

49 C.F.R. Part 23 Stakeholder Listening Session:



U.S. Department
of Transportation
**Federal Aviation
Administration**

Long-Term, Exclusive Agreements

Joint Ventures

Appendix A- Uniform Report

Office Of Civil Rights

*ACHIEVING SAFETY
THROUGH DIVERSITY*

**Presented by:
FAA Office of Civil Rights**

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Long-Term, Exclusive Agreements

"Long-Term" Definition - 49 CFR Section 23.75(a)

Section 23.75(a) prohibits recipients from entering into long-term, exclusive agreements (LTE) for concessions. The regulation defines a long-term agreement as one having a term longer than five years. Concession agreements require high capital investment, such as food/beverage, and frequently require lease terms of more than five years. For example, hotel agreements are almost certainly always more than five years. Given most concession agreements exceed five years, almost all fall under the regulatory definition of long-term agreements.

- ❑ Should the definition of "long-term" be modified to a term that is more suited for the airport concession industry, i.e. 10 years? Please explain.

"Exclusive" Definition - 49 CFR Section 23.75(a)

Section 23.75 does not define the term “exclusive”; however the LTE Guidance issued in June 2013 provides:

For purposes of this guidance and in accord with 49 CFR Section 23.75, the term “exclusive” is defined as a type of business activity that is conducted solely by a single business entity on the entire airport. In the context of this guidance, the concept of “exclusive” includes the absence of any ACDBE participation. This is consistent with previous DOT guidance on LTE agreements. An airport’s use of the word “exclusive” in describing the rights of a concessionaire is not controlling as to whether the enterprise has a LTE agreement under the ACDBE program rule. (Emphasis added)

Recipients have expressed that the LTE Guidance is not clear as to whether an agreement is exclusive (or not) if there is ACDBE participation.

- ❑ Should the definition for “exclusive”, as it pertains to concession lease agreements, be modified? Please explain.

LTE Approval Documentation Requirements - 49 CFR Section 23.75(c)

Section 23.75 (c) requires recipients to submit for approval to the FAA copies of their long-term-exclusive agreements along with several types of information. Recipients seeking approval for a long-term, exclusive agreement have indicated that meeting this requirement can be very difficult and time-consuming because the amount and type of information required by Section 23.75(c) is typically not available before the RFP is issued and given that any significant changes that arise after the RFP is issued would require re-issuing the RFP.

- Is additional guidance required to clarify whether to count the work performed by a non-disadvantaged partner of an ACDBE toward the ACDBE's participation in the joint venture?

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Work Performed by Own Forces Requirement

The 2008 FAA Joint Venture Guidance indicates that if persons employed directly by the ACDBE partner perform the tasks associated with the ACDBE's participation in the joint venture, then the ACDBE is clearly performing that work with its own forces and such work can be counted toward the ACDBE's joint venture participation. However, the Guidance is silent as to how airports should view work performed by a non-disadvantaged individual who owns a minority interest in an ACDBE joint venture partner.

- ❑ Is additional guidance required to clarify whether or not a non-disadvantaged partner of an ACDBE firm performs any of the work is not relevant to the counting of ACDBE participation in the joint venture?

Work Performed by Own Forces Requirement (Cont'd)

In some cases a non-ACDBE partner in a joint venture requires that the ACDBE partner(s) “hire an associate manager” to perform its/their roles, for which costs to the non-ACDBE partner or joint venture agrees to reimburse the ACDBE. Stakeholders have indicated that the Guidance is not clear as to whether the costs of that associate manager hired by the ACDBE can be reimbursed by the joint venture so as to allow the ACDBE to be deemed to be “operating with its own forces.”

- Is guidance needed to clarify that the costs of this type of ACDBE hire can be reimbursed by the prime or joint venture?

ACDBE Personal Guarantee Requirement for Non-ACDBE Joint Venture Partner Financing

The 2008 FAA Joint Venture Guidance allows for non-ACDBE joint venture participants to provide financing to the ACDBE participants if certain conditions are met. One of those conditions is that the loan (note) be a full recourse note and personally guaranteed by the ACDBE and/or secured by assets outside of the ownership interest or future profits of the joint venture. Stakeholders have indicated that pledging the assets of the business should be sufficient and guaranteeing the loan with their personal assets is burdensome and unnecessary in that all the business assets they have amassed, along with their reputation, should be sufficient.

- Should the requirement be eliminated for an ACDBE participant to “personal guarantee” a loan from a joint venture non-ACDBE participant? Please explain

Loan Terms Between Non-ACDBEs and/or Joint Venture Partnerships & ACDBEs

The 2008 FAA Joint Venture Guidance permits a non-ACDBE participant to provide financing to the ACDBE participant. However, concerns have been raised that non-ACDBE participants are adding additional loan requirements that create barriers to ACDBE participation in joint ventures.

- ❑ Is additional guidance needed to clarify that the financial arrangements (loans from non-ACDBEs and/or Joint Venture Partnerships to ACDBEs) should not be structured in a way that negatively affect the ACDBE's ownership and control under the regulations?

Monitoring "Separate and Distinct Responsibilities" of Single Unit Locations

Airports find it challenging to review and monitor ACDBE roles and responsibilities when the joint venture agreement includes a vague description of the work to be performed by the ACDBE and does not reflect control of the assigned roles by the ACDBE. For example, the regulation is not clear on how to analyze the duties and responsibilities and how to quantify and count participation in joint venture operations of single unit locations.

- ❑ Should the section of the Guidance that addresses counting ACDBE joint venture participation towards ACDBE goals be expanded to add additional detail on how airports should quantify, monitor, and report ACDBE participation in the joint venture operations? Please explain.

Management Fees or Service/Administrative Fees

Management fees or service/administrative fees are acceptable to be paid to joint venture participants depending upon the participant's contribution to the management of the operation. Stakeholders have indicated that non-ACDBE partners have adopted fees that are used in place of a "draw" arrangement.

- Is additional guidance needed to clarify that service and management fees should represent a cost to the joint venture and not be deemed as profit to the non-ACDBE joint venture partner? Please explain.

Measuring ACDBE Joint Venture Participation with Ownership

The definition of a joint venture states that an ACDBE's share in the capital contribution, control, management, risks, and profits of the joint venture is commensurate with its ownership interest and that the ACDBE credit should be commensurate with ownership percentage. The 2008 FAA Joint Venture Guidance states that some slight variations may occur due to the fact that the measurement is somewhat subjective in certain categories and that the key factor is the reasonableness of the claimed participation after reviewing all of the elements of the joint venture. Stakeholders have indicated that airports are misinterpreting the ownership interest and that there's a lot of confusion on this issue.

- Is additional guidance needed to clarify what information meets the preponderance of the evidence that the regulation requires with respect to being an eligible joint venture for counting purposes?

Joint Venture Accounting Practices / Information Sharing

Stakeholders have indicated that the joint venture's financial accounting is managed and tracked in a way that only the non-ACDBE partner can comprehend. For example, the non-ACDBE partner sweeps the daily deposits to the main corporate account which is hidden from the ACDBE partner, leaving the ACDBE partner without the ability to track deposits and withdrawals from joint venture accounts.

- Is additional guidance needed to clarify the financial information that should be shared with the partners along acceptable accounting principles? Please explain.

Review & Approval JV Agreements (Timing)

Airports are instructed to review concession joint ventures for which ACDBE participation is counted towards goals to ensure compliance with the 2008 FAA Joint Venture Guidance. The review of the joint venture agreement should take place prior to execution. However, stakeholders have indicated that ACDBEs are being forced to sign joint venture agreements prior to airport review.

- Is additional guidance needed to clarify when the airport should review and approve the joint venture agreement?

Uniform Report – Appendix A

Participation of Joint Venture Partnerships (Block 5) -Appendix A

In the Uniform Report of ACDBE Participation (Uniform Report) form, block #5 is not specific on how to count the participation of joint venture partnerships that have one or more ACDBE partners.

- Should the Uniform Report be modified to clarify what should be reported in each column? Please explain.

Purchases of Goods & Services (ACDBE & Non-ACDBE Combined) (Blocks 8 & 9) - Appendix A

In the Uniform Report, blocks #8 and #9, require airports to enter the total car rental concession purchases of goods and services (ACDBE and non-ACDBE combined). Airports routinely state that car rental companies do not report the required revenues and value of their expenditures with ACDBE and non-ACDBE firms in the same formats or time intervals, if at all. Car rental companies expressed concerns that airports inconsistently interpret regulations that govern reporting resulting in an administrative burden for the industry.

- Should Appendix A be modified to more clearly indicate what specific data should be collected and reported? Please explain.

Reporting Instructions for Goods/Services (Blocks 5 through 9) - Appendix A

In the Uniform Report, block #5, states that “Goods/services” refers to those goods and services purchased by the airport itself or by concessionaires and management contractors from certified DBEs. 49 CFR Section 23.3 defines a concession as a business 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.

- ❑ Should the instructions in the Uniform Report be modified to clarify that the goods and services reported in blocks #5 through #9 should not include goods and services purchased by the recipient/airport? Please explain.

Reporting Participation of ACDBEs with Multiple Owners from Different Disadvantaged Groups - Appendix A

In the Uniform Report, block #10 does not specify how to report the participation of an ACDBE firm that is owned by multiple individuals of different races, ethnicities, and gender.

- Should the Uniform Report be modified to address the reporting of ACDBE firms owned by multiple partners with different races, ethnicities, and gender? Please explain.

Part 23 Review- Points Contacts

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