

# ACDBE Joint Ventures – Analyzing & Monitoring Control



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

*Office Of Civil Rights*

*ACHIEVING SAFETY  
THROUGH DIVERSITY*

**Presented by:**

**Dolores P. Spriggs**

**Office of Civil Rights**

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# Preview

- Joint Venture (JV) Basic Information
- JV Agreement Initial Review
- Review of Overall Control
- Review of Specific Control
- JV Agreement Approval
- JV Monitoring
- Common Questions & Misunderstandings

# Joint Venture Basic Information

# The Basics

- What is a Joint Venture?
- Counting ACDBE Participation
- Direct Ownership Arrangement
- Certification Requirements

# Joint Venture Agreement Initial Review

# When Do I Review the Agreement?

- Draft Form
- Prior to execution
- Relationship to Prime contract
- Application to developer model
- Exceptions due to state requirements

# What Information Do I Review?

- Capital Contributions
- Overall Management of the joint venture
- Method and Timing for Calculation of Profits
- Method and Timing for Distribution of Profits
- Business Losses
- Role of each Party

Approved for Counting!

# Information Form

Model ACDBE Joint Venture Information  
(to be submitted with joint venture agreement for review)

The Department recommends that airport sponsors request the following information from participants in prospective ACDBE joint ventures. The Department believes that this information will assist sponsors in evaluating joint venture proposals. The following form is a model that sponsors may wish to use in obtaining this information, but use of the model form is not mandatory.

\*\*\*\*\*

1. Name of Joint Venture:
2. Name, address and phone number of joint venture contact person:
3. Firms participating in joint venture (use additional pages if necessary):

Name of firm:  
Address:  
Phone Number:  
Contact name/phone number:  
% ownership:        %  
ACDBE: yes no        Certifying agency:  
Date of Certification:  
Type of work for which certification was granted:

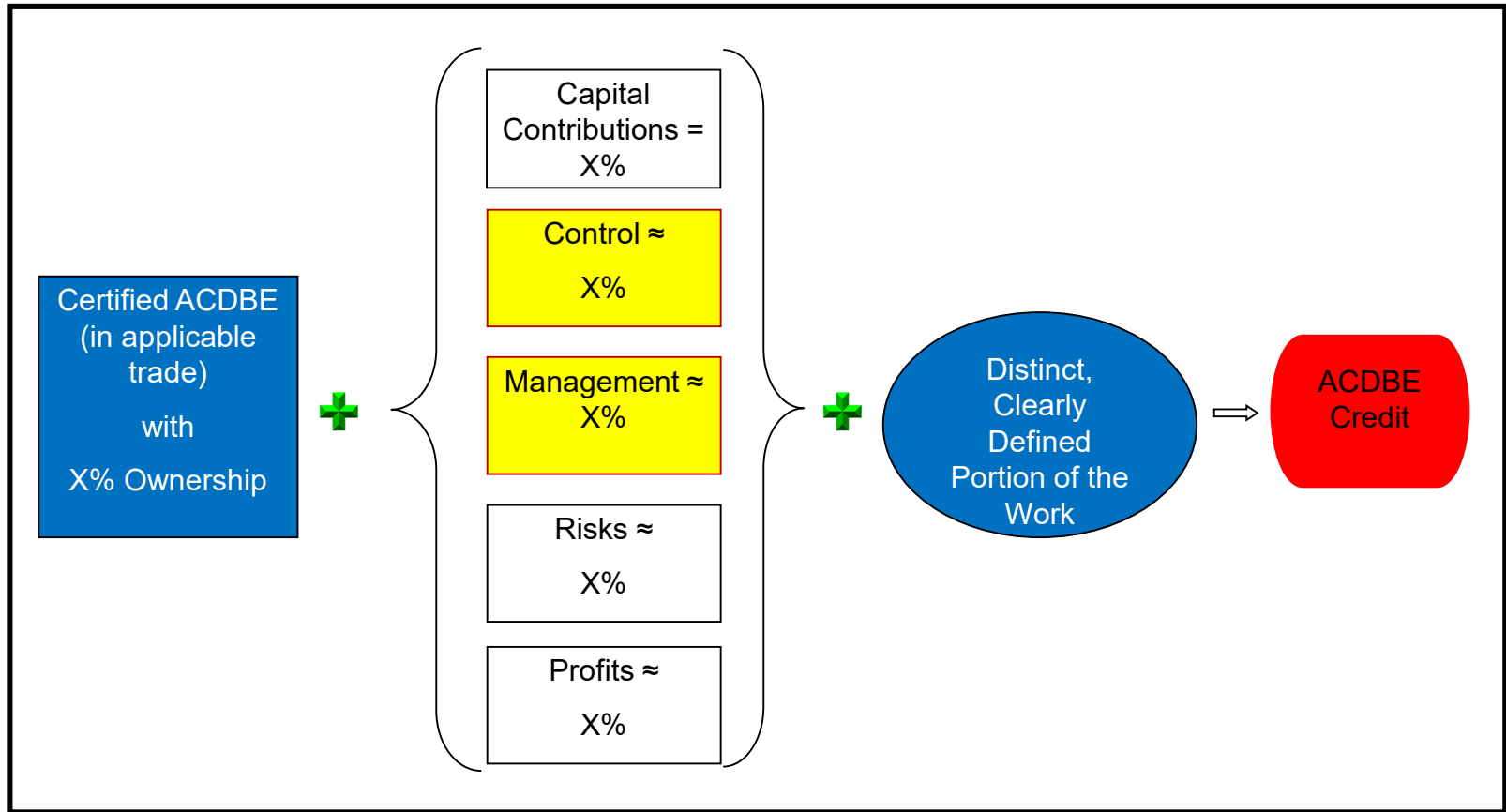
**Note:** This form in its entirety can be found in the 2008 FAA Joint Venture Guidance

Name of firm:  
Address:  
Phone Number:  
Contact name/phone number:  
% ownership:        %  
ACDBE: yes no        Certifying agency:  
Date of Certification:





# JV Agreement Review



# Review of Control

# Control

- **OVERALL**
  - The ACDBE participant(s) in the JV should have control in proportion to their ownership interest and proportionate control of the governance of the joint venture
- **SPECIFIC ROLES AND DUTIES**
  - Each JV partner should assume full responsibility for executing each element of the work assigned to it

# Information Sharing

- Financial reports, tax returns, and other information necessary to manage/control the business
- Documentation supporting charges to the Joint Venture
- Accounting records to verify charges

# Review of Overall Control

# Overall Management/Control

- Overall management – **NOT** the same as “distinct, clearly-defined portion of the work”
- Overall control on major decisions/actions requiring unanimous consent
- JV Manager – Authority
- Roles and duties of each party

# Governance Committee

- Function of committee
- Total number of committee of members
- Number of ACDBE committee members
- Responsibilities/authority
- Frequency of meeting
- Voting

# Major Decisions - Control

- Borrowing money
- Capital calls not required by the lease, losses or unforeseen expenses
- Entering into any contract over a certain threshold
- Amendment or modification to agreement
- Terminating the agreement
- Multiple ACDBEs



# Management Fees - Control

- Contribution to the “indirect” management of the operation
- Fees charged should be reasonable
- Not a “draw” arrangement
- Represents a recovery of costs
- Not a profit to the provider of the service

# Sample Review of Overall Control

(Voting power & *What do they vote on?* )

*Sample clauses are NOT official U.S. Department of Transportation guidance.*

# Who gets to vote?

## *(Sample Contract Clause)*

Supermajority Vote means with respect to approval by the Management Committee, the approval of a majority of the authorized number of committee members which must include approval of at least one ACDBE committee member, and with respect to approval by the Partners, the approval by Partners collectively holding at least eighty percent (80%) of the aggregate percentage interests of the Joint Venture.

**Not  
Approved**

# Who gets to vote, Cont'd

## *(Sample Contract Clause)*

Supermajority Vote means with respect to approval by the Management Committee, the approval of a majority of the authorized number of committee members which must include approval of ~~at least one~~ all ACDBE committee members, and with respect to approval by the Partners, the unanimous approval by all Partners ~~collectively holding at least eighty percent (80%) of the aggregate percentage interests of the Company.~~

TEXT ADDED

TEXT REMOVED

# What do they get to vote on?

## *(Sample Contract Clause)*

Decisions Requiring ACDBE Partner Consent. Notwithstanding anything to the contrary in this Agreement, the following transactions shall not be permitted without the consent of a particular ACDBE Partner if such transaction results in a material and detrimental impact on such ACDBE Partner's shares:

- (a) Amend this Agreement.
- (b) Assign all or any material portion of the Company's property.
- (b) Confess a judgment against the Company.

**Not  
Approved**

# What do they get to vote on, cont'd

## *(Sample Contract Clause)*

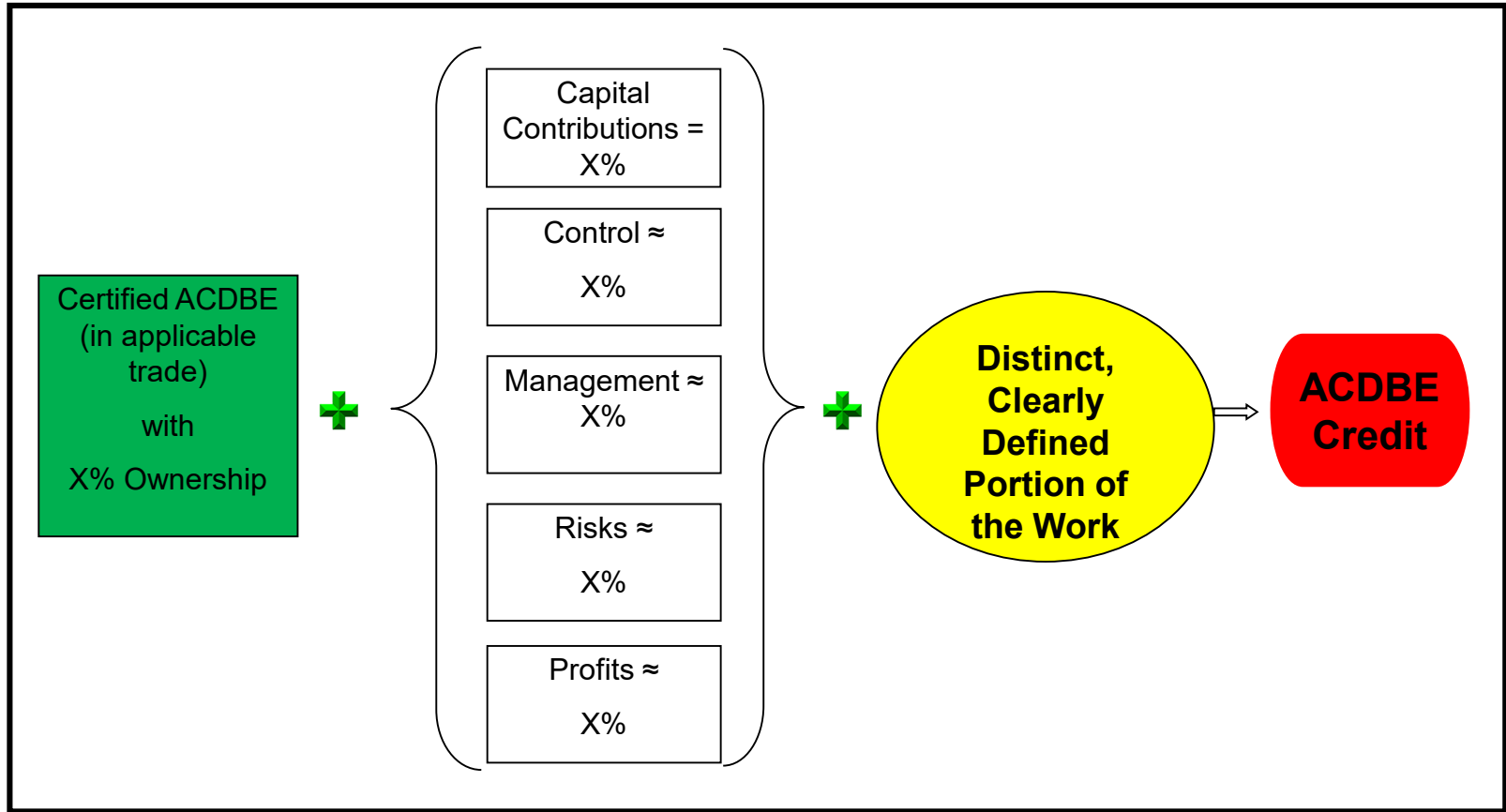
Major Decisions. Notwithstanding any provision contained elsewhere in this Agreement, neither the Managing Partner nor any other Partner shall have the authority to take, and the Joint Venture shall not take, any of the following actions without the approval of all of the Partners:

- (a) The sale of all, or substantially all, of the assets ...
- (b) The incurring of any indebtedness for borrowed money.
- (c) The acquisition of any property, real or personal, ...
- (d) The transfer or pledge, mortgage of a security interest in the assets ...
- (e) The dissolution or liquidation of the Company ...
- (f) Expenditures by the Managing Partner in excess of \$XXX...
- (g) Additional Capital Contributions not required by lease or losses.
- (h) The declaration, payment or making of any distribution to Members other than distributions made in accordance with the Agreement.
- (i) The election or removal of the Managing Member.
- (j) The establishment of reserves other than accrued expenses and liabilities.

# Review of Specific Control

*(Distinct, Clearly Defined Portion of the Work)*

# Distinct Clearly Defined Portion





# Counting ACDBE Participation in a JV

- 49 CFR §23.55 (d) states that *“when an ACDBE performs as a participant in a joint venture, count a portion of the gross receipts equal to the distinct, clearly defined portion of the work of the concession that the ACDBE performs with its own forces toward ACDBE goals.”*

# Distinct and Clearly Defined

- “Distinct” means separate and distinguishable
- “Clearly defined” means that there is no guesswork
- Full understanding
  - Time & Resource Requirements

# ACDBE Role

- Proportionate to it's ownership interest
- Distinct and clearly defined
- Clear understanding of the exact work
- Not clearly defined - “assist with,”  
“ensure,” or “participate in”

# ACDBE Role, Cont'd

- Comprehensive role in complete operation
- Minor roles
- Frequency and level of importance
- Commercially useful function

# Performs With Its Own Forces

- Employed (and controlled) directly by the ACDBE
- Power to control
- Burden of proof
- ACDBE payroll  $\neq$  ACDBE control

# Some Examples

- Purchasing/Ordering
- Hiring/Firing
- Merchandising
- Menu development/food quality control
- Inventory control/management

# Sample Review of Specific Control (Allocation of Duties)

*Sample clauses are NOT official U.S. Department of Transportation guidance.*

# Sample - Allocations of Duties

Operations	Procurement	Administration
Human Resources - Non ACDBE	Purchasing - ACDBE	Accounting/Payroll/ Taxes - Non ACDBE
Loss Prevention - Non-ACDBE	Inventory Management - Unknown (?)	Legal Services - Non-ACDBE
Safety/Security - Unknown (?)	Pricing - ACDBE	Business Development - ACDBE
Day-to-Day Airport Relations - Non ACDBE	Décor/Display Unknown (?)	HR/Training Program - ACDBE
Cash Management Non-ACDBE	Product Assortment - ACDBE	Policies/Procedures - ACDBE
Maintenance - Non ACDBE	Negotiation of Special Programs - Non-ACDBE	Corporate Support - ACDBE
Monitoring Performance - Unknown (?)	Monitoring Procurement Performance - ACDBE	Budgeting Procurement - ACDBE

**Not  
Approved**



# Sample – Revised Allocations of Duties

**\*Must be tailored to tasks required to the specific operation.**

<b>Human Resources</b>	<ul style="list-style-type: none"> <li>• The Partner Manager shall be hired by the ACDBE and shall report to the ACDBE and may be dismissed only by ACDBE.</li> <li>• Staff product department hire/fire, supervise, schedule, and train employees.</li> </ul>
<b>Pricing</b> <i>(Highly variable based on concept)</i>	<ul style="list-style-type: none"> <li>• <b>Responsible for</b> determining price points of specific product.</li> <li>• <b>Complete</b> and monitor pricing based on price comparisons as required.</li> </ul>
<b>Merchandising</b>	<ul style="list-style-type: none"> <li>• <b>Work</b> with vendors to determine product assortment.</li> <li>• <b>Determine</b> product placements &amp; markdowns to improve inventory turn.</li> </ul>
<b>Purchasing</b>	<ul style="list-style-type: none"> <li>• <b>Purchase</b> assigned product categories.</li> <li>• Forecasts sales for product categories.</li> <li>• <b>Secure</b> products and establish store stock levels.</li> <li>• <b>Coordinate</b> with replenishment teams to distribute to stores.</li> <li>• <b>Manage and monitor</b> levels through operating systems.</li> </ul>
<b>Inventory Management</b> <i>(Specific to concept)</i>	<ul style="list-style-type: none"> <li>• ACDBE is responsible for the management of the product.</li> <li>• <b>Execute</b> in-store action plan to delist stock/ close promotions.</li> <li>• <b>Verify</b> set distribution center stock and allocated to appropriate store.</li> <li>• <b>Distribute</b> adequate stock within each location.</li> <li>• <b>Determine</b> stock allotments for new brands and expansions.</li> <li>• <b>Conduct</b> weekly cycle counts on key brands and items.</li> <li>• <b>Perform</b> annual booked inventory counts.</li> </ul>

# JV Agreement Approval

# Approval Letter

- Approval for counting of ACDBE participation
- ACDBE participation credit
- Ongoing compliance with agreement
- Ongoing assessment of ACDBE's distinct, clearly-defined portion of the work
- Request documentation necessary to monitor the agreement

# JV Monitoring

# Timing of Monitoring Activities

- Ongoing process
- Documents submitted – quarterly/annually
- Site visits

# Desk Audit

- Review of all JV documentation
- Annual verification of ACDBE certification
- May be conducted routinely as documents are submitted or on a scheduled basis

# Documents to Review

- Management committee meetings minutes
- Distribution statements of profits and losses
- Proposed amendments to JV
- Proposed changes to assigned roles and responsibilities
- Reconciliation of fees (management)
- Tax returns & capital account activity

# Site Visits

- Crucial for JV Compliance
- Best practice is at least annually
- Scheduled versus unannounced
- Responsibilities are not standard
- Unique tailored approach based on roles/responsibilities



# Monitoring Reports

- Consolidated findings
- Non-compliance action items
- Required written certification (§ 23.29)

# Key Takeaways

- Understand the content of the agreement
- Ensure control is clearly expressed not inferred
- Understand industry vocabulary
- Get expert advise if needed

# Common Questions & Misunderstandings

# What is the difference between overall management and 'Distinct, clearly-defined portion of the work?'

Overall management includes activities that any business owner would regularly perform to manage the business, such as reviewing financial information, developing strategies to increase sales, reviewing operations, walking facilities and noting areas in need of attention, etc.

Distinct, clearly-defined portion of the work includes regularly occurring activities necessary in the operation of the business, such as human resource activities, floor supervision, purchasing of product/supplies, etc.

# Is the ACDBE owner required to be on site?

No, however, as with any small business, it is not conceivable that a small business owner would never be on site. The ACDBE owner should have a presence such that he/she is known and recognized by the employees he/she employs in the fulfillment of their duties. It should be clear that the ACDBE firm controls the portion of the work assigned to it.

# What information should be shared between JV partners?

Consistent with the intent of the JV Guidance, the joint venture partnership should be transparent among the partners. The ACDBE, even if a minority partner, is an owner of the joint venture and should have access to real-time information regarding the partnership such as financing documents, databases, payroll records, human resource projections, hiring plans, payables, tax returns (including K-1s), financial performance documents, profit & loss statements, balance sheets, etc. It is highly encouraged that joint venture agreements include information sharing requirements and that airports monitor these requirements on a regular basis (See Joint Guidance Section 5.2).

# What level of control should an ACDBE have in a JV?

The ACDBE participant in a joint venture should have control commensurate with its ownership interest in both the overall management and in the specific roles/ responsibilities assigned to the ACDBE. (See Joint Guidance Section 3.2 and 4.3).

Thank You!