



# Federal Aviation Administration

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## Memorandum

Date: October 25, 2019

To: Office of Airports Regional Directors, AXX-600s;  
Regional Airport Planning & Programming, AXX-610s;  
Airports District Office Managers, XXX-ADOs.

From: Robert Craven, Director, Office of Airport Planning  
and Programming, APP-1 

Subject: Reauthorization Program Guidance Letter (R-PGL) 19-07: DBE &  
Related Programs

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This Reauthorization Program Guidance Letter (R-PGL) 19-07 explains and implements provisions in the FAA Reauthorization Act of 2018 (the 2018 Act) (P.L. 115-254), impacting Disadvantaged Business Enterprise (DBE) and related programs under 49 U.S.C., chapter 471, the primary statutory provision governing the Airport Improvement Program (AIP). This R-PGL is directed to Office of Airport's staff for the purpose of helping them implement statutory changes. This R-PGL is not legally binding in its own right and will not be relied upon by the FAA as a separate basis for affirmative enforcement action or other administrative penalty.

Policy established in R-PGL-19-07 includes analyses and implementation strategies for the following topics and bill Sections:

| Bill Section(s) | Topic                                             | 49 USC Section(s) impacted                    |
|-----------------|---------------------------------------------------|-----------------------------------------------|
| 150             | Definition of Small Business Concern              | 47113                                         |
| 153             | Nondiscrimination (Indian preference)             | 47123                                         |
| 157             | Minority and Disadvantaged Business Participation | 47107(e), 47113;<br>49 CFR parts 23<br>and 26 |

## **Section 150, Definition of Small Business Concern.**

Section 150 conforms the definition of a Small Business Concern to construction industry standards. Previously subsection (B) stated that a Small Business Concern did not include *“a concern, or group of concerns controlled by the same socially and economically disadvantaged individual, that has average annual gross receipts over the prior 3 fiscal years of more than \$16,015,000, as adjusted by the Secretary of Transportation for inflation.”*

The 2018 Act replaced subsection (B), now stating that *“in the case of a concern in the construction industry, a concern shall be considered a small business concern if the concern meets the size standard for the North American Industry Classification System Code 237310, as adjusted by the Small Business Administration.”*

### **Moving forward:**

This provision creates a separate DBE size standard definition for AIP projects from other DBE programs in the DOT. The FAA Office of Civil Rights is currently working with DOT and the other DOT operating administrations to develop a communications strategy to advise certification agencies about the size change and actions they must take as a result.

### **Guidance and Tools:**

The FAA Office of Civil Rights, in conjunction with DOT and the other DOT operating administrations, will issue any communications and/or changes or modifications to DBE program requirements. If there are changes that impact the current version of the AIP Handbook (FAA Order 5100.38D, Change 1) the Handbook will be updated in its next version to reflect these changes.

## **Section 153, Nondiscrimination (Indian preference).**

Section 153 adds a new subsection (b) for Indian Employment. Title 2 of Code of Federal Regulations (CFR) part 200 section 319 – Competition, requires that all AIP projects provide full and open competition. In the past, preferential employment of “Indians living on or near a reservation” (hereafter “Indian employment preference”) may have been considered a local preference, and therefore not allowable for AIP-funded contracts.

The partial text of section 153:

*(1) TRIBAL SPONSOR PREFERENCE. —Consistent with section 703(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2(i)), nothing in this section shall*

*preclude the preferential employment of Indians living on or near a reservation on a project or contract at—*

*(A) an airport sponsored by an Indian tribal government; or*

*(B) an airport located on an Indian reservation.*

*(2) STATE PREFERENCE. —A State may implement a preference for employment of Indians on a project carried out under this subchapter near an Indian reservation.*

*(3) IMPLEMENTATION — The Secretary shall consult with Indian tribal governments and cooperate with the States to implement this subsection.*

Airport sponsor procurement packages for AIP funded projects may include an Indian employment preference meeting section 153 since this is not a prohibited local preference. This exception does not extend to tribal preferences.

#### **Moving forward:**

This provision does not change grant administration, except to clarify that an airport sponsor may include an Indian employment preference in its procurement package under the specific circumstances outlined in section 153. A state can also include an Indian employment preference for an AIP funded project near an Indian reservation. All other provisions in the current version of the AIP Handbook are applicable.

To assure compliance with the consultation requirement in this provision, the FAA's Office of Airports, in conjunction with the Office of Civil Rights, has concluded regional offices (RO) and airports district offices (ADO) will advise states and airport sponsors of the change in the statute through existing communication forums.

#### **Guidance and Tools:**

The FAA will update the current version of the AIP Handbook (FAA Order 5100.38D, Change 1) in its next version to reflect this change.

### **Section 157, Minority and disadvantaged business participation.**

Section 157(a) is the finding of Congress that discrimination and related barriers continue to pose obstacles to airport-related minority and women-owned businesses.

This finding confirms that there is a compelling need for the continuation of the airport disadvantaged business enterprise program and the airport concessions disadvantaged business enterprise program to address race and gender discrimination in airport-related business.

Section 157(b) requires FAA to assess and report on compliance with the prompt payment requirements under 49 CFR part 26. Additionally, the FAA is required to ensure that airports track and report prompt payment complaints.

**Moving forward:**

From an AIP administration standpoint, the finding provision does not change grant administration for FAA RO/ADO personnel. The Office of Civil Rights (ACR) is responsible for the compliance and oversight of the DBE and Airport Concessions DBE (ACDBE) program. ACR issued a letter to airports sponsors in March 2019 advising sponsor of the new requirements under section 157 and directing participating sponsors to track and report to the FAA prompt payment complaints. In the letter, ACR identified the data to be reported and provided a link for sponsors to report complaints and file related data.

RO/ADO personnel should direct questions from airport sponsors regarding this provision to their FAA Regional DBE/ACDBE Program Compliance Specialist. Contact information can be found here:

[https://www.faa.gov/about/office\\_org/headquarters\\_offices/acr/bus\\_ent\\_program/contact/](https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/contact/)

**Guidance and Tools:**

The FAA Office of Civil Rights will continue to work with the Office of Airports as Office of Civil Rights administers the DBE/ACDBE program.