



# City of Austin

## Airport Concessions Disadvantaged Business Program

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**ACDBE PROGRAM**  
**POLICY STATEMENT**

**Section 23.1, 23.23                      Objectives/Policy Statement**

The City of Austin has established an Airport Concession Disadvantaged Business Enterprise (ACDBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 23. The City of Austin's Austin Bergstrom International Airport (AUS) is a primary airport and has received federal funds authorized for airport development (authorized under Title 49 of the United States Code). The City of Austin has signed airport grant assurances that it will comply with 49 CFR Part 23.

It is the policy of the City of Austin to ensure that ACDBEs, as defined in Part 23, have an equal opportunity to participate in airport concessions. It is also the City's policy to:

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

The Director of the City of Austin's Small & Minority Resources Department has been designated as the ACDBE Liaison Officer (ACDBELO). In that capacity, the Director of the Small & Minority Resources Department is responsible for implementing all aspects of the ACDBE program. Implementation of the ACDBE program is accorded the same priority as compliance with all other legal obligations incurred by the City of Austin in its financial assistance agreements with the Department of Transportation.

The City of Austin has disseminated this policy statement to the Austin City Council, the City's Department of Aviation, the Austin Bergstrom International Airport, and all other relevant components of the City's organization. This statement has also been distributed to ACDBE and non-ACDBE concessionaire communities in the Austin area. The City of Austin has distributed this statement to the ACDBE and non-ACDBE concessionaires, service providers and trade associations.

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Spencer Cronk, City Manager

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Date

PROPOSED

## **SUBPART A – GENERAL REQUIREMENTS**

### **Section 23.1 Objectives**

The objectives are found in the policy statement on the first page of this program.

### **Section 23.3 Definitions**

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

### **Section 23.5 Applicability**

The City of Austin's Austin Bergstrom International Airport is a primary airport and the sponsor of federal airport funds authorized for airport development after January 1988 that is authorized under Title 49 of the United States Code.

### **Section 23.9 Non-discrimination Requirements**

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

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

The City of Austin acknowledges these representations are also in accordance with obligations contained in its Civil Rights, Disadvantaged Business Enterprise (DBE) and ACDBE Airport grant assurances.

The City of Austin will include the following assurances in all airport concession agreements and management contracts it executes with any firm:

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

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

## Section 23.11

## Compliance and Enforcement

The City of Austin will comply with and is subject to the provisions of 49 CFR Part 26 (26.101, 26.105, 26.107) and 2 CFR parts 180 and 1200.

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

2 C.F.R. Part 180, Government-wide Debarment and Suspension (Non-procurement), effective November 15, 2006, adopted and supplemented by DOT at 2 C.F.R. Part 1200, effective June 2, 2008, provides Office of Management and Budget (OMB) guidance for Federal agencies on the government-wide debarment and suspension system for non-procurement transactions, programs and activities. 2 C.F.R. Part 1200 adopts the OMB guidance in subparts A through I of 2 CFR Part 180, as supplemented by Part 1200, as the Department of Transportation policies and procedures for non-procurement suspension and debarment.

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

The following enforcement actions apply to firms participating in the City of Austin's ACDBE program:

- (a) For a firm that does not meet the eligibility criteria of subpart C of this part and that attempts to participate as an ACDBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department of Transportation (DOT) or the Federal Aviation Administration (FAA) may initiate suspension or debarment proceedings against the firm under 2 CFR parts 180 and 1200.
- (b) For a firm that, in order to meet ACDBE goals or other AC/DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart C of this part, DOT or FAA may initiate suspension or debarment proceedings against the firm under 2 CFR parts 180 and 1200.
- (c) DOT may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the ACDBE program whose conduct is subject to such action under 49 CFR Part 31.

(d) DOT may refer to the Department of Justice, for prosecution under 18 U.S.C. §1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of an ACDBE in the City of Austin's ACDBE program or otherwise violates applicable Federal statutes.

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

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

## **SUBPART B – ACDBE PROGRAMS**

### **Section 23.21 ACDBE Program Updates**

Since the City of Austin's Austin Bergstrom International Airport (AUS) is a medium hub primary airport, we are required to have an ACDBE program.

As a condition of eligibility for FAA financial assistance, the City of Austin will submit its ACDBE program and overall goals to FAA according to Section 23.45(a) of this part.

Until the City of Austin's new ACDBE program is submitted and approved, it will continue, in accordance with 49 CFR Part 23, to implement its ACDBE program that was in effect and previously approved.

This ACDBE program will be implemented at the Austin Bergstrom International Airport (AUS).

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

### **Section 23.23 Administrative Provisions**

**Policy Statement:** The City of Austin is committed to operating its ACDBE program in a nondiscriminatory manner.

The City of Austin's Policy Statement is elaborated on the first page of this program.

**ACDBE Liaison Officer (ACDBELO):** The City has designated the following individual as its ACDBELO: The Director of the Small & Minority Resources Department (SMBR), Edward Campos, Interim Director, 811 Barton Springs Road, Austin, Texas 78704, Telephone 512-974-7206, e-mail – Edward.Campos@austintexas.gov.

In that capacity, the ACDBELO is responsible for implementing all aspects of the ACDBE program and ensuring that the City of Austin complies with all provision of 49 CFR Part 23. The ACDBELO has direct, independent access to the Chief Executive Officer (the City Manager) of the City of Austin concerning ACDBE program matters. The City's Aviation Department manages the Austin-Bergstrom International Airport (AUS). The Aviation Executive Director and AUS is responsible for identifying, executing and managing concession contracts. In addition to receiving FAA approval for long term exclusive agreements in accordance with this part. An organization chart displaying the ACDBELO and AUS position in the organization is found in **Attachment 1** of this program.

The ACDBELO is responsible for developing, implementing and monitoring the ACDBE program, in coordination with the Aviation Department Executive Director. The ACDBELO has a staff of 12 to assist in the administration of the program and has designated the Compliance Officer, Certification Division Manager and Program Compliance Coordinator as ACDBELO Designees. The duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required by FAA or DOT.
2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Works with all departments to set overall annual goals
4. Ensures that bid notices and requests for proposals are available to ACDBEs in a timely manner.
5. Identifies contracts and procurements so that ACDBE goals are included in solicitations (both race-neutral methods and contract specific goals)
6. Analyzes the City of Austin's progress toward attainment and identifies ways to improve progress.
7. Participates in pre-bid meetings.
8. Advises the Austin City Council, Airport Advisory Commission and Department of Aviation on ACDBE matters and achievement.
9. Serves as staff liaison for the MBE/WBE Procurement Program Advisory Committee.
10. Provides ACDBEs with information and assistance in preparing bids, obtaining bonding, financing, and insurance; acts as a liaison to the Minority Trade Alliance (MTA).
11. Plans and participates in ACDBE training seminars.
12. Acts as liaison to the Unified Certification Program (TUCP) in Texas.
13. Provides outreach to ACDBEs and community organizations to advise them of opportunities.
14. Maintain the City of Austin's updated directory on certified ACDBEs and distinguishes them from DBEs.

**In addition the ACDBELO Designees will be responsible for the following:**

1. Monitor certification status.
2. Collect and review reports from prime concessionaires.
3. Provide periodic reports to Austin City Council, when requested.
4. Update ACDBE Plan.

5. Conduct on-going site visits.

Directory: The City of Austin, through the Texas Unified Certification Program (TUCP), maintains a directory identifying all firms eligible to participate as DBEs and ACDBEs. The Directory lists the firm's name, address, phone number, date of the most recent certification, and the type of work the firm has been certified to perform as an ACDBE.

The TUCP will ensure that the Directory lists each type of work for which a firm is eligible to be certified by using the most specific NAICS code available to describe each type of work. The TUCP will make any changes to the current directory entries necessary to meet the requirements of this paragraph.

The TUCP revises the Directory daily. We make the Directory available as follows

<https://txdot.txdotcms.com/>

### **Section 23.25 Ensuring Nondiscriminatory Participation of ACDBEs**

The City of Austin will take the following measures to ensure nondiscriminatory participation of ACDBEs in concessions, and other covered activities (23.25(a)).

*The City of Austin will not exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 23 on the basis of race, color, sex, or national origin. In administering its ACDBE program, the City of Austin will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the ACDBE program with the respect to individuals of a particular race, color, sex, or national origin.*

The City of Austin will seek ACDBE participation in all types of concession activities, rather than concentrating participation in one category or a few categories to the exclusion of others. (23.25(c))

The City of Austin's overall goal methodology and a description of the race-neutral measures it will use to meet the goals are described in Section 23.25 and Appendix 4 of this plan. The goals are set consistent with the requirements of Subpart D. (23.25(b), (d))

If the City of Austin projects that race-neutral measures alone are not sufficient to meet an overall goal, it will use race-conscious measures as described in Section 23.25 (e) (1-2) and Appendix 4 and 5 of this plan. (23.25(e))

The City of Austin will require businesses subject to ACDBE goals at the airport (except car rental companies) to make good faith efforts to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with ACDBEs. (23.25(f))

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

## **Section 23.27 Reporting**

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

Beginning March 1, 2006, the City submitted to the FAA Regional Civil Rights Office, an annual ACDBE participation report on the form in Appendix a of Part 23, and will continue to do so.

## **Section 23.29 Compliance and Enforcement Procedures**

The City of Austin has implemented the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 23:

On the reports of ACDBE participation, the City will show the “Uniform Report of ACDBE Participation” as it relates to the overall goal. The monitoring mechanism used by the Small & Minority Resources Department (SMBR) begins at the stage when the concession space is advertised with the ACDBE goal via [www.abia.org](http://www.abia.org) and other outlets as determined by AUS. SMBR will attend the pre-proposal meetings and make a presentation to the proposers to explain the ACDBE program requirements. After the proposal submission, AUS will distribute a copy of each proposal received to SMBR to determine if the proposer has either met the ACDBE goals by submission of Letters of Intent for ACDBE suppliers, Joint Venture arrangements, participation by ACDBE owners/operators, or any other arrangement listed in the proposal document or the submission of a good faith effort.

After a successful proposer is identified and awarded by Austin City Council, and once the concessionaire has signed a lease agreement, SMBR in collaboration with AUS begins to monitor the utilization of ACDBEs by performing on-site inspections, reviews of the concessionaire’s gross receipts, invoices from and payments to ACDBEs, Joint Venture documents, and any other documents related to the performance of the ACDBEs in the operation of the concession, and interviews with staff, non-eligible owners and ACDBEs. Determinations of compliance are made from this information.

If it is determined that an ACDBE firm is not being utilized in the manner detailed in the initial proposal, is being underutilized, not being paid, or not being paid in a timely fashion, SMBR will immediately conduct a compliance investigation. If the concessionaire is found non-compliant with ACDBE requirements, SMBR will recommend to AUS that the concessionaire come into Compliance or be found to be in breach of its agreement.

1. The City of Austin will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.107.
2. The City of Austin will consider similar action under its own legal authority, including responsibility determinations in future contracts. The regulations, provisions, and contract remedies available to the City in the events of non-compliance with the ACDBE regulation by a participant in procurement activities are listed in Attachment 3. (26.37)

## **SUBPART C – CERTIFICATION AND ELIGIBILITY**

**Section 23.31** The City of Austin will use the procedures and standards of Part 26, except as provided in 23.31, for certification of ACDBEs to participate in concessions program and such standards are incorporated herein.

The City of Austin is a member of the Unified Certification Program (TUCP) administered by the Texas Department of Transportation. The TUCP meets all of the requirements of this section. The TUCP's directory of eligible DBEs specifies whether a firm is certified as a DBE for purposes of Part 26, and ACDBE for purposes of Part 23, or both.

Prior to entering into a new contract, extension, or option with a currently certified ACDBE, the City will review its eligibility at that time (i.e., "as soon as possible") rather than waiting until the latest date allowed under Part 23. The schedule for this review process will be: review the eligibility of currently certified ACDBEs to make sure that they continue to meet the standards of Part 23 three years from the anniversary date of each firm's most recent certification. The Certification Division has staff members who are responsible for ACDBE Certification and Monitoring.

**Section 23.33** The City of Austin will treat a firm as a small business eligible to be certified as an ACDBE if its gross receipts, averaged over the firm's previous three fiscal years, do not exceed \$56.42 million for non-car rental ACDBEs and \$75.23 million for car rental ACDBEs. The size standard for banks and other financial institutions is \$1 billion in assets, for pay telephone companies is 1500 employees and for ACDBE automobile dealers is 350 employees.

**Section 23.35** The personal net worth standard used in determining eligibility for purposes of Part 23 is \$1.32 million.

The City of Austin *recognizes that Personal net worth* means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth (PNW) does not include the following:

- (1) The individual's ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification;
- (2) The individual's equity in his or her primary place of residence; and
- (3) Other assets that the individual can document are necessary to obtain financing or a franchise agreement for the initiation or expansion of his or her ACDBE firm (or have in fact been encumbered to support existing financing for the individual's ACDBE business) to a maximum of \$3 million. (\*Note: The effectiveness of this paragraph (3) will be suspended with respect to any application for ACDBE certification made or any financing or franchise agreement obtained after June 20, 2012. (23.3))

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.

Any person who has a personal net worth exceeding this amount is not a socially and economically disadvantaged individual, even if a member of a group otherwise presumed to be disadvantaged. (See 23.3 - *Personal Net Worth* definition and 23.35)

The City of Austin will presume that a firm that is certified as a DBE under Part 26 is eligible to participate as an ACDBE. However, before certifying such a firm, the City of Austin will 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. The City of Austin is not obligated to certify a Part 26 DBE as an ACDBE if the firm does not perform work relevant to the concessions program. (23.37).

The City of Austin recognizes that the provisions of Part 26, section 26.83(c) (2-6), do not apply to certifications for purposes of Part 23. The City will follow the provisions of 23.39 (a) through (e). The Certification Division will obtain resumes or work histories of the principal owners of the firm and personally interview these individuals. The City of Austin will analyze the ownership of stock of the firm, if it is a corporation. It will analyze the bonding and financial capacity of the firm. The Certification Division will determine the work history of the firm, including any concession contracts or other contracts it may have received. The Certification Division will 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. The Certification Division will obtain a statement from the firm of the types of concessions it prefers to operate or the type of other contracts it prefers to perform.

The City of Austin will ensure that the ACDBE firm meets the applicable size standard. (23.39(a) (b)).

The City of Austin acknowledges that a prime contractor 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.

The City of Austin recognizes that the eligibility of Alaska Native Corporations (ANC) owned firms for purposes of Part 23 is governed by Part 26, section 26.73(h). (23.39(c) (d)).

The City of Austin will use the certification standards of Part 23 to determine the ACDBE eligibility of firms that provide goods and services to concessionaires. (23.39(l))

In instances when the eligibility of a concessionaire is removed after the concessionaire has entered into a concession agreement because the firm exceeded the size standard or the owner has exceeded the PNW standard, and the firm in all other respects remains an eligible DBE, the City of Austin may continue to count the concessionaire's participation toward ACDBE goals during the remainder of the current concession agreement. The City of Austin will 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. (23.39(e))

The City of Austin will use the Uniform Application Form found in Appendix F to Part 26 with additional instruction as stated in 23.39(g).

### **Section 26.83 Procedures for Certification Decisions**

#### Re-certifications 26.83(a) & (c)

The Certification Division will ensure the TUCP reviews the eligibility of ACDBEs that we certified, to make sure that they will meet the standards of Subpart C of Part 23 and Subpart E of Part 26. The Certification Division will complete this review no later than three years from the most recent certification date of each firm. The schedule for this review process will be: The Certification Division will review the eligibility of currently certified ACDBEs to make sure that they continue to meet the standards of Part 23 three years from the anniversary date of each firm's most recent certification. The Small & Minority Resources Department's Certification Division has staff members who are responsible for ACDBE Certification and Monitoring.

For firms that TUCP have certified or reviewed and found eligible under Part 23/26, the Certification Division will again review their eligibility three years from the anniversary date of each firm's most recent certification. These reviews will include the following components: Site visits, reviews of appropriate records, contracts, financial information, joint venture agreements, certification information and other relevant information deemed necessary.

#### **"No Change" Affidavits and Notices of Change (26.83(j))**

The TUCP requires all ACDBEs owners to give notice, in a written affidavit, of any change in its circumstances affecting its ability to meet size, disadvantaged status, and ownership

or control criteria of 49 CFR Part 26 or of any material changes in the information provided with the City of Austin's application for certification.

The TUCP also requires all ACDBE owners it certified to submit every year, on the anniversary date of their certification, a "no change" affidavit meeting the requirements of 26.83(j). The text of this affidavit is the following:

The undersigned swears under penalty of perjury: that he or she has read and understands this eligibility affidavit and has the authority to sign it; that the responses and accompanying documents are true, complete and correct; that there have been no material changes regarding the firm's disadvantaged status, ownership or control and that any such changes have previously been reported to the Civil Rights & Business Resource Center; and that the firm continues to meet SBA and US Department of Transportation small business size criteria.

The TUCP requires ACDBEs to submit with this affidavit documentation of the firm's size and gross receipts.

The TUCP will notify all currently certified ACDBE firms of these obligations via B2G database notifications 30 days prior to the anniversary of their certification due date. This notification will inform ACDBEs that to submit the "no change" affidavit, their owners must swear or affirm that they meet all regulatory requirements of Part 23/26, including personal net worth. Likewise, if a firm's owner knows or should know that he or she, or the firm, fails to meet a Part 23/26 eligibility requirement (e.g. personal net worth), the obligation to submit a notice of change applies.

#### **Section 26.85 Interstate Certification**

When a firm currently certified in its home state ("State A") applies to another State ("State B") for ACDBE certification, State B may, at its discretion, accept State A's certification and certify the firm, without further procedures. The City of Austin will follow the procedures defined in Section 26.85.

#### **Section 26.86 Denials of Initial Requests for Certification**

If the City of Austin denies a firm's application or decertifies it, it may not reapply until 12 months have passed from the City's action.

#### **Section 26.87 Removal of a DBE's Eligibility**

In the event we propose to remove an ACDBE's certification, the City of Austin will follow procedures consistent with 26.87.

**Attachment 4** to this program sets forth these procedures in detail.

## **Section 26.89 Certification Appeals**

Any firm or complainant may appeal the decision in a certification matter to DOT. Such appeals may be sent to:

US Department of Transportation Departmental  
Office of Civil Rights  
External Civil Rights Program Division (S-33)  
1200 New Jersey Ave., S.E.  
Washington, DC 20590  
Phone: 202-366-4754  
TTY: 202-366-9696  
Fax: 202-366-5575

The TUCP will promptly implement any DOT certification appeal decisions affecting the eligibility of ACDBEs (e.g., certify a firm if DOT has determined that the denial of its application was erroneous).

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

#### **Section 23.41 Basic Overall Goal Requirement**

The City of Austin will establish two separate overall ACDBE goals; one for car rentals and another for concessions other than car rentals. The overall goals will cover a three year period and the sponsor will review the goals annually to make sure the goal continues to fit the sponsor's circumstances. The City of Austin will report any significant overall goal adjustments to the FAA.

If the average annual concession revenues for car rentals over the preceding 3 years do not exceed \$200,000, The City of Austin need not submit an overall goal for car rentals. Likewise, if the average annual concession revenues for concessions other than car rentals over the preceding 3 years do not exceed \$200,000, the City of Austin need not submit an overall goal for concessions other than car rentals. The City of Austin understands that "revenue" means total revenue generated by concessions, not the fees received by the airport from concessionaires.

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

#### **Section 23.43 Consultation in Goal Setting**

The City's Small & Minority Business Resources Compliance Division consults with stakeholders before submitting the overall goals to the FAA. Stakeholders will include, but not be limited to, minority and women's business groups, community organizations, trade associations representing concessionaires currently located at the airport, as well as existing concessionaires themselves, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for ACDBEs, and the sponsors efforts to increase participation of ACDBEs.

When submitting the overall goals, the City will identify the stakeholders consulted and provide a summary of the information obtained from the stakeholders.

SMBR will publish a notice of proposed overall goals, informing the public that the proposed goal and its rationale are available for inspection online at [www.austintexas.gov/SMBR](http://www.austintexas.gov/SMBR) for 30 days following the date of notice. SMBR will accept comments on the goals for 45 days from the date of the notice. In addition, the goals are published on the AUS website at [www.abia.org](http://www.abia.org).

SMBR's overall submission to FAA will include: the goal (including a breakout of estimated race neutral and race-conscious participation as appropriate); a copy of the methodology used to develop the goal; a summary of information and comments received during this public participation process and the City's responses; and proof of publication of the goal in media outlets listed above.

The City will begin using its overall goal on October 1 of the specified year, unless it has received other instructions from FAA. If the City establishes a goal on a project basis, it will begin using the goal by the time of its first solicitation for a FAA assisted contract for the project. SMBR's goal will remain effective for the duration of the three- year period established and approved by FAA.

### **Section 23.45 Overall Goals**

The City's Austin Bergstrom International Airport is a medium hub primary airport. As a condition of eligibility for FAA financial assistance, the sponsor will submit its overall goals according to the following schedule:

<b>Primary Airport Size</b>	<b>Region Covered</b>	<b>Date Due</b>	<b>Period</b>	<b>Next Goal Due</b>
Large/Medium Hubs	All regions	October 1, 2019	2020/2021/2022	October 1, 2021 (2022/2023/2024)

If a new concession opportunity arises at a time that falls between the normal submission dates above and the estimated average of annual gross revenues are anticipated to be \$200,000 or greater, the sponsor will submit an appropriate adjustment to its overall goal to FAA for approval no later than 90 days before issuing the solicitation for the new concession opportunity. (23.45i)

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

The sponsor (AUS) will arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by ACDBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under § 26.39 of this part.

A description of the methodology to calculate the overall goal for concessions other than car rentals, the goal calculations, and the data we relied on can be found in **Attachment 5** to this program.

A description of the methodology to calculate the overall goal for car rentals, the goal calculations, and the data we relied on can be found in **Attachment 6** to this program.

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

The breakout of estimated race-neutral and race-conscious participation can be found with the goal methodology in **Attachment 5 & 6** to this program. This section of the program will be reviewed annually when the goal calculation is reviewed under 23.41(c).

### **Concession Specific Goals (Also include this language in the DBE goal attachment) (23.25 (c)(e)(1)(iv))**

The City of Austin will use concession specific goals to meet any portion of the overall goals it does not project being able to meet using race-neutral means. Concession specific goals are established so that, over the period to which the overall goals apply, they will cumulatively result in meeting any portion of the overall goal that is not projected to be met through the use of race-neutral means.

The City of Austin will establish concession-specific goals only on those concessions that have direct ownership arrangements (except car rentals), sublease, or subcontracting possibilities. The City of Austin will require businesses subject to ACDBE goals at the airport (except car rental companies) to make good faith efforts to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with DBEs (23.25 (f)). Car rental firms are not required to change their corporate structure to provide for direct ownership arrangements. 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.)

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

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

If the concession specific goal applies to purchases and/or leases of goods and services, the City of Austin will calculate the goal by dividing the estimated dollar value of such purchases and/or leases from ACDBEs by the total estimated dollar value of all purchases to be made by the concessionaire. (23.25(e)(1)(ii))

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

To be eligible to be awarded a concession that has a concession specific goal, bidders/offerors must make good faith efforts to meet the goal. A bidder/offeror may do so either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so. (23.25(e)(1)(iv)).

Examples of good faith efforts are found in Appendix A to 49 CFR Part 26. The procedures applicable to 49 CFR Sections 26.51 and 26.53, regarding contract goals apply to the City of Austin's concession specific goals. Specifically:

#### **Section 26.53 Good Faith Efforts Procedures**

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

The obligation of the bidder/offeror is to make good faith efforts. The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts. Examples of good faith efforts are found in Appendix A to Part 26.

The City of Austin's Small & Minority Resources Department Compliance Division is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive.

The City will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing to a contract with the bidder/offeror.

Information to be submitted (26.53(b))

The City of Austin treats concessionaire's compliance with good faith efforts' requirements as a matter of responsiveness.

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

1. The names and addresses of ACDBE firms or ACDBE suppliers of goods and services that will participate in the concession;
2. A description of the type of work or role to be performed, or a description of the goods and/or services to be provided, by the ACDBE in the operation of the concession; The dollar amount of the participation of each ACDBE firm/supplier participating;
3. Written and signed documentation of commitment to use an ACDBE whose participation it submits to meet the Lease Agreement Goal;
4. Written and signed confirmation from the ACDBE that it is participating in the concession as provided in the prime concessionaire's Lease Agreement and;
5. If the contract goal is not met, evidence of good faith efforts to meet the goal.

Administrative reconsideration (26.53(d))

Within five business days of being informed by the Small & Minority Business Resources Department (SMBR) that it is not responsive because it has not documented sufficient good faith efforts, a concessionaire may request administrative reconsideration. Concessionaire should make this request in writing to the following reconsideration official: Small & Minority Resources Department, c/o Director, 811 Barton Springs Road, Austin, TX 78704. The reconsideration official will not have played any role in the original determination that the concessionaire did not document sufficient good faith efforts.

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

**Attachment 7** to this program sets forth these procedures in detail.

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

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

In this situation, SMBR will require the concessionaire to obtain prior approval of the substitute ACDBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts.

In the event that a concessionaire must add or replace an ACDBE subcontractor, supplier, or partner, or in the event that a new scope of work is added to the ongoing project, and the concessionaire in such events is non-compliant with maintenance of the original ACDBE goal upon which the concession agreement was awarded, the following modified good faith efforts must be completed. Failure of a concessionaire to show good faith efforts as to any one of the following categories shall render its overall good faith showing insufficient; and its contract performance in non-compliance with this program.

The following is a list of types of actions which the City will consider as part of the concessionaire's good faith efforts to obtain ACDBE participation. It is not intended to be mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

- (1) Verification in writing to SMBR of the concessionaire's intention to terminate or replace an ACDBE originally identified for participation in the bid or proposal upon which the contract was awarded. The reason for the termination or replacement must be stated and the type of work or services must be identified.
- (2) Verification that the Concessionaire used the most current TUCP Directory from the TUCP Website in an effort to contact ACDBEs that are certified in the applicable area of work or supply at the time of the good faith effort.
- (3) Verification of efforts to contact appropriate ACDBEs within the same identified area must be documented. Phone calls to ACDBEs will be an acceptable form of contact.
- (4) Documentation of the modified good faith effort must be submitted to SMBR prior to approval.

SMBR will provide such written consent only if it agrees, for reasons stated in its concurrence document, that the prime concession has good cause to terminate the ACDBE firm. For purposes of this paragraph, good cause includes the following circumstances:

- (1) The listed ACDBE sub-concession fails or refuses to execute a written contract;
- (2) The listed ACDBE sub-concession fails or refuses to perform the work of its sub-concession in a way consistent with normal industry standards.

Provided however, that good cause does not exist if the failure or refusal of the ACDBE sub-concession to perform its work on the sub-concession results from the bad faith or discriminatory action of the prime contractor;

- (3) The listed ACDBE sub-concession fails or refuses to meet the prime concession's reasonable, non-discriminatory bond requirements.
- (4) The listed ACDBE sub-concession becomes bankrupt, insolvent, or exhibits credit unworthiness;
- (5) The listed ACDBE sub-concession is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR Parts 180, 215 and 1,200 or applicable state law;
- (6) The City has determined that the listed ACDBE subcontractor is not responsible;
- (7) The listed ACDBE sub-concession voluntarily withdraws from the project and provides to us written notice of its withdrawal;
- (8) The listed ACDBE is ineligible to receive ACDBE credit for the type of work required;
- (9) An ACDBE owner dies or becomes disabled with the result that the listed ACDBE concession is unable to complete its work on the contract;
- (10) Other documented good cause that we have determined compels the termination of the ACDBE sub-concession. Provided, that good cause does not exist if the prime concession seeks to terminate an ACDBE it relied upon to obtain the contract so that the prime concession can self-perform the work for which the ACDBE concession was engaged or so that the prime contractor can substitute another ACDBE or non-ACDBE concession after contract award.

Before transmitting its request to terminate and/or substitute an ACDBE sub-concession, the prime concession must give notice in writing to the ACDBE sub-concession, with a copy to us, of its intent to request to terminate and/or substitute, and the reason for the request.

The prime concession must give the ACDBE five days to respond to the prime concession's notice and advise us and the concessionaire of the reasons, if any, why it objects to the proposed termination of its sub-concession and why we should not approve the prime concession's action. If required in a particular case as a matter of public necessity (e.g., safety), we may provide a response period shorter than five days.

SMBR will require a concessionaire to make good faith efforts to replace an ACDBE that is terminated or has otherwise failed to complete its work on a concession with another certified ACDBE. These good faith efforts shall be directed at finding another ACDBE to perform at least the same amount of work under the concession contract as the ACDBE that was terminated, to the extent needed to meet the concession contract goal that we established for the procurement. The good faith efforts shall be documented by the concessionaire. If SMBR requests documentation from the concessionaire under this provision, the concessionaire shall submit the documentation within 7 days, which may be extended for an additional 7 days if necessary at the request of the concessionaire, and the recipient shall provide a

written determination to the concessionaire stating whether or not good faith effort have been demonstrated.

The City will include in each prime concession contract the contract clause required by §26.13(b) stating that failure by the concessionaire to carry out the requirements of this Part is a material breach of the contract and may result in the termination of the concession contract or such other remedies set forth in that section that we deem appropriate if the prime concessionaire fails to comply with the requirements of this section.

If the concessionaire fails or refuses to comply in the time specified, the City's contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the concessionaire still fails to comply, the contracting officer may issue a termination for default proceeding.

Sample Proposal/Bid Specification:

## **SECTION I. INSTRUCTIONS TO PROPOSERS**

The requirements of 49 CFR Part 23, regulations of the U.S. Department of Transportation, applies to this concession. It is the policy of the City of Austin to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this concession will be conditioned upon satisfying the requirements of this proposal/bid specification. These requirements apply to all concessions firms and suppliers, including those who qualify as an ACDBE.

Airport Concessions Disadvantaged Business Enterprise (ACDBE) participation is highly encouraged in all concession opportunities. In order to qualify as an ACDBE, a proposer, joint venture partner, goods/services provider and/or any other firm upon whose certification as an ACDBE is being relied must be currently certified by the City of Austin, Small & Minority Resources Department (SMBR) or the Texas Department of Transportation TUCP as an ACDBE under 49 CFR Part 23. The ACDBE's certification letter must be submitted at proposal time. **(Only the ACDBE partner needs to be ACDBE certified.)**

For this \_\_\_\_\_ concession opportunity, an ACDBE participation goal of \_\_\_\_\_ % has been established by the SMBR Director. ACDBE participation may be in the form of a joint venture, partnership or other legal arrangement that meets the eligibility standards in 49 CFR Part 23. The ACDBE goal for this concession opportunity also may be met through the providing of goods and services from certified vendors. A list of ACDBE-certified vendors may be obtained from the Small & Minority Business Resources Department (see below for contact information) and the ACDBE Commitment Form must be included with the proposal.

Additionally, if participation is to be obtained from a supplier(s) of goods and/or services, the ACDBE Letter of Intent Form (including Affirmation) indicating which certified vendor(s) has agreed to participate must be included with the proposal. The successful proposer will be

responsible for meeting this goal (or providing documentation of a good faith effort) on or before the deadline for submission of proposals in response to this RFP.

Certification applications may be obtained on the internet at [www.austintexas.gov/SMBR](http://www.austintexas.gov/SMBR). Questions regarding the certification process should be directed to the Small & Minority Resources Department's Certification Division Manager.

Entities proposing joint ventures with ACDBE participation in order to meet an ACDBE goal must be approved by SMBR prior to submission. The Small & Minority Business Resources Department considers any entity that is comprised of an ACDBE and one or more other firms to be a joint venture even if the participants do not identify elsewhere as a joint venture. The proposing joint venture must submit its ACDBE Certification and joint venture Letter of Approval from SMBR with its proposal documentation. It is strongly encouraged that joint ventures proposing with ACDBE participation submit their documentation to SMBR for approval as soon as possible and no later than \_\_\_\_\_.

The concession firm shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26 (Attachment 7), to meet the concession specific goal for ACDBE participation in the performance of this concession.

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

#### **SECTION IV. REQUIRED FORMS**

##### **ACDBE Participation and Commitment Form AIRPORT CONCESSION DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS**

Airport Concessions Disadvantaged Business Enterprise (ACDBE) participation is highly encouraged in all concession opportunities. In order to qualify as an ACDBE, a proposer, joint venture partner, goods/services provider and/or any other firm upon whose certification as an ACDBE is being relied must be currently certified by City of Austin, Small & Minority Resources Department (SMBR) or the Texas Department of Transportation UCP as an ACDBE under 49 CFR Part 23. The ACDBE's certification letter must be submitted at proposal time. (Only the ACDBE partner needs to be ACDBE certified.)

For this \_\_\_\_\_ concession opportunity, an ACDBE participation goal of \_\_\_\_\_% has been established by the SMBR Director. ACDBE participation may be in the form of a joint venture, partnership or other legal arrangement that meets the eligibility standards in 49 CFR Part 23. The ACDBE goal for this concession opportunity also

may be met through the providing of goods and services from certified vendors. A list of ACDBE-certified vendors may be obtained from the Small & Minority Business Resources Department (see below for contact information) and the ACDBE Commitment Form must be included with the proposal. Additionally, if participation is to be obtained from a supplier(s) of goods and services, the ACDBE Letter of Intent Form (including Affirmation) indicating which certified vendor(s) has agreed to participate must be included with the proposal. All firms upon which ACDBE certification is being relied, whether as proposer, JV partner, goods and services provider, sub-concessionaire, subcontractor, or any other arrangement, must be certified by the City of Austin or the Texas Department of Transportation UCP as an ACDBE at the time Joint Venture paperwork or proposal, whichever is **earlier**, is submitted. The successful proposer will be responsible for meeting this goal (or providing documentation of a good faith effort) on or before the deadline for submission of proposals in response to this RFP.

Certification applications may be obtained on the internet at [www.austintexas.gov/SMBR](http://www.austintexas.gov/SMBR). Questions regarding the certification process should be directed to the Small & Minority Business Resources Department Certification Division Manager.

### **ACDBE Participation:**

ACDBE participation must be included in the proposal and evidenced by an ACDBE Commitment Form, Letter of Intent (if applicable) and Affirmation signed by the proposer and by each ACDBE participant. The amount and type of participation proposed will become a firm commitment in the Lease Agreement. The monitoring by SMBR of the participation throughout the term of the concession agreement depends upon the type of ACDBE participation as submitted in the proposal. The options are:

1. 100 % ACDBE participation: The Concession is solely owned and operated by an ACDBE firm (letter of intent not necessary).
2. Percentage Participation: A designated percentage of the business to be owned operated and/or maintained by an ACDBE through sub-contract, sub-lease or joint venture arrangements.\*\*
3. Percentage of Goods/Services towards Vendor Purchases: A designated percentage of the gross revenue committed to the purchase of goods and services from ACDBE certified vendors.

**\*\* Joint Venture Agreements:** *For purposes of ACDBE participation, 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. The Small & Minority Business Resources Department considers any entity that is comprised of an ACDBE and one or more other firms to be joint venture even if the participants do not identify elsewhere as a joint venture. Joint venture entities are not certified as ACDBEs.*

***If the proposer is participating in a joint venture with a certified ACDBE firm, the Joint Venture Eligibility Form and Joint Venture Affidavit contained in this RFP must be completed. ATTACHMENT 12***

**Note:** The final date for submission of the Joint Venture Agreement and all associated forms and documentation for approval by the Small & Minority Business Resources Department (SMBR) is on\_\_\_\_\_.

All firms upon which ACDBE certification is being relied, whether as proposer, JV partner, goods and services provider, sub concessionaire, subcontractor or any other arrangement, must be certified by the City of Austin or the Texas Department of Transportation UCP as an ACDBE at the time Joint Venture paperwork or proposal, whichever is **earlier**, is submitted.

**ACDBE Good Faith Efforts:**

The Department of Transportation (DOT) ACDBE regulations, 49 Code of Federal Regulations Part 23 provides for the adoption of a good faith effort (GFE) goals program to be administered by the Small & Minority Business Resources Department (SMBR). In order to comply with the proposal requirements of Part 23 a proposer shall either meet the specific ACDBE goal for this concession opportunity, or in the alternative demonstrate that the proposer has made sufficient good faith efforts to meet the goal in accordance with the good faith effort provisions of Part 23 detailed below.

**Documentation, in SMBR's format, must be provided to support your Good Faith Efforts.**

1. If pre-proposal meetings are scheduled by the City at which ACDBEs may be informed of concession opportunities under a given proposal solicitation, attendance at such pre-proposal meetings is mandatory. Proposers are responsible for the information provided at these meetings. The good faith effort statement must reflect the proposer's knowledge of the information provided at these meetings.
2. Verifications of efforts to subcontract or joint venture, consistent with industry and professional practice, with the ACDBE whom the proposer has contracted, or who have contracted the proposer, including the name, addresses and telephone numbers of all ACDBEs contacted; a description of efforts made to subcontract; a description of the information provided to ACDBEs regarding the scope of work to be performed by subcontractors and members of a joint venture; and if attempts to subcontractor actually occurred, the dates and places of such process and a description of the outcome.

3. Verification that, consistent with industry and professional practice, the proposer gave ACDBEs necessary access to and adequate time to review projected scopes of work and other documents as well as adequate time to prepare subcontractor proposals and/or negotiate joint venture arrangements. The proposer will also give a statement as to why the proposer and the ACDBE did not succeed in reaching a subcontractor or joint venture agreement.
4. Verification that, reasonably consistent with industry and professional practice, and the proposer's past practices on similar projects, the proposer selected appropriate goods and services, and functions and activities of the concession operation, to be performed by ACDBEs in order to achieve the goals, including consideration of structuring the contract into economically feasible units to facilitate meaningful ACDBE participation.

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

The City of Austin will count ACDBE participation toward overall goals other than car rental as provided in 49 CFR 23.53.

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

The City of Austin will count ACDBE participation toward overall goals other than car rental as provided in 49 CFR 23.55.

**Section 23.57 (b) Goal shortfall accountability.** If the awards and commitments on the 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, the City will:

- (1) Analyze in detail the reasons for the difference between the overall goal and awards and commitments in that fiscal year;
- (2) Establish specific steps and milestones to correct the problems identified in the City's analysis to fully meet the goal for the new fiscal year;
- (2) (i) CORE 30 or other Airport designated by FAA: The City of Austin will submit the analysis and corrective actions developed under paragraphs (b)(1) and (2) of this section to the FAA for approval. If the FAA approves the report, the City will be regarded as complying with the requirements of this section for the remainder of the fiscal year.
  - (ii) As an airport not meeting the criteria of paragraph (b)(3)(i) of this section, the City of Austin will retain analysis and corrective actions in its records for three years and make it available to the FAA, on request, for review.

- (3) The City of Austin understands the FAA may impose conditions as part of its approval of the City's analysis and corrective actions including, but not limited to, modifications to the City's overall goal methodology, changes in race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.
- (5) The City of Austin understands that it 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 the ACDBE program in good faith if any of the following things occur:
- (i) The City of Austin does not submit analysis of and corrective actions to FAA in a timely manner as required under paragraph (b)(3) of this section;
  - (ii) FAA disapproves the analysis or corrective actions; or
  - (iii) The City of Austin does not fully implement:
    - (A) The corrective actions to which it has committed, or
    - (B) Conditions that FAA has imposed following review of the analysis and corrective actions.
    - (C) If information coming to the attention of FAA demonstrates that current trends make it unlikely that the City will achieve ACDBE awards and commitments that would be necessary to allow it to meet its overall goals at the end of the fiscal year, FAA may require the City to make further good faith efforts, such as modifying the race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

### **Section 23.61 Quotas or Set-asides**

The City of Austin will not use quotas or set-asides as a means of obtaining ACDBE participation.

## **SUBPART E – OTHER PROVISIONS**

### **Section 23.71 Existing Agreements**

The City of Austin will assess potential for ACDBE participation when an extension or option to renew an existing agreement is exercised, or when a material amendments is made. The City of Austin will use any means authorized by Part 23 to obtain a modified amount of ACDBE participation in the renewed or amended agreement.

### **Section 23.73 Privately-Owned or Leased Terminal Buildings**

The City of Austin will pass through applicable provisions of Part 23 to private terminal owner or lessee via its agreement with the owner or lessee (*other means – identify.*) The City of Austin will ensure that the owner or lessee complies with Part 23. The City will obtain from the owner or lessee the goals and other elements of the ACDBE program required under Part 23 and it is incorporated herein and submitted as **Attachment 11**.

### **Section 23.75 Long-Term Exclusive Agreements**

The City of Austin's Aviation Department will not enter into a long-term and exclusive agreements for concessions without prior approval of the FAA Regional Civil Rights Office. The City of Austin understands that a "long-term" agreement is one having a term of longer than 5 years. The City of Austin understands that an "exclusive" agreement is one in which an entire category of a particular business opportunity is limited to a single business entity. If special, local circumstances exist that make it important to enter into a long-term and exclusive agreement, the City of Austin will submit detailed information to the FAA Regional Civil Rights Office for review and approval.

### **Section 23.79 Geographic Preferences**

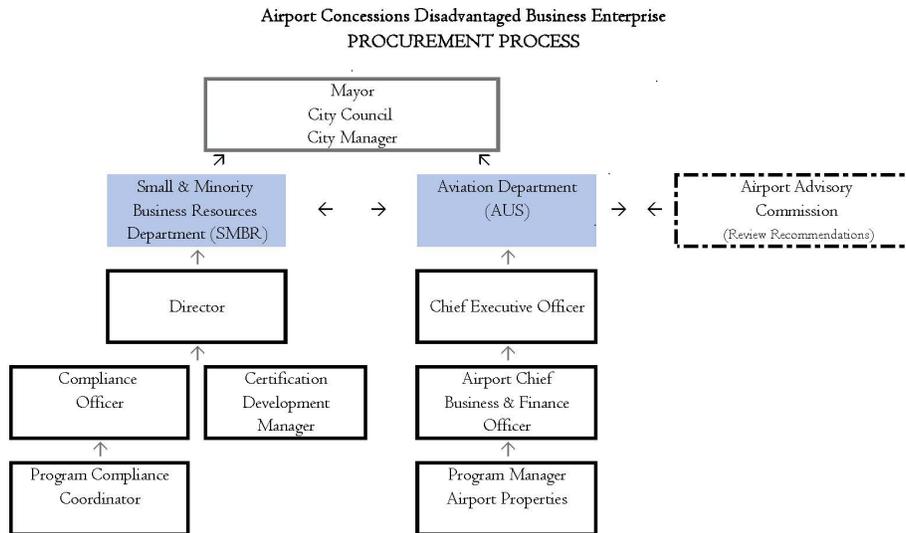
The City of Austin will not use a "local geographic preference", i.e., any requirement that gives an ACDBE located in one place (e.g., Texas) an advantage over ACDBEs from other places in obtaining business as, or with, a concession at the airport.

## **ATTACHMENTS**

Attachment 1	Organizational Chart
Attachment 2	DBE/ACDBE Directory (or website link)
Attachment 3	Monitoring and Enforcement Mechanisms
Attachment 4	State's UCP Agreement
Attachment 5	Overall Goal for Concessions other than Car Rental Calculation, Consultation, Breakout of Estimated Race-Neutral & Race-Conscious Participation
Attachment 6	Overall Goals for Car Rentals Calculation, Consultation, Breakout of Estimated Race-Neutral & Race-Conscious Participation
Attachment 7	SMBR Form 1 & 2; Good Faith Effort Process
Attachment 8	Certification Application Forms
Attachment 9	Procedures for Removal of ACDBEs Eligibility
Attachment 10	Regulations: 49 CFR Part 23
Attachment 11	Goals and Elements for Privately-Owned or Leased Terminal Buildings
Attachment 12	Compliance Forms & Joint Venture Requirements

# Attachment 1

## Organizational Chart



**Attachment 2**

**Texas  
DBE/ACDBE  
Directory**

<https://coTUCP.dbesystem.com/directory.asp>

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### Attachment 3

#### Sample Monitoring and Enforcement Mechanisms

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

Contractual Provisions and Remedies: The City of Austin's standard construction contract provisions for project subject to the ACDBE program provide that noncompliance remedies for such breach. These provisions include the following:

**Instructions to Proposers** include this statement: "All proposers for this contract are hereby notified that if they are awarded a contract, failure to carry out the City's policy and the ACDBE obligation, as set forth above, shall constitute a breach of contract which may result in termination of such contract or such other remedy as deemed appropriate by the City."

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

The City of Austin will insert the following provisions into concessions agreements and management contracts:

**Section 1. General.** Except as the context otherwise requires and unless otherwise expressly provided herein, the capitalized terms in this Exhibit to the Agreement shall have the same meaning as any similarly capitalized terms defined in the Agreement or in any exhibit thereto.

**Section 2. ACDBE Obligation.** This Agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR Part 23, Subpart F. The Concessionaire 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 covered by 49 CRF Part 23.

**Section 3. Other Agreements.** The Concessionaire agrees to include the above statements in any subsequent concession agreements that it enters into and cause those businesses to similarly include the statements in further agreements.

**Section 4. ACDBE Participation in This Agreement.** Concessionaire has represented that it is qualified as an Airport Concession Disadvantaged Business Enterprise (ACDBE) under 49 CFR Part 23 of the regulations of the U.S. Department of Transportation and hereby covenants to remain so throughout the term of this Agreement. Concessionaire's status as a certified ACDBE constitutes 100% ACDBE participation and satisfies all DBE obligations of this agreement.

**Attachment 4**  
**State's TUCP Agreement**

**UNIFIED CERTIFICATION PROGRAM PLAN**

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STATE OF TEXAS

Revised

PROPOSED

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1. Original 2002 Texas Unified Certification Program Plan
2. Executive Committee approval of 2013 TUCP Plan revision
3. USDOT April 5, 2004 approval of Texas TUCP Plan
4. TUCP Members who have ratified Texas TUCP Plan
5. Uniform Certification Application

6. Statement of Findings and Facts
7. Change Affidavit
8. Letter of Certification
9. TUCP Work Code Map
10. Work Code Change Request
11. Approved TUCP Executive Committee Meeting Minutes

PROPOSED

**STATE OF TEXAS**  
**DISADVANTAGED BUSINESS ENTERPRISE**  
**UNIFIED CERTIFICATION PROGRAM PLAN**

**Introduction**

This document revises the original Texas Unified Certification Program Plan of 2002 (see Attachment 1). For the sake of brevity, the sections in the original plan regarding the history and formation of Texas's TUCP have been omitted from this revision. Specifically, the sections on pages 2 through 8, as well as the first paragraph of page 9, of the original plan are omitted. They are adopted by reference to the original plan.

This revision does not alter the fundamental nature or concept of the original TUCP plan, it only updates things such as current members, member names, typographical errors, etc. It also adds a process for admitting new members through the ratification process, and adds procedures for administration of the Certification process.

The need for revision to Texas's TUCP plan was raised at a January 31, 2007 meeting of members in The City of Austin. This revision has been reviewed and approved by the Unified Certification Program Executive Committee on behalf of the TUCP members (see Attachment 2 for their approval). It is understood that any revision to the original TUCP plan that alters its fundamental framework must be submitted to the US Department of Transportation (USDOT) for approval. The original TUCP plan was approved by USDOT on April 5, 2004 (see Attachment 3).

**Program Commitments**

In accordance with 49 CFR Part 26.81, USDOT recipients within the State of Texas establish the following Unified Certification Program (TUCP). The TUCP will follow all certification procedures and standards of 49 CFR Parts 23 and 26. The TUCP will cooperate fully with oversight, review, and monitoring activities of USDOT and its operating administrations. The TUCP will implement USDOT directives and guidance concerning certification matters.

**Ratification Process**

All Texas recipients of federal funds administered by USDOT, either directly or indirectly, must ratify or comply with this TUCP Plan. Failure to ratify the plan may be grounds for USDOT, or one of its operating administrations, finding the recipient in "noncompliance" with its DBE Regulation. A finding of noncompliance may put the recipient's federal funds in jeopardy.

See Attachment 4 for a list of TUCP members who have ratified this plan.

## **Executive Committee**

It is impractical to put all decisions regarding the TUCP before the entire TUCP membership. Therefore, the TUCP establishes a Unified Certification Program Executive Committee (TUCP) for the purpose of rendering decisions on issues relevant to the program both during implementation and throughout its future evolution. This committee will meet regularly during TUCP implementation and a minimum of semi-annually thereafter. The TUCP will include, but is not limited to, representatives from the following agencies: the Texas Department of Transportation, the Regional Transportation District, the City of The City of Austin's SMBR, Texas Springs Airport or designated City of Texas Springs representative, and a fifth member, representing the smaller members, invited for the meeting.

For purposes of determining a quorum and voting, each member agency of the TUCP is entitled to one vote. A quorum is defined as the presence of a majority of the TUCP members then named at the time of the meeting. A vote of the majority of TUCP members in attendance at a meeting at which a quorum is established shall be the act of the TUCP on all normal matters. Upon approval by the TUCP, the minutes will become part of this TUCP plan by incorporation into Attachment 11.

The following rules will be in effect for matters described as extra-normal. A quorum is defined as the presence of all members then named at the time of the meeting. A unanimous vote of all TUCP members then named at the time of the meeting is required to act on all such matters. Extra-normal matters may include alteration of this TUCP Plan in any fundamental manner, admittance of new TUCP members, and recognition of new Certifying Members.

## **Communication**

Sharing information on any matter related to the operation of the TUCP is a core element of the process. All Texas TUCP members must be free to communicate openly with each other. Communication can take the form of, but is not limited to, telephone conversations, conference call, meetings, correspondence, and/or electronic transmittals.

If any Texas TUCP member is in receipt of information that is necessary or critical to making a determination of DBE eligibility, they shall notify and submit the appropriate information to the member conducting the review, if known, or to all of the recognized certification members if the member is unknown. Each Texas TUCP member shall be made aware through use of the TUCP Directory of all status changes affecting certifications.

This TUCP plan is a document that is certain to undergo revisions, changes and improvements over the course of time. The TUCP will strive to keep all recipients informed of potential changes and solicit continuous input aimed at refining and improving the TUCP. CDOT's Civil Rights & Business Resource Center is the point of contact for all such input, which will subsequently be relayed to the TUCP for any necessary action.

## **Impact on Recipient Programs**

The TUCP will not establish, recommend, or alter any TUCP member's overall DBE Program, other than to supplement an approved program submittal, DBE goal or goal methodology. DBE goal development, program administration, monitoring, and reporting remains the sole responsibility of the member with a USDOT-approved DBE Program in accordance with 49 CFR Part 26.

## **Program Overview and Requirements**

Texas's TUCP concept is referred to as Interagency Recognition. It is one that allows for one or more certifying members within the state of Texas, each operating independently but bound together by this TUCP plan and its requirements.

### **EACH CERTIFYING MEMBER MUST:**

- Be a current Texas TUCP member;
- Submit a written request to the TUCP that it be recognized as a certifying member. The request must clearly demonstrate that the requesting member possesses the necessary in-house staff (not contractor) with expertise in the certification process and eligibility standards, that is has the ability to control certification work, and indicate how it will comply with all aspects of this TUCP plan;
- Be formally recognized in writing, by unanimous agreement of the TUCP, as a certifying member. The TUCP is responsible for compliance and oversight of Texas's TUCP. Currently, CDOT's Civil Rights & Business Resource Center (CRBRC) and the City of The City of Austin's Division of Small Business Opportunity (SMBR) are the only recognized certifying members;
- Adopt or employ the platform/system deployed by the certifying members at the time the ;
- Recognize as a certified DBE, any business that has obtained a valid certification from any certifying member recognized by the TUCP;
- Apply criteria established by USDOT in 49 CFR, Part 23 or Part 26 as applicable, to all businesses applying for DBE certification to perform work on USDOT-assisted highway, aviation, and transit projects;
- Apply criteria established by the USDOT in 49 CFR Part 23 to all businesses applying for DBE certification to perform work in the area of airport concessions;
- Utilize the Uniform Certification Application provided in appendix F to 49 CFR Part 26, included herein as Attachment 5, for all businesses applying for DBE certification under 49 CFR Parts 23 and 26;
- Utilize the Uniform Statement of Findings and Facts, included herein as Attachment 6, to summarize the certification determinations for all firms making application for DBE certification;
- Utilize standard Change Affidavit included herein as Attachment 7. Accept a Change Affidavit from any firm who submits it to them. If they are not the administrators of the firm's DBE certification, they will forward it to the member that is for processing;
- Utilize standard Letter of Certification included herein as Attachments 8;
- Establish an appeal process consistent with the requirements of 49 CFR Parts 26.86-89;

- 49 CFR Part 26.81(g) requires “*Each TUCP shall maintain a unified DBE directory containing, for all firms certified by the TUCP (including those from other states certified under the provisions of this section), the information required by section 26.31. The TUCP shall make the directory available to the public electronically, on the internet, as well as in print.*” Pursuant to those requirements, each certifying member will participate in a Unified Certification Directory (TUCP Directory) and provide updates regarding new certifications, renewals, denials and other appropriate information at a minimum frequency of once per week;
- **NOT** process for certification any DBE application submitted by a firm previously denied, or whose certification was revoked, by another certifying member recognized under this TUCP; **UNLESS** 12 months has elapsed since the firm was notified of its denial or revocation of certification;
- Reapplications must be made to the certifying member that issued the denial or revocation within 3 years from the date of denial or revocation. If a firm denied by CDOT becomes certified by SMBR for its local programs, elects to reapply for DBE certification after 12 months but less than 3 years following the DBE denial, it must reapply for DBE certification with CDOT. Exceptions to this requirement may be made when an applicant submits a written request to have its new application processed by a different member;
- Firms that have withdrawn prior applications must reapply with the certifying member to which the original application was made if the prior withdrawal occurred within 1 year;
- There will be no joint processing of DBE applications; and
- Regarding Information Sharing: send, to all certifying members operating within the State of Texas, a copy of any denial and revocation notification letters issued; keep a comprehensive file of its own and other members’ denials and revocations to ensure they do not process applications from firms who have been denied or revoked by another certifying member.

**ALL MEMBERS MUST:**

- Be recipients of USDOT financial assistance;
- Abide by the provisions of this TUCP plan and the requirements of 49 CFR Parts 23 and 26;
- Recognize as certified DBEs, **only** those firms contained in the TUCP Directory;
- Recognize as certified DBEs, **all** firms in the TUCP Directory regardless of the certifying member proffering the certification, provided the certifying member is recognized by the TUCP to perform certification functions; and
- Refer businesses seeking DBE certification to one of the certifying members recognized by the TUCP to perform certification functions.

## **Certification Member Roles, Responsibilities, and Procedures**

The DBE Program is a USDOT program. As such, firms seeking certification must provide a service that can be used by at least one Texas TUCP member to meet a DBE goal. To be processed, applications from firms that do not provide a service listed on the current Texas Unified Certification Program (TUCP) Work Code Map (see Attachment 9) must include a written referral letter from a TUCP member. The referral letter must identify the specific services and state that those services can be counted toward the member's DBE goal.

TUCP members entrusted with Certification services under this TUCP plan acknowledge that it is their responsibility to provide those services on behalf of all Texas TUCP members. Inherent in that responsibility is the willingness to provide those services without regard to a determination that a given firm provides services that may not be used in its own DBE program.

Applications are to be processed by the certifying member to whom an application is submitted; applications will not be transferred between certifying members. The sole exception to this policy will be in the case of firms seeking ACDBE certification for AUS. If a firm seeking ACDBE for AUS certification applies with the CRBRC, the application will be transferred to SMBR.

Firms whose applications have been denied, revoked, or withdrawn may not reapply until one year has passed from the date of the denial, revocation, or withdrawal. Within 3 years from the date of the denial, revocation, or withdrawal firms seeking to reapply must do so with the agency issuing the denial, revocation, or withdrawal. Following 3 years, the firm may reapply with any certifying member.

Once a firm has been certified, administration of the file will remain with the certifying member who conducted the review and granted certification. Files will not be transferred from one certifying member to another.

The certifying member is responsible for making any changes. Those changes include address, phone number, contact person, email, and work codes. If another member receives a request to make changes, the request must be forwarded to the member administering the firm's DBE certification.

When CDOT or SMBR certifies a DBE trucking company, the number of trucks must be entered into the Business Description field in the TUCP directory in the following format: X eligible to be counted.

### **TUCP Member Compliance**

A great deal of the discussion has taken place regarding the need to trust each TUCP member, as well as acknowledging issues that may arise related to quality and compliance. We acknowledge there are many agency-specific issues related to certification processes. The primary areas of concern are:

- Political Influence or Interference in Certification Determinations;
- Incomplete or Inadequate Definition of Processes;
- Non-Compliance With 49 CFR Parts 23 and 26; and
- Quality of Determinations.

In order for the TUCP to succeed and its members to maintain the level of trust needed to effectively comply with the TUCP requirements, it is necessary to implement minimum

requirements for compliance, as well as a process for dealing with any member that is found to be in non-compliance. The specific minimum requirements are:

- All decisions related to certification must be made in compliance with 49 CFR Parts 23 and 26. This requires the political independence to make determinations based upon the specific facts presented;
- Outside entities, such as industry or political organizations, cannot be involved in the certification process or determinations;
- All certifying members must make all decisions and recommendations on certification based purely upon the eligibility requirements, without consideration of political influence or factors; and
- All TUCP members agree that there is no “conditional, provisional, or emergency” certification, nor is there a provision within 49 CFR Parts 23 or 26 for “conditional, provisional, or emergency” certification. Eligibility determinations are to be made in accordance with 49 CFR Parts 23 and 26 from the facts presented at the time of application.

If any Texas TUCP member feels that a particular member is not complying with the requirements of 49 CFR Parts 23 and 26, they may make a written complaint to the TUCP through CDOT’s CRBRC. The TUCP will review the complaint and circumstances fully. If the TUCP, not including the complaining member or the member in question, reaches a consensus that the member is not complying with the requirements, remedial action will be taken. Remedial action can take the form of one of the following:

- **Written Findings** – The TUCP may issue a formal written determination of the issues regarding that member’s certification procedures or practices. This determination will be sent to the senior management official or chief operating officer of the member in question, the program administrator, and USDOT. It is hoped that the member will review the procedures at issue and make improvements to the process in order to meet 49 CFR Parts 23 and 26;
- **Monitoring & Concurrence** – The TUCP may issue a formal written determination as set out above, as well as provide a procedural review and concurrence process. It is the hope of the members that the member in question will take this opportunity to gain additional knowledge and education of the regulations and requirements;

The member in question will be required to obtain TUCP concurrence in certification determinations for a specific period of time. Depending upon the situation, the TUCP may choose to “pair” the member with another certifying member or it may choose to require concurrence by a majority of the TUCP. If a member is paired with another certifying member and a dispute continues to exist, the TUCP will make the final determination; or

- **Non-Compliance** – Should the TUCP make every effort to correct the deficiencies in a member’s certification process but is unsuccessful, additional measures may be necessary. Should the TUCP find that a member is not acting in good faith, the TUCP will submit its findings to USDOT and the relevant operating administration along with a formal request for assistance in resolving the issue.

### **Training**

The TUCP is committed to implementing a process that meets the requirements of the regulation and is applied uniformly by all certifying members. Uniform training is the key. This committee will develop and initiate training sessions to ensure all current and future certifying members utilize the same methods and procedures and make sound DBE certification determinations. All certifying members will be required to complete these training sessions before beginning certification reviews. Confirmation of a member’s completion of training will be made by the TUCP through a formal letter of recognition.

### **North American Industry Classification System (NAICS) Codes**

The Texas TUCP certifying members will certify all firms in compliance with 49 CFR Part 26, including designating specific work types. The NAICS codes will be used for determining small business size as required by 13 CFR Part 121. Consistent with 49 CFR Part 26.71(n), specific work types DBE firms are eligible to be counted for will be based on the NAICS system. Texas has agreed to identify firms by a six-digit base number plus a text description. The following is an example of a complete work code: 541330 Electrical Engineering Services.

Any firm may request modification and/or additions to their approved work codes by making a written request to the certifying member. That request must include the equipment and experience indicating the firm’s ability to perform the particular work type. In addition, the firm must submit documentation of past contracts on which the firm has performed the specific type of work. A sample request form is contained herein as Attachment 10.

### **Appeals Process**

Each certifying member must have an appeals process in place that meets the requirements of 49 CFR Part 26. Texas TUCP’s two certifying members have firmly established appeals processes. Applicants wishing to appeal denial determinations of initial applications must appeal directly to USDOT. Firms wishing to appeal a certification revocation determination will appeal through the certifying member’s local appeal process. In the event a firm wishes to appeal that local determination, it must appeal directly to USDOT.

### **Third-Party Challenges**

Texas TUCP's certifying members shall accept signed written complaints from any person, including Texas TUCP members, alleging that a currently certified firm is ineligible. The complaining party must state specific reasons for ineligibility and submit any documentation in support of the challenge. The firm whose certification is challenged will be notified by the administering member in writing of the challenge, the basic grounds, and the relevant eligibility standards. The administering member will be responsible for thoroughly investigating the complaint, within a reasonable time, not to exceed 60 days. The member shall notify the DBE in writing, by certified mail, of the preliminary findings. If reasonable cause to remove certification eligibility is found, they will notify the complaining party of the specific grounds and inform the firm of its right to appeal the preliminary findings in accordance with the certifying member's appeal process.

### **Reciprocity**

In accordance with 49 CFR Part 26.81(e) and (f) Texas TUCP may elect to enter into written reciprocity agreements with TUCPs in other states or regions. The decision to execute such an agreement will be made by a majority vote of the TUCP. All Texas TUCP members agree that they will not independently execute any reciprocity agreements with any other agency or entity, including city, county, state or federal agencies, binding that member, and subsequently the TUCP, to a reciprocity agreement.

### **Interstate Certification**

In January 2012 USDOT's new rule (49 CFR Part 26.85) governing interstate certification took effect. When a firm located outside Texas applies for DBE certification in Texas, Texas TUCP may process the application in one of two ways (assuming the firm is certified in its home state): we may accept the home state's certification and certify the firm without further procedures, or we may not accept the home state's certification. The TUCP has chosen the second option to process out-of-state applications.

The applicant must provide Texas TUCP with a complete copy of its (original) application form, all supporting documents, and any other information it has submitted to the home state or any other state related to the firm's certification. (See 49 CFR Part 26.85(c))

Within 7 days of receiving all information required under Part 26.85(c), Texas TUCP must contact the home state to request a copy of the on-site interview transcript and eligibility report.

Within 60 days of receiving all information required under Part 26.85(c), Texas TUCP must certify the firm or notify it of the specific reasons why we believe it is not eligible. Texas TUCP must provide an opportunity for an appeal with the decision maker. The firm may respond in writing or request an in-person meeting. In-person meetings must take place within 30 days of the request.

Texas TUCP must issue a written determination within 30 days of receipt of the written response or the meeting with the decision maker, whichever is later. This determination may be appealed to USDOT.

### **Process for Expediting Applications**

As a matter of general principle, applications for DBE certification are to be processed on

a first-come first-served basis. Texas TUCP members set forth the following process for expediting applications:

- The expediting process is to be used on a case-by-case basis;
- The general principle behind the expediting process is that the firm performs a service that could be used on an upcoming project of a Texas TUCP member, and that there is a lack of currently certified firms on the TUCP Directory performing that service which could be drawn upon;
- A request to expedite an application must be made in writing by the prime contractor or consultant proposing to use the applicant to meet a DBE goal on a specific project or contract;
- A request to expedite must include the project (project number if known), the TUCP member owning the project, the type of work the firm seeks to perform on the project, and the date of bid opening or proposal submission;
- Agreement to expedite an application is not a guarantee of a favorable outcome, i.e., certification;
- Agreement to expedite an application does not include “conditional” certification pending an eligibility determination; and
- Agreement to expedite an application is nothing more than putting the application to the front of the application queue. The applicant must meet all other processing requirements, i.e., complete documentation, on-site interview, eligibility standards.

### **Process for Adding Work Codes**

Because the DBE Program is a program of USDOT, firms seeking certification must provide a service that can be counted by at least one TUCP member toward that member’s annual DBE goal. The Work Code Map is a reflection of the various types of work TUCP members have indicated they can count in their programs. This section defines the process to create and add new work codes to the TUCP Work Codes.

- First, the requested new work code must exist in NAICS. Texas TUCP will not create work codes that do not already exist in NAICS;
- Texas TUCP members will be surveyed to confirm that the services can count toward a DBE goal. If no TUCP member responds affirmatively, there is no need to add the work code and the process will end;
- If at least one TUCP member responds affirmatively, the requested work code will be created, but only if a minimum of two DBE firms performing the requested work code are available; and
- Until there are at least two DBE firms available, the firm making the request should be given an appropriate miscellaneous work code with a suitable description in the Certified Business Description field.

## **Attachment 5**

### **Section 23.45: Overall Goal Calculation for Concessions Other Than Car Rentals**

#### **Amount of Goal:**

The City of Austin's overall goal for ACDBE concessions other than car rental during the period beginning 2021 and ending 2023 is **7.55%** of the total gross receipts for concessions at The City of Austin International Airport. The following are not included in the total gross receipts for concessions: (a) the gross receipts of car rental operations, (b) the dollar amount of a management contract or subcontract with a non-ACDBE, and (d) any portion of a firm's estimated gross receipts that will not be generated from a concession.

#### **The concession opportunities anticipated during this goal period are:**

The concessions opportunities estimated projected revenues from 2021 – 2023 gross receipts of **\$ 206,040,764**. If a new concession opportunity arises prior to the end of this goal period and the estimated average of annual gross revenue are anticipated to be \$200,000 or greater, the City of Austin will submit an appropriate adjustment to the overall goal. This will be submitted to FAA for approval at least 6 months before executing the new concession agreement. (23.45(i)).

The City of Austin has determined that its market area is the **Austin Metropolitan Statistical Area** see Sec. 23.51(b)(3). This is the geographical area in which the substantial majority of firms which seek to do concessions business with the airport are located and the geographical area in which the firms that receive a substantial majority of concessions related revenue are located.

#### **Methodology Used to Calculate Overall Goal**

##### **Goods and Services**

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

##### **Management Contract or Subcontract**

The City of Austin can meet the percentage goal by including any business operated through a management contract or subcontract with an ACDBE. The City, and the

businesses at the airport, will add the dollar amount of a management contract or subcontract with an ACDBE to the total participation by ACDBEs in airport concessions (both the numerations and the denominator) and to the base from which the airport's percentage goal is calculated. However, the dollar amount of a management contract or subcontract with a non-ACDBE and the gross revenue of business activities to which the management contract or subcontract pertains will not be added to this base in either the numerator or denominator.

**Step 1: 23.51(c)**

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

Option 1:

Ready, willing, and able non-car rental ACDBEs in the market area  
 Base figure = \_\_\_\_\_

All ready, willing and able non-car rental concession firms in the market area

The data source or demonstrable evidence used to derive the numerator was:

TUCP DIRECTORY - NAICS CODES: 453220, 454210, 541810, 722310, 722410.

The data source or demonstrable evidence used to derive the denominator was the *Census Bureau Data at*

<https://data.census.gov/cedsci/table?q=541810&q=0400000US48&tid=CBP2017>

NAICS CODES: 453220, 454210, 541810, 722310, 722410.

When the City of Austin divided the numerator by the denominator the City arrived at the base figure of 3.58% for the overall goal for non-car rental concessions.

NAICS Code	Concession Opportunity	No. ACDBE Firms	Census Participants/Concession Listing Participants	ACDBE Availability
722410, 722310	Food & Beverage	24	602	3.99%
453220	Retail including News Gift Newsstands	64	1486	4.31%
541810	Advertising	8	632	1.27%
454210	Vending Machines	9	209	4.31%
	<b>TOTAL</b>	<b>105</b>	<b>2929</b>	<b>3.58%</b>

**Step 2: 23.51(d)**

In order to reflect, as accurately as possible, the ACDBE participation that would be expected in the absence of discrimination, the City adjusts its base figure of 3.58% by 7.92%, so the overall goal for non-car rental concessions is 7.55%.

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

**Past Participation:** The City of Austin has information relative to concessions; Food & Beverage, Advertising and Retail based on gross receipts.

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

To calculate a base figure of relative availability of ACDBEs, the City calculated the percentage of relative non-car rental ACDBE's by NAICS codes using the TUCP Directory data to establish the number of participating ACDBE's and the total number of non-car rental concession firms using the Census Bureau Data to arrive at 3.58% of available firms for the market area. Using the past participation median of 11.51% for the last five years (FY 2015-2019), the City of Austin made an adjustment to the base figure to reflect projected ACDBE participation. (The calculations of the goal  $3.58\% + 11.51\% = 15.09\% / 2 = 7.55\%$ ). The overall goal for non-car rental concessions is 7.55%.

<i>Fiscal Year</i>	<i>Total (\$)</i>	<i>ACDBE (\$)</i>	<i>ACDBE Participation Goal</i>	<i>Percentage ACDBE Participation</i>	<i>Difference</i>
<i>FY 15</i>	\$94,459,394	\$10,206,244	14.72%	10.80%	-3.92%
<i>FY 16</i>	\$114,840,403	\$19,224,824	14.72%	16.74%	2.02%
<b><i>FY 17</i></b>	<b>\$111,372,122</b>	<b>\$12,818,697</b>	14.72%	<b>11.51%</b>	<b>-3.21%</b>
<i>FY 18</i>	\$161,419,493	\$22,606,371	11.06%	14.00%	2.94%
<i>FY 19</i>	\$178,941,878	\$15,936,642	11.06%	8.91%	-2.15%
<i>Total</i>	\$661,033,290	\$80,792,778	11.06%	12.22%	-4.31%
<b><i>Median Participation/Average Difference</i></b>		<b>11.51%</b>			

Therefore, the overall goal for non-car rental concessions for FY 2021-2023 is 7.55%.

**Consultation with Stakeholders (23.43)**

Prior to submitting this goal to FAA, the City of Austin consulted with the following stakeholders: The Minority and Women's Chambers, Certified ACDBE Businesses, Airport Advisory Committee, Airport Property Office, as well as existing concessionaires themselves. Austin Bergstrom International Airport will conduct, annually, outreach for the purpose of disseminating information as to upcoming concession spaces as well as construction projects. Postings can be found on the City's website, [www.austintexas.gov/snbr](http://www.austintexas.gov/snbr) and the [www.abia.org](http://www.abia.org).

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

City of Austin will meet the maximum feasible portion of its overall goal by using race-conscious means of facilitating ACDBE participation. The City of Austin uses the following race-neutral measures to increase or assure ACDBE participation.

1. *Locating and identifying ACDBEs and other small businesses that may be interested in participating as concessionaires under 49 CFR Part 23;*
2. *Notifying ACDBEs of concession opportunities and encouraging them to compete, when appropriate;*
3. *When practical, structuring concession activities so as to encourage and facilitate the participation of ACDBEs;*
4. *Providing technical assistance to ACDBEs in overcoming limitations, such as inability to obtain bonding or financing;*
5. *Ensuring that competitors for concession opportunities are informed during pre-solicitation meetings about how the City of Austin's ACDBE program will affect the procurement process;*
6. *Providing information concerning the availability of ACDBE firms to bidders to assist them in obtaining ACDBE participation; and*
7. *Establishing a business development program (see 49 CFR Part 26.35), technical assistance program or taking other steps to foster ACDBE participation in concessions.*

The City estimates that it will meet the overall goal of **7.55%** through race-conscious measures. The City expects it will obtain zero percent from race-neutral participation, due to under achievement through race-neutral measures (-3.21%) in past history. The City of Austin projected that race-neutral participation will be based on the past participation of awarded contracts to ACDBE firms as primes.

In order to ensure the ACDBE program will be narrowly tailored to overcome the effects of discrimination, if the City uses concession-specific goals, it will adjust the estimated breakout of race-neutral and race-conscious participation as needed to reflect actual ACDBE participation (see 26.51(f)) and the City will track and report race-neutral and race conscious participation separately. For reporting purposes, race-neutral ACDBE participation includes, but is not necessarily limited to, the following: ACDBE participation through a prime contract that an ACDBE obtains through customary competitive procurement procedures; ACDBE participation through a subcontract on a prime contract that does not carry ACDBE goals; ACDBE participation on a prime contract exceeding a concession-specific goal; and ACDBE participation through a subcontract from a prime contractor that did not consider a firm's ACDBE status in making the award.

The City will maintain data separately on ACDBE achievements in those contracts with and without concession specific goals, respectively.

## Attachment 6

### Section 23.45: Overall Goal Calculation for Car Rentals

The City of Austin's overall goal for car rentals during the period beginning 2021 ending 2022 is 1.38% of the total gross receipts of car rental operations at Austin Bergstrom International Airport (AUS).

The concession Car Rental opportunities anticipated during this goal period are: **1.38%** with an estimated gross receipts revenue of **\$350,153,643**.

If a new car rental concession opportunity arises prior to the end of this goals period and the estimated average of annual gross revenues are anticipated to be \$200,00 or greater, the City of Austin will submit an appropriate adjustment to the overall goal. This will be submitted to FAA for approval at least 6 months before executing the new concession agreement.

The City of Austin has determined that its market area is Austin-Round Rock Metropolitan Statistical Area. This is the geographical area in which the substantial majority of firms which seek to do concessions business with the airport are located and the geographical area in which the firms receive a substantial majority of concessions related revenues are located.

#### Methodology Used To Calculate Overall Goal

##### Goods and Services

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

##### **Step 1: 23.51**

The City of Austin determined the base figure for the relative availability of car rental ACDBEs. The base figure was calculated as follows:

##### Option 1:

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

The data source or demonstrable evidence used to derive the numerator was:  
TUCP DIRECTORY - NAICS CODES: 488410, 524126, 561720, 811121, 811192.

The data source or demonstrable evidence used to derive the denominator was the *Census Bureau Data at* <https://data.census.gov/cedsci/table?q=541810&g=0400000US48&tid=CBP2017>

NAICS CODES: 488410, 524126, 561720, 811121, 811192.

When the City of Austin divided the numerator by the denominator the City arrived at the base figure of 0.64% for the overall goal for car rental concessions.

NAICS Code	Concession Opportunity	No. ACDBE Firms	Census Participants/ Concession Listing Participants	ACDBE Availability
811121	Auto Body Work	2	206	0.97%
488410	Towing Services	1	423	0.24%
811192	Car Wash & Auto Detailing	1	152	0.66%
561720	Custodial Services	14	1708	0.82%
524126	Insurance	1	484	0.21%
	<b>TOTAL</b>	<b>19</b>	<b>2973</b>	<b>0.64%</b>

**Step 2: 23.51(d)**

**Past Participation:** The City of Austin has information relative to goods and services for car rental concessions based on gross receipts.

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

To calculate a base figure of relative availability of ACDBEs, the City of Austin calculated the percentage of relative car rental ACDBE's by NAICS codes using the TUCP Directory data to establish the number of participating ACDBE's; and the total number of car rental concession firms using the Census Bureau Data to arrive at 0.64% of available firms for the market area. Using the past participation median of 2.12% for the last five years (FY 2015-2019), the City made an adjustment of the base figure in order to reflect projected ACDBE participation. The City's overall goal for car rental concessions is 1.38%

**Concessions Revenue**

Fiscal Year	TOTAL (\$)	ACDBE (\$)	ACDBE Participation Goal	ACDBE Participation Percentage	Difference
FY15	\$142,961,764.00	\$227,250.30	2.43%	0.16%	-2.27%
FY16	\$133,810,391.00	\$113,935.00	2.43%	0.09%	-2.34%
FY17	\$9,039,314.00	\$191,565.00	2.43%	2.12%	-0.31%
FY18	\$142,271,966.31	\$0.00	2.43%	0.00%	-2.43%
FY19	\$200,555.00	\$3,628.00	2.43%	1.81%	-0.62%
<b>Total</b>	<b>\$428,283,990.31</b>	<b>\$536,378.30</b>	<b>2.43%</b>	<b>4.17%</b>	<b>-7.98%</b>
<b>Median Participation/ Average Difference</b>			<b>2.12%</b>		

If a new concession opportunity arises prior to the end of this goal period and the estimated average of annual gross revenues are anticipated to be \$200,000 or greater, the City of Austin will submit to the FAA an appropriate adjustment to the overall goal. This will be submitted to FAA for approval no later than 90 days before issuing the solicitation for the new concession opportunity. (23.45(i)).

Therefore, the overall goal for non-car rental concessions for FY 2021-2023 is 1.38%.

### **Consultation with Stakeholders (23.43)**

Prior to submitting this goal to FAA, the City of Austin consulted with the following stakeholder: The Minority and Women's Chambers, Certified ACDBE Businesses, Airport Advisory Committee, Airport Property Office as well as existing concessionaires themselves. Austin Bergstrom International Airport will conduct, annually, outreach for the purpose of disseminating information as to upcoming concession spaces as well as construction projects. In addition "Pre-Proposal" Meetings will be held as concession spaces become available.

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

City of Austin will meet the maximum feasible portion of its overall goal by using race-conscious means of facilitating ACDBE participation. The City of Austin uses the following race-neutral measures to increase or assure ACDBE participation.

1. *Locating and identifying ACDBEs and other small businesses who may be interested in participating as concessionaires under 49 CFR Part 23;*
2. *Notifying ACDBEs of concession opportunities and encouraging them to compete, when appropriate;*
3. *When practical, structuring concession activities so as to encourage and facilitate the participation of ACDBEs;*
4. *Providing technical assistance to ACDBEs in overcoming limitations, such as inability to obtain bonding or financing;*
5. *Ensuring that competitors for concession opportunities are informed during pre-solicitation meetings about how the City of Austin's ACDBE program will affect the procurement process;*
6. *Providing information concerning the availability of ACDBE firms to bidders to assist them in obtaining ACDBE participation; and*
7. *Establishing a business development program (see 49 CFR Part 26.35), technical assistance program or taking other steps to foster ACDBE participation in concessions.*

The City estimates that it will meet its overall goal of **1.38%** through race-conscious measures. The City expects it will obtain zero percent from race-neutral measures (-0.31%) due to under achievement of the race-neutral measures in past history. The City of Austin projected that race-neutral participation will be based on the past participation of awarded contracts to ACDBE firms as primes.

In order to ensure that the ACDBE program will be narrowly tailored to overcome the effects of discrimination, the City will adjust the estimated breakout of race-neutral and race-conscious participation as needed to reflect actual ACDBE participation (see 26.51(f)) and will track and report race-neutral and race-conscious participation separately, if concession-specific goals are used. For reporting purposes, race-neutral ACDBE participation includes, but is not necessarily limited to, the following: ACDBE participation through a prime contract that an ACDBE obtains through customary competitive procurement procedures; ACDBE participation through a subcontract on a prime contract that does not carry ACDBE goal; ACDBE participation on a prime contract exceeding a concession specific goal; and ACDBE participation through a subcontract from a prime contractor that did not consider a firm's ACDBE status in making the award.

The City will maintain data separately on ACDBE achievements in those contracts with and without concession specific goals, respectively.

**Attachment 7**

**Airport Concessions Disadvantaged Business Enterprise (ACDBE)  
COMMITMENT FORM  
(SMBR Form 1)**

***(This form is required as part of your proposal submission.)***

The ACDBE goal for this concession package is \_\_\_\_\_%

***NOTE: SMBR will only credit ACDBE participation that is certified by an approved certification entity at the time of proposal submission.***

The undersigned concessionaire/vendor has satisfied the requirements of the proposal specifications in the following manner (Please check ( ✓ ) only one box):

- 100% Self-Performance: The proposer, a certified ACDBE firm and sole concessionaire, is committed to meeting or exceeding the ACDBE goal through 100% self-performance. *(If checked, must submit required ACDBE certificate).*
- Percentage Participation: The proposer is committed to meeting or exceeding the ACDBE goal, with a minimum of \_\_\_\_\_% ACDBE participation on this concessions package. *(If checked, must submit required SMBR Forms 2, 4, Draft Partnership Agreement and ACDBE certificate(s)).*
- The proposer is unable to meet the ACDBE goal and is committed to a minimum of \_\_\_\_\_% ACDBE participation on this concessions package and submits documentation demonstrating good faith efforts. *(If checked, must submit required SMBR Forms 2, 3, 4, Draft Partnership Agreement and ACDBE certificate(s)).*
- The proposer is unable to meet the ACDBE goal and submits documentation demonstrating good faith efforts. *(If checked, please refer to SMBR Form 3 for documentation required).*

Name of Proposing Entity: \_\_\_\_\_

Name of Authorized Representative or Designee: \_\_\_\_\_

Title: \_\_\_\_\_

Signature \_\_\_\_\_ Date: \_\_\_\_\_

**Attachment 7**

**ACDBE Intent To Perform  
(SMBR Form 2)**

***(This form is required as part of your proposal submission, except for 100% ACDBE participation.)***

**NOTE:** An ACDBE Intent To Perform must be submitted for all ACDBEs listed and attach a copy of the ACDBE Certificate for each ACDBE; and Affidavit Number for out-of-state ACDBE firms.

**Name of**

\_\_\_\_\_

Address \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_ E-mail address \_\_\_\_\_

**Name of ACDBE Firm:**

\_\_\_\_\_

Address \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_ E-mail address \_\_\_\_\_

Description of Subconcessions, Goods and Services or work to be performed by ACDBE firm:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The Concessionaire is committed to utilizing the above named ACDBE as a subconcession, supplier of goods and services for work described above. The estimated dollar value and percentage of this work is \$ \_\_\_\_\_. \_\_\_\_\_ %

**NOTE:** The ACDBE goal is expressed as a percentage of the total gross dollar value of the proposed concession awarded to ACDBE.

**AFFIRMATION:**

I hereby affirm that the above information is true and complete to the best of my knowledge. I further understand and agree that, this document shall be attached thereto and become a binding part of the concession contract. I further attest that the above-named ACDBE firm affirms that it will perform the portion of the contract for the estimated dollar value as stated above.

By: \_\_\_\_\_  
Concessionaire Signature Date Title

By: \_\_\_\_\_  
ACDBE Signature Date Title

## **Attachment 8**

### **Certification Application Forms**

*Get Certified - Apply Online*

Apply [HERE \(https://austintexas.mwdbe.com\)](https://austintexas.mwdbe.com) for Certification.

Getting Started Guide for new firms (not yet certified) - [click here](#) to download copy.

Certification & Compliance Getting Started Guide (for certified firms) - [click here](#) to download copy.

If you have any questions about Certification, please call (512) 974-7645 or email [SMBRCertification@austintexas.gov](mailto:SMBRCertification@austintexas.gov)

## **Attachment 9**

### **Procedures for Removal of ACDBEs Eligibility**

(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in §26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed 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.

(c) *DOT directive to initiate proceeding.* (1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under §26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You 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 and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decision maker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a TUCP is operational in its state, a small airport or small transit authority (*i.e.*, an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You may base a decision to remove a firm's eligibility only on one or more of the following grounds:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information relevant to eligibility that has been concealed or misrepresented by the firm;

(4) A change in the certification standards or requirements of the Department since you certified the firm;

(5) Your decision to certify the firm was clearly erroneous;

(6) The firm has failed to cooperate with you (see §26.109(c));

(7) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see §26.73(a)(2)); or

(8) The firm has been suspended or debarred for conduct related to the DBE program. The notice required by paragraph (g) of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason shall not be subject to the hearing procedures in paragraph (d) of this section.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under §26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding. Provided that, when sending such a notice to a complainant other than a DOT operating administration, you must not include information reasonably construed as confidential business information without the written consent of the firm that submitted the information.

(h) [Reserved]

(i) *Status of firm during proceeding.* (1) A firm remains an eligible DBE during the pendency of your proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.

(j) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where you have let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

(3) *Exception:* If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.

(k) *Availability of appeal.* When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under §26.89.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003; 76 FR 5101, Jan. 28, 2011; 79 FR 59599, Oct. 2, 2014]

## **Attachment 10**

### **Regulations: 49 CFR Part 23**

<https://www.ecfr.gov/cgi-bin/text-idx?SID=0248ce3819846318132716c378eef399&mc=true&node=pt49.1.23&ran=div5>

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

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

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## **Subpart A—General**

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### **§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.

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

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

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

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

- (i) One concern controls or has the power to control the other; or
- (ii) A third party or parties controls or has the power to control both; or
- (iii) An identity of interest between or among parties exists such that affiliation may be found.

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

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

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

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

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

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

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

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

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

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

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

(4) Any business meeting the definition of concession is covered by this subpart, regardless of the name given to the agreement with the recipient, concessionaire, or airport terminal owner or lessee. A concession may be operated under various types of agreements, including but not limited to the following:

- (i) Leases.
- (ii) Subleases.
- (iii) Permits.
- (iv) Contracts or subcontracts.
- (v) Other instruments or arrangements.

(5) The conduct of an aeronautical activity is not considered a concession for purposes of this subpart. Aeronautical activities include scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight carrying capacities; fixed base operators; flight schools; recreational service providers (e.g., sky-diving, parachute-jumping, flying guides); and air tour services.

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

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

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

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

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

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

*Indian tribe* means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of “tribally-owned concern” in this section.

*Joint venture* means an association of an ACDBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and

knowledge, and in which the ACDBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest. Joint venture entities are not certified as ACDBEs.

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

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

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

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

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

*Native Hawaiian Organization* means any community service organization serving Native Hawaiians in the State of Hawaii that is a not-for-profit organization chartered by the State of Hawaii, and is controlled by Native Hawaiians

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

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

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

*Personal net worth* means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth (PNW) does not include the following:

(1) The individual's ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification; (2) The individual's equity in his or her primary place of residence; and (3) Other assets that the individual can document are necessary to obtain financing or a franchise agreement for the initiation or expansion of his or her ACDBE firm (or have in fact been encumbered to support existing financing for the individual's ACDBE business) to a maximum of \$3 million. The effectiveness of this paragraph (3) of this definition is suspended with respect to any application for ACDBE certification made or any financing or franchise agreement obtained after June 20, 2012.

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

*Primary industry classification* means the North American Industrial Classification System (NAICS) code designation that best describes the primary business of a firm. The NAICS Manual is available through

the National Technical Information Service (NTIS) of the U.S. Department of Commerce (Springfield, VA, 22261). NTIS also makes materials available through its Web site (<http://www.ntis.gov/naics>).

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

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

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

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

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

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

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

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

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

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

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

(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).

[70 FR 14508, Mar. 22, 2005, as amended at 72 FR 15616, Apr. 2, 2007; 77 FR 36931, June 20, 2012]

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### **§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.

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### **§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]

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### **§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.”

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### **§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]

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

(a) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 23 and issued after April 21, 2005, express the official positions and views of the Department of Transportation or the Federal Aviation Administration.

(b) The Secretary of Transportation, Office of the Secretary of Transportation, and the FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or the FAA, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

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

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

(d) You can apply for a waiver of any provision of subpart B or D of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate an ACDBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of subpart B or D of this part. To receive a program waiver, you must follow these procedures:

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

(2) Your application must show that—

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

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

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

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

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

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

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

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

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

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

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

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## Subpart B—ACDBE Programs

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### §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.

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### **§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).

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### **§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.

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### **§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.

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### **§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]

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## **Subpart C—Certification and Eligibility of ACDBEs**

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### **§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 (TUCP) in your state (see part 26, §26.81).

(b) The TUCP'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 TUCP, 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.

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

(a) As a recipient, you must, except as provided in paragraph (b) of this section, treat a firm as a small business eligible to be certified as an ACDBE if its gross receipts, averaged over the firm's previous three fiscal years, do not exceed \$56.42 million.

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

(1) *Banks and financial institutions*: \$1 billion in assets;

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

(3) *Pay telephones*: 1,500 employees;

(4) *Automobile dealers*: 350 employees.

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

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

The personal net worth standard used in determining eligibility for purposes of this part is \$1.32 million. Any individual who has a personal net worth exceeding this amount is not a socially and economically disadvantaged individual for purposes of this part, even if the individual is a member of a group otherwise presumed to be disadvantaged.

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

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### **§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.

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### **§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 TUCPs are established in a state (see part 26, §26.81), the TUCP, 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 TUCPs 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

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### §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.

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### §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.

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### §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 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]

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### **§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.

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### §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.

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### §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.

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### **§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.

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### **§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.

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

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

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

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

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

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

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

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

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

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

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

(iii) You do not fully implement:

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

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

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

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### **§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.

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### **§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.

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## **Subpart E—Other Provisions**

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### **§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.

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### **§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).

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**§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.

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### §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.

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## 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.



## **Attachment 11**

### **Goals and Elements for Privately-Owned or Leased Terminal Building**

The City will pass through applicable provisions of Part 23 to a private terminal owner or lessee via agreement with the owner or lessee (other means - identified). The City will ensure that the owner or lessee complies with Part 23. The City will obtain from the owner or lessee the goals and other elements of the ACDBE program required under Part 23 as incorporated herein. Section 23.75 Long-Term Exclusive Agreements. The City will not enter into a long-term exclusive agreement for concessions without prior approval of the FAA Regional Civil Rights Office. The City understands that a long-term agreement is one having a term of longer than 5 years. The City understands that an "exclusive" agreement is one in which an entire category of a particular business opportunity is limited to a single business entity. If special, local circumstances exist that make it important to enter into a long-term and exclusive agreement, the City will submit detailed information to the FAA Regional Civil Rights Office for review and approval.

**Attachment 12**

**SMBR Form 1: Airport Concessions Disadvantaged Business Enterprise  
COMMITMENT FORM**

***(This form is required as part of your proposal submission.)***

The ACDBE goal for this concession package is \_\_\_\_\_%

**NOTE:** *SMBR will only credit ACDBE participation that is certified by an approved certification entity (City of Austin or TUCP) at the time of proposal submission.*

The undersigned concessionaire/vendor has satisfied the requirements of the proposal specifications in the following manner (Please check ( ✓ ) only one box):

- 100% Self-Performance: The proposer, a certified ACDBE firm and sole concessionaire, is committed to meeting or exceeding the ACDBE goal through 100% self-performance. *(If checked, must submit required ACDBE certificate).*
- Percentage Participation: The proposer is committed to meeting or exceeding the ACDBE goal, with a minimum of \_\_\_\_\_% ACDBE participation on this concessions package. *(If checked, must submit required SMBR Forms 2, 4, Draft Partnership Agreement and ACDBE certificate(s)).*
- The proposer is unable to meet the ACDBE goal and is committed to a minimum of \_\_\_\_\_% ACDBE participation on this concessions package and submits documentation demonstrating good faith efforts. *(If checked, must submit required SMBR Forms 2, 3, 4, Draft Partnership Agreement and ACDBE certificate(s)).*
- The proposer is unable to meet the ACDBE goal and submits documentation demonstrating good faith efforts. *(If checked, please refer to SMBR Form 3 for documentation required).*

Name of Proposing Entity: \_\_\_\_\_

Name of Authorized Representative or Designee: \_\_\_\_\_

Title: \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**Attachment 12 Continued**

**SMBR Form 2: ACDBE Intent to Perform**

*(This form is required as part of your proposal submission, except for 100% ACDBE participation.)*

**NOTE:** An ACDBE Intent To Perform must be submitted for all ACDBEs listed and attach a copy of the ACDBE Certificate for each ACDBE from City of Austin or TUCP certifying agencies.

**Name of Concession/Vendor firm** \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip \_\_\_\_\_

Telephone: \_\_\_\_\_ E-mail address \_\_\_\_\_

**Name of ACDBE Firm:** \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip \_\_\_\_\_

Telephone: \_\_\_\_\_ E-mail address \_\_\_\_\_

Description of Goods and Services or work to be performed by ACDBE firm:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The Concessionaire is committed to utilizing the above named ACDBE for the goods and services or work described above. The estimated dollar value and percentage of this work is  
\$ \_\_\_\_\_ . \_\_\_\_\_ %

*NOTE: The ACDBE goal is expressed as a percentage of the total gross dollar value of the proposed concession awarded to ACDBE.*

**AFFIRMATION:**

I hereby affirm that the above information is true and complete to the best of my knowledge. I further understand and agree that, this document shall be attached thereto and become a binding part of the concession contract. I further attest that the above-named ACDBE firm affirms that it will perform the portion of the contract for the estimated dollar value as stated above.

By: \_\_\_\_\_  
Concessionaire Signature                      Date                      Title

By: \_\_\_\_\_  
ACDBE Signature                      Date                      Title

## **Attachment 12 Continued**

### **SMBR Form 3: ACDBE GOOD FAITH EFFORTS**

Please read these instructions carefully before completing the required Airport Concession Disadvantaged Business Enterprise (ACDBE) Good Faith Effort Plan. These instructions are designed to assist proposers prepare the required detailed and complete good faith effort information.

To be eligible to be awarded a concession that has concession specific goals; proposers must make good faith efforts to meet the goals. A proposer 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. Examples of good faith efforts are found on **Good Faith Effort Requirements** page. The Airport treats proposer's compliance with good faith efforts requirements as a matter of responsiveness. Each solicitation for which concession specific goals have been established will require the proposer to submit support documentation which addresses each of the factors outlined in the **Good Faith Effort Requirements** page.

#### **Administrative Reconsideration 26.53(a)**

Within two calendar days of being informed by The Austin Bergstrom International Airport that it is not responsive because it has not documented sufficient good faith efforts, a concessionaire may request administrative reconsideration. Concessionaire should make this request in writing and send it via overnight courier to the following reconsideration official:

**Director of the Small & Minority Resources Department  
811 Barton Springs Road  
Austin, Texas 78704  
512-974-7600**

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

As part of this reconsideration, the concessionaire will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The concessionaire will have the opportunity to meet in person with our reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do. However, the decision shall be made based solely on the entire administrative record submitted with the proposal. No new information will be evaluated.

We will send the concessionaire a written decision on reconsideration, explaining the basis for finding that the concessionaire did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

### **SMBR Form 3 (Continued)**

While the request is being considered, the airport will suspend its review of proposals for five days for that package. Once a determination is made by SMBR, or upon the expiration of a minimum of 5 days, the airport will resume evaluation of proposals sent in response to the RFP.

#### **Good Faith Efforts When an ACDBE is Replaced on a Concession (23.53(f))**

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

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

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

## Good Faith Effort Requirements

### GOOD FAITH EFFORT (GFE) Criteria

NOTE: Include a response to GFE criteria and support documentation in bid/proposal only if the ACDBE goal is not achieved.

The following factors are taken into account when assessing a good faith effort response. These factors are minimally considered as good faith efforts and demonstrate specific initiatives made in attempting to achieve the applicable contract-specific Airport Concession Disadvantaged Business Enterprise (ACDBE). These factors should not be considered as a template, checklist or some quantitative formula. Proposers are required to meet all factors outlined below and provide support documentation in order for the good faith effort plan to be assessed. Mere pro forma efforts are not good faith efforts to meet the ACDBE contract requirements. This means that a bidder/proposer must show that it took all necessary and reasonable steps to achieve an ACDBE goal or other requirement of this GFE which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient ACDBE participation, even if they were not fully successful. SMBR will evaluate the GFE on quality, quantity, and intensity of the different kinds of efforts that the bidder/proposer has made, based on the regulations and the guidance in Code of Federal Regulations.

**NOT SUBMITTING PROPER SUPPORT DOCUMENTATION IS NOT EVIDENCE OF A PROPER DEMONSTRATION OF GOOD FAITH EFFORT. SUBMITTAL OF THE CRITERIA, WITH NO ADDITIONAL DOCUMENTATION, WILL NOT BE CONSIDERED ADEQUATE DEMONSTRATION OF GOOD FAITH EFFORT.**

Proposers are not limited to these particular areas and may include other efforts deemed appropriate. Complete form and attach support documentation only if the ACDBE goal is not achieved. For additional guidance concerning Good Faith Efforts, please refer to the Electronic Code of Federal Regulations (CFR 49 part 26 Appendix A).

1.	Were written notices sent to all ACDBEs from the availability list at least five (5) business days prior to the submission of this <i>Compliance Plan</i> ? Note: Must provide copy of the ACDBEs acceptance response.
2.	Were two separate methods used to contact all MBE/WBES from the availability list at least five (5) business days prior to the submission of this <i>Compliance Plan</i> ? <i>Must provide a copy of the ACDBE's response. Please list the two methods used to contact ACDBEs. (i.e. fax, email, mail, and/or phone)</i>
	List Methods:
3.	Were steps taken to follow up with interested ACDBEs?
4.	Were advertisements placed with a local publication? (i.e. newspaper, minority or women organizations, or electronic/social media)? <b>If no, please attach.</b>
5.	Were written notices sent to Minority or Women organizations? <b>If no, please attach.</b>
6.	Were additional elements of work identified to achieve the goals or subgoals?
	If yes, please explain:
7.	Was SMBR contacted for assistance?
	If yes, complete following: Contact person, Date of Contact and Summary of Request.
8.	Were Minority or Women organizations contacted for assistance?
	If yes, complete following: Organizations(s), Date of Contact and Summary of Request.
9.	Is the following documentation attached to support good faith effort requirements to achieve goals or subgoals? <b>(Documentation is not limited to this list.)</b>
	Copy of written solicitation sent to ACDBEs
	Two separate methods of notices sent to ACDBEs in the Texas Unified Certification Program (fax transmittals, emails, and/or phone log).
	Copy of advertisements
	Copy of notices sent to Minority and Women organizations
	Documentation that demonstrates efforts made to reach agreements with the ACDBEs who responded to Bidder's written notice? (i.e. copy of bids/proposals, spreadsheet breakdown of ACDBEs considered follow-up emails/phone logs and/or correspondence between Bidder and interested ACDBEs)

**FOR SMBR USE ONLY:**

Plan Reviewed by: \_\_\_\_\_

Date: \_\_\_\_\_

Signature of SMBR Representative: \_\_\_\_\_ Date: \_\_\_\_\_

Signature of ACDBELO or Designee: \_\_\_\_\_ Date: \_\_\_\_\_

Recommendation: Approval: \_\_\_\_\_ Denial: \_\_\_\_\_

SMBR Form 4: Airport Concessions Disadvantage Business Enterprise (ACDBE)  
Concessionaire Information

Program Name \_\_\_\_\_

Program will be Owned by the Following Entities (only those owning 10% or more):

Entity 1: \_\_\_\_\_ Ownership Percentage \_\_\_\_\_

Entity 2: \_\_\_\_\_ Ownership Percentage \_\_\_\_\_

Entity 3: \_\_\_\_\_ Ownership Percentage \_\_\_\_\_

**Entity 1 Information:**

Entity's principal place of business is in the city of \_\_\_\_\_

Entity's principal place of business is in the county of \_\_\_\_\_

Entity's majority stockholders, majority partners, majority owners, or franchisees reside or work in the city of \_\_\_\_\_

Owner 1: \_\_\_\_\_ Ownership Percentage \_\_\_\_\_

Owner 2: \_\_\_\_\_ Ownership Percentage \_\_\_\_\_

Owner 3: \_\_\_\_\_ Ownership Percentage \_\_\_\_\_

**Entity 2 Information:**

Entity's principal place of business is in the city of \_\_\_\_\_

Entity's principal place of business is in the county of \_\_\_\_\_

Entity's majority stockholders, majority partners, majority owners, or franchisees reside or work in the city of \_\_\_\_\_

Owner 1: \_\_\_\_\_ Ownership Percentage \_\_\_\_\_

Owner 2: \_\_\_\_\_ Ownership Percentage \_\_\_\_\_

Owner 3: \_\_\_\_\_ Ownership Percentage \_\_\_\_\_

**Entity 3 Information:**

Entity's principal place of business is in the city of \_\_\_\_\_

Entity's principal place of business is in the county of \_\_\_\_\_

Entity's majority stockholders, majority partners, majority owners, or franchisees reside or work in the city of \_\_\_\_\_

Owner 1: \_\_\_\_\_ Ownership Percentage \_\_\_\_\_

Owner 2: \_\_\_\_\_ Ownership Percentage \_\_\_\_\_

Owner 3: \_\_\_\_\_ Ownership Percentage \_\_\_\_\_

**SMBR Form 4**  
(Continued)

Are any of the entities currently certified by the Texas Unified Certification Program (TUCP) or SMBR Certification? Yes  No

If yes, please include copy(ies) of certificate(s).

If Yes, which entity of the Joint Venture? \_\_\_\_\_

What is the certification agency? \_\_\_\_\_

What is the certification number? \_\_\_\_\_

If Yes, which entity of the Joint Venture? \_\_\_\_\_

What is the certification agency? \_\_\_\_\_

What is the certification number? \_\_\_\_\_

**Is the entity certified as a Disadvantaged Business Enterprise?**  Yes  No

If yes, please include copy(ies) of certificate(s).

**Is the entity certified as a Minority/Women Business Enterprise?**  Yes  No

If yes, please include copy(ies) of certificate(s).

**SMBR Form 4**  
(Continued)

Information and Questionnaire

**How to Determine ACDBE Participation**

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.

An ACDBE is to be responsible for a **distinct, clearly defined portion of the work of the contract. 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.

The FAA has outlined the following areas for review when substantiating the level of ACDBE participation on your proposed lease(s) with the Austin Bergstrom International Airport.

**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.

## SMBR Form 4

(Continued)

**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. 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.

**SMBR Form 4**  
(Continued)

**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 result 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.

**Annual Requirement** - Concessionaire shall file with SMBR on the anniversary date of the ACDBE's certification, a written affidavit, in a form acceptable to SMBR, stating any change(s) in the circumstances affecting the ACDBE's ability to meet ACDBE certification eligibility, including but not limited to size, ownership or control criteria of 49 C.F.R. Part 23 or any material changes in the information provided with the ACDBE's application for certification.

Concessionaire shall also file with SMBR on an annual basis on or before date determined by, or as requested by the SMBR Director or designee, a written affidavit, in a form acceptable to SMBR, stating any change(s) in the circumstances affecting the Concessionaire's ACDBE participation.

The written affidavit shall show Concessionaire's compliance with 49 C.F.R Part 23, including but not limited to capital contribution, roles, responsibilities, control, percentage of equity ownership and address any material change(s) in the ACDBE's participation in the operations authorized by the Lease and information provided in the Concessionaire's proposal regarding ACDBE participation to the ACDBELO or designee.

The following are a list of questions used in evaluating a new Joint Venture Agreement, but are also helpful when evaluating a current agreement as well.

**SMBR Form 4**  
(Continued)

Joint Venture Eligibility

**ACDBE Review Questionnaire** (submittal should include both the questions with the corresponding answers):

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: \_\_\_\_\_

**SMBR Form 4**  
(Continued)

ACDBE: yes  no

Certifying agency: \_\_\_\_\_

Date of Certification: \_\_\_\_\_

Type of work for which certification was granted: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**CAPITAL**

*Is the ACDBE capital investment financed by the Prime? If so, how is it being repaid?*

4. ACDBE initial capital contribution: \$ \_\_\_\_\_ and/or \_\_\_\_\_%

5. Future capital contributions (explain requirements):

6. Source of funds for the ACDBE capital contribution:

**CONTROL/ MANAGEMENT**

What areas of the business are to be controlled by the ACDBE? The ACDBE is expected to have distinctive areas of the business for which they have a majority "vote" and control. We need more information than terms and phrases such as "participate in", or "advise about" when used in describing the work of the ACDBE, since the work and responsibility are not distinctive. The ACDBE is expected to participate in the day-to-day management of the business.

7. Describe the portion of the work or elements of the business that will be controlled by the ACDBE:

8. Describe the portion of the work or elements of the business to be 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.).

**SMBR Form 4**  
(Continued)

10. 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:
11. 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:
12. Which firm will be responsible for accounting functions relative to the joint venture's business?
13. 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?
14. 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	ACDBE Firm	Joint Venture
Management	<hr/>		
Administrative	<hr/>		
Support	<hr/>		
Hourly Employees	<hr/>		

15. Please provide the name of the person who will be responsible for hiring employees for the joint venture. Who will they be employed by?

**SMBR Form 4**  
(Continued)

16. 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).

17. What will be the voting rights of the joint venture members?

RISKS AND PROFITS

18. Describe the ACDBE's share in the profits of the joint venture:

19. Describe the ACDBE's share in the risks of the joint venture:

20. Does the ACDBE pay the Prime a service or management fee? If so,

- a. How is the service or management fee calculated?
- b. How often is the service or management fee paid?
- c. What are the services provided by the non-ACDBE partner in return for the service or management fee?

OTHER

21. Attach a copy of the Joint Venture Agreement, Promissory Note or Loan Agreement (if applicable), and any and all written agreements between the joint venture partners.

22. List all other business relationships between the joint venture participants, including other Joint Venture Agreements in which the parties are jointly involved.

23. What is the ACDBE participation commitment of your Lease Agreement with the Austin Bergstrom International Airport?

## SMBR Form 5

### Minority/Women Business Enterprise (M/WBE) COMMITMENT FORM

*(This form is required as part of the bid/proposal submission for build out of lease and/or concession space.)*

The goal for the design and construction of concession space is

MBE \_\_\_\_\_%  WBE \_\_\_\_\_%

**NOTE:** SMBR will only credit M/WBE participation that is certified by an approved certification entity at the time of bid/proposal submission. In addition to having a valid certification, M/WBEs must also have a place of business in the Airport's market area<sup>1</sup> at the time of bid/proposal submission for credit towards meeting a contract goal.

The undersigned Concessionaire/Vendor has satisfied the requirements of the proposal specifications in the following manner (Please check (✓) the appropriate space):

\_\_\_\_\_ Self-Performance: The proposer, a certified M/WBE firm, is committed to meeting or exceeding the M/WBE goal through self-performance.

\_\_\_\_\_ Self-Performance & Percentage Participation: The proposer, a certified M/WBE firm, is committed to meeting or exceeding the M/WBE goal, with a minimum of \_\_\_\_\_% self-performance and a minimum of \_\_\_\_\_% M/WBE subcontracting participation on this contract. *(If checked, must submit required M/WBE Compliance Plan).*

\_\_\_\_\_ Percentage Participation: The proposer is committed to meeting or exceeding the M/WBE goal, with a minimum of \_\_\_\_\_% M/WBE subcontracting participation on this contract. *(If checked, must submit required M/WBE Compliance Plan).*

\_\_\_\_\_ The Contractor is unable to meet the M/WBE goal of \_\_\_\_\_% and is committed to a minimum of \_\_\_\_\_% M/WBE utilization on this contract and submits documentation demonstrating good faith efforts. *(If checked, must submit required M/WBE Compliance Plan and Good Faith Effort Requirements).*

\_\_\_\_\_ The Contractor is unable to meet the M/WBE goal of \_\_\_\_\_% and submits documentation demonstrating good faith efforts. *(If checked, must submit required Good Faith Effort Requirements).*

Name of Proposing Entity: \_\_\_\_\_

Name of Authorized Representative or Designee: \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Title

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Date

<sup>1</sup> The Airport's market area is defined as the Austin-Round Rock Metropolitan Statistical Area include the following five counties Travis, Hayes, Caldwell, Bastrop and Williamson counties.

**SMBR Form 5**  
(Continued)

**M/WBE COMPLIANCE PLAN**

*(This form is required as part of the bid/proposal submission.)*

The tenant finish out (design and construction of lease and/or concession space) M/WBE participation goal for this solicitation is \_\_\_\_ %. The good faith solicitation level is 100% meaning the Concessionaire and its Contractor will make a good faith effort to solicit all (100%) available M/WBEs for its contracting/ subcontracting opportunities not just a select few. The Concessionaire and its selected Contractor will continually pursue a level of M/WBE participation that equals or exceeds the stated goal. This Compliance Plan provides for the M/WBE participation to be solicited and procured after the concession lease has been awarded and describes the delivery method the Concessionaire and its selected General Contractor will follow to solicit, obtain and maintain M/WBE participation to meet the M/WBE commitment.

**Goods & Services**

1. Identify products and services that will be procured and utilized in the daily operations of the concession.
2. Describe proposer's efforts to identify and utilize M/WBE vendors for these products and services.

**Tenant Build Out - Design**

3. Identify architectural and engineering services that will be procured and utilized in the design of the concession.
4. Describe proposer's efforts to identify and utilize M/WBE vendors for these services.

**Tenant Build Out – Construction**

5. Identify construction and construction-related services that will be procured and utilized in the construction finish out of the concession.
6. Describe proposer's efforts to identify and utilize M/WBE vendors for these services.
7. Describe procurement process proposer will utilize in awarding prime and subcontracting contracts.

**M/WBE Community Outreach Efforts and Advertising to M/WBE Certified Firms**

8. Describe proposer's efforts to solicit, obtain and maintain M/WBE participation to meet the M/WBE commitment including publicly advertising business opportunities, hosting M/WBE outreach meetings, partnering with M/WBE advocacy organizations, offering technical assistance support, etc.
9. Provide contact information for designee responsible for managing the procurement process and ensuring compliance with the M/WBE commitment.

**Compliance Documents and Reporting**

The Concessionaire will submit the following documentation, properly completed and submitted when required.

- Schedule of Subcontractors Forms (design and construction)
- Final Utilization Forms (design and construction)

## STATEMENT OF RESPONSIBILITY



### **STATEMENT OF RESPONSIBILITY Minority-owned and Women-owned Business Enterprise Procurement Program**

In accordance with City Code Chapters 2-9A and 2-9B, as amended, establish a Minority-owned Business Enterprise and Women-owned Business Enterprise (MBE/WBE) Procurement Program in Construction and Professional Services; The aim of this program is to promote local certified business participation in City procurements, through its prime contract awards and subcontracts, and to afford MBE's and WBE's an opportunity to compete for City contracts. In particular, the programs encourage bidders or proposers to provide opportunities to certified MBE's and WBE's for subcontracts or related contracts. A subcontractor, firm or supplier for the purposes of this form is defined as any person or Business Enterprise providing goods, labor, or services to a bidder or proposer if such goods, labor, or services are procured or used in fulfillment of the bidder's or proposer's obligations arising from a contract with the City including third party agreements. In accordance with City Code Chapters 2-9A and 2-9B, goals for MBE/WBE participation differ from contract to contract. Goals are based on the type of contract, the availability of MBE/WBE's to perform the functions of the contract, and other factors.

Although the specific scopes of work and the magnitude of the scopes for anticipated projects obligated in the contract agreement cannot be determined at this time, once scopes have been identified as subcontracting opportunities, the bidder or proposer must contact the City's Small & Minority Business Resources Department for an availability list and goal determination. At that time, the Proposer shall submit a MBE/WBE Compliance Plan meeting such goals or provide documentation detailing their Good Faith Efforts to meet the established MBE/WBE goal. The Compliance Plan will be reviewed and approved by the Small and Minority Business Resources Department.

I understand my obligation to the aforementioned requirements to meet the City's MBE/WBE Procurement Programs for this contract. The City of Austin will require me to comply with the City Code Chapters 2-9A and 2-9B. This signed Statement of Responsibility is my commitment to the requirements of the MBE/WBE Programs which will become a part of this contract.

\_\_\_\_\_  
Name and Title of Authorized Representative (Print or Type)

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

## Proposer Checklist

### ACDBE Program Requirement Checklist

- A. ACDBE: Description and documentation of ACDBE contribution(s) and role(s) in the proposed concept that meets the requirements.
- B. SMBR Form 1: Required for all proposers
- C. SMBR Form 2: Required for proposers with percentage participation and joint ventures.
- D. SMBR Form 3: Required for all Good Faith Efforts.
- E. SMBR Form 4: Required for proposers with percentage participation and joint ventures.
- F. Joint Venture Requirements & Forms  
Draft Joint Venture or Operating Agreement must be submitted in its entirety including amendments, exhibits, attachments and any promissory notes (including a description of the collateral for any loan or personal guarantee) associated with the proposed operation(s). This is required for all proposers with percentage participation.
- G. ACDBE Certificates for all ACDBE firms identified (Required for all proposers)
- H. SMBR Form 5: M/WBE Commitment Form and Compliance Plan Build out of Lease and/or Concession Space (Required)
- I. M/WBE Certificates for all M/WBE firms identified (Required for all proposers).
- J. Proposer's Check List

### AFFIRMATION

I HEREBY AFFIRM THAT THE ABOVE INFORMATION IS TRUE AND COMPLETE TO THE BEST OF MY KNOWLEDGE.

NAME AND TITLE OF AUTHORIZED OFFICIAL:

\_\_\_\_\_

SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_\_

## Joint Venture Requirements & Forms

Posted on [www.austintexas.gov/smbr](http://www.austintexas.gov/smbr) and [www.abia.org](http://www.abia.org)



### **City of Austin's SMBR Austin Bergstrom International Airport ACDBE Joint Venture Agreement Review Form** (To be submitted with joint venture agreement for review)

The following information is requested from participants in prospective ACDBE joint ventures. This information will assist Austin Bergstrom International Airport (ABIA) in evaluating joint venture proposals outlined in U.S. Department of Transportation, Federal Aviation Administration, Joint Venture Guidance governed under 49 CFR Part 23.

---

1. Name of Joint Venture:

2. Joint Venture Contact Person

Address:

Phone Number:

3. Firms participating in joint venture:

Name of firm:

Address:

Phone:

Contact name/phone number:

Ownership Percentage: %

ACDBE  Yes  No

Certifying Agency:

Date of Certification:

Type of work for which certification was granted:

Name of firm:

Address:

Phone:

Contact name/phone number:

Ownership Percentage: %

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.

	<b>Non-ACDBE Firm</b>	<b>ACDBE Firm</b>	<b>Joint Venture</b>
<b>Management</b>			
<b>Administrative</b>			
<b>Support</b>			
<b>Hourly Employees</b>			

17. Please provide the name of the person who will be responsible for hiring employees for the joint venture.

<b>Hiring Manager(s)</b>

- 17b. Who will employees 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).

<b>Position</b>	<b>Employer (Firm)</b>

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.