

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

- The primary function of an advertising concession is selling advertising displays or messages at an airport pursuant to a written agreement with the airport owner, with another concessionaire, or with the owner or lessor of a terminal (if other than the recipient).
- An ACDBE engaged in providing advertising services may have an agreement with the recipient as a prime concessionaire (i.e., the owner of the concession) working with or without a joint venture partner. An ACDBE also may provide services as a contractor to the concessionaire.
- To determine how to count ACDBE participation in a transaction involving advertising goods or services, a recipient must determine in what capacity the ACDBE is performing (e.g., prime concessionaire, joint venture partner, sub-concessionaire, lessee, supplier or contractor) and the manner in which the ACDBE is compensated (e.g., gross receipts earned versus fees or commission for services provided).
- If the ACDBE is a prime concessionaire, the ACDBE's participation is counted based on the gross receipts earned by the ACDBE as provided at 49 C.F.R. §23.55(b).
- If the ACDBE is a subcontractor or sub-concessionaire to a non-ACDBE and the ACDBE's compensation under the agreement is based on gross receipts earned by the ACDBE, those earnings should be counted pursuant to 49 C.F.R. §23.55(c).
- If the ACDBE's compensation is solely based on fees and commissions, the ACDBE's participation for a bona fide service is counted based on the fees and commissions paid as provided at 49 C.F.R. § 23.55(e).
- **EXAMPLE 1:** Firm A (a certified ACDBE) is awarded the airport's advertising concession. Firm A sells \$2,000,000 in advertising to various clients. The entire \$2,000,000 of the sales generated by Firm A should be counted as ACDBE participation, assuming the work is actually performed by the ACDBE with its own forces. In this example, the ACDBE participation on the contract would be counted as race-neutral participation since Firm A obtained the contract through customary competitive procurement procedures.
- In the case of a joint venture, recipients must first determine that the ACDBE joint venture partner is in fact functioning in a manner consistent with the ACDBE Joint Venture Guidance. By definition the ACDBE in a joint venture must be responsible for a distinct, clearly defined portion of the work of the contract and must share in the capital contribution, control, management, risks, and profits of the joint venture commensurate with the ACDBE's ownership interest. See 49 C.F.R. §23.3.

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

with costs or goods incurred in connection with renovation, repairs, or a construction concession commonly referred to as “build-out” costs. See 49 C.F.R. §23.55 (k).

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

\* \* \* \* \*

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