

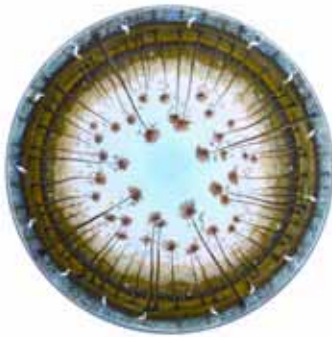


DALLAS/FORT WORTH
INTERNATIONAL AIRPORT

Minority/Women Business Enterprise (M/WBE) Policy and Procedures Manual

Business Diversity & Development Department

DFW International Airport will provide Customers outstanding facilities and services, expanding global access and economic benefits to those we serve.



Art Program

The centerpieces of DFW's multimillion dollar Public Art Program are International Terminal D and the Skylink train stations. More than 30 local, national and international artists were selected to design the works that are featured throughout the terminal and Skylink stations. Featured on the front cover are terrazzo floor medallions designed by minority and women artists.

Top Row, Left to Right:

Cypress Trees
Arthello Beck

Louise
Linda & Ed Blackburn

Untitled
Viola Delgado

Middle Row, Left to Right:

Dance! Don't Walk
Linda Guy

Untitled
Judy Smith Hearst

Floating in Space, a Waltz
Jane Helslander

Bottom Row, Left to Right:

Celebration
Pamela Nelson

Destination Game
Beatrice Lebreton

The Highest Power
Richard Zapata

**MINORITY/WOMEN BUSINESS ENTERPRISE
(MWBE) POLICY AND PROCEDURES MANUAL**

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DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD POLICY STATEMENT

It is the policy of the Dallas/ Fort Worth International Airport Board (hereinafter referred to as "the Airport") that the Airport, its' contractors, subcontractors and concessionaires, shall not discriminate on the basis of race, color, religion, national origin, or sex in the award and performance of contracts, subcontracts and concessions and to remove barriers for minority and women-owned business enterprises to compete for contracts, subcontracts and concessions awarded by the Airport.

It is the policy of the Airport to support the growth and development of minority and women-owned businesses that can successfully compete, outside of the Program, for Airport prime contracting opportunities.

In the implementation of this policy, the priority of the Airport is to encourage and foster the growth and development of locally owned minority and women-owned businesses in the Owner Cities of Dallas and Fort Worth. The Airport incorporates by reference the policy of the board on locally-owned businesses.

It is the policy of the Airport to use race conscious and race neutral measures to enhance the participation of minority and women-owned businesses in Airport contracts, subcontracts and concessions to the extent permitted by law.

It is the policy of the Airport to establish a contract specific goal setting process for contracting and concession opportunities.

It is the policy of the Airport not to contract or continue to contract with any business entity that engages in discriminatory conduct in the award and performance of contracts, subcontracts and concessions.

In furtherance of this policy, Airport staff, by Airport Board Resolution, has implemented this Program designed to eliminate the present and ongoing effects of past and present discrimination against minority and women-owned businesses. This Program is designed to increase minority and women-owned business utilization, in the awarding of Airport and third party contracts for construction, professional services, procurement and concessions. This program is an extension of the policies designed to ensure that minority and women-owned businesses are afforded an equitable opportunity to compete on all Airport contracts.

The Program has been developed pursuant to generally accepted affirmative action oriented principles, applicable state, federal and municipal regulations. Airport contractors and potential contractors and third parties and their contractors must, in addition to complying with the applicable provisions of the D/FW Airport Board's Minority/Women Business Enterprise Policy and Procedures Manual, shall also comply with any other specific M/WBE requirement(s) set forth by various Laws and Executive

Orders resulting from local, state or federal initiatives. All requirements placed on the Airport by various funding sources are specifically passed on to contractors involving those funds.

SECTION I. INTRODUCTION

The Airport's Minority/Women Business Enterprise (MWBE) Policy and Procedures Manual is promulgated by the Chief Executive Officer pursuant to his powers and duties as defined by the Contract and Agreement between the City of Dallas and the City of Fort Worth dated and effective as of April 15, 1968.

This document represents the third revision of the MWBE Policy and Procedures Manual and reaffirms the Board of Directors' commitment to its policy of nondiscrimination through a positive and continuing business process of specific policies and practices designed to ensure the full realization of equal opportunity in all of the Airport's contracting opportunities.

It is the ***Airport's MWBE Policy*** (see attached) to support the growth and development of minority and woman-owned businesses that can successfully compete for Airport prime contracting opportunities.

It is also the policy and a priority of the Airport to encourage and foster the growth and development of locally owned minority and woman-owned businesses in the cities of Dallas and Fort Worth as well as other local surrounding communities. In the implementation of the Airport's MWBE Policy and Procedures Manual, the Airport shall encourage all Airport procurements including interlocal agreements and commercial development contracting to make every effort to utilize local MWBEs to achieve this goal.

This business process will take effect immediately. This MWBE Policy and Procedures Manual supersedes, except as otherwise stated herein, other MWBE Program Manuals previously adopted.

SECTION II. SCOPE

The policies, procedures and contract clause(s) established under this MWBE Policy and Procedures Manual shall be applicable to Airport Contractors, Vendors and Consultants of contracts, related subcontracts and concessionaires as well as to those certain Commercial developers and contractors on Contracts described herein. These policies, procedures and contract clauses shall apply to all such contracts and agreements, unless the provisions herein are in conflict with state or federal law or rules and regulations promulgated there under.

SECTION III. DEFINITIONS

A "Glossary of Definitions" for the terms used in the Airport's MWBE Policy and Procedures Manual is located in the Appendix of this document.

SECTION IV. BDDD ROLES AND RESPONSIBILITIES

The Airport's Business Diversity & Development Department ("BDDD") is responsible for the implementation, coordination and monitoring of the MWBE Policy and Procedures Manual. BDDD will coordinate and cooperate with the Airport operational staff as necessary for effective implementation of the MWBE Policy and Procedures.

The Business Diversity & Development Department Vice President reports directly to the Executive Vice President of Administration and Diversity and has direct, unrestricted access to the Airport's CEO in matters concerning this MWBE Policy and Procedures Manual.

A copy of the **BDDD Organizational Chart** is attached.

The Airport's Business Diversity & Development Department has the overall responsibility to administer, monitor and enforce MWBE policies, standards and procedures as well as govern the implementation, interpretation and application of this business process in a manner to achieve the MWBE Policy and Procedures Manual's stated purposes. The Business Diversity and Development Department is responsible for the following as it relates to general contracting practices:

- Responsible for the Airport's MWBE Policy and Procedures Manual.
- Implement and administer the Airport's MWBE Policy and Procedures Manual's policies, standards and procedures to as well as govern the implementation, interpretation, and application of this Business process in a manner deemed necessary to achieve the Business process' stated purposes.
- Develop and maintain systematic procedures to ensure that MWBEs are able to compete on all Airport and Commercial Development Contracts.
- Develop listings of minority/women-owned business enterprises for prime and subcontracting opportunities. These listings reflect suppliers or services for which the Airport, Commercial Development Contractors and/or their respective contractors have a business use.
- Review and verify the certification status of minority and women-owned firms. The Vice President of BDDD makes the final determination on appeals regarding MWBE certification eligibility.
- Review bids and solicitations to ensure that MWBEs have and continue to have an equal opportunity to participate in airport and commercial development contracts, including, but not limited to reviewing the scope of work, bonding requirements, insurance requirements and the conditions in which retainage is held, etc.

- Consider and verify the utilization of MWBEs by applicable contractors/consultants, concessionaires and Commercial Development Contractors.
- Prepare and present periodic reports to the Airport Board of Directors on the progress of the MWBE Business process.
- Assess and recommend periodically the Airport's overall MWBE goals and any process changes which may be necessary to improve the overall effectiveness of the MWBE Policy and Procedures Manual.
- Set a contract-specific MWBE participation goal on all applicable business opportunities including contract modifications as defined herein.
- Monitor and report the progress of MWBE participation in all procurements by airport departments.
- Responsible for evaluating and making the Airport's Commercially Useful Function (CUF) determination for MWBEs participating on Airport procurements. The Vice President of the Business Diversity & Development Department shall be responsible for determining if an MWBE is performing a commercially useful function.
- Responsible for evaluating and making the Airport's Good Faith Efforts (GFE) determination for contractors achieving MWBEs participation on Airport procurements.
- Promote and educate Airport personnel and contractors about the Expedited Payment Program and identify Airport solicitations for participation per the program requirement. (See Appendix)
- Monitor and ensure MWBE compliance for Airport procurements in the Contract Close out process.
- Promote and conduct outreach functions for the benefit of and in cooperation with the MWBE community.
- Review and develop policies and procedures consistent with current laws, litigation and regulations that support the legality of the Business process.
- Assist all Airport departments and Commercial Development Contractors with the implementation and/or application of the MWBE Business process.

- Attend pre-bid/proposal and pre-construction/design conferences to explain the MWBE Business process and its requirements as well as respond to pertinent questions.
- Review requests for bids/proposals and other solicitation documentation including the evaluation criteria to ensure inclusion of MWBE Business process requirements and remove artificial barriers to potential MWBE participation.
- Encourage and promote joint ventures, partnering and teaming arrangements between small businesses, minority/women owned and non-minority/women owned firms and between two or more minority/women owned firms to enhance innovative approaches to increase MWBE participation.
- Participate in pre-solicitation discussions including any design review meetings to take into consideration such factors as including but not limited to MWBE availability, bonding limits, and type of work capabilities available from MWBEs in the development of drawing and specifications.
- Promote the MWBE business process and its accomplishments through innovative initiatives such as recognition programs & awards as well as annual reports and newsletters.

In addition to the general responsibilities of BDDD, there are certain responsibilities specific to Airport Development for Capital Projects.

- Business Diversity & Development Department shall review projected work packages (scope of work and itemized engineering estimate) to identify where opportunities exist to maximize MWBE participation. For example, the BDDD will set appropriate goals for work packages, identify other appropriate actions and initiatives to enhance participation and partner with the department design consultant and capital project contractors, as follows:
 - i. work with staff and consultants to identify professional subcontracting and MWBE vendor availability opportunities prior to any solicitations;
 - ii. work with capital projects contractors to identify construction subcontracting opportunities, prior to any solicitations;
 - iii. work with capital projects contractors to identify potential MWBE (i.e. contractors, vendors and/or suppliers) firms for negotiated subcontracts prior to any solicitations;
 - iv. work with capital projects contractors and Airport's General Counsel, when applicable, to evaluate and verify the good faith efforts of apparent low bidders.

SECTION V. OTHER AIRPORT DEPARTMENTS' ROLES AND RESPONSIBILITIES

Each department of the Airport which has or shares responsibility for the awarding or monitoring of Airport contracts, including concessions or Commercial Development, has a responsibility to promote, support, and assist in carrying out the MWBE Business process. Such departments are to be held accountable for exercising specific functions in support of the Business process, as well as any other function(s) deemed necessary by management to implement the goals and objectives of the Board's MWBE policies.

In an effort to meet and promote the DFW Airport MWBE business process to increase MWBE participation on Airport procurements, all departments requesting bids, proposals or any other solicitation on behalf of the Airport shall:

- Notify and provide BDDD upon departmental knowledge of an anticipated solicitation the necessary information including, but not limited to, the scope of work, budget, schedule, bid specifications as well as any other relevant information of that procurement solicitation in a timely manner prior to the procurement announcement. This timely notice and supplemental documentation from the departments will assist BDDD to effectively identify opportunities for potential MWBE participation.
- Notify BDDD before a solicitation will be advertised and forward a copy of the advertisement to BDDD.
- Ensure that all applicable provisions of the MWBE Business process are included in bid specifications/proposals and contracts.
- Assist, when necessary, in the compilation of contract data for MWBE availability/utilization determination.
- Assist BDDD in identifying, potential MWBEs in the construction, goods, general services and professional service areas.
- Assist in the development, monitoring and implementation of MWBE contract goals.
- Provide BDDD with a copy of or independent access electronically to the necessary information for each contract including, but not limited to, the contract value, any contract modifications, the MWBE goal commitment and the contracting parties signatures confirming an executed agreement with the Airport. This information can be provided to BDDD through a copy of the face sheet and key pages of the signed executed contract or lease agreement, the Notice of Award, the Notice to Proceed, Change Orders as well as any other relevant information. This timely receipt of supplemental post award

documentation will assist BDDD in monitoring the compliance of the Airport's contractors in the achievement of the stated MWBE commitment.

- Notify BDDD, in a timely manner, prior to any key post award contract meetings or issues that could affect the contractor's ability to achieve the MWBE commitment such as contract kickoff meetings and monthly meetings.

The Airport shall, to the extent legally practicable, include MWBE participation and/or other related criteria (i.e. work force composition, supplier inclusion programs, mentoring program, outreach program, etc.) as part of the evaluation criteria for all professional service solicitations.

The following Airport departments have specific MWBE business process implementation responsibilities as follows:

A. AUDIT SERVICES DEPARTMENT

- Provide audit assistance, as necessary, to determine compliance with policies and procedures set forth in the MWBE Business process.
- Assess and make recommendation when requested on MWBE policy and appeals regarding MWBE certification eligibility.
- Assess and make recommendations when requested on the utilization of MWBEs including but not limited to allegations of fraud.

B. RISK MANAGEMENT

- Review applicable insurance requirements with a view towards determining, if prudent and feasible, whether established risk/exposure limits may be changed to allow business enterprises, particularly MWBEs to bid more competitively on all Airport contracts.
- Evaluate contract insurance requirements, when feasible, commensurate with the size, duration, location and type of service provided for the contract.

C. LEGAL DEPARTMENT

- Provide legal assistance, as necessary, to ensure that the MWBE Business process and implementation policies and procedures meet legal standards.

D. AIRPORT DEVELOPMENT AND ENGINEERING ("ADE")

- ADE will make known to BDDD upcoming projects on which bids/proposals are solicited. ADE will provide support and technical assistance in coordination

with BDDD's efforts aimed at implementing the MWBE Business process objectives.

- Work in conjunction with BDDD to develop the MWBE contract specific goals.
- Assist in the development, monitoring and implementation of MWBE contract specific goals.
- Ensure that all applicable provisions of the MWBE Business process are included in bid proposals specifications and contracts.
- In coordination with BDDD, assist in notifying MWBE related organizations or associations (chambers, trade organizations, non-profit plan rooms) of the Airport contracts to be bid/proposed. Make plans and specifications relating to Airport contracts available to prospective bidders including MWBEs in sufficient time for adequate review. In coordination with BDDD, provide copies of Airport construction plans and specifications to such agencies, thus enabling MWBEs or other interested bidders to review the plans without purchasing or placing a deposit on them, and within sufficient notice to provide adequate response time.
- In coordination with BDDD when feasible, includes a project design criterion that includes consideration of MWBE availability, bonding limits, and type of work capabilities to facilitate maximum competitive participation.
- Provide for the use of procurement methods when feasible that will increase potential MWBE participation as well as discourage the use of specifications and plans that unduly impact opportunities for MWBE participation or requirements to specify the use of certain restricting goods and materials.
- Encourage joint ventures, partnering and teaming arrangements that provide business opportunity for MWBEs.
- Assist and participate in workshops, trade fairs, outreach seminars, etc., aimed at identifying and increasing the participation of MWBEs on Airport projects.
- Advertise the Airport's construction and professional services contract opportunities via the Airport's internet web site as an effort to maximize MWBE participation.
- Include BDDD representatives as part of the Airport's principal selection and evaluation teams as a voting member to ensure review and consideration of MWBE participation on such contracts and compliance with MWBE business process requirements.

- Require compliance with MWBE contractual clauses including but not limited to substitution of subcontractors/subconsultants, as well as reporting and counting guidelines on Airport projects.
- Require that each contractor submit as part of the Airport's pay request process, the required MWBE contractual information to ensure an accurate accounting of MWBE contractual participation.
- Assist and support BDDD by providing relevant contractual information such as, but not limited to, successful low bidder information, construction/professional schedules, solicitation notices, etc., to better monitor and ensure compliance with applicable MWBE business process requirements.
- Assist and support BDDD by ensuring that the contractor forward all necessary documents and information to close out the contract that provide a final accounting for MWBE participation on the contract.

E. REVENUE MANAGEMENT ("RM")

- RM will direct negotiations and make known to BDDD upcoming concession/commercial development opportunities on which bids/proposals are solicited before the solicitation. Further, will review projected concession/commercial development packages to identify where opportunities exist to maximize MWBE participation prior to solicitation.
- RM will communicate and coordinate with BDDD for outreach initiatives or events. Provide resources to activities that assist and educate MWBEs in a timely manner.
- Include BDDD representatives as a voting member of RM evaluation teams to ensure review and consideration of MWBE participation and compliance with MWBE business process requirements.
- Ensure that all applicable provisions of the MWBE business process are included in the proposal specifications and the contractual documents.
- Make proposals available to prospective bidders/proposers, including MWBEs in a timely matter.
- RM will work with BDDD in notifying MWBE related organizations or associations of the concession and commercial development opportunity and providing a copy of the solicitation.

- Periodically review applicable insurance and bonding requirements determine, whether established risk/exposure limits may be changed to allow business enterprises, particularly MWBEs, to bid/propose more competitively.
- Encourage the formation of joint ventures and partnerships and teaming arrangements, particularly those that provide a meaningful and significant role for MWBE participation.
- RM will communicate with BDDD and ensure that BDDD has conducted a review of as well as approved the MWBE participation efforts of any potential concessionaire or commercial developer prior to the solicitation's submission to the Airport Board.
- RM will timely notify BDDD of any potential or actual sale of existing Airport concession to ensure ample opportunity to promote the concession opportunity for MWBEs.
- Assist and support BDDD by ensuring that the concessionaires and commercial developers forward and submit BDDD documentation needed for Airport MWBE compliance and reporting.
- Assist as requested in the policy formulation and implementation of MWBE Business process.

F. PROCUREMENT & MATERIALS MANAGEMENT DEPARTMENT ("PMM")

- PMM department, in cooperation with BDDD, will make known to BDDD upcoming projects on which bids/proposals are solicited. Further, PMM will provide support and technical assistance as it relates to the procurement process in coordination with BDDD's efforts aimed at implementing the MWBE Business process objectives.
- PMM should make available bid specifications to prospective bidders on Airport contracts, including MWBEs, in sufficient time for review. Allow, to the greatest extent feasible, sufficient time so as to facilitate the participation of MWBEs. Where possible, attempt to reach MWBEs by using Public Service Announcements, in addition to advertising for specific bids.
- Provide for the use of procurement approaches that will increase potential MWBE participation, e.g., using certain types of materials and methods, and breaking down larger contracts into smaller ones when feasible.
- Review applicable insurance and bonding requirements with a view toward determining, if the requirements are prudent and feasible, and whether such

established risk/exposure limits enhance business enterprises, including MWBEs, to bid more competitively on all Airport contracts.

- In soliciting responses for bids for goods and services as well as requests for professional services between \$3,000 and \$50,000, PMM shall contact or solicit proposals from a minimum of two MWBEs. Additionally, PMM should also contact two Historically Underutilized Businesses (HUBs) in accordance to Board Policy when soliciting for goods and general services between \$3,000 and \$50,000. PMM shall also coordinate with BDDD to assist in identifying potential MWBE bidders for those items where MWBEs are known suppliers of such goods and services.
- Assist and participate in workshops, trade fairs, outreach seminars, etc., aimed at identifying and increasing the participation of MWBEs on Airport projects.
- Advertise the Airport's construction, goods, general services, and professional services contract opportunities via the Airport's internet web site as to maximize MWBE participation.
- Include BDDD representatives as part of the Airport's principal selection and evaluation teams as a voting member to ensure review and consideration of MWBE participation on such contracts and compliance with MWBE Business process requirements.
- Require compliance with MWBE contractual clauses including but not limited to substitution of subcontractors/subconsultants, and reporting and counting guidelines on Airport projects.
- Require that each contractor submit as part of the Airport's pay request process, the required MWBE contractual information to ensure an accurate accounting of MWBE contractual participation.
- Assist and support BDDD by providing relevant contractual information such as, but not limited to, successful low bidder information, construction/professional schedules, solicitation notices, etc., to better monitor and ensure compliance with applicable MWBE Business process requirements.

SECTION VI. CONTRACT SCOPE AND TERMS

BDDD shall review the contract scope, terms and specifications for all contracts, concession and Commercial Development opportunities to assess and identify other contract opportunities that Contractors can utilize consistent with the Airport's interest that will allow MWBEs an equitable opportunity to compete.

When applicable and economically feasible, the procuring departments shall take the following actions to assist BDDD in promoting better opportunities for MWBEs as well as small emerging businesses in Airport procurements:

1. Divide proposed acquisitions of goods and services, if practicable, including construction into reasonably small lots (not less than economic production runs or economically feasible projects) to permit offers on quantities less than the total requirement or discreet portions of the construction project.
2. Limit the contract term to a maximum of three (3) years with no more than two (2) one year extensions. Contracts that are expected to be an exception to this term limit should notify BDDD of any proposed exception.
3. Structure construction projects such that, if practicable, minority or woman-owned business concern may compete for prime contracts.
4. Ensure that delivery schedules are established on a realistic basis that will encourage MWBE participation to the extent consistent with the actual requirements of the Airport.
5. Where practicable, direct contracting shall be used for construction related services that are normally items within the prime contract. Those services will be provided on a direct contract with the Airport and/or Commercial Development Contractors, but the businesses will work according to the project schedule set by the prime contractor.
6. Encourage prime contractors to form contractual relations with MWBEs at all levels including subcontract equity and joint venture relationships.
7. The Sponsoring/Procuring Department shall
 - a) provide a copy of the proposed acquisition package to BDDD representative prior to the issuance of the solicitation if –
 - (i) The proposed acquisition is for supplies or services currently being provided by a MWBE and the new proposed acquisition is of a quantity or estimated dollar value and specifications, the magnitude of which makes it unlikely that MWBEs can compete for prime contracts, or
 - (ii) The proposed acquisition is for construction and seeks to package or consolidate discrete construction projects and the magnitude of this consolidation makes it unlikely that MWBEs can compete for the prime contract.

- b) If BDDD determines that solicitation requests/specifications prohibit or deter MWBE participation, the Sponsoring/Procuring department shall also provide an explanation for the need for the prohibitive requirements including, but not limited to,
 - (i) Proposed solicitation cannot be divided into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement;
 - (ii) Delivery schedules cannot be established on a realistic basis that will encourage MWBEs participation to the extent consistent with the actual requirements of the sponsoring/procuring department;
 - (iii) Proposed acquisition cannot be structured so as to make it likely that MWBEs can compete for the prime contract; or
 - (iv) Consolidated construction project cannot be required as separate discrete projects.
- c) BDDD shall review the proposed solicitation and any supplemental documentation to make a recommendation to the sponsoring/procuring department regarding the proposed solicitation package.

SECTION VII. OVERALL MWBE GOALS

Process for Overall Goal

The DFW Airport MWBE goals are aspirational goals based on the Airport's current Availability/Disparity Study. The resolution as adopted by the DFW Board of Directors identifying the current MWBE participation goals is located in the Appendix section of this Manual.

However, BDDD may, as appropriate, adjust the goal upon review to ensure that the MWBE goals are narrowly tailored to the Airport's MWBE Policy and Procedures Manual on an annual basis or based on contract-specific goal setting throughout the year.

SECTION VIII. CONTRACT SPECIFIC GOALS

The Airport will employ a contract specific MWBE goal process to establish such goals on a contract-by-contract basis for the 1) goods, 2) general services, 3) high tech goods & services, 4) revenue generating services, 5) construction and 6) professional services solicitations. Contract specific goals are established to allow the Airport to

give consideration to actual project subcontracting opportunities, and therefore, narrowly tailoring the Airport's implementation of the MWBE Business process.

A. CONTRACTS

All construction, professional services, goods and general services solicitations shall contain the appropriate MWBE goal as determined by BDD Department. In no case shall a contract be executed until the Contractor has made a commitment or demonstrated an acceptable good faith effort toward achievement of the MWBE goal. If goals are not met, no sanctions will be recommended or imposed provided the successful Contractor can fully demonstrate that they made an acceptable good-faith effort, as defined by the Airport. **Aspirational goals are not to be construed as quotas or set-asides.**

The Airport's MWBE Business process shall establish contract specific goals on ***prime contracts and supplemental agreements, change orders, sole source (as applicable) or any other contract modifications executed with the Airport or Commercial Development.*** A complete copy of the **Policy for Contract Solicitations between \$3,000 to \$50,000** is included in the Appendix. The following are the MWBE participation guidelines for other Airport procurements.

- For Goods & Services, high tech goods & services and construction procurements:
 - Between \$3,000 and \$50,000: which requires at least three responses; at least two responses should be from a certified HUB per state procurement law and at least two responses should be from an MBE or WBE. If an MBE or WBE firm is also certified as an HUB, the firm's quote can count toward both the state law and MWBE Business process requirements.
 - Procuring departments shall first solicit responses from certified HUBs and MWBEs from Dallas and Tarrant counties. Then, if no local MWBEs and HUBs are found, certified MWBEs within the State of Texas are solicited for these procurements. BDDD should be timely contacted to ensure efforts to meet the Airport's MWBE policy encouraging MWBE participation in prime contracting opportunities are addressed.
- For Professional Services procurements:
 - Between \$3,000 and \$50,000: at least two responses should be from an MWBE.
 - Procuring departments shall first solicit responses from certified MWBEs from Dallas and Tarrant counties and then, if no local MWBEs are found, certified MWBEs within the State of Texas are solicited for these procurements. BDDD should be timely contacted to ensure efforts to meet

the Airport's MWBE policy encouraging MWBE participation in prime contracting opportunities are addressed.

- For Revenue Generating contracts:
 - Commercial Development Contracts- All construction, procurement and professional service contracts shall establish individual contract goals and the Commercial Development contractor shall advise BDDD of its MWBE commitment prior to award.
 - Airport Concessions – Eliminate artificial barriers that restrict the use of minority/women-owned business enterprises in the subcontracting and purchasing activities associated with the Airport concession in accordance with applicable requirements of the MWBE Business process and/or under the Department of Transportation's (DOT) 49 CFR Part 23 and any amendments thereto.
- For Other Procurement Options: The Airport utilizes other procurement options such as the following:
 - Interlocal Agreements
 - Sole Source Agreements
 - Best Value
 - Emergency procurements
 - Single or Specified Source procurements

For the above procurement options, it is the MWBE policy to encourage the utilization of locally owned minority and woman-owned businesses in the cities of Dallas and Fort Worth to achieve the Airport's MWBE goal.

Any contract specific goal modification on option years may be greater or less than the original contract commitment. BDDD may also have the option to modify a contract specific goal on any contract executed by the Airport. Establishing contract specific goals on the original contract or any contract modification requires an examination of the project requirements for subcontracting opportunities such as an examination of estimated dollar value, material content, scope of work, etc., as well as consideration of the apparent capability and availability of MWBEs that may be necessary to attain the goals established on a particular project. While limited scopes of work or other unknown factors may preclude precise quantification of MWBE goals, BDDD staff will make its goal determination by the careful review of each Airport solicitation.

In order for BDDD to make its MWBE goal determination, the Contracting Departments shall timely provide BDDD the following information for each solicitation including but not limited to:

1. The type of project or facility being designed and a description of the work to be performed;
2. The estimated dollar amount of the contract;
3. The options of a prime contractor or general contractor in terms of breaking the work out for subcontracting purposes and the estimates in dollar amounts of each sub-trade element appropriate for the particular project;
4. A projected list of materials that will be needed on the project;
5. Identification of items which may be constructed on the worksite or in remote locations;
6. Transportation needs of the project;
7. Identification of items which will be constructed as integral units or fabricated;
8. Installation skills required
9. Available pool of MWBE vendors and contractors; and
10. Other components, as appropriate.

This information in addition to advance preparation of detailed cost estimates; significant pool of certified MWBEs in the relevant contracting areas; and a focused MWBE outreach regimen are essential to the goal setting methodology. BDDD staff shall not disclose costs estimate data to any potential contractor or consultant. As set forth above, data obtained by this analysis will be reviewed in light of the Airport's actual experience on similar projects, as well as information on the overall availability of MWBEs performing work in relevant areas of expertise, and as appropriate and available, other local airport MWBE participation on similar projects.

B. SOLE, SINGLE OR SPECIFIED SOURCE CONTRACTS

All solicitations designated as sole, single or specified source, brand designations or solicitations not subject to Board approval shall be reviewed by BDDD prior to award to determine any potential MWBE participation opportunities. To make this assessment, the Contracting Department shall provide BDDD the following information:

1. The type of project or facility being designed and a description of the work to be performed;
2. The estimated dollar amount of the contract;
3. The justification and documentation for a sole source award; or
4. The justification and documentation for brand or single/specified source designation procurements.

SECTION IX. CERTIFICATION

In order to credit the participation of minority and woman-owned businesses on Airport procurements towards the Airport's MWBE overall and contract specific goals, the Airport will require that minority and woman-owned businesses are certified as MWBEs by BDDD or a certification agency approved by the Airport's BDD department. The approved certification agencies are the following: the North Central Texas Regional Certification Agency ("NCTRCA"); the DFW Minority Business Council ("DFWMBC"); the Small Business Administration ("SBA") - [8a certification only]; the approved entities of the Texas Unified Certification Program ("TUCP"); and the Woman's Business Council-Southwest ("WBCS").

The purpose of Certification is three-fold:

1. To ensure increased availability of minority and women-owned business enterprises for the MWBE Business process;
2. To ensure the integrity of the MWBE Business process and that the Business process is implemented for its intended purpose; and,
3. To ensure the integrity of the MWBEs participating in Airport procurements as well as MWBE initiatives and programs established by the Airport.

The Airport BDD department reserves the right to review, accept or reject any MWBE certifications on all Airport procurements. The Airport also, under the appropriate circumstances, reserves the right to accept other certifications. In the case of joint ventures, the MWBE joint venture partner(s) must have completed the certification process with an approved certification agency.

BDDD reserves the right to prioritize MWBE status certification review of firms that are currently involved in the bidding process or in contract negotiations with the Airport or a Commercial Development contractor. BDDD also has the right to decline to recognize the MWBE certification of any firm on a case-by-case basis as determined by BDDD.

A. MWBE CERTIFICATION ELIGIBILITY

If a firm is not certified as a minority or woman-owned business by an approved certification entity at the time of contract award, BDDD will not allow the participation to count towards the MWBE goals. However, BDDD will allow the Contractor to utilize MWBEs certified during the performance of the contract towards the MWBE participation goal once documentation confirming such certification is submitted to BDDD. BDDD shall be notified of any change in the Contractor's or any identified subcontractor's company ownership or control which could affect the MWBE participation of the project. This notification shall be within ten (10) business days of the associated change or contractor's knowledge of a change in ownership or control. If Airport department personnel is aware of any potential change that would affect the achievement of the MWBE commitment, the department personnel is responsible to notify BDDD within ten (10) days of receipt of this information.

BDDD incorporates by reference the **NCTRCA Certification Guidelines** as model certification guidelines and reserves the right to independently certify MWBEs.

B. COUNTING MWBE PARTICIPATION OF INELIGIBLE MWBEs

If the certification status of a MWBE subcontractor/subconsultant becomes ineligible in the course of a contract due to circumstances beyond the control of the Contractor, the BDDD may grant a grace period in which the participation of the ineligible MWBE can count towards the MWBE goal. An example of circumstances where this is applicable is a lapse due to administrative reasons or there has been a change in ownership or control in the MWBE. Any payments made to the non-certified firm received after that time will not be counted towards the participation goal unless the firm becomes re-certified. Further, the Contractor shall strive to meet the MWBE goal. The Contractor shall make good faith efforts to meet the MWBE participation commitment by replacing the firm with another certified MWBE especially if there is additional work added to the project or if there is work on the project that is not committed.

If the certification status of a MWBE subcontractor/subconsultant becomes ineligible in the course of a contract due to circumstances that are fraudulent in nature, the Contractor can only count the participation of the MWBE up to the time/date that the BDDD declares the firm ineligible. Furthermore, any future participation of that firm on any Airport procurement will not count towards any MWBE project goal. The Airport will only count the actual dollars paid to the ineligible MWBE towards the MWBE goal for no longer than one month after the ineligibility determination or at the conclusion of the current payment cycle, whichever occurs first.

C. REMOVAL OF MWBE ELIGIBILITY

If there is a challenge to the eligibility of a MWBE, the Airport reserves the right not to count that participation towards the achievement of the goal. Contractors are advised

that the issue of whether or not the MWBEs identified for an Airport opportunity are eligible certified firms is the responsibility of the Vice President of Business Diversity & Development Department (BDDD VP). If the Airport determines based on evidence received, that a currently certified MWBE is ineligible as a certified firm, BDDD should follow the stated process:

- First, BDDD must provide written notification to the MWBE as well as any prime contractors utilizing that MWBE on any Airport contracts.
- Then, within ten (10) days after receiving the notice, the MWBE will have an opportunity to respond and submit documentation to BDDD.
- BDDD will also gather pertinent information regarding the MWBE certification eligibility and if the information is sufficient, BDDD will assess the information for a determination.
- Within fifteen (15) business days of a receipt of that documentation, the BDDD VP shall make a determination of MWBE certification eligibility. In making the determination, the BDDD VP shall consider the response of the MWBE firm, if applicable, and information obtained by Airport BDDD personnel either through written documentation received from a third party or based on personal investigation and data.
- BDDD will then notify the MWBE of its determination via certified mail as well as notify any prime contractors, the Audit department and other appropriate departments about the determination.

If an MWBE is determined to be ineligible due to fraudulent actions, further participation of that MWBE on Airport procurements will not count towards the goal. If the ineligible MWBE's participation on an Airport procurement is currently being credited toward the MWBE goal, the Airport will only count the actual dollars paid to the ineligible MWBE for one month after the ineligibility determination or at the conclusion of the current payment cycle, whichever occurs first.

If a firm is determined to be an ineligible MWBE due to fraudulent actions, the Airport Board reserves the right to discontinue business with the firm in question based on the combined recommendation and assessment by BDDD and any other relevant departments.

The BDDD VP may elect to forward the relevant information and its recommendation to the Audit department for further review and/or an additional recommendation. The Airport shall then provide a written response to the MWBE in question that they are or they are not eligible as an approved certified MWBE for Airport procurements. The final decision regarding certification eligibility may be appealed directly to binding arbitration within ten (10) business days from notice of BDDD's decision.

SECTION X. COUNTING MWBE PARTICIPATION

In accordance with the Airport's commitment for the utilization of MWBEs in Airport procurements, BDDD establishes overall MWBE agency goals as well as contract specific MWBE goals. Once the MWBE overall agency goals have been established, MWBE participation is then measured at the prime, subcontracting or equity participation levels. The Airport primarily establishes contract specific goals on its procurements to achieve the overall MWBE goals. The contract specific goals on Airport procurements established by BDDD are subcontracting goals that apply to any prime contractor or commercial development contractor including MWBE prime or commercial development contractors.

In the solicitation of MWBEs for Airport procurements, Concessions or Commercial Development contracts/leases, BDDD discourages and will not allow prime contractors to require exclusive teaming arrangements or agreements. Such exclusive restrictions directly contradict the Airport's BDDD mission to proactively facilitate and remove barriers as well as capacity-building opportunities for minority and women owned businesses.

When a MWBE is the prime contractor on a Airport procurement with established MWBE goals, the MWBE prime contractor is still responsible for meeting the MWBE subcontracting goal requirement. The MWBE prime must submit the documentation to BDDD necessary to demonstrate its commitment to achieving the MWBE participation goal accordingly. If there is no MWBE goal established for the Airport procurement and the prime contractor is an MWBE prime contractor, the MWBE prime participation will count towards the Airport's overall agency MWBE goal.

MWBE goals and commitments noted in this section specifically refer to, unless otherwise stated, contract specific subcontracting goals and commitments upon contract award.

When a MWBE participates in a contract as a subcontractor, the BDDD will allow the prime contractor to count only the value of the work actually performed by the MWBE toward MWBE commitment.

- A. The Contractor will be allowed to count the entire amount of that portion of a professional services, construction, goods and general services contract (or other contract not covered by paragraph (B) of this section) that is performed by the MWBEs own workforces. This amount should include the cost of supplies and materials obtained by the MWBE for the work of the contract, including supplies purchased or equipment leased by the MWBE (except supplies and equipment the MWBE subcontractor purchases or leases from the prime Contractor or its affiliate).
- B. The Contractor will be allowed to count the entire amount of fees or commissions charged by a MWBE for providing bona fide services, such as professional, technical, Contractor, or managerial services, or for providing bonds or insurance.

- C. When a MWBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward MWBE commitment only if the MWBE's subcontractor is itself a MWBE. Work that a MWBE subcontracts to a non-MWBE does not count toward MWBE commitment.

The BDDD will count expenditures to a MWBE toward the prime contractor's MWBE commitment only if the MWBE is performing a commercially useful function on that contract.

- A. An MWBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the MWBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the materials, and installing (where applicable) and paying for the materials itself. To determine whether a MWBE is performing a commercially useful function, the Contractor must evaluate the amount of the work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the MWBE credit claimed for its performance of the work, and other relevant factors.
- B. A MWBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of MWBE participation. In determining whether a MWBE is such an extra participant, the Contractor must examine similar transactions, particularly those in which MWBEs do not participate.
- C. If a MWBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work forces, or the MWBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the Contractor must presume that it is not performing a commercially useful function.
- D. When a MWBE is presumed not to be performing a commercially useful function as provided in paragraph (C) of this section, the MWBE may present evidence to rebut this presumption. BDDD may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

The BDDD will count expenditures with MWBEs for materials or supplies toward the prime contractor's MWBE commitment as provided in the following:

- A. If the materials or supplies are obtained from a MWBE manufacturer, BDDD will allow the prime contractor to count one hundred percent (100%) of the cost of the materials or supplies toward MWBE commitment. For purposes of this paragraph, a manufacturer is a firm that operates or maintains a factory or establishment that

produces, on the premises, the materials, supplies, articles, or equipment required under the contract and the general character described by the specifications.

- B. If the materials or supplies are purchased from a MWBE regular dealer, BDDD will allow the prime contractor to count sixty percent (60%) of the cost of the materials or supplies toward MWBE commitment.
- (1) For purposes of this section, to be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
 - (2) A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph, if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
 - (3) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph.

With respect to materials or supplies purchased from a MWBE which is neither a manufacturer nor a regular dealer, BDDD will allow the prime contractor to count the entire amount of fees or commissions charges for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward MWBE commitment, provided the fees are reasonable and not excessive as compared with fees customarily allowed for similar services. However, the prime contractor may not count any portion of the cost of the materials and supplies themselves toward MWBE goals.

The BDDD will allow the prime contractor to count expenditures with a MWBE trucking company toward the MWBE commitment if BDDD has determined that the MWBE trucking company is performing a commercially useful function according to the Counting - ***MWBE Participation*** section of the Airport's MWBE Contract provision which is incorporated into this Business process by reference.

If a MWBE subcontractor is not certified by BDDD or an approved certification agency at the time of the execution of the contract, supplemental agreement or subcontract, the Contractor shall not count the firm's participation toward any MWBE goals until the firm is certified.

The BDDD will not allow the prime contractor to count the participation of a MWBE subcontractor toward the prime Contractor's MWBE achievements or overall goal until the committed amount has been actually paid to the MWBE.

The BDDD will count MWBE participation where the MWBE or joint venture partner performs a portion of work on the contract and the percentage of ownership or equity of the MWBE in joint venture. BDDD will allow the joint venture to count the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the MWBE joint venture partner performs with its own forces toward MWBE commitment.

The Airport and its prime contractors may also count toward the MWBE goals the following expenditures to MWBE firms:

1. The fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services, and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the Airport to be reasonable and not excessive as compared with fees customarily allowed for similar services.
2. The fees charged for delivery of material and supplies required on a job site (but not the cost of materials and supplies themselves) when the hauler, trucker or delivery service is not also the manufacturer of or a regular dealer in the materials and supplies, provided that the fee is determined by the Airport to be reasonable and not excessive as compared with fees customarily allowed for similar services.
3. The fees of commission charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission is determined by the Airport to be reasonable and not excessive as compared with fees customarily allowed for similar services.

The Airport and its prime contractors will not count the following categories of expenditures toward the MWBE commitment:

1. Utilities – payments for water and telephone;
2. Payments to non-profit organizations;
3. Payments to other government agencies;
4. Bank fees;
5. Insurance premiums; and
6. Employee conferences and training seminars.

SECTION XI. GOOD FAITH EFFORTS

Determining Good Faith Efforts

If a Contractor, including MWBE prime contractors, does not meet the MWBE goal, it shall nevertheless be eligible for award of the Contract if it can demonstrate to the Airport that it has made a good faith effort to meet the MWBE goal. This good faith effort documentation should be submitted when the initial response to the Airport's solicitation is due. On the other hand, if the Contractor, including MWBE prime contractors, strives to meet the goal and falls short of achieving the goal, it shall nevertheless be eligible for award of the Contract if it can demonstrate to BDDD that it has made a good faith effort to meet the M/WBE goal. This good faith effort documentation should be submitted within five (5) business days when requested by BDDD.

The issue of whether or not the Contractor has met or exceeded the established goal and/or has demonstrated good faith efforts is considered a matter of the Contractor's responsibility. The requirement to submit the good faith documentation is considered a matter of the Contractor's responsiveness. The Airport will only award contracts to Contractors determined to be responsive and responsible. The Vice President of the Business Diversity & Development Department (BDDD) or designee shall be responsible for determining if the Contractor's good faith effort is sufficient to meet the contract MWBE goals.

In evaluating a Contractor's good faith effort submission, the Airport will only consider those documented efforts that occurred prior to the good faith effort submission. Under no circumstance shall BDDD recommend award of a Airport procurement without the final good faith efforts determination by the Airport's Reconsideration Official.

In making a determination that the contractor has made a good faith effort to meet the M/WBE goals, BDDD shall consider specific documentation concerning the steps taken to obtain M/WBE participation, with a consideration of, by way of illustration and not limitation, the following factors:

1. Whether the contractor attended any pre-bid or pre-proposal meetings scheduled by the Airport to discuss subcontracting and supplier opportunities for MWBE participation and whether the contractor obtained a current list of MWBE subcontractors and/or suppliers from the Airport's BDDD office;
2. Whether the contractor timely advertised in general circulation, trade association, and/or MWBE-focused media concerning subcontracting and supplier opportunities;
3. Whether the contractor provided timely written notice via mail or facsimile to a reasonable number of MWBEs and/or contacted a reasonable number of

MWBEs via telephone about the subcontracting/supplier opportunities. A "reasonable number of MWBEs" is based on the number of MWBEs available in the areas of subcontracting or supplier opportunities which is a minimal of three (3) MWBEs per subcontracting opportunity;

4. Whether the contractor solicited the MWBEs a reasonable time prior to bid submission, exclusive of the day the bids are opened to allow MWBEs to participate effectively. Also, whether the contractor followed up those initial solicitations of interest by contacting MWBEs to determine with certainty whether the MWBEs were interested a minimum of three (3) calendar days prior to bid opening;
5. Whether the contractor selected portions of the work to be performed by MWBEs in order to increase the likelihood of meeting the MWBE goals (including, where appropriate, breaking down the contract into economically feasible subcontracts to facilitate MWBE participation;
6. Whether the contractor provided interested MWBEs with the plans, specifications, scope of work and requirements of the contract or adequate information about the locations of the plans, specifications, scope of work and requirements of the contract;
7. Whether the contractor negotiated in good faith with interested MWBEs, not rejecting MWBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;
8. Whether the contractor negotiated in good faith with interested MWBEs using good business judgment, taking into consideration the MWBE subcontractor's price quote and not rejecting reasonable quotes from interested MWBE firms;
9. Whether the contractor made efforts to assist interested MWBEs in obtaining bonding, lines of credit, insurance, etc., required by the Airport;
10. Whether the contractor made efforts to assist interested MWBEs in obtaining necessary equipment, supplies, materials, or related assistance or services;
11. Whether the contractor effectively used the services of available minority and women community organizations; contractor groups; local, state, and federal business assistance offices; and other organizations that provide assistance in identifying MWBEs;
12. Whether the contractor, if applicable, obtained written documentation from a Airport approved Surety Support Consultant or a bona fide surety company indicating that bonding was denied prior to the MWBEs being rejected as a potential subcontractor for failing to obtain contractor required bonding.

Documentation furnished by a surety company will be subject to verification by BDDD; and

13. Whether other contractors have attained a sufficient level of MWBE participation to meet the contract goals will also be taken into consideration when determining whether the contractor in question has made a good faith effort. The reference to "contractor" in this section is inclusive of consultants, vendors or other providers as defined in the ***Glossary of Terms*** for this manual.

If a contractor fails to submit the Good Faith Efforts documentation by the deadline for submission, it waives the right to appeal the Good Faith Efforts decision. BDDD will review not only the different kinds of efforts the contractor has made but also the quantity and quality of those efforts. Efforts that are merely pro forma are not good faith efforts to meet the goals (even if they are sincerely motivated). The Airport will consider, if given all relevant circumstances, the contractor efforts could not reasonably be expected to produce a level of M/WBE participation sufficient to meet the goal.

SECTION XII. APPELLATE PROCESS AND RECONSIDERATION OFFICIAL

Contractors are reminded that the issue of whether or not the Contractor has met or exceeded the established goal and/or demonstrated good faith efforts is considered a matter of the Contractor's **responsibility**. The requirement to submit the good faith documentation is considered a matter of the Contractor's **responsiveness**. The Airport will only award contracts to Contractors determined to be responsive and responsible. Failure to submit good faith efforts documentation at the established deadline which is an issue of responsiveness will render the contractor as non responsive and the contractor shall be disqualified and not eligible for award. The Vice President of Business Diversity & Development Department (BDDD VP) shall be responsible for determining a Contractor's good faith efforts to meet the MWBE contract goals.

In making the determination, the BDDD VP shall consider the good faith efforts information and within ten (10) business days of receipt of the documentation, make determination and provide a written response that the Contractor is or is not responsible because it has not documented or demonstrated a good faith effort. If the Contractor is determined not to be responsible because it has not documented or demonstrated a good faith effort, a Contractor may request administrative review and final reconsideration.

If a Contractor desires a review of the VP of BDDD's decision, it shall file a written request for final reconsideration within 10 business days after receipt of the decision to the following Reconsideration Official:

Executive Vice President
Administration and Diversity

DFW Airport, 3200 East Airfield Drive
P.O. Box 619428, DFW Airport, Texas 75261-9428

The Reconsideration Official will not have played a role in the determination that the Contractor did not document or demonstrate good faith efforts to meet the contract goals. As part of the reconsideration, the Contractor will have the opportunity to provide written documentation or argument concerning the issue of good faith. The Contractor may elect to meet in person with the Reconsideration Official to discuss whether the Contractor made adequate good faith efforts to meet the goals. The Vice President of BDDD shall be present at any reconsideration meeting or hearing regarding to the good faith efforts determination between the Reconsideration Official and the Contractor or their representatives.

SECTION XIII. PRE-AWARD PLAN COMPLIANCE

M/WBE Utilization Forms and Related Documentation

Each Contractor shall submit for all solicitations, bids or proposals, completed DMWBE utilization forms as outlined below.

Invitation for Bid (IFB) for General Goods and Services:

- **Final Schedule of Subcontractors** shall be submitted at bid time. If the solicitation is for an indefinite-delivery contract, the Contractor shall submit a statement of commitment along with the pool of subcontractors it intends to utilize to fulfill its commitment.
- **Intent to Perform as a Subcontractor** A signed and executed form for each DMWBE subcontractor should be submitted at bid time.
- **Good Faith Effort** documentation and supporting documents. If the Contractor fails to meet the DMWBE goal, this documentation shall be submitted at bid time.
- The Airport will not award a contract to any Contractor who has not supplied this documentation.

Invitation for Bid (IFB) for Construction Projects:

- **Preliminary Schedule of Subcontractors** shall be submitted at bid time. If the solicitation is for an indefinite-delivery contract, the Contractor shall submit a statement of commitment along with the pool of subcontractors it intends to utilize to fulfill its commitment.
- **Final Schedule of Subcontractors** shall be submitted within three (3) business days from the date of the bid opening or with the bid verification.
- **Intent to Perform as a Subcontractor** A signed and executed form for each DMWBE subcontractor shall be submitted within three (3) business days from the date of the bid opening or with the bid verification.

- **Good Faith Effort** documentation and supporting documents. If the Contractor fails to meet the DMWBE goal, this documentation shall be submitted at bid time.
- The Airport will not award a contract to any Contractor who has not supplied this documentation.

Request for Proposals (RFP) or Request for Qualifications (RFQ):

- **Preliminary Schedule of Subcontractors** shall be submitted at the time of proposal submission. If the solicitation is for an indefinite-delivery contract, the Contractor shall submit a statement of commitment along with the pool of subcontractors it intends to utilize to fulfill its commitment.
- **Final Schedule of Subcontractors** shall be submitted with the best and final offer.
- **Intent to Perform as a Subcontractor** The signed and executed form for each DMWBE subconsultant shall be submitted with the best and final offer.
- **Good Faith Effort** documentation and supporting documents. If the Contractor fails to meet the DMWBE goal, this documentation shall be submitted at the time of proposal submission.
- The Airport will not award a contract to any Contractor who has not supplied this documentation.

Request for Price Proposal for a task/delivery order under an Indefinite Delivery Contract:

- **Preliminary Schedule of Subcontractors** shall be submitted at the time of initial price proposal submission.
- **Final Schedule of Subcontractors** shall be submitted with the final price proposal.
- **Intent to Perform as a Subcontractor** The signed and executed form for each DMWBE subcontractor shall be submitted with the final price proposal.

Commercial Development projects:

- **Verification of DMWBE Expenditure and Equity Goal Determination** shall be submitted at the time of proposal submission.
- **Final Schedule of Subcontractors** shall be submitted at the Airport's Pre-Construction Meeting.
- **Intent to Perform as a Subcontractor** The signed and executed form for each DMWBE subcontractor shall be submitted within five (5) business days from the date of the Airport's Pre-Construction Meeting.

The **Schedule of Subcontractors** form shall list all subcontractors on the project and detail the preliminary percentage or dollar commitment of the Contractor to DMWBE participation. Submission of the **Intent to Perform as a Subcontractor** forms for each DMWBE firm shall constitute a representation by the Contractor to the Airport that it believes such DMWBE firm to be certified as a DMWBE and ready, willing and able to perform the work as designated. It shall also represent a commitment by the

Contractor that if it is awarded the contract, it will enter into a subcontract with such DMWBE for the work described at the approximate price and percentage set forth in the **Intent to Perform as a Subcontractor** forms. The winning bidder/proposer shall enter into formal agreements with the DMWBE firms for work as indicated on the **Final Schedule of Subcontractors** and **Intent to Perform** forms within ten (10) business days after receipt of the contract executed by the Board or Contractor's Notice of Award. The Contractor, if requested, shall provide the BDDD copies of those agreements within five (5) business days of execution.

If the DMWBE subcontractor information or status changes after the forms have been submitted but prior to award of the contract, the Contractor must immediately notify BDDD of the changes and a written explanation for the change by submitting a **Request for Approval of Change to Final Schedule of Subcontractors** form (see attached). No change in DMWBE participation after bid submission, but prior to contract award, may change, or be deemed to change, the Contractor's submitted bid amount. The Modification and Substitutions section of the DMWBE Policy and Procedures Manual shall govern the modifications and substitutions of the DMWBE firms that occur after contract award.

SECTION XIV. POST AWARD COMPLIANCE

A. MONITORING PAYMENTS TO MWBEs

It is Board policy that all invoices in compliance with contract payment terms and conditions should be paid within 30 days from the date the original invoice is received to comply with the Prompt Payment Act, or sooner if required by the contract terms. All responsible departments must follow the policy and procedure in order for the Board to be in compliance with all necessary requirements.

To ensure that the prime contractor meets all its MWBE obligations under contract, BDDD will review the contractor's MWBE involvement throughout the term of the contract including any term extensions from the original contract period. If a contract includes a Minority/Women Owned Business Enterprise (MWBE) subcontracting commitment, the Contractor must submit a **Pay Period Activity Report (PPAR)** (with verifying information) concurrent with the Contractor's submission of payment requests with each invoice. (see attached). The information reflected on this report will be utilized to provide constant monitoring of the payments made to MWBE as well as non MWBE subcontractors in relation to the percentage of work performed). Failure to include a required PPAR form with the invoice will result in the invoice being returned to the Contractor.

BDDD will not permit a Contractor to count the participation of a MWBE subcontractor toward the prime Contractor's MWBE achievements or overall goal until the associated amount being counted toward the goal has been actually paid to the MWBE.

The compliance monitoring will also include on-site inspections. This provides the opportunity to confirm that MWBE subcontractors as listed on the Intent to Perform As a Subcontractor for Contract Award forms, are actually providing the contracted services. The Contractor especially on construction contracts is responsible for providing BDDD, if requested, a project work schedule together with a list of all subcontractors for the scheduled work. This will also assist in scheduling on-site compliance reviews.

The Airport may withhold all or part of any progress payments otherwise due a contractor if the contractor fails to make prompt payments as defined in the section herein to its subcontractors, supplier, material man or laborers or fails to comply with the Board's MWBE Contract Provisions, policy and the requirements outlined in the Business process Manual.

All reports of noncompliance will be referred to the Contract Administrator, and if appropriate to the Legal Department.

B. REGULAR REPORTS

In order to monitor the progress of its MWBE Business process, BDDD shall maintain a record-keeping system designed to:

1. Assess overall MWBE utilization on Airport contracts, subcontracts and concessions.
2. Identify and monitor Prime and Subcontractor's MWBE utilization for the overall project and on a task-by-task basis.
3. Identify and list certified MWBEs. The listings shall be available to the Airport bidders/proposers, and contractors in their efforts to meet MWBE requirements.

BDDD will monitor the Airport contracts for Contractor's achievements of the MWBE utilization goals on a monthly basis. BDDD will also review the overall Airport's progress and performance in achieving the MWBE utilization goals on a quarterly and annual basis. Other MWBE-related internal and external reports shall also be prepared, as required or requested. If the contract administrator or any other Airport personnel becomes aware of any issues of non compliance with the MWBE provisions or this manual, a BDDD representative or the department should be notified immediately.

SECTION XV. MODIFICATIONS OR SUBSTITUTIONS

If a prime contractor proposes to terminate or substitute a MWBE subcontractor for any reason after submission of the final Schedule of Subcontractors/Subconsultants as determined in the MWBE Business process either prior to or after contract award, the Prime Contractor (referred to hereinafter as "Contractor") will be required to make good faith efforts as defined in the Section herein to find a substitute MWBE subcontractor and/or subconsultant (referred to hereinafter as subcontractor) for the original MWBE. The good faith effort shall be directed at finding another MWBE to perform or provide at least the same amount of work, material or service under the contract as the original MWBE contractor. The Contractor may also find additional MWBE firms and/or adjust the current/projected MWBE participation to meet the MWBE goal. This section and its requirements are applicable to MWBE as well as non MWBE prime contractors. The Contractor must notify BDDD about any additions, modifications or deductions that would affect the contract's MWBE participation. If there is any MWBE participation performed by a firm that replaced a MWBE firm through a substitution or modification without prior approval by BDDD, that participation will not be credited towards the contract's MWBE commitment.

The Contractor's documentation to BDDD should include the specific reasons for the proposed substitution. Stated reasons that are acceptable include, but are not limited to: a MWBE was found not to be able to perform on time; a MWBE was found not to be able to produce acceptable work; and/or a MWBE has made an unreasonable escalation in price. In the case of a MWBE subcontractor being substituted for another MWBE subcontractor, the Contractor should also include the name, address, certification number and principal office of the proposed MWBE firm. The Contractor should also submit a signed Intent to Perform form for each new MWBE subcontractor. The Contractor must provide BDDD with any and all documents and information as may be requested with respect to the modification. Prior to submitting a request for substitution based on non-performance, the Contractor shall provide notice to the subcontractor of the performance issue and provide the subcontractor an opportunity to correct the situation. Then, the Contractor must submit documentation detailing the notice and the efforts made by the Prime Contractor and the MWBE subcontractor to cure the non-performance situation to BDDD. This section shall not apply in an Emergency situation or contracts directly related to passenger safety, security and health.

1. If a prime contractor wishes to terminate, for convenience, a MWBE subcontractor whose service is listed to achieve the MWBE contract commitment and then self perform the work of the terminated MWBE subcontractor with its own forces an affiliate or a non-M/WBE subcontractor forces, it must submit written documentation to BDDD prior to the termination of the MWBE subcontractor. The submitted documentation should include the reasons for the termination and the contractor's good faith efforts to find a substitute MWBE firm. The BDDD will approve or disapprove the substitution based on the good faith efforts documentation as defined in the Section herein.

A prime contractor may not terminate a MWBE subcontractor and perform the work with its own or an affiliate's forces or replace the MWBE subcontractor with a non-MWBE subcontractor without the prior written consent of BDDD. The decision of BDDD regarding whether good faith effort was sufficient will be documented as set forth herein by the Good Faith Efforts section of the MWBE Business process Manual.

2. If the prime contractor wishes to terminate, for convenience, a MWBE subcontractor listed as fulfilling its MWBE contract commitment and substitute the original MWBE subcontractor with another MWBE subcontractor, it must submit written documentation to BDDD outlining the reasons for the substitution prior to the termination of the original MWBE. Additionally, the Contractor must submit to BDDD along with the request for substitution, an Intent to Perform as a Subcontractor form to verify that the new MWBE firm(s) is certified by an approved certifying agency. The BDDD will approve or disapprove the substitution based on the submitted documentation. BDDD shall notify the prime contractor, in writing, of the decision as expeditiously as possible. If the proposed substitution is approved, the contractor shall provide to BDDD, upon request, within five (5) business days of its receipt of the request for the substitution, a copy of the executed subcontract agreement with the new MWBE firm. A copy will be forwarded to the appropriate department.
3. If there is a modification or substitution that affects the original list of subcontractors submitted with the bid/proposal, excluding vendors, that information shall be submitted for review and approval through the **Request For Approval of Change To Final Schedule of Subcontractors form** (See attached) in accordance with Airport procedures when adding, changing or deleting subcontractors on Airport projects. Contractors shall make a good faith effort to replace MWBE subcontractors that are unable to perform on the contract with another MWBE in accordance with the Good Faith Efforts requirements herein.
4. If the prime contractor does not comply with the modifications and substitutions requirement outlined in this MWBE Business process, BDDD may elect to apply contract remedies as described herein. At no time should a MWBE firm receive a termination notice prior to the receipt of BDDD granting approval for the substitution or modification. Additionally, the Airport may order that the prime contractor forfeit the profits from the terminated portion of the MWBE subcontract. BDDD reserves the right to request any information and/or documentation regarding the request for substitution.

SECTION XVI. MWBE CONTRACT CLAUSES

All Airport departments having contract administration responsibilities shall ensure that the ***MWBE Contract Provisions*** (see attached) language is included in all Contracts and related subcontractors subject to Airport Board of Directors' approval. The inclusion of the MWBE Business process requirements and applicable goal(s) in a contractor's bid/proposal package shall become a binding part of the contract. The following specific General Airport and MWBE Contract clauses shall be included in all Contracts and related subcontractors subject to Airport Board of Director's approval.

A. PROMPT PAYMENT

It is Board policy that all invoices in compliance with contract payment terms and conditions should be paid within 30 days from the date the original invoice is received to comply with the Prompt Payment Act, or sooner if required by the contract terms. As part of its MWBE business process, the Airport will include, where practicable, the following or similar clause in each prime contract and requires the inclusion of the following clause in every subcontract at all tiers.

The prime contractor on construction, general services, supplier and other Airport non-professional services contracts who receives a payment under an Airport contract shall pay its subcontractors no later than the 7th day after the date the prime contractor receives payment from the Airport.

The prime contractor also agrees to promptly request the release of any retainage withheld from subcontractors within seven (7) days after the subcontractor's work is satisfactorily completed and receives partial acceptance, substantial completion or final completion/final acceptance as defined in the General Provisions of the contract. Furthermore, the prime contractor agrees to pay the subcontractor its retainage within seven (7) days after the date the prime contractor receives the subcontractor's retainage payment from the Airport.

A finding of non-payment shall be a material breach of this contract. The Airport may, withhold progress payments until the Contractor demonstrates timely payment of sums due subcontractors. The Airport also reserves the right to exercise other breach of contract remedies. The reference to "contractor" in this section is inclusive of consultants, vendors or other providers as defined in the ***Glossary of Terms*** for this manual.

B. EXPEDITED PAYMENT

In an effort to remove the obstacle of the length of time for subcontractor payments on Airport procurements, the Airport Board has an Expedited Payment Policy. This policy is applicable if a prime contractor has been awarded a multi-year contract for construction and/or maintenance services of at least \$10,000,000 in contract value. The Expedited Payment program would require those eligible prime contractors which

voluntarily participate in the program to pay their subcontractors within seven (7) days after receipt of the subcontractor's invoice. The Airport would then pay interest and provide other incentives to the prime contractor on eligible expedited payments according to the **Expedited Payment Process and Policy** (see attached).

C. NON-DISCRIMINATION ASSURANCE

As part of the MWBE Business process, the Airport will include that the following or similar clause is placed in every prime contract and subcontract.

During the performance of this contract, the contractor or subcontractor agrees that it will not discriminate on the basis of race, color, national origin or sex. Failure by the contractor to ensure non-discrimination is a material breach of contract, which may result in the termination of this contract or such other remedy, as the Airport deems appropriate. The Contractor understands that it is required to insert the substance of this clause in all subcontracts and purchase orders.

D. OTHER MWBE CONTRACT CLAUSES

Additionally, as part of the MWBE Business process, the Airport will include the Minority and Woman-Owned Business Enterprise (MWBE) Contract Provisions in every prime contract and subcontract as well as the Minority and Woman-Owned Business Enterprise (MWBE) Revenue Contract Provisions for concessions and Commercial Development contracts. The following clauses are key clauses that are emphasized in the implementation of the MWBE requirements.

1. It is the policy of the Airport to remove barriers for Minority and Women-Owned Business Enterprises (MWBEs) to compete and create a level playing field for MWBEs to participate in Airport contracts and related subcontracts.
2. The Contractor specifically shall comply with all applicable provisions of the Airport's MWBE Business process and any amendments thereto. MWBE and Non-MWBE subcontractors also agree to comply with all applicable provisions of the Airport's MWBE Business process.
3. Contractor shall appoint a high-level official with decision-making capabilities for the Contractor to administer and coordinate the Contractor's efforts to carry out the requirements and provisions of the Airport MWBE policy and contract provisions. This official shall be the single point of contact for MWBE contract issues and must provide current contact information.

SECTION XVII. AIRPORT CONCESSIONS

In furtherance of the Airport's MWBE policy, concessionaires will be required to comply with the following assurances:

A. POLICY

1. It is the policy of the Dallas/Fort Worth International Airport Board of Directors to remove barriers for MWBEs to compete and create a level playing field for MWBEs to participate in Airport contracts and related subcontracts. It is also the Airport's policy to promote participation of MWBEs that represent the diverse, ethnic, cultural, racial and gender groups which comprise Dallas and Fort Worth. Additionally, BDDD has the mission to proactively facilitate and maximize business and capacity building opportunities for minority and women businesses by collaborating with internal customers and implementing effective innovative programs and approaches for prime, subcontracting and revenue generating opportunities. Therefore, the proposer or concessionaire shall demonstrate good faith efforts to promote this policy through its concession and consumer service program at the Airport. Additionally, the proposer or concessionaire shall provide maximum opportunity for the consideration and use of minority/women-owned business enterprises in all aspects and activities associated with Airport concession including, but not exclusive to, ownership/equity opportunities, construction opportunities and contracting/purchasing activities associated with the operation of the Airport concession. The proposer or concessionaire shall abide by all applicable provisions of the Airport's MWBE Business process, including applicable aspects of any contractual MWBE Clause.
2. Proposer/concessionaire further agrees that no person shall be excluded from participation in, denied the benefits of, or otherwise discriminated against in connection with the award and performance of any Airport contract because of race, color, religion, national origin, sex, age, handicap or political belief or affiliation.

B. ADMINISTRATIVE GUIDELINES

1. The proposers or concessionaire shall demonstrate good faith efforts to meet the aspirational Airport MWBE equity and expenditure goals established for Airport concessions. The proposers or concessionaire shall seek proportional MWBE equity ownership of its entity based on gross receipts or revenue through a formal collaboration such as a joint venture or partnership. The Joint venture or Partnership concessions agreement shall reflect the MWBE equity ownership commensurate with the level of participation in the business to justify counting towards the MWBE equity goal. For example, 35% MWBE equity ownership in the business should relate to 35% meaningful participation or participation that has a commercially useful function.
2. BDDD will conduct a review of the MWBE participation efforts of any potential concessionaire prior to the Airport Board approval.

3. Proposers or concessionaire understands and agrees that if his/her proposal is accepted and deficiencies in any aspect of its minority and women-owned business utilization effort regarding either contracting/expenditures or equity are found as a result of a review or investigation, the proposers or concessionaire may be required to demonstrate its good faith efforts, as defined by the Airport.

C. MONITORING AND COMPLIANCE

1. BDDD will work together with the Airport Concessions department to ensure the implementation of the Airport's MWBE Policy in regards to revenue generating opportunities.
2. Concessionaires shall be required to report monthly gross revenue and expenditures to MWBEs performing services or supplying goods. The expenditures for MWBE contractors utilized in concession construction finish out or remodeling should be reported at the time the work is completed.
3. Concessionaires shall be required to list the specific duties, functions and responsibilities performed by the equity MWBE partner or other MWBEs performing services or supplying goods (other MWBEs).
4. Concessionaires shall be required to submit a written notification to BDDD of any material change in the ownership, control, duties, functions and responsibilities of the equity MWBE partners and other MWBEs within thirty (30) days prior to implementing the change.
5. If the ownership and control of the equity MWBE partner should fall below the initial level of commitment by the Airport concessionaire, the concessionaire shall have 120 business days to reinstate the commitment level of ownership and control. Concessionaire shall provide documentation to BDDD showing good faith efforts were used to obtain the committed MWBE participation if they fail to comply with this 120 day requirement.
6. BDDD will periodically review the specific duties, functions and responsibilities of each equity MWBE partner and other MWBE to confirm that no material change has occurred.
7. BDDD will perform periodic reviews, including site visits, each year on a representative number of judgmentally selected concessionaires and contractors to confirm the equity MWBE partners and other MWBEs are performing the listed duties, functions and responsibilities.
8. Concessionaire shall report the MWBE participation utilized to meet the Airport's MWBE equity goal and expenditure goal to BDDD on a quarterly basis. BDDD will monitor the monthly gross revenues of concessionaires,

especially the equity MWBE partners and monitor progress of concessionaire commitments to other MWBEs versus actual participation.

9. BDDD will require that concessionaires submit written confirmation, annually-no later than October 1st, that there are no changes in ownership, control, duties, functions and responsibilities of equity MWBE partners, including terms and conditions of joint venture agreements.
10. Prior to lease renewal or extensions, BDDD will review and approve the MWBE participation plan or commitments for MWBE equity and expenditures.
11. In the event of a sale of an existing Airport concession, BDDD will review and approve for compliance the proposed concessionaire's MWBE participation plan for achieving the MWBE equity and expenditure goals prior to Board approval.

All Airport concessions and proposed concession agreements shall be conducted in accordance with applicable requirements of the MWBE Business process and/or under DOT's **49 CFR Part 23** and any amendments thereto (see attached). Failure to adhere to the **FAA Joint Venture Guidelines** (see attached) and the Airport's policy or failure to submit the documentation required regarding equity MWBE and other MWBE participation and utilization in accordance to this MWBE Business process may result in the termination of the concessionaire's lease agreement by the Airport.

SECTION XVIII. COMMERCIAL DEVELOPMENT CONTRACTS

In furtherance of the Airport's MWBE policy, Commercial Development contractors shall be required to comply with the following assurances:

A. POLICY

1. It is the policy of the Dallas/Fort Worth International Airport Board of Directors to remove barriers for MWBEs to compete and create a level playing field for MWBEs to participate in Airport commercial leasing and development contracts as well as any equity or contracting opportunities created by these commercial leasing and development contracts. The Commercial Development contractor shall demonstrate good faith efforts to promote this policy through its planning and implementation of its development program. The Commercial Development contractor shall also provide maximum opportunity for the consideration and use of minority/women-owned business enterprises in all aspects and activities associated with commercial leasing and development including, but not exclusive to, ownership/equity participation and opportunities as well as contracting/purchasing activities associated with the operation of the commercial development. The Commercial Development

contractor shall abide by all applicable provisions of the Airport's MWBE Business process, including applicable aspects of any contractual MWBE Clause.

2. The Commercial Development contractor further agrees that no person shall be excluded from participation in, denied the benefits of, or otherwise discriminated against in connection with the award and performance of any Airport contract because of race, color, religion, national origin, sex, age, handicap or political belief or affiliation.
3. Additionally, it is the policy and a DFW Airport priority to ensure that the resulting development of the Commercial Development contracts as well as leasing and development opportunities outline a structured commitment to MWBE values. The Airport will ensure to the maximum extent practicable that good faith efforts towards the consideration, solicitation and involvement of MWBEs in every aspect of the development plan will be done in cooperation with BDDD including, but not exclusive to, ownership/equity participation as well as contracting/purchasing activities.

B. ADMINISTRATIVE GUIDELINES

1. The commercial development contractor shall demonstrate good faith efforts to meet the aspirational Airport MWBE equity and expenditure goals established for Airport commercial leasing and development contracts by submitting a **Verification of MWBE Expenditure and Equity Goals Determinations form for Commercial Development** (see attached). The Commercial Development contractor shall seek proportional MWBE equity ownership of its development team based on gross receipts or revenue through a formal collaboration such as a joint venture or partnership. The MWBE equity percentage participation and risk must commensurate to the capital investment, carry interest or services to the Commercial Development contractor and meet the Airport's **MWBE Equity Guidelines** (see attached). The Joint venture or Partnership agreement shall reflect the MWBE equity ownership commensurate with the level of participation in the business to justify counting towards the MWBE goals.
2. BDDD shall establish individual contract goals on all Commercial Development construction, professional service and contracting/purchasing activities associated with commercial leasing and development contracts. BDDD will conduct a review of the MWBE equity and expenditures participation efforts of any potential commercial development contractor prior to the Airport Board approval.
3. The award of an Airport Commercial Development contract is in part based upon its meeting or exceeding MWBE participation levels for equity/investment and for contracting/expenditures under this commercial development contract. The percentage for MWBE equity/investment shall be calculated by taking the total dollars provided by MWBEs and dividing that amount by the total dollars

invested by the commercial development contractor. In other words, if MWBEs invested \$20.00 in this commercial development contract or operations to be conducted under this commercial development contract and the total dollars invested by the commercial development contractor was \$100.00 then the MWBE participation for equity/investment would be twenty percent (20%).

4. The MWBE percentage goal involvement shall be expressed as a percentage of the total gross revenue projected for the Airport lease and development opportunity. This MWBE involvement should be demonstrated through active involvement in the project with respect to ownership, control, design, development, construction, management, and leasing, franchising, operation and/or brokerage services.
5. The percentage for MWBE contracting/expenditures actually achieved shall be calculated by taking the total dollars paid to MWBE subcontractors and dividing that amount by the total dollars paid to contractors. Therefore, if MWBE contractors performing work under this contract were paid \$20.00 and the total dollars paid to all contractors performing work under this contract was \$100.00 then the MWBE contractor participation would be twenty percent (20%).
6. The Commercial Development contractor understands and agrees that if his/her proposal is accepted and deficiencies in any aspect of its minority and women-owned business utilization effort regarding either contracting/expenditures or equity are found as a result of a review or investigation, the Commercial Development contractor may be required to demonstrate its good faith efforts to BDDD.

C. MONITORING AND COMPLIANCE

1. BDDD will work together with the Commercial Development department to ensure the implementation of the Airport's MWBE Policy and BDDD involvement in the complete process in regards to Commercial Development Contracts.
2. The Commercial Development contractor shall appoint and designate to BDDD a high-level official to administer and coordinate its efforts to carry out the Airport's MWBE policy and requirements.
3. Commercial Development contractors shall be required to list the specific ownership, control, duties, functions and responsibilities performed by MWBE equity partners.
4. If the ownership and control of the equity MWBE should fall below the initial level of commitment by the Airport Commercial Development contractor, the Commercial Development contractor shall have 120 business days to reinstate the commitment level of ownership and control. Commercial Development

contractor shall provide documentation to BDDD showing good faith efforts were used to obtain the committed MWBE participation if they fail to comply with this 120 day requirement.

5. Commercial Development contractors shall be required to submit written notification of any material change in the ownership, control, duties, functions and responsibilities of any equity MWBE partner and other MWBEs within thirty (30) days prior to implementing the change.
6. The Commercial Development contractor shall submit monthly reports of payments and subcontract and/or supplier expenditures to MWBE and non-MWBEs in such form and manner and at such times as BDDD shall prescribe. The Commercial Development contractor and any other subcontractors as a result of this contract shall provide any and all documentation necessary to establish the MWBE status of equity MWBE partner and other MWBE contractors.
7. BDDD will perform periodic reviews, including site visits, on a representative number of judgmentally selected Commercial Development contractors to confirm the specific ownership, control, duties, functions and responsibilities of each equity MWBE partner and other MWBEs as submitted in the Commercial Development contractor's MWBE commitment plan and to ensure that no material change has occurred.
8. The Commercial Development contractor shall provide BDDD access to all joint venture agreements, financing and operating agreements, books, records, accounts and any other documents requested to verify the MWBE participation. The Commercial Development contractor shall provide reports in such form and at such times as required by the BDDD to provide an accounting for capital contributions, control, management, expenditures, payments, distribution of profits and royalty payments. Access as required by this paragraph shall include the right of the BDDD to conduct MWBE audits. All such audits shall be conducted during normal business hours and only after reasonable notice has been provided to the commercial development contractor by BDDD.
9. Prior to contract/lease renewal or extensions, BDDD will review and approve the MWBE participation plan or commitments for equity MWBE partners and expenditures.

All Airport Commercial Development contractors and proposed Commercial Development contract agreements shall be conducted in accordance with applicable requirements of the MWBE Business process. Failure to adhere to the Airports policy and requirements or failure to submit the documentation required regarding equity MWBE partner and other MWBE participation and utilization in accordance to this MWBE Business process will be considered a material breach of the contract.

SECTION XIX. OUTREACH

An integral component of the Airport's MWBE Business process are the processes, procedures and formalized efforts to identify, solicit and ensure MWBE participation on the Airport's contracting opportunities. The Airport's commitment to the achievement of equitable contracting opportunities is the principal reason in establishing an outreach component within the MWBE Business process. The MWBE Business process' outreach efforts are designed to document initiatives and establish procedures which best inform, present, and achieve results for maximum consideration and participation by MWBEs. Key actions to the Airport's outreach efforts are internal and external communication as well as interaction by BDDD and other Airport departments and the MWBE business community.

A. INTERNAL COMMUNICATION

As detailed the OTHER DEPARTMENTS ROLES AND RESPONSIBILITIES Section in the Business process manual, all Airport departments that have or share the responsibility for the awarding of Airport contracts have a responsibility to support and assist in promoting and carrying out the MWBE Business process. In support of the Airport's MWBE policy and Business process, BDDD has established in conjunction with appropriate Airport departments, procedures to enhance qualifications, competitiveness, and opportunities for MWBE involvement. Processes have been jointly established to capture, disseminate, analyze, and communicate Airport business opportunities, and address barriers to effective MWBE participation.

B. EXTERNAL COMMUNICATION

Communication and support of the Airport's MWBE Business process initiatives by entities that represent or promote MWBE interest is a crucial element to a viable and effective MWBE Business process effort. Correspondingly, BDDD has also formalized efforts to ensure communication and participation by external MWBE related entities in maximizing the Airport's MWBE identification and solicitation efforts. Efforts with these entities are geared towards establishing a fluid communication process that informs, facilitates networking, and assists in the overall development and management of the Airport's Business process. BDDD shall participate in MWBE sponsored activities and look to these entities as the principal organizations to generate support and participation by the minority and women business community.

C. MWBE LISTINGS

As part of the Airport's efforts to identity and ensure solicitation of MWBE involvement/utilization on Airport projects, BDDD shall maintain listings of MWBE firms by trade areas; i.e., construction, professional services (architects and engineers, etc.), procurement and concessions. These listings will be used to notify MWBEs of business opportunities; and provide the primary vehicle for Airport bidders/proposers and contractors to satisfy MWBE Business process requirements, meet the Airport's MWBE

goal, as well as, facilitate a base for joint ventures, partnerships, etc. The listings include firms that have satisfied the Airport's MWBE certification process.

SECTION XX. CONTRACTOR COMPLIANCE

The Airport shall provide technical assistance to Airport bidders, contractors and consultants as necessary in complying with the General Airport and **MWBE Contract Provisions** (see attached) as well as MWBE Business process requirements in general. The capital projects contractors and Commercial Development contractors shall provide a bidders list of all contractors, consultants, vendors and/or suppliers that they will solicit bids from prior to any solicitations (for both MWBE and non-MWBE firms).

After bid opening and identification of successful bidder or selection of successful proposer, that bidder/proposer, except for purchasing contractors (vendors), will be required to provide the information listed below prior to the award of the contract:

1. Demonstrated acceptable compliance with applicable provisions of the MWBE Contract provisions. This includes a review to ensure achievement of the Airport's MWBE goal or adequate submission of its good faith efforts, as determined by the BDDD, when applicable.
2. Submittal of MWBE certification information by an approved Airport certification entity for all certified MWBEs utilized on the project, including MWBE prime if applicable. It is the responsibility of the Prime Contractor to ensure that its MWBE subcontractors/vendors submit all necessary information for proper MWBE status review, certification and credit.
3. Notwithstanding the fact that a prospective contractor may have the capability to complete a total project with its own work force, and without the use of subcontractors/subconsultants, all Airport and Commercial Development contractors are required to demonstrate sufficient good faith efforts to subcontract with and/or procure supplies/services with minority and women-owned business enterprises in its subconsultant/subcontractor or supplier service area. Contractors who propose to perform the contract with their own work force, and without the use of subcontractors will be required to demonstrate its good faith efforts by submitting information to determine the following, and effectuate a waiver of MWBE Business process requirements:
 - a. That it is a normal business practice of the contractor to perform the elements of the contract with its own work forces without the use of subcontractors;

- b. That the technical nature of the proposed project does not facilitate subcontracting nor any significant supplier opportunities in support of the project; and/or,
- c. That the contractor in fact has demonstrated its capabilities to perform the elements of the contract with its own forces without the use of subcontracts.

Business process abuse, suspected Business process abuse or any violation of this Business process by either Airport prime contractors or by minority/woman-owned firms is to be submitted to BDDD for formal or informal review and resolution. Although BDDD will conduct its Business process inquiries with the highest confidentiality, certain allegations, accusations and Business process infractions will only be pursued if submitted in a formal manner. Formal inquiries are to be submitted in a written, non-anonymous format, which may request a response on the Airport's behalf. Informal inquiries may entail verbal notice(s) and/or a meeting to discuss the issue(s) in question.

BDDD reserves the right to accept or decline to pursue submitted inquiries and will ascertain on a case-by-case basis the procedural format for such investigations.

SECTION XXI. JOINT VENTURES, TEAMING AND MENTOR-PROTÉGÉ PROGRAMS

The Airport shall encourage where economically feasible, joint ventures, teaming arrangements and mentor protégé program to ensure prime contracting opportunities for MWBEs on all eligible projects valued (*i.e.* either through the expenditure of funds or generation of revenues to the contractor), over \$50,000.00.

- A. If a Contractor engages in a joint venture or teaming arrangement to satisfy its MWBE commitment, BDDD shall review all contractual agreements or other pertinent documents regarding:
 - 1. The initial capital investment of each venture partner or team member;
 - 2. The proportional allocation of profits and losses to each venture partner or participation percentage to each team member;
 - 3. The sharing of the right to control the ownership and management of the joint venture or team;
 - 4. Actual participation of the venture partners in the performance of the contract;
 - 5. The method of and responsibility for accounting;
 - 6. The methods by which disputes are resolved; and

7. Other pertinent joint venture or teaming arrangement factors.

On the basis of these factors, BDDD shall determine the degree of MWBE participation resulting from the joint venture or teaming arrangement which may be credited towards the applicable goals of the project.

The Contractor shall provide BDDD access to review all records pertaining to joint venture or teaming arrangement before and after the award of a contract reasonably necessary to access compliance with this section including, but not limited to, certification and financial records. Prior to Board approval, the joint venture partners shall submit a final joint venture or other agreement documenting and reflecting the parties' agreement on the terms and/or material terms of the parties' legal relationship. The Airport Board shall not execute a written lease, contract or issue a notice to proceed including a limited notice to proceed until a fully executed copy of the joint venture agreement has been submitted to the procuring Airport department as well as BDD. Failure of the parties to reach an agreement on the terms of the Joint Venture as well as failure to submit a fully executed agreement may result in rejection of the solicitation.

B. Mentor-protégé. If a Contractor engages in a mentor protégé relationship to satisfy the Contractor's MWBE commitment, BDDD shall review all contractual agreements or other pertinent documents related to the following:

1. To satisfy the Contractor's equal business opportunity commitment, the mentor protégé relationship must be approved by BDDD.
2. The protégé firm must be a certified MWBE – who was certified by an approved Airport certifying agency.
3. A written mentor-protégé agreement must be completed by both parties to the mentor-protégé arrangement and executed before a notary public. The agreement shall clearly delineate the rights and responsibilities of each mentor and protégé contracting activity. The parties must agree to enter into the relationship for a minimum of one year.
4. Protégé firms will not be permitted to re-subcontract any of their work to the mentor firm. The protégé firm will not re-subcontract or assign any of its work to any other contractor without BDDD's prior written approval.
5. Protégé firms may be used to satisfy up to 100 percent of the total MWBE goal for any project or service.
6. During the duration of the contract, the Contractor must provide BDDD a monthly summary of the kinds of mentor skills provided to each protégé which shall include:

- a. Numbers of hours expended in fulfillment of the project by each participant.
 - b. Managerial assistance provided.
 - c. Technical assistance provided.
 - d. Financial assistance provided.
 - e. Bonding assistance provided.
 - f. Number of private or public sector projects bid on by the mentor-protégé team.
 - g. Number of private or public sector contracts awarded to the mentor-protégé team.
7. No officer, director, employee or member of the mentor-protégé team shall be allowed to bid or otherwise participate independently on a contract where the mentor-protégé is bidding or otherwise participating.

SECTION XXII. MWBE COMPLIANCE WITH INVESTMENT AND FINANCIAL POLICIES

The Airport will strive to provide opportunities to those organizations and businesses locally that assist in building the tax base and support for Dallas/Ft. Worth International Airport. To achieve this initiative, Contractors will submit distinct information about potential local and MWBE service providers in this arena which includes investment policies for financial pensions, retirement plans, and other financial bonds. Any search for a new or additional provider shall include all MWBE and local reporting organizations as identified by BDDD. An examination of the results of this initiative will be reviewed and determined by the Vice President of BDDD or appropriate designee.

SECTION XXIII. COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAW

Current federal, state and local laws prohibit the Airport from including MWBE set-asides or mandating quotas in its Business process. Nothing in this MWBE Business process or policy is intended to be construed as requiring a set-aside or mandatory quota.

In the event that an apparent conflict arises between the language contained in this Policy and federal, state or local law or ordinance, such language shall be construed so as to comply with the federal, state or local law or ordinance.

SECTION XXIV. NON-COMPLIANCE ENFORCEMENT

All participants in the MWBE Business process must comply with Airport's requirements set forth in the MWBE Business process, and applicable federal and state laws. BDDD reserves the right to apply legal and contract remedies available under federal, state and local law, including but not limited to, responsibility determinations in future contracts, suspension and debarment procedures and forfeiture of profits as provided for elsewhere.

The MWBE participation percentage commitment made by the Contractor at the time of contract award is deemed to be contractual in nature. Therefore, failure of the Contractor to meet the MWBE participation percentage commitment on any Airport contract may constitute a material breach of the contract. The Airport shall have the right to terminate the contract, deduct from money due or to become due the Contractor an amount equal to the dollar amount of the unmet MWBE participation commitment, secure a refund from the Contractor of that amount, or pursue other such remedies at law or in equity to which the Airport may be entitled. Any money deducted or refunded under this Section shall be collected and considered liquidated damages for Contractor's failure to comply with the Contract, not as a penalty.

BDDD may recommend additional sanctions against Contractors who are found to be in non-compliance with MWBE Business process requirements of MWBE contract provisions at any time during the term of an Airport contract.

BDDD may report any suspected false, fraudulent or dishonest conduct in the commitment and attainment of any MWBE goal on any Airport or Commercial Development procurement to the Airport's Department of Audit Services or any applicable enforcement agency including the State Attorney General's Office.

SECTION XXV. SEVERABILITY

The provisions of this MWBE Business process are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of the MWBE Business process, or the invalidity of the application thereof to any person or circumstances shall not affect the validity of the remainder of this Business process, or the validity of its application to other persons or circumstances.

SECTION XXVI. DISCRIMINATION MWBE DATA COLLECTION

The Airport will not passively support discrimination by doing business with contractors that discriminate on other private and public sector projects. In order to track the MWBE participation practices of the contracting community, BDDD shall collect statistics documenting MWBE participation on public and private projects for

each successful Contractor. The Contractor shall provide to BDDD upon request and within ten (10) business days of that request, the following information:

1. A list and description of all private sector and governmental projects undertaken in the Dallas/Fort Worth Metroplex within the last 12 months.
2. The total dollar value of each project, the name of each business that performed services on such projects, including all minority and non-minority subcontractors, a description of the services performed by each business, the NAICS code(s) applicable to such services, the total project dollars paid to each business, the race and gender ownership of each business, and contact information for each business.

GLOSSARY OF DEFINITIONS

- A. AFFECTED CLASS – A group of persons, identifiable by name or characteristics, who are the victims of a pattern or practice of discrimination.
- B. AFFIRMATIVE ACTION – Actions, policies, and procedures to which a contractor commits itself that are designed to achieve equal employment opportunity. The affirmative action obligation entails (1) thorough, systematic efforts to prevent discrimination from occurring or to detect it and eliminate it as promptly as possible, and (2) recruitment and outreach measures.
- C. AVAILABILITY - The calculated estimate of qualified minority/women-owned business enterprises in a particular trade and/or profession.
- D. BEST VALUE - A Best Value evaluation allows evaluators to consider other criteria in addition to purchase price and minimum specifications in the award of a competitive sealed bid.
- E. BIDDER/PROPOSER – Any person, firm, partnership, corporation, association or joint venture as herein provided seeking to be awarded an Airport contract or lease by a competitive process.
- F. BUSINESS ENTERPRISE – Any legal entity which is organized to engage in lawful commercial transactions and is actively engaged in such transactions as means of livelihood, such as a sole proprietorship, partnership or corporation, but not a joint venture except as hereinafter provided.
- G. BUSINESS PROCESS – Any undertaking to enhance the participation of Minority and Women-owned Businesses by the Airport in contracts/procurements including reimbursement and revenue generating contracts.
- H. CERTIFICATION – The certification of a firm as a minority or woman-owned firm by the Airport's BDD department or a certification agency approved by the Airport's BDD department.
- I. CHALLENGE – A formal filing by a third party to rebut the presumption that a particular individual is not a minority or women-owned business.
- J. COMMERCIAL DEVELOPMENT CONTRACT – An award by a person, corporation, association or other legal entity (excluding the Airport) expending or committing the expenditure (by direct payment, reimbursement, or otherwise) of the proceeds of Airport revenue bonds or the proceeds of bonds issued by a nonprofit airport facility financing corporation for work, labor, services, supplies, equipment, materials, or any combination of the foregoing, in connection with improvements at the Airport.

- K. **COMMERCIALLY USEFUL FUNCTION** – Refers to work performed by a MWBE firm in a particular transaction that, in light of industry practices and other relevant considerations, has a necessary and useful role in the transaction *i.e.*, the firm's role is not superfluous in an attempt to obtain credit towards goals. If, in BDDD's judgment, the firm (even though an eligible MWBE) does not perform a commercially useful function in the transaction, no credit toward the goal may be awarded.
- L. **COMPLIANCE** – Refers to the fact that a Contractor has correctly implemented the requirements of the applicable MWBE Business process requirements.
- M. **CONCESSION** – The right to operate a business that sells goods and/or services to the public at a designated location or locations in one of the Airport's passenger terminals or on Airport premises.
- N. **CONCESSIONAIRE** – The operator of an Airport concession.
- O. **CONSTRUCTION CONTRACT** – Any contract for the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings or highways, or other changes or improvements to real property, including facilities providing utility services.
- P. **CONSTRUCTION SITE** – The general physical location of any building, highway or real property undergoing construction, rehabilitation, alteration, conversion, extension, demolition repair, or any other change or improvement, and any temporary location or facility at which a contractor or other participating party meets a demand or performs a function relating to the contract or subcontract.
- Q. **CONSTRUCTION WORK** – The construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings or highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection and other onsite functions incidental to the actual construction.
- R. **CONTRACT** – An award by the Airport whereby the Airport expends or commits the expenditure of funds in return for work, labor, services, supplies, equipment, materials, or any combination of the foregoing. A legally binding relationship obliging a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them.
- S. **CONTRACT MODIFICATION** – Any change (deductive or additive) to the scope of work or dollar amount in any Airport contract including but not exclusive of: supplemental agreements, contract options renewal years and change orders.
- T. **CONTRACTING OPPORTUNITY** – A procurement action to commercially obtain a product or service (as opposed to intergovernmental actions).

- U. CONTRACTOR – One who participates, through a contract /subcontract (at any tier) or any other contractual agreement with the Airport. A contractor includes but is not exclusive to a contractor, consultant, commercial development developers, commercial development contractors and vendors.
- V. CONTROL - is the primary power to direct the management of a business enterprise - specifically; the minority or woman owner(s) must possess the power and ability to direct or cause the direction of the management and policies of the firm, and to make the day-to-day, as well as major, decisions on matters of management, policy and operations.
- W. DISADVANTAGED BUSINESS ENTERPRISE (DBE) - means a for-profit business concern:
1. That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged as defined in the Airport's DBE Manual 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 are controlled by one or more of the socially and economically disadvantaged individuals who own it.
- X. GOAL – A numerically expressed objective, which contractors and consultants are required to make good faith efforts to achieve. Goals in the MWBE Business process are considered aspirational.
- Y. GOOD FAITH EFFORTS – steps taken to achieve a MWBE goal or other requirements which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the Business process requirement.
- Z. HISTORICALLY UNDERUTILIZED BUSINESS (HUB) - A Historically Underutilized Business (HUB) is a corporation, sole proprietorship, partnership or joint venture formed for the purpose of making a profit in which at least 51 percent or more of the business is owned, operated and controlled by a woman and/or ethnic minority in accordance with the Texas Government Code.
- AA. INDEFINITE DELIVERY CONTRACT - A contract that has been awarded to one or more vendors to facilitate the delivery of supplies and/or services. Usually a contract for supplies or services that does not procure or specify a firm quantity of supplies or the amount of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies or services during the period of the contract.
- BB. INDIAN TRIBE – Any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native Corporation, which is

recognized as eligible for the special Business process and services provided by the United States to Indians because of their status or is recognized as such by the State in which the tribe, band, nation, group or "tribally-owned concern" is located.

- CC. JOINT VENTURE - An association of a MWBE firm and/or 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 MWBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.
- DD. MANUFACTURER – An individual (or individuals) who owns, operates, or maintains a factory or establishment that produces on the premises the components, materials, or supplies obtained by the Airport, contractor or consultant.
- EE. MINORITY BUSINESS ENTERPRISE (MBE) – A for profit business concern which is at least 51 percent owned and controlled by one or more minority person(s), or in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more minorities; and whose management and daily business operations are controlled by one or more of the minority individuals who own it. An MBE is a firm that is certified by an approved Airport certification entity as noted in the Certification section in this manual.
- FF. MINORITY PERSONS - Individuals who are citizens of the United States (or lawfully admitted permanent residents) and who are:
- "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, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
 - "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese cultures or origin, regardless of race;
 - "Native Americans," which includes persons who are American Indians; and
 - "Subcontinent Asian Americans," which includes persons whose origins are

from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka.

- GG. MULTI TIER SUBCONTRACTOR- Subcontractors whose work to provide services or supplies is directly related to the performance of an Airport contract with the prime contractor or at any lower tier subcontractor (whether at a first, second, or third tier) to a first-tier subcontractor.
- HH. MWBE GOAL – A goal as determined annually or on a contract by contract basis by the Airport to be achieved during a fiscal year or the term of a particular contract, based on staff evaluation and determination of the identifiable potential contract opportunities and the availability of minority/women-owned business enterprises in the Dallas/Fort Worth market area to perform work, or in the applicable market area. The MWBE goal shall not be considered or construed as constituting a fixed quota.
- II. PRIMARY INDUSTRY CLASSIFICATION – The six digits North American Industrial Classification System (NAICS) code designation, which best describes the primary business of a firm. The NAICS code listing is accessible through the NAICS website (www.naics.com).
- JJ. PRIME CONTRACTOR – Any person, firm, partnership, corporation, association or joint venture as herein provided which has executed a contract with the Airport or Commercial Development contract or agreement.
- KK. QUOTA – A contracting practice restricting the eligibility for the competitive award of a contract by the designation of an assigned share or proportion of the contract or procurements to a certain group or class.
- LL. REGULAR DEALER – A firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business, and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as manufacturers or regular dealers within the meaning of this definition.
- MM. SET ASIDE – A contracting practice restricting eligibility for the competitive award of a contract to a certain group or class.
- NN. SMALL BUSINESS – As defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto except that a small business shall not include any business or group of businesses controlled by the

same socially and economically disadvantaged individuals(s) which has annual average gross receipts in excess of the standards established by the Small Business Administration's regulation under 13 CFR 121 for a consecutive three-year period.

- OO. SUBCONTRACTOR - Any named person, firm, partnership, corporation, association or joint venture as herein provided identified as providing work, labor, services, supplies, equipment, materials or any combination of the foregoing, under contract to a prime contractor on an Airport contract at any tier.
- PP. TEXAS UNIFIED CERTIFICATION PROGRAM (TUCP) is a "one stop" certification process for the State of Texas DBE Programs, established October 1, 2002. Certain approved agencies within the State of Texas which have agreed to perform the certification processing for DBE firm (and some MWBE) applications within the state of Texas by specific TUCP regions.
- QQ. WOMEN BUSINESS ENTERPRISE (WBE) – A for profit business concern which is at least 51 percent owned and controlled by one or more female person(s), or in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and whose management and daily business operations are controlled by one or more of the female individuals who own it. A WBE is a firm that is certified by an approved Airport certification entity as noted in the Certification section herein.

ATTACHMENTS

- I. AIRPORT BOARD POLICY - Adoption of Revised M/WBE Policy and Procedures Manual
- II. BDDD ORGANIZATIONAL CHART
- III. AIRPORT BOARD POLICY - Delegation of Expenditure Authority (Policy for Contract Solicitations Between \$3,000 to \$50,000)
- IV. NCTRCA CERTIFICATION STANDARDS
- V. SCHEDULE OF SUBCONTRACTORS - PRELIMINARY (Form 90a)
- VI. SCHEDULE OF SUBCONTRACTORS - FINAL (Form 90b)
- VII. INTENT TO PERFORM CONTRACT AS A D/M/WBE SUBCONTRACTOR (Form 110, Local)
- VIII. REQUEST FOR APPROVAL OF CHANGE TO FINAL SCHEDULE OF SUBCONTRACTORS (FORM 102a)
- IX. PAY PERIOD ACTIVITY REPORT (PPAR) - MONTHLY
- X. PAY PERIOD ACTIVITY REPORT (PPAR) - FINAL
- XI. DMWBE CONTRACT PROVISIONS
- XII. AIRPORT BOARD POLICY - Adoption of Expedited Payment Policy
- XIII. DEPARTMENT OF TRANSPORTATION FEDERAL REGISTER 49 CFR PART 23 (March 22, 2005)
- XIV. MWBE REVENUE CONTRACT PROVISIONS (Concessions and Commercial Development Contracts)
- XV. VERIFICATION OF MWBE EXPENDITURE AND EQUITY GOAL DETERMINATION FORM (Commercial Development Projects)
- XVI. FEDERAL AIRPORT ADMINISTRATION ("FAA") JOINT VENTURE GUIDELINES

DALLAS FORT WORTH INTERNATIONAL AIRPORT BOARD

OFFICIAL BOARD ACTION/RESOLUTION

Date 11/06/2008	Committee Finance/Audit	Subject Adoption of Revised Minority/Women Business Enterprise (M/WBE) Policy and Procedures Manual	Resolution # 2008–11–269	
Action That the Chief Executive Officer or designee be authorized to adopt the revisions to the M/WBE Policy and Procedures Manual.				
Description <ul style="list-style-type: none">• It is the policy of the DFW Airport Board to ensure that minority and women–owned businesses are provided opportunities to compete on a level playing field for contracts, subcontracts and concessions. The priority of the Board is to encourage and foster the growth and development of locally owned minority and women–owned businesses in the Owner Cities of Dallas and Fort Worth.• The revised M/WBE Policy and Procedures Manual and its implementation mechanism, outline the objectives and the processes that will be used to accomplish the Board's goal. The policies, procedures and program requirements established under the revised M/WBE Policy and Procedures Manual are applicable to all airport contractors, vendors, consultants and third–party contracts.• The Small and Emerging Business Department (SEBD) (renamed the Business Diversity and Development Department (BDDD)) has primary responsibility for the development and implementation of the Board's M/WBE Policy and Procedures Manual.				
Justification <ul style="list-style-type: none">• The revised M/WBE Policy and Procedures Manual incorporates changes that reflect the most recent best practices, legal guidelines regarding affirmative action contracting programs as well as enhanced and new internal policies and procedures. The changes also include input and recommendations made by the following Departments: Procurement and Materials Management, Concessions, Commercial Development, and Airport Development and Engineering.• The revised M/WBE Policy and Procedures Manual also incorporates, when appropriate, program elements of the Federal Department of Transportation's revised DBE policy and program, 49 CFR Parts 23 and 26.				
D/M/WBE Information <ul style="list-style-type: none">• N/A				
Schedule/Term <ul style="list-style-type: none">• N/A				
Contract #	Agreement #	Purchase Order #	Action Amount \$0	Revised Amount \$0
For Information contact Don O''Bannon 3–5502 Suzanne Cruz–Sewell 3–5503		Fund	Project #	External Funding Source Amount \$0

Additional Information

This revised M/WBE Policy and Procedures Manual is the fourth program revision. The M/WBE Program was last revised and adopted by the Board on May 8, 2003. This revision incorporates changes that reflect the most recent best practices, legal guidelines regarding affirmative action contracting programs, program elements of the DOT revised DBE policy and program, 49 CFR Part 23 & 26, as well as enhanced and new internal policies and processes.

Some of the primary revisions include:

- the department name change from Small & Emerging Business Department (SEBD) to Business Diversity and Development Department (BDDD);
- modifications to M/WBE contract procedures;
- modifications to the M/WBE policy and procedures for Airport Concessions and Commercial Development; and
- modifications to the certification policy and procedures and the acceptance of two additional certification organizations, the Womens Business Council – Southwest and the DFW Minority Business Council.

The overall M/WBE Annual Goals remain unchanged: Construction 30%, Professional Services 27%, Procurement 25%, Concessions Retail 32%, Concessions Food & Beverage 35%, Concessions Newstands 46% and Concession Other 20%. These goals are aspirational goals and are based on the Airport's current Availability & Disparity Study. These goals may be adjusted, once the 2008/09 Availability & Disparity Study is completed, to ensure that the M/WBE goals are narrowly tailored to the Airport's M/WBE Program. The SEBD (BDDD) will continue to employ a contract specific M/WBE goal setting process to establish such goals on a contract-by-contract basis.

Additional Attachments: **N**

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

That the Chief Executive Officer or designee be authorized to adopt the revised M/WBE Business Process Manual.

Approved as to Form by


Gary Keane
General Counsel
Oct 29, 2008 10:18 am

Approved as to Funding by

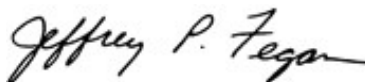

Max Underwood
Vice President
Finance
Oct 29, 2008 10:42 am

Approved as to M/WBE by


Don O'Bannon
Vice President
Small & Emerging Business
Oct 28, 2008 5:30 pm

SIGNATURE REQUIRED FOR APPROVAL**Approved by**


Department Head
Small & Emerging Business
Oct 28, 2008 5:29 pm



Chief Executive Officer

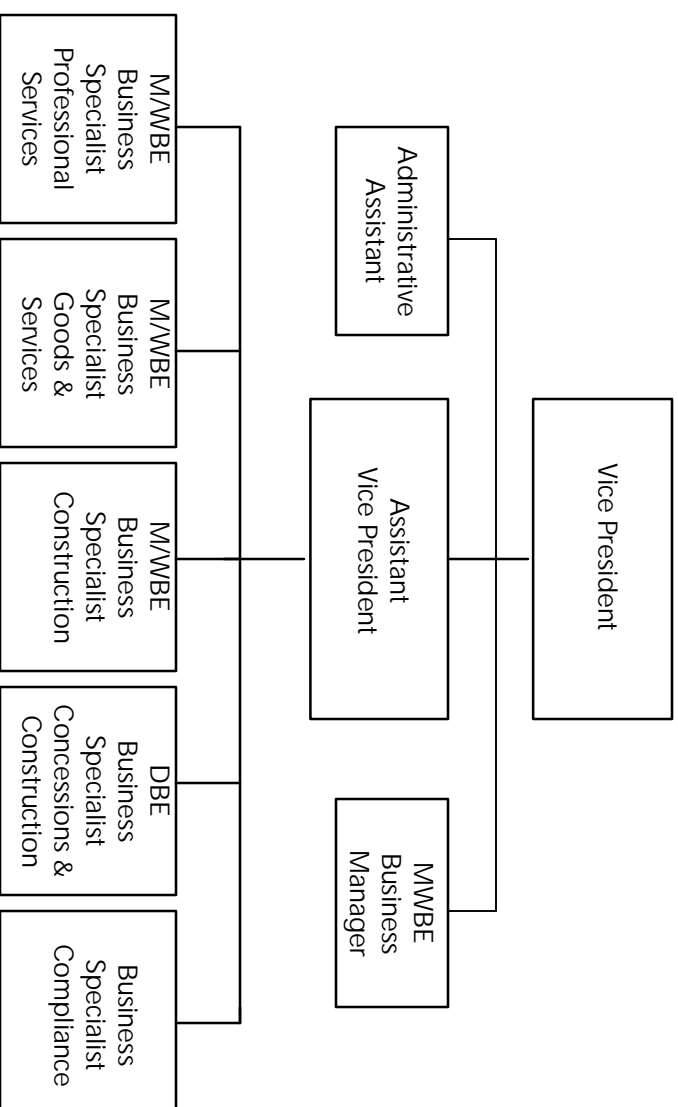
Nov 13, 2008 3:11 pm

Date



Organizational Chart

Business Diversity & Development Department



**DALLAS FORT WORTH INTERNATIONAL AIRPORT BOARD
OFFICIAL BOARD ACTION/RESOLUTION**

Date	Committee	Subject	Resolution #
11/01/2007	Finance/Audit	Delegation of Expenditure Authority	2007-11-306

Action

That the Board approve (1) an increase in the CEO's delegated contracting/expenditure authority from \$25,000 to \$50,000 (from \$40,000 to \$50,000 for professional services contracts); (2) an increase in the threshold at which biddable contracts must be bid from more than \$25,000 to more than \$50,000; (3) in awarding procurement's contracts between \$3,000 and \$50,000, the staff will contact at least two Historically Under-utilized Businesses as required by law and two Minority/Woman-owned Businesses; and (4) a change in reporting requirements for contract actions within the CEO's delegated authority.

Description

- Under Resolution No. 2001-10-380 the Board delegated contracting/expenditure authority up to \$25,000 (up to \$40,000 for professional services contracts) to the CEO. In addition, under state law, the Board has generally been required to competitively bid non-professional service procurement contracts of \$25,000 or more.
- At the last legislative session, the Legislature amended the competitive bid law (Local Government Code Chapter 252) to increase the threshold at which contracts must be bid from more than \$25,000 to more than \$50,000.

As briefed to the Board at its October Finance Committee meeting, this action would:

1. increase the CEO's delegated contracting/expenditure authority from \$25,000 to \$50,000 (from \$40,000 to \$50,000 for professional service contracts);
2. raise the threshold at which biddable contracts must be competitively bid from more than \$25,000 to more than \$50,000;
3. in awarding procurement's contracts between \$3,000 and \$50,000, the staff will contact at least two Historically Under-utilized Businesses as required by law and two Minority/Woman-owned Businesses;
4. change the reporting requirements for contract actions taken within the CEOs delegated expenditure authority, as follows;

D/M/WBE Information

- N/A

Contract #	Agreement #	Purchase Order #	Action Amount	Revised Amount
			\$0	\$0
For Information contact	Fund	Project #	External Funding Source	Amount
Joanne Baca Garcia 3-5605 Kay Foster 3-5616				\$0

Description Continued:

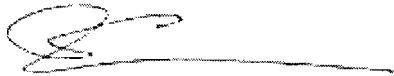
- Contract/Purchase Order Increases/Decreases from between \$10,000 and \$25,000 to between \$25,000 and \$50,000
- Purchase Orders/Goods and General Services Contracts from between \$15,000 and \$25,000 to between \$25,000 and \$50,000
- Professional Services Contracts for between \$10,000 and \$40,000 to between \$25,000 and \$50,000.

Additional Information

- This action will supersede Resolution No. 2001-10-380 dated October 4, 2001.
- This action does not increase the CEO's existing authority to approve change orders of up to \$25,000 (\$40,000 for professional service contracts).
- Staff will report to the Airport Board in six months to update them on MWBE participation for contracts awarded pursuant to the delegated expenditure authority.

Additional Attachments: **N****BE IT RESOLVED BY THE DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD**

That the Board approve (1) an increase in the CEO's delegated contracting/expenditure authority from \$25,000 to \$50,000 (from \$40,000 to \$50,000 for professional services contracts); (2) an increase in the threshold at which biddable contracts must be bid from more than \$25,000 to more than \$50,000; (3) in awarding procurement's contracts between \$3,000 and \$50,000, the staff will contact at least two Historically Under-utilized Businesses as required by law and two Minority/Woman-owned Businesses; and (4) a change in reporting requirements for contract actions within the CEO's delegated authority.

Approved as to Form by


Gary Keane
General Counsel
Oct 31, 2007 3:30 pm

Approved as to Funding by

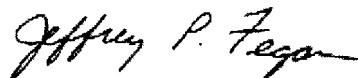

Max Underwood
Vice President
Finance
Oct 31, 2007 4:01 pm

Approved as to M/WBE by


Don O'Bannon
Vice President
Small & Emerging Business
Oct 31, 2007 2:06 pm

SIGNATURE REQUIRED FOR APPROVAL**Approved by**


Department Head
Procurement & Materials Mgmt
Oct 31, 2007 1:59 pm



Chief Executive Officer

Nov 2, 2007 10:08 am

Date

NORTH CENTRAL TEXAS REGIONAL CERTIFICATION AGENCY

MINORITY/WOMEN BUSINESS ENTERPRISES CERTIFICATION

POLICY AND PROCEDURES MANUAL

**ADOPTED
March 16, 2008**

MINORITY/WOMEN BUSINESS ENTERPRISES CERTIFICATION STANDARDS AND PROCEDURES MANUAL

I. MISSION STATEMENT

It is the mission of the NCTRCA to provide assistance through education and counseling throughout the certification process in order to build a certified vendor pool for our member entities.

II. POLICY STATEMENT

It is the policy of the public entities that are members of the North Central Texas Regional Certification Agency (Agency) that Minority Business Enterprises (MBEs) and Women-Owned Business Enterprises (WBEs) have the maximum possible opportunity to participate in their procurement activities. With this policy in mind, the public entities established the Agency to assist MBEs and WBEs with certification. The procedures outlined in this document describe the Agency's certification process.

It should be noted that failure to be certified as a MBE or WBE by the Agency DOES NOT PRECLUDE a firm from participating directly in any of the governmental member entities' purchasing and contracting opportunities.

III. RESPONSIBILITIES

The Agency's Board of Directors is ultimately responsible for ensuring that the Agency's policies and applicable federal, state and local regulations are implemented and enforced. The Agency's Director is the operational manager responsible for the overall implementation, monitoring and reporting of the Agency's certification process and shall execute all Agency correspondence. The Agency's staff is assigned the responsibilities for the day-to-day implementation of the Agency's certification process.

IV. PROPRIETARY DISCLOSURE

The Agency will safeguard from disclosure, information that is covered by federal, state and local laws and regulations, and that reasonably may be regarded as confidential personal and business information. Disclosure of information applicable to and provided as results of the certification process will only be with the owner advice and consent.

V. DEFINITIONS

"Affidavit" - A notarized document that swears/affirms that the foregoing information and statements are true and correct that have been provided in the application for certification.

"Affidavit Number" - A unique number assigned to an applicant that has submitted a complete application for the purpose of rendering a decision regarding certification.

"Affiliate" - To associate oneself as a subordinate, subsidiary or member with another.

“Affiliation” - As defined in part by the U. S. Small Business Administration (SBA) in 13CFR121.103 “ (1) Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. (2) SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.

“Agency” - North Central Texas Regional Certification Agency.

“Alaska Native” - A citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen who a Native village or Native group regards as an Alaska Native, if their father or mother is/was regarded as an Alaska Native.

“Alaska Native Corporation (ANC)” - 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, as amended in 43 U.S.C. 1601, et seq.

“Appeals Advisory Committee (AAC)” - An ad-hoc committee composed of governmental member entities created when a firm has been denied certification and wishes to appeal the Agency’s decision.

“Applicant” - A business entity that requests the Agency to certify it as an MBE or WBE by submission of an application for certification.

“Board” - The Agency’s Board of Directors composed of governmental entities and associate member entities.

“Certification” - The process by which a business enterprise is initially determined by the Agency to be a bona-fide minority or woman owned business.

“Certification Term” - The MBE or WBE certification of a business issued for a one-year term with updates required on an annual basis.

“Challenge” - A formal filing, that must be submitted in writing, by a third party to rebut the presumption that a particular firm does not meet the standards for being certified as an MBE or WBE business and shall be addressed by the Agency Director within 60 calendar days from the formal filing date.

“Control” - The applicant(s) must have 51% ownership and primary power to direct the management of a business enterprise on a day-to-day basis.

“Corporation” - A business concern in which minorities or women own at least 51% of an existing legal entity created for liability purposes.

“Denial” - The Agency’s action of denying certification to a firm that does not meet the certification eligibility criteria as outlined in this manual and other regulations promulgated by Board of Directors.

“Immediate Family Member” - Any relative that can be considered a father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law of the applicant(s).

“Indian Tribe” - Any 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 to Indians because of their status by the United States Government. Or, when such programs and services are recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of “tribally-owned concern”.

“Minority Business Enterprise (MBE)” - Is a business concern which

- a. is at least 51 percent owned and controlled by one or more minority persons, or in the case of any publicly owned business, at least 51 percent of the stock is owned by one or more minority persons and
- b. whose management and daily business operations are controlled by one or more minority persons who own it.

“Minority Individual” – A person who is a citizen or lawfully admitted permanent resident of the United States and who is:

“Asian-Pacific Americans” - 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.

“Black Americans” - Includes persons having origins in any of the Black racial groups of Africa.

“Hispanic Americans” - Includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.

“Native Americans” - Includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians.

“Subcontinent Asian Americans” – Includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka; or any individual who, on a case-by-case basis, is found to be a minority individual.

“Native Hawaiian” - Any individual whose ancestors were natives, prior to 1778, of the area, which now comprises the State of Hawaii.

“Native Hawaiian Organization” - Any community service organization serving Native Hawaiians in the State of Hawaii, which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

“Ownership” – The business structure of the firm under the definitions for “sole proprietorship, partnership and corporation”.

“Partnership” - A business concern in which minorities or women own at least 51 percent of the partnership assets or interests.

“Primary Industry Classification” - The six-digit number assigned by the North American Industrial Classification System (NAICS) or a comparable classification system identified by the Board of Directors.

“Principal Place of Business” – 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 Agency will determine the principal place of business for MBE/WBE program purposes.

“Separate Martial Agreement” - A legal binding agreement between a husband and wife, of which the husband relinquishes his ownership interest in the wife's sole and separate property in the applicant firm. This must take the form of an affidavit sworn to by the owner (s) of the applicant firm before a person who is authorized by state law to administer oaths and filed in the county in which the couple resides.

“Small Business Administration (SBA)” – United States Small Business Administration.

“Sole Proprietorship” - A business concern that is owned by a minority and/or woman.

“Tribally Owned Concern” - Any concern at least 51 percent owned by a recognized Indian tribe.

“Viable Business Concern” - A firm that has been in business for at least 90 calendar days.

“Women Business Enterprise (WBE)” - A business concern which

- a. is at least 51 percent owned and controlled by one or more women, or in the case of any publicly owned business, at least 51 percent of the stock is owned by one or more women; and,
- b. whose management and daily business operations are controlled by one or more women who own it.

VI. MBE/WBE ELIGIBILITY STANDARDS

At a minimum, the following standards will be used by the Agency as part of the certification process. The process will be used in determining whether a firm is a business concern, owned and controlled by one or more minorities, and/or women. If eligible the firm will be certified as a MBE or WBE. A MBE or WBE can be either a minority owned business enterprise or a woman owned business enterprise that meets all certification eligibility standards.

VII. CERTIFICATION STANDARDS

A. Allocation of burdens of proof

(1) In determining whether to certify a firm as eligible to participate as a MBE or WBE, the firm seeking certification has the burden of demonstrating to the Agency, by a preponderance of the evidence, that it meets the requirements of the standards concerning group membership or individual status, ownership, and control.

(2) The Agency must refutably presume that members of the designated groups are minorities and women. However, applicants have the obligation to provide the Agency information concerning their minority status.

(3) The Agency must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, and control.

B. Rules that governs group membership determinations

(1) If the Agency has a reason to question whether an individual is a member of the presumptive group, it must require the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of the group.

(2) In making such a determination, the Agency must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the relevant community regards the person as a member of the group. The Agency may require the applicant to produce documentation of group membership.

(3) The decisions concerning membership in a designated group is subject to the certification appeals procedures.

C. Rules that governs determinations of ownership

(1) The Agency must consider all the facts in the record, viewed as a whole, in determining whether the minorities and/or women in a firm own the firm.

(2) To be an eligible MBE or WBE, a firm must be at least 51 percent owned, controlled and managed by individual(s) who are minorities and/or women. In the case of a corporation, such individual (s) must own at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding. In the case of a partnership, the minorities and/or women must own 51 percent of each class of partnership interest. Such ownership must be reflected in the firm's partnership agreement. In the case of a LLC the minorities and/or women must own at least 51 percent of each class of member interest.

(3) The firm's ownership by minorities and/or women must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The minorities and/or women owner (s) must enjoy the customary incidents of ownership, and share

in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

(4) All securities that constitute ownership of a firm shall be held directly by minorities and/or women. Except as provided below, no securities or assets held in trust, or by any guardian for a minor, are considered as held by a minority or woman in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by minorities and/or women for purposes of determining ownership of the firm, if:

(a) The beneficial owner of securities or assets held in trust are minorities or women, and the trustee is the same or another such individual; or

(b) The beneficial owners of a trust are minorities and/or women who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same minorities or women are the sole grantor, beneficiary, and trustee.

(5) The contributions of capital or expertise by the minorities and/or women owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include:

- A promise to contribute capital;
- An unsecured note payable to the firm or an owner who is not a disadvantaged individual;
- A mere participation in a firm's activities as an employee.

Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

(6) The following requirements apply to situations in which expertise is relied upon as part of the minorities and/or women owner's contribution to acquire ownership.

(a) The owner's expertise must be documented in the record and be:

- (i) In a specialized field;
- (ii) Of outstanding quality;
- (iii) In areas critical to the firm's operations;
- (iv) Indispensable to the firm's potential success;
- (v) Specific to the type of work the firm performs;

These records must clearly show the contribution of expertise and its value to the firm.

(b) The individual whose expertise is relied upon must have a significant financial investment in the firm.

(7) The Agency must always deem as held by a minority or woman, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result:

- (a) Of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or
- (b) Through inheritance, or otherwise because of the death of the former owner.

- (8) (a) The Agency must presume for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-minority or non-MBE/WBE firm who is:
- (i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
 - (ii) Involved in the same or a similar line of business; or
 - (iii) Engaged in an ongoing business relationship with the firm; or
 - (iv) An affiliate of the firm, for which the individual is seeking certification.
- (b) To overcome this presumption and permit the interests or assets to be counted, the minorities or women must demonstrate to you, by clear and convincing evidence, that:
- (i) The gift or transfer to the individual(s) was made for reasons other than obtaining certification as a MBE or WBE; and
 - (ii) The minorities or women actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-minority who provided the gift or transfer.
- (9) The Agency must apply the following rules in situations in which marital assets form a basis for ownership of a firm:
- (a) Marital assets that are held jointly or as community property by both spouses and are used to acquire the ownership interest asserted by one spouse, the Agency must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. The Agency will not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the minority or woman owner of the firm.
- (b) A copy of the Separate Marital Agreement document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for MBE or WBE certification.
- (10) The Agency may consider the following factors in determining the ownership of a firm. However, the Agency shall not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because:
- (a) A minority or woman acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph (5) above;
 - (b) There is a provision for the co-signature of a spouse who is not a minority on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents;
 - (c) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a minority to a spouse who is such an individual. In this case, the Agency must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by minorities and/or women.

D. Rules that govern determinations concerning control

(1) In determining whether minorities and/or women owners control a firm, you must consider all the facts in the record, viewed as a whole.

(2) Only an independent business may be certified as a MBE or WBE. An independent business is one the viability in which does not depend on its relationship with another firm or firms.

In determining whether a potential MBE or WBE is an independent business, the Agency must verify the relationships with non-MBE/WBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

- The Agency must consider whether present or recent employer/employee relationships between the minorities and/or women owner(s) of the potential M/WBE and non-M/WBE firms or persons associated with non-MBE/WBE firms' compromise the independence of the potential MBE or WBE firm.
- The Agency must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential MBE or WBE firm.
- In considering factors related to the independence of a potential MBE or WBE firm, the Agency must consider the consistency of relationships between the potential MBE/WBE and non-MBE/WBE firm (s) with normal industry practice.

(3) A MBE or WBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the minorities and/or women owners. There can be no restrictions:

- Through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (i.e., cumulative voting rights, voting powers attached to different classes of stock):
- Employment contracts;
- Requirements for concurrence by non-minority partners;
- Conditions precedent or subsequent;
- Executor agreements, voting trusts, restrictions on or assignments of voting rights that prevent the minorities and/or women owners, without the cooperation or vote of any non-minority, from making any business decision of the firm.

This paragraph does not preclude a spousal co-signature on documents as provided for in paragraph C above.

(4) The minorities and/or women owner (s) must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

- The minorities or women owner(s) must hold the highest officer position in the company (i.e., chief executive officer or president).
- In a corporation the minorities and/or women owner(s) must control the board of directors.

- In a partnership, one or more minorities and/or women owner(s) must serve as general partners, with control over all decisions.

(5) Individuals who are not minorities and/or women may be involved in a MBE or WBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

(6) The minorities and/or women owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are minorities and/or women. Such delegations of authority must be revocable, and the minorities and women owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the minorities and/or women owners in the firm's overall affairs must be such that the Agency can reasonably conclude that the minorities and/or women owners actually exercise control over the firm's operations, management, and policy.

(7) The minorities and/or women owner(s) must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The minorities and/or women owner(s) is not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The minorities and/or women owner (s) must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking.

- Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

(8) If a state or local law requires the person(s) to have a particular license or other credential in order to own and/or control a certain type of firm, then the minorities and/or women who own and control a potential MBE or WBE firm of that type must possess the required license or credential. If a state or local law does not require such a person to have such a license or credential to own and/or control a firm, the Agency must not deny certification solely on the ground that the person lacks the license or credential. However, it may take into account the absence of the license or credential as one factor in determining whether the minorities and/or women owner(s) actually control the firm.

(9) (a) The Agency may consider differences in remuneration between the minorities and/or women owners and other participants in the firm in determining whether to certify a firm as a MBE or WBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. After a careful evaluation, the Agency may determine that the minorities and/or women owner(s) controls a firm although that owner's remuneration is lower than that of other participants.

(b) In a case where a non-minority formerly controlled the firm, and a minority and/or woman is now in control, the Agency must consider the difference in remuneration of the former and

current owner of the firm as a factor in determining who controls the firm, particularly when the non-minority remains involved with the firm and continues to receive greater compensation than the minority and/or woman.

(10) In order to be viewed as controlling a firm, the minorities and/or women owner(s) cannot engage in outside employment or other business interests that conflict with the management of the firm. Nor may management prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

(11) (a) A minority and/or woman may control a firm even though one or more of the individual's immediate family members (who themselves are not minorities or women) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, the Agency must make a judgment about the control, the minorities and/or women owners exercises vis-a-vis other persons involved in the business, without regard to whether or not the other persons are immediate family members.

(b) If the Agency cannot determine that the minorities and/or women owner(s), as distinct from the family as a whole, control the firm, then the minorities and/or women owner(s) have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

(12) Where a firm was formerly owned and/or controlled by a non-minority whether or not an immediate family member, ownership and/or control were transferred to a minority and/or woman, and the non-minority remains involved with the firm in any capacity, the minority and/or woman now owning the firm must demonstrate to the Agency, by clear and convincing evidence, that:

- The transfer of ownership and/or control to the minorities and/or women was made for reasons other than obtaining certification as a MBE or WBE; and
- The minorities and/or women actually control the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-minority who formerly owned and/or controlled the firm.

(13) In determining whether the minorities and/or women owner(s) control a firm, the Agency may consider whether the firm owns equipment necessary to perform its work. However, the Agency cannot determine that a firm is not controlled by a minorities and/or women solely because the firm leases, rather than owns, equipment. Especially, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

(14) The Agency must grant certification to a firm only for specific types of work in which the minorities and/or women owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate that its minorities and/or women owners are able to control the firm with respect to that type of work. The Agency may not, in this situation, require that the firm be re-certified or submit a new application for certification, however it must verify the minorities and/or women owner's control of the firm in the additional type of work.

(15) A business operating under a franchise or license agreement may be certified if it meets the standards and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the Agency should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license. That is providing the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership.

Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

(16) In order for a partnership to be controlled by minorities and/or women, any non-minority partner(s) must not have the power, without the specific written concurrence of the minorities and/or women partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

(17) The minorities and/or women controlling a firm may use an employee leasing company. The use of such a company does not preclude the minorities and/or women from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

E. Other rules affecting certification

(1) (a) The Agency must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a MBE or WBE; however, consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward MBE/WBE goals.

(b) The Agency may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the MBE/WBE program.

(2) The Agency must evaluate the eligibility of a firm on the basis of present circumstances. It must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by minorities and/or women at some time in the past, if the firm currently meets the ownership and control standards of this part. Nor must it refuse to certify a firm solely on the basis that it is a newly formed firm.

(3) MBE or WBE firms seeking certification shall cooperate fully with the Agency's requests for information relevant to the certification process. Failure or refusal to provide such information is a ground for withdrawal, denial or removal of certification.

(4) Only firms organized for profit may be eligible MBE or WBEs. Not-for-profit organizations, even though controlled by minorities and/or women are not eligible to be certified as a MBE or WBEs.

(5) An eligible MBE or WBE firm must be owned and controlled by individuals who are minorities and/or women. Except as provided for in this paragraph, a firm which is owned by another firm, even a MBE or WBE firm, cannot be an eligible MBE or WBE.

(a) If minorities and/or women 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, the Agency 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.

(b) The Agency may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by minorities and/or women. The following examples illustrate how this cumulative ownership provision works:

EXAMPLE 1:

Individual (s) who are minorities and/or women owns 100 percent of a holding company, which has a wholly owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

EXAMPLE 2:

Minorities and/or women that own 100 percent of the holding company, which owns 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.

EXAMPLE 3:

Minorities and/or women that own 80 percent of the holding company, which in turn owns 70 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by minorities and/or women is 56 percent (80 percent of the 70 percent). This is more than 51 percent, so the Agency may certify the subsidiary, if all other requirements are met.

EXAMPLE 4:

Same as Example 2 or 3, but someone other than minorities and/or women own the parent or holding company controls the subsidiary. Even though the subsidiary is owned by minorities and/or women, through the holding or parent company, the Agency cannot certify it because it fails to meet control requirements.

EXAMPLE 5:

Minorities and/or women own 60 percent of the holding company, which in turn owns 51 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by minorities and/or women is about 31 percent. This is less than 51 percent, so the Agency cannot certify the subsidiary.

EXAMPLE 6:

Minority and/or women own 51 percent of a limited partnership of which the general partner owns 1 percent. In this case, the minority and/or women must also own 51 percent of the governing subsidiary.

(6) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by minorities and/or women.

(7) The Agency must not require a MBE or WBE firm to be pre-qualified as a condition for certification unless the member entities require firms that participate in its contracts and subcontracts to be pre-qualified.

(8) A firm that is owned by an Indian Tribe, Alaska Native Corporation, or Native Hawaiian Organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals, may be eligible for certification. However, the firm must be controlled by minorities and/or women.

VIII. CERTIFICATION PROCEDURES

A. Procedures the Agency must follow in making certification decisions.

(1) The Agency must ensure that only eligible firms are certified as MBE or WBEs.

(2) The Agency must determine the eligibility of firms as MBE or WBEs consistent with the certification standards adopted by the Board of Directors.

(3) The Agency must take all the following steps in determining whether a MBE or WBE firm meets the standards:

- Review the certification application and all supporting documentation prior to making a decision about the firm's eligibility.
- Determine the work history of the firm, including any contract it has received and works it has completed, if applicable;
- Obtain a description of the firm's scope of work it performs as needed or required to participate in the MBE/WBE programs;
- Obtain or compile a list of the equipment owned by or available to the firm and the licenses of the firm's key personnel to perform the work it seeks to do as part of M/WBE program;
- Ensure the applicant attests to the accuracy and truthfulness of the information included in the certification application. This shall be done in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths.

(4) The Agency must make a decision on an application for certification within 90 calendar days of receiving an application from the applicant firm with all information required for certification. The Agency may extend this time period once, for no more than an additional 60 calendar days, upon written notice to the firm, explaining fully and specifically the reasons for the extension.

(5) Once the Agency has certified a MBE or WBE, the certification will be valid for one (1) year; unless the certification is successfully challenged and invalidated.

(6) All MBEs and WBEs must inform the Agency in writing within thirty (30) calendar days of any change in circumstances such as ownership, control requirements or any material change in the information provided in their application. Changes in management responsibility among members of a limited liability company are covered by this requirement.

The firm must attach supporting documentation describing in detail the nature of any changes. The notice must take the form of an affidavit sworn to by the owner (s) of the firm before a person who is authorized by state law to administer oaths. If the firm fails to make timely

notification of such a change, it will be deemed to have failed to cooperate with the Agency's requirements for certification and shall be removed from the certified vendor list.

(7) Upon the firm's initial certification, the MBE or WBE firm will be required to re-certify each year by submitting an affidavit of no change. This affidavit must be sworn to by the firm's owner (s) before a person who is authorized by state law to administer oaths. The Agency also requires a complete copy of business tax returns and corporate minutes, if applicable.

The firm must identify if there is anything that may affect its ownership and control requirements or any material changes in the information provided in its application form. If the firm fails to provide this affidavit in a timely manner, it will be deemed to have failed to cooperate and shall be lapsed.

(8) Any previously certified MBE or WBE firm that has recently been purchased by another minority and/or woman must complete a new application and submit supporting documentation to validate the firm's eligibility. The Agency must review the data to determine if the firm is at least 51 percent owned, controlled, managed by individual(s) that are a part of the presumptive group. The new owner(s) must also demonstrate the knowledge or expertise to perform the work in which the firm is seeking certification.

(9) The Agency must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable federal, state, and local law.

B. Rules that governs denials of initial requests for certification

(1) When the Agency denies the request of certification by a firm, it shall provide the firm a written explanation of the reasons for the denial; specifically referencing the evidence in the record that supports each reason. All documents and other information on which the denial is based must be made available to the applicant, on request.

(2) When the Agency denies certification of a firm, the firm may appeal to the Agency and request the opportunity to present their case to the Appeals Advisory Committee (AAC). The individuals who serve on an AAC must be knowledgeable about the certification requirements.

(3) The AAC will be composed of three (3) representatives from the governmental member entities. If additional information, documentation or action is requested, the AAC will establish a specified time for the request to be compiled (agreed to by the applicant). The AAC will meet to discuss the additional information or documentation or action and the AAC's decision will be rendered by the Agency Director in writing no later than thirty (30) calendar days from the agreed to date.

If no additional information or documentation or action is needed, the applicant will be advised that the AAC's decision will be rendered by the Agency Director in writing no later than thirty (30) calendar days from appeal date.

(4) Decisions made by the AAC shall be final. If the AAC's decision is to deny the applicant firm, the Agency must establish a time period of no more than twelve months from the date of the denial letter that must elapse before the firm may reapply to the Agency for certification. The time period for reapplication begins on the date of the final denial letter.

C. Procedures to challenge/remove a MBE or WBEs eligibility

(1) Ineligibility complaints

Any person or entity may file a challenge with the Agency by submitting a written complaint alleging that a certified firm is ineligible and specify the alleged reasons for ineligibility. The Agency is not required to accept a general allegation that a firm is ineligible or an anonymous complaint.

The complaint shall include any information or arguments supporting the complainant's assertion that the firm is ineligible and why the firm should not continue to be certified. Confidentiality of complainants' identities will be protected.

The Agency must review its records concerning the firm, any material provided by the firm and the complainant, and other available information. The Agency may request additional information from the firm or conduct any other investigation that it deems necessary and render a decision no later than sixty (60) calendar days from the receipt date of the complaint.

If the Agency determines, based on this review, that there is reasonable cause to believe that the firm is ineligible, it shall. If the Agency determines that reasonable cause does not exist, it shall notify the complainant and the firm in writing of this determination and the cause for it. All statements and findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(2) Agency initiated proceedings

If a firm notifies the Agency of a change in its circumstances or other information and the Agency determines that there is reasonable cause to believe that a currently certified firm is ineligible, it shall provide written notice to the firm. The notification shall state the reasons for the determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(3) Hearing

When the Agency notifies a firm that there is reasonable cause to remove its eligibility as provided in paragraph above, it shall give the firm an opportunity for an informal hearing. The firm may respond to the reasons for the proposed removal of its eligibility in person, providing information and arguments concerning why it should remain certified.

- (a) In such a proceeding, the firm bears the burden of proving, by a preponderance of the evidence that it meets the certification standards.
- (b) The Agency shall maintain a record of the hearing.
- (c) The firm may elect to present information and arguments in writing, without attending a hearing.

(4) Separation of functions

The Agency must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility. Such office and personnel can not be subject to direction from the office or personnel who did take part in these actions.

(5) Grounds for decision

The Agency must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to it at the time that it certified the firm. It may base such a decision on one or more of the following:

- (a) Changes in the firm's circumstances since the certification of the firm that render the firm unable to meet the eligibility standards;
- (b) Information or evidence not available to it at the time the firm was certified;
- (c) Information that was concealed or misrepresented by the firm in previous certification actions;
- (d) A change in the certification standards or requirements since the firm was certified;
- (e) A documented finding that was initially overlooked by Agency staff or
- (f) A documented finding that the determination to certify the firm was factually erroneous.

(6) Notice of decision

Following the final decision, the Agency shall provide the firm written notice within fifteen (15) calendar days of the decision and the reasons.

(7) The status of firm during proceeding

A firm remains an eligible MBE or WBE in the Agency's database during the pending phase of a proceeding to remove its eligibility. The firm does not become ineligible until the issuance of the final letter of denial.



SCHEDULE OF SUBCONTRACTORS¹ (PRELIMINARY)

Prime Bidder/Contractor: _____
☐ DBE ☐ MBE ☐ WBE ☐ NON-D/M/WBE

Contract Name: _____

Contract/Solicitation Number: _____

As part of the procedures for the submission of a complete Proposal/Bid, all Bidders/Proposers are required to identify **ALL** participating subcontractors applicable to the above project and include this form as part of the bid. The submission of this information is considered an issue of responsibility, and the Board will not award a contract to any Contractor who has not supplied this documentation. Use additional sheets if necessary.

Name of Subcontractor(s)	Certification Status ² (check the applicable)				Description of Material or Service Being Provided or Performed	Dollar Amount (\$) or Percentage (%) of Work
	DBE	MBE	WBE	NON-D/M/WBE		
Dollar Amount/Percentage of Work to be Completed by Non-D/M/WBE Subcontractors						
Dollar Amount/Percentage of Work to be Completed by D/M/WBE Subcontractors						
Dollar Amount/Percentage of Work to be Self-Performed by the Prime						
Total Dollar Amount/Percentage of Work (The Total Amount shall equal the Amount Proposed on Summary of Proposal Page)						

PRIME CONTRACTOR'S CERTIFICATION

The above information is true and complete to the best of my knowledge and belief. I further understand and agree that if awarded the Contract, this certification shall be attached thereto and become a part thereof. Failure to provide accurate information or exercise positive, good faith efforts (as defined by the Board's D/M/WBE Program) in support of the Board's minority/women business intent and objective may result in being considered non-responsive to the Board's requirements. Furthermore, It is understood and agreed that, if awarded a Contract by the Airport Board, the Contractor will not make additions, deletions, or substitutions to this certified list of DMWBE subcontractors without the consent of the Board's Vice President of Business Diversity & Development Department (BDDD) or designee through the submittal of D/M/WBE Form No. 102, ***Request for Approval of Change to Final Schedule of Subcontractors*** if this is determined to be the final schedule. The BDDD reserves the right to ensure compliance with the Board's D/M/WBE program as deemed necessary including but not limited to audits of submitted D/M/WBE information applicable to the Contractor/subcontractors participating on the Contract.

Name and Title of Authorized Representative: _____
(Please print or type)

Signature: _____ Date: _____

¹ Any named person, firm, partnership, corporation, association or joint venture as herein provided identified as providing work, labor, services, supplies, equipment, materials or any combination of the foregoing, under contract to a prime contractor on an Airport contract at any tier.

² In order to credit the participation of minority and woman-owned businesses on Airport procurements towards the Airport's MWBE overall and contract specific goals, the Airport will require that minority and woman-owned businesses are certified as MWBEs by BDDD or a certification agency approved by the Airport's BDD department. As Defined in the M/WBE and DBE Policy and Procedures Manuals.



SCHEDULE OF SUBCONTRACTORS¹ (FINAL)

Prime Bidder/Contractor: _____
☐ DBE ☐ MBE ☐ WBE ☐ NON-D/M/WBE

Contract Name: _____

Contract/Solicitation Number: _____

As part of the procedures for the submission of a complete Proposal/Bid, all Bidders/Proposers are required to identify **ALL** participating subcontractors applicable to the above project and include this form as part of the bid. The submission of this information is considered an issue of responsibility, and the Board will not award a contract to any Contractor who has not supplied this documentation. Use additional sheets if necessary.

Name of Subcontractor(s)	Certification Status ² (check the applicable)				Description of Material or Service Being Provided or Performed	Dollar Amount (\$) or Percentage (%) of Work
	DBE	MBE	WBE	NON-D/M/WBE		
Dollar Amount/Percentage of Work to be Completed by Non-D/M/WBE Subcontractors						
Dollar Amount/Percentage of Work to be Completed by D/M/WBE Subcontractors						
Dollar Amount/Percentage of Work to be Self-Performed by the Prime						
Total Dollar Amount/Percentage of Work (The Total Amount shall equal the Amount Proposed on Summary of Proposal Page)						

PRIME CONTRACTOR'S CERTIFICATION

The above information is true and complete to the best of my knowledge and belief. I further understand and agree that if awarded the Contract, this certification shall be attached thereto and become a part thereof. Failure to provide accurate information or exercise positive, good faith efforts (as defined by the Board's D/M/WBE Program) in support of the Board's minority/women business intent and objective may result in being considered non-responsive to the Board's requirements. Furthermore, It is understood and agreed that, if awarded a Contract by the Airport Board, the Contractor will not make additions, deletions, or substitutions to this certified list of DMWBE subcontractors without the consent of the Board's Vice President of Business Diversity & Development Department (BDDD) or designee through the submittal of D/M/WBE Form No. 102, ***Request for Approval of Change to Final Schedule of Subcontractors*** if this is determined to be the final schedule. The BDDD reserves the right to ensure compliance with the Board's D/M/WBE program as deemed necessary including but not limited to audits of submitted D/M/WBE information applicable to the Contractor/subcontractors participating on the Contract.

Name and Title of Authorized Representative: _____
(Please print or type)

Signature: _____ Date: _____

¹ Any named person, firm, partnership, corporation, association or joint venture as herein provided identified as providing work, labor, services, supplies, equipment, materials or any combination of the foregoing, under contract to a prime contractor on an Airport contract at any tier.

² In order to credit the participation of minority and woman-owned businesses on Airport procurements towards the Airport's MWBE overall and contract specific goals, the Airport will require that minority and woman-owned businesses are certified as MWBEs by BDDD or a certification agency approved by the Airport's BDD department. As Defined in the M/WBE and DBE Policy and Procedures Manuals.



DALLAS/FORT WORTH
INTERNATIONAL AIRPORT

INTENT TO PERFORM CONTRACT AS A D/M/WBE SUBCONTRACTOR¹

The Airport requires that minority and woman-owned businesses be certified as D/M/WBEs by BDDD or an approved certification agency as defined in the M/WBE and DBE Policy and Procedures Manuals.

1. Contract / Solicitation Number: _____
2. Name of Prime Contractor: _____
3. Address, City, State and Zip: _____
4. The Prime Contractor designates the following person as their high-level official designated to administer and coordinate the efforts to carry out the M/WBE policy on behalf of the Prime Contractor:

(Name and Title -Please Print)

(Phone)

The undersigned subcontractor is prepared to perform the following described work and/or supply the material listed in connection with the above project (where applicable specify "supply" or "install" or both):

1. Scope of Work: _____
2. Price: \$ _____
3. D/M/WBE Certification # _____
4. 2nd Tier Subcontracting: _____% of the proposed subcontract described above will be sublet and/or awarded to **Non-D/M/WBE** contractor(s).

(Name of D/M/WBE Subcontracting Firm)

(Address, City, State and Zip)

(Telephone)

(Signature of Owner, President or Authorized Agent)

(Printed name)

(Date)

DECLARATION OF PRIME CONTRACTOR

I HEREBY DECLARE AND AFFIRM that as a duly authorized representative of the Prime Contractor stated above, I have personally reviewed the material and facts set forth in this form. To the best of my knowledge, information and belief, the facts and representations contained in this form are true and the owner or authorized agent of the D/M/WBE firm stated above signed this form in the place indicated, and no material facts have been omitted.

The undersigned affirms that the Prime Contractor has no ownership or financial interest in the D/M/WBE subcontracting firm stated above. Except as authorized by the Vice President of Business Diversity & Development Department or his designee, the undersigned shall enter into a formal agreement with the listed D/M/WBE firm for work as indicated by this form within ten (10) business days after receipt of the contract executed by the Airport. The undersigned will, if requested, provide said Vice President or his designee a copy of that agreement within five (5) business days of the written request.

Pursuant to State Law, any person [entity] who makes a false or fraudulent statement in connection with the participation of a D/M/WBE in any locally funded project or otherwise violates applicable program requirements may be referred for prosecution.

(Name of Owner, President or Authorized Agent and Title)

(Signature)

(Date)

¹ Any named person, firm, partnership, corporation, association or joint venture as herein provided identified as providing work, labor, services, supplies, equipment, materials or any combination of the foregoing, under contract to a prime contractor on an Airport contract at any tier.



DALLAS/FORT WORTH
INTERNATIONAL AIRPORT

**REQUEST FOR APPROVAL OF CHANGE
TO ORIGINAL SCHEDULE OF SUBCONTRACTORS**

Contractor, _____, project
_____, requests approval of the
following addition(s) and/or deletion(s) on the **SCHEDULE OF SUBCONTRACTORS (D/M/WBE Form No. 90)** ,
as originally submitted as part of the bid on the above named project.

**CHECK (X) BLOCK FOR EACH TRANSACTION
CHANGE**

<i>ADD</i>	<i>DELETE</i>	<i>COMPANY NAME</i>	<i>TRADE</i>	<i>D/M/WBE STATUS</i>	<i>DOLLAR AMOUNT</i>	<i>INTENT TO PERFORM</i>

JUSTIFICATION

CERTIFICATION OF AFFIDAVIT

The above information is true and complete to the best of my knowledge and belief. I further understand and agree that this certification shall become a part of my contract with the Dallas/Fort Worth International Airport Board.

Name and Title of Signer: _____
(Please Print or Type)

Signature: _____

Date: _____

Routed To:

Approved By:

(Check One)

- ☐ Airport Development Dept.
☐ Procurement & Materials Mgmt.

Vice President or Designee
Business Diversity & Development Dept.



DALLAS/FORT WORTH
INTERNATIONAL AIRPORT

Note: Two (2) original copies of the PPAR must be attached to each invoice submitted for payment. Failure to attach a PPAR may result in a delayed payment process.

DISADVANTAGED/MINORITY/WOMEN BUSINESS ENTERPRISE (D/M/WBE) PROGRAM
Pay Period Activity Report (PPAR)

Reporting Period for the Month _____ 20_____ Invoice Date _____						
Prime Contractor/Consultant Name:			Current Contract Value:			
Address:						
Contract Number:			Project Title:			
Supplemental Agreement No.:						
Pay Request Number:						
List <u>all</u> Subcontractors/Subconsultants Awards and/or Purchases Made on this Project as of this Reporting Period						
Subcontractor/Subconsultant/Vendor Name	NCTRCA Certified		Description of Services	Committed \$ Amount	\$ Paid Through Reporting Date	Monthly Payments
	*M/WBE	Non-M/WBE				
(Use additional sheets if necessary)				TOTALS		
Prime Contractor/Consultant MONTHLY Summary						
A. Prime Participation B.M/WBE Subs Participation & Percentage Paid C.Non-M/WBE Subs Participation & Percentage Paid D.Total Paid to Date for this Month					Monthly \$	Monthly %
Prime Contractor/Consultant CUMULATIVE Dollar Amount Paid Through Reporting Period						
E. Prime Participation F. M/WBE Subs Participation & Percentage G. Non-M/WBE Subs Participation & Percentage Paid Through Reporting Period H. Total Paid to Date & Percentage					Cumulative \$	Cumulative %
Authorized Signature _____				Title _____	Date _____	
Telephone No. _____		Fax No. _____		E-Mail _____		



DALLAS/FORT WORTH
INTERNATIONAL AIRPORT

Note: Two (2) original copies of the FINAL PPAR must be attached to the FINAL INVOICE submitted for payment. Failure to attach this document may result in a delayed payment process.

DISADVANTAGED/MINORITY/WOMEN BUSINESS ENTERPRISE (D/M/WBE) PROGRAM FINAL Pay Period Activity Report (PPAR)

Reporting Period for the Month _____ 20_____						
Invoice Date _____						
Prime Contractor/Consultant Name:				Current Contract Value:		
Address:						
Contract Number:			Project Title:			
Supplemental Agreement No.:						
Pay Request Number:						
List <u>all</u> Subcontractors/Subconsultants Awards and/or Purchases Made on this Project as of this Reporting Period						
Subcontractor/Subconsultant/Vendor Name	Certified		Description of Services	Committed \$ Amount	\$ Paid Through Reporting Date	\$ Projected Final Payment (Cumulative Total)
	*M/WBE	Non-M/WBE				
(Use additional sheets if necessary)				TOTALS		
Prime Contractor/Consultant CUMULATIVE TOTALS					Dollar Amount	
Paid To Date					Cumulative \$	Cumulative %
A. Prime Participation (Inclusive of Final Payment)						
B. M/WBE Subs Participation & Percentage (Inclusive of Final Payment)						
C. Non-M/WBE Subs Participation & Percentage (Inclusive of Final Payment)						
D. Project Contract Total Upon Receipt of Final Payment						100.00%
Authorized Signature _____				Title _____	Date _____	
Telephone No. _____		Fax No. _____		E-Mail _____		

DISADVANTAGED/MINORITY/WOMEN BUSINESS ENTERPRISE (D/M/WBE) CONTRACT PROVISIONS

Note: A "Contractor" is defined as one who participates, through a contract/subcontract (at any tier) or any other contractual agreement with the Airport or, for purposes of these Provisions, seeks to do so by submission of a bid or proposal on any such contract or subcontract. A contractor includes but is not limited to a contractor, consultant, commercial development developers, commercial development contractors and vendors.

1.0 GENERAL REQUIREMENTS

- A. It is the policy of the Dallas/Fort Worth International Airport Board of Directors ("BOARD") to support the growth and development of disadvantaged, minority and woman-owned businesses that can successfully compete for Airport prime contracting opportunities.
- B. The Business Diversity & Development Department (BDDD) is tasked to ensure compliance with and implement the Airport's DMWBE policy and procedures. BDDD has the mission to proactively facilitate and maximize business and capacity building opportunities for minority and women businesses by collaborating with internal customers and implementing effective innovative programs and approaches for prime, subcontracting and revenue generating opportunities.
- C. The Contractor or Consultant (referred to hereinafter as "Contractor") specifically agrees to comply with all applicable provisions of the BOARD's DMWBE Policy and Procedures Manual and any amendments thereto. DMWBE and Non-DMWBE subcontractors/subconsultants also agree to comply with all applicable provisions of the BOARD's DMWBE Policy and Procedures Manual.
- D. The Contractor shall maintain records, as specified in the Audit and Records Section of the Special Provisions, in the Contract, showing:
 - 1. Subcontract/supplier awards, including awards to DMWBEs;
 - 2. Specific efforts to identify and award such contracts to DMWBEs, such as when requested, copies of executed contracts with DMWBEs to establish actual DMWBE project participation.
- E. The Contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of the DMWBE Business Process in the administration of this contract. Failure by the Contractor to carry out these requirements may be a material breach of this contract, and could result in the termination of this contract, or such other remedy, as the BOARD deems appropriate.

- F. The Contractor shall insert an Article containing all of the provisions of this Section, including this paragraph, in all subcontracts hereunder, except altered as necessary for the proper identification of the contracting parties and the OWNER under this contract.

2.0 ADMINISTRATIVE REQUIREMENTS

- A. The Contractor shall appoint a high-level official to administer and coordinate the Contractor's efforts to carry out this DMWBE policy.
- B. The Contractor agrees to submit monthly reports of payments and subcontract and/or supplier awards to DMWBEs and Non-DMWBEs in such form and manner and at such times as the BOARD shall prescribe.
- C. The Contractor shall provide the BOARD access to all books, records, accounts and personnel in accordance with the Audit and Records section of the Special Provisions. Such access will be used for, among other purposes, determining DMWBE participation and compliance with the DMWBE Policy and Procedures Manual(s). All Contractors may be subject to interim and post-contract DMWBE audits. Audit determination(s) regarding Contractor's compliance with the DMWBE Policy and Procedures Manual(s) may be considered and have a bearing on consideration of the Contractor for award of future contracts.

3.0 GOALS AND GOOD FAITH

- A. Notification is hereby given that a DMWBE contract specific goal has been established for this Contract. The applicable DMWBE commitment is ____% (____ percent) of the total dollar value of this Contract including any change orders and/or modifications.
- B. If Contractor, including DMWBE prime contractors, will not meet the DMWBE goal, it shall nevertheless be eligible for award of the Contract if it can demonstrate to the BOARD that it has made a good faith effort to meet the DMWBE goal. This good faith effort documentation shall be submitted with the Contractor's bid or proposal.
- C. The submission of good faith efforts documentation is a matter of responsiveness. In making a determination that the contractor has made a good faith effort to meet the DMWBE goals, BDDD shall consider specific documentation concerning the steps taken to obtain DMWBE participation, with a consideration of, by way of illustration and not limitation, the following factors:

1. Whether the Contractor attended any pre-bid or pre-proposal meetings scheduled by the BOARD to discuss subcontracting and supplier opportunities for DMWBE participation and whether the contractor obtained a current list of DMWBE subcontractors and/or suppliers from the Airport's BDDD office;
2. Whether the Contractor advertised in general circulation, trade association, and/or DMWBE focus media concerning subcontracting and supplier opportunities;
3. Whether the Contractor provided written notice via email or facsimile to a reasonable number of DMWBEs and/or contacted a reasonable number of DMWBEs via telephone about the subcontracting/supplier opportunities. A "reasonable number of DMWBEs" is based on the number of DMWBEs available in the areas of subcontracting or supplier opportunities which is a minimal of three (3) DMWBEs per subcontracting opportunity;
4. Whether the Contractor solicited the DMWBEs at least seven (7) calendar days prior to bid opening, exclusive of the day the bids are opened to allow DMWBEs to participate effectively. Also, whether the contractor followed up those initial solicitations of interest by contacting DMWBEs at least three (3) calendar days prior to bid opening to determine with certainty whether the DMWBEs were interested;
5. Whether the Contractor selected portions of the work to be performed by DMWBEs in order to increase the likelihood of meeting the DMWBE goals (including, where appropriate, breaking down the contract into economically feasible subcontracts to facilitate DMWBE participation);
6. Whether the Contractor provided interested DMWBEs with adequate information about the plans, specifications, scope of work and requirements of the contract or adequate information about the locations of the plans, specifications, scope of work and requirements of the contract;
7. Whether the Contractor fairly investigated and evaluated the interested DMWBEs' capabilities; not rejecting DMWBEs as unqualified without sound reasons based on a thorough investigation;
8. Whether the Contractor negotiated in good faith with interested DMWBEs regarding price, using good business judgment and not rejecting reasonable quotes from interested DMWBE firms;
9. Whether the Contractor made efforts to assist interested DMWBEs in obtaining BOARD or Contractor-required bonding, lines of credit, insurance, etc.;
10. Whether the Contractor made efforts to assist interested DMWBEs in obtaining necessary equipment, supplies, materials, or related assistance or services;
11. Whether the Contractor effectively used the services of available minority and women community organizations; chambers, contractor groups; local, State, and Federal business assistance offices, and other organizations that provide assistance in the identification of DMWBEs;

12. Whether the Contractor obtained written documentation from the BOARD's approved Surety Support Consultant, if applicable, or from a bonafide surety company indicating that bonding was denied and for what reason(s), prior to the DMWBE being rejected as a potential subcontractor for failing to obtain Contractor-required bonding. Documentation furnished by a surety company will be subject to verification by the BOARD; and
 13. Whether other Contractors have attained a sufficient level of DMWBE participation to meet the contract goals will also be taken into consideration in determining whether the contractor in question has made a good faith effort.
- D. The BOARD will look not only at the different kinds of efforts that the Contractor has made but also the quantity and intensity of those efforts. Efforts that are merely pro-forma are not good faith efforts to meet the goal (even if they are sincerely motivated). The BOARD will also consider, given all relevant circumstances, if the Contractor's efforts could reasonably be expected to produce a level of DMWBE participation sufficient to meet the goal.
- E. Contractors are reminded that the issue of whether or not the established goal has been met and/or whether there were sufficient good faith efforts is considered a matter of the Contractor's **responsibility**. The requirement to submit the good faith documentation is considered a matter of the Contractor's **responsiveness**. The BOARD will only award contracts to Contractors determined to be responsive and responsible. If a Contractor fails to submit Good Faith Efforts documentation by the established deadline for submission, it waives the right to appeal the Good Faith Efforts decision. The Vice President of Business Diversity & Development Department (BDDD) or designee shall be responsible for determining whether the Contractor made the required good faith effort to meet the DMWBE contract goals and, if not, for recommending that the Contractor be deemed not responsible.
- F. A Contractor determined not to have made a good faith effort under Paragraph E above may request administrative review and final reconsideration under the BOARD's DMWBE Business process. As part of any reconsideration, if requested, the Contractor may elect to meet in person with the Reconsideration Official (Executive Vice President of Administration and Diversity) to appeal BDDD's good faith efforts and responsibility determination.

4.0 COUNTING – MWBE PARTICIPATION

- A. In accordance with the BOARD's commitment for the utilization of, or good faith efforts to utilize, DMWBEs in Airport procurements, the Airport's BDDD establishes overall DMWBE agency goals as well as contract specific DMWBE

goals. Once the DMWBE overall agency goals have been established, DMWBE participation is then measured at the prime, subcontracting or equity participation levels. The BOARD primarily establishes contract specific goals on its procurements to achieve the overall annual DMWBE goals. The contract specific goals on Airport procurements established by BDDD are subcontracting goals that apply to any prime contractor or commercial development contractor including DMWBE prime or commercial development contractors.

- B. In the solicitation of DMWBEs for Airport procurements (contracts and/or lease agreements), BDDD discourages and will not allow prime contractors to require, exclusive teaming arrangements or agreements. Such exclusive restrictions directly contradict the Airport's BDDD mission to proactively facilitate and maximize business as well as capacity-building opportunities for minority and women owned businesses.
- C. When a DMWBE is the prime contractor under an Airport contract with established DMWBE goals, the DMWBE prime contractor is still responsible for meeting the DMWBE subcontracting goal requirement or for making a good faith effort to do so. The DMWBE prime must submit the documentation to BDDD necessary to demonstrate its commitment to achieving the DMWBE participation goal or its good faith efforts. If there is no DMWBE goal established for the Airport procurement and the prime contractor is a DMWBE prime contractor, the DMWBE prime participation will count towards the Airport's overall agency DMWBE goal.
- D. DMWBE goals and commitments noted in this section specifically refer, unless otherwise stated, to contract specific subcontracting goals and to the Contractor's contractual DMWBE commitments.
- E. When a DMWBE participates in a contract, the Contractor shall count only the value of the work actually performed by the DMWBE toward DMWBE goals.
 - 1. The Contractor shall count the entire amount of that portion of a contract that is performed by the DMWBEs own forces. The Contractor may count the cost of supplies and materials obtained by the DMWBE for the work of the contract, including supplies purchased or equipment leased by the DMWBE (except supplies and equipment the DMWBE subcontractor purchases or leases from the prime Contractor or its affiliate).
 - 2. The Contractor shall count toward the DMWBE goals the entire amount of fees or commissions charged by a DMWBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of an Airport contract, provided it determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

3. When a DMWBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DMWBE goals only if the DMWBE's subcontractor is itself a DMWBE. Work that a DMWBE subcontracts to a non-DMWBE firm does not count toward DMWBE goals.
- F. The Contractor will count expenditures to a DMWBE subcontractor toward DMWBE goals only if the DMWBE is performing a commercially useful function on that contract.
1. A DMWBE performs a commercially useful function when it's responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DMWBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the materials, and installing (where applicable) and paying for the materials itself. To determine whether a DMWBE is performing a commercially useful function, the Contractor must evaluate the amount of the work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing, the DMWBE credit claimed for its performance of the work, and other relevant factors.
 2. A DMWBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of MWBE participation. In determining whether a DMWBE is such an extra participant, the Contractor must examine, among other relevant factors, similar transaction, particularly those in which DMWBEs do not participate.
 3. If a DMWBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work forces, or the MWBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the Contractor must presume that it is not performing a commercially useful function.
 4. When a DMWBE is presumed not to be performing a commercially useful function as provided in this section, the DMWBE may present evidence to rebut this presumption. BDDD may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.
- G. The Contractor shall use the following factors in determining whether a DMWBE trucking company is performing a commercially useful function:
1. The DMWBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular

contract, and there cannot be a contrived arrangement for the purpose of appearing to meet DMWBE goals.

2. The DMWBE must itself own and operate at least one fully licensed, insured and operational truck used on the contract.
3. The DMWBE shall receive credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
4. The DMWBE may lease trucks from another DMWBE firm, including an owner-operator who is certified as a DMWBE. The DMWBE who leases trucks from another DMWBE shall receive credit for the total value of the transportation services the lessee DMWBE provides on the contract.
5. The DMWBE may also lease trucks from a non-DMWBE firm, including from an owner-operator. The DMWBE who leases trucks from a non-DMWBE is entitled to a credit only for the fee or commission it receives as a result of the lease arrangement. The DMWBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DMWBE.
6. For purposes of this paragraph G., a lease must indicate that the MWBE has exclusive use and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DMWBE, so long as the lease gives the MWBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DMWBE.

H. The Contractor shall count expenditures to DMWBEs for materials or supplies toward DMWBE goals as provided in the following:

1. (a) If the materials or supplies are obtained from a DMWBE manufacturer, count one hundred percent (100%) of the cost of the materials or supplies toward DMWBE goals.
(b) For purposes of this paragraph, a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
2. (a) If the materials or supplies are purchased from a DMWBE regular dealer, count sixty percent (60%) of the cost of the materials or supplies toward DMWBE goals.
(b) For purposes of this section a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.
(1) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

- (2) A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
 - (3) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph.
- 3. With respect to materials or supplies purchased from a DMWBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commission charges for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DMWBE goals, provided the fees are reasonable and not excessive as compared with fees customarily allowed for similar services. However, the Contractor shall not count any portion of the cost of the materials and supplies themselves toward DMWBE goals.
- I. If a DMWBE subcontractor is not certified by the BOARD or an approved certification agency at the time of the execution of the contract, supplemental agreement or subcontract, the Contractor shall not count the firm's participation toward any DMWBE goals until the firm is certified. Additionally, the Contractor shall not count toward the Contractor's overall goal the dollar value of work performed under a contract with a firm after it has ceased to be certified as defined in the Certification section in the BOARD's DMWBE Policy and Procedures Manual and the Certification section below.
- J. The BOARD will count the value of the work actually performed by the DMWBE or joint venture partner performs a portion of work on the contract and the percentage of ownership or equity of the DMWBE in joint venture. The BOARD will allow the joint venture to count the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DMWBE performs with its own forces toward DMWBE commitment.
- K. The Contractor shall not count the participation of a DMWBE subcontractor toward the prime Contractor's DMWBE achievements or overall goal until the amount being counted toward the goal has been actually paid to the DMWBE.
- L. The following expenditures to DMWBE firms may also count toward the DMWBE goals:

1. The fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services, and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the Airport to be reasonable and not excessive as compared with fees customarily allowed for similar services.
2. The fees charged for delivery of material and supplies required on a job site (but not the cost of materials and supplies themselves) when the hauler, trucker or delivery service is not also the manufacturer of or a regular dealer in the materials and supplies, provided that the fee is determined by the Airport to be reasonable and not excessive as compared with fees customarily allowed for similar services.
3. The fees of commission charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission is determined by the Airport to be reasonable and not excessive as compared with fees customarily allowed for similar services.

M. The following expenditures will not count toward the DMWBE commitment:

1. Utilities – payments for water, electricity, telephone and natural gas;
2. Payments to non-profit organizations;
3. Payments to other government agencies;
4. Bank fees;
5. Insurance premiums; and
6. Expenditures for employee conferences and training seminars

5.0 CERTIFICATION

- A. In order to credit the participation of minority and woman-owned businesses on Airport procurements towards the BOARD's DMWBE overall and contract specific goals, the BOARD will require that minority and woman-owned businesses are certified as DMWBEs by the Airport BDDD or by a certification agency approved by the Airport's BDD department. The approved certification agencies are the following: the North Central Texas Regional Certification Agency ("NCTRCA"); the DFW Minority Business Council ("DFWMBC"); the Small Business Administration ("SBA")- [8a certification only]; the approved entities of the Texas Unified Certification Program ("TUCP"); and the Women's Business Council-Southwest ("WBCS").

- B. The Contractor shall submit to the BOARD a properly completed DMWBE Certification Affidavit, with all required attachments, for all DMWBE companies utilized or proposed to be utilized as subcontractors, vendors, or suppliers in the performance of work on said project within five (5) business days when requested by the BOARD. The Contractor and/or subcontractor authorizes the BOARD's representatives to review and photocopy any documents in the certification files related to the Contractor or subcontractor.
- C. If a firm is not certified as a minority or woman-owned business by an approved certification entity at the time of contract award, the BOARD will not allow the participation to count towards the DMWBE goals. However, the BOARD will allow the Contractor to utilize DMWBEs certified during the performance of the contract towards the DMWBE participation goal once documentation confirming such certification is submitted to the Airport's BDDD.
- D. The Airport BDD department reserves the right to review, accept or reject any DMWBE certifications on all Airport procurements. The BOARD also, under the appropriate circumstances, reserves the right to accept other certifications. In the case of joint ventures, the DMWBE member(s) must have completed the certification process with an approved certification agency.

6.0 DMWBE UTILIZATION FORMS AND RELATED DOCUMENTATION

Each Contractor shall submit for all solicitations, bids or proposals, completed DMWBE utilization forms as outlined below.

Invitation for Bid (IFB) for General Goods and Services:

- **Final Schedule of Subcontractors** shall be submitted at bid time. If the solicitation is for an indefinite-delivery contract, the Contractor shall submit a statement of commitment along with the pool of subcontractors it intends to utilize to fulfill its commitment.
- **Intent to Perform as a Subcontractor** A signed and executed form for each DMWBE subcontractor should be submitted at bid time.
- **Good Faith Effort** documentation and supporting documents. If the Contractor fails to meet the DMWBE goal, this documentation shall be submitted at bid time.
- The Airport will not award a contract to any Contractor who has not supplied this documentation.

Invitation for Bid (IFB) for Construction Projects:

- **Preliminary Schedule of Subcontractors** shall be submitted at bid time. If the solicitation is for an indefinite-delivery contract, the Contractor shall submit a

statement of commitment along with the pool of subcontractors it intends to utilize to fulfill its commitment.

- **Final Schedule of Subcontractors** shall be submitted within three (3) business days from the date of the bid opening or with the bid verification.
- **Intent to Perform as a Subcontractor** A signed and executed form for each DMWBE subcontractor shall be submitted within three (3) business days from the date of the bid opening or with the bid verification.
- **Good Faith Effort** documentation and supporting documents. If the Contractor fails to meet the DMWBE goal, this documentation shall be submitted at bid time.
- The Airport will not award a contract to any Contractor who has not supplied this documentation.

Request for Proposals (RFP) or Request for Qualifications (RFQ):

- **Preliminary Schedule of Subcontractors** shall be submitted at the time of proposal submission. If the solicitation is for an indefinite-delivery contract, the Contractor shall submit a statement of commitment along with the pool of subcontractors it intends to utilize to fulfill its commitment.
- **Final Schedule of Subcontractors** shall be submitted with the best and final offer.
- **Intent to Perform as a Subcontractor** The signed and executed form for each DMWBE subconsultant shall be submitted with the best and final offer.
- **Good Faith Effort** documentation and supporting documents. If the Contractor fails to meet the DMWBE goal, this documentation shall be submitted at the time of proposal submission.
- The Airport will not award a contract to any Contractor who has not supplied this documentation.

Request for Price Proposal for a task/delivery order under an Indefinite Delivery Contract:

- **Preliminary Schedule of Subcontractors** shall be submitted at the time of initial price proposal submission.
- **Final Schedule of Subcontractors** shall be submitted with the final price proposal.
- **Intent to Perform as a Subcontractor** The signed and executed form for each DMWBE subcontractor shall be submitted with the final price proposal.

Commercial Development projects:

- **Verification of DMWBE Expenditure and Equity Goal Determination** shall be submitted at the time of proposal submission.
- **Final Schedule of Subcontractors** shall be submitted at the Airport's Pre-Construction Meeting.
- **Intent to Perform as a Subcontractor** The signed and executed form for each DMWBE subcontractor shall be submitted within five (5) business days from the date of the Airport's Pre-Construction Meeting.

The **Schedule of Subcontractors** form shall list all subcontractors on the project and detail the preliminary percentage or dollar commitment of the Contractor to DMWBE participation. Submission of the **Intent to Perform as a Subcontractor** forms for each DMWBE firm shall constitute a representation by the Contractor to the Airport that it believes such DMWBE firm to be certified as a DMWBE and ready, willing and able to perform the work as designated. It shall also represent a commitment by the Contractor that if it is awarded the contract, it will enter into a subcontract with such DMWBE for the work described at the approximate price and percentage set forth in the **Intent to Perform as a Subcontractor** forms. The winning bidder/proposer shall enter into formal agreements with the DMWBE firms for work as indicated on the **Final Schedule of Subcontractors** and **Intent to Perform** forms within ten (10) business days after receipt of the contract executed by the Board or Contractor's Notice of Award. The Contractor, if requested, shall provide the BDDD copies of those agreements within five (5) business days of execution.

If the DMWBE subcontractor information or status changes after the forms have been submitted but prior to award of the contract, the Contractor must immediately notify BDDD of the changes and a written explanation for the change by submitting a **Request for Approval of Change to Final Schedule of Subcontractors** form (see attached). No change in DMWBE participation after bid submission, but prior to contract award, may change, or be deemed to change, the Contractor's submitted bid amount. The Modification and Substitutions section of the DMWBE Policy and Procedures Manual shall govern the modifications and substitutions of the DMWBE firms that occur after contract award.

7.0 PAYMENT

- A. Prompt Payment. It is Board policy that all invoices in compliance with contract payment terms and conditions should be paid within 30 days from the date the original invoice is received or sooner if required by the contract terms. As part of its DMWBE business process, the BOARD will include, where practicable, the following or similar clause in each prime contract and requires the inclusion of the following clause in every subcontract at all tiers. ***"The prime contractor on construction, general services, supplier and other BOARD non-professional services contracts who receives a payment under a BOARD contract shall pay its subcontractors no later than the 7th day after the date the prime contractor receives payment from the BOARD. The prime contractor shall also promptly request the release of any retainage withheld from subcontractors within seven (7) days after the subcontractor's work is satisfactorily completed and receives partial acceptance, substantial completion or final completion/final acceptance as defined in the General Provisions of the contract. Furthermore, the prime contractor shall pay the***

subcontractor its retainage within seven (7) days after the date the prime contractor receives the subcontractor's retainage payment from the BOARD. A finding of non-payment shall be a material breach of this contract. The BOARD may; withhold progress payments until the Contractor demonstrates timely payment of sums due subcontractors. The BOARD also reserves the right to exercise other breach of contract remedies. The reference to "contractor" in this section is inclusive of consultants, vendors or other providers as defined in the Glossary of Terms for the DMWBE Policy and Procedures Manual."

- B. Expedited Payment. In an effort to remove the obstacle of the length of time for subcontractor payments on BOARD procurements, the BOARD has an Expedited Payment Policy. This policy is applicable if a prime contractor has been awarded a multi-year contract for construction and/or maintenance services of at least \$10,000,000 in contract value. The Expedited Payment program requires those eligible prime contractors that voluntarily participate in the program to pay their subcontractors within seven (7) days after receipt of the subcontractor's invoice. The BOARD would then pay interest and provide other incentives to the prime contractor on eligible expedited payments according to the Expedited Payment Process and Policy.
- C. Monitoring Payments to MWBEs. To ensure that the prime contractor meets all its DMWBE obligations under contract, BDDD will review the contractor's DMWBE involvement throughout the term of the contract including any term extensions of the original contract period. If a contract includes a DMWBE subcontracting commitment, it is mandatory that the Contractor shall submit a **Pay Period Activity Report (PPAR) (with verifying information)** concurrent with the Contractor's submission of payment requests with each invoice. (see attached).

8.0 MODIFICATIONS OR SUBSTITUTIONS

This Section applies to all subcontractor modifications, changes and substitutions under this Contract. The Contractor shall comply with this Section to the extent needed to achieve the DMWBE commitment agreed to at the time of the contract award.

If a prime contractor proposes to terminate or substitute a DMWBE subcontractor for any reason after submission of the **Final Schedule of Subcontractors** form as determined in the DMWBE business process either prior to or after contract award, the Prime Contractor (referred to in this section hereinafter as "Contractor") shall make good faith efforts as defined in these DMWBE Contract Provisions to find a substitute DMWBE subcontractor for the original DMWBE. The good faith effort shall be directed at finding another DMWBE to perform or provide at least the same amount of work, material or

service under the contract as the original DMWBE contractor. The Contractor may also find additional DMWBE firms and/or adjust the current/projected DMWBE participation to meet the DMWBE goal. This section and its requirements are applicable to DMWBE as well as non-DMWBE prime contractors. The Contractor must notify the BDDD about any additions, modifications or deductions that would affect the contract's DMWBE participation.

The Contractor's documentation to the BOARD shall include the specific reasons for the proposed substitution. Stated reasons that are acceptable include, but are not limited to: a DMWBE was found not to be able to perform on time; a DMWBE was found not to be able to produce acceptable work; and/or a DMWBE has made an unreasonable escalation in price. In the case of a DDMWBE subcontractor being substituted for another DMWBE subcontractor, the Contractor shall also include the name, address, certification number and principal office of the proposed DMWBE firm. This information shall be submitted on a **signed Intent to Perform form** that the Contractor must submit for each new DMWBE subcontractor. The Contractor must provide BDDD with any and all documents and information as may be requested by BDDD with respect to the modification. Prior to submitting a request for a substitution based on non-performance, the Contractor shall provide notice to the subcontractor of the performance issue and provide the subcontractor an opportunity to correct the situation. If the effort to correct the non-performance is unsuccessfully and the Contractor intends to proceed with obtaining a substitute subcontractor, then, the Contractor must submit documentation detailing the notice and the efforts made by the Prime Contractor and the DMWBE subcontractor to cure the situation to BDDD.

- A. If a prime Contractor wishes to terminate or substitute a DMWBE subcontractor listed as fulfilling its contract goal, and then perform the work of the terminated DMWBE subcontractor with its own forces, a non-DMWBE subcontractor or with another DMWBE subcontractor, it must submit to the BDDD for approval written documentation explaining the reasons for the change prior to the termination or substitution of the DMWBE subcontractor or the performance of the subcontract work by Contractor's own forces. This shall include any changes to items of work, material, services, or DMWBE firms that differ from those identified on the Intent to Perform As A Subcontractor form(s) on file with the BDDD. The BDDD will approve or disapprove the substitution based on the good faith efforts documentation as defined in these DMWBE Contract Provisions. A prime contractor may not terminate a DMWBE subcontractor and/or perform the work with its own forces, those of an affiliate or replace the DMWBE subcontractor with a non-DMWBE subcontractor without the prior written consent of the BDDD. The decision of BDDD regarding whether good faith efforts were made will be documented as set forth herein by the Good Faith Efforts section of this contract provision.

The Contractor must provide any and all documentation and information as may be requested by BDDD with respect to the requested change.

- B. If the prime contractor wishes to terminate, for convenience, a DMWBE subcontractor listed as fulfilling its contract goal and substitute the original DMWBE subcontractor with another DMWBE subcontractor, it must submit written documentation to BDDD outlining the reasons for the substitution prior to the termination of the original DMWBE. The Contractor must submit to BDDD with the request for substitution, an Intent to Perform as a Subcontractor form to verify that the new DMWBE firm(s) is certified by an approved certifying agency. The BDDD will approve or disapprove the substitution based on the submitted documentation. If the proposed substitution is approved, the contractor shall provide to BDDD, if requested, within five ("5") business days of its receipt of the request, a copy of the executed subcontract agreement with the substituted DMWBE firm.
- C. All changes to the **Intent to Perform As A Subcontractor** form(s) submitted in response to a bid/proposal, excluding vendors, shall be submitted for review and approval through **Request for Approval of Change to Final Schedule of Subcontractors** form, in accordance with the BOARD's procedures when adding, changing, or deleting subcontractors/subconsultants on Airport projects. Contractors shall make a good faith effort to replace DMWBE subcontractors/subconsultants unable to perform on the contract with another DMWBE to the extent needed to achieve the DMWBE commitment agreed to at contract award.
- D. In the event that a firm submitted by a Bidder, Proposer, or Contractor in accordance with the requirements of the CERTIFICATION section above can not be certified, the Contractor will be notified and given an opportunity to substitute a certified DMWBE firm for that firm. The Contractor will have ten (10) business days from the date of notification to accomplish the substitution. In the event the Contractor is unable to contract with another substitute DMWBE firm, the good faith efforts that the Contractor made in attempting to contract with a substitute must be documented to the Vice-President of BDDD or designee at the end of the same ten (10) business day period.
- E. If the prime contractor does not comply with these provisions relating to the modification or termination of, and/or substitution for, a DMWBE subcontractor, or relating to the Contractor's performance of the subcontract work with its own forces, the BOARD may elect to apply contract remedies as described in the BOARD DMWBE Policy and Procedures Manual and these DMWBE Contract Provisions. At no time shall a DMWBE subcontractor be given a termination notice, or have its participation modified, or its work performed by the Contractor's own forces unless the Contractor has received prior written approval to do so from BDDD. Additionally, the BOARD may order that the Contractor forfeit, and the Contractor shall in that event forfeit,

the profits from the terminated, or terminated portion of the DMWBE subcontract for from the portion of the subcontract work performed by the Contractor's own forces. The BDDD reserves the right to request, and in that event Contractor shall provide to BDDD, any information and/or documentation regarding a substitution, termination, modification or a performance of subcontract work by Contractor's own forces addressed in this Section 8.

9.0 COMPLIANCE AND ENFORCEMENT

- A. The Contractor shall forward all necessary documents and information to close out the contract and shall cooperate with the BOARD in providing the final accounting for DMWBE participation on the contract. BDDD reserves the right to exercise all rights and remedies including those in the PAYMENT section to ensure receipt of all necessary documents.
- B. All participants in the DMWBE business process must comply with the BOARD's requirements set forth in the DMWBE Policy and Procedures Manual, and these DMWBE Contract Provisions as well as with applicable federal and state laws. BDDD reserves the right to apply legal and contract remedies available under federal, state and local law, including but not limited to, adverse responsibility determinations in connection with the award of future contracts, suspension and debarment procedures and forfeiture of profits as provided for elsewhere.
- C. The DMWBE participation percentage commitment made by the Contractor at the time of contract award is deemed to be contractual in nature. Therefore, failure of the Contractor to meet the DMWBE participation percentage commitment in any Airport contract may constitute a material breach of the contract. The BOARD shall have the right to terminate the contract, deduct from money due or to become due the Contractor an amount equal to the dollar amount of the unmet DMWBE participation commitment, secure a refund from the Contractor of that amount, or pursue other such remedies at law or in equity to which the BOARD may be entitled. Any money deducted or refunded under this Section shall be collected and considered liquidated damages for Contractor's failure to comply with the Contract, not as a penalty.
- D. The BOARD may report any suspected false, fraudulent or dishonest conduct relating to Contractor's performance, attempted performance or purported performance of its obligations under these DMWBE Contract Provisions to the BOARD's Department of Audit Services or to any applicable enforcement agency including the State Attorney General's Office.

**DALLAS FORT WORTH INTERNATIONAL AIRPORT BOARD
OFFICIAL BOARD ACTION/RESOLUTION**

Date	Committee	Subject	Resolution #	
10/04/2007	Finance/Audit	Adoption of Expedited Payment Policy	2007-10-288	
Action That the Airport Board does hereby adopt an Expedited Payment Policy.				
Description <ul style="list-style-type: none">• The Airport Board recognizes that typically the standard work/pay cycle could approach up to ninety (90) days for a subcontractor to receive payment, once it begins work and submits an invoice to a prime contractor. The standard work/payment cycle for payment of subcontractor"s invoices can be a barrier to participation.• To remove this obstacle, the Airport Board endorses a policy supporting prompt payment of invoices to first tier subcontractors under an expedited payment program. The goal of this policy is to reduce the standard work/payment cycle for such first tier subcontractors to thirty seven (37) days.• It is the Airport Board"s policy that maintenance and construction prime contractors that have a direct contractual relationship with the Airport may participate in an expedited payment program to pay first tier subcontractors, including small, minority and women-owned businesses, within seven (7) days of receipt of an invoice for services or labor performed under a fixed price subcontract.• It is the policy of the Airport Board that a prime contractor that voluntarily agrees to participate in the expedited payment program shall as a condition to such participation, agree to provide such administrative support as is necessary to properly administer the program. A prime contractor shall be eligible to participate in the expedited payment program if awarded a multi-year contract for construction and/or maintenance services of at least \$10,000,000 in contract value.• The Airport Board"s policy is to pay interest to the prime contractor on eligible expedited payments from the date the payment is made to the subcontractor for work performed during the billing period through the date that the Prime Contractor submits its invoice to the Airport. This period shall not, under any circumstance, exceed 30 days. The Airport Board"s Chief Executive Officer is directed to develop procedures for the implementation of this Policy, including a standard method for calculating the interest payment to be made to the prime contractor and an annualized escalation, as appropriate.				
D/M/WBE Information <ul style="list-style-type: none">• N/A				
Schedule/Term <ul style="list-style-type: none">• N/A				
Contract #	Agreement #	Purchase Order #	Action Amount	Revised Amount
			\$0.00	\$0.00
For Information contact	Fund	Project #	External Funding Source	Amount
Don O"Bannon 3-5502				\$0.00

- As a condition to participation in the expedited payment program established by this Policy, the first tier subcontractor shall agree to pay any lower tier subcontractors in a direct contractual relationship with it within (7) days of receipt of the invoice payment. The Prime Contractor also, as a condition to participation, agrees to submit invoices to DFW Airport on a monthly basis.
- The Airport Board will pay interest to the prime contractor at an interest rate that equates to the federal funds rate plus 100 basis points. Currently, this equates to an interest rate of 5.75%. The rate would be determined annually and would be subject to a minimum rate of 6% and a maximum rate of 8%. This interest rate would be applied to the subcontractor payment amounts and only from the time that the subcontractors were paid until the prime submits its invoice to the Airport or approximately 30 days maximum.
- The estimated maximum interest paid to primes, should all eligible primes volunteer for the expedited payment program, would be approximately \$60,000 in FY 2008 and \$200,000 in FY 2009. This represents approximately .25% of eligible contracts amounts for these years.
- The implementation of this policy will be contingent on the availability of funding.

Justification

- Expedited payments will alleviate some of the typical cash flow constraints experienced by small, minority and/or women-owned subcontractors on large multi-year projects.
- Expedited payments will improve the ability of all subcontractors, including small, minority and/or women-owned businesses, to do business with the Airport Board. It will enhance the Airport Board's business environment for subcontractors and ultimately contribute to a stronger pool of businesses that can provide goods and services to the Board and contribute the North Texas economy.

Additional Attachments: **N**

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

That the Airport Board does hereby adopt an Expedited Payment Policy.

Approved as to Form by



Gary Keane
General Counsel
Oct 3, 2007 10:53 am

Approved as to Funding by



Max Underwood
Vice President
Finance
Oct 3, 2007 11:54 am

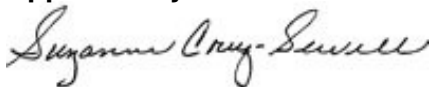
Approved as to M/WBE by



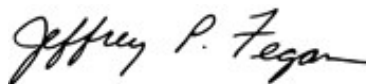
Don O'Bannon
Vice President
Small & Emerging Business
Oct 3, 2007 10:49 am

SIGNATURE REQUIRED FOR APPROVAL

Approved by



Department Head
Small & Emerging Business
Oct 3, 2007 10:49 am



Chief Executive Officer

Oct 4, 2007 1:26 pm

Date



Federal Register

**Tuesday,
March 22, 2005**

Part II

Department of Transportation

Office of the Secretary

49 CFR Part 23

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

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

[Docket No. OST-97-2550]

RIN 2105-AC91

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

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

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

FOR FURTHER INFORMATION CONTACT:

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

SUPPLEMENTARY INFORMATION:**Background**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Major Issues

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

1. Small Business Size Standards

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

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

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

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

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

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

2. Personal Net Worth

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Counting ACDBE Credit for Car Rental Companies

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

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

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

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

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

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

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

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

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

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

4. Overall Goals

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

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

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

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

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

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

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

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

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

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

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

Section-by-Section Analysis

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

Section 23.1 What Are the Objectives of This Part?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

One large airport suggested that the joint venture definition not require that the DBE partner perform an independent part of the work, arguing that concessions joint ventures did not operate in this way. We have become aware that some concessions joint ventures indeed do not involve an ACDBE performing an independent part of the work; some of these have been the focus of fraud investigations by the Department's Inspector General and other law enforcement organizations. If the 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, which we intend to post on the DOT DBE Web site as soon as it is available.

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

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

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

Section 23.5 To Whom Does This Part Apply?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The parenthetical "except car rental companies" reflects another provision

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

Section 23.27 What Information Does a Recipient Have To Retain and Report About Implementation of Its ACDBE Program?

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

Section 23.29 What Monitoring and Compliance Procedures Must Recipients Follow?

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

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

Subpart C—Certification of ACDBEs

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

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

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

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

somewhat different certification provisions of Part 26.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 23.77 Does This Part Preempt Local Requirements?

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

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

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

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

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

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

Regulatory Analyses and Notices

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

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

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

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

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

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

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

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

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

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

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

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

OMB is required to make a decision concerning information collections

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

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

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

Norman Y. Mineta,
Secretary of Transportation.

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

- 1. Revise part 23 to read as follows:

PART 23—PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS

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Sec.

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

Subpart A—General

§ 23.1 What are the objectives of this part?

This part seeks to achieve several objectives:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Leases.

(ii) Subleases.

(iii) Permits.

(iv) Contracts or subcontracts.

(v) Other instruments or arrangements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

determine the principal place of business for ACDBE program purposes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(vi) Women;

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

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

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

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

§ 23.5 To whom does this part apply?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Your application must show that—

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

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

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

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

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

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

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

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

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

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

period originally set for the duration of the program waiver.

Subpart B—ACDBE Programs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 23.29 What monitoring and compliance procedures must recipients follow?

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

Subpart C—Certification and Eligibility of ACDBEs

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

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

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

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

they meet the eligibility standards of this part.

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

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

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

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

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

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

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

(3) Pay telephones: 1,500 employees.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

certifies firms for the ACDBE concession program.

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

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

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

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

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

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

Subpart D—Goals, Good Faith Efforts, and Counting

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

non-ACDBE pertains are not added to this base.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

renewals of such contracts or agreements).

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

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

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

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

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

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

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

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

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

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

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

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

Subpart E—Other Provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) Documentation that ACDBE participants are properly certified.

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

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

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

§ 23.77 Does this part preempt local requirements?

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

comply with the requirements of this part.

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

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

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

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

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

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

Appendix A to Part 23—Uniform Report of ACDBE Participation

Instructions for Uniform Report of ACDBE Participation

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

person FAA should contact with questions about the report.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Uniform Report of ACDBE Participation

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

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

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

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

8. Car rental Cumulative ACDBE participation		A Total dollars (everyone)	B Total number (everyone)	C Total to ACDBEs (dollars)	D Total to ACDBEs (number)	E RC to ACDBEs (dollars)	F RN to ACDBEs (dollars)	G % of dollars to ACDBEs
Prime Concessions. Subconcessions. Goods/Services. Totals.								
9. Car rental New ACDBE participation this period		A Total dollars (everyone)	B Total number (everyone)	C Total to ACDBEs (dollars)	D Total to ACDBEs (number)	E RC to ACDBEs (dollars)	F RN to ACDBEs (dollars)	G % of dollars to ACDBEs
Prime Concessions. Subconcessions. Goods/Services. Totals.								
10. Cumulative ACDBE participation by race/gender	A Black Americans	B Hispanic Americans	C Asian-Pa- cific Ameri- cans	D Asian-In- dian Amer- icans	E Native Americans	F Non-minor- ity Women	G Other	H Totals
Car Rental. Non-Car Rental. Totals.								

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

[FR Doc. 05-5530 Filed 3-16-05; 3:20 pm]

BILLING CODE 4910-62-P



DALLAS/FORT WORTH
INTERNATIONAL AIRPORT

M/WBE REVENUE CONTRACT PROVISIONS (Concessions and Commercial Development Contracts)

1. The equity M/WBE partners' percentage participation and risk must be commensurate to the capital investment, carry interest or services provided to the proposing entity;
2. The equity M/WBE partner may fund the investment from their own personal or family resources but financed or loaned capital investment must be obtained from a third-party financial institution or equity investment fund or other business in which providing capital or risk investments is done as part of that business' normal and ordinary course of business;
3. A proposing bidder, its subsidiaries or affiliated companies may not finance the capital investment of the M/WBE equity partners;
4. The Airport will not count toward the M/WBE goals, working capital equity or passive, participation financed or provided under a non-recourse financing or capital arrangement or in which the underlying financial arrangement may be waived or forgiven;
5. The Airport will not count toward the M/WBE goals , working capital equity or passive, participation investors in which the proposing bidder, its subsidiaries, or affiliated companies is the guarantor or a co-signor on the underlying financial obligations.
6. The M/WBE equity partner must be responsible for a distinct, clearly defined portion of the work of the revenue contract;
7. A proposing bidder may not request or require as a condition of participating as a equity partner that M/WBE firms or individuals enter into an exclusive arrangement that precludes that firm or individual from participating on multiple teams as a equity partner or subcontractor.
8. Individual MWBE equity partners are not required to be certified by an approved certification agency in order to count their participation toward the goal but the Airport reserves the right to request information or documents establishing the investor's ethnicity, i.e., birth certificate, affidavits, immigration records or other forms of documentation;
9. M/WBE equity partners shall be certified by an approved certification agency in order to count their participation toward the M/WBE participation goals;
10. The Airport reserves the right to audit and the proposing entity and its equity partners agree to provide all documentation or information including but not limited to joint venture agreements, financing arrangements and operating agreements that would permit the Airport to monitor and verify compliance;

11. The proposing bidder also agrees to provide monthly, quarterly and/or annual M/WBE participation reports in a form and frequency satisfactory to the Airport to provide an accounting for capital contributions, control, management, expenditures, payments, distribution of profits and royalty payments for any equity MWBE partners and subcontractors by the proposing entity on the Dallas/Fort Worth International Airport for the revenue contract project;
12. The Airport may use during the selection process at its sole discretion the certification procedures and guidelines set forth in 49 C.F.R. Part 23 and 26;
13. The M/WBE Program shall, except as set forth above, govern all applicable contracts, subcontracts and/or investment relationships, equity or passive, related to any revenue contract.



DALLAS/FORT WORTH
INTERNATIONAL AIRPORT

**VERIFICATION OF M/WBE EXPENDITURE & EQUITY
GOAL DETERMINATION FORM
(For Commercial Development Projects)**

To Dallas/Fort Worth International Airport ("Airport") Representative:

By signing below, we confirm and acknowledge that we have met with appropriate representative in Airport's Business Diversity & Development Department and developed our commitment to achieve following M/WBE participation goal in connection with proposed expansion of ground lease area in compliance with requirements of Airport's Minority/Women Business Enterprise (M/WBE) Business Process:

____% M/WBE participation in the expenditure for the construction of all improvements and facilities to be constructed on proposed Expansion Area.

____% M/WBE participation in the equity of the commercial development.

Plan to achieve goal: Following is a detailed step by step description of the plan to be implemented in a good faith effort to reach above stated M/WBE aspirational goal:

☐ Check this box to indicate that ____ (insert number) of extra pages are attached to supplement above detailed plan information.

Authorized Signature: _____(Date: _____)

By: _____
(Print name)

Title: _____
(Insert title or capacity of party signing)



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

July 17, 2008

Dear Airport Sponsor:

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

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

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

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

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

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

Sincerely,

Fanny Rivera
Assistant Administrator for Civil Rights
and FAA Diversity Advocate

Enclosure

**AIRPORT CONCESSIONS
DISADVANTAGED
BUSINESS ENTERPRISE**

**JOINT
VENTURE
GUIDANCE**

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

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

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

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

Section 1 – General

1.0 What is the purpose of this Joint Venture Guidance?

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

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

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

1.1 Why is Joint Venture Guidance necessary?

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

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

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

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

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

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

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

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

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

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

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

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

Section 2 – Definitions

2.1 What is a joint venture?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 3 – Joint Venture Review

3.1 What reviews should the airport make?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.4 How should profits and losses be calculated and divided?

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

3.5 Are service and management fees acceptable?

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

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

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

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

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

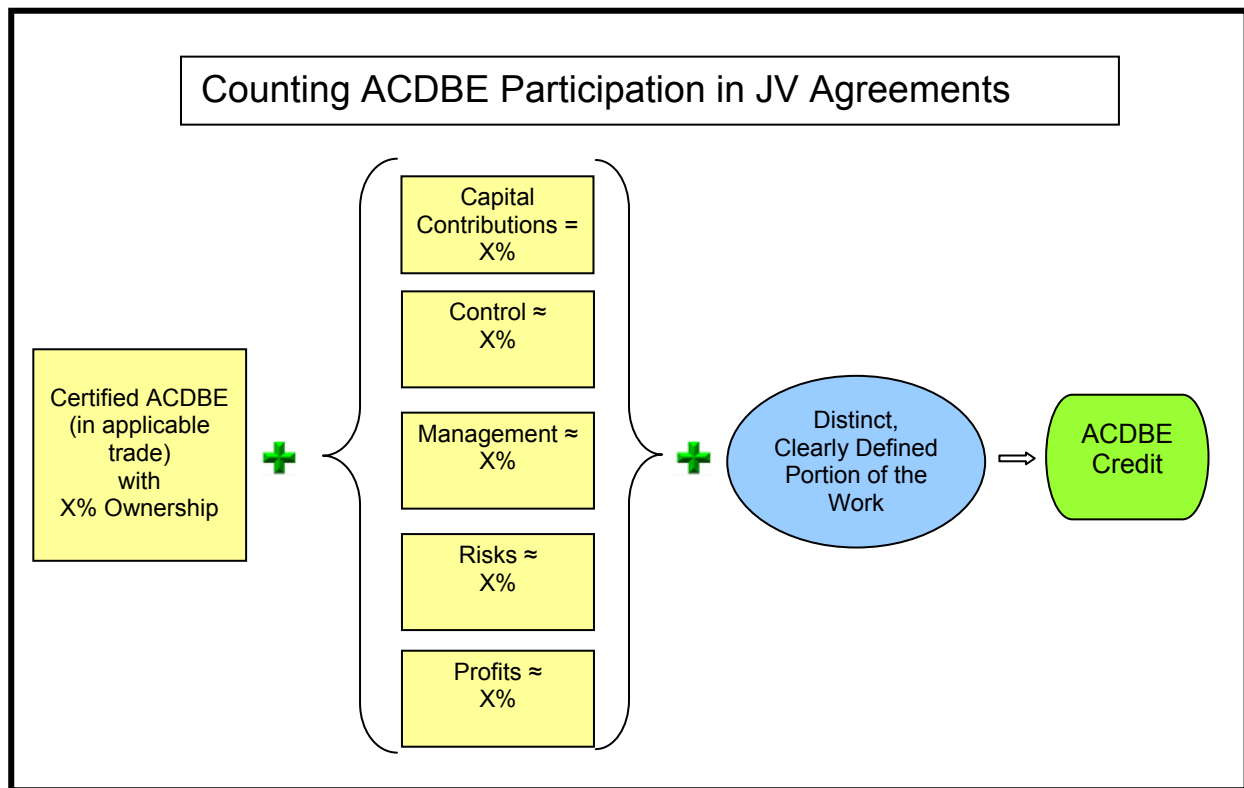
Section 4 – Counting ACDBE joint venture participation towards ACDBE goals

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

49 CFR § 23.55(d) states as follows:

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

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



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

The following are tips for accomplishing this review:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 5 – Monitoring ACDBE participation in joint ventures

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

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

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

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

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

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

5.3 What annual updates and changes are required?

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

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

Section 6 – Additional information

6.1 Can a joint venture be certified as an ACDBE?

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

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

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

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

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

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

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

Yes. ACDBE firms must be certified in the type of work to be undertaken by the joint venture (e.g., an ACDBE participant in a retail joint venture must be 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 ACDBE's certification eligibility is compromised. Any suspected loss of control or independence should be referred to the certifying agency, which shall institute decertification proceedings, if appropriate, consistent with § 26.87.

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

No. 49 CFR Part 23 states as follows:

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

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

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

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

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

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

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: ☐ yes ☐ 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: ☐ yes ☐ 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.

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

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

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

Attachment 2

Samples Joint Venture – ACDBE Portion of the Work

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

Example 1

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

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

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

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

The ACDBE roles of recruiting minority employees and finding DBE vendors are activities included under broader categories - Human Resources (under the “Operations” category of the business) and Purchasing (under the “Product” category of the business). There are numerous daily activities involved in the subcategories of “Human Resources” and “Purchasing.” All of “Operations” is about 1/3 of the business effort in this example and all of “Product” is also about 1/3 of the business effort. Human Resources is only one task within the “Operations” category and purchasing is only one task within the “Product”

category. Recruiting minority employees and finding minority vendors are small tasks within the broader subcategories. In addition, it is difficult, if not impossible, to quantify the value of these tasks in terms of their impact on gross receipts. In fact, it is likely that this portion of the work is negligible since neither of these activities actually involves management of a function or control of a result (i.e., DBE vendors may be located, however the level of purchasing to be accomplished from these vendors, their product placement within the facility, prices to be paid for merchandise, etc. are outside of the control of the ACDBE; minority employees may be recruited, however their hiring, training, management and retention are outside of the ACDBE's control). In this instance, an airport would not have sufficient data to approve the joint venture for counting towards ACDBE participation because the portion of the work to be performed by the ACDBE is very difficult to quantify. In this instance, the airport should request that the joint venture participants clarify the role of the ACDBE in order to understand the nature and extent of the ACDBE's role.

Conversely, assume that all other factors are the same as described above (i.e., the ownership is stated as 20% and capital contributions, management, etc. are commensurate), except that the ACDBE independently performs all functions in the "Operations" category. In this case, it could reasonably be determined that the ACDBE performs at least 33% of the work for its 20% ownership share. However, because the definition states that the ACDBE shares in the capital contribution, control, management, risks, and profits of the joint venture commensurate with its ownership interest, a joint venture where the ACDBE's contributions are not proportionate do not meet the definition of a joint venture under the regulation. In this instance, the participation could be counted at 20%, not a greater percentage which might be indicated by the portion of the work performed by the ACDBE.

Example 2

In this example, a joint venture between a non-ACDBE and an ACDBE operates a news/gift concession at an airport. The ACDBE is reported to have a 15% share in the ownership of the joint venture. The ACDBE has contributed capital from its own funds in proportion to its stated ownership. The ACDBE participates on a management committee and there are a number of business decisions requiring unanimous consent. The ACDBE's share of the profits and risks of the joint venture are proportionate to its stated ownership interest. There are management fees paid to the non-ACDBE partner, however, they are calculated as a reimbursement of costs incurred to perform support functions and are not a profit center. Up to this point, the joint venture agreement appears to comply with the regulation and this guidance. The ACDBE is assigned the following activities:

- 1) Supervise the Manager in developing the annual budget of the Joint Venture
- 2) Evaluate day-to-day operations and make recommendations to improve efficiencies
- 3) Sourcing and recruitment of personnel
- 4) Supervise employee training and development
- 5) Develop marketing and promotional concepts
- 6) Assist and advise regarding the needs of the local community
- 7) Identify potential DBE vendors
- 8) Monitor store compliance with other income programs

Given the description of the various activities above, it is not possible to ascertain exactly what portion of the work will be performed by the ACDBE. In order to assign any credit for the ACDBE role, additional information is needed for each of the assigned roles as follows:

- 1) Supervise the Manager in developing the annual budget of the Joint Venture

Who does the Manager report to for other functions? What control does the ACDBE have over the budget? While budgeting is important, it is only an annual budget and the description does not really indicate a very active role. How much time will be spent on this? Exactly what will the ACDBE do?

- 2) Evaluate day-to-day operations and make recommendations to improve efficiencies

Without further explanation this appears to be is a relatively meaningless role. What happens to the evaluations and recommendations once they are made? How often does this occur? Who actually does it? This seems to apply more to the overall management of the business. There is no supporting evidence to indicate that it is a distinct, clearly defined role.

- 3) Sourcing and recruitment of personnel

What exactly does this activity entail? Is the ACDBE actually responsible for hiring? How often does this occur and what is the level of effort expended to accomplish this? Does on-site staff participate? If so, to what extent?

- 4) Supervise employee training and development

Who will the ACDBE supervise? What level of effort is required for this activity? How much time is involved? Describe the nature of the training and development to be supervised.

- 5) Develop marketing and promotional concepts

Is the ACDBE solely responsible for marketing? What level of effort is required? How much time is involved? What is the budget for this? Are employees involved? If so, to whom do they report?

- 6) Assist and advise regarding the needs of the local community

An “assist” role does not appear to represent a “distinct, clearly defined” portion of the work. What is meant by the “needs of the local community?” Describe what the needs of the community might be. This seems to be a minor role in the overall scope of the operations.

- 7) Identify potential DBE vendors

What happens after the vendors are identified? Who has control over determining if they are used? Who negotiates with them and determines if goods or services will be purchased? What does this represent in dollars compared to the total purchases made?

- 8) Monitor store compliance with other income programs

This is, again, very unclear. What happens after monitoring? Who determines what compliance is necessary? What happens in the event of non-compliance? How often

is this monitoring done? How long does it take? How is it accomplished in other operations? How important is this in the scope of the operation?

As you can see, before any credit is assigned for ACDBE participation, there are a number of questions to be answered and issues to be resolved. Until the ACDBE is assigned a “distinct, clearly defined” portion of the work to perform, no credit can be given.

Example 3

A joint venture between a non-ACDBE and an ACDBE operates a food/beverage concession consisting of 8 locations at an airport. The ACDBE is reported to have a 35% share in the ownership of the joint venture. The ACDBE has contributed its proportionate share of the capital obtained through a combination of its own funds (15% of the required investment) and a loan from the non-ACDBE (85% of the required investment). A loan agreement has not been supplied. The ACDBE participates on a management committee and certain business decisions require unanimous consent. The ACDBE shares in the profits and risks of the joint venture in proportion to its stated ownership interest. There are no management fees paid to either party. The following is the description of the ACDBE role in the operation of the business as supplied in the joint venture agreement:

- 1) [ACDBE] company will have primary responsibility for the operation of gourmet coffee locations in Terminals 1, 2 and 3
- 2) [ACDBE] company will employ staff to manage and operate said locations in accordance with the lease agreement and direction provided by the Management Committee
- 3) [ACDBE] company will attend and participate in weekly manager’s meetings
- 4) [ACDBE] company will attend and participate in monthly meetings of the Management Committee

Given the above situation, the airport should request the following information in order to assess the credit to be counted towards ACDBE participation for this joint venture:

- 1) A copy of the proposed loan agreement in order to ensure that the loan provides information detailed in Section 3.3 of the joint venture guidance

- 2) A clear explanation of what “primary responsibility” actually means
- 3) An estimate of gross receipts to be earned by the ACDBE operated locations compared to total gross receipts

While there are questions to be answered in order to determine the credit to be counted for this joint venture, the fact that the ACDBE firm will be assigned specific units to operate will provide a more objective basis for establishing credit.

Attachment 3

JV REVIEW PROCESS

