

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

Subparts A & B



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

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

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Office Of Civil Rights

*ACHIEVING SAFETY
THROUGH DIVERSITY*



Subpart A Questions



Objectives - 49 C.F.R. 23.1

Part 23 objectives are not consistent with objectives of part 26. More specifically, there are two objectives in part 26 that are not included in part 23. They are: “(f) To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients, (g) To assist the development of firms that can compete successfully in the marketplace outside the DBE program.” Part 26 objectives were updated in 2014 to promote the use of all types of DBEs. It has been suggested that the objectives of part 23 should mirror part 26.

Should these two objectives be included as part of the Part 23 objectives (edited to reference ACDBE instead of DBE)?

Subpart A Questions (cont'd)



NAICS Definition - 49 C.F.R. 23.3

The regulation requires the use of the North American Industrial Classification System (NAICS) code designation that best describes the primary business of a firm. The NAICS codes used for concessions do not always describe the business accurately or may require numerous codes to define a single business. 49 C.F.R.

§ 26.71(n)(3) allows for firms to request the UCP to supplement an assigned NAICS code if the firm believes there is not a NAICS code that fully or clearly describes the types of work in which is seeking to be certified. Per § 23.31, this provision is applicable to part 23.

Is additional guidance required to provide clarity regarding classification and use of NAICs codes for concessions?

Subpart A Questions (cont'd)



Personal Net Worth Definition - 49 C.F.R. 23.3

Prior to 2012, applicants for ACDBE certification were permitted to exclude from their personal net worth 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. In 2012, this exclusion was suspended, however firms who were already certified using the exclusion were permitted to continue to exclude these assets until such time as the assets were no longer encumbered. If there are firms whose personal net worth was calculated using the exclusion, certifiers should review the exclusion to insure that it remains valid. Once the loan or agreement for which the exclusion was used are repaid or no longer necessary, the exclusion is no longer valid.

Has this been an issue for certifiers?

Subpart A Questions (cont'd)



Concession Definition - 49 C.F.R. 23.3

The definition of "concession" states that an ACDBE is a concession and further defines a concession. It has been reported that some certifying agencies are not providing an ACDBE certification designation to firms who meet all eligibility criteria but are not operating a concession, as defined by the regulation, at the time that the certification application is submitted. The FAA continues to clarify that certification applicants are not required to have a current operation at an airport or an agreement with the recipient, another concessionaire, or the owner or lessee of a terminal in order to be designated as an ACDBE.

Is there a need to modify the definition to clarify that firms do not have to be operating a concession at the time of application submission to be eligible for certification as an ACDBE?

Subpart A Questions (cont'd)

Concession Definition - 49 C.F.R. 23.3

It has also been reported that the definition should be clearer regarding suppliers of good/services to concessionaires. The definition includes a business that provides goods or services to concessionaires; however due to the exclusion in 23.55 (k) not all business that provide a good or service to a concessionaire can be counted, i.e. architects and contractors.

Is there a need to clarify which suppliers of goods and services should fall under the definition of a concessions?



Subpart A Questions (cont'd)

Sublease Definition - 49 C.F.R. 23.3

The term is used in several sections of the regulation but not defined. Definitions arose from uncertainty as to how to count ACDBE participation from airport sublease. While Appendix A helps define a sublease in terms of a “subconcession” it has been suggested that there is a need to add a definition of the term “sublease” under Part 23.

Is there a need to add the definition of the term sublease?



Subpart A Questions (cont'd)

Assurance Language - 49 C.F.R. 23.9

Section 23.9 (c) of the regulation states that an airport must include a specific assurance in all concession agreements and management contracts executed with any firm after April 21, 2005. It has been reported that concessionaires have difficulty including the required assurances in purchase orders and that airports find it overly burdensome.

Is there a need to clarify the grant assurances requirement?



Subpart B Questions

Establishing concession-specific goals for particular concession opportunities- 49 C.F.R. 23.25 (e)(1)(ii)

49 C.F.R. 23.25 (e)(1)(ii) states 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. Goals based on purchases are often difficult to set because most airports do not collect purchase information from their concessionaires and many concessionaires have national purchasing programs.

Is there a need to provide more clarity concerning the issue of collecting goods & services data from concessionaires?



Subpart B Questions (cont'd)



Direct Ownership Arrangements Good Faith effort requirement - 49 C.F.R. 23.25 (f)

23.25 (f) states: 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. Overall goals for non-car rental concessions are set based on gross receipts (§ 23.47(a)). Specific contract goals are set prior to solicitation and cannot be changed after responses are received. Good faith efforts are evaluated consistent with § 26.53 and Appendix A of Part 26.

Is there a need to provide clarity on how and when should a goal based on the purchases of goods and services be used as opposed to a goal based on direct ownership arrangement?

Tentative Listening Session Schedule

- **November 15, 2018** - Subparts A-B (General, Definitions, ACDBE Programs)
- **Week of January 14, 2019** - Subpart C (Certification)
- **Week of April 15, 2019** - Subpart D (Goals and Good Faith Efforts)
- **Week of June 10, 2019** - Subpart E & Appendix A (Other Provisions, Uniform Report)



49 C.F.R. Part 23 Review Team

Nicholas Giles, Equal Opportunity Specialist, National Airports Policy & Compliance, FAA Office of Civil Rights

Nicholas.giles@faa.gov

Dolores Leyva, Equal Opportunity Specialist, National External Operations Program, FAA Office of Civil Rights

Dolores.leyva@faa.gov

Marcus England, Team Lead, National Airports Policy & Compliance, FAA Office of Civil Rights

Marcus.England@faa.gov