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## Title 49 —Transportation

### Subtitle A —Office of the Secretary of Transportation

#### Part 23 Participation of Disadvantaged Business Enterprise in Airport Concessions

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## **PART 23—PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS**

**Authority:** 49 U.S.C. 47107 and 47113; 42 U.S.C. 2000d; 49 U.S.C. 322; E.O. 12138, 44 FR 29637, 3 CFR, 1979 Comp., p. 393.

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

### **Subpart A—General**

#### **§ 23.1 What are the objectives of this part?**

This part seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of opportunities for concessions by airports receiving DOT financial assistance;
- (b) To create a level playing field on which ACDBEs can compete fairly for opportunities for concessions;
- (c) To ensure that the Department's ACDBE program is narrowly tailored in accordance with applicable law;
- (d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as ACDBEs;
- (e) To help remove barriers to the participation of ACDBEs in opportunities for concessions at airports receiving DOT financial assistance;
- (f) To promote the use of ACDBEs in all types of concessions activities at airports receiving DOT financial assistance;
- (g) To assist the development of firms that can compete successfully in the marketplace outside the ACDBE program; and

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

[70 FR 14508, Mar. 22, 2005, as amended at 89 FR 24956, Apr. 9, 2024]

## § 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(h)) 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 firm seeking to operate as 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** means 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 whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

**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.*)

**Assets** has the same meaning the term has in 49 CFR part 26.

**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 that serve the traveling public 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 traveling 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 1 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., skydiving, 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.

**Contingent liability** means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant firm, legal claims and judgments, and provisions for Federal income tax.

**Days** means calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

**Department or DOT** means the U.S. Department of Transportation, including the Office of the Secretary.

**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.

**Liabilities** mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

**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.

**Operating Administration or OA** means any of the following: Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an OA includes his or her designee(s).

**Part 26** means 49 CFR part 26, DOT's Disadvantaged Business Enterprise Program regulation.

**Personal net worth or PNW** has the same meaning the term has in 49 CFR part 26.

**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 U.S. Census Bureau of the U.S. Department of Commerce. The U.S. Census Bureau also makes materials available through its website (<https://www.census.gov/naics/>).

**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.

**Recipient** is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

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

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

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

**Small business concern** means a for profit business that does not exceed the size standards of § 23.33.

**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 has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of a certain group and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control. Socially and economically disadvantaged individuals include:

- (1) Any individual determined by a recipient to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if the certifier requires it.
- (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 enrolled members of a federally or State-recognized Indian Tribe, Alaska Natives, or Native Hawaiians.
  - (iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong.
  - (v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
  - (vi) Women;
  - (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

**Subconcession** means 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.

**Sublease** means a lease by a lessee (tenant) to a sublessee (subtenant). Sublease is an example of a subconcession in which the sublessee is independently responsible for the full financing and operation of the subleased concession location(s) and activities. A sublease passes on to the sublessee all requirements applicable to the concession under the primary lease, including proportionate share of the rent and capital expenditures.

**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).

[89 FR 24956, Apr. 9, 2024]

### § 23.5 To whom does this part apply?

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

### § 23.7 Program reviews.

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

[75 FR 16358, Apr. 1, 2010]

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

- (a) As a recipient, you must meet the non-discrimination requirements provided in part 26, § 26.7 with respect to the award and performance of any concession agreement, management contract or subcontract, purchase or lease agreement, or other agreement covered by this subpart.
- (b) You must also take all necessary and reasonable steps to ensure nondiscrimination in the award and administration of contracts and agreements covered by this part.
- (c) You must include the following assurances in all concession agreements and management contracts you execute with any firm after April 21, 2005:
  - (1) "This agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR part 23. The concessionaire or contractor agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement, management contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR part 23.
  - (2) "The concessionaire or contractor agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR part 23, that it enters and cause those businesses to similarly include the statements in further agreements."

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

The compliance and enforcement provisions of part 26 (§§ 26.101 and 26.105 through 26.109) apply to this part in the same way that they apply to FAA recipients and programs under part 26.



[70 FR 14508, Mar. 22, 2005, as amended at 72 FR 15616, Apr. 2, 2007]

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

- (a) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 23 and issued after April 21, 2005, express the official positions and views of the Department of Transportation or the Federal Aviation Administration.
- (b) The Secretary of Transportation, Office of the Secretary of Transportation, and the FAA may issue written interpretations or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or the FAA, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

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

- (c) You may apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation or the FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.
- (d) You can apply for a waiver of any provision of subpart B or D of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers authorize 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.

[70 FR 14508, Mar. 22, 2005, as amended at 72 FR 15616, Apr. 2, 2007; 89 FR 24958, Apr. 9, 2024]

## Subpart B—ACDBE Programs

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

- (a) If you are a primary airport and receive FAA financial assistance, you must submit an ACDBE program plan meeting the requirements of this part to the FAA for approval.
  - (1) The recipient must submit this program plan on the same schedule as provided for in 23.45(a) of this part.
  - (2) Timely submission and FAA approval of a recipient's ACDBE program plan is a condition of eligibility for FAA financial assistance.
- (b) If you are a primary airport that does not have an ACDBE 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 plan 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. However, you must establish a separate ACDBE goal for each airport.
- (d) If a recipient makes any significant changes to their ACDBE program at any time, the recipient must provide the amended program to the FAA for approval before implementing the changes.
- (e) If a recipient is 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, it is not required to have an ACDBE program. However, the recipient must take appropriate outreach steps to encourage available ACDBEs to participate as concessionaires whenever there is a concession opportunity.

[89 FR 24958, Apr. 9, 2024]

**§ 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).
- (c) You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in their community and make reasonable efforts to use these institutions. You must also encourage prime concessionaires to use such institutions.

[70 FR 14508, Mar. 22, 2005, as amended at 89 FR 24959, Apr. 9, 2024]

**§ 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 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 § 26.35 of this chapter); 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) In setting concession-specific goals for concession opportunities other than car rental, you are required to explore, to the maximum extent practicable, all available options to set goals that concessionaires can meet through direct ownership arrangements. A concession-specific goal for any concession other than car rental may be based on purchases or leases of goods and services only when the analysis of the relative availability of ACDBEs and all relevant evidence reasonably supports that there is *de minimis* availability for direct ownership arrangement participation for that concession opportunity.
- (ii) In setting car rental concession-specific goals, you cannot require a car rental company to change its corporate structure to provide for participation via direct ownership arrangement. When your overall goal for car rental concessions is based on purchases or leases of goods and services, you are not required to explore options for direct ownership arrangements prior to setting a car rental concession-specific goal based on purchases or leases of goods and services.
- (iii) If the objective of the concession-specific goal is to obtain ACDBE participation through a direct ownership arrangement with an ACDBE, calculate the goal as a percentage of the total estimated annual gross receipts from the concession.
- (iv) If the goal applies to purchases or leases of goods and services from ACDBEs, calculate the goal as a percentage of the total estimated dollar value of all purchases to be made by the concessionaire.
- (v) 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.
- (vi) The administrative procedures applicable to contract goals in §§ 26.51 through 26.53 of this chapter 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 non-car rental 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 car rental and non-car rental ACDBE goals at the airport to make good faith efforts to meet goals when set pursuant to paragraph (e) of this section.
- (g) As provided in § 23.61 of this part, you must not use set-asides and quotas as means of obtaining ACDBE participation.

[70 FR 14508, Mar. 22, 2005, as amended at 89 FR 24959, Apr. 9, 2024]

**§ 23.26 Fostering small business participation.**

- (a) Your ACDBE program must include an element to provide for the structuring of concession opportunities to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of concession opportunities that may preclude small business participation in solicitations.
- (b) This element must be submitted to the FAA for approval as a part of your ACDBE program no later than October 7, 2024. As part of this program element you may include, but are not limited to including, the following strategies:
  - (1) Establish a race-neutral small business set-aside for certain concession opportunities. Such a strategy would include the rationale for selecting small business set-aside concession opportunities which may include consideration of size and availability of small businesses to operate the concession.
  - (2) Consider the concession opportunities available through all concession models.
  - (3) On concession opportunities that do not include ACDBE contract goals, require all concession models to provide subleasing opportunities of a size that small businesses, including ACDBEs, can reasonably operate.
  - (4) Identify alternative concession contracting approaches to facilitate the ability of small businesses, including ACDBEs, to compete for and obtain direct leasing opportunities.
- (c) This element should include an objective, definition of small business, verification process, monitoring plan, and implementation timeline.
- (d) Your element must include the following assurances:
  - (1) Your element is authorized under State law;
  - (2) Certified ACDBEs that meet the size criteria established under your element are presumptively eligible to participate in your element;
  - (3) There are no geographic preferences or limitations imposed on any concession opportunities included in your element;
  - (4) There are no limits on the number of concession opportunities awarded to firms participating in your element but that every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses;
  - (5) You will take aggressive steps to encourage those minority and women owned firms that are eligible for ACDBE certification to become certified; and
  - (6) Your element is open to small businesses regardless of their location (*i.e.*, that there is no local or other geographic preference).
- (e) A State, local, or other program, in which eligibility requires satisfaction of race/gender or other criteria in addition to business size, may not be used to comply with the requirements of this part.
- (f) This element must not include local geographic preferences per § 23.79.

- (g) You must submit an annual report on small business participation obtained through the use of your small business element. This report must be submitted in a format acceptable to the FAA based on a schedule established and posted to the agency's website, available at [https://www.faa.gov/about/office\\_org/headquarters\\_offices/acr/bus\\_ent\\_program](https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program).
- (h) You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your ACDBE program.

[89 FR 24959, Apr. 9, 2024]

### **§ 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) You must submit an annual report on ACDBE participation to the FAA by March 1 following the end of each fiscal year. This report must be submitted in the format acceptable to the FAA and contain all of the information described in the Uniform Report of ACDBE Participation.
- (c) You must create and maintain active participants list information as described in paragraph (c)(2) of this section and enter it into a system designated by the FAA.
  - (1) The purpose of this active participants list is to ensure that you have the most accurate data possible about the universe of ACDBE and non-ACDBEs who seek work in your airport concessions program as a tool to help you set your overall goals, and to provide the Department with data for evaluating the extent to which the objectives of § 23.1 are being achieved.
  - (2) You must obtain the following active participants list information about ACDBE and non-ACDBEs who seek to work on each of your concession opportunities.
    - (i) Firm name;
    - (ii) Firm address including ZIP code;
    - (iii) Firm status as an ACDBE or non-ACDBE;
    - (iv) Race and gender information for the firm's majority owner;
    - (v) NAICS code applicable to the concession contract in which the firm is seeking to perform;
    - (vi) Age of the firm; and
    - (vii) The annual gross receipts of the firm. You may obtain this information by asking each firm to indicate into what gross receipts bracket they fit (e.g., less than \$1 million; \$1-3 million; \$3-6 million; \$6-10 million, etc.) rather than requesting an exact figure from the firm.
  - (3) You must collect the data from all active participants for your concession opportunities by requiring the information in paragraph (c)(2) of this section to be submitted with their proposals or initial responses to negotiated procurements. You must enter this data in FAA's designated system no later than March 1 following the fiscal year in which the relevant concession opportunity was awarded.

- (d) The State department of transportation in each Unified Certification Program (UCP) established pursuant to § 26.81 of this chapter must report to DOT's Departmental Office of Civil Rights each year, the following information:
- (1) The number and percentage of in-state and out-of-state ACDBE certifications for socially and economically disadvantaged by gender and ethnicity (Black American, Asian-Pacific American, Native American, Hispanic American, Subcontinent-Asian Americans, and non-minority);
  - (2) The number of ACDBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible;
  - (3) The number of decertified firms:
    - (i) Total in-state and out-of-state firms decertified;
    - (ii) Names of in-state and out-of-state firms decertified because SEDO exceeded the personal net worth cap;
    - (iii) Names of in-state and out-of-state firms decertified for excess gross receipts beyond the relevant size standard.
  - (4) Number of in-state and out-of-state ACDBEs summarily suspended;
  - (5) Number of in-state and out-of-state ACDBE applications received for an individualized determination of social and economic disadvantage status; and
  - (6) Number of in-state and out-of-state ACDBEs whose owner(s) made an individualized showing of social and economic disadvantaged status.

[70 FR 14508, Mar. 22, 2005, as amended at 89 FR 24960, Apr. 9, 2024]

## § 23.29 What monitoring and compliance procedures must recipients follow?

As a recipient, you must implement appropriate mechanisms to ensure compliance with the requirements of this part by all participants in the program. You must include in your concession program the specific provisions to be inserted into concession agreements and management contracts setting forth the enforcement mechanisms and other means you use to ensure compliance. These provisions must include a monitoring and enforcement mechanism to verify that the work committed to ACDBEs is actually performed by the ACDBEs. This mechanism must include a written certification that you have reviewed records of all contracts, leases, joint venture agreements, or other concession-related agreements and monitored the work on-site at your airport for this purpose. The monitoring to which this paragraph refers may be conducted in conjunction with monitoring of concession performance for other purposes.

[77 FR 36931, June 20, 2012]

## Subpart C—Certification and Eligibility of ACDBEs

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

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

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

[70 FR 14508, Mar. 22, 2005, as amended at 89 FR 24960, Apr. 9, 2024]

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

- (a) Except as provided in paragraph (b) of this section, recipients must treat a firm as a small business eligible to be certified as an ACDBE if the gross receipts of the applicant firm and its affiliates, calculated in accordance with 13 CFR 121.104 averaged over the firm's previous five fiscal years, do not exceed \$56.42 million.
- (b) The following types of businesses have size standards that differ from the standard set forth in paragraph (a) of this section:
  - (1) **Banks and financial institutions.** \$1 billion in assets;
  - (2) **Passenger car rental companies.** \$75.23 million average annual gross receipts over the firm's previous five fiscal years;
  - (3) **Pay telephones.** 1,500 employees; and
  - (4) **New car dealers.** 350 employees.
- (c) For size purposes, gross receipts (as defined in 13 CFR 121.104(a)), of affiliates should be included in a manner consistent with 13 CFR 121.104(d), except in the context of joint ventures. For gross receipts attributable to joint venture partners, a firm must include in its gross receipts its proportionate share of joint venture receipts, unless the proportionate share already is accounted for in receipts reflecting transactions between the firm and its joint ventures (e.g., subcontracts from a joint venture entity to joint venture partners).

[89 FR 24960, Apr. 9, 2024]

### § 23.35 What role do business development and mentor-protégé programs have in the DBE program?

- (a) An owner whose PNW exceeds \$2,047,000 is not presumed economically disadvantaged.
- (b) The Department will adjust the PNW cap by May 9, 2027 by multiplying \$1,600,000 by the growth in total household net worth since 2019 as described by "Financial Accounts of the United States: Balance Sheet of Households (Supplementary Table B.101.h)" produced by the Board of Governors of the Federal Reserve (<https://www.federalreserve.gov/releases/z1/>), and normalized by the total number of households as collected by the Census in "Families and Living Arrangements" (<https://www.census.gov/topics/families/families-and-households.html>) to account for population growth. The Department will adjust the PNW cap every 3 years on the anniversary of the adjustment date described in this section. The Department will post the adjustments on the Departmental Office of Civil Rights' web page, available at <https://www.Transportation.gov/DBEPNW>. Each such adjustment will become the currently applicable PNW limit for purposes of this regulation.
- (c) The Department will use formula 1 to this paragraph (c) to adjust the PNW limit:



## Formula 1 to Paragraph (c)

<p>Future Year PNW Cap</p> <p>= [\$1,600,000] *</p>	<p>Q1-Q4 Average Household Net Worth of Future Year / Total Households of Future Year _____</p> <p>Q1-Q4 Average Household Net worth of 2019 (\$106,722,704 million / Total Households of 2019 (128,579)</p>
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[89 FR 55088, July 3, 2024]

**§ 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 perform work or provide services relevant to the airport's concessions program.

[70 FR 14508, Mar. 22, 2005, as amended at 89 FR 24961, Apr. 9, 2024]

**§ 23.39 What are other ACDBE certification requirements?**

- (a) The provisions of § 26.83(c)(1) of this chapter 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) Visit the firm's principal place of business, virtually or in person, and interview the SEDO, officers, and key personnel. You must review those persons' résumés and/or work histories. You must maintain a complete audio recording of the interviews. The certifier must also visit one or more active job sites (if there is one). These activities comprise the "on-site review" (OSR), a written report of which the certifier must keep in its files.
  - (2) Analyze documentation related to the legal structure, ownership, and control of the applicant firm. This includes, but is not limited to, articles of incorporation/organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued certificates of good standing;
  - (3) Analyze the bonding and financial capacity of the firm; lease and loan agreements; and bank account signature cards;
  - (4) Determine the work history of the firm, including any concession contracts or other contracts it may have received; and payroll records;
  - (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;
  - (7) Obtain complete Federal income tax returns (or requests for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last 5 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service; and
  - (8) Require applicants for ACDBE certification to complete and submit an appropriate application form, except as otherwise provided in § 26.85 of this chapter.
- (b) In reviewing the Declaration of Eligibility required by § 26.83(j) of this chapter, you must ensure that the ACDBE applicant provides documentation that it meets the applicable size standard in § 23.33.
  - (c) For purposes of this part, the term *prime contractor* in § 26.87(j) of this chapter includes a firm holding a 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 § 26.63(c)(2) of this chapter do not apply. The eligibility of ANC-owned firms for purposes of this part is governed by § 26.63(c)(1) of this chapter.
  - (e) You must use the Uniform Certification Application found in part 26 of this chapter without change. However, you may provide in your ACDBE program, with the written approval of the concerned Operating Administration, for supplementing the form by requesting specified additional information consistent with this part. The applicant must state that it is applying for certification as an ACDBE and complete all of section 5.
  - (f) 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.

[89 FR 24961, Apr. 9, 2024]

## 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.
- (c) The requirements of this section do not apply if no new concession opportunities will become available during the goal period. However, recipients must take appropriate outreach steps to encourage available ACDBEs to participate as concessionaires whenever there is a concession opportunity.

[70 FR 14508, Mar. 22, 2005, as amended at 89 FR 24961, Apr. 9, 2024]

### **§ 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 overall goals meeting the requirements of this subpart are due based on a schedule established by the FAA and posted on the FAA's website.
- (b) You must then submit goals every three years based on the published schedule.
- (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.

- (i) If a new concession opportunity, the estimated average annual gross revenues of which are anticipated to be \$200,000 or greater, arises at a time that falls between normal submission dates for overall goals, you must submit an appropriate adjustment to your overall goal to the FAA for approval no later than 90 days before issuing the solicitation for the new concession opportunity.

[70 FR 14508, Mar. 22, 2005, as amended at 77 FR 36931, June 20, 2012; 89 FR 24962, Apr. 9, 2024]

### § 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, <https://www.census.gov/programs-surveys/cbp.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.

[70 FR 14508, Mar. 22, 2005, as amended at 89 FR 24962, Apr. 9, 2024]

### **§ 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 an 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.

[70 FR 14508, Mar. 22, 2005, as amended at 89 FR 24962, Apr. 9, 2024]

### **§ 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 100 percent 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 an 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 100 percent 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 100 percent 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) When an ACDBE is decertified because one or more of its disadvantaged owners exceed the PNW cap or the firm exceeds the 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. However, you must verify that the firm in all other respects remains an eligible ACDBE and 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).
  - (1) The firm must inform the recipient in writing of any change in circumstances affecting its ability to meet ownership or control requirements of subpart C of this part or any material change. Reporting must be made as provided in § 26.83(i) of this chapter.



- (2) The firm must provide to the recipient, annually on December 1, a Declaration of Eligibility, affirming that there have been no changes in the firm's circumstances affecting its ability to meet ownership or control requirements of subpart C of this part or any other material changes, other than changes regarding the firm's business size or the owner's personal net worth.
- (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.

[70 FR 14508, Mar. 22, 2005, as amended at 89 FR 24962, Apr. 9, 2024]

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

- (a) You cannot be penalized, or treated by the Department as being in noncompliance with this part, simply because your ACDBE participation falls short of your overall goals. You can be penalized or treated as being in noncompliance only if you have failed to administer your ACDBE program in good faith.
- (b) If the awards and commitments shown on your Uniform Report of ACDBE Participation (found in Appendix A to this Part) at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your ACDBE program in good faith:
  - (1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;
  - (2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year;
  - (3)
    - (i) If you are a CORE 30 airport or other airport designated by the FAA, you must submit, by April 1, the analysis and corrective actions developed under paragraphs (b)(1) and (2) of this section to the FAA for approval.
    - (ii) As an airport not meeting the criteria of paragraph (b)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to the FAA, on request, for their review.
  - (4) The FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.
  - (5) You may be regarded as being in noncompliance with this part, and therefore subject to the remedies in § 23.11 of this part and other applicable regulations, for failing to implement your ACDBE program in good faith if any of the following things occur:
    - (i) You do not submit your analysis and corrective actions to FAA in a timely manner as required under paragraph (b)(3) of this section;
    - (ii) FAA disapproves your analysis or corrective actions; or

(iii) You do not fully implement:

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

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

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

[70 FR 14508, Mar. 22, 2005, as amended at 77 FR 36931, June 20, 2012; 89 FR 24962, Apr. 9, 2024]

### § 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 ACDBEs' 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.

[70 FR 14508, Mar. 22, 2005, as amended at 89 FR 24962, Apr. 9, 2024]

### § 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?

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.

[70 FR 14508, Mar. 22, 2005, as amended at 89 FR 24962, Apr. 9, 2024]

### § 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.
  - (1) For purposes of this section, a long-term agreement is one having a term of more than ten years, including any combination of base term and options or holdovers to extend the term of the agreement, if the effect is a term of more than ten years.
  - (2) For purposes of this section, an exclusive agreement is one having a type of business activity that is conducted solely by a single business entity on the entire airport, irrespective of ACDBE participation.
- (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, the items in paragraphs (c)(1) through (3) of this section must be submitted at least 60 days before the solicitation is released and items in paragraphs (c)(4) through (7) of this section must be submitted at least 45 days before contract award:
  - (1) A description of the special local circumstances that warrant a long-term, exclusive agreement.
  - (2) A copy of the solicitation.
  - (3) ACDBE contract goal analysis developed in accordance with this part.
  - (4) Documentation that ACDBE participants are certified in the appropriate NAICS code in order for the participation to count towards ACDBE goals.
  - (5) A general description of the type of business or businesses to be operated by the ACDBE, including location and concept of the ACDBE operation.
  - (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, if applicable.
  - (7) Final long-term exclusive concession agreement, subleasing or other agreements.
- (d) In order to obtain FAA approval of a long-term exclusive concession agreement that has been awarded through direct negotiations, you must submit the items in paragraphs (c)(1) and (3) through (7) of this section at least 45 days before contract award.

- (e) In order to obtain FAA approval of an exclusive concession agreement that becomes long-term as a result of a holdover tenancy, you must submit to the responsible FAA regional office a holdover plan for FAA approval at least 60 days prior to the expiration of the current lease term. The holdover plan shall include the following information:
  - (1) A description of the special local circumstances that warrant the holdover.
  - (2) Anticipated date for renewal or re-bidding of the agreement.
  - (3) The method to be applied for renewal or re-bidding of the agreement.
  - (4) Submission of all items required under paragraphs (c)(3), (4), (6), and (7) of this section for the agreement in holdover status or an explanation as to why the item is not available or cannot be submitted.

[89 FR 24962, Apr. 9, 2024]

### § 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.

[70 FR 14508, Mar. 22, 2005, as amended at 89 FR 24963, Apr. 9, 2024]

### § 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 a concessionaire located in one place (e.g., your local area) an advantage over concessionaires from other places in obtaining business as, or with, a concession at your airport.

[89 FR 24963, Apr. 9, 2024]