

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 23

[Docket OST-97-2550; Notice]

RIN 2105-AC91

Participation by Disadvantaged Business Enterprises in Airport Concessions

AGENCY: Office of the Secretary, DOT

ACTION: Final Rule

SUMMARY: This rule revises and updates the Department's regulation concerning participation by airport concessionaire disadvantaged business enterprises (ACDBEs) in the concessions activities of airports receiving Federal financial assistance from the airport improvement program (AIP) of the Federal Aviation Administration (FAA). It makes the ACDBE concessions rule parallel in many important respects to the Department's DBE regulation for Federally-assisted contracts. It also addresses issues such as goal-setting, personal net worth and business size standards, and counting ACDBE participation by car rental companies.

EFFECTIVE DATE: This rule is effective [insert date 30 days from date of publication in the *Federal Register*].

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SUPPLEMENTARY INFORMATION:

Background

This final rule revises and updates the Department's regulation to ensure nondiscrimination in the provision of opportunities for disadvantaged business enterprises in airport concessions (49 CFR Part 23). The regulation is mandated by 49 U.S.C. 47107(e), originally enacted in 1987 and amended in 1992. The current language of this section is the following:

(e) Written Assurances of Opportunities for Small Business Concerns. (1) The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that the airport owner or operator will take necessary action to ensure, to the maximum extent practicable, that at least 10 percent of all business at the airport selling consumer products or providing consumer services to the public are small business concerns (as defined by regulations of the Secretary) owned and controlled by a socially and economically disadvantaged individual (as defined in section 47113(a) of this title).

(2) An airport owner or operator may meet the percentage goal of paragraph (1) of this subsection by including any business operated through a management contract or subcontract. The dollar amount of a management contract or subcontract with a disadvantaged business enterprise shall be added to the total participation by disadvantaged business enterprises in airport concessions and to the base from which the airport's percentage goal is calculated. The dollar amount of the management contract or subcontract with a non-disadvantaged business enterprise and the gross revenue of business activities to which the management contract or subcontract pertains may not be added to this base.

(3) Except as provided in paragraph (4) of this subsection, an airport owner or operator may meet the percentage goal of paragraph (1) of this subsection by including the purchase from disadvantaged business enterprises of

goods and services used in businesses conducted at the airport, but the owner or operator and the businesses conducted at the airport shall make good faith efforts to explore all available options to achieve, to the maximum extent practicable, compliance with the goal through direct ownership arrangements, including joint ventures and franchises.

(4) (A) In complying with paragraph (1) of this subsection, an airport owner or operator shall include the revenues of car rental firms in the base from which the percentage goal in paragraph (1) is calculated.

(B) An airport owner or operator may require a car rental firm to meet a requirement under paragraph (1) of this subsection by purchasing or leasing goods or services from a disadvantaged business enterprise. If an owner or operator requires such a purchase or lease, a car rental firm shall be permitted to meet the requirement by including purchases or leases of vehicles from any vendor that qualifies as a small business concern owned and controlled by a socially and economically disadvantaged individual.

(C) This subsection does not require a car rental firm to change its corporate structure or to provide for direct ownership arrangement to meet the requirement of this subsection.

(5) This subsection does not preempt –

(A) a State or local law, regulation, or policy enacted by the governing body of an airport owner or operator or;

(B) the authority of a State or local government or airport owner or operator to adopt or enforce a law, regulation, or policy related to disadvantaged business enterprises.

(6) An airport owner or operator may provide opportunities for a small business concern owned and controlled by a socially and economically disadvantaged individual to participate through direct contractual agreement with that concern.

(7) An air carrier that provides passenger or property-carrying services or another business that conduct aeronautical activities at an airport may not be included in the percentage goal of paragraph (1)

The present version of Part 23 was issued in 1992 (57 FR 18410, April 30, 1992) and amended in 1999 (64 FR 5126, February 2, 1999). There have been three proposed rules to revise Part 23: in 1993 (58 FR 52050, October 8, 1993), 1997 (62 FR 24548, May 30, 1997), and 2000 (65 FR 54454; September 8, 2000). This final rule responds to comments on the most recent of these proposals.

In the 2000 proposal, the Department suggested making the DBE concessions rule a subpart of 49 CFR Part 26, the DBE rule for DOT-assisted

contracts. However, the DOT-assisted contracts and concessions rules are based on different statutes. They apply to different kinds of businesses, and concern distinct types of relationships between recipients of DOT financial assistance and businesses. There are a number of substantive differences between the two regulatory schemes (e.g., business size standards). For these reasons, the Department has decided to keep the two regulations separate. ACDBEs will continue to be governed by Part 23, as revised by this issuance, and DOT-assisted contracts DBE provisions will remain in Part 26. Keeping the regulatory provisions separate should help to avoid confusion.

The Supreme Court's decision in Adarand v. Peña, which established the requirement that race-conscious affirmative action programs meet the "strict scrutiny" standard of review, was rendered in 1995. In 1999, when the Department made major changes to Part 26 in order to meet Adarand requirements, we did not issue a comprehensive revision of the airport concessions DBE requirements. Consequently, one of the most important functions of this final rule is to ensure that the airport concessions requirements of Part 23 meet Adarand requirements.

In 2003-04, the Department's Office of Inspector General (IG) issued two reports that addressed fraud and abuse problems in the Department's DBE program. Many of the IG's recommendations focused on the need for more effective oversight of the DBE program by state and local recipients and by DOT operating administrations. However, some of the IG's recommendations directly concerned regulatory provisions governing the airport concessions DBE program. Probably the two most significant IG recommendations were that the Department expeditiously complete this rulemaking and that it include a specific personal net worth standard for owners of ACDBEs. The Department takes the IG's findings and recommendations very seriously, and we believe that the prevention of fraud and abuse in all portions of the DBE program is a very high priority. This final rule, like the 2000 proposed rule, includes a specific personal

net worth standard. The accompanying supplemental notice of proposed rulemaking asks for comment on additional steps the Department might take to prevent fraud and abuse.

Major Issues

The Department identified the following issues as the most important in developing this final rule: small business size standards, personal net worth standards, counting of ACDBE participation by car rental companies, and the goal-setting process. The bulk of comments on the 2000 NPRM concerned these issues. This portion of the preamble describes each of these issues, notes how the Department proposed to resolve it in the 2000 NPRM, summarizes comments on it, and provides a rationale for the Department's decision.

1. Small Business Size Standards

Size standards in this ACDBE regulation are important for a number of reasons. They implement the statutory requirement that participants be small businesses. They provide a means to ensure that a firm's participation in DBE programs is not necessarily of indefinite duration: if a firm grows to exceed size standards, it ceases to be eligible for the program. They are calibrated to help meet the objectives of the program, including permitting ACDBE firms to compete in the airport concessions market.

In Part 26, businesses seeking DBE certification must, by statute, meet SBA size standards and an additional cap on average annual gross receipts, currently set at \$17.42 million and subject to periodic adjustments for inflation. These requirements do not apply to Part 23, since the ACDBE statute gives the Secretary discretion to set size standards for concessions. For most airport concessions, the size standard under current Part 23 is \$30 million average annual gross receipts. The proper business size standard for the ACDBE program has been the subject of comment on all the Part 23 NPRMs that the

Department has issued. For the reasons stated in the supplemental notice of proposed rulemaking (SNPRM) that we are publishing in today's Federal Register, the Department is seeking additional comment on a number of size-related issues.

In the interim, we will maintain the status quo with respect to Part 23 size standards, with the two exceptions discussed below. First, since goods and services purchased by concessionaires from ACDBE businesses can count toward ACDBE goals, we think it is important to clarify in the regulatory text our understanding of the application of the rule's size standards to ACDBE goods and services providers. For certification purposes, a firm that provides goods and services to airport concessionaires is an ACDBE if, assuming it meets other eligibility criteria, it meets the size standards for ACDBE concessionaires. A firm that provides restaurant equipment to a restaurant at the airport, for purposes of Part 23, must meet the general Part 23 size standard, rather than the smaller SBA or Part 26 standards, to be an eligible ACDBE, so that the restaurant and the airport can count the purchase toward DBE goals.

Second, with respect to banks, the Department received a petition for rulemaking from a financial institution saying that organizations in its position were unable to compete against much larger institutions (i.e., in the hundred billion dollars in assets range) at the current size standard of \$150 million in assets. The petitioner had been certified by an airport sponsor as an MBE (in a local MBE program) and a DBE with assets of \$275 million. However, because this exceeded the \$150 million standard, the petitioner was subsequently decertified. We believe that the petitioner has a fair point, with respect to the competitive disadvantages it faces against far larger institutions. Consequently, we will increase the banks and financial institutions size standards to \$275 million, which will allow DBE financial institutions to participate at a level that is more competitive.

We also note that the SBA business size standards no longer use an employee number standard for car dealers, but rather use a gross receipts standard. We believe that this approach, consistent with the way the Department approaches most business size standards in this rule, is sensible. Consequently, we are using the \$30 million gross receipts standard for car dealers as well as for other concession-related businesses, rather than the previous employee number standard.

2. Personal Net Worth

In order to meet narrow tailoring requirements, it is essential that a DBE program not be overinclusive. The statutory scope of the ACDBE program is to ensure nondiscrimination for airport concession businesses owned and controlled by individuals who are socially and economically disadvantaged. To prevent the program from becoming overinclusive, the ACDBE program should ensure that persons who are not disadvantaged do not have the opportunity to participate.

By statute, persons in certain designated groups are presumed to be socially and economically disadvantaged. The Department has always held this presumption to be rebuttable. That is, if a member of a designated group is shown to be non-disadvantaged, he or she would no longer be able to participate as an ACDBE owner. (Likewise, a person who is not presumed to be disadvantaged could participate if he demonstrated, on an individual basis, that he is socially and economically disadvantaged.) This rebuttable presumption feature of the existing rule is intended to provide a safeguard against the program becoming overinclusive, since a UCP (or recipient in a state where a UCP is not yet in effect) – on its own or in response to a complaint – has the authority to determine that an individual should no longer be regarded as disadvantaged.

The Department has recognized, however, that in the absence of a specific criterion for determining whether the presumption of disadvantage has been rebutted, there are difficult problems of proof and judgment when an issue is raised concerning the application of the presumption to an individual. For this reason, in the 1999 revision to Part 26, the Department adopted a numerical standard for this purpose. The absence of such a specific numerical standard in Part 23 has caused confusion. As noted above, the Department's Office of Inspector General (OIG) has recommended that Part 23 include a PNW numerical standard.

The Department agrees that Part 23 should include a PNW numerical standard. The question confronting the Department in this rulemaking is what that standard should be. In the 2000 NPRM, we proposed a \$2 million PNW standard. This was higher than the \$750,000 standard of Part 26 in recognition of the generally accepted proposition that airport concession businesses are more capital intensive, higher cash flow businesses than many businesses working under Part 26. The owners of concessions therefore need more assets in order to enter and thrive.

There were a variety of comments on the PNW proposal. Many of the airport commenters generally said that we should not impose "onerous" requirements on ACDBEs or airports in the PNW area. They did not provide any specifics, however. Some airports supported the proposed \$2 million cap, while an airport trade association and other airports said that \$2 million or an unspecified higher standard would be appropriate. However, other airports and a union said that the \$2 million proposal was too high. Generally, these comments said that a cap at this level or higher would undermine the reason for having a PNW standard, allow persons into the program that were too rich, and lead to overinclusiveness problems. One of these commenters suggested a \$1 million standard and another suggested \$750,000. Another comment said that

whatever the PNW level was, it should be the same for concessions and DOT-assisted contracts.

Many comments from ACDBEs and from an ACDBE trade association, as well as some airports, said that the final rule should not include any PNW standard or that the cap should be significantly higher (e.g., \$3-10 million). Their main argument, which some comments fleshed out with real-world examples, is that in order to finance business expansion in a capital-intensive field like concessions, lenders required very high asset levels on the part of owners. If a business could not expand without its owners accumulating enough assets to exceed the \$2 million cap, the ACDBE program would create a glass ceiling.

Some comments suggested ways of limiting the adverse effects of PNW. These included (1) making PNW a rebuttable presumption; (2) establishing a sliding scale for PNW, relative to the projected gross sales of the business; (3) having a two-tier (e.g., entry and retention) standard; (4) establishing some system that would reflect the individual situations of businesses and owners, and (5) excluding from the PNW calculation assets encumbered (e.g., as collateral for a loan) for business purposes. A number of commenters also favored grandfathering existing concessionaires, so they did not lose their certification and contracts because of a new PNW standard coming into being.

Since the 2000 SNPRM, Federal courts have decided a number of cases upholding Part 26 as being narrowly tailored. The existence of the \$750,000 PNW cap in Part 26 was one of the factors leading to these successful defenses of the regulation. This strengthens the Department's belief that a PNW cap of this kind is appropriate to add to Part 23.

The Department has concluded that \$750,000 is an appropriate standard for PNW. It is consistent with the Part 26 standard, and it has been approved by the courts in that context. Having only one PNW standard will avoid confusion between the Part 23 and Part 26 portions of the Department's DBE program. It

will avoid concerns about overinclusiveness in the program by ensuring that persons who would fairly be perceived as too wealthy for a program aimed at assisting “disadvantaged” individuals do not participate. It responds to the concerns about confusion and fraud that were the basis for the OIG’s recommendation.

At the same time, the Department is sensitive to the concern of commenters that a PNW standard at this level could inhibit opportunities for business owners to enter the concessions field and expand existing businesses. We do not believe that having a substantially higher PNW standard across the board is the best way to respond to this concern: too high a standard would undermine the rationale for having a PNW standard in the first place. It could lead to concerns about overinclusiveness and to the perception that the program was not appropriately focused on disadvantaged individuals.

In calculating PNW, Part 26 makes reasonable exclusions for the business owner’s equity in his or her owner’s primary residence and the business applying for certification. In the different business context of concessions, the Department will add a third exclusion. Assets that the owner/applicant can demonstrate are necessary to obtain financing to enter or expand a concessions business at an airport subject to Part 23 (e.g., by producing letters from banks to that effect) would also be excluded from the PNW calculation, as would assets that have in fact been encumbered to support existing financing for the applicant’s business. This provision would extend only to “recourse” assets (i.e., those that were encumbered or to be encumbered in order to obtain financing, as in a case where an asset is used a collateral for a loan).

For example, if the owner/applicant for ACDBE certification to operate a fast food franchise at an airport could document that MegaBurger Corporation requires the franchisee to have \$X in assets before it will grant the franchise, that amount would be excluded from the PNW calculation. Likewise, if the owner of an ACDBE retail or service business who wished to expand operations to another

airport could document that a number of financial institutions required \$Y in personal assets to back a loan needed for the expansion, \$Y would be excluded from the PNW calculation. Airports/UCPs would be responsible for verifying the documentation pertinent to this exclusion.

Without unduly expanding the well-accepted \$750,000 standard, this approach will take into account individual circumstances and avoid the “glass ceiling” effect of an across-the-board PNW standard about which commenters were concerned. There will be additional information that owners will have to obtain and recipients and UCPs will have to evaluate, but we believe that this is justified in the interest of a narrowly tailored regulation that remains fair and flexible regulation that achieves the objectives of nondiscrimination and opening business opportunities to ACDBEs.

To prevent the eligibility standards from becoming too open-ended, resulting in the participation of individuals so wealthy that it would be difficult to justify their inclusion in a program aimed at disadvantaged individuals, we are adding a \$3 million cap on this third exclusion. This figure is consistent with many comments concerning the appropriate extent of a PNW threshold. That is, an applicant could present documentation to the certifying authority that he or she required a certain amount of assets to open or expand a concessions business. If that amount exceeded \$3 million, the amount of the individual’s net worth above \$3 million would be added to the PNW calculation.

Here is an example of how these provisions would work. A hypothetical business owner, Ms. T, has a gross PNW of \$4.6 million. The equity in her primary residence is \$400,000. Her equity in the business is \$500,000. She produces adequate documentation from at least two financial institutions that they will require \$3.6 million in assets to support their granting the loan necessary to open a concession business at a particular airport. (Ms. T’s documentation would also need to justify the need for a loan of the amount

referenced in the letters from the financial institutions, documenting the build-out costs and other capital investment needed to begin operating the concession.)

Because \$3.6 million exceeds the \$3 million cap on the third exclusion from the PNW calculation, \$600,000 would count toward that calculation. In this case, her net PNW would be \$700,000 (\$4.6 million - \$3 million - \$400,000 - \$500,000). This amount is less than the PNW threshold, so Ms. T would be an eligible ACDBE owner. However, if her gross PNW were \$5 million, then her net PNW, after subtracting all three exclusions, would be \$1.1 million, putting her over the PNW threshold and making her ineligible to be an ACDBE owner.

Certifying authorities need to carefully evaluate accounting mechanisms that applicants may use to try to circumvent the PNW threshold. For example, if within two years prior to or following an application for certification, an applicant transfers assets (e.g., to a family member or to a trust), the certifying authority should regard those assets as continuing to count against the applicant's PNW.

Because we often receive questions on this point, we want to emphasize that PNW is calculated separately for each individual who the applicant business claims to be a disadvantaged owner and controller of the business. In a situation where there is more than one disadvantaged individual involved in a business, PNW is not aggregated for the owners. It remains an individual-by-individual calculation. It is never necessary to obtain PNW statements from people who do not claim to be disadvantaged individuals for purposes of ownership or control (e.g., a white male who is a participant in the company).

3. Counting ACDBE credit for car rental companies. The issue of how to assign DBE credit to car rental companies is the longest-running, most divisive issue in the history of Part 23. Briefly stated, the issue concerns situations in which a car rental company purchases an often large number of cars (a "fleet purchase") from a motor vehicle manufacturer. Typically, the vehicles themselves are

transported directly (“drop-shipped”) from the manufacturer (e.g., Ford or General Motors) to the car rental company’s airport facility, never physically touching the property of a car dealer. However, usually because of state laws that require vehicles to be purchased from a car dealer, the transactions are invoiced through a dealer, who receives a small fee for processing the paperwork.

If the dealer in this situation is an ACDBE, how much ACDBE credit is it appropriate for the car rental company to claim? Is it the entire value of the vehicle (many thousands of dollars) or merely the transaction fee that the dealer receives (perhaps \$50-200)? Under normal DBE counting principles, such as those of §26.55, the answer is clearly the latter. A DBE whose commercially useful function is limited to processing or expediting a transaction, and who does not meet the rule’s definition of a regular dealer with respect to the items in question, receives only its fee or commission for the work it actually does. Even if it is acting as a regular dealer, credit is limited to 60 percent of the value of the goods purchased.

However, subsection (e)(4)(B) of the ACDBE statute provides that “a car rental firm shall be permitted to meet the [ACDBE goal] requirement by including purchases or leases of vehicles from any vendor that qualifies as” an ACDBE. Car rental industry commenters have argued strongly, in response to the 2000 SNPRM and its predecessors, that this provision means that airports must count the entire value of cars purchased via ACDBE car dealers, however contrary such a result would be to the way DBE credit is counted in any other context.

Prior to the 2000 SNPRM, trade associations for ACDBEs and car rental companies made a joint recommendation to DOT to resolve the issue. They proposed that, of the first 10 percent of an airport’s concession-specific goal for a car rental company, 70 percent could be achieved by counting the full value of cars purchased through ACDBE dealers, with the remaining 30 percent

accounted for by other purchases of goods and services from ACDBEs. However, for any increment of an airport's concession-specific goal over 10 percent, the car rental company could achieve all of that increment through counting the full value of cars purchased through ACDBE car dealers. The 2000 SNPRM proposed to adopt the recommendation, except for the provision calling for being able to meet all of the portion of a goal exceeding 10 percent via counting the full price of cars purchased through ACDBE car dealers.

Comments to the 2000 SNPRM took a variety of positions on the proposal. Three airports and an airport trade association opposed permitting car rental vehicle purchases to count toward goals. Another airport said that airports should get DBE participation by subcontracting with DBEs that directly own a concession. The airport trade association and four airports opposed the "10 per cent" provision of the trade associations' recommendation, which the Department had not included in the SNPRM. A car rental trade association, on the other hand, insisted that the Department must accept all provisions of the recommendation, including the 10 percent provision, and the ACDBE trade association that had joined in the recommendation continued to support it.

In the SNPRM, the Department also proposed a two-goal structure, with separate overall goals for car rental companies and all other concessionaires, respectively. As discussed later in this preamble, the Department is adopting this proposal. This provision has the important benefit of preventing the often very large gross receipts of car rental companies and potentially very high DBE participation dollar amounts resulting from counting the full value of vehicles in toward DBE goals from overwhelming DBE goals and participation in other areas of concessions. Having this separate goal for car rental companies therefore significantly reduces the possibility of skewing the program and limiting opportunities to other DBEs as the result of permitting car rental companies to count the full value of vehicles purchased through ACDBE car dealers.

For this reason, and in order to avoid any possibility of conflict with the statute, the Department has decided that the final rule will permit car rental companies to count the full value of vehicle purchases from ACDBE car dealers. We are not adopting the trade associations' recommendation. While we appreciate the associations' efforts to find a compromise resolution to this issue, we believe that there is no sound basis for mandating the proposed 70/30 division or for the use of the statute's aspirational 10 percent goal to play an operational role in determining how ACDBE credit is counted. In fact, we believe the use of the 10 percent goal in this way is inconsistent with a narrowly tailored ACDBE program.

Nevertheless, the Department is concerned that this resolution of the issue could have adverse effects on ACDBEs who seek to sell services or goods other than vehicles to car rental companies. Consequently, airports would require car rental companies to document to the airport the good faith efforts they have made to obtain participation from ACDBE vendors of goods and services (other than car dealers). Airports would not set a numerical goal for the use of these vendors, and there are many ways that car rental companies could show good faith efforts to this end. One of these might be for a car rental company, as suggested by the trade associations' recommendation, to obtain 30 percent of its ADCBE credit from the use of ACDBE vendors of goods and services.

4. Overall Goals. In Part 26, the Department established a data-driven overall goal-setting mechanism that directed recipients, including airports, to establish a goal estimating the amount of DBE participation that they would expect if there were a "level playing field" in contracting, free from the effects of discrimination. Recipients were also required to estimate how much of that goal could be achieved through race-neutral means. Recipients were permitted to use race-conscious means, such as contract goals, only to obtain that part of their overall goal they could not achieve through race-neutral means. The rule made clear

that recipients were not to be penalized for not making their overall goal, and that the statutory 10 percent goal was an “aspirational” goal that did not affect the operation of recipients’ DBE programs. Since Part 26 was issued, every Federal court that has considered the question has determined that this goal setting mechanism is consistent with narrow tailoring requirements of constitutional law.

The 2000 SNPRM for Part 23 essentially proposed to adopt, in a somewhat shortened form, the Part 26 goal-setting concepts. In addition, the SNPRM proposed a two-goal structure for concessions. That is, airports would set one overall goal for car rental companies and another overall goal for all other concessions. The purpose of this structure was to ensure that the much larger dollar volumes and much broader counting rules involved in the car rental industry at many airports did not so skew the airport’s goal that other types of DBE businesses could not benefit from the program. The Department also sought comment on the idea of having a nationwide goal for major car rental companies, somewhat analogous to the transit vehicle manufacturer goal provision of Part 26.

Six airports, an ACDBE trade association, and an ACDBE favored, and one airport and a consultant opposed, separate goals for car rental and non-car rental activities. A car rental association gave qualified support to the idea, but commented that it thought that each airport would need to make a separate compelling need finding with respect to car rentals. Five airports supported and one opposed allowing an option for national car rental goals; ACDBE and car rental industry trade associations expressed doubt that the idea was workable. Another large airport suggested separate goals for goods and services on one hand, and direct ownership arrangements for car rental companies on the other.

An airport trade association and nine airports asked for greater guidance and clarification on how the goal-setting system would work in the concessions area, saying that such factors as the absence of data comparable to the DOT-

assisted contracting world and the difficulty of integrating goods and services, management contracts, and direct ownership arrangements under the same overall goal made implementation very burdensome and confusing. Three of these commenters plus an ACDBE trade association said the same point applied to the race neutral/race conscious split in the concessions context. One airport supported the NPRM as written.

One airport wanted to use set-asides for car rentals. An airport trade association wanted airports to be able to set goals based on the number of concessions without going through a waiver procedure, and one airport supported the waiver process. A car rental industry trade association argued that race-neutral methods must be used chronologically before race-conscious methods could be used.

The Department believes that it is very important to include the two-goal structure in the final rule. We agree that it does, to an extent, increase the administrative workload of airports. However, it recognizes the differences between the car rental industry and other types of concessions, a difference that is meaningful in the context of a narrowly tailored regulation. Most important, in light of the statutory provision concerning the counting of vehicle purchases as a means of meeting car rental companies' ACDBE goals, it avoids a distortion resulting from the very large dollar amounts of participation attributed to ACDBE car dealers that could otherwise skew an airport's ACDBE program. Having a separate goal for non-car rental activities will ensure that retail businesses, management contractors, and other concessionaires will have the opportunity to compete on a level playing field not only vis-à-vis non-ACDBE firms, but also vis-a-vis firms in a very different industry where ACDBE participation is counted very differently. Having a separate goal for car rental companies does not, in our view, require a localized finding of discrimination pertaining specifically to the car rental industries. There is a national determination of compelling need for the entire program, and a division of

overall goals into two segments for administrative purposes does not call for additional findings of need for the program.

Particularly given that courts have found that Part 26, including its goal-setting mechanism, meets narrow tailoring requirements, the Department believes it is essential to conform the Part 23 goal-setting provisions as closely as possible to those of Part 26. These requirements are spelled out in greater detail here than in the 2000 SNPRM, which should assist airports in complying with them. We also give airports from 1-3 years to establish new goals, which should allow them time to complete the work involved. Of course, by this time, airports have had five years' experience in working with Part 26 goals, and so using a parallel mechanism in Part 23 should be an easier and more familiar exercise than it might have seemed in 2000. We would also call airports' attention to the goal-setting "Tips" on the Department's DBE web site (<http://osdbuweb.dot.gov/business/dbe/tips.html>). The Department plans to develop a revised version of these Tips specifically pertaining to airport concessions in the near future.

Because the Department believes it would be difficult to devise an overall goal based on the number of concession businesses or contracts, as distinct from the receipts of concession firms, the final rule does not include the provision allowing recipients to seek waivers to establish a goal on that basis, as the 2000 SNPRM proposed. However, airports can use the program waiver provision of §23.13 to request authority to use a goal-setting mechanism that differs from that of Subpart D of Part 23.

While the idea of a transit vehicle manufacturer-like nationwide goal for large car rental companies remains intriguing, the Department is not sure that this approach is feasible. Therefore, rather than include such a provision in the final rule, we are asking for further comment on this subject in the SNPRM. Set-asides and quotas are not an appropriate part of a narrowly tailored rule, and Part 23 prohibits airports from using these measures.

The argument that recipients must, in a chronological sense, use race-neutral methods before they can use race-conscious methods has been raised in litigation under Part 26. It has not prevailed. Nor does it make sense as policy. Airports are required to give priority to the use of race-neutral means, meaning that they must achieve as much as possible of their overall goals through race-neutral means. The utility of race-neutral means, or the necessity of race-conscious means, is likely to vary throughout the year as different sorts of business opportunities occur. For example, obtaining ACDBE participation in one business opportunity in February of a certain year may require race-conscious measures, while an excellent race-neutral opportunity may occur in November of that year.

Section-by Section Analysis

This portion of the preamble discusses, in turn, each section of the final rule, providing, as appropriate, responses to comments, additional information about the Department's rationale for adopting individual provisions, and the Department's intent for how the provisions should be interpreted and implemented.

§23.1 What are the objectives of this part?

The objectives of this program are very similar to those stated for Part 26. Extensive information has been developed over the years, which may be found in such sources as disparity studies of which the Department is aware and data presented to Congress (e.g., in the context of the floor discussion of the 1998 reauthorization of the DBE program for Federal Highway Administration and Federal Transit Administration financial assistance) that supports the proposition that there is not a level playing field for small disadvantaged businesses in the U.S. The legislative history of the original ACDBE statute itself shows that Congress was very concerned that DBE firms had the "fair" (i.e.,

nondiscriminatory) access to concession opportunities (see 133 Congressional Record 25986-87; October 1, 1987).

Under Part 26, many airports have had to continue race-conscious methods to achieve their overall goals, which are in turn a measure of the level of DBE participation they could expect absent the effects of discrimination. There is no reason to believe, and no one has submitted any information to the Department's rulemakings to suggest, that airport concession programs are exempt from the effects of discrimination to which other public sector business activities at airports and elsewhere are subject. Race-conscious methods continue to be a necessary part of a narrowly tailored strategy to ensure nondiscrimination in concessions.

§23.3 What do the terms used in this Part mean?

Most of the comment on this section concerned the issue of whether advertising firms should be included in the definition of "concession." A substantial number of letters from mostly small-to-medium sized airports supported including advertising companies. One large airport opposed doing so. Three of the comments favoring advertising suggested limitations. One said that only billboards on public access roads to the terminal or other facilities for travelers should count. Another said only in-terminal ads should count. The third said that only companies "primarily" in the business of advertising in terminals should be viewed as concessions (as opposed, for instance, to telecommunications or internet companies whose terminal ads were tangential to their main business).

While the existing Part 23 does not explicitly address the issue, many airports have certified advertising firms as DBEs for many years. Advertising appears to be a field in which DBE firms have had some success. It is also a field in which small businesses, including ACDBEs, must often compete against very

large corporations. The level playing field that Part 23 attempts to provide is of considerable importance to firms in that position.

Like management contractors and some providers of telecommunications services, advertising firms often do not have stores located on the airport. Nevertheless, firms of these kinds provide important services to members of the public who use the airport. These firms have the objective of selling products to the public, and their existence at airports provides services to the public. They have financial relationships with the airport similar to those of more traditional food and retail concessions. We do not believe it would be sound policy, or required by law, to oust advertising firms from the ACDBE program. Consequently, to avoid confusion, we have explicitly included such firms in the “concession” definition. We do not think it would be useful to limit their participation to a particular advertising location on the airport, such as terminals or billboards along access roads; the legal and policy situation of one such location is not readily distinguishable from others.

Consistent with the 1992 amendment to the statute, the definition of “concession” now specifically includes firms with management contracts or subcontracts and businesses that provide goods and services to other concessionaires. Of course, businesses of this kind must be certified as ACDBEs in order to generate ACDBE credit in this program.

The definition of an ACDBE is consistent with that of Part 26. With some exceptions, the certification provisions of Part 26 apply to ACDBEs. Some comments addressed the provision of certification standards stating that an ACDBE must be an existing business. Four large airports opposed this requirement (one suggested that a firm could be certified based on its business plan). Their main rationale was that the requirement would be a barrier to new businesses. One large airport supported the requirement. We believe that it is important to retain this requirement, in order to ensure that only genuinely eligible businesses are certified as ACDBEs. When a business is still in the

process of formation, it is all the more difficult to determine whether disadvantaged individuals really own and control it. It is difficult to make a site visit to a business plan. Given the increased emphasis on preventing DBE fraud, we believe that the existing business requirement is essential. At the same time, as under Part 26, it is not appropriate to refuse to certify a business solely because it is a new business, but it must exist.

A car rental association continued to advocate the position, which it had taken in comments on previous proposed rules, that so-called “dealers in development” (i.e., dealers participating in manufacturers’ development programs that did not fully meet Part 23 ownership and control criteria, such as 51 percent ownership by disadvantaged individuals) should be certified as ACDBEs. In the preambles to its 1997 and 2000 proposals, the Department had explained at some length why we concluded that a business that did not meet generally applicable DBE ownership and control criteria should not be certified as an ACDBE. Nothing in the comments in the docket for this rulemaking has provided a persuasive reason to change the Department’s position.

Concession businesses must serve the public on the airport. Airport and ACDBE trade associations, one business, and nine airports supported the consequent concept that businesses on airport property that do not primarily serve travelers should not be counted as concessions. One commenter suggested waiving this requirement for small airports in Alaska. We agree that businesses that do not primarily serve the public should not be viewed as concessions. If one or more small businesses or airports in Alaska wish to seek a waiver from this provision, they may apply under the provisions of §23.13.

One commenter asked whether management contracts included contracts for the management of hotels on the airport. While it is not necessary to include this level of detail in the regulatory text, we see no reason to believe that hotel management contracts would be treated differently from any other kind of management contracts. In evaluating the whether a management contractor

provides a commercially useful function and the amount of ACDBE credit that should be given for the contractor's work, an airport should scrutinize carefully the actual tasks performed by the ACDBE as an entity to make sure that they are consistent with the credit claimed.

One large airport suggested that the joint venture definition not require that the DBE partner perform an independent part of the work, arguing that concessions joint ventures did not operate in this way. We have become aware that some concessions joint ventures indeed do not involve an ACDBE performing an independent part of the work; some of these have been the focus of fraud investigations by the Department's Inspector General and other law enforcement organizations. If the ACDBE participant is not required to perform independently a distinct portion of the joint venture's work, it becomes very easy for a prime concessionaire seeking to circumvent ACDBE requirements by having an ACDBE "silent partner" on its payroll. We believe that changing this provision would adversely affect the integrity of the program. Because joint ventures have become a problematic part of the ACDBE program, the Department is drafting additional guidance on the subject, which we intend to post on the DOT DBE web site as soon as it is available.

We also note that UCPs and airports should not certify joint ventures themselves as ACDBEs, and the definition makes this point explicit. By definition, a joint venture is an association of an ACDBE and another firm to carry out a single business enterprise. As noted in Part 26 (§26.73(e)), "[a]n eligible DBE firm must be owned by individuals who are socially and economically disadvantaged... [A] firm that is not owned by such individuals, but instead is owned by another firm -- even a DBE firm -- cannot be an eligible DBE." Even if a joint venture is more than 51 percent owned by a ACDBE firm, therefore, the joint venture -- because it is owned by other firms, not directly by disadvantaged individuals -- cannot be an eligible ACDBE firm. (This same point applies to DBEs under Part 26.) We note that, given the counting rule for

joint ventures in Parts 23 and 26, this fact should not make any difference in the way that ACDBE credit is counted. Credit toward DBE goals is awarded under both rules only for the distinct, clearly defined portion of the work of the joint venture performed by the DBE or ACDBE participant, regardless of the certification status of the joint venture entity. In reviewing currently certified firms (see §23.31(c)), airports and UCPs should remove joint venture entities (though not certified DBE firms that participate in joint ventures) from their directories, consistent with this direction.

The other definitions are consistent with those in Part 26 and have not changed substantively from the 2000 SNPRM. They were not the source of additional comment. We have added, for administrative purposes, definitions of small, medium, large hub, and non-hub primary airports.

§ 23.5 To whom does this part apply?

This section recites that Part 23 applies to airports that have received FAA financial assistance for airport development since January 1988, when the Department's airport concessions DBE rules first went into effect. Note that, under §23.21, not all airports covered by Part 23 are required to have an ACDBE program.

§23.7 How long do the provisions of this part remain in effect?

The Department is introducing a "sunset" provision into the final rule as a way of addressing the durational element of narrow tailoring. A narrowly-tailored rule is not intended to remain in effect indefinitely. Rather, the rule should be reviewed periodically to ensure that it continues to be needed and that it remains a constitutionally appropriate way of implementing its objectives. Consequently, this provision states that this rule will terminate and cease being operative in five years, unless the Department extends it. We intend, beginning four years from now, to review the rule to determine whether it should be

extended, modified, or allowed to expire. Of course, the underlying DBE statute remains in place, and its requirements continue to apply regardless of the status of this regulation, absent future Congressional action.

§ 23.9 What are the nondiscrimination and assurance requirements of this part for recipients?

This section cross references the nondiscrimination requirements of Part 26 and provides the text of assurances that airports must include in concession agreements and management contracts in the future. The section does not require airports to revise existing contracts to include the assurance text.

§23.11 What compliance and enforcement provisions are used under this part?

This section recites that standard FAA/DOT enforcement procedures – the same ones used for Part 26 – apply to Part 23.

§ 23.13 How does the Department issue guidance, interpretations, exemptions, and waivers pertaining to this part?

This section parallels Part 26, §26.15, concerning guidance, interpretations, exemptions and waivers. Program participants should note that guidance provided concerning existing Part 23 should not be relied upon in the future, given the many changes made in this final rule. The Department will issue new or revised guidance concerning the revised Part 23.

§23.21 Who must submit an ACDBE program to FAA, and when?

The basic trigger for the requirement to have an ACDBE program is being a primary airport and receiving FAA financial assistance. Other categories of airports (e.g., non-primary or general aviation airports) do not have to submit an ACDBE program. Airports that currently have a DBE program under the existing Part 23 must update their programs to meet the requirements of this new

rule. They will do so on the same three-year staggered schedule provided for submission of ACDBE goals (i.e., next January for large and medium hubs, next year for small hubs, and the following year for non-hub primary airports).

Until FAA approves revised programs, airports will continue to use their existing concessions DBE programs. Airports should review their programs immediately to ensure that they do not contain any provisions that are contrary to this part, however. For example, this part prohibits the use of set-asides. If an airport's current program provides for the use of set-asides, that provision should be deleted at once, even though the airport's revised program is not due be submitted to FAA until one to three years from now.

§23.23 What administrative provisions must be in a recipient's ACDBE program?

§23.25 What measures must recipients include in their ACDBE programs to ensure nondiscriminatory participation of ACDBEs in concessions?

Section 23.23 provides a structure for a recipient's ACDBE program that is parallel to that for Part 26 DBE programs. Indeed, where an airport must have both an ACDBE program and a DBE program, the administrative provisions can be combined to a considerable degree.

Section 23.25 requires goal-setting as provided in Subpart D of Part 26, the use of race-neutral measures by airports themselves to obtain DBE participation, and the use of race-conscious measures like concession-specific goals when race-neutral measures standing alone are not sufficient to meet overall goals. Airports are expected to include the race-neutral and, if needed, race-conscious measures they will implement in the ACDBE programs they submit to the FAA. The section notes that concession opportunities are to be sought in all areas of the concession industry, so that different kinds of businesses have the chance to participate. It is not appropriate to have a single area of concessions or a few

firms so dominating ACDBE participation that others lack a realistic opportunity to help meet the overall goal.

Section 23.25(f) is a new paragraph incorporating the last clause of subsection (e)(3) of the statute. Paragraph (f) provides that an airport's ACDBE program "must require businesses subject to ACDBE goals at the airport (except car rental companies) make good faith efforts to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with DBEs." Both in the statute and in paragraph (f), this requirement operates in the context of the ability of airport businesses to meet ACDBE goals through the purchase of goods and services from ACDBE vendors. While meeting goals through the purchase of goods and services is authorized, it is important for ACDBE goals to encourage the participation of ACDBEs in a variety of ways. It is a healthier situation for ACDBE programs, for example, if ACDBE participation a business or airport comes not only through goods and services purchases but also through individual concessions run by ACDBEs.

The parenthetical "except car rental companies" reflects another provision of the statute (subsection (e)(4)(C)), which provides that car rental firms are not required to change their corporate structure to provide for direct ownership arrangements. This means, for example, that car rental companies that operate corporation-owned stores cannot be required to obtain ACDBE participation through such means as subleases or joint ventures. This limitation does not apply to non-car rental concession businesses, however. Even if a non-car rental business (e.g., a news and gift shop company) normally operates corporation-owned stores, direct ownership arrangements with ACDBEs that might alter or create an exception to the firm's normal way of doing business are among the options the business must make good faith efforts to explore under this provision.

§23.27 What information does a recipient have to retain and report about implementation of its ACDBE program?

Recipients must save compliance information for three years. Beginning March 1, 2006, recipients will submit a report of ACDBE participation (see Appendix A). The report is a modification of the Part 26 reporting form that the Department issued in June 2003, with instructions adapted for purposes of the ACDBE program.

§23.29 What monitoring and compliance procedures must recipients follow?

Ensuring that participants in the ACDBE program comply with the requirements of this rule and preventing fraudulent activities in the program are among the most important responsibilities of recipients. It is not enough merely to set goals and award concessions; airports must make sure that promised ACDBE participation really occurs after award and that participants are not able to circumvent the requirements of the program to the detriment of actual ACDBE participation. Each ACDBE program must include the monitoring and compliance measures the airport will use, including levels of effort and resources devoted to this task. For example, the program would describe the frequency of reviews of records, on-site reviews of concession workplaces, etc. to determine whether ACDBEs are actually performing the work for which credit is being claimed and that participants are not circumventing program requirements. This kind of oversight is crucial to combating ACDBE fraud, and FAA will closely scrutinize this aspect of ACDBE programs to ensure that levels of effort are sufficient.

In addition, if an airport includes additional provisions beyond what Part 23 requires (see §23.77), FAA has a responsibility to review such provisions and work with airports to ensure that additional provisions do not create policy or

legal problems. FAA will reject program submissions that are inconsistent with Part 26.

Subpart C – Certification of ACDBEs

Certification under Part 23 basically follows the model of Part 26, with the exception of those areas – such as size standards, discussed above – in which the Department recognizes differences in the ACDBE and DOT-assisted contracts marketplaces. Firms certified under Part 26 are eligible under Part 23 as well, provided they can control the firm with respect to the concession activities involved. Part 26 certification standards and procedures – even if not specifically referenced in Part 23 – are intended to apply to the ACDBE program except where otherwise provided.

Section 23.39 mentions a number of other differences between Part 23 and Part 26 certification. These differences are self-explanatory, for the most part. The reason for not applying Part 26's special provision for Alaska Native Corporation-owned firms is that the statute requiring this provision in DOT-assisted contracts does not apply in the ACDBE context, since this context does not involve DOT-assisted contracts.

The eligibility of joint ventures has been a continuing problem under the DBE program, including both eligibility and operational issues that have called the legitimacy of joint venture arrangements into question. The Inspector General has pointed to situations in which joint ventures or similar arrangements appear to have been used as a subterfuge by firms seeking to evade or defraud the program. The rule's definition of joint ventures makes explicit that these entities should not be certified as DBEs in their own right. As noted above, the Department is planning to make available additional guidance concerning the use of joint ventures in the ACDBE program, including certification issues pertaining to joint ventures.

When the rule says that suppliers of goods and services to concessionaires are to be evaluated for certification as ACDBEs according to the provisions of this part (§23.39(i)), we mean that Part 23 provisions (e.g., concerning personal net worth and business size) are to be used for this purpose. Firms that provide goods and services to concessionaires are not subject to the somewhat different certification provisions of Part 26.

In certain respects, particularly with respect to personal net worth, this rule changes the eligibility criteria for ACDBEs. Consequently, airports or UCPs, are required to review the eligibility of currently certified firms. These reviews must take place within three years of the most recent certification of the firm, or a year from the rule's effective date, whichever comes later. Any firm that loses eligibility because of the new PNW requirements would be able to complete work on an existing contract or other concession agreement, with its participation counted toward ACDBE goals. Options, extensions, renewals, etc. of the firm's participation beyond the termination of the agreement in force at the time of the firm's decertification would not count as DBE participation, however.

We emphasize that Part 26 standards do apply to certifications under Part 23 for most aspects of ownership and control. For example, absentee ownership of firms raises the same control issues in a Part 23 context as it does in a Part 26 context (see §26.71(j)). Also, as the definition of "concession" now explicitly provides, recipients should not certify holding companies as ACDBEs. Holding companies do not perform concession activities. While holding companies may play a narrow role in DBE and ACDBE firms (see §26.73(e)), the holding companies themselves are not certified in this role. Recipients should pay careful attention to affiliation relationships between and among holding companies and their concession subsidiaries. It is likely that, when a concession that is owned by a holding company seeks certification, the concession is affiliated with both the holding company itself and other subsidiaries of the holding company. These

relationships can have important effects on the ability of the applicant firm to meet size standards.

Recipients should also pay close attention to affiliation relationships that may arise in joint venture arrangements. If one participant in a joint venture – or other business arrangement – exerts too much control over the business decisions and operational activities of another, then there may be an affiliation relationship between the two and/or an issue of whether the second firm is sufficiently independent to be certified.

On-site reviews are a key part of the concession certification process. The Department realizes that, particularly for a concession that does not yet have a location established on an airport, it may be difficult to identify a “job site” at which to conduct such a review. In this case, recipients could conduct the on-site review solely at the firm’s headquarters or other principal place of doing business.

At the time that this rule is being issued, not all states have approved unified certification programs (UCPs). Until a UCP is approved and in operation for a given state, individual airports in that state continue to have responsibility for certifying ACDBEs. Once a UCP is approved and in operation in a state, certification of ACDBEs becomes the responsibility of the UCP, rather than of individual airports.

§23.41 What is the basic overall goal requirement for recipients?

Having overall goals is a basic requirement of airports’ ACDBE programs, without which airports are not eligible for FAA financial assistance. Overall goals cover periods of three years, rather than one year as in the case of Part 26, in recognition of the longer time frames involved in concession relationships between businesses and airports. As discussed above, recipients are required to have two separate overall goals: one for car rentals, and one for all concessions other than car rentals.

There is an important exception to this general rule, designed to reduce administrative burdens on airports that have little or no concessions activity. If an airport has less than \$200,000 in concessions revenue (averaged over three years), in either the car rental or non-car rental category, then the airport does not have to submit an overall goal in that category. The Department believes that requiring airports that have little or no concession revenues to pursue the overall-goal setting process is likely to be unproductive, if not altogether futile. At the same time, this provision focuses ACDBE goal-setting efforts on those airports where these efforts are most likely to result in meaningful ACDBE participation. Airports that did not have to set an overall goal for one or both categories would still be required to pursue race-neutral means to provide opportunities for ACDBEs in their concessions activities.

This determination is made separately for each of the two overall goal categories. For example, suppose Airport X has had non-car rental concession revenues of \$150,000, \$200,000, and \$175,000 in 2002, 2003, and 2004, respectively. Under this rule, it would not have to submit a non-car rental overall goal in 2005, because the average of its non-car rental revenues over the preceding three years was less than \$200,000. On the other hand, if Airport X's average car rental concession revenues were \$300,000 for the same period, it would have to submit an overall goal for car rentals in 2005.

Based on recent FAA data, virtually all larger airports (large and medium hubs) would have to submit both overall goals. These airports account for the vast majority of all concession revenues in both the car rental and non-car rental categories. Among intermediate-size airports (small hubs), all but five of 69 would have to submit car rental goals, and 50 of the 69 would have to submit non-car rental goals. Among 390 small airports (non-hubs), 309 would not have to submit car rental goals and 233 would not have to submit non-car rental goals.

Many of these small airports (165 with respect to car rentals, and 92 with respect to non-car rental concessions) report no concession revenues in those categories.

As under Part 26, goals must be for DBEs in general, as opposed to group-specific goals for one or another subgroup of DBEs. Also as under Part 26, airports can apply for a program waiver of this provision if, based on evidence (e.g., from a disparity study) showing underutilization only of certain groups, they believe that use of group-specific goals is necessary to achieve the objectives of a narrowly-tailored program.

§23.43 What are the consultation requirements in the development of recipients' overall goals?

§23.45 What are the requirements for submitting overall goal information to the FAA?

The process of setting overall goals includes consultation with stakeholders in the ACDBE program. A public comment period, as such, is not required, however. In the Department's experience with Part 26's requirement for a comment period, few comments have been received by most recipients. We do not believe that such a requirement would be productive in the concessions context, which is even more specialized and less likely to be the subject of meaningful comment from anyone except stakeholders, who are covered by the consultation requirement.

The rule requires recipients to submit overall goals every three years. In order to give smaller airports more time to work with the goal-setting process, we are establishing the following schedule for submitting new overall goals and new ACDBE programs: January 2006 for large and medium hubs, October 2006 for small hubs, and the October 2007 for smaller primary airports. Revised goals are then due October 2006, 2007, and 2008, respectively, and every three years thereafter. If an airport changes status (e.g., a small hub increases in size to

become a medium hub), it will stay on the original schedule. This will also mean that FAA will not have to focus on reviewing goals from all airports in any one year, making its review process more efficient. In the time before an airport has its first new goals under this rule approved by FAA, it must continue using its existing goals.

Some airport commenters asked for additional flexibility in terms of submission dates for goals (e.g., with respect to airports' fiscal years, which differ from the Federal fiscal year in some cases). In our view, it is not as necessary to tie the submission of concessions goals to fiscal years as it may be for Part 26 goals, since the latter are more dependent on contracting under a particular fiscal year's Federal funds. However, if an airport has difficulty with the standard goal submission dates in the final rule, it can ask FAA for a program waiver to establish a different date for its submissions.

§23.47 What is the base for a recipient's goal for concessions other than car rentals?

§23.49 What is the base for a recipient's goal for car rentals?

Section 23.47 concerns the base for the first of the two overall goals that airports must set. The base for this goal includes the gross receipts of all concessions at the airport, with three important exceptions. First, as the title of the section indicates, the receipts of car rental concessions are not counted in the base for this goal. Secondly, companies' receipts that are not generated from concession activities do not become part of the base. In the example provided in the regulatory text, the receipts generated by a restaurant in the terminal are added to the base, while the receipts of the same food service company's flight catering activities are not.

The third exception is statutory, required by the plain language of 49 U.S.C. 47107(e)(2). Under this statutory provision, the dollar amount of the management contract or subcontract with an ACDBE and the gross receipts of a business activity to which such a management contract or subcontract pertains are added to the base for this goal, while the dollar amount of the management contract or subcontract with a non-ACDBE firm and the gross receipts of business activities to which such a management or subcontract pertains are not.

Section 23.49 concerns the second of the two goals, that for car rentals. It is straightforward: the base for this goal includes the total gross receipts of car rental operations at your airport, and nothing else. In setting car rental goals, airports may take into account the way in which car rental participation is counted, so that goals remain proportional to the type of participation submitted by the car rental companies.

§23.51 How are a recipient's overall goals expressed and calculated?

This section concerns the very important subject of airports' calculation of overall goals. It applies to both the overall goal for car rentals and the overall goal for other concession activities. It is designed to parallel the goal-setting mechanism of Part 26, which has withstood a number of legal challenges.

We recognize that, particularly for some large airports, it is possible that the market area for many types of concessions could be nationwide in scope. Even some of the smaller airports may have national or regional market areas in some or all of their concession categories. As the Department develops goal-setting guidance for airports, we will explore, in cooperation with the Census Bureau and airports, whether it would be possible to establish national availability estimates in particular categories. If this approach proves feasible, it would allow the Department to go ahead and set availability estimates in a

number of industry categories, which could allow concerned airports to simply use those estimates with whatever weights are appropriate for each airport.

We are aware of the concern some airport commenters expressed about the utility of existing data to set goals for concessions. In this context, it is important to remember that what the rules call for is the best available data. The rules do not demand perfect data. It is likely true that Census data and the NAICS codes do not specify what firms are willing to work in the airport context. This, of course, is also true in the DOT-assisted contracting context. For example, the NAICS codes do not tell us which florists are willing to be florists at airports. By the same token, the codes do not indicate which heavy construction firms are willing to perform heavy construction at airports. Despite this, we still use the NAICS codes to provide an indication of availability in the construction context, and we can use the same codes in the florist context as well.

Looking at the Census Bureau's County Business Patterns database, it appears that the primary codes most likely to be useful to airports will probably be 44 (Retail Trade) and 72 (Accommodation and food services). Both of these categories break down into 6 digit codes in most (even small) metropolitan areas and counties. For instance, 44 includes tape, CD and pre-recorded music stores (451220), florists (453110), and gift, novelty and souvenir stores (453220). NAICS code 72 includes, among other things, cafeterias (722212), full-service restaurants (722110) and drinking places (alcoholic beverages) (722410).

We would point out that even some specialized types of business that operate as concessions have NAICS codes of their own (e.g., 812113 for nail salons and 454210 for vending machine operators). Even shoeshine kiosks, which do not have a specific NAICS code, can be included a broader category of "other personal services." The fact of the matter is that these categories are probably more specific than the categories available for construction and other

activities frequently used under Part 26. We see no reason that the Census databases and NAICS codes cannot be used for goal-setting under Part 23.

One potential problem that we would ask airports and UCPs to address is the potential under-representation of ACDBEs in directories. That is, program participants have expressed concern that, because concession opportunities occur less frequently than Part 26 contracting opportunities, and because certification offices may have been more focused on Part 26 contracting, fewer ACDBEs may appear on some certification lists. This could lead, in turn, to Step 1 relative availability calculations being unrealistically low. The Department recommends that airports and UCPs conduct outreach activities to encourage potential ACDBEs to seek certification. Airports could also augment their counts of available DBEs with firms in local MBE/WBE directories and Part 26 DBE directories (i.e., with respect to firms on those lists in concession-relevant NAICS codes), or trade association lists. Moreover, to the extent they have evidence of ACDBE under-representation in directories, airports could use this evidence as part of a Step 2 adjustment.

The regulatory text does not use the term “bidders list” that Part 26 uses. Rather, Part 23 uses the term “active participants list.” This is because “bidding,” in the sense the term is used in DOT-assisted contracting, is often not used in the concessions context. In any case, the idea is to identify interested firms and build a list from that source. It is likely that many airports may have a strong sense of those firms that are likely to be interested in seeking concession opportunities. Their information comes from a number of sources, such as past experience with firms that have run concessions or sought concession contracts or leases, knowledge about the universe of firms in certain areas of retail and food and beverage service that tend to be interested in participating in airport concessions, and attendance lists from informational and outreach meetings about upcoming concessions opportunities. While these sources do not represent bidders lists in

the traditional sense, they appear feasible to develop and can provide a good source of availability data.

When the rule says that an airport can use the goal of another recipient as the basis for Step 1 of its goal-setting exercise, it should be noted that this concept is not necessarily limited to other airports in the same geographical area. For instance, suppose a large airport on the East Coast and a large airport on the West Coast both have a national market area for certain types of concessions. With appropriate adjustments for differences in local market areas and the airports' concession programs, these two airports might be able to use the same analysis in setting their goals.

§23.53 How do car rental companies count ACDBE participation toward their goals?

§23.55 How do recipients count ACDBE participation toward goals for items other than car rentals?

Section 23.53 addresses the issue of counting ACDBE participation for car rental companies, which is discussed at length under "major issues" above. Section 23.55 is the counting provision for other types of concessions, and it generally follows the counting provisions of Part 26. For example, when an ACDBE enters into a sub-concession agreement or lease with a non-ACDBE, the part of the work performed by the non-ACDBE is not counted toward goals. One exception to this pattern concerns regular dealers. Under Part 26, recipients may count toward goals only 60 percent of the value of goods purchased from DBE regular dealers. Under this section, however, recipients may count 100 percent of the value of items purchases from an ACDBE regular dealer. This difference is based on the greater role that goods and services purchases play in the concessions context and a lesser concern that overuse of goods and services purchases will distort opportunities for other contractors. In response to a

question from a commenter, goods and services purchased from ACDBEs by management contractors would also count toward goals, assuming that the goods and services are used for the management contractor's operations at the airport. This section also includes a few provisions peculiar to the concessions context, such as a provision directing that so-called "build out" costs of a concession not be counted toward ACDBE goals.

We wish to emphasize the provision of this section concerning counting the participation of ACDBE participants in joint ventures. Credit may be counted only for the independent, distinct portion of the work performed by the ACDBE with its own forces.

It is very important to avoid overcounting the value of the ACDBE's participation. For example, suppose a joint venture asserts that the portion of its work performed by the ACDBE participant involves the performance of professional or back office services. The joint venture claims credit amounting to 30 percent of its gross receipts for this function. If the business sought similar legal, accounting, payroll, personnel administration, etc. services from an outside firm, would the fees paid the outside firm amount to around 30 percent of its gross receipts? If not, then it is likely the joint venture is overvaluing the contribution of the ACDBE participant, and the airport should not count all the DBE credit requested.

As a policy matter, we believe it is preferable for ACDBE joint venture participants to actually have a defined role in the revenue-generating activities of the business (e.g., the joint venture runs four food service locations in the airport, and the ACDBE is directly responsible for one of them). There is a greater likelihood of confusion, counting, and other administrative difficulties, as well as of abuse, when ACDBE participation is claimed for joint ventures in which the ACDBE participant has only a vaguely defined role in the entity as a whole.

§23.57 What happens if a recipient falls short of meeting its overall goals?

§23.59 What is the role of the statutory 10 percent goal in the ACDBE program?

§23.61 Can recipients use quotas or set-asides as part of their ACDBE programs?

These three sections emphasize that recipients are not penalized for failing to meet their overall goals (i.e., failure to “hit the number”), that the statutory 10 percent goal is an aspirational goal that does not play an operational role in airports’ ACDBE programs, and that the use of quotas and set-asides is forbidden. All three provisions are taken from Part 26 (except that the prohibition on the use of set-asides has been strengthened), where they have been part of the narrowly-tailored approach to the DBE program that the Federal courts have approved.

§ 23.71 Does a recipient have to change existing concession agreements?

This section emphasizes that the changes in Part 23 do not require airports to change or abrogate existing concession agreements with private businesses. A few commenters had asked for reassurance on this point. However, airports must take advantage of opportunities that arise at the time of the renewal, modification, or extension of existing concession agreements to obtain a modified amount of ACDBE participation in the renewed or amended agreement.

§23.73 What requirements apply to privately-owned or leased terminal buildings?

This provision is virtually identical to the version in the 1997 and 2000 proposals. We did not receive any comments on it.

§ 23.75 Can recipients enter into long-term, exclusive agreements with concessionaires?

This provision continues the long-standing requirement that long-term, exclusive leases are prohibited, except where the airport obtains FAA approval. The section includes a procedure for obtaining such approval, including a list of information FAA needs before it can grant this approval. ACDBE participation is a key part of this information. Comments on the various proposed versions of this section generally favored requiring opportunities for DBE participation as part of a long-term, exclusive lease arrangement. Consistent with the Department's prior proposals, only FAA approval under this section will be needed for long-term exclusive leases. DOT approval through an exemption process will no longer be required.

One airport suggested making 10 years rather than 5 years the criterion for a long-term exclusive lease subject to this section. We have not adopted this comment because doing so would reduce the degree of oversight FAA can exercise under the rule to make sure that long-term concession agreements include adequate ACDBE participation.

FAA is currently working on revised guidance concerning long-term exclusive lease issues. FAA will issue this guidance, on the DOT DBE web site among other places, as soon as it is ready.

§ 23.77 Does this part preempt local requirements?

This section restates the statutory provision that the regulation does not automatically preempt all local requirements. However, local laws, regulations, and policies may not directly conflict with this regulation, and airports would have to take steps to avoid situations where a local requirement conflicts with a Federal requirement. It should be noted also that this provision refers to substantive DBE and similar requirements of local entities, and it in no way avoids the need to comply with Federal requirements for confidentiality (e.g., with respect to information submitted in response to PNW requirements).

A car rental trade association asked the Department to prohibit airports from having requirements involving such measures as bid preferences, preferences for the allocation of space, or good faith efforts pertaining to direct ownership arrangements. We have not adopted specific prohibitions, but have instead specified what is required of airports. Airports will be expected to comply with these Federal requirements and not impose any conflicting requirements.

The Department is concerned, however, that additional or more stringent local or state requirements that go beyond the provisions of Part 23 could implicate the Federal ACDBE program in matters of questionable constitutionality. We are adding a provision directing airports to attach copies of any provisions additional to those needed to carry out Part 23 requirements to their ACDBE program submissions. FAA will review these provisions, and FAA will not approve an ACDBE program if there are “go-beyond” provisions that are inconsistent with this rule. In any case, even where FAA has reviewed a state or local provision and determined that it does not conflict with Part 23, there should be a clear firewall between the ACDBE program and such additional state or local requirements. There must be a separate program document for them, and the Federal and state/local additional programs, respectively, must be administered in a clearly distinct manner.

§23.79 Does this part permit recipients to use local geographic preferences?

The 2000 SNPRM proposed that, in some cases, airports could use local geographic preferences in selecting concessionaires if they obtained a program waiver from the FAA. On further reflection, the Department has decided that the disadvantages of local preferences that we noted in the SNPRM, such as the elimination of the benefits of wider competition for business opportunities and the possible loss of opportunities for DBEs who are not located in the locality served by an airport, are important enough to warrant prohibiting local

preferences altogether. The ACDBE program is a national program, and at least some concession markets are national markets. In this context, a local preference program is out of place. It is also out of character with a narrowly-tailored program, in that it would limit selections of ACDBEs to something less than their actual availability in the marketplace. Among commenters, one airport favored local preferences and a car rental trade association opposed them; there was not widespread interest or support for retaining local preferences, in any case.

REGULATORY ANALYSES AND NOTICES

This rule is nonsignificant for purposes of Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. While the rule is of considerable interest to the airport community and businesses that work on airports, it is essentially an update of a long-standing, continuing program that does not break new policy ground in most areas. It does not impose significant new costs on airports or businesses. The rule does not have Federalism impacts sufficient to warrant the preparation of a Federalism Assessment.

The Department certifies that this rule will not have a significant economic effect on a substantial number of small entities. The rule clearly affects small entities: ACDBEs are, by definition, small businesses. However, the economic effect of the rule on these small entities is not likely to be significant. Until the Department takes action based on the accompanying SNPRM, there are no changes from the current rule with respect to business size standards. The personal net worth standard may affect some existing ACDBE owners, but these effects are significantly mitigated by "grandfathering" of existing contracts and, more importantly, by the exclusion of documented needs to hold assets to support business growth. In other respects, compared to the existing rule, the new rule is not expected to have noticeable incremental economic effects on small businesses.

A number of provisions of this rule involve information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA). With some modifications, these information collection requirements of the rule continue existing Part 23 requirements, major elements of the ACDBE program that airports and concessionaires have been implementing at least 1992. Overall, the Department believes the overall burden of these requirements will remain the same or shrink. These requirements are the following:

- Firms applying for DBE certification must provide information (including PNW data) to recipients/uniform certification programs (UCPs) to allow them to make eligibility decisions. Currently certified firms must provide information to recipients/UCPs to allow them to review the firms' continuing eligibility.
- When firms bid on concession opportunities that have concession-specific goals, they must document their ACDBE participation and/or the good faith efforts they have made to meet the contract goals.
- Recipients must calculate overall goals and transmit them to the FAA for approval. There are two sets of overall goals: one for car rentals and one for non-car rental concessions. Many smaller airports will not have to submit overall goals.
- Recipients must have a revised ACDBE program approved by the FAA. This is a one-time requirement.
- * Recipients must retain ACDBE data for three years and submit an annual report to the FAA.

The Department estimates that these program elements will result in a total of approximately 41,000 annual burden hours to recipients and contractors, plus an additional 44,000 burden hours in the first year for the revision and submission of ACDBE programs.

Both as the result of comments and what the Department learns as it implements the ACDBE program under Part 23, it is possible for the Department's information needs and the way we meet them to change. Sometimes the way we collect information can be changed informally (e.g., by guidance telling recipients they need not repeat information that does not change significantly from year to year). In other circumstances, a technical amendment to the regulation may be needed. In any case, the Department will remain sensitive to situations in which modifying information collection requirements becomes appropriate.

As required by the PRA, the Department has submitted an information collection approval request to OMB. You should direct comments to the Office of Information and Regulatory Affairs (OIRA), OMB, Room 10235, New Executive Office Building, Washington, DC, 20503; Attention: Desk Officer for U.S. Department of Transportation. Because mail service to OIRA is very difficult because of security measures, it is preferable for interested persons to fax comments to OMB. The fax number for this purpose is 202-395-6974. You may also transmit copies of your comments to the Department's docket for this rulemaking.

The Department considers comments by the public on information collections for several purposes:

- Evaluating the necessity of information collections for the proper performance of the Department's functions, including whether the information has practical utility.
- Evaluating the accuracy of the Department's estimate of the burden of the information collections, including the validity of the methods and assumptions used.

- Enhancing the quality, usefulness, and clarity of the information to be collected.
- Minimizing the burden of the collection of information on respondents, including through the use of electronic and other methods.

The Department points out that all the information collection elements discussed in this section of the preamble have not only been part of the Department's ACDBE program for many years, but have also been the subject of extensive public comment following the 1993, 1997, and 2000 proposed rules on this subject.. Among the many comments received in response to these notices were

a number addressing administrative burden issues surrounding these program elements. In this final rule, the Department has responded to these comments.

OMB is required to make a decision concerning information collections within 30-60 days of the publication of this notice. Therefore, for best effect, comments should be received by DOT/OMB within 30 days of publication. Following receipt of OMB approval, the Department will publish a Federal Register notice containing the applicable OMB approval numbers.

There are a number of other statutes and Executive Orders that apply to the rulemaking process that the Department considers in all rulemakings. However, none of them are relevant to this rule. These include the Unfunded Mandates Reform Act (which does not apply to nondiscrimination/civil rights requirements), the National Environmental Policy Act, E.O. 12630 (concerning property rights), E.O. 12988 (concerning civil justice reform), and E.O. 13045 (protection of children from environmental risks).

ISSUED THIS 8th DAY OF MARCH 2005 AT WASHINGTON, D.C.

(signed)

Norman Y. Mineta
Secretary of Transportation

For the reasons stated in the preamble, the Department takes the following actions:

1. The authority for Part 23, Title 49, Code of Federal Regulations, is revised to read as follows:

Authority: 49 U.S.C. 47107; 42 U.S.C. 2000d; 49 U.S.C. 322; Executive Order 12138.

2. Revise Part 23 to read as follows:

49 CFR PART 23 - PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS

Sec.

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Appendix A to Part 23 – Uniform Report of ACDBE Participation

Subpart A - General

§23.1 What are the objectives of this part?

This part seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of opportunities for concessions by airports receiving DOT financial assistance;
- (b) To create a level playing field on which ACDBEs can compete fairly for opportunities for concessions;
- (c) To ensure that the Department's ACDBE program is narrowly tailored in accordance with applicable law;
- (d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as ACDBEs;
- (e) To help remove barriers to the participation of ACDBEs in opportunities for concessions at airports receiving DOT financial assistance; and
- (f) To provide appropriate flexibility to airports receiving DOT financial assistance in establishing and providing opportunities for ACDBEs.

§23.3 What do the terms used in this Part mean?

"Administrator" means the Administrator of the Federal Aviation Administration (FAA).

"Affiliation" has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121, except that the provisions of SBA regulations concerning affiliation in the context of joint ventures (13 CFR §121.103(f)) do not apply to this part.

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

- (i) One concern controls or has the power to control the other; or
- (ii) A third party or parties controls or has the power to control both; or
- (iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and

contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the ACDBE program.

“Airport Concession Disadvantaged Business Enterprise (ACDBE)” means a concession that is a for-profit small business concern --

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

“Alaska Native Corporation (ANC)” means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)

“Car dealership” means an establishment primarily engaged in the retail sale of new and/or used automobiles. Car dealerships frequently maintain repair departments and carry stocks of replacement parts, tires, batteries, and automotive accessories. Such establishments also frequently sell pickup trucks and vans at retail. In the standard industrial classification system, car dealerships are categorized in NAICS code 441110.

"Concession" means one or more of the types of for-profit businesses listed in paragraph (1) or (2) of this definition:

(1) A business, located on an airport subject to this part, 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.

(2) A business conducting one or more of the following covered activities, even if it does not maintain an office, store, or other business location on an airport subject to this part, as long as the activities take place on the airport: management contracts and subcontracts, a web-based or other electronic business in a terminal or which passengers can access at the terminal, an advertising business that provides advertising displays or messages to the public on the airport, or a business that provides goods and services to concessionaires.

EXAMPLE TO PARAGRAPH (2): A supplier of goods or a management contractor maintains its office or primary place of business off the airport. However the supplier provides goods to a retail establishment in the airport; or the management contractor operates the parking facility on the airport. These businesses are considered concessions for purposes of this part.

(3) For purposes of this subpart, a business is not considered to be “located on the airport” solely because it picks up and/or delivers customers under a permit, license, or other agreement. For example, providers of taxi, limousine, car rental, or hotel services are not considered to be located on the airport just because they send shuttles onto airport grounds to pick up passengers or drop them off. A business is considered to be “located on the airport,” however, if it has an on-airport facility. Such facilities include in the case of a taxi operator, a dispatcher; in the case of a limousine, a booth selling tickets to the public; in the case of a car rental company, a counter at which its services are sold to the public or a ready return facility; and in the case of a hotel operator, a hotel located anywhere on airport property.

(4) Any business meeting the definition of concession is covered by this subpart, regardless of the name given to the agreement with the recipient, concessionaire, or airport terminal owner or lessee. A concession may be operated under various types of agreements, including but not limited to the following:

- (i) Leases.

- (ii) Subleases.
- (iii) Permits.
- (iv) Contracts or subcontracts.
- (v) Other instruments or arrangements.

(5) The conduct of an aeronautical activity is not considered a concession for purposes of this subpart. Aeronautical activities include scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight carrying capacities; fixed base operators; flight schools; recreational service providers (e.g., sky-diving, parachute-jumping, flying guides); and air tour services.

(6) Other examples of entities that do not meet the definition of a concession include flight kitchens and in-flight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, telephone and electric service to the airport facility, holding companies, and skycap services under contract with an air carrier or airport.

"Concessionaire" means a firm that owns and controls a concession or a portion of a concession.

"Department (DOT)" means the U.S. Department of Transportation, including the Office of the Secretary and the Federal Aviation Administration (FAA).

"Direct ownership arrangement" means a joint venture, partnership, sublease, licensee, franchise, or other arrangement in which a firm owns and controls a concession.

"Good faith efforts" means efforts to achieve an ACDBE goal or other requirement of this part that, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to meet the program requirement.

"Immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter,

mother-in-law, father-in-law, brother-in-law, sister-in-law, or registered domestic partner.

“Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of “tribally-owned concern” in this section.

“Joint venture” means an association of an ACDBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the ACDBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest. Joint venture entities are not certified as ACDBEs.

“Large hub primary airport” means a commercial service airport that has a number of passenger boardings equal to at least one percent of all passenger boardings in the United States.

“Management contract or subcontract” means an agreement with a recipient or another management contractor under which a firm directs or operates one or more business activities, the assets of which are owned, leased, or otherwise controlled by the recipient. The managing agent generally receives, as compensation, a flat fee or a percentage of the gross receipts or profit from the business activity. For purposes of this subpart, the business activity operated or directed by the managing agent must be other than an aeronautical activity, be located at an airport subject to this subpart, and be engaged in the sale of consumer goods or provision of services to the public.

"Material amendment" means a significant change to the basic rights or obligations of the parties to a concession agreement. Examples of material amendments include an extension to the term not provided for in the original agreement or a substantial increase in the scope of the concession privilege. Examples of nonmaterial amendments include a change in the name of the concessionaire or a change to the payment due dates.

"Medium hub primary airport" means a commercial service airport that has a number of passenger boardings equal to at least 0.25 percent of all passenger boardings in the United States but less than one percent of such passenger boardings.

"Native Hawaiian" means any individual whose ancestors were natives, prior to 1778, of the area that now comprises the State of Hawaii.

"Native Hawaiian Organization" means any community service organization serving Native Hawaiians in the State of Hawaii that is a not-for-profit organization chartered by the State of Hawaii, and is controlled by Native Hawaiians

"Noncompliance" means that a recipient has not correctly implemented the requirements of this part.

"Nonhub primary airport" means a commercial service airport that has more than 10,000 passenger boardings each year but less than 0.05 percent of all passenger boardings in the United States.

"Part 26" means 49 CFR Part 26, the Department of Transportation's disadvantaged business enterprise regulation for DOT-assisted contracts.

"Personal net worth" means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include the following: (1) the individual's ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification; (2) the individual's equity in his or her primary place of residence; and (3) other 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. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

"Primary airport" means a commercial service airport that the Secretary determines to have more than 10,000 passengers enplaned annually.

"Primary industry classification" means the North American Industrial Classification System (NAICS) code designation that best describes the primary business of a firm. The NAICS Manual is available through the National Technical Information Service (NTIS) of the U. S. Department of Commerce (Springfield, VA, 22261). NTIS also makes materials available through its web site (www.ntis.gov/naics).

"Primary recipient" means a recipient to which DOT financial assistance is extended through the programs of the FAA and which passes some or all of it on to another recipient.

"Principal place of business" means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for ACDBE program purposes.

"Race-conscious" means a measure or program that is focused specifically on assisting only ACDBEs, including women-owned ACDBEs. For the purposes of this part, race-conscious measures include gender-conscious measures.

"Race-neutral" means a measure or program that is, or can be, used to assist all small businesses, without making distinctions or classifications on the basis of race or gender.

“Secretary” means the Secretary of Transportation or his/her designee.

“Set-aside” means a contracting practice restricting eligibility for the competitive award of a contract solely to ACDBE firms.

“Small Business Administration” or “SBA” means the United States Small Business Administration.

"Small business concern" means a for-profit business that does not exceed the size standards of §23.23 of this part.

“Small hub airport” means a publicly owned commercial service airport that has a number of passenger boardings equal to at least 0.05 percent of all passenger boardings in the United States but less than 0.25 percent of such passenger boardings.

"Socially and economically disadvantaged individual" means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is --

(1) Any individual determined by a recipient to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand,

Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

"Recipient" means any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA.

"Tribally-owned concern" means any concern at least 51 percent owned by an Indian tribe as defined in this section.

"You" refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

§ 23.5 To whom does this part apply?

If you are a recipient that has received a grant for airport development at any time after January 1988 that was authorized under Title 49 of the United States Code, this part applies to you.

§23.7 How long do the provisions of this part remain in effect?

Unless extended by the Department, the provisions of this rule will terminate and become inoperative on [insert date five years from effective date of this part].

§ 23.9 What are the nondiscrimination and assurance requirements of this part for recipients?

(a) As a recipient, you must meet the non-discrimination requirements provided in Part 26, §26.7 with respect to the award and performance of any concession agreement, management contract or subcontract, purchase or lease agreement, or other agreement covered by this subpart.

(b) You must also take all necessary and reasonable steps to ensure nondiscrimination in the award and administration of contracts and agreements covered by this part.

(c) You must include the following assurances in all concession agreements and management contracts you execute with any firm after [insert effective date of this part]:

(1) "This agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR Part 23. The concessionaire or contractor agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement, management contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR Part 23.

(2) "The concessionaire or contractor agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR Part 23, that it enters and cause those businesses to similarly include the statements in further agreements."

§23.11 What compliance and enforcement provisions are used under this part?

The compliance and enforcement provisions of Part 26 (§§26.101 and 26.105 - 26.107) apply to this part in the same way that they apply to FAA recipients and programs under Part 26.

§ 23.13 How does the Department issue guidance, interpretations, exemptions, and waivers pertaining to this part?

(a) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this Part 23 and issued after [insert date effective date of this rule] have definitive, binding effect in implementing the provisions of this part and constitute the official position of the Department of Transportation.

(b) Written interpretations and guidance are valid and binding, and constitute the official position of the Department of Transportation, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR Part 23.

(c) You may apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation or the FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.

(d) You can apply for a waiver of any provision of Subpart B or D of this part including, but not limited to, any provisions regarding administrative

requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate an ACDBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of Subpart B or D of this part. To receive a program waiver, you must follow these procedures:

(1) You must apply through the FAA. The application must include a specific program proposal and address how you will meet the criteria of paragraph (d)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the ACDBE community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.

(2) Your application must show that --

(i) There is a reasonable basis to conclude that you could achieve a level of ACDBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in Subpart B or D of this part;

(ii) Conditions at your airport are appropriate for implementing the proposal;

(iii) Your proposal would prevent discrimination against any individual or group in access to concession opportunities or other benefits of the program; and

(iv) Your proposal is consistent with applicable law and FAA program requirements.

(3) The FAA Administrator has the authority to approve your application. If the Administrator grants your application, you may

administer your ACDBE program as provided in your proposal, subject to the following conditions:

(i) ACDBE eligibility is determined as provided in Subpart C of this part, and ACDBE participation is counted as provided in §§23.53 – 23.55.

(ii) Your level of ACDBE participation continues to be consistent with the objectives of this part;

(iii) There is a reasonable limitation on the duration of the your modified program; and

(iv) Any other conditions the Administrator makes on the grant of the waiver.

(4) The Administrator may end a program waiver at any time and require you to comply with this part's provisions. The Administrator may also extend the waiver, if he or she determines that all requirements of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program waiver.

Subpart B – ACDBE programs

§23.21 Who must submit an ACDBE program to FAA, and when?

(a) Except as provided in paragraph (e) of this section, if you are a primary airport that has or was required to have a concessions DBE program prior to [insert effective date of this part], you must submit a revised ACDBE program meeting the requirements of this part to the appropriate FAA regional office for approval.

(1) You must submit this revised program on the same schedule provided for your first submission of overall goals in §23.45(a) of this part.

(2) Timely submission and FAA approval of your revised ACDBE program is a condition of eligibility for FAA financial assistance.

(3) Until your new ACDBE program is submitted and approved, you must continue to implement your concessions DBE program that was in effect before the effective date of this amendment to Part 23, except with respect to any provision that is contrary to this part.

(b) If you are a primary airport that does not now have a DBE concessions program, and you apply for a grant of FAA funds for airport planning and development under 49 U.S.C. 47107 *et seq.*, you must submit an ACDBE program to the FAA at the time of your application. Timely submission and FAA approval of your ACDBE program are conditions of eligibility for FAA financial assistance.

(c) If you are the owner of more than one airport that is required to have an ACDBE program, you may implement one plan for all your locations. If you do so, you must establish a separate ACDBE goal for each location.

(d) If you make any significant changes to your ACDBE program at any time, you must provide the amended program to the FAA for approval before implementing the changes.

(e) If you are a non-primary airport, non-commercial service airport, a general aviation airport, reliever airport, or any other airport that does not have scheduled commercial service, you are not required to have an ACDBE program. However, you must take appropriate outreach steps to encourage available ACDBEs to participate as concessionaires whenever there is a concession opportunity.

§23.23 What administrative provisions must be in a recipient's ACDBE program?

(a) If, as a recipient that must have an ACDBE program, the program must include provisions for a policy statement, liaison officer, and directory, as provided in Part 26, §§26.23, 26.25, and 26.31, as well as certification of ACDBEs as provided by Subpart C of this Part. You must include a statement in your program committing you to operating your ACDBE program in a nondiscriminatory manner.

(b) You may combine your provisions for implementing these requirements under this part and Part 26 (e.g., a single policy statement can cover both Federally-assisted airport contracts and concessions; the same individual can act as the liaison officer for both Part 23 and Part 26 matters).

§23.25 What measures must recipients include in their ACDBE programs to ensure nondiscriminatory participation of ACDBEs in concessions?

(a) You must include in your ACDBE program a narrative description of the types of measures you intend to make to ensure nondiscriminatory participation of ACDBEs in concession and other covered activities.

(b) Your ACDBE program must provide for setting goals consistent with the requirements of Subpart D of this part.

(c) Your ACDBE program must provide for seeking ACDBE participation in all types of concession activities, rather than concentrating participation in one category or a few categories to the exclusion of others.

(d) Your ACDBE program must include race-neutral measures that you will take. You must maximize the use of race-neutral measures, obtaining as much as possible of the ACDBE participation needed to meet overall goals through such measures. These are responsibilities that you directly undertake as a recipient, in addition to the efforts that concessionaires make, to obtain ACDBE participation. The following are examples of race-neutral measures you can implement:

- (1) Locating and identifying ACDBEs and other small businesses who may be interested in participating as concessionaires under this part;
- (2) Notifying ACDBEs of concession opportunities and encouraging them to compete, when appropriate;
- (3) When practical, structuring concession activities so as to encourage and facilitate the participation of ACDBEs
- (4) Providing technical assistance to ACDBEs in overcoming limitations, such as inability to obtain bonding or financing;
- (5) Ensuring that competitors for concession opportunities are informed during pre-solicitation meetings about how the recipient's ACDBE program will affect the procurement process;
- (6) Providing information concerning the availability of ACDBE firms to competitors to assist them in obtaining ACDBE participation; and
- (7) Establishing a business development program (see Part 26, §26.35); technical assistance program; or taking other steps to foster ACDBE participation in concessions.

(e) Your ACDBE program must also provide for the use of race-conscious measures when race-neutral measures, standing alone, are not projected to be sufficient to meet an overall goal. The following are examples of race-conscious measures you can implement:

- (1) Establishing concession-specific goals for particular concession opportunities.
 - (i) If the objective of the concession-specific goal is to obtain ACDBE participation through a direct ownership arrangement with a ACDBE, calculate the goal as a percentage of the total estimated annual gross receipts from the concession.

(ii) 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.

(iii) To be eligible to be awarded the concession, competitors must make good faith efforts to meet this goal. A competitor may do so either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so.

(iv) The administrative procedures applicable to contract goals in Part 26, §26.51-53, apply with respect to concession-specific goals.

(2) Negotiation with a potential concessionaire to include ACDBE participation, through direct ownership arrangements or measures, in the operation of the concession.

(3) With the prior approval of FAA, other methods that take a competitor's ability to provide ACDBE participation into account in awarding a concession.

(f) 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.

(g) As provided in §23.61 of this part, you must not use set-asides and quotas as means of obtaining ACDBE participation.

§23.27 What information does a recipient have to retain and report about implementation of its ACDBE program?

(a) As a recipient, you must retain sufficient basic information about your program implementation, your certification of ACDBEs, and the award and performance of agreements and contracts to enable the FAA to determine your compliance with this part. You must retain this data for a minimum of three years following the end of the concession agreement or other covered contract.

(b) Beginning March 1, 2006, you must submit an annual report on ACDBE participation using the form found in Appendix A to this part. You must submit the report to the appropriate FAA Regional Civil Rights Office.

§23.29 What monitoring and compliance procedures must recipients follow?

As a recipient, you must implement appropriate mechanisms to ensure compliance with the requirements of this part by all participants in the program. You must include in your concession program the specific provisions to be inserted into concession agreements and management contracts, the enforcement mechanisms, and other means you use to ensure compliance. These provisions must include a monitoring and enforcement mechanism to verify that the work committed to ACDBEs is actually performed by the ACDBEs. Your program must describe in detail the level of effort and resources devoted to monitoring and enforcement.

Subpart C - Certification and Eligibility of ACDBEs

§23.31 What certification standards and procedures do recipients use to certify ACDBEs?

(a) As a recipient, you must use, except as provided in this subpart, the procedures and standards of Part 26, §§26.61-91 for certification of ACDBEs to participate in your concessions program. Your ACDBE program must incorporate the use of these standards and procedures and must provide that

certification decisions for ACDBEs will be made by the Unified Certification Program (UCP) in your state (see Part 26, §26.81).

(b) The UCP's directory of eligible DBEs must specify whether a firm is certified as a DBE for purposes of Part 26, an ACDBE for purposes of Part 23, or both.

(c) As an airport or UCP, you must review the eligibility of currently certified ACDBE firms to make sure that they meet the eligibility standards of this part.

(1) You must complete these reviews as soon as possible, but in no case later than [insert date one year from the effective date of rule] or three years from the anniversary date of each firm's most recent certification, whichever is later.

(2) You must direct all currently certified ACDBEs to submit to you by [insert date one year from effective date of rule] a personal net worth statement, a certification of disadvantage, and an affidavit of no change.

§23.33 What size standards do recipients use to determine the eligibility of ACDBEs?

(a) As a recipient, you must, except as provided in paragraph (b) of this section, treat a firm as a small business eligible to be certified as an ACDBE if its gross receipts, averaged over the firm's previous three fiscal years, do not exceed \$30 million.

(b) The following types of businesses have size standards that differ from the standard set forth in paragraph (a) of this section:

(1) Banks and financial institutions: \$275 million in assets;

(2) Car rental companies: \$40 million average annual gross receipts over the firm's three previous fiscal years;

(3) Pay telephones: 1,500 employees.

§23.35 What is the personal net worth standard for disadvantaged owners of ACDBEs?

The personal net worth standard used in determining eligibility for purposes of this part is \$750,000. Any individual who has a personal net worth exceeding this amount is not a socially and economically disadvantaged individual for purposes of this part, even if the individual is a member of a group otherwise presumed to be disadvantaged.

§23.37 Are firms certified under 49 CFR Part 26 eligible to participate as ACDBEs?

(a) You must presume that a firm that is certified as a DBE under Part 26 is eligible to participate as an ACDBE. By meeting the size, disadvantage (including personal net worth), ownership and control standards of Part 26, the firm will have also met the eligibility standards for Part 23.

(b) However, before certifying such a firm, you must ensure that the disadvantaged owners of a DBE certified under Part 26 are able to control the firm with respect to its activity in the concessions program. In addition, you are not required to certify a Part 26 DBE as a Part 23 ACDBE if the firm does not do work relevant to the airport's concessions program.

§ 23. 39 What other certification requirements apply in the case of ACDBEs?

(a) The provisions of Part 26, §§26.83 (c)(2) through (c)(6) do not apply to certifications for purposes of this part. Instead, in determining whether a firm is an eligible ACDBE, you must take the following steps:

- (1) Obtain the resumes or work histories of the principal owners of the firm and personally interview these individuals;
- (2) Analyze the ownership of stock of the firm, if it is a corporation;
- (3) Analyze the bonding and financial capacity of the firm;

- (4) Determine the work history of the firm, including any concession contracts or other contracts it may have received;
 - (5) Obtain or compile a list of the licenses of the firm and its key personnel to perform the concession contracts or other contracts it wishes to receive;
 - (6) Obtain a statement from the firm of the type(s) of concession(s) it prefers to operate or the type(s) of other contract(s) it prefers to perform.
- (b) In reviewing the affidavit required by Part 26, §26.83(j), you must ensure that the ACDBE firm meets the applicable size standard in §23.33.
- (c) For purposes of this part, the term "prime contractor" in Part 26, §26.87(i) includes a firm holding a prime contract with an airport concessionaire to provide goods or services to the concessionaire or a firm holding a prime concession agreement with a recipient.
- (d) With respect to firms owned by Alaska Native Corporations (ANCs), the provisions of Part 26, §26.73(i) do not apply under this part. The eligibility of ANC-owned firms for purposes of this part is governed by §26.73(h).
- (e) When you remove a concessionaire's eligibility after the concessionaire has entered a concession agreement, because the firm exceeded the small business size standard or because an owner has exceeded the personal net worth standard, and the firm in all other respects remains an eligible DBE, you may continue to count the concessionaire's participation toward DBE goals during the remainder of the current concession agreement. However, you must not count the concessionaire's participation toward DBE goals beyond the termination date for the concession agreement in effect at the time of the decertification (e.g., in a case where the agreement is renewed or extended, or an option for continued participation beyond the current term of the agreement is exercised).
- (f) When UCPs are established in a state (see Part 26, §26.81), the UCP, rather than individual recipients, certifies firms for the ACDBE concession program.

(g) You must use the Uniform Application Form found in Appendix F to Part 26. However, you must instruct applicants to take the following additional steps:

(1) In the space available in Section 2(B)(7) of the form, the applicant must state that it is applying for certification as an ACDBE.

(2) With respect to Section 4 (C) of the form, the applicant must provide information on an attached page concerning the address/location, ownership/lease status, current value of property or lease, and fees/lease payments paid to the airport.

(3) The applicant need not complete Section 4(I) and (J). However, the applicant must provide information on an attached page concerning any other airport concession businesses the applicant firm or any affiliate owns and/or operates, including name, location, type of concession, and start date of concession.

(h) Car rental companies and private terminal owners or lessees are not authorized to certify firms as ACDBEs. As a car rental company or private terminal owner or lessee, you must obtain ACDBE participation from firms which a recipient or UCPs have certified as ACDBEs.

(i) You must use the certification standards of this part to determine the ACDBE eligibility of firms that provide goods and services to concessionaires.

Subpart D - Goals, Good Faith Efforts, and Counting

§23.41 What is the basic overall goal requirement for recipients?

(a) If you are a recipient who must implement an ACDBE program, you must, except as provided in paragraph (b) of this section, establish two separate overall ACDBE goals. The first is for car rentals; the second is for concessions other than car rentals.

(b) If your annual car rental concession revenues, averaged over the three-years preceding the date on which you are required to submit overall goals, do

not exceed \$200,000, you are not required to submit a car rental overall goal. If your annual revenues for concessions other than car rentals, averaged over the three years preceding the date on which you are required to submit overall goals, do not exceed \$200,000, you are not required to submit a non-car rental overall goal.

(c) Each overall goal must cover a three-year period. You must review your goals annually to make sure they continue to fit your circumstances appropriately. You must report to the FAA any significant adjustments that you make to your goal in the time before your next scheduled submission.

(d) Your goals established under this part must provide for participation by all certified ACDBEs and may not be subdivided into group-specific goals.

(e) If you fail to establish and implement goals as provided in this section, you are not in compliance with this part. If you establish and implement goals in a way different from that provided in this part, you are not in compliance with this part. If you fail to comply with this requirement, you are not eligible to receive FAA financial assistance.

§23.43 What are the consultation requirements in the development of recipients' overall goals?

(a) As a recipient, you must consult with stakeholders before submitting your overall goals to FAA.

(b) Stakeholders with whom you must consult include, but are not limited to, minority and women's business groups, community organizations, trade associations representing concessionaires currently located at the airport, as well as existing concessionaires themselves, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for ACDBEs, and the recipient's efforts to increase participation of ACDBEs.

§23.45 What are the requirements for submitting overall goal information to the FAA?

(a) You must submit your overall goals to the appropriate FAA Regional Civil Rights Office for approval. Your first set of overall goals meeting the requirements of this subpart are due on the following schedule:

(1) If you are a large or medium hub primary airport on [insert effective date of this rule], by January 1, 2006. You must make your next submissions by October 1, 2008.

(2) If you are a small hub primary airport on [insert effective date of this rule], by October 1, 2006.

(3) If you are a nonhub primary airport on [insert effective date of this rule], by October 1, 2007.

(b) You must then submit new goals every three years after the date that applies to you.

(c) Timely submission and FAA approval of your overall goals is a condition of eligibility for FAA financial assistance.

(d) In the time before you make your first submission under paragraph (a) of this section, you must continue to use the overall goals that have been approved by the FAA before the effective date of this part.

(e) Your overall goal submission must include a description of the method used to calculate your goals and the data you relied on. You must “show your work” to enable the FAA to understand how you concluded your goals were appropriate. This means that you must provide to the FAA the data, calculations, assumptions, and reasoning used in establishing your goals.

(f) Your submission must include your projection of the portions of your overall goals you propose to meet through use of race-neutral and race-conscious means, respectively, and the basis for making this projection (see §23.51(d)(5))

(g) FAA may approve or disapprove the way you calculated your goal, including your race-neutral/race-conscious “split,” as part of its review of your plan or goal submission. Except as provided in paragraph (h) of this section, the FAA does not approve or disapprove the goal itself (i.e., the number).

(h) If the FAA determines that your goals have not been correctly calculated or the justification is inadequate, the FAA may, after consulting with you, adjust your overall goal or race-conscious/race-neutral “split.” The adjusted goal represents the FAA’s determination of an appropriate overall goal for ACDBE participation in the recipient’s concession program, based on relevant data and analysis. The adjusted goal is binding on you.

(i) If a new concession opportunity the estimated average annual gross revenues of which are anticipated to be \$200,000 or greater arises at a time that falls between normal submission dates for overall goals, you must submit an appropriate adjustment to your overall goal to the FAA for approval at least six months before executing the concession agreement for the new concession opportunity.

§23.47 What is the base for a recipient’s goal for concessions other than car rentals?

(a) As a recipient, the base for your goal includes the total gross receipts of concessions, except as otherwise provided in this section.

(b) This base does not include the gross receipts of car rental operations.

(c) The dollar amount of a management contract or subcontract with a non-ACDBE and the gross receipts of business activities to which a management or subcontract with a non-ACDBE pertains are not added to this base.

(d) This base does not include any portion of a firm's estimated gross receipts that will not be generated from a concession.

EXAMPLE TO PARAGRAPH (d): A firm operates a restaurant in the airport terminal which serves the traveling public and, under the same lease agreement, provides in-flight catering service to air carriers. The projected gross receipts from the restaurant are included in the overall goal calculation, while the gross receipts to be earned by the in-flight catering services are not.

§23.49 What is the base for a recipient's goal for car rentals?

Except in the case where you use the alternative goal approach of section 23.51(c)(5)(ii) of this part, the base for your goal is the total gross receipts of car rental operations at your airport. You do not include gross receipts of other concessions in this base.

§23.51 How are a recipient's overall goals expressed and calculated?

(a) Your objective in setting a goal is to estimate the percentage of the base calculated under §§23.47 – 23.49 that would be performed by ACDBEs in the absence of discrimination and its effects.

(1) This percentage is the estimated ACDBE participation that would occur if there were a “level playing field” for firms to work as concessionaires for your airport.

(2) In conducting this goal setting process, you are determining the extent, if any, to which the firms in your market area have suffered discrimination or its effects in connection with concession opportunities or related business opportunities.

(3) You must complete the goal-setting process separately for each of the two overall goals identified in §23.41 of this part.

(b) (1) Each overall concessions goal must be based on demonstrable evidence of the availability of ready, willing and able ACDBEs relative to all businesses ready, willing and able to participate in your ACDBE program (hereafter, the "relative availability of ACDBEs").

(2) You cannot simply rely on the 10 percent national aspirational goal, your previous overall goal, or past ACDBE participation rates in your program without reference to the relative availability of ACDBEs in your market.

(3) Your market area is defined by the geographical area in which the substantial majority of firms which seek to do concessions business with the airport are located and the geographical area in which the firms which receive the substantial majority of concessions-related revenues are located. Your market area may be different for different types of concessions.

(c) Step 1. You must begin your goal setting process by determining a base figure for the relative availability of ACDBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining the evidence available to you. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the FAA.

(1) Use DBE Directories and Census Bureau Data. Determine the number of ready, willing and able ACDBEs in your market area from your ACDBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, willing and able businesses available in your market area that perform work in the same NAICS codes. (Information about the CBP data base may be obtained from the Census Bureau at their web site,

www.census.gov/epcd/cbp/view/cbpview.html.) Divide the number of ACDBEs by the number of all businesses to derive a base figure for the relative availability of ACDBEs in your market area.

(2) Use an Active Participants List. Determine the number of ACDBEs that have participated or attempted to participate in your airport concessions program in previous years. Determine the number of all businesses that have participated or attempted to participate in your airport concession program in previous years. Divide the number of ACDBEs who have participated or attempted to participate by the number for all businesses to derive a base figure for the relative availability of ACDBEs in your market area.

(3) Use data from a disparity study. Use a percentage figure derived from data in a valid, applicable disparity study.

(4) Use the goal of another recipient. If another airport or other DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.

(5) Alternative methods. (i) You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of ACDBEs in your market area.

(ii) In the case of a car rental goal, where it appears that all or most of the goal is likely to be met through the purchases by car rental companies of vehicles or other goods or services from ACDBEs, one permissible alternative is to structure the goal entirely in terms of purchases of goods and services. In this case, you would calculate your car rental overall goal by dividing the estimated dollar value of

such purchases from ACDBEs by the total estimated dollar value of all purchases to be made by car rental companies

(d) Step 2. Once you have calculated a base figure, you must examine all relevant evidence reasonably available in your jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.

(1) There are many types of evidence that must be considered when adjusting the base figure. These include, but are not limited to: (i) The current capacity of ACDBEs to perform work in your concessions program, as measured by the volume of work ACDBEs have performed in recent years; and (ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure.

(2) If your base figure is the goal of another recipient, you must adjust it for differences in your market area and your concessions program.

(3) If available, you must consider evidence from related fields that affect the opportunities for ACDBEs to form, grow and compete. These include, but are not limited to: (i) Statistical disparities in the ability of ACDBEs to get the financing, bonding and insurance required to participate in your program; (ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for ACDBEs to perform in your program.

(4) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination, or the effects of an ongoing ACDBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

(5) Among the information you submit with your overall goal (see 23.45(e)), you must include description of the methodology you used to establish

the goal, including your base figure and the evidence with which it was calculated, as well as the adjustments you made to the base figure and the evidence relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and an explanation of how you used that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see §§ 26.51(c)).

(e) You are not required to obtain prior FAA concurrence with your overall goal (i.e., with the number itself). However, if the FAA's review suggests that your overall goal has not been correctly calculated, or that your method for calculating goals is inadequate, the FAA may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you.

(f) If you need additional time to collect data or take other steps to develop an approach to setting overall goals, you may request the approval of the FAA Administrator for an interim goal and/or goal-setting mechanism. Such a mechanism must:

- (1) Reflect the relative availability of ACDBEs in your local market area to the maximum extent feasible given the data available to you; and
- (2) Avoid imposing undue burdens on non-ACDBEs.

§23.53 How do car rental companies count ACDBE participation toward their goals?

(a) As a car rental company, you may, in meeting the goal the airport has set for you, include purchases or leases of vehicles from any vendor that is a certified ACDBE.

(b) As a car rental company, if you choose to meet the goal the airport has set for you by including purchases or leases of vehicles from an ACDBE vendor,

you must also submit to the recipient documentation of the good faith efforts you have made to obtain ACDBE participation from other ACDBE providers of goods and services.

(c) While this part does not require you to obtain ACDBE participation through direct ownership arrangements, you may count such participation toward the goal the airport has set for you.

(d) The following special rules apply to counting participation related to car rental operations:

(1) Count the entire amount of the cost charged by an ACDBE for repairing vehicles, provided that it is reasonable and not excessive as compared with fees customarily allowed for similar services.

(2) Count the entire amount of the fee or commission charged by a ACDBE to manage a car rental concession under an agreement with the concessionaire toward ACDBE goals, provided that it is reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) Do not count any portion of a fee paid by a manufacturer to a car dealership for reimbursement of work performed under the manufacturer's warranty.

(e) For other goods and services, count participation toward ACDBE goals as provided in Part 26, §26.55 and §23.55 of this part. In the event of any conflict between these two sections, §23.55 controls.

(f) If you have a national or regional contract, count a pro-rated share of the amount of that contract toward the goals of each airport covered by the contract. Use the proportion of your applicable gross receipts as the basis for making this pro-rated assignment of ACDBE participation.

EXAMPLE TO PARAGRAPH (f): Car Rental Company X signs a regional contract with an ACDBE car dealer to supply cars to all five airports in a state. The five airports each account for 20 percent of X's

gross receipts in the state. Twenty percent of the value of the cars purchased through the ACDBE car dealer would count toward the goal of each airport.

§23.55 How do recipients count ACDBE participation toward goals for items other than car rentals?

(a) You count only ACDBE participation that results from a commercially useful function. For purposes of this part, the term commercially useful function has the same meaning as in Part 26, § 26.55(c), except that the requirements of § 26.55(c)(3) do not apply to concessions.

(b) Count the total dollar value of gross receipts an ACDBE earns under a concession agreement and the total dollar value of a management contract or subcontract with an ACDBE toward the goal. However, if the ACDBE enters into a subconcession agreement or subcontract with a non-ACDBE, do not count any of the gross receipts earned by the non-ACDBE.

(c) When an ACDBE performs as a subconcessionaire or subcontractor for a non-ACDBE, count only the portion of the gross receipts earned by the ACDBE under its subagreement.

(d) 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.

(e) Count the entire amount of fees or commissions charged by an ACDBE firm for a bona fide service, provided that, as the recipient, you determine this amount to be reasonable and not excessive as compared with fees customarily allowed for similar services. Such services may include, but are not

limited to, professional, technical, consultant, legal, security systems, advertising, building cleaning and maintenance, computer programming, or managerial.

(f) Count 100 percent of the cost of goods obtained from an ACDBE manufacturer. For purposes of this part, the term manufacturer has the same meaning as in Part 26, §26.55(e)(1)(ii).

(g) Count 100 percent of the cost of goods purchased or leased from a ACDBE regular dealer. For purposes of this part, the term “regular dealer” has the same meaning as in Part 26, §26.55(e)(2)(ii).

(h) Count credit toward ACDBE goals for goods purchased from an ACDBE which is neither a manufacturer nor a regular dealer as follows:

(1) Count the entire amount of fees or commissions charged for assistance in the procurement of the goods, provided that this amount is reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the goods themselves.

(2) Count the entire amount of fees or transportation charges for the delivery of goods required for a concession, provided that this amount is reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of goods themselves.

(i) If a firm has not been certified as an ACDBE in accordance with the standards in this Part, do not count the firm's participation toward ACDBE goals.

(j) Do not count the work performed or gross receipts earned by a firm after its eligibility has been removed toward ACDBE goals. However, if an ACDBE firm certified on [insert effective date of this part] is decertified because one or more of its disadvantaged owners do not meet the personal net worth criterion or the firm exceeds business size standards of this part during the performance of a contract or other agreement, the

firm's participation may continue to be counted toward ACDBE goals for the remainder of the term of the contract or other agreement (but not extensions or renewals of such contracts or agreements).

(k) Do not count costs incurred in connection with the renovation, repair, or construction of a concession facility (sometimes referred to as the "build-out).

(l) Do not count the ACDBE participation of car rental companies toward your ACDBE achievements toward this goal.

§23.57 What happens if a recipient falls short of meeting its overall goals?

(a) You cannot be penalized, or treated by the Department as being in noncompliance with this part, simply because your ACDBE participation falls short of your overall goals. You can be penalized or treated as being in noncompliance only if you have failed to administer your ACDBE program in good faith.

(b) If your ACDBE participation falls short of your overall goals, FAA may require you to submit to the FAA a statement of the reasons why you were unable to meet it and the steps you are taking to meet your overall goals or to adjust them based on changed circumstances.

(c) In response to your submission, FAA may require you to implement appropriate remedial measures,

§23.59 What is the role of the statutory 10 percent goal in the ACDBE program?

(a) The statute authorizing the ACDBE program provides that, except to the extent the Secretary determines otherwise, not less than 10 percent of concession businesses are to be ACDBEs.

(b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in airport concessions.

(c) The national 10 percent aspirational goal does not authorize or require recipients to set overall or concession-specific goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

§23.61 Can recipients use quotas or set-asides as part of their ACDBE programs?

You must not use quotas or set-asides for ACDBE participation in your program.

Subpart E - Other Provisions

§ 23.71 Does a recipient have to change existing concession agreements?

Nothing in this part requires you to modify or abrogate an existing concession agreement (one executed before [insert effective date of this part]) during its term. When an extension or option to renew such an agreement is exercised, or when a material amendment is made, you must assess potential for ACDBE participation and may, if permitted by the agreement, use any means authorized by this part to obtain a modified amount of ACDBE participation in the renewed or amended agreement.

§23.73 What requirements apply to privately-owned or leased terminal buildings?

(a) If you are a recipient who is required to implement an ACDBE program on whose airport there is a privately-owned or leased terminal building that has concessions, or any portion of such a building, this section applies to you.

(b) You must pass through the applicable requirements of this part to the private terminal owner or lessee via your agreement with the owner or lessee or

by other means. You must ensure that the terminal owner or lessee complies with the requirements of this part.

(c) If your airport is a primary airport, you must obtain from the terminal owner or lessee the goals and other elements of the ACDBE program required under this part. You must incorporate this information into your concession plan and submit it to the FAA in accordance with this part.

(d) If the terminal building is at a non-primary commercial service airport or general aviation airport or reliever airport, you must ensure that the owner complies with the requirements in § 23.21(e)

§ 23.75 Can recipients enter into long-term, exclusive agreements with concessionaires?

(a) Except as provided in paragraph (b) of this section, you must not enter into long-term, exclusive agreements for concessions. For purposes of this section, a long-term agreement is one having a term longer than five years.

(b) You may enter into a long-term, exclusive concession agreement only under the following conditions:

(1) Special local circumstances exist that make it important to enter such agreement, and

(2) The responsible FAA regional office approves your plan for meeting the standards of paragraph (c) of this section.

(c) In order to obtain FAA approval of a long-term-exclusive concession agreement, you must submit the following information to the FAA regional office:

(1) A description of the special local circumstances that warrant a long-term, exclusive agreement.

(2) A copy of the draft and final leasing and subleasing or other agreements. This long-term, exclusive agreement must provide that:

(i) A number of ACDBEs that reasonably reflects their availability in your market area, in the absence of discrimination, to do the types of work required will participate as concessionaires throughout the term of the agreement and account for at a percentage of the estimated annual gross receipts equivalent to a level set in accordance with §§23.47 - 23.49 of this part.

(ii) You will review the extent of ACDBE participation before the exercise of each renewal option to consider whether an increase or decrease in ACDBE participation is warranted.

(iii) An ACDBE concessionaire that is unable to perform successfully will be replaced by another ACDBE concessionaire, if the remaining term of the agreement makes this feasible. In the event that such action is not feasible, you will require the concessionaire to make good faith efforts during the remaining term of the agreement to encourage ACDBEs to compete for the purchases and/or leases of goods and services to be made by the concessionaire.

(3) Assurances that any ACDBE participant will be in an acceptable form, such as a sublease, joint venture, or partnership.

(4) Documentation that ACDBE participants are properly certified.

(5) A description of the type of business or businesses to be operated (e.g., location, storage and delivery space, "back-of-the-house facilities" such as kitchens, window display space, advertising space, and other amenities that will increase the ACDBE's chance to succeed).

(6) Information on the investment required on the part of the ACDBE and any unusual management or financial arrangements between the prime concessionaire and ACDBE.

(7) Information on the estimated gross receipts and net profit to be earned by the ACDBE.

§ 23.77 Does this part preempt local requirements?

(a) In the event that a State or local law, regulation, or policy differs from the requirements of this part, the recipient must, as a condition of remaining eligible to receive Federal financial assistance from the DOT, take such steps as may be necessary to comply with the requirements of this part.

(b) You must clearly identify any State or local law, regulation, or policy pertaining to minority, women's, or disadvantaged business enterprise concerning airport concessions that adds to, goes beyond, or imposes more stringent requirements than the provisions of this part. FAA will determine whether such a law, regulation, or policy conflicts with this part, in which case the requirements of this part will govern.

(c) If not deemed in conflict by the FAA, you must write and administer such a state or local law, policy, or regulation separately from the ACDBE program.

(d) You must provide copies of any such provisions and the legal authority supporting them to the FAA with your ACDBE program submission. FAA will not approve an ACDBE program if there are such provisions that conflict with the provisions of this Part.

(e) However, nothing in this part preempts any state or local law, regulation, or policy enacted by the governing body of a recipient, or the authority of any State or local government or recipient to adopt or enforce any law, regulation, or policy relating to ACDBEs, as long as the law, regulation, or policy does not conflict with this part.

§23.79 Does this part permit recipients to use local geographic preferences?

No. As a recipient you must not use a local geographic preference. For purposes of this section, a local geographic preference is any requirement that gives a ACDBE located in one place (e.g., your local area) an advantage over

ACDBEs from other places in obtaining business as, or with, a concession at your airport.

Appendix A to Part 23 – UNIFORM REPORT OF ACDBE PARTICIPATION

INSTRUCTIONS FOR UNIFORM REPORT OF ACDBE PARTICIPATION

1. Insert name of airport receiving FAA financial assistance and AIP number..

2. Provide the name and contact information (phone, fax, e-mail) for the person FAA should contact with questions about the report

- 3a. Provide the annual reporting period to which the report pertains (e.g., October 2005 – September 2006).

- 3b. Provide the date on which the report is submitted to FAA.

4. This block and blocks 5 and 6 concern non-car rental goals and participation only. In this block, provide the overall non-car rental percentage goal and the race-conscious (RC) and race-neutral (RN) components of it. The RC and RN percentages should add up to the overall percentage goal.

5. For purposes of this block and blocks 6, 8, and 9, the participation categories listed at the left of the block are the following: “Prime Concessions” are concessions who have a direct relationship with the airport (e.g., a company who has a lease agreement directly with the airport to operate a concession). A “subconcession” is a firm that has a sublease or

other agreement with a prime concessionaire, rather than with the airport itself, to operate a concession at the airport. A “management contract” is an agreement between the airport and a firm to manage a portion of the airport’s facilities or operations (e.g., manage the parking facilities). “Goods/services” refers to those goods and services purchased by the airport itself or by concessionaires and management contractors from certified DBEs.

Block 5 concerns all non-car rental concession activity covered by 49 CFR Part 23 during the reporting period, both new or continuing.

In Column A, enter the total concession gross revenues for concessionaires (prime and sub) and purchases of goods and services (ACDBE and non-ACDBE combined) at the airport. In Column B, enter the number of lease agreements, contracts, etc. in effect or taking place during the reporting period in each participation category for all concessionaires and purchases of goods and services (ACDBE and non-ACDBE combined).

Because, by statute, non-ACDBE management contracts do not count as part of the base for ACDBE goals, the cells for total management contract participation and ACDBE participation as a percentage of total management contracting dollars are not intended to be filled in blocks 5, 6, 8, and 9.

In Column C, enter the total gross revenues in each participation category (ACDBEs) only. In Column D, enter the number of lease agreements, contracts, etc., in effect or entered into during the reporting period in each participation category for all concessionaires and purchases of goods and services (ACDBEs only).

Columns E and F are subsets of Column C: break out the total gross revenues listed in Column C into the portions that are attributable to race-conscious and race-neutral measures, respectively. Column G is a percentage calculation. It answers the question, what percentage of the numbers in Column A is represented by the corresponding numbers in Column C?

6. The numbers in this Block concern only new non-car rental concession opportunities that arose during the current reporting period. In other words, the information requested in Block 6 is a subset of that requested in Block 5. Otherwise, this Block is filled out in the same way as Block 5.

7. Blocks 7-9 concern car rental goals and participation. In Block 7, provide the overall car rental percentage goal and the race-conscious (RC) and race-neutral (RN) components of it. The RC and RN percentages should add up to the overall percentage goal.

8. Block 8 is parallel to Block 5, except that it is for car rentals. The instructions for filling it out are the same as for Block 5.

9. Block 9 is parallel to Block 6, except that it is for car rentals. The information requested in Block 9 is a subset of that requested in Block 8. The instructions for filling it out are the same as for Block 6.

10. Block 10 instructs recipients to bring forward the cumulative ACDBE participation figures from Blocks 5 and 8, breaking down these figures by race and gender categories. Participation by non-minority women-owned firms should be listed in the "non-minority women" column. Participation

by firms owned by minority women should be listed in the appropriate minority group column. The “other” column should be used to reflect participation by individuals who are not a member of a presumptively disadvantaged group who have been found disadvantaged on a case-by-case basis.

11. This block instructs recipients to attach five information items for each ACDBE firm participating in its program during the reporting period. If the firm’s participation numbers are reflected in Blocks 5 – 6 and/or 8-9, the requested information about that firm should be attached in response to this item.

UNIFORM REPORT OF ACDBE PARTICIPATION

1. Name of Recipient and AIP Number:

2. Contact Information:

3a. Reporting Period:

3b. Date of Report:

4. Current Non-Car Rental ACDBE Goal: Race Conscious Goal ____ % Race
Neutral Goal ____ %

Overall Goal ____ %

| 5. Non-Car Rental | A | B | C | D | E | F | G |
|---------------------------------------|---------------------------------|--------------------------------|----------------------------------|---------------------------------|-------------------------------|-------------------------------|-----------------------------|
| CUMULATIVE ACDBE PARTICIPATION | Total Dollars (everyone) | Total Number (everyone) | Total to ACDBEs (dollars) | Total to ACDBEs (number) | RC to ACDBEs (dollars) | RN to ACDBEs (dollars) | % of dollars to ACDB |
| Prime Concessions | | | | | | | |
| Subconcessions | | | | | | | |
| Management Contracts | XXXXXXX | XXXXXXX | | | | | XXXXX |
| Goods/Services | | | | | | | |
| Totals | | | | | | | |

| 6. Non-Car Rental | A | B | C | D | E | F | G |
|--|---------------------------------|--------------------------------|----------------------------------|---------------------------------|-------------------------------|-------------------------------|-------------------------------|
| NEW ACDBE PARTICIPATION THIS PERIOD | Total Dollars (everyone) | Total Number (everyone) | Total to ACDBEs (dollars) | Total to ACDBEs (number) | RC to ACDBEs (dollars) | RN to ACDBEs (dollars) | % of dollars to ACDBEs |
| Prime Concessions | | | | | | | |
| Subconcessions | | | | | | | |
| Management Contracts | XXXXXXX | XXXXXXX | | | | | XX |
| Goods/Services | | | | | | | |
| Totals | | | | | | | |

7. Current Car Rental ACDBE Goal: Race Conscious Goal ____ % Race Neutral Goal ____ %
Overall Goal ____ %

| 8. Car Rental | A | B | C | D | E | F | G |
|---------------------------------------|---------------------------------|--------------------------------|----------------------------------|---------------------------------|-------------------------------|-------------------------------|-------------------------------|
| CUMULATIVE ACDBE PARTICIPATION | Total Dollars (everyone) | Total Number (everyone) | Total to ACDBEs (dollars) | Total to ACDBEs (number) | RC to ACDBEs (dollars) | RN to ACDBEs (dollars) | % of dollars to ACDBEs |
| Prime Concessions | | | | | | | |
| Subconcessions | | | | | | | |
| Goods/Services | | | | | | | |
| Totals | | | | | | | |

| 9. Car Rental | A | B | C | D | E | F | G |
|--|---------------------------------|--------------------------------|----------------------------------|---------------------------------|-------------------------------|-------------------------------|-------------------------------|
| NEW ACDBE PARTICIPATION THIS PERIOD | Total Dollars (everyone) | Total Number (everyone) | Total to ACDBEs (dollars) | Total to ACDBEs (number) | RC to ACDBEs (dollars) | RN to ACDBEs (dollars) | % of dollars to ACDBEs |
| Prime Concessions | | | | | | | |
| Subconcessions | | | | | | | |
| Goods/Services | | | | | | | |
| Totals | | | | | | | |

| 10. CUMULATIVE ACDBE PARTICIPATION BY RACE/GENDER | A | B | C | D | E | F |
|--|--------------------|------------------------|--------------------------------|-------------------------------|---------------------|---------------------------|
| | Black Americans | Hispanic Americans) | Asian- Pacific Americans | Asian- Indian Americans | Native Americans | Non- minority Women |
| Car Rental | | | | | | |
| Non-Car Rental | | | | | | |
| Totals | | | | | | |

11. On an attachment, list the following information for each ACDBE firm participating in your program during the period of this report: (1) Firm name; (2) Type of business; (3) Beginning and expiration dates of agreement, including options to renew; (4) Dates that material amendments have been or will be made to agreement (if known); (5) Estimated gross receipts for the firm during this reporting period.