

Implementation Guidance for the Final Rule

Part 23

*The preamble to the Final Rule states that it becomes effective on **May 9, 2024**; 30 days after the Final Rule's publication. Given the Final Rule's changes in major areas of ACDBE program implementation, the issue of how to address the transition between the former rule and the new rule arises.¹*

1. When must the new Part 23 small business element be established?

- The Final Rule adds a provision in § 23.26 which mirrors and replicates the Part 26 requirement (set forth in § 26.39) and states that a recipient must establish a small business element (SBE) for its ACDBE program. The SBE is designed to foster small business participation in concession activities, and creating the SBE is a requirement of good faith implementation of a recipient's ACDBE program. The recipient must take all reasonable steps to eliminate obstacles to the participation of small business concerns, including unnecessary and unwarranted bundling of concession opportunities which may preclude small business participation in solicitations.
- Under the Final Rule, recipients must submit their SBE to the FAA for approval within 180 days following publication of the Final Rule (SBE submission deadline). Timely submission of the SBE is condition of eligibility for FAA financial assistance. The Department recognizes that creation of the SBE will require additional effort and time and anticipates that recipients will begin working on the SBE as expeditiously as possible after the Final Rule's publication.
- Since the SBE is race-neutral and its use can assist recipients in meeting the race-neutral provisions of their overall goals, it will become an integral part of the recipient's ACDBE program. The SBE requirement furthers the overall objectives of the DBE and ACDBE programs, since recipients must meet as much as possible of their overall goals through race-neutral means and measures.
- As part of their proposed element, recipients must actively implement their programs through a variety of strategies that could include race- and gender-neutral small business set-asides, prime subleasing opportunities, and alternative concession contracting approaches or strategies.
- If applicable, recipients are responsible for establishing SBE certification eligibility requirements and are encouraged to provide relevant SBE program information and documents on their websites (e.g., certification application, links to software platform, directory, additional resources).

¹ *The contents of the document do not have the force and effect of law and are not meant to bind the public in any way, and the document is intended only to provide information to the public regarding existing requirements under the law or agency policies.*

- Under § 23.26 of the Final Rule, the SBE must include an objective, a definition of small business, six enumerated assurances, eligibility or verification processes, monitoring plan, and an implementation timeline.
- Pursuant to § 23.79 of Part 23, the SBE must not include a local geographical preference. As part of the SBE assurances, the recipient must require that the program remain open to small businesses regardless of their location (i.e., no local or other geographic preference). See question #3 below.
- As stated in the Final Rule preamble, the Department expects airport recipients to be innovative and creative and not completely dismiss certain approaches over others solely because they do not appear to be viable options under current practices.

2. When must the SBE reporting requirement be implemented?

- The new Part 23 SBE requires that recipients begin collecting and submit an annual report on small business participation obtained through the use of its SBE. The new Part 23 SBE annual reporting requirement is intended to be added as a supplemental report to the Part 23 Uniform Report and will be required to be submitted on the annual date that the Part 23 Uniform Report is due (March 1). The first annual submission that should include the SBE, which is the report covering Fiscal Year 2024, will be due on March 1, 2025.
- A sample SBE report will be posted to the FAA's website available at https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program.
- FAA recipients should begin collecting the data as soon as practicable after publication of the Final Rule. This will impact goals and methodologies being worked on after that date and SBE information will need to be incorporated with the submission.

3. Does the prohibition of local geographic preferences in § 23.79 prohibit the application of local hire provisions in airport concessions?

- For purposes of § 23.79 of Part 23, the prohibition against local geographic preference does not necessarily prohibit local hiring initiatives, as long as such initiatives do not have the effect of giving a concession located in a local area an advantage over concessions from other places.
- As required by § 23.77, airport recipients must report to the FAA any other state or local law, regulation, or policy pertaining to minorities, women, or disadvantaged business enterprises concerning airport concessions that adds to, goes beyond, or imposes more stringent requirements than the provisions of Part 23. The FAA will determine whether such a law, regulation, or policy conflicts with this part, in which case the requirements of this part will govern.

4. What specific measures are recipients required to undertake in monitoring race-neutral participation from their small business elements?

- Recipients must monitor race-neutral participation derived from their small business elements. Monitoring for performance of a commercially useful function (CUF) is required in order to count a firm's participation in reports. The FAA will issue standalone guidance on the SBE and reporting requirements after the Final Rule's effective date.

5. Will the FAA consultation concerning small business consortiums be available before or after the effective date of the Final Rule?

- After the effective date of the final rule, the FAA will offer consultations to interested recipients on the mechanics and measures required to establish and implement statewide consortiums for SBEs. Recipients can request consultation by contacting their Regional Airport DBE/ACDBE Program Compliance Specialist, whose contact information is accessible at https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/contact. The Department will make reasonable efforts to provide technical assistance to recipients.
- The Department anticipates that smaller hub airports may benefit from statewide SBE consortiums permitting them to pool resources and work collaboratively with other recipients who are required to actively implement SBEs under DBE and ACDBE programs.

6. When must the ACDBE Active Participants List be implemented?

- The Final Rule adds an active participants list requirement, parallel to the Part 26 bidders list requirement, to § 23.27 of Part 23. The following information must be obtained about ACDBEs and non-ACDBEs who seek to work on concession opportunities:
 - Firm name;
 - Firm address including zip code;
 - Firm status as an ACDBE or non-ACDBE;
 - Race and gender information for the firm's majority owner;
 - NAICS code applicable to the concession contact in which the firm seeks to perform;
 - Age of the firm; and
 - The annual gross receipts of the firm.
- The required data must be collected from all firms that have participated or attempted to participate in airport concession activities and submitted proposals or initial responses to negotiated procurements.
- The Final Rule provides that the data must be entered into the FAA's designated system no later than March 1 following the end of each fiscal year. (beginning March 1, 2025). However, recipients should begin collecting the data expeditiously after the effective date.

- The Department intends to develop its own database for use by recipients. However, the Final Rule allows for the delay in the Department's database implementation to allow ample time for the Department to build and implement it. Once the Department's database is fully operational, recipients will be able to enter the required information with relative ease and minimal burden.
- Recipients should use the information to set overall goals. However, if a recipient decides to use an active participation list that is not representative of all ready, willing, and able ACDBEs relative to all businesses that are ready, willing, and able to participate in a recipient's ACDBE program, the active participation list must be used in tandem with other data sources to ensure that it meets the existing standards in Part 23 applicable to alternative methods used to derive a base figure for the ACDBE availability estimate.

7. Will the change from a five-year term to a ten-year term for long term, exclusive (LTE) concessionaire agreements affect existing agreements?

- Yes. Extending the definition of long-term from a five-year term to a ten-year term will affect existing agreements. Long-term is now defined in the Final Rule as an LTE agreement having a term of more than ten years, including any combination of base term and options or holdovers that extend the term of the agreement if the effect is a term of more than ten years.
- The new requirements will impact existing agreements when a material amendment is under negotiation following publication of the Final Rule and scheduled to take effect after the Final Rule's effective date. The Final Rule and FAA's current guidance on LTE agreements prohibit sponsors from entering into LTE agreements for the operations of concessions except under very limited conditions. The FAA must approve all LTE agreements before award. The FAA is aware that there may be existing agreements that it has not approved. These agreements must be immediately submitted to the FAA for review. Following the effective date of the Final Rule, the FAA may update and/or revise its existing guidance on LTE agreements to assist sponsors in structuring their leasing activities in conformance with Part 23.

8. Will the change in the long-term, exclusive agreement term impact holdovers?

- Yes. The Final Rule provides that exclusive leases, agreements, or contracts that become long-term as the result of a holdover, absent an approved plan to release a solicitation for that opportunity or to renegotiate the lease or contract, are generally prohibited. Holdover provisions of an airport lease typically allow the airport sponsor to extend the terms of an existing airport lease without execution of a new lease.

9. What are the new oversight and compliance requirements for LTE agreements?

- If an agreement becomes long-term and exclusive as a result of a holdover, airport recipients must submit a “holdover plan” to the FAA for approval at least 60 days prior to the expiration of the current contract, agreement or lease. Holdover plans include similar information and requirements for LTE agreements, except that recipients must submit a written explanation for the holdover and the method and date they intend to use to solicit or renegotiate the concession contract, agreement, or lease in holdover status. Airport recipients must also articulate a need for the holdover period that causes an exclusive agreement to become a long-term lease or contract.
- In addition, the Final Rule addresses LTE agreements awarded through direct negotiation. New paragraph (d) of § 23.75 does not require airport recipients to submit a copy of the solicitation. Airport recipients are still required to submit other items generally required for LTE Agreements (e.g., description of the special local circumstances, ACDBE contract goal analysis, ACDBE certification documentation, business description, investment information, a copy of the final LTE agreement.)

10. When must recipients begin using the amended Uniform Report?

- The Final Rule removes the Uniform Report form from Appendix A and requires that it be posted on the Department’s website. Instructions concerning added data will be included in the revised form, and recipients should begin capturing the new data after the Final Rule’s effective date and will submit the revised Uniform Report by the March 1, 2025, deadline.

11. Where can recipients find the FAA’s overall goal submission schedule?

- Recipients must submit goals every three years based on the published schedule which appears at:
https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program.

12. When and how should recipients address the revised ACDBE stakeholder consultation requirement?

- The Final Rule revises § 23.43 and requires consultation only when the ACDBE goal methodology includes opportunities for new concession agreements for both direct ownership arrangements and purchases of goods and services. Recipients should implement any consultation change for goal-setting efforts currently underway after the Final Rule effective date.
- As stated in the Final Rule preamble, the Department believes that consultation is still necessary when an adjustment is being made, or is proposed to be made, to the base figure of the recipient’s ACDBE goal. The

Final Rule text does not state this expressly because adjustments usually arise only when there are new concession opportunities.

13. What are the new ongoing monitoring requirements for continued counting of ACDBEs decertified during the term of agreements?

- Under the Final Rule, the counting rules for firms decertified after entering a concession agreement, previously found in §§ 23.39(e) and 23.55(j) are now set forth in § 23.55(j).
- Under § 23.55(j), participation of ACDBE firms which lose certification for exceeding size and personal net worth (PNW) limits may count toward ACDBE goals for the remainder of the term of a concession agreement. However, continued credit of participation requires that decertified firms maintain their eligibility in all other respects (e.g., ownership and control). Proactive and ongoing monitoring is pivotal for airport recipients to determine if decertified firms' participation can continue to be counted toward ACDBE goals for the remainder of the term of a concession agreement.
- The Final Rule adds to the Part 23 monitoring and oversight obligations for counting participation under § 23.55(j) by providing that decertified ACDBEs must submit to airport recipients, Declarations of Eligibility (DOEs) as a condition of continued counting. (See Part 26 2024 final rule implementation.)
- Under the Final Rule, airport recipients must start collecting these DOE submissions upon the effective date of the Final Rule.
- The Final Rule continues to require that the recipient not count the concessionaire's participation toward goals beyond the termination date for the concession agreement in effect at the time of decertification (e.g., in a case where the agreement is renewed or extended in conformance with the new LTE requirements or an option for continued participation beyond the current term is exercised).

14. When and how should recipients adhere to the new requirement that they investigate the full extent of services offered by financial institutions?

- The Final Rule adds a new requirement in § 23.23(c) which mirrors the related requirement in Part 26 and states that the recipient must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in their community. As stated in the Final Rule's preamble, the Department recognizes that access to capital historically has and continues to be a major barrier to ACDBE participation in the program. The Final Rule seeks to reduce this barrier by adding the new requirement.
- After the effective date of the Final Rule, recipients should update their ACDBE programs to include provisions for implementing these requirements under this section. These provisions should describe what reasonable efforts each recipient will make to use such institutions and encourage prime concessionaires to use these institutions as well. Recipients are expected to

work proactively and thoroughly toward meeting this requirement. Recipients should have already commenced reasonable efforts based upon the FAA's 2023 updated *Best Practices for Fostering Participation from new DBEs and ACDBEs at Airports* (April 11, 2023) letter which recommended that recipients begin doing so. See

https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program.

The new language codifies the best practices in the letter.

- The term “financial institution” in this provision includes, but is not limited to, traditional banking institutions and Community Development Financial Institutions.
- Recipients should ensure that all efforts planned or made under this section are conducted in good faith and comply with program requirements.

15. When do the new requirements for setting non-car rental goods and service concession-specific goals become effective?

- The new requirements apply to any concession-specific goal that is set after the Final Rule's effective date. After the Final Rule's effective date, recipients must adhere to the revised language of § 23.25(e)(1)(i) which states that a concession-specific goal for any concession other than car rental may be based on purchases or leases of goods and services only when the analysis of the relative availability of ACDBEs and all relevant evidence reasonably supports that there is de minimis availability for direct ownership arrangement participation for that concession opportunity.

16. When does the Final Rule's shortfall analysis take effect and how will it impact pending shortfall analysis submissions?

- The Final Rule extends the due date for submitting the shortfall analysis provided in § 23.57 from within 90 days of the end of the fiscal year to 30 days after submitting the Uniform Report. The Final Rule sets the due date to April 1 for the shortfall analysis,
- Recipients must submit a shortfall analysis and corrective action plan to the FAA if they do not meet their ACDBE participation goal. The plan explains the differences between the recipient's overall goal and the awards and commitments in that fiscal year and the specific steps and milestones recipients will take to remedy the shortfall.
- Tips for goal shortfall analyses and corrective measures are addressed in a standalone document on the FAA website, and recipients may continue to be guided by this document.

17. Are there set deadlines for the significant changes to the Final Rule to be included in ACDBE Program Plans (i.e., small business element)?

- While the Final Rule does not include established deadlines for all significant changes, recipients should make reasonable efforts in meeting new requirements as soon as possible after the effective date.
- Since the Final Rule will necessitate significant amendments to recipients' ACDBE program plans, FAA recipients are encouraged to begin making revisions as soon as the Final Rule is published and to increase these efforts once the Final Rule takes effect. Recipients should begin reviewing the new requirements immediately and begin engaging impacted program personnel in this effort.

18. When should FAA recipients begin to implement the Final Rule's revised certification standards?

- FAA recipients should begin to review and implement the Final Rule's revised certification standards and procedures immediately.
- FAA recipients should also thoroughly review the new Part 26 certification transitional guidance which addresses major certification changes including, but not limited to, the new PNW cap, small business size standards, and declarations of eligibility. FAA recipients are expected to become conversant with the new provisions, particularly as they apply to ACDBE certification. Generally, these provisions are intended to be implemented after the effective date of the Final Rule; however, the Part 26 guidance addresses the anticipated actions and timelines in detail.

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.