Dallas/Fort Worth International Airport
ACDBE PROGRAM

Table of Contents

Section 23.1, 23.23 Objectives/Policy Statement
Section 23.3 Definitions ................................................................................................................. 3
Section 23.5 Applicability .................................................................................................................. 3
Section 23.9 Non-discrimination Requirements ................................................................................ 3
Section 23.11 Compliance and Enforcement ..................................................................................... 3
Section 23.21 ACDBE Program Updates ............................................................................................ 4
Section 23.23 Administrative Provisions ........................................................................................... 4
Section 23.25 Ensuring Nondiscriminatory Participation of ACDBEs .............................................. 5
Section 23.27 Reporting ..................................................................................................................... 6
Section 23.29 Compliance and Enforcement Procedures ..................................................................... 6
Section 23.31 ACDBE Certification .................................................................................................... 7
Section 23.41 Basic Overall Goal Requirement ................................................................................ 7
Section 23.43 Consultation in Goal Setting ......................................................................................... 7
Section 23.45 Overall Goals ............................................................................................................... 8
Section 23.53 Counting ACDBE Participation for Car Rental Goals ................................................ 11
Section 23.55 Counting ACDBE Participation for Concessions Other than Car Rentals ............... 11
Section 23.57 Failure to Meet Overall Goals ...................................................................................... 11
Section 23.61 Quotas or Set-asides .................................................................................................. 11
Section 23.71 Existing Agreements .................................................................................................. 11
Section 23.75 Long-Term Exclusive Agreements ............................................................................. 12
Section 23.79 Geographic Preferences .............................................................................................. 12

ATTACHMENTS

Attachment 1 Organizational Chart
Attachment 2 Monitoring and Enforcement Mechanisms
Attachment 3 Overall Goal and Methodology for Concessions Other Than Car Rentals
   (FY 2012 – FY 2014)
Attachment 4 Overall Goal Methodology for Car Rental Concessions (FY 2012 – FY 2014)
Attachment 5 Regulations: 49 CFR Part 23
Attachment 6 Trade Organizations/Associations
Attachment 7 Joint Venture Guidance
POLICY STATEMENT

Section 23.1, 23.23  Objectives/Policy Statement

The Dallas/Fort Worth International Airport Board (Airport Board) has established an Airport Concession Disadvantaged Business Enterprise (ACDBE) program in accordance with regulations of the U.S. Department of Transportation (USDOT), 49 CFR Part 23. The Airport Board has received federal funds authorized for airport development after January 1988 (authorized under Title 49 of the United States Code and has signed airport grant assurances that it will comply with 49 CFR Part 23.

It is the policy of the Airport Board to ensure that ACDBEs as defined in Part 23, have an equal opportunity to receive and participate in concession opportunities. It is also our policy:

1. To ensure nondiscrimination in the award and administration of opportunities for concessions by airports receiving USDOT financial assistance;
2. To create a level playing field on which ACDBEs can compete fairly for opportunities for concessions;
3. To ensure that our ACDBE program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet this part’s eligibility standards are permitted to participate as ACDBEs at the airport;
5. To help remove barriers to the participation of ACDBEs in opportunities for concessions at our airports; and
6. To provide appropriate flexibility to the airport in establishing and providing opportunities for ACDBEs.

The Vice President of the Business Diversity & Development Department has been designated as the Airport Board’s Liaison Officer for the ACDBE Program. The DBE Liaison Officer is responsible for implementing all aspects of the ACDBE program. Implementation of the program is accorded the same priority as compliance with all other legal obligations incurred by the Airport Board in its financial assistance agreements with the Department of Transportation.

The Airport Board has distributed this policy statement to the Board of Directors and relevant Departments. The Airport Board has also distributed this statement to DBE and non-DBE businesses that perform work for the Airport Board on DOT-assisted contracts at all pre-proposal conferences.

Sean Donohue
Chief Executive Officer
Dallas/Fort Worth International Airport

Date 11/1/13
DALLAS FORT WORTH INTERNATIONAL AIRPORT BOARD
OFFICIAL BOARD ACTION/RESOLUTION

<table>
<thead>
<tr>
<th>Date</th>
<th>Committee</th>
<th>Subject</th>
<th>Resolution #</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/03/2013</td>
<td>Concessions/Commercial</td>
<td>Adoption of Revised Airport Concessions Disadvantaged Business Enterprise (ACDBE) Policy and Program</td>
<td>2013-10-297</td>
</tr>
<tr>
<td></td>
<td>Development</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Action**
That the Chief Executive Officer or designee be authorized to adopt the revised Airport Concessions Disadvantaged Business Enterprise (ACDBE) Policy and Program.

**Description**
- The Airport Board has established an Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program in accordance with the U.S. Department of Transportation (USDOT) regulations, 49 CFR Part 23. The Airport Board receives Federal financial assistance from the DOT, and as a condition of receiving this assistance, has signed an assurance that it will comply with 49 CFP Part 23.
- It is the policy of the Airport Board to ensure nondiscrimination in the award and administration of opportunities for concessions by airports receiving USDOT financial assistance.

**Justification**
- The final rule for the ACDBE Program (49 CFR Part 23) was published in the Federal Register in June 2012. The main purpose of the rule was to conform key changes, that were made to the Disadvantaged Business Enterprise (DBE) Program (49 CFR Part 26) in January 2011, to the ACDBE Program.
- The regulatory updates required the Airport Board to update its 2006 ACDBE Policy and Program and submit to the Federal Aviation Administration (FAA) for review and approval.
- The Airport Board submitted its revised ACDBE Policy and Program to FAA on March 29, 2013 and received FAA approval on August 8, 2013.

**D/S/M/WBE Information**
- N/A

**Schedule/Term**
- N/A

<table>
<thead>
<tr>
<th>Contract #</th>
<th>Agreement #</th>
<th>Purchase Order #</th>
<th>Action Amount</th>
<th>Revised Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>$0</td>
<td>$0</td>
</tr>
</tbody>
</table>

For Information contact
Tamela Lee
3-5510

<table>
<thead>
<tr>
<th>Fund</th>
<th>Project #</th>
<th>External Funding Source</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>$0</td>
</tr>
</tbody>
</table>
Additional Information
Summary of the major rule provisions:

- ACDBE personal net worth (PNW) cap adjusted for inflation from $750,000 to $1.32 million, for ACDBE certification eligibility;
- The third exemption in the ACDBE PNW definition was suspended prospectively (the third exemption excludes from an applicant’s PNW those assets that the applicant used to encumber loans as collateral for the initiation or expansion of the applicant's ACDBE business, up to $3 million);
- Increase program oversight is required of sponsors to monitor ACDBE participation in every ACDBE contract;
- Sponsors are required to analyze their goal achievement process and take corrective actions when their overall ACDBE goal is not met in a given year;
- New procedures are required for termination of an ACDBE firm for convenience;
- Interstate and other certification changes are extended to the ACDBE program;
- Race-conscious goal-setting is required when race-neutral goals are not being achieved; and
- ACDBE small business size standards were adjusted for inflation.

BE IT RESOLVED BY THE DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD

That the Chief Executive Officer or designee be authorized to adopt the revised Airport Concessions Disadvantaged Business Enterprise (ACDBE) Policy and Program.

Approved as to Form by
Rodriguez, Elaine
General Counsel
Sep 23, 2013 5:21 pm

Approved as to Funding by
Palacios, Abel
AVP Business Financial Plng
Finance
Sep 24, 2013 10:00 am

Approved as to M/WBE by
Lee, Tamela
VP Business Diversity & Dev
Business Diversity and Development
Sep 23, 2013 5:06 pm

SIGNATURE REQUIRED FOR APPROVAL

Approved by
Department Head
Small & Emerging Business
Sep 23, 2013 5:06 pm

Chief Executive Officer
Date
Oct 5, 2013 2:09 pm
August 8, 2013

Via Electronic Mail

Ms. Tamela Lee
Vice President
Business Diversity & Development Department
Dallas/Fort Worth International Airport
PO Box 619428
DFW Airport, TX  75261

Re: Airport Concessions Disadvantaged Business Enterprise Program

Dear Ms. Lee:

This letter is in reference to the Airport Concessions Disadvantaged Business Enterprise (ACDBE) program submitted for the Dallas/Fort Worth International Airport. Based on our review, we have determined that the program meets the standards set forth in 49 CFR Part 23, Department of Transportation regulations.

Regular updates of your ACDBE program are not required as long as you remain in compliance. However, you are required to submit significant changes for approval. Please submit an executed copy of the Policy Statement (page one) of your ACDBE program at your earliest convenience.

If you have any questions or need assistance, please call Ms. Dolores Leyva at (310) 725-3939 or e-mail at dolores.leyva@faa.gov.

Sincerely,

Michael D. Freilich, Director
Civil Rights & DBE Compliance
Western-Pacific Region

cc:   ASW 650
SECTION 23.3 Definitions

The Airport Board will use terms in this program that have the meaning defined in Section 23.3 and Part 26, Section 26.5 where applicable.

SECTION 23.5 Applicability

The Airport Board operates a primary airport and is the sponsor of federal airport funds authorized for airport development after January 1988 that was authorized under Title 49 of the United States Code.

SECTION 23.9 Non-discrimination Requirements

The Airport Board will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any concession agreement, management contract or subcontract, purchase or lease agreement or other agreement covered by 49 CFR Part 23 on the basis of race, color, sex, or national origin.

In administering its DBE program, the Airport Board will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or impairing accomplishment of the objectives of the ACDBE program with respect to individuals of a particular race, color, sex, or national origin.

The Airport Board acknowledges these representations are also in accordance with obligations contained in its Civil Rights, DBE and ACDBE Airport grant assurances.

The Airport Board will include the following assurances in all concession agreements and management contracts it executes 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.

SECTION 23.11 Compliance and Enforcement

The Airport Board will comply with and is subject to the provisions of 49 CFR Part 26 (§§ 26.101 and 26.105 through 26.109). The Airport Board will comply with this part or be subject to formal enforcement action under §26.105 or appropriate program sanctions, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122.

The Airport Board’s compliance with all requirements of this part is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

Compliance reviews: The FAA may review the airport sponsor’s compliance with this part at any time, including but not limited to, reviews of paperwork, on-site reviews, and review of the airport sponsor’s monitoring and enforcement mechanism, as appropriate. The FAA Office of Civil Rights may initiate a compliance review based on complaints received.

Any person who knows of a violation of this part by the Airport Board may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

The following enforcement actions apply to firms participating in the Airport Board’s ACDBE program:

(Board Approved 10/03/2013)
1. For a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate as an ACDBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department of Transportation (USDOT) or the Federal Aviation Administration (FAA) may initiate suspension or debarment proceedings against you under 49 CFR part 29.

2. For a firm that, in order to meet ACDBE goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, USDOT or FAA may initiate suspension or debarment proceedings against you under 49 CFR part 29.

3. In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the FAA may consider the fact that a purported ACDBE has been certified. However, such certification does not preclude USDOT from determining that the purported ACDBE, or another firm that has used or attempted to use it to meet ACDBE goals, should be suspended or debarred.

4. USDOT may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the ACDBE program whose conduct is subject to such action under 49 CFR part 31.

5. USDOT may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of an ACDBE in the Airport Board’s ACDBE program or otherwise violates applicable Federal statutes.

SUBPART B – ACDBE Programs

Section 23.21 ACDBE Program Updates

Since the Airport Board operates a large hub primary airport, we are required to have an ACDBE program. As a condition of eligibility for FAA financial assistance, the Airport Board will submit its overall ACDBE goals to FAA every three years on October 1 commencing on October 1, 2008.

When the Airport Board makes significant changes to its ACDBE program, we will provide the amended program to the FAA for approval prior to implementing the changes.

Section 23.23 Administrative Provisions

Policy Statement: The Airport Board is committed to operating its ACDBE program in a nondiscriminatory manner. The Airport Board’s Policy Statement is elaborated on the first page of this program.

ACDBE Liaison Officer (ACDBELO): The Airport Board has designated the following individual as our ACDBELO:

Vice President
Dallas/Fort Worth International Airport
Business Diversity & Development Department
P.O. Box 619428
DFW Airport, Texas 75261-9428
972 973 5000 telephone
972 973 5501 fax

In that capacity, the ACDBELO is responsible for implementing all aspects of the ACDBE program and ensuring that the Airport Board complies with all provision of 49 CFR Part 23. The ACDBELO has direct, independent access to the Chief Executive Officer concerning ACDBE program matters. An organization chart displaying the ACDBELO’s position in the organization is found in Attachment 1 to this program.

(Board Approved 10/03/2013)
The ACDBELO is responsible for developing, implementing and monitoring the ACDBE program, in coordination with other appropriate officials. The duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required by FAA or USDOT.
2. Reviews third party contracts for compliance with this program.
3. Works with all departments to set overall annual goals.
4. Ensures that bid notices and requests for proposals are available to ACDBEs in a timely manner.
5. Identifies contracts so that ACDBE goals are included in solicitations (both race-neutral methods and contract specific goals).
6. Analyzes the Airport Board’s progress toward goal attainment and identifies ways to improve progress.
7. Participates in pre-proposal meetings.
8. Advises the CEO on ACDBE matters and achievement.
9. Provides ACDBEs with information and technical assistance.
10. Plans and participates in ACDBE training seminars.
11. Acts as liaison to the Texas Unified Certification Program (TUCP).
12. Provides outreach to ACDBEs and community organizations to advise them of opportunities.

DBE Directory: The TUCP maintains a DBE Directory identifying all firms eligible to participate as ACDBEs. The DBE Directory lists the firm’s name, address, phone number, date of the most recent certification, and the type of work the firm has been certified to perform as an ACDBE. The DBE Directory is available on the Texas Department of Transportation website at www.txdot.com.

Section 23.25 Ensuring Nondiscriminatory Participation of ACDBEs

The Airport Board will take the following measures to ensure nondiscriminatory participation of ACDBEs in concession, and other covered activities (23.25(a)).

1. The Airport Board will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the ACDBE program with respect to individuals of a particular race, color, sex, or national origin.
2. The Airport Board will include the following assurances in all concession agreements and management contracts it executes with any firm after April 21, 2005:
   (a) 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.
   (b) 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.
3. The Airport Board will review the contract size, term and specifications and make such changes that will allow ACDBEs an equitable opportunity to compete for all concession opportunities that they can perform to the extent consistent with the Airport Board’s interest.

The Airport Board 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. (23.25(c))
The Airport Board’s overall goal methodology and a description of the race-neutral measures it will take to meet the goals are described in Section 23.25 and Attachments 3 and 4 of this plan. The goals are set consistent with the requirements of Subpart D. (23.25(b), (d))

If the Airport Board projects that race-neutral measures, standing alone, are not sufficient to meet an overall goal, it will use race-conscious measures as described in Section 23.25 (e) (1-2) and Attachment 3 – Overall Goal Methodology for Concessions Other Than Car Rentals and Attachment 4– Overall Goal Methodology for Car Rentals of this plan. (23.25(e)).

The Airport Board 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. The Airport Board will not use set-asides or quotas as a means of obtaining ACDBE participation. (23.25(g))

Section 23.27 Reporting

We will retain sufficient basic information about our ACDBE program implementation, ACDBE certification and the award and performance of agreements and contracts to enable the FAA to determine our compliance with Part 23. This data will be retained for a minimum of 3 years following the end of the concession agreement or other covered contract.

The Airport Board will transmit to FAA annually on March 1, the “Uniform Report of ACDBE Participation” form. This information will be transmitted electronically via the DBE Office Online Reporting System (DOORS). We will also report the ACDBE firms contact information either on the FAA DBE Contractor’s Form or other similar format.

Section 23.29 Compliance and Enforcement Procedures

The Airport Board will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 23.

1. The Airport Board will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that USDOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the USDOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.107.

2. The Airport Board will consider similar action under our own legal authorities, including responsibility determinations in future contracts.

3. The Airport Board will also implement a monitoring and enforcement mechanism to ensure that work committed to ACDBEs at contract award is actually performed by the ACDBEs (Attachment 2). This mechanism will provide for a running tally of actual ACDBE attainments (e.g., gross receipts actually earned by ACDBE firms), including a means of comparing these attainments to commitments. This will be accomplished by documented ongoing, scheduled and unscheduled on-site visits to the operations and meetings with Concessions staff. The contract monitoring files will contain written certification that staff has reviewed records of all contracts, leases, joint venture agreements, or other concession-related agreements and monitored the work on-site at the Airport for the purpose of compliance with the ACDBE contract requirements and the Airport’s ACDBE Program.

SUBPART C – CERTIFICATION AND ELIGIBILITY

Section 23.31 ACDBE Certification

The Airport Board accepts the certification of the Texas Unified Certification Program (TUCP). New applicants expressing interest in becoming certified are directed to the North Central Texas Regional Certification Agency (“NCTRCA”), one of the TUCP certifying agencies. The TUCP and its certifying agencies follow the certification standards of Subpart D of Part 26, except as provided in 23.31, and the certification procedures of Subpart E of Part 26 to determine the eligibility of firms to participate as ACDBEs in DOT-assisted contracts. To be certified as an ACDBE, a firm must meet the applicable certification eligibility standards.
The TUCP’s DBE Directory will specify whether a firm is certified as a DBE, ACDBE, or both.

**SUBPART D – GOALS, GOOD FAITH EFFORTS, AND COUNTING**

**Section 23.41 Basic Overall Goal Requirement**

The Airport Board will establish two separate overall ACDBE goals; one for car rentals and another for concessions other than car rentals. The overall goals will cover a three year period and will be reviewed annually to make sure the goal continues to fit circumstances. Any significant overall goal adjustments will be reported to the FAA.

The Airport’s overall goals will provide for participation by all certified ACDBEs and will not be subdivided into group-specific goals.

**Section 23.43 Consultation in Goal Setting**

The Airport Board will consult with stakeholders before setting goals for individual contracts, which will ultimately result in overall goals. Stakeholders will include, but not be 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 sponsors efforts to increase participation of ACDBEs.

**Section 23.45 Overall Goals**

The Airport Board operates a large hub primary airport. As a condition of eligibility for FAA financial assistance, we will submit overall goals every three years by October 1, commencing on October 1, 2008.

If a new concession opportunity arises at a time that falls between the normal submission dates above and the estimated average of annual gross revenues are anticipated to be $200,000 or greater, we will submit an appropriate adjustment to our overall goal to FAA for approval.

The Airport Board will establish overall goals in accordance with the 2-Step process as specified in section 23.51. After determining the total gross receipts for the concession activity, the first step is to determine the relative availability of ACDBEs in the market area, “base figure”. The second step is examine all relevant evidence reasonably available in the sponsor’s jurisdiction to determine if an adjustment to the Step 1 “base figure” is necessary so that the goal reflects as accurately as possible the ACDBE participation the sponsor would expect in the absence of discrimination. Evidence may include, but is not limited to past participation by ACDBEs, a disparity study, evidence from related fields that affect ACDBE opportunities to form, grow, and compete (such as statistical disparities) in ability to get required financing, bonding, insurance; or data on employment, self-employment, education and training.

A description of the methodology to calculate the overall goal for car rentals, the goal calculations, and the data we relied on can be found in Attachment 4 – Overall Goal Methodology for Car Rentals to this program.

A description of the methodology to calculate the overall goal for concessions other than car rentals, the goal calculations, and the data we relied on can be found in Attachment 3 – Overall Goal Methodology for Concessions Other Than Car Rentals to this program.

**Projection of Estimated Race-Neutral & Race-Conscious Participation (23.45(f), 23.25(d-e))**

The breakout of estimated race-neutral and race-conscious participation can be found with the goal methodology in (Attachments 3 and 4) to this program. This section of the program will be reviewed annually when the goal calculation is reviewed under 23.41(c).

**Concession Specific Goals (23.25(e)(1)(iv))**
The Airport Board will use concession specific goals to meet any portion of the overall goals that it does not project being able to meet using race-neutral means. Concession specific goals are established so that, over the period to which the overall goals apply, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race-neutral means.

The Airport Board will establish concession specific goals only on those concessions that have direct ownership arrangements (except car rentals), sublease, or subcontracting possibilities.

The Airport Board need not establish a concession specific goal on every such concession, and the size of concession specific goals will be adapted to the circumstances of each such concession (e.g., type and location of concession, availability of ACDBEs.)

If the objective of a concession specific goal is to obtain ACDBE participation through direct ownership with an ACDBE, the Airport Board will calculate the goal as a percentage of the total estimated annual gross receipts from the concession. (23.25(e)(1)(i))

If the concession specific goal applies to purchases and/or leases of goods and services, the Airport Board will 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. (23.25(e)(1)(ii))

**Good Faith Efforts Procedures on Concession Specific Goals (23.25(e)(1)(iii), (iv))**

To be eligible to be awarded a concession that has a concession specific goal; competitors must make good faith efforts to meet the 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. (23.25(e)(1)(iii)). Examples of good faith efforts are found in Appendix A to 49 CFR Part 26. The procedures applicable to 49 CFR Part 26.51-3, regarding contract goals apply to the Airport Board’s concession specific goals. Specifically,

**Demonstration of good faith efforts (26.53(a) & (c))**

The following personnel are responsible for determining whether a concessionaire who has not met the concession specific goal has documented sufficient good faith efforts to be regarded as responsive.

**Vice President**  
Dallas/Fort Worth International Airport  
Business Diversity & Development Department  
P.O. Box 619428  
DFW Airport, Texas 75261-9428  
972 973 5000 telephone  
972 973 5501 fax

The Airport Board will ensure that all information is complete and accurate and adequately documents the concessionaire’s good faith efforts before we commit to the concession agreement with the bidder/offeror.

**Information to be submitted (26.53(b))**

The Airport Board treats concessionaire’s compliance with good faith efforts requirements as a matter of responsiveness.

Each solicitation for which a concession specific goal has been established will require the concessionaires to submit the following information:

1. The names and addresses of ACDBE firms or ACDBE suppliers of goods and services that will participate in the concession;
2. A description of the work that each ACDBE will perform;
3. The dollar amount of the participation of each ACDBE firm/supplier participating;
(4) Written and signed documentation of commitment to use a ACDBE whose participation it submits to meet a contract goal;

(5) Written and signed confirmation from the ACDBE that it is participating in the concession as provided in the prime concessionaire’s commitment and

(6) If the contract goal is not met, evidence of good faith efforts.

Administrative reconsideration (26.53(d))

Within five (5) days of being informed by the Airport Board that it is not responsive because it has not documented sufficient good faith efforts, a concessionaire may request administrative reconsideration. Concessionaire should make this request in writing to the following reconsideration official:

Executive Vice President of Administration & Diversity
Dallas/Fort Worth International Airport
P.O. Box 619428
DFW Airport, Texas 75261-9428
972 973 5215 telephone
972 973-5501 fax

The reconsideration official will not have played any role in the original determination that the concessionaire did not document sufficient good faith efforts.

As part of this reconsideration, the concessionaire will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The concessionaire will have the opportunity to meet in person with the reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The reconsideration official will send the concessionaire a written decision on reconsideration, explaining the basis for finding that the concessionaire did or did not meet the goal or make adequate good faith efforts to do so. The written decision on reconsideration is not administratively appealable to the Department of Transportation.

Good Faith Efforts when an ACDBE is replaced on a concession (26.53(f))

The Airport Board will require a concessionaire to make good faith efforts to replace an ACDBE that is terminated or has otherwise failed to complete its concession agreement, lease, or subcontract with another certified ACDBE, to the extent needed to meet the concession specific goal. The Airport Board will require the concessionaire to notify the ACDBE Liaison Officer immediately of the ACDBEs inability or unwillingness to perform and provide reasonable documentation before the ACDBE is terminated or replaced.

In this situation, the concessionaire will be required to obtain the Airport Board’s prior approval of the substitute ACDBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts. The concessionaire must include the specific reasons for the termination and/or failure to complete its agreement as set forth above. The concessionaire must also provide the ACDBE with any and all documents and information as may be requested with respect to the termination or substitution of the ACDBE.

If the concessionaire fails or refuses to comply in the time specified, the Concessions Department will notify the concessionaire that it is in default. If the concessionaire still fails to comply, the contracting officer may issue a termination for default proceeding.

Sample Proposal/Bid Specification:

The requirements of 49 CFR Part 23, regulations of the U.S. Department of Transportation, apply to this concession. It is the policy of the Airport Board to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this concession will be conditioned upon satisfying the requirements of this proposal/bid specification. These
requirements apply to all concessions firm and suppliers, including those who qualify as an ACDBE. An ACDBE concession specific goal of _____ percent of *(annual gross receipts; value of leases and/or purchases of goods and services)* has been established for this concession. The concession firm shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26, to meet the concession specific goal for ACDBE participation in the performance of this concession.

The concession firm will be required to submit the following information:

(1) The names and addresses of ACDBE firms and suppliers that will participate in the concession
(2) A description of the work that each ACDBE will perform
(3) The dollar amount of the participation of each ACDBE firm participating
(4) Written and signed documentation of commitment to use a ACDBE whose participation it submits to meet a contract goal
(5) Written and signed confirmation from the ACDBE that it is participating in the concession as provided in the prime concessionaire’s commitment
(6) If the contract goal is not met, then evidence of good faith efforts.

**Section 23.53 Counting ACDBE Participation for Car Rental Goals**

We will count ACDBE participation toward overall goals for car rental concessions as provided in 49 CFR 23.53.

**Section 23.55 Counting ACDBE Participation for Concessions Other than Car Rentals**

We will count ACDBE participation toward goals for concessions other than car rental as provided in 49 CFR 23.55.

**Section 23.57 Failure to Meet Overall Goals**

The Airport Board will maintain an approved ACDBE Program and overall ACDBE goal and will administer the ACDBE Program in good faith to be considered to be in compliance with this part.

If the awards and commitments shown on the Uniform Report of ACDBE Participation at the end of any fiscal year are less than the overall goal applicable to that fiscal year, the Airport Board will:

1. Analyze in detail the reasons for the difference between the overall goal and the awards and commitments in that fiscal year;
2. Establish specific steps and milestones to correct the problems identified in the analysis and to enable the goal for the new fiscal year to be met;
3. The Airport Board will submit to the FAA, within 90 days of the end of the fiscal year, the analysis and corrective actions developed.

**Section 23.61 Quotas or Set-asides**

The Airport Board does not use quotas or set-asides as a means of obtaining ACDBE participation.

**SUBPART E – OTHER PROVISIONS**

**Section 23.71 Existing Agreements**

The Airport Board will assess potential for ACDBE participation when an extension or option to renew an existing agreement is exercised, or when a material amendment is made. We will use any means authorized by part 23 to obtain a modified amount of ACDBE participation in the renewed or amended agreement.
Section 23.75 Long-Term Exclusive Agreements

The Airport Board will not enter into a long-term exclusive agreement for concessions without prior approval of the FAA Regional Civil Rights Office. We understand that a “long-term” agreement is one having a term of longer than 5 years. We understand that an “exclusive” agreement is one in which an entire category of a particular business opportunity is limited to a single business entity. If special, local circumstances exist that make it important to enter into a long-term and exclusive agreement, the Airport Board will submit detailed information to the FAA Regional Civil Rights Office for review and approval.

Section 23.79 Geographic Preferences

The Airport Board will not use a: “local geographic preference”, i.e., any requirement that gives an ACDBE located in one place an advantage over ACDBEs from other places in obtaining business as, or with, a concession at the airport.
The ACDBELO has direct access to the Chief Executive Officer.
Attachment 2

Monitoring and Enforcement Mechanisms

The Airport Board has available several remedies to enforce the ACDBE requirements contained in its contracts, including, but not limited to, the following:

1. Breach of contract action, pursuant to the terms of the contract
2. Other actions deemed appropriate including responsibility reviews on future concession award opportunities

In addition, the federal government has available several enforcement mechanisms that it may apply to firms participating in the ACDBE program, including, but not limited to, the following:

1. Suspension or debarment proceedings pursuant to 49 CFR part 23:
   In a suspension or debarment proceeding, the FAA may consider the fact that a purported ACDBE has been certified. However, such certification does not preclude DOT from determining that the purported ACDBE, or another firm that has used or attempted to use it to meet ACDBE goals, should be suspended or debarred.
2. Enforcement action pursuant to 49 CFR part 31:
   DOT may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the ACDBE program whose conduct is subject to such action under 49 CFR part 31; and
3. Prosecution pursuant to 18 USC 1001:
   DOT may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of an ACDBE in DFW Airport’s ACDBE program or otherwise violates applicable Federal statutes.

The Airport Board will implement various mechanisms to monitor program participants to ensure they comply with Part 23, including, but not limited to the following:

1. The Airport Board will insert the following provisions into concessions agreements and management contracts:
   A. This agreement is subject to the requirements of the U.S. Department of Transportation’s regulation, 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.
   B. 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.
2. We will implement the following additional monitoring and compliance procedures:
   A. Concessionaires or contractors will be required to submit monthly gross revenue earned by ACDBEs and expenditures to DBEs.
   B. Concessionaires or contractors will be required to list the specific duties, functions and responsibilities that ACDBEs or DBEs will perform.
C. Concessionaires or contractors will be required to submit, for review, a written notification of any material change in the duties, functions and responsibilities of ACDBEs and DBEs prior to implementing the change.

D. The Airport Board will review, annually, the specific duties, functions and responsibilities of each ACDBE and DBE to confirm that no material change has occurred.

E. The Airport Board will perform periodic reviews, including site visits, each year on a representative number of judgmentally selected concessionaires and contractors to confirm ACDBEs and DBEs are performing listed duties, functions and responsibilities.

3. We will implement our compliance and monitoring procedures as follows:

A. The Airport Board will utilize existing compliance software to capture monthly gross revenues of concessionaires, including ACDBEs and monitor progress of concessionaire commitments to ACDBEs versus actual participation.

B. The Airport Board will require that concessionaires submit written confirmation, annually, that there are no changes in duties, functions and responsibilities of ACDBEs, including terms and conditions of joint venture agreements.

C. The Airport Board will use appropriate personnel to perform, at least quarterly, reviews of ACDBEs to ensure that their activities correspond to the previously submitted list of duties, functions and responsibilities. All ACDBEs will be reviewed within a three-year period from the start of the review process, at which time the review process will begin again. Reviews will include site visits, reviews of appropriate records, contracts, financial information, joint venture agreements, certification information and other relevant information deemed necessary.

D. The Airport Board will request from concessionaires any expenditures made with ACDBEs or DBEs in performing services and supplying goods. Those expenditures will be reported periodically to the Airport Board, but no less than semi-annually.

E. Joint ventures will be reviewed in accordance with 49 CFR part 23 and the July 2008 FAA Joint Venture Guidance (Attachment 7). For each concession joint venture in operation at the airport that includes an ACDBE participant and for which ACDBE participation is being counted, the Airport Board will undertake the following monitoring tasks:

1) Certification Verification
ACDBE certification for firms being counted in joint ventures will be verified annually. Staff will insure that the certification is current and for the applicable trade.

2) Reports
The Airport Board will monitor monthly and year-to-date gross revenues for the Joint Venture and the ACDBE dollar and percentage share of gross revenues.

3) Annual On-Site Observation/Review
The Airport Board will conduct site visits to the joint venture operation not less than annually. Site visits shall also include interaction with managers/employees and others involved in the operation as appropriate.

4) JV documentation (minutes of meetings, etc.)
The Airport Board will require the submission of annual activity reports detailing the activity of the ACDBE partner in relation to its assigned role in the operation. The Airport Board will also require joint ventures to submit the minutes of management or principal committee meetings or other meetings which involve decision-making by the partners. Meeting minutes
will be required on a quarterly basis. All reports will be reviewed and action will be taken if appropriate.

5) **Financial Reviews**
The Airport Board will review documentation of all capital contributions made by the Joint Venture and by the ACDBE partner, including any promissory notes. The Airport Board will also review any distributions made by the joint venture on a quarterly basis.

6) **Required Notifications**
The Airport Board will require Joint Venture participants to submit any changes in the Joint Venture Agreement, changes in the roles and responsibilities performed by each partner or changes in the financial participation of any partner. The Airport Board will review and respond to any such notifications within 60 days.

F. The Airport Board will include, in the contract files, a written certification that it has reviewed records of all contracts, leases, joint venture agreements, or other concession-related agreements and monitored the work on-site for each concession contract to which 49 CFR part 23 applies.
Overall Goal Calculation for Concessions Other Than Car Rentals

Amount of Goal

The Airport Board’s overall goal for concessions other than car rental during the period beginning October 1, 2011 and ending September 30, 2014 is 31.9% of the total gross receipts for concessions. The following are not included in the total gross receipts for concessions: (a) the gross receipts of car rental operations, (b) the dollar amount of a management contract or subcontract with a non-ACDBE, (c) the gross receipts of business activities to which a management contract or subcontract with a non-ACDBE pertains, and (d) any portion of a firm’s estimated gross receipts that will not be generated from a concession.

The concession opportunities anticipated during this goal period are projected as follows:

<table>
<thead>
<tr>
<th>Anticipated Date</th>
<th>Terminal(s)</th>
<th>Approximate # of Locations</th>
<th>Concession Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sept. 27, 2011 (Released)</td>
<td>B &amp; E (Part 1)</td>
<td>27</td>
<td>11 F&amp;B, 11 Retail, 5 Newsstands</td>
</tr>
<tr>
<td>February 2012 (Release)</td>
<td>B &amp; E (Part 2)</td>
<td>30</td>
<td>Combination of F&amp;B, Retail, Newsstands</td>
</tr>
<tr>
<td>Summer 2012 (Release)</td>
<td>D</td>
<td>20-25</td>
<td>Combination of F&amp;B, Retail, Newsstands</td>
</tr>
<tr>
<td>Spring 2014 (Release)</td>
<td>C</td>
<td>36</td>
<td>Combination of F&amp;B, Retail, Newsstands</td>
</tr>
</tbody>
</table>

The estimated gross receipts revenue projected for concessions for the three-year period, assuming flat revenue growth for the goal period is approximately $800 million.

The Airport Board has determined that its market area is the State of Texas. This is 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 receive a substantial majority of concessions related revenues are located.
Methodology used to Calculate Overall Goal

Goods and Services

The Airport Board can meet the percentage goal by including the purchase from ACDBEs of goods and services used in businesses conducted at the airport. It 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. The dollar value from purchases of goods and services from ACDBEs may be added to the numerator, and the dollar value from purchases of goods and services from all firms (ACDBEs and non-ACDBEs) may be added to the denominator.

Management Contract or Subcontract

The Airport Board can meet the percentage goal by including any business operated through a management contract or subcontract with an ACDBE. It will add the dollar amount of a management contract or subcontract with an ACDBE to the total participation by ACDBEs in airport concessions (both the numerator AND the denominator) and to the base from which the airport’s percentage goal is calculated. However, the dollar amount of a management contract or subcontract with a non-ACDBE and the gross revenue of business activities to which the management contract or subcontract pertains will not be added to this base in either the numerator or denominator.

Step 1: 23.51(c)

The Airport Board determined the base figure for the relative availability of ACDBEs other than car rentals. The base figure was calculated as follows:

Methodology:

\[
\text{Ready, willing, and able non-car rental ACDBEs in the market area} \\
\text{Base figure = } \frac{\text{All ready, willing and able non-car rental concession firms in the market area}}{246}
\]

\[
\text{Base figure = } \frac{71}{246}
\]

The data source or demonstrable evidence used to derive both the numerator and denominator was an active participant list as outlined in 23.51(c)(2). The
active participants lists was developed based on existing concessionaires operating at DFW Airport (excluding car rental firms) and firms that expressed an interest in doing business at DFW Airport as concessionaires.

When the Airport Board divided the numerator by the denominator it arrived at the base figure for our overall goal for non-car rental concessions of: **28.9%**

**Step 2: 23.51(d)**

After calculating a base figure of the relative availability of ACDBEs, the Airport Board examined evidence to determine what adjustment was needed to the base figure in order to arrive at the overall goal.

The data used to determine the adjustment to the base figure was:

a. **Past participation** – The Airport Board evaluated the current capacity of ACDBEs to perform work in our concessions program by measuring the volume of work ACDBEs have performed over the previous three year period.

Past history of ACDBE participation for in non-car rental concessions is as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>ACDBE Goal</th>
<th>Total $</th>
<th>ACDBE $</th>
<th>ACDBE %</th>
<th>RC %</th>
<th>RN %</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>33.0%</td>
<td>$252,672,980</td>
<td>$88,913,281</td>
<td>35.2%</td>
<td>32.9%</td>
<td>2.3%</td>
</tr>
<tr>
<td>2010</td>
<td>33.0%</td>
<td>$265,763,285</td>
<td>$101,729,774</td>
<td>38.3%</td>
<td>34.8%</td>
<td>3.5%</td>
</tr>
<tr>
<td>2011</td>
<td>33.0%</td>
<td>$291,428,767</td>
<td>$117,561,491</td>
<td>40.3%</td>
<td>36.2%</td>
<td>4.1%</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>$809,865,032</td>
<td>$308,204,546</td>
<td>38.1%</td>
<td>34.7%</td>
<td>3.4%</td>
</tr>
</tbody>
</table>

The total past participation was used to adjust the base goal as follows:

Base Goal – 28.9% + Three-Year Past Participation (median) – 34.8% = **63.7%**

63.7% ÷ 2 = **31.9%**

**The Airport Board, therefore, proposes 31.9% as our overall goal for the 2012-2014 goal period.**

**Consultation with Stakeholders (23.43)**

Stakeholders were consulted for comment during the month of October 2012. Consultations included the dissemination of a written notice to area minority chambers and advocacy organizations as well as a formal briefing held on 10/25/11. Existing and prospective concessionaires were notified at two different briefings held on 10/14/11 and 10/24/11. A public notice was issued in the local newspaper to ensure any individual or organization, potentially having
information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for ACDBEs, and The Airport Board’s efforts to increase participation of ACDBEs, received the opportunity to provide comments. No comments were received.

**Breakout of Estimated Race-Neutral & Race Conscious Participation**

**Section 23.51**

The Airport Board will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating ACDBE participation. It will use the following race-neutral measures to increase ACDBE participation. It is understood that the Airport Board will be expected to actually take these steps, and that this is not merely a paper exercise.

1. **Locating and identifying ACDBEs and other small businesses who may be interested in participating as concessionaires under 49 CFR Part 23;**
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 presolicitation meetings about how the Airport Board’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 49 CFR Part 26.35); technical assistance program or taking other steps to foster ACDBE participation in concessions.**

The history of the race-neutral/race-conscious split for the most recent three years is as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>ACDBE %</th>
<th>RC %</th>
<th>RN %</th>
<th>RC % to Total (RC/Total)</th>
<th>RC % to Total (RC/Total)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>35.2%</td>
<td>32.9%</td>
<td>2.3%</td>
<td>93.5%</td>
<td>6.5%</td>
</tr>
<tr>
<td>2010</td>
<td>38.3%</td>
<td>34.8%</td>
<td>3.5%</td>
<td>90.9%</td>
<td>10.1%</td>
</tr>
<tr>
<td>2011</td>
<td>40.3%</td>
<td>36.2%</td>
<td>4.1%</td>
<td>89.8%</td>
<td>10.2%</td>
</tr>
<tr>
<td>Total</td>
<td>38.1%</td>
<td>34.7%</td>
<td>3.4%</td>
<td>91.1%</td>
<td>8.9%</td>
</tr>
</tbody>
</table>

Given the above, it appears that race-neutral participation has increased slightly over the past three years. We propose that we will be able to meet the same
portion of the goal using race-neutral means for the upcoming three years as we have been able to meet in 2011, the most recent fiscal year. Therefore, the Airport Board estimates that, in meeting our overall goal of 31.9%, it will obtain 10.2% of the participation through race-neutral means.

\[31.9\% \times 10.2\% = 3.3\% \text{ race-neutral}\]

Therefore, the Airport Board estimates that 3.3% ACDBE participation for the goal period will be met through race-neutral means. The balance of the overall goal of 31.9% is 28.6% and will be met using race-conscious means.

If the Airport Board projects that the race-neutral portion of the overall goal will not be met, it may use the following race-conscious measures to meet the overall goal:

1. **Concession-specific goals for particular concession opportunities.**
2. **Negotiation with potential concessionaires to include ACDBE participation through direct ownership arrangements or measures, in the operation of the concession.**
3. **With prior FAA approval, other methods that take a competitor’s ability to provide ACDBE participation into account in awarding a concession.**

In order to ensure that the ACDBE program will be narrowly tailored to overcome the effects of discrimination, if concession specific goals are utilized, the Airport Board will adjust the estimated breakout of race neutral and race-conscious participation as needed to reflect actual ACDBE participation (see 26.51(f)) and it will track and report race-neutral and race conscious participation separately.

For reporting purposes, race-neutral ACDBE participation includes, but is not necessarily limited to, the following: ACDBE participation through a prime contract that an ACDBE obtains through customary competitive procurement procedures; ACDBE participation through a subcontract on a prime contract that does not carry ACDBE goal; and ACDBE participation through a subcontract from a prime contractor that did not consider a firm’s ACDBE status in making the award. The Airport Board will maintain data separately on ACDBE achievements in those contracts with and without concession specific goals, respectively.
DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD
(AIRPORT BOARD)
Overall Goal Calculation for Car Rentals

Amount of Goal

The Airport Board’s overall goal for car rentals during the period beginning October 1, 2011 and ending September 30, 2014 is the following: **3.75%** of the total anticipated expenditures for goods and services of car rental operations at DFW Airport.

The concession opportunities anticipated during this goal period are: general operational needs required for rental car agencies to operate during the year (i.e. windshield repair, automotive repair, office supplies, fuel, office equipment, uniforms, safety equipment, etc…).

The Airport Board has determined that its market area is national for car rental concessions and corporate expenditures and Dallas and Tarrant County for local purchases of goods and services required to sustain on-going business operations.

Methodology used to Calculate Overall Goal

Goods and Services

The Airport Board can meet the percentage goal by including the purchase from ACDBEs of goods and services used in businesses at the airport. The dollar value from purchases of goods and services from ACDBEs may be added to the numerator, and the dollar value from purchases of goods and services from all firms (ACDBEs and non-ACDBEs) may be added to the denominator.

**Step 1:** 23.51(c)

§ 23.51 (c)(4) states as follows:

> 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.

Pursuant to this, the Airport Board has elected to utilize **3.75%** as the base goal, which is the base goal set by Houston Intercontinental Airport (Houston) for car rental. The rationale for using Houston Intercontinental Airport’s car rental goal as a base figure is as follows:
1) Houston is a large HUB Airport like DFW Airport.
2) Houston has multiple car rental firms operating on its property comparable to DFW Airport.
3) Both Houston and DFW have a consolidated rental car facility that serves as the base of operations for the rental car firms.
4) Houston is in relatively close geographical proximity to DFW Airport; therefore it would share some similar requirements for rental car operations.
5) The relevant market areas for car rentals are comparable due to the nature of the car rental business, the geographical proximity of both airports, similar types of operations and customers served, and a common pool of DBEs, certified by the TUCP, that can provided goods and services. Both the Houston Metropolitan area and the Dallas/Fort Worth Metropolitan area reflect comparable firms that can supply goods and services to rental car firms. Some of those firms also seek to do business in both the Houston and Dallas/Fort Worth market.

**Step 2: 23.51(d)**

After calculating a base figure of the relative availability of ACDBEs, the Airport Board considered evidence to determine what adjustment was needed to the base figure in order to arrive at the overall goal and determined that an adjustment is not necessary.

The car rental contracts were awarded in 1998 for a 25 year term. Therefore, the contracts will not expire until 2023. The contracts require the car rental companies to comply with federal requirements regarding ACDBE requirements. The Airport Board is planning to implement more stringent reporting requirements in the coming year and may adjust the goal in the future depending upon the results.

**Consultation with Stakeholders (23.43)**

Stakeholders will be consulted for comment during the month of October 2012. Consultations include the dissemination of a written notice to area minority chambers and advocacy organizations as well as a formal briefing scheduled on 10/25/11. Existing and prospective concessionaires will be notified at two different briefings: 10/14/11 and 10/24/11. A public notice will also be issued in the local newspaper to ensure any individual or organization, which could be expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for ACDBEs, and the Airport Board’s efforts to increase participation of ACDBEs, receives the opportunity to provide comments. A summary of relevant information from these stakeholders will be provided.

**Breakout of Estimated Race-Neutral & Race Conscious Participation**
Section 23.51

The Airport Board will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating ACDBE participation. The Airport Board uses the following race-neutral means to increase ACDBE participation:

1. Located and identifying ACDBEs and other small businesses who may be interested in participating as concessionaires under 49 CFR Part 23
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 presolicitation meetings about how the sponsor’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 49 CFR Part 26.35); technical assistance program or taking other steps to foster ACDBE participation in concessions.

The Airport Board estimates that, in meeting the overall goal of 3.75%, it will obtain 3.75% through race-conscious measures.

The following is a summary of the basis of our estimated breakout of race-neutral and race-conscious ACDBE participation:

Car rental contracts have been in place since 1998. The Airport Board achieved minimal participation, 0% to 1%, utilizing race-neutral measures. Given this, it does not believe that race neutral measures can achieve any portion of the goal and proposes to implement race-conscious measure in the coming year.

In order to ensure that the ACDBE program is narrowly tailored to overcome the effects of discrimination, the Airport Board will adjust the estimated breakout of race-neutral and race-conscious participation as needed and will track and report race-neutral and race-conscious participation separately.
Attachment 5

Regulations: 49 CFR Part 23

Title 49: Transportation

PART 23—PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS

Section Contents

Subpart A—General

§ 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 Program reviews.
§ 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 and Eligibility 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 goal for concessions other than car rentals?
§ 23.49 What is the base for a recipient's goal 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


Source:   70 FR 14508, Mar. 22, 2005, unless otherwise noted.

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 (PNW) does not include the following:

1. The individual's ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification; 2. The individual's equity in his or her primary place of residence; and 3. 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. The effectiveness of this paragraph (3) of this definition is suspended with respect to any application for ACDBE certification made or any financing or franchise agreement obtained after June 20, 2012.

*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 §23.33 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.
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, Kiribati, Tuvalu, 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 Program reviews.

In 2010, and thereafter at the discretion of the Secretary, the Department will initiate a review of the ACDBE program to determine what, if any, modifications should be made to this part.

[75 FR 16358, Apr. 1, 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 26.109) 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, express the official positions and views of the Department of Transportation or the Federal Aviation Administration.

(b) The Secretary of Transportation, Office of the Secretary of Transportation, and the FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or the FAA, 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 ACDBE 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 setting forth 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. This mechanism must include a written certification that you have reviewed records of all contracts, leases, joint venture agreements, or other concession-related agreements and monitored the work on-site at your airport for this purpose. The monitoring to which this paragraph refers may be conducted in conjunction with monitoring of concession performance for other purposes.

[77 FR 36931, June 20, 2012]

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 $56.42 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: $1 billion in assets;

(2) Car rental companies: $75.23 million average annual gross receipts over the firm’s three previous fiscal years, as adjusted by the Department for inflation every two years from April 3, 2009.

(3) Pay telephones: 1,500 employees;

(4) Automobile dealers: 350 employees.

(c) The Department adjusts the numbers in paragraphs (a) and (b)(2) of this section using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment. The Department publishes a Federal Register document informing the public of each adjustment.

[77 FR 36931, June 20, 2012]

§ 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 $1.32 million. 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.

[70 FR 14508, Mar. 22, 2005, as amended at 77 FR 36931, June 20, 2012]

§ 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 non-hub 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 no later than 90 days before issuing the solicitation for the new concession opportunity.

[70 FR 14508, Mar. 22, 2005, as amended at 77 FR 36931, June 20, 2012]

§ 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.
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”).

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.

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”).
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 the awards and commitments shown on your Uniform Report of ACDBE Participation (found in Appendix A to this Part) at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your ACDBE program in good faith:

1. Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;

2. Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year;

3. (i) If you are a CORE 30 airport or other airport designated by the FAA, you must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (b)(1) and (2) of this section to the FAA for approval. If the FAA approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

   (ii) As an airport not meeting the criteria of paragraph (b)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to the FAA, on request, for their review.

4. The FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.

5. You may be regarded as being in noncompliance with this part, and therefore subject to the remedies in §23.11 of this part and other applicable regulations, for failing to implement your ACDBE program in good faith if any of the following things occur:

   (i) You do not submit your analysis and corrective actions to FAA in a timely manner as required under paragraph (b)(3) of this section;

   (ii) FAA disapproves your analysis or corrective actions; or

   (iii) You do not fully implement:

      (A) The corrective actions to which you have committed, or

      (B) Conditions that FAA has imposed following review of your analysis and corrective actions.

(c) If information coming to the attention of FAA demonstrates that current trends make it unlikely that you, as an airport, will achieve ACDBE awards and commitments that would be necessary to
allow you to meet your overall goal at the end of the fiscal year, FAA may require you to make further good faith efforts, such as modifying your race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

[70 FR 14508, Mar. 22, 2005, as amended at 77 FR 36931, June 20, 2012]

§ 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.
Attachment 6

Community and Trade Organizations

The Airport Board’s ACDBE Plan, Overall Goals and Concession contract goals will be available on the Airport’s Website at: http://dfwairport.com/bdd/P1_047772.php. Concessionaires operating at the airport, ACDBEs certified by the TUCP and the following organizations will be notified of the availability of these documents.

National Retail Federation
325 7th Street N.W. Suite 1100
Washington, DC  20004

National Restaurant Association
2055 L Street NW
Washington, DC  20036

Airport Minority Advisory Council
2345 Crystal Drive Suite 902
Arlington, Va  22202
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.
Section 1 – General

1.0 What is the purpose of this Joint Venture Guidance?  
1.1 Why is Joint Venture Guidance necessary?  
1.2 What does 49 CFR Part 23 say about joint ventures as an option for ACDBE participation?

Section 2 – Definitions

2.1 What is a joint venture?  
2.2 What does an “association” of an ACDBE firm and one or more other firms mean?  
2.3 May a “single, for-profit business enterprise” have more than one contract or business location at an airport?  
2.4 What does “the parties combine their property, capital, efforts, skills and knowledge” mean?  
2.5 What does “the ACDBE is responsible for a distinct, clearly defined portion of the work of the contract” mean?  
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?

Section 3 – Joint Venture Review

3.1 What reviews should the airport make?  
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?  
3.3 Can the non-ACDBE joint venture participant loan capital to the ACDBE joint venture participant?  
3.4 How should profits and losses be calculated and divided?  
3.5 Are service and management fees acceptable?  
3.6 Can the ACDBE or joint venture purchase inventory, supplies, services, etc., from the non-ACDBE?
Section 4 – Counting ACDBE joint venture participation towards ACDBE goals

4.1 How is ACDBE participation in a joint venture counted towards ACDBE goals?  
4.2 How can the value of the ACDBE role be determined?  
4.3 What does “performs with its own forces” mean?  
4.4 What if the level of participation by the ACDBE changes?

Section 5 – Monitoring ACDBE participation in joint ventures

5.1 What is needed in terms of monitoring the joint venture?  
5.2 What is included in the airport’s agreement with the joint venture?  
5.3 What annual updates and changes are required?

Section 6 – Additional information

6.1 Can a joint venture be certified as an ACDBE?  
6.2 Does the ACDBE participant in a joint venture have to be certified in a specific type of work?  
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?  
6.4 Is the airport subject to enforcement of interpretations presented in this guidance for existing joint ventures? Is the guidance retroactive?  
6.5 What enforcement mechanisms are available to the Department in the event of noncompliance or misconduct?

Attachment 1 - Model ACDBE Joint Venture Information (Sample Form)  
Attachment 2 - Samples: Joint Venture -- ACDBE Portion of the Work  
Attachment 3 - Joint Venture Review Process (Flowchart)
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
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 ACDBE’s 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 ACDBE’s 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 a 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 ACDBEs 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 to 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.
Attachment 1

Model ACDBE Joint Venture Information
(to be submitted with joint venture agreement for review)

The Department recommends that airport sponsors request the following information from participants in prospective ACDBE joint ventures. The Department believes that this information will assist sponsors in evaluating joint venture proposals. The following form is a model that sponsors may wish to use in obtaining this information, but use of the model form is not mandatory.

********************************************************************************************
********
1. Name of Joint Venture:
2. Name, address and phone number of joint venture contact person:
3. Firms participating in joint venture (use additional pages if necessary):
   Name of firm:
   Address:
   Phone Number:
   Contact name/phone number:
   % ownership: %
   ACDBE: [square]yes [square]no Certifying agency:
   Date of Certification:
   Type of work for which certification was granted:
   Name of firm:
   Address:
   Phone Number:
   Contact name/phone number:
   % ownership: %
   ACDBE: [square]yes [square]no Certifying agency:
   Date of Certification:
   Type of work for which certification was granted:
4. ACDBE initial capital contribution: $ %
5. Future capital contributions (explain requirements):
6. Source of funds for the ACDBE capital contribution:
7. Describe the portion of the work or elements of the business controlled by the ACDBE:

8. Describe the portion of the work or elements of the business controlled by the non-ACDBE:

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.

<table>
<thead>
<tr>
<th>Non-ACDBE Firm</th>
<th>ACDBE Firm</th>
<th>Joint Venture</th>
</tr>
</thead>
<tbody>
<tr>
<td>Management</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Administrative</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Support</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hourly Employees</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
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.
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:

<table>
<thead>
<tr>
<th>Operations (1/3 of the business effort)</th>
<th>Product (1/3 of the business effort)</th>
<th>Administration/Corp Support (1/3 of the business effort)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Human Resources (Supervise on-site operations staff, hire/fire staff, scheduling, training, etc.)</td>
<td>Purchasing</td>
<td>Accounting/Payroll/ Taxes</td>
</tr>
<tr>
<td>Loss Prevention</td>
<td>Inventory Management</td>
<td>Legal Services</td>
</tr>
<tr>
<td>Safety/Security</td>
<td>Pricing</td>
<td>Business Development/Landlord Relations</td>
</tr>
<tr>
<td>Cash Management (check-out, banking)</td>
<td>Décor/Display</td>
<td>Human Resources/Training Programs</td>
</tr>
<tr>
<td>Day-to-Day Landlord Relations</td>
<td>Product Assortment (retail)/Menu Development (food)</td>
<td>Policies/Procedures</td>
</tr>
<tr>
<td>Maintenance/Cleaning</td>
<td>Negotiation of Special Programs, Rebates, Display Allowances, etc.</td>
<td>Other Corporate Support</td>
</tr>
<tr>
<td>Budgeting/Monitoring Performance</td>
<td>Budgeting/Monitoring Performance</td>
<td>Budgeting/Monitoring Performance</td>
</tr>
</tbody>
</table>

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.
**JV REVIEW PROCESS**

1. Receive JV agreement and JV Information Form for review
2. Verify ACDBE participant's certification status
3. Is ACDBE certified in appropriate trade?
   - Yes
     - Review agreement and other documentation
     - Identify claimed ACDBE ownership %
     - Review amount and source of capital contributions
     - Are capital contributions commensurate with ownership?
       - No
         - Do not approve for counting
       - Yes - Self-financed
         - In compliance
         - Send letter to JV partners notifying them that capital contributions must be proportionate to ownership interest
       - Yes - loan from non-ACDBE
         - not in compliance
         - Do not approve for counting
4. Review ACDBE participation in control of the joint venture business
5. Note: ACDBE must be certified as an ACDBE in the NAICS code for the trade to be operated by the JV (i.e., if operating a food/beverage trade, DBE must be certified as a food/beverage operator)

**Note:**
- Review source of contributions - If financed by non-ACDBE, review loan agreement for compliance with guidelines
- Send letter to JV partners notifying them that participation cannot be counted
- Note: Review participation on management committee, items requiring unanimous consent and control of assigned role
Is control by the ACDBE commensurate with ownership?  

Yes

Review ACDBE participation in management of the joint venture

No

Do not approve for counting

Note: Review overall and day-to-day management. Review restrictions, mgmt, fees, etc.

Send letter to JV partners notifying them of the issues and informing them that participation will not be counted given the current structure or requesting additional information

Does the ACDBE participate in the management (overall and day-to-day) commensurate with ownership?  

Yes

Review ACDBE participation in risks and profits of the joint venture

No

Do not approve for counting

Note: Review agreement for accounting methods, ensure no "guaranteed draw", no siphoning of profit

Send letter to JV partners notifying them of the issues and informing them that participation will not be counted in the current structure or requesting additional information

Is management by the ACDBE commensurate with ownership?  

Yes

Meets basic requirements

No

Do not approve for counting

Note: Review overall and day-to-day management. Review restrictions, mgmt, fees, etc.

Send letter to JV partners notifying them of the issues and informing them that participation will not be counted given the current structure or requesting additional information
Yes

Review ACDBE portion of the work

Does the work assigned to the ACDBE represent a distinct, clearly defined portion of the work?

No

Send letter to JV partners providing details of the issues/concerns and that participation cannot be counted in the current structure or requesting additional information

Yes

Review ACDBE roles assigned in accordance with JV Guidance

Approve for counting, assign ACDBE Credit

Send letter to JV partners notifying of participation to be counted and monitoring procedures