the ACDBE is decertified for reasons which prevent the counting of participation in the joint venture, such as sale of the majority interest in the company or fraud, it is reasonable to allow a provision for dissolution or the buyout of the ACDBE participant. Resolution of this issue would be handled between the parties.

6.4 Is the airport subject to enforcement of interpretations presented in this guidance for existing joint ventures? Is the guidance retroactive?

Yes, the airport is subject to enforcement of interpretations presented in this guidance. This guidance seeks to clarify many of the issues surrounding ACDBE participation in airport concession joint venture agreements. Airports are instructed to review existing concession joint ventures for which ACDBE participation is counted towards goals to ensure compliance with this guidance. With regard to credit for ACDBE participation, the FAA will not penalize airports for past misinterpretations, nor will adjustments to past accomplishment reports be required. However, future counting of ACDBE participation in existing joint venture agreements should be determined in light of this guidance. Future annual concession accomplishment reports should reflect the appropriate credit. This will require a re-evaluation of joint venture agreements currently operating to determine the appropriate level of ACDBE participation which should be counted. If there is a small difference, airports are encouraged to pursue an increase in the ACDBE role. If there is a significant difference as a result of this re-evaluation, airports are encouraged to look for other sources or methods for increasing participation (e.g., new opportunities and/or ACDBE goods and services). Airports are advised to evaluate their entire program and find avenues and opportunities for achieving their overall goal. This may or may not include the renegotiation of the ACDBE role in joint venture agreements already in place. Past mis-counting of ACDBE participation in joint venture agreements, except in cases of intentional misrepresentation, should not be a reason for an airport to find the joint venture in default of the concessions agreement or lease, nor should it be a reason for the non-ACDBE to find the ACDBE in default of the joint venture agreement.

6.5 What enforcement mechanisms are available to the Department in the event of noncompliance or misconduct?

The same compliance and enforcement and compliance mechanisms apply under Part 23 as under Part 26. Under 49 CFR § 26.105, airports are subject to sanctions under FAA statutes and regulations if they fail to comply with DBE regulations. Under 49 CFR § 26.107, businesses working in the DBE or ACDBE program who engage in misconduct may be subject to suspension or debarment, enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, or criminal prosecution. The Department of Transportation's Office of Inspector General (OIG) makes investigating and prosecuting DBE fraud a priority. The OIG, working with U.S. attorneys' offices, has helped to create successful criminal prosecutions for fraudulent conduct in the DBE and ACDBE programs. Anyone who becomes aware of fraud, waste, or abuse in these programs should inform OIG as well as FAA officials.

9. Describe the ACDBE's involvement in the overall management of the joint venture (e.g., participation on a management committee or managing board, voting rights, etc.)
10. Describe the ACDBE's share in the profits of the joint venture:
11. Describe the ACDBE's share in the risks of the joint venture:
12. Describe the roles and responsibilities of each joint venture participant with respect to managing the joint venture (use additional sheets if necessary):
 - a. ACDBE joint venture participant:
 - b. Non- ACDBE joint venture participant:
13. Describe the roles and responsibilities of each joint venture participant with respect to operation of the joint venture (use additional sheets if necessary):
 - a. ACDBE joint venture participant:
 - b. Non- ACDBE joint venture participant:
14. Which firm will be responsible for accounting functions relative to the joint venture's business?
15. Explain what authority each party will have to commit or obligate the other to insurance and bonding companies, financing institutions, suppliers, subcontractors, and/or other parties?
16. Please provide information relating to the approximate **number** of management, administrative, support and non-management employees that will be required to operate the business and indicate whether they will be employees of the ACDBE, non-ACDBE or joint venture.

	Non-ACDBE Firm	ACDBE Firm	Joint Venture
Management			
Administrative			
Support			
Hourly Employees			

17. Please provide the name of the person who will be responsible for hiring employees for the joint venture. Who will they be employed by?
18. Are any of the proposed joint venture employees currently employees of any of the joint venture partners? yes no
If yes, please list the number and positions and indicate which firm currently employs the individual(s).

19. Attach a copy of the proposed joint venture agreement, promissory note or loan agreement (if applicable), and any and all written agreements between the joint venture partners.
20. List all other business relationships between the joint venture participants, including other joint venture agreements in which the parties are jointly involved.

Attachment 2

Samples Joint Venture – ACDBE Portion of the Work

Each joint venture agreement submitted for ACDBE credit must be reviewed and analyzed in order to determine the amount of ACDBE credit to be given, if any, for the ACDBE participation in the business. It is critical that the reviewer gain a clear understanding of the ACDBE role in relation to the entire operation of the total business. Once that is accomplished and it has been determined that ACDBE participation will be counted toward the ACDBE goal, the business must be monitored to ensure that it is operating as represented in the joint venture agreement and as approved for counting. The following will provide some examples of possible ways to analyze the value of the portion of the work assigned to the ACDBE. These examples are not meant to provide a comprehensive guide for establishing values since each business and each agreement may have unique characteristics. Rather, these examples are provided to establish potential thought processes for analyzing participation.

Example 1

The ACDBE ownership of a retail joint venture is stated as 20%. The ACDBE shares in the capital contribution, control, overall management (through participation on the management committee), risks, and profits of the joint venture commensurate with its stated ownership interest. The ACDBE assigned role in the business includes “participation in” and “assistance with” various activities which routinely occur in the day-to-day operation of the business. These roles may be valued as part of the overall management of the business, but should not be valued in terms of performing a **distinct, clearly defined portion of the work**, since the extent of this participation is unknown and is neither distinct nor clearly-defined.

Now, let us assume that the ACDBE partner is also assigned the role of finding DBE vendors to be utilized by the business and recruiting minority employees for the business.

The major day-to-day activities performed by the business are determined to be approximately:

Operations (1/3 of the business effort)	Product (1/3 of the business effort)	Administration/ Corp Support (1/3 of the business effort)
Human Resources (Supervise on-site operations staff, hire/fire staff, scheduling, training, etc.)	Purchasing	Accounting/Payroll/ Taxes
Loss Prevention	Inventory Management	Legal Services
Safety/Security	Pricing	Business Development/ Landlord Relations
Cash Management (check-out, banking)	Décor/Display	Human Resources/ Training Programs
Day-to-Day Landlord Relations	Product Assortment (retail)/Menu Development (food)	Policies/Procedures
Maintenance/Cleaning	Negotiation of Special Programs, Rebates, Display Allowances, etc.	Other Corporate Support
Budgeting/Monitoring Performance	Budgeting/Monitoring Performance	Budgeting/Monitoring Performance

The ACDBE roles of recruiting minority employees and finding DBE vendors are activities included under broader categories - Human Resources (under the "Operations" category of the business) and Purchasing (under the "Product" category of the business). There are numerous daily activities involved in the subcategories of "Human Resources" and "Purchasing." All of "Operations" is about 1/3 of the business effort in this example and all of "Product" is also about 1/3 of the business effort. Human Resources is only one task within the "Operations" category and purchasing is only one task within the "Product"

category. Recruiting minority employees and finding minority vendors are small tasks within the broader subcategories. In addition, it is difficult, if not impossible, to quantify the value of these tasks in terms of their impact on gross receipts. In fact, it is likely that this portion of the work is negligible since neither of these activities actually involves management of a function or control of a result (i.e., DBE vendors may be located, however the level of purchasing to be accomplished from these vendors, their product placement within the facility, prices to be paid for merchandise, etc. are outside of the control of the ACDBE; minority employees may be recruited, however their hiring, training, management and retention are outside of the ACDBE's control). In this instance, an airport would not have sufficient data to approve the joint venture for counting towards ACDBE participation because the portion of the work to be performed by the ACDBE is very difficult to quantify. In this instance, the airport should request that the joint venture participants clarify the role of the ACDBE in order to understand the nature and extent of the ACDBE's role.

Conversely, assume that all other factors are the same as described above (i.e., the ownership is stated as 20% and capital contributions, management, etc. are commensurate), except that the ACDBE independently performs all functions in the "Operations" category. In this case, it could reasonably be determined that the ACDBE performs at least 33% of the work for its 20% ownership share. However, because the definition states that the ACDBE shares in the capital contribution, control, management, risks, and profits of the joint venture commensurate with its ownership interest, a joint venture where the ACDBE's contributions are not proportionate do not meet the definition of a joint venture under the regulation. In this instance, the participation could be counted at 20%, not a greater percentage which might be indicated by the portion of the work performed by the ACDBE.

Example 2

In this example, a joint venture between a non-ACDBE and an ACDBE operates a news/gift concession at an airport. The ACDBE is reported to have a 15% share in the ownership of the joint venture. The ACDBE has contributed capital from its own funds in proportion to its stated ownership. The ACDBE participates on a management committee and there are a number of business decisions requiring unanimous consent. The ACDBE's share of the profits and risks of the joint venture are proportionate to its stated ownership interest. There are management fees paid to the non-ACDBE partner, however, they are calculated as a reimbursement of costs incurred to perform support functions and are not a profit center. Up to this point, the joint venture agreement appears to comply with the regulation and this guidance. The ACDBE is assigned the following activities:

- 1) Supervise the Manager in developing the annual budget of the Joint Venture
- 2) Evaluate day-to-day operations and make recommendations to improve efficiencies
- 3) Sourcing and recruitment of personnel
- 4) Supervise employee training and development
- 5) Develop marketing and promotional concepts
- 6) Assist and advise regarding the needs of the local community
- 7) Identify potential DBE vendors
- 8) Monitor store compliance with other income programs

Given the description of the various activities above, it is not possible to ascertain exactly what portion of the work will be performed by the ACDBE. In order to assign any credit for the ACDBE role, additional information is needed for each of the assigned roles as follows:

- 1) Supervise the Manager in developing the annual budget of the Joint Venture

Who does the Manager report to for other functions? What control does the ACDBE have over the budget? While budgeting is important, it is only an annual budget and the description does not really indicate a very active role. How much time will be spent on this? Exactly what will the ACDBE do?

- 2) Evaluate day-to-day operations and make recommendations to improve efficiencies

Without further explanation this appears to be is a relatively meaningless role. What happens to the evaluations and recommendations once they are made? How often does this occur? Who actually does it? This seems to apply more to the overall management of the business. There is no supporting evidence to indicate that it is a distinct, clearly defined role.

- 3) Sourcing and recruitment of personnel

What exactly does this activity entail? Is the ACDBE actually responsible for hiring? How often does this occur and what is the level of effort expended to accomplish this? Does on-site staff participate? If so, to what extent?

- 4) Supervise employee training and development

Who will the ACDBE supervise? What level of effort is required for this activity? How much time is involved? Describe the nature of the training and development to be supervised.

- 5) Develop marketing and promotional concepts

Is the ACDBE solely responsible for marketing? What level of effort is required? How much time is involved? What is the budget for this? Are employees involved? If so, to whom do they report?

- 6) Assist and advise regarding the needs of the local community

An "assist" role does not appear to represent a "distinct, clearly defined" portion of the work. What is meant by the "needs of the local community?" Describe what the needs of the community might be. This seems to be a minor role in the overall scope of the operations.

- 7) Identify potential DBE vendors

What happens after the vendors are identified? Who has control over determining if they are used? Who negotiates with them and determines if goods or services will be purchased? What does this represent in dollars compared to the total purchases made?

- 8) Monitor store compliance with other income programs

This is, again, very unclear. What happens after monitoring? Who determines what compliance is necessary? What happens in the event of non-compliance? How often

is this monitoring done? How long does it take? How is it accomplished in other operations? How important is this in the scope of the operation?

As you can see, before any credit is assigned for ACDBE participation, there are a number of questions to be answered and issues to be resolved. Until the ACDBE is assigned a “distinct, clearly defined” portion of the work to perform, no credit can be given.

Example 3

A joint venture between a non-ACDBE and an ACDBE operates a food/beverage concession consisting of 8 locations at an airport. The ACDBE is reported to have a 35% share in the ownership of the joint venture. The ACDBE has contributed its proportionate share of the capital obtained through a combination of its own funds (15% of the required investment) and a loan from the non-ACDBE (85% of the required investment). A loan agreement has not been supplied. The ACDBE participates on a management committee and certain business decisions require unanimous consent. The ACDBE shares in the profits and risks of the joint venture in proportion to its stated ownership interest. There are no management fees paid to either party. The following is the description of the ACDBE role in the operation of the business as supplied in the joint venture agreement:

- 1) [ACDBE] company will have primary responsibility for the operation of gourmet coffee locations in Terminals 1, 2 and 3
- 2) [ACDBE] company will employ staff to manage and operate said locations in accordance with the lease agreement and direction provided by the Management Committee
- 3) [ACDBE] company will attend and participate in weekly manager’s meetings
- 4) [ACDBE] company will attend and participate in monthly meetings of the Management Committee

Given the above situation, the airport should request the following information in order to assess the credit to be counted towards ACDBE participation for this joint venture:

- 1) A copy of the proposed loan agreement in order to ensure that the loan provides information detailed in Section 3.3 of the joint venture guidance

- 2) A clear explanation of what “primary responsibility” actually means
- 3) An estimate of gross receipts to be earned by the ACDBE operated locations compared to total gross receipts

While there are questions to be answered in order to determine the credit to be counted for this joint venture, the fact that the ACDBE firm will be assigned specific units to operate will provide a more objective basis for establishing credit.

Attachment 3

JV REVIEW PROCESS

