

Official FAQs on DBE Program Regulations (49 CFR 23)

The General Counsel of the Department of Transportation has reviewed these questions and answers and approved them as consistent with the language and intent of 49 CFR Part 23. These questions and answers therefore represent the institutional position of the Department of Transportation.

These questions and answers provide guidance and information for compliance with the provisions under 49 CFR part 23, pertaining to the implementation of the Department's disadvantaged business enterprise program. Like all guidance material, these questions and answers are not, in themselves, legally binding or mandatory, and do not constitute regulations. They are issued to provide an acceptable means, but not the only means, of compliance with Part 23. While these questions and answers are not mandatory, they are derived from extensive DOT, recipient, and contractor experience and input concerning the determination of compliance with Part 23.

Q&A

Additional guidance:

[FAA Guidance on Airport Concession Requirements](#)

[FY 2001 Concession Goals Under 49 CFR Part 23 - Attachment 1A](#)

[Additional Guidance on Airport Concessions](#)

[Overall Disadvantaged Business Enterprise Concession Goal](#)

Questions and Answers

Section 23.75

Question: Can recipients enter into long-term, exclusive agreements with concessionaires?

The purpose of this guidance on Long-Term, Exclusive (LTE) agreements for concessions is to provide information and direction to airport sponsors, ACDBE program staff, stakeholders, and all other interested parties on how to determine whether an agreement is considered a LTE agreement subject to the prohibition against such agreements in the ACDBE program rules.

[Long-Term, Exclusive \(LTE\) Guidance](#)

Section 23.31; 26.67(b)(2) - Personal Net Worth

Question: If the owner of a DBE or ACDBE certified firm or applicant firm has a personal net worth of less than \$1.32 million, does that necessarily mean that the recipient must regard the owner as being economically disadvantaged?

Answer: No. A person cannot be regarded as economically disadvantaged if he or she exceeds the \$1.32 million personal net worth (PNW) cap. However, there may be some cases in which an individual whose PNW is less than \$1.32 million may properly be regarded as not being economically disadvantaged.

- The legal and policy rationale behind the PNW provision of the rule is that a program designed to assist United States Department of Transportation Official FAQs on DBE Program Regulations (49 CFR 23) | Department of Transportation socially and economically disadvantaged individuals should not include people who can reasonably be regarded as having accumulated wealth too substantial to need the program's assistance.
- Consequently, in determining whether an individual is economically disadvantaged, a recipient is entitled to look not only at the individual's PNW but also at his or her overall economic situation to make a reasonable determination of whether the individual is fairly regarded as being economically disadvantaged.
- Consistent with Small Business Administration practice in the 8(a) program, it is appropriate for recipients to review the total fair market value of the individual's assets and determine if that level appears to be substantial and indicates an ability to accumulate substantial wealth.
- For example, an individual with very high assets and significant liabilities may, in accounting terms, have a PNW of less than \$1,320,000. However, the person's assets (e.g., a very expensive house, a yacht, extensive real or personal property holdings) may lead to a conclusion that he or she is not economically disadvantaged. The recipient can rebut the individual's presumption of economic disadvantage under these circumstances, as provided in sec. 26.67(b)(2).

This guidance applies to determinations of economic disadvantage under both 49 CFR Part 23 and 49 CFR Part 26.

Section 23.3 - Net Worth and the ACDBE Program (ARCHIVED)

Question: In the ACDBE program, what financial obligations may be counted toward the personal net worth exclusions for assets supporting business financing?

Answer: The definition of personal net worth (PNW) in the ACDBE regulation is the following: Personal net worth means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include the following:

- The individual's ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification;
- the individual's equity in his or her primary place of residence; and

- other assets that the individual can document are necessary to obtain financing or a franchise agreement for the initiation or expansion of his or her ACDBE firm (or have in fact been encumbered to support existing financing for the individual's ACDBE business), to a maximum of \$3 million [emphasis added].

An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Only assets supporting obligations for which the individual is currently liable, which are properly documented, and for which his or her personal assets are encumbered, should be counted toward this exclusion.

EXAMPLE 1: Smith has \$3 million line of credit from a bank to initiate an airport concession project for Firm X. His personal assets are pledged as security for the entire \$3 million line of credit. At the time the Firm X applies for certification as an ACDBE, Smith has drawn \$600,000 from the line of credit. Because his only obligation at the time of application is to repay the \$600,000 draw from the line of credit, the proper amount to be excluded from the PMW calculation for Smith is \$600,000.

EXAMPLE 2: Two years ago, Jones got a \$2 million loan to expand his airport concession business. His personal assets were pledged as security for the loan. Firm Y applied for ACDBE certification at the same time as Jones received his loan, and the \$2 million was properly excluded from his PNW certification. By today, however, Jones has paid off \$1.2 million of the loan. Only \$800,000 is now properly excluded from today's PNW calculation, if proper documentation is provided. (Annual affidavits should reflect the current balance remaining to be paid on the loan, not the original amount of the loan.)

EXAMPLE 3: Brown received a loan from a bank for \$1.5 million in connection with starting a concession. At the time her firm applies for certification, however, the assets securing the loan appear to be those of a concession corporation, as distinct from her own personal assets. The \$1.5 million is not properly excluded from Brown's PNW calculation.

The initiation or expansion of a concession concerning which an owner seeks this exclusion should be real and present rather than a possibility that is speculative or well into the future. For example, assets supporting a loan or line of credit obtained today for a projected expansion of a concession three years from now would not be a reasonable basis for excluding the assets from today's PNW calculation.

Assets eligible for this exclusion from the PNW calculation are properly excluded from an owner's PNW calculation regardless of the location of concession for which the financing in question was arranged.

EXAMPLE 1: Williams got a loan of \$1 million from Bank X to start a concession business at Airport 1. Her personal assets were pledged as security for the loan. Airport 1 properly excluded \$1 million when it calculated Williams' PNW. Now Williams is starting Firm B at Airport 2. When Firm B applies to Airport 2 for ACDBE certification, \$500,000 remains to be paid off on the loan to Bank X. Airport 2 should exclude \$500,000 in calculating Williams' PNW, assuming proper documentation is provided.

EXAMPLE 2: Williams also got a \$1.3 million loan from Bank Y to help finance the concession at Airport 2. Her personal assets, above and beyond those pledged as security for the \$1 million loan from Bank X, are pledged as security for the loan from Bank Y. Airport 2 would properly exclude \$1.3 million in calculating Williams' PNW, in addition to the \$500,000 excluded in Example 1, for a total of \$1.8 million. The total assets excluded under this provision of the rule could never exceed \$3 million.

Since an ACDBE applicant bears the burden of demonstrating its eligibility, it is reasonable for recipients to request all supporting documentation for each financial obligation claimed by the applicant, including loan agreements, supporting lien and/or letter of credit documents, and specification of the assets used to secure a loan or line of credit.

Recipients should pay particular attention to the terms of a financial obligation, determine the extent to which the individual owner, as distinct from a corporation or other party, is obligated to repay, or is repaying, the obligation. The recipient should make appropriate inquiries into whether there are any additional borrowers or other factors that may affect the size or duration of the individual owner's debt.

NOTE: The guidance in this Q & A applies only to 49 CFR Part 23. It does not apply to 49 CFR Part 26.

Question: May a recipient or UCP require a firm certified as a DBE under Part 26 to complete an entire new application to be certified as an ACDBE under part 23? (Section 23.37) (12/9/2011)

Answer: No. Section 23.37 provides that as a recipient or UCP, you are required to presume that a firm certified in your State as a DBE under Part 26 meets size, disadvantage, ownership, and control requirements for certification as an ACDBE under Part 23.

- A recipient or UCP must check to make sure a Part 23 applicant meets the Part 23 PNW cap.
- There is only one additional determination that you need to make in order to certify such a firm as an ACDBE: whether the disadvantaged owners of the Part 26-certified

firm can control the activities of the firm with respect to its participation in the ACDBE program.

- You are not required to certify a DBE firm as an ACDBE if the firm does not do work relevant to the airport concessions program (e.g., operating a concession or providing goods and services to concessions).
- In summary, when you receive an ACDBE application that has a current Part 26 DBE certification in your State, you should only seek information on two subjects: the firm owner's PNW and the disadvantaged owner's ability to control the firm with respect to airport concession activities. You may not require the firm to file a complete new application.

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WHAT ARE THE GOOD FAITH EFFORTS OBLIGATIONS OF CAR RENTAL COMPANIES TO MEET ACDBE GOALS AT AN AIRPORT?

- Airport recipients are required to establish an annual overall ACDBE goal for car rental concession opportunities pursuant to 49 C.F.R. § 23.41(a) (2016).
- Once the overall ACDBE goal for car rental concession operations is established, individual goals are set by the airport for each car rental company operating at the airport.
- By statute (49 U.S.C. § 47107(e) (2014)), a car rental company must make a good faith effort to meet its ACDBE goal by exploring all options available to meet the goal to the maximum extent possible. The variety of options include the purchase of goods and services from ACDBE vendors. This, in turn, includes, but is not limited to, the purchase or lease of vehicles from an ACDBE vendor, vehicle repair services provided by ACDBEs, janitorial services, insurance, and management fees or commissions earned by ACDBEs.
- Under the statute cited above, a car rental company cannot be required to change its corporate structure to provide for direct ownership arrangements with ACDBEs to meet its ACDBE goal. However, a car rental company may choose to meet all or some portion of its goal through direct ownership arrangements with ACDBEs to comply with its good faith efforts obligation. In other words, a car rental company may engage in joint ventures, franchises, or subleases with an ACDBE to meet its ACDBE goal but cannot be

required to do so.

- The ACDBE program regulation at 49 C.F.R. § 23.25(f) (2016) is intended to implement the statutory good faith efforts obligation. It states that: “[Recipients’] 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.
- As explained by the Department in the preamble to the final rule adopting section 23.25(f): “Both in the statute and in paragraph (f), this requirement operates in the context of the ability of airport businesses to meet ACDBE goals through the purchase of goods and services from ACDBE vendors. While meeting goals through the purchase of goods and services is authorized, it is important for ACDBE goals to encourage the participation of ACDBEs in a variety of ways. It is a healthier situation for ACDBE programs, for example, if ACDBE participation [at] a business or airport comes not only through goods and services purchases but also through concessions run by ACDBEs.” This speaks to encouraging the participation of car rental concessions owned and operated by ACDBEs in addition to the purchase of goods and services from ACDBEs. See 70 Fed. Reg. 14496 (March 22, 2005).
- The parenthetical language in 49 C.F.R. § 23.25(f) (2016) does not excuse car rental companies from the general obligation imposed on businesses subject to ACDBE goals to make good faith efforts to meet the goal. The parenthetical “except car rental companies” is intended only to implement the statutory limitation in 49 U.S.C. § 47107(e)(4) (2014) against requiring car rental companies to change their corporate structure to include direct ownership arrangements as a means of meeting ACDBE goals. See *id.*
- Airports are expected to rigorously review the quality, quantity and intensity of the good faith efforts made by the car rental companies to meet their ACDBE goal on a regular basis to ensure compliance. Airports should review 49 C.F.R. Part 26, Appendix A “Guidance Concerning Good Faith Efforts” that is made applicable to concession specific goals pursuant to 49 C.F.R. § 23.25(e) (2016). Many of the efforts described in Section IV of Appendix A would also apply to car rental companies. A failure by the car rental company to demonstrate sufficient good faith efforts may result in a finding of non-compliance with ACDBE program requirements and must be enforced by the airport. Failure by the airport to do so may result in a finding of non-compliance against the airport.

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Section 26.21(b)(2); 26.43; 26.51(b)

What actions should a recipient take before implementing a small business program on federally assisted projects as a race- and gender-neutral means of facilitating DBE participation in meeting the recipient's overall goal? (Posted - 7/15/09)

Recipients are obligated to meet the maximum feasible portion of their overall goal through race- and gender-neutral means of facilitating DBE participation. See 49 CFR § 26.51.

Since the program was substantially revised in 1999, the Department has long recognized that race- and gender-neutral small business set aside programs may be an acceptable means of achieving the objective of § 26.51 without running afoul of the prohibition in § 26.43 against the use of set-asides or quotas. See related Q&A entitled "Does the rule's limitation on the use of set-asides apply to race-neutral small business set-asides?" "A small business goals program is another example of a race- and gender-neutral program that may provide opportunities for DBEs and non-DBEs to fairly compete for federally assisted contracts.

If a recipient intends to implement a small business program as one means of achieving its annual overall DBE goal, the recipient must, pursuant to 49 CFR § 26.21(b)(2), submit to the appropriate operating administration for prior approval an amendment to its DBE program plan to identify the program as an initiative implemented to provide contracting opportunities to DBEs and other small businesses.

In amending the DBE program plan, the small business program does not replace the DBE program or otherwise operate as a substitute for the DBE program. It is simply another race- and gender-neutral tool that may offer additional contracting opportunities to DBEs. Recipients are not required to develop such a program.

When a recipient uses a small business program to achieve DBE participation, it may count only the participation of small businesses that are certified under 49 CFR Part 26 toward its annual overall DBE goal. Race- and gender-neutral DBE participation obtained through the small business program must be calculated by dividing the total dollars to DBEs through the small business program by the total federal dollars. Race- and gender-neutral DBE participation is not calculated as a percentage of the total small business program.

As required by 49 CFR § 26.51(d), a recipient is expected to establish DBE contract goals to meet any portion of the annual overall goal it is unable to meet through the small business program or other race-neutral measures. A proposed DBE program plan amendment should, at a minimum, contain the following elements:

1. a detailed description of the small business program, its objectives, and how it is designed to operate (e.g., firm eligibility/size criteria and means of ensuring eligibility of participating firms);
2. assurance that the program is authorized under state law;

3. assurance that certified DBEs that meet the size criteria established under the program are presumptively eligible to participate in the program;
4. assurance that there are no geographic preferences or limitations imposed on any federally assisted procurement included in the program;
5. assurance that there are no limits on the number of contracts awarded to firms participating in the program but that every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses; and
6. assurance that aggressive steps will be taken to encourage those minority and women owned firms that are eligible for DBE certification to become certified.
7. assurance that the program is open to small businesses regardless of their location (i.e., that there is no local or other geographic preference).

As a condition of approval, operating administrations may, in consultation with the recipient, limit the size and type of federally assisted contracts that participate in the small business program to ensure effective competition based on the availability of small businesses in the particular industry or work code.

The operating administration may not approve the small business program if it conflicts with other relevant federal requirements, and it may rescind its approval if it determines that the program is being implemented in a way that creates a de facto DBE set aside in violation of § 26.43.

Implementation of the small business program is subject to periodic review by the operating administration of its effectiveness in helping the recipient meet its annual overall DBE goal. Approval may be rescinded if the program is ineffective.

The following questions and answers relate to implementation of Section 26.39 Fostering Small Business Participation (12/6/2011)

- 1. What are recipients required to submit to the concerned operating administration (OA) to comply with 49 CFR § 26.39?**
 - Recipients must submit to the appropriate OA an amendment to their DBE program plan that sets forth in detail the steps to be taken to facilitate competition by small business concerns.
 - The concerned OA will provide instructions to recipients on whether the amendment should be submitted for review as a stand-alone document or whether it should be incorporated into the recipient's existing DBE program plans. If the amendment is submitted for review as a stand-alone document, it must be integrated into the body of the recipient's DBE program plan document once approved.
 - There is no requirement that the DBE plan amendment be signed by all recipients in the

state.

- Recipients must submit the program amendment to the concerned OA by February 28, 2012.

2. By what date must the small business element be implemented?

- The implementation date should be established by the OA when it approves the small business element submitted by the recipient. This date should not be more than nine months after the approval date.
- Recipients are encouraged to include an implementation schedule as part of their submission to ensure the small business element is fully operational within nine months of approval.

3. Must the recipient address each of the strategies presented as examples in the rule as part of its submission?

- list, and you are not expected to explain why one strategy was chosen No. The list of strategies set out in the rule is designed to give you some ideas on how to accomplish the objectives of the rule. Additional suggestions may be found in the preamble discussion of the rule at 76 Fed. Reg. 5094. This is not an exclusive instead of others.
- Recipients may choose one or more of the listed strategies or may develop any alternative strategy that can be effective in creating contracting opportunities for small businesses.
- Recipients (particularly FTA and FAA recipients) also may collaborate with regional partners by pooling resources and/or creating joint programs, but each recipient in the collaborative must make a submission to the appropriate OA.
- In any case, we believe it to be advisable that your submission address unbundling contracts in the context of your procurement program, even if unbundling is not ultimately a strategy you choose.
- A recipient that has an existing race-neutral small business program that has been used to set aside state-funded contracts for competition among small businesses may decide to use that program for federally-assisted contracts to meet this requirement, subject to OA approval. However, the recipient is not required to do so. If an existing small business program is used to comply with the rule, recipients must take steps to separate state and federal contracts to ensure proper reporting to US DOT of DBE participation on federally-assisted contracts only.

4. How should recipients define a small business when developing a small business

program to foster small business participation?

- Since the small business element developed by a recipient will be a part of the recipient's approved DBE program plan, recipients should use the definition of small business concerns set out in 49 CFR §26.5.
- This will ensure that all small businesses allowed to participate in the recipient's program (DBEs and non-DBEs alike) are subject to the same size standards and, consequently, compete with similarly-sized businesses.
- A state or local MBE/WBE or other program, in which eligibility requires satisfaction of race/gender or other criteria in addition to business size, may not be used to comply with the rule.

5. Should a personal net worth (PNW) requirement be a part of any small business program used to comply with this requirement?

- A recipient has the option of establishing a PNW threshold as an eligibility criterion for its small business program element. Except in a micro-small business program (where a PNW threshold could be lower), if a recipient chooses to establish such a requirement as part of its program, the PNW threshold should be consistent with the one in 49 CFR Part 26.

6. Could a micro-small business program be an appropriate part of a small business element in a DBE program?

- Yes. A recipient may develop a program for very small businesses (e.g., those with annual gross receipts well below the SBA small business size criteria). As part of such a program, a recipient could also have a lower PNW threshold for owners of the very small businesses.
- Where a recipient creates a micro-small business program, we believe it is a best practice to also provide opportunities to facilitate competition among small businesses that are larger than those eligible to participate in the micro-small business program.

7. Are small business goals required?

- No. The use of small business goals is optional.
- The use of race-neutral small business goals on the same contracts that have DBE contract goals can be difficult to administer. We recommend that recipients not do so unless they have a clear understanding of these complexities and how they expect to manage them.

8. Can supportive services programs be used to meet the requirements of section

26.39?

- The FHWA-funded “supportive service program” is intended to be used only to assist DBEs. Recipients should not include services to non-DBEs as part of that program.
- However, a state- or locally-funded supportive services-type program could be made available to non-DBE firms as a part of the recipient’s small business program element.
- Outreach activities are not sufficient, standing alone, to meet the requirements of section 26.39. Recipients are responsible for taking active, effective steps to increase small business participation.

9. Should a small business program include a verification requirement? If so, may a recipient rely upon or accept the verification process used by another entity?

- Yes, to both questions.
- To ensure that a firm is in fact a small business concern and to minimize fraud and abuse, it is advisable for a recipient to take steps to verify eligibility of a firm to participate in the recipient’s program. This means that a program should not allow firms to self-certify/verify as small businesses.
- A recipient may rely on the certification/verification processes used by another entity as long as the process is designed to confirm eligibility consistent with small business criteria consistent with those of Part 26. A certified DBE is presumed eligible to participate in a small business program developed to comply with 49 CFR §26.39, unless it is a micro-small business program.
- While it is not necessary for a recipient to verify the small business status of every firm that might in some way benefit from the recipient’s program, if participation will result in a tangible advantage for a firm (e.g., getting a contract via a small business set-aside program), verification is important to avoid program fraud.

10. Are recipients expected to report on the level of small business participation achieved through their program?

- No. Recipients will be required only to track and report any race-neutral participation by certified DBEs achieved through their small business element or program in the same way they report race-neutral DBE participation obtained through other methods (see by 49 CFR §26.11(a)).
- Nevertheless, recipients may find it useful to collect data on small business participation obtained through their program, in order to answer any future questions that could arise

about the results of their programs.

11. How is the small business program element requirement to be applied to sub-recipients?

- The required small business program amendment is part of your overall DBE program. Therefore, it applies to sub-recipients in the same way as your overall DBE program.
- Just as direct recipients are expected to ensure that their sub-recipients comply with goal-setting or certification requirements, so direct recipients are expected to ensure that sub-recipients implement the recipient's approved small business element made a part of the recipient's DBE program plan.
- In any case where a sub-recipient has its own DBE program, separate from that of a direct recipient, the sub-recipient is responsible for creating its own small business program and submitting it to the concerned operating administration for approval.

12. How does this Q&A relate to guidance posted July 15, 2009, titled "What actions should a recipient take before implementing a small business program on federally assisted projects as a race- and gender-neutral means of facilitating DBE participation in meeting the recipient's overall goal?"

- This guidance should be read in concert with the July 2009 Q&A.
- In establishing a race-neutral small business set-aside as a measure under the small business program element required by section 26.39, you should follow the guidance in the July 2009 Q&A.
- It is important to note that implementing a small business element or program is intended to facilitate compliance with the twin obligations in 49 CFR §26.51: (1) to meet the maximum feasible portion of the overall goal by using race-neutral means of obtaining DBE participation and (2) to establish DBE contract goals to meet any portion of the overall goal you are unable to meet using race-neutral means alone.

13. The DBE rule appears to prohibit set-asides. How, then, is it permitted to have small business set-asides as part of the small business program element?

- Section 26.43 generally prohibits the use of set-asides for DBEs. This means that limiting competition on a contract to DBEs – a category based on race- or gender-based classifications – is forbidden. It is the race-conscious nature of a DBE set-aside that necessitates this prohibition.
- A small business set-aside is different. In this case, competition is limited only on the basis of business size. This is a race-neutral, rather than race-conscious, classification. Consequently, a small business set-aside does not fall under the prohibition applying to DBE set-asides.

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How do recipients count Airport Concessions Disadvantaged Business Enterprise (ACDBE) participation that involves the sale of advertising displays or messages to the public on the airport? (undated)

- The primary function of an advertising concession is selling advertising displays or messages at an airport pursuant to a written agreement with the airport owner, with another concessionaire, or with the owner or lessor of a terminal (if other than the recipient).
- An ACDBE engaged in providing advertising services may have an agreement with the recipient as a prime concessionaire (i.e., the owner of the concession) working with or without a joint venture partner. An ACDBE also may provide services as a contractor to the concessionaire.
- To determine how to count ACDBE participation in a transaction involving advertising goods or services, a recipient must determine in what capacity the ACDBE is performing (e.g., prime concessionaire, joint venture partner, sub-concessionaire, lessee, supplier or contractor) and the manner in which the ACDBE is compensated (e.g., gross receipts earned versus fees or commission for services provided).
- If the ACDBE is a prime concessionaire, the ACDBE's participation is counted based on the gross receipts earned by the ACDBE as provided at 49 C.F.R. §23.55(b).
- If the ACDBE is a subcontractor or sub-concessionaire to a non-ACDBE and the ACDBE's compensation under the agreement is based on gross receipts earned by the ACDBE, those earnings should be counted pursuant to 49 C.F.R. §23.55(c).
- If the ACDBE's compensation is solely based on fees and commissions, the ACDBE's participation for a bona fide service is counted based on the fees and commissions paid as provided at 49 C.F.R. § 23.55(e).
- **EXAMPLE 1:** Firm A (a certified ACDBE) is awarded the airport's advertising concession. Firm A sells \$2,000,000 in advertising to various clients. The entire
- \$2,000,000 of the sales generated by Firm A should be counted as ACDBE participation, assuming the work is actually performed by the ACDBE with its own forces. In this example, the ACDBE participation on the contract would be counted as race-neutral participation since Firm A obtained the contract through customary competitive procurement procedures.
- In the case of a joint venture, recipients must first determine that the ACDBE joint venture partner is in fact functioning in a manner consistent with the ACDBE Joint Venture Guidance. By definition the ACDBE in a joint venture must be responsible for a distinct, clearly defined portion of the work of the contract and must share in the capital contribution,

control, management, risks, and profits of the joint venture commensurate with the ACDBE's ownership interest. See 49 C.F.R. §23.3.

- If the ACDBE firm is participating as a direct owner of the advertising concession through a joint venture arrangement, partnership, sublease, licensee, franchise, or other arrangement in which the ACDBE owns or controls all or some part of the concession and consequently shares in the profits and risks of the concession, the recipient counts the total value of gross receipts the ACDBE earns pursuant to the concession agreement as provided at 49 C.F.R. §23.55(b) – (d).
- **EXAMPLE 2:** Firm B is not a certified ACDBE. Firm B enters into a joint venture with Firm A (a certified ACDBE) and the ownership percentage of the ACDBE in the joint venture is 10%. The joint venture is awarded the advertising concession for the airport. The joint venture is expected to generate \$100,000,000 in sales over a five year term of the concession agreement. The airport confirms that the ACDBE capital contribution, control, management, risks, and profits are commensurate with its ownership interest of 10% in accordance with the Joint Venture Guidance. In this example, 10% of the gross receipts generated by the joint venture should be counted as ACDBE participation.
- **EXAMPLE 3:** Firm C, not a certified ACDBE, enters into a sublicense agreement with Firm A, the certified ACDBE. The agreement grants a specific number of locations to Firm A on an exclusive basis for the sale of advertising. Firm A makes a significant investment for the specified locations and is responsible for the entire administration of the locations. The entire sales generated by Firm A should be counted as ACDBE participation.
- If the ACDBE firm is a service contractor to the concessionaire and is compensated based on fees or a commission, the recipient counts the fees or commissions charged by the ACDBE that are reasonable and not excessive as compared with fees customarily allowed for similar services.
- **EXAMPLE 4:** Firm C in example 3 enters into a sublicense agreement with Firm A, the ACDBE. The agreement grants a specific number of locations to Firm A on an exclusive basis for the sale of advertising. Firm A does not make an investment for the specified locations and is not responsible for the overall administration of the locations. Firm C pays Firm A a commission based on its sales. Firm A's sole function is to sell ads and has little to no other responsibility. Count only the fees or commission paid to Firm A for the services it provides.
- **EXAMPLE 5:** Firm C in example 3 enters into a contract with Firm A, the ACDBE. Firm A's sole function is to sell ads, for which it is compensated based on commission and fees earned. Count only the fees or commissions paid by Firm C for the service it received. If the ACDBE provides a bona fide service other than selling advertising, count the entire amount of fees charged by the ACDBE as provided at 49 C.F.R. §23.55(e). In the case where the ACDBE is a supplier of goods count the cost of goods supplied by the ACDBE firm as provided at 49 C.F.R. §23.55(g) – (h). This should not be confused with costs or goods incurred in connection with renovation, repairs, or a construction concession commonly referred to as "build-out" costs. See 49 C.F.R. §23.55 (k).

- **EXAMPLE 6:** Firm C, in example 3, enters into a service contract with Firm A, the ACDBE. Firm A agrees to provide services such as maintenance, electrical work, and other service associated with the contract. Firm C pays Firm A a fee for the services rendered. Count only the fees paid to Firm A for the service it provides.
- **EXAMPLE 7:** Firm C, in example 3, purchased a good (i.e., advertising displays) from Firm A, the ACDBE. In order to calculate the ACDBE participation amount you will need to determine if Firm A is a manufacturer, a regular dealer, or neither of the two and count the participation according to 23.55 (f) – (h).

FAA Guidance on Airport Concession Requirements

Background

Regulations of the U.S. Department of Transportation (DOT) require primary airports to implement and annually update a disadvantage business enterprise (DBE) concession plan (49 CFR Part 23, Subpart F, Section 23.93(b)(2)). Set forth below is guidance on updating your plan for Fiscal Year (FY) 02.

Each primary airport should submit the information in items 1 through 4 to the FAA Regional Civil Rights Office by February 1, 2002.

Required Reports

1. Accomplishment report. This report is authorized by 49 CFR Section 23.95(d) and should be submitted in the format of Appendix 4 to the Federal Aviation Administration's (FAA) "Sample DBE Concession Plan." Guidance to assist recipients in completing the report is found on page 7 of the "Sample DBE Concession Plan."

It refers to recipients who calculated goals as a percentage of the gross receipts from all concessions. Indicate the actual DBE participation achieved during the period October 1, 2000, through September 30, 2001, by making the calculation shown on the bottom of Appendix 4.

If your previous year overall goal was calculated as a percentage of the number of concession agreements, rather than as a percentage of gross receipts, please refer to Page 7 of the "Sample DBE Concession Plan" on how to determine actual DBE participation. In either case, the report should reflect businesses operating as concessionaires only.

2. Report of certified DBE concessionaires counted toward the goals (Attachment 2). Each recipient should complete this report in accordance with the instructions provided.

3. Explanation. If applicable, attach an explanation why the previous year goal was not met.

4. FY-01 overall DBE goal.

(a) Due to the pending changes to the DBE rule, FAA is not establishing a multi-year concession plan at this time. As with FY-01, we are requesting that recipients submit an overall goal for one year only. It should cover FY-02 (October 1, 2001 through September 30, 2002) and be submitted by February 1. Do not submit goals for years beyond that date. If a recipient previously received approval to calculate overall goals as a percentage of the number of concession agreements, the same procedure may be used for the FY-02 goal. A rationale as specified in 49 CFR Section 23.99 need not be resubmitted. Only businesses meeting the definition of "concession" in Subpart F, 49 CFR Part 23, are included in the overall goal calculation. Do not include management contracts or subcontracts

with DBEs, or the purchases or leases of goods or services from off-airport DBEs in the overall goal.

(b) DOT and FAA have advised airports that in order to operate a concession program that meets current constitutional standards, the goal-setting process must be narrowly tailored. As such, the goals must reflect the relative availability of ready, willing, and able DBEs. The overall goal-setting process of 49 CFR Part 26, to which Section 23.95 refers, has sufficient flexibility to cover situations in which procurements are made on a national, as well as on a local, basis. Additional guidance on setting overall goals is included in Attachment 1A. It is identical to the guidance we provided for developing the FY-01 goal and supersedes the guidelines in the FAA's "Sample DBE Concession Plan" (July 1992).

(c) The FAA has determined that recipients are not required to provide for public participation, as specified in 49 CFR Section 26.45(g), in setting their overall FY-02 concession goal.

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FY 2001 Concession Goals Under 49 CFR Part 23 - Attachment 1A

1. Background.

Department of Transportation regulations require that overall concession goals be calculated consistent with the process in Section 26.45 for setting goals under DOT-assisted projects (49 CFR Section 23.95(a)). The FAA offers the following approach as one way to apply Section 26.45 to setting the airport's overall FY-02 concession goal. Other methods can be used, subject to approval of the FAA.

2. One approach to setting goals.

- a) This guidance considers a recipient who expresses its overall goal as a percentage of gross receipts to be earned by all concessionaires (Section 23.95(a)(2)(i)), rather than as a percentage of the total number of concession agreements operating at the airport during the goal period (Section 23.95(a)(2)(ii)).

| |
|--|
| $\text{Overall DBE Goal} = \frac{\text{Estimated Gross Receipts from DBEs (\$)}}{\text{Estimated Gross Receipts from All Concessions (\$)}}$ |
|--|

- b) Except for those concession agreements referenced in Paragraph c, include in the numerator and denominator, as appropriate, gross receipts to be earned by existing DBEs and/or non-DBEs that will participate in the concession agreements.
- c) Consistent with the two-step process outlined in 49 CFR Section 26.45, determine the relative availability of DBEs ready, willing, and able to perform work for each "concession opportunity" that will occur during the goal period. A "concession opportunity" includes any of the following actions by a recipient—
- (1) awarding a new concession agreement;
 - (2) exercising an option to renew an existing agreement; or
 - (3) making a material amendment to an existing agreement.
- d) Under "Step 1" of the two-step process (Section 26.45(c)), use available sources of data or information to determine the base figure. (See Paragraph e.) A combination of sources can also be used. Recipients are not restricted to the methods listed in Section 26.45(c). Moreover, the FAA's own review indicates that the industrial classifications in the Census Bureau's County Business Pattern data base, referenced in 26.45(c)(1), in some instances do not correspond to the types of businesses operated as concessions and thus, may not provide adequate data. A recipient can also employ a different method for each "concession opportunity" if the method best suits a given procurement. Any methodology chosen must be based on demonstrable evidence of market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in the recipient's market.

- e) Sources of data that the recipient may consider using in determining a base figure include, but are not limited to the following--

- (1) DBE directories.
- (2) Lists of bidders, proposers, or other firms who previously competed for a concession contract.
- (3) Firms who previously expressed interest in operating a concession, e.g., attendees at pre-solicitation conferences, firms who purchased Request for Proposal documents, etc.
- (4) Information on DBEs and non-DBEs currently performing the same or a similar type of concession at the recipient's airport or other airports in the recipient's market area.
- (5) Any pertinent data maintained by FAA regional offices.
- (6) Data derived from a valid, applicable disparity study.

- f) Make appropriate adjustments to the base figure using an approach consistent with "Step 2" as outlined in 49 CFR Section 26.45(d).

- g) After determining the relative availability of DBEs for a concession opportunity, multiply the percentage figure by the total projected gross receipts from the concession. The resulting figure represents estimated DBE participation and is added to the numerator, while the total estimated gross receipts from the concession is added to the denominator.

3. Example applying the approach.

- a) Figure 1 lists concession agreements to be operated at a hypothetical primary airport during FY-02. The first seven agreements shown will carry over from previous years, and none will be materially amended or renewed during FY-02. As such, none represents a "concession opportunity." The projected gross receipts for the DBE and non-DBE participants are included in the numerator and denominator, as applicable, as shown in Figure 2.
- b) Each of the last four agreements listed in Figure 1 offers a concession opportunity--three new ones will be awarded, while the term of the lease with "The News Shop" (a non-DBE) will be extended 5 years. Consistent with the two-step process outlined in 49 CFR Section 26.45(b) through (d), the recipient determines the relative availability of DBEs for each of these opportunities.

- (1) The recipient determines that the relative availability of DBEs to operate the new bookstore is 14%. Thus, \$50,700 (14% of \$362,000) represents projected DBE gross receipts and is included in the numerator, while the total receipts (\$362,000) are added to the denominator (Figure 2).
- (2) As a condition of extending The News Shop's lease for 5 additional years, the airport imposes a requirement on this firm to make good faith efforts to sublease one of its locations in the midfield terminal to a DBE. The sublease is expected to generate approximately \$90,000 in revenues. The recipient determines that the

relative availability of DBEs to perform the work of the concession is 16.2%. Projected DBE participation in this instance is $16.2\% \times \$90,000$ or \$14,600. Thus, \$14,600 is added to the numerator, while total estimated gross receipts (\$882,000) is included in the denominator (Figure 2).

(3) The recipient determines that the relative availability of DBE firms in its market area (in this case, the entire country) that provide baggage cart services is zero. Following a review of information consistent with the two-step process, the recipient determines that the only firm that provides such services is a non-DBE. Consequently, none of the projected gross receipts from this concession are added to the numerator, while the total (\$119,000) is included in the denominator (Figure 2).

(4) A food court consisting of 4 businesses begins operation during FY-01. The relative availability of DBE food/beverage operators is determined by the recipient to be 18 percent. Projected DBE gross receipts is calculated to be \$264,800 ($18\% \times \$1,471,000$ total), and the appropriate figures are added to the numerator and denominator (Figure 2).

4. Setting Contract goals.

- a. Contract goals are authorized by 49 CFR Section 23.103(a), but the rule does not require that one be set for each concession.
- b. The relative availability percentage for each concession opportunity, as described above, is the appropriate figure to use as the contract goal. For example, a contract goal for the Bookstore would be 14%.
- c. DOT/FAA recommends that recipients implement race-neutral mechanisms, whenever possible, if doing so will result in achieving the overall goal.
- d. Imposing a contract goal on a car rental is subject to the provisions of 49 U.S.C. Section 47107(e)(4)(C), which states:

"This subsection does not require a car rental firm to change its corporate structure to provide for a direct ownership arrangement to meet the requirements of this subsection."

Direct ownership arrangements include joint ventures, franchises, and subleases. The FAA has advised recipients that the above provision is in effect.

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Additional Guidance on Airport Concessions

Under 49 CFR Part 26, a DOT recipient is not authorized to require submission of a statement of personal net worth (PNW) from a firm seeking to participate in the DBE program only as a concessionaire. On June 28, 1999, DOT published a "Final rule; correction" to Part 26 in the Federal Register (64 F.R. 34569). The amendment specifies that the disadvantaged owners of airport concessionaires are not required to submit PNW statements. In the preamble, DOT clarified that the PNW cap in 49 CFR Section 26.67, which is applicable to DOT-assisted contractors, does not apply to concessionaires.

A supplemental Notice of Proposed Rulemaking (SNPRM) published September 8, 2000, proposed establishing a PNW cap for the airport concession program (65 F.R. 54454). The comments submitted to the proposal are currently under review by DOT. A final rule has not been issued. FAA will notify recipients upon publication of a final rule establishing a PNW cap for the concessionaires. Until such time as that occurs, recipients must refrain from requesting PNW information from the disadvantaged owner of a concession, unless the firm also applies for certification as a DOT-assisted contractor.

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| Figure 1 - Overall DBE Concession Goal | | | | | |
|--|-----------------------------|---------------------------------|-------------------------------------|--------------------------|---------------------------|
| Goal Period: From <u>10/1/01</u> Through <u>9/30/02</u> | | | | | |
| <u>Name of Concessionaire</u> | <u>Business Type</u> | <u>Estimated Gross Receipts</u> | <u>Estimated DBE Gross Receipts</u> | <u>Date Lease Begins</u> | <u>Date Lease Expires</u> |
| First Dominion | ATM/Money Exchange | 7.0 * | | 1/1/97 | 12/31/02 |
| Indian Crafters | Gift Shop | 167.0 | 167.0 | 1/1/97 | 12/31/02 |
| Telephonic | Local Pay Telephone | 265.0 | | 5/1/98 | 4/30/02 |
| Vendomatic | Vending | 225.0 | | 1/1/98 | 12/31/03 |
| Pizzeria | Italian Food | 875.0 | 105.0 ** | 1/1/99 | 12/31/04 |
| Fun Company | Game Room | 82.0 | | 6/1/99 | 5/31/03 |
| Town Rental | Car Rental | 1269.0 | | 6/1/99 | 5/31/03 |
| New Agreement | Bookstore | 362.0 | 50.7 | 1/1/01 | 12/30/06 |
| The News Shop | News/Retail | 882.0 | 14.6 | 2/1/01 | 1/31/06 |
| New Agreement | Baggage Carts | 119.0 | | 2/1/01 | 1/31/06 |
| New Agreement | Food Court (4 locations) | 1471.0 | 264.8 | 3/1/01 | 2/28/06 |
| Total | | \$ 5,724.0 | 602.1 | | |
| * Net payment to the airport. | | | | | |
| ** DBE is a 12% joint venture partner. | | | | | |
| Overall DBE Goal = $\frac{\$ 602.1}{\$5,724.0} = 10.5\%$ | | | | | |
| Note: Gross receipts in thousands (000's). | | | | | |

Overall Disadvantaged Business Enterprise Concession Goal

Overall Disadvantaged Business Enterprise Concession Goal Period: From 10/1/01 through 9/30/02

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