

# Evaluating Long-Term Exclusive Airport Concession Agreements



Federal Aviation  
Administration

## *GUIDANCE OVERVIEW*

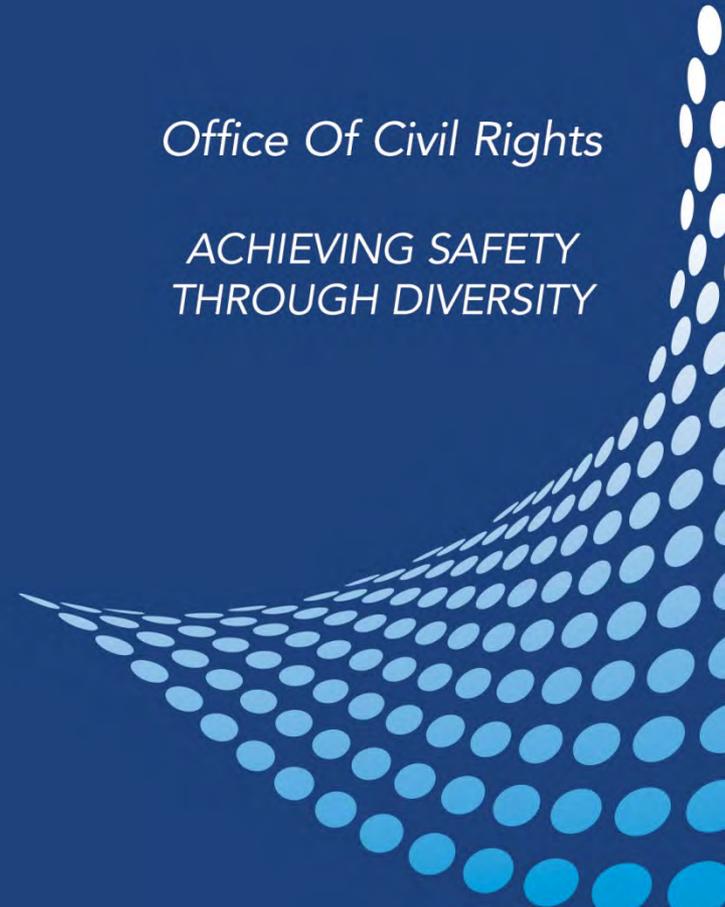
*Office Of Civil Rights*

*ACHIEVING SAFETY  
THROUGH DIVERSITY*

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# Introduction

The Federal Aviation Administration (FAA) is responsible for overseeing and monitoring airport compliance within the ACDBE program as found in 49 CFR Part 23. The FAA and the U.S. Department of Transportation (DOT) provide guidance to airports, ACDBEs, and stakeholders to effectively administer their overall ACDBE program.

# Guidance Structure

- Main Document
- Examples
- Attachment

# Purpose

- ❑ To provide information and direction to sponsors, Airport Concession Disadvantaged Business Enterprise (ACDBE) program staff, stakeholders, and all other interested parties on how to evaluate long-term, exclusive agreements in the ACDBE program
- ❑ Designed to assist sponsors in structuring their leasing activities so that ACDBEs have an opportunity to participate in airport concessions

# Why Long-term, Exclusive Agreement Guidance?

- ❑ 49 CFR § 23.75 provides that airports must not enter into long-term, exclusive agreements for the operation of concessions except under very limited conditions
- ❑ The FAA wants to ensure that sponsors interpret and apply the rule in a consistent and correct way. **The FAA must approve all LTE agreements before award.**
- ❑ To clarify existing requirements and address existing and future concession agreements before they become problematic

# To Whom Does this Guidance Apply?

- Only applicable to Part 23 concession agreements
  
- All Sponsors
  - ❖ *All sponsors should review this guidance to determine whether any leases and/or contracts with prime concessionaires are actually LTE agreements that require FAA approval.*

# Definition of Exclusive

## Exclusive:

- For purposes of this guidance and in accord with 49 CFR § 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.

### ❖ Sample business categories:

*Retail*

*Parking*

*Food Service*

*Lodging*

*Advertising*

*Dining Service*

*Restaurants*

*Car Rental*

*Duty Free*

# Limitations

The limitation on long-term, exclusive agreements (Section 23.75) applies to all long-term, exclusive agreements, i.e., more than five years in length, and that give the lessee or lessees the sole right to conduct a particular type of business on the entire Airport.

# Approval

Submit a written request to the FAA Regional Office of Civil Rights.

Include the following:

- Description of the special local circumstances.
- Copy of the draft lease, subleases, and other pertinent or related documents.
- The number of ACDBEs to the extent that they reasonably reflect their availability in your market area in the absence of discrimination.
- Assurances that any ACDBE participation will be in an acceptable form, e.g., sublease, joint venture, or partnership.
- Documentation that ACDBE participants are properly certified.
- A description of the type of business or businesses to be operated.
- Information on the estimated investment required on the part of the ACDBE and any unusual management or financial arrangements between the prime concessionaire and the ACDBE.
- Information on the estimated gross receipts and net profit to be earned by the ACDBE.

# FAA Determination

- ❑ FAA staff will make an initial determination based on the information received
- ❑ A copy of the final lease and sublease should be provided at least 45 days prior to signing
- ❑ FAA reserves the right to review final documents, e.g., final lease, subleases, and other pertinent and related documents to ensure that all required information is included

# Evaluation of Agreements

- Examine agreement in reference to the category of concession
- No requirement that competitors offer identical goods, services, or benefits, to avoid violating the limitation against long-term, exclusive agreements

# Evaluation of Agreements *cont'd.*

- ❑ If the sponsor awards a short-term (five years or less) exclusive agreement, but also provides an option or options to renew exercisable by the sponsor and/or the concessionaire for more than five years, then the agreement is not “short-term” but is considered “long-term” and will require FAA review.
  
- ❖ *Airport sponsors should review all exclusive agreements with a base term and option years that when combined exceed 5 years to ensure that they are not in effect de facto long-term, exclusive.*

# Evaluation of Agreements *cont'd.*

- ❑ Applications for FAA approval of a long-term exclusive agreement must include a description of special local circumstances that support the request. Examples of special local circumstances:
  - the market size relative to the number of available vendors
  - reduced enplanements
  - an extreme act of nature
  - new business concepts
  - severe economic factors (for instance, an airline goes out of business)
- ❑ A private operator is considered to have the same obligations as the sponsor in determining the long-term and/or exclusive nature of lease agreements and to ensure ACDBE participation as the market dictates.

# Evaluation of Agreements *cont'd.*

- ❑ The prime concessionaire shall make **good faith efforts** to ensure ACDBE participation for the term of the lease through subleasing, joint venture, partnership, or other suitable forms of agreements.
- ❑ An ACDBE concessionaire that is unable to perform successfully in a long-term, exclusive agreement must be replaced by another ACDBE concessionaire, if the remaining term of the agreement makes this feasible (in the event this is not feasible):
  - ❖ The sponsor will require the concessionaire to make good faith efforts during the remaining term of the agreement to retain ACDBEs for the purchase and/or lease of goods and services to be made by the concessionaire.

# Example A

## Full-service restaurant 1

- sole right to operate a sit-down establishment

## Full-service restaurant 2

- sole right to sell hot dogs, pizza, and other carryout items

Both have seven year leases. **Neither** has an “exclusive” agreement under the ACDBE regulations, since there are two different food providers and FAA approval would not be required. The determining factor is that both food operators provide meal items.

# Example B

## Concessionaire 1

- sole agreement to operate a restaurant and snack bar
- excludes vending machines

## Concessionaire 2

- sole operator of vending machines, offering some of same types of food items (e.g., sandwiches, soft drinks, etc.) as Concessionaire 1

The agreement for the vending machines is considered long-term, exclusive because vending machines represent a different category of concession than restaurants and snack bars. Therefore, **both** agreements are subject to FAA approval.

# Example C

## Candy shop

- exclusive right to sell candy for two years
- lease gives full authority to the lessee to exercise two, two-year options to continue operations
- airport has no control over the exercise of that option  
*(assuming the lessee has not violated any parts of the agreement)*

The consecutive two-year options plus the original two-year term equate to **more than five years**. The FAA will review this lease because it is an LTE agreement.

# Example D

- airport awards 10-year exclusive lease to a prime concessionaire who has an ACDBE subcontractor; request approved by FAA
- After two years, ACDBE requests (*from the sponsor*) to be released from its contractual obligations because of a severe economic downturn that will make it difficult for the ACDBE to maintain financial viability; request is approved
- prime concessionaire has made offers to several ACDBEs to replace original ACDBE, but because of current conditions and the economic situation, they have all declined

Although these actions are likely GFE, prime is required to continue to make GFE during remaining term of agreement to encourage ACDBEs to compete for purchases and/or leases of goods & services to be made by concessionaire.

# Impact of Long-term, Exclusive Agreements

- ❑ ACDBEs are excluded over a long period of time from the opportunity to compete for business
- ❑ The “spirit” [intent] of the regulation is violated

# SUMMARY

Absent limited circumstances, sponsors should not enter into long-term, exclusive agreements for concessions. Compliance with the DBE and ACDBE regulations are a condition of continued financial assistance. Sponsors who are uncertain whether potential lease agreements would be long-term, exclusive in light of this guidance, should contact the FAA for assistance with interpretation or in finding alternative means of compliance with the long-term, exclusive agreement requirements.

# FAA's External Civil Rights Website

The Long-term, Exclusive Airport Concession Agreement Guidance is posted on FAA's Office of Civil Rights website at:

[http://www.faa.gov/about/office\\_org/headquarters\\_offices/acr/bus\\_ent\\_program/dbe\\_program\\_admin/media/LTE\\_Guidance\\_Final.pdf](http://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/dbe_program_admin/media/LTE_Guidance_Final.pdf)

# Questions

