



Disadvantaged Business Enterprise Program
Airport Concessions Disadvantaged Business Enterprise Program

FINAL RULE

OST • FAA • FHWA • FTA

**ACDBE Final Rule
April 2024**

49 CFR Part 23



Topics Covered

- Overview: Changes and Impacts
- Technical Corrections Overview
- Notable Updates to Definitions
- ACDBE Certification Updates
- Program Updates
- Reporting Updates
- Implementation Guidance

Final Rule Changes and Impacts

Rule Changes

- Part 23 Program objectives
- Adds new program objectives to Part 23
- Addition of an ACDBE Small Business Element
- Requirement of consultation
- Establishes framework for counting participation of ACDBE firms decertified after concession award
- Clarifies the use of goods and services for concession specific goals
- Codifies the best practice for sponsors, as part of their ACDBE programs to investigate, use, and encourage the use of SEDO financial institutions.
- Extends the term length of Long-Term Exclusive (LTE) agreements from 5 years to 10 years
- Defines the term "exclusive"
- Updates the documentation and information requirements for LTE Agreement submissions
- Subjects exclusive concession agreements that become long-term as a result of a holdover tenancy to the LTE review requirements.

Impacts

- Aligns ACDBE program objectives with objectives in 49 CFR part 26
- Enhances program administration and oversight
- Increases efforts to facilitate race neutral ACDBE participation via small business opportunities
- Streamlines goal-setting and reporting requirements
- Supports the Administration's Equity Plan approach to data-driven decision making (data collection)
- Reduces barriers to capital access for ACDBEs
- Reduces administrative burdens (overall)

Technical Corrections Overview

- Ensure consistency between Part 23 and Part 26
- Remove obsolete and/or duplicative provisions
- Clarify requirements to submit an ACDBE program
- Additions/Changes to definitions to clarify existing requirements

Notable Updates to Definitions (§ 23.3)

- Adopts existing definitions in Part 26
- Part 23 Updates:
 - Amends definition of ACDBE
 - Definition of Concession
 - Definition of Sublease/sub-concession

Part 23 Program Updates

ACDBE Certification Updates

- PNW Cap Raised from \$1.32 million to \$2,047,000
 - Major change - exclude retirement accounts in full.
 - New Formula for PNW Cap Calculation
 - Three-year periodic cap adjustment.
 - Eliminates suspended ACDBE PNW's "third exemption."
- Size Standards (§ 23.33)
 - Size calculation on a 5-year basis
- Joint venture receipts must be included in the size calculation in proportion to the ACDBE's ownership interests
- Franchise and license agreements (§ 26.71(h))

Financial Institutions (§ 23.23)

- Codifies the best practice for recipients, as part of their ACDBE programs
- Investigate, use and encourage the use of Socially and Economically Disadvantaged Owner (SEDO) financial institutions
- What is a financial institution?

ACDBE Goal Setting

- Direct Ownership Requirement (§ 23.25)
- Goods and Service Concession Specific Goals (§ 23.25)
- Overall Goal Setting Consultation Requirement (§ 23.43)
 - Only When New Concession Opportunities Exist

Counting ACDBE Participation (§ 23.55)

- Framework for continuing counting of participation of ACDBE firms decertified after concession award
- Requirement to monitoring firm's eligibility
- Submission of Declaration of Eligibility (DOE)

Small Business Element (§ 23.26)

- Fostering Small Business Participation
- Create Small Business Element Due October 9, 2024
- Examples of ACDBE SBE Race-neutral strategies
 - Establishing small business set-asides for certain concession opportunities
 - Considering concession opportunities available through all concession models
 - Identifying alternative contracting approaches to facilitate the ability of small businesses, including ACDBEs, to compete for and obtain direct leasing opportunities
 - Requiring all concession models to provide subleasing opportunities of a size that small businesses, including ACDBEs, reasonably can operate
- Required Assurances
- Annual SBE Reporting

Long-Term Exclusive (LTE) Agreements (§ 23.75)

- Extends “**Long-Term**” to 10 years, including options or holdovers
- Term “**Exclusive**” defined in regulation
- Designates new timeframes for submitting documentation to FAA for approval
 - 60 days before solicitation is released
 - 45 days before contract award
- LTE Agreements as a result of holdover tenancies
 - 60 days prior to the expiration of the current lease term.

Long-Term Exclusive – Competitive Solicitation

Two-Step Review Process (§ 23.75 (c))

Step 1: Documentation required 60 days before solicitation

- 1) A description of the special local circumstances
- 2) A copy of the solicitation
- 3) ACDBE contract goal analysis

Step 2: Documentation required 45 days before contract award

- 4) Documentation that ACDBE participants are certified in the appropriate NAICS code
- 5) A general description of the type of business or businesses to be operated by the ACDBE
- 6) Information on the investment and any unusual management or financial arrangements between the prime concessionaire and ACDBE
- 7) Final long-term exclusive concession agreement, subleasing or other agreements

Long-Term Exclusive – Direct Negotiations

Documentation required 45 days before contract award (§ 23.75 (d))

- 1) A description of the special local circumstances
- 2) ACDBE contract goal analysis
- 3) Documentation that ACDBE participants are certified in the appropriate NAICS code
- 4) A general description of the type of business or businesses to be operated by the ACDBE
- 5) Information on the investment and any unusual management or financial arrangements between the prime concessionaire and ACDBE
- 6) Final long-term exclusive concession agreement, subleasing or other agreements

Long-Term Exclusive – Holdover Agreements

Holdover plan due at least 60 days (§ 23.75 (e))

- 1) A description of the special local circumstances that warrant the holdover
- 2) Anticipated date for renewal or re-bidding of the agreement
- 3) The method to be applied for renewal or re-bidding of the agreement
- 4) Submission of all documentation required before contract award or an explanation as to why the item is not available or cannot be submitted

Local Geographic Preferences (§ 23.79)

- Must not use a local geographic preference.
- A local geographic preference is any requirement that gives a **concessionaire** located in one place (e.g., your local area) an advantage over concessionaires from other places in obtaining business as, or with, a concession at your airport.

Part 23 Reporting Updates

ACDBE Active Participants List (§ 23.27)

- What information must be collected?
 - Firm's name, address, and its classification as an ACDBE or non-ACDBE
 - Race and gender details of the firm's majority owner
 - NAICS code relevant to the concession contract the firm aims to pursue
 - Age of the firm
 - Firm's annual gross receipts
- Reporting Active Participant List Information
- How does it apply to goal setting?

ACDBE Rule Reporting Requirement

- Expands the MAP-21 reporting requirements
 - Include ACDBEs and the number and percentage of in-state and out-of-state SEDOs by gender and ethnicity (§ 23.27)
- Small Business Element Reporting (23.26)
- ACDBE Participation Report (§ 23.27)
 - New Joint Venture Participation Category
 - Reporting Participation of Firms Owned by Multiple SEDOs of Different Gender/Ethnic Backgrounds
 - Small Business Element Reporting

Overview of ACDBE Reporting Requirements

REPORTING REQUIREMENT	PRIOR RULE	2024 FINAL RULE MODIFICATION
Annual number and percentage of in-state and out-of-state ACDBE certifications	N/A	Each year in conjunction with part 26 MAP-21 call.
Send Small Business Element as part of ACDBE Program plan to FAA	N/A	Within 180 days after the rule is published.
ACDBE Uniform Report		Annually by March 1, commencing March 1, 2025
Active Participant List	None	Annually by March 1, commencing March 1, 2025
Small Business Element Reporting	None	Annually by March 1, commencing March 1, 2025
ACDBE Goal Shortall Analysis sent to FAA	Core 30 airports–within 90 days of the end of the fiscal year	April 1 (i.e., 30 days from day due date of Uniform Report- March 1)
Definition of “long-term” in LTEs	5 years	Extended to 10 years
Submission of LTE Concession Agreements to FAA	No date	Competitive Solicitation - 60 days before solicitation is released/ 45 days before contract award Direct Negotiation - 45 days before contract award Holdover - 60 days prior to the expiration of the current lease term

Implementation Guidance Topics

1. When must the new Part 23 small business element be established?
2. When must the SBE reporting requirement be implemented?
3. Does the prohibition of local geographic preferences in § 23.79 prohibit the application of local hire provisions in airport concessions?
4. What specific measures are recipients required to undertake in monitoring race-neutral participation from their small business elements?
5. Will the FAA consultation concerning small business consortiums be available before or after the effective date of the Final Rule?
6. When must the ACDBE Active Participants List be implemented?
7. Will the change from a five-year term to a ten-year term for long-term, exclusive (LTE) concessionaire agreements affect existing agreements?
8. Will the change in the long-term, exclusive agreement term impact holdovers?
9. What are the new oversight and compliance requirements for LTE agreements?
10. When must recipients begin using the amended Uniform Report

Implementation Guidance Topics (continued)

10. Where can recipients find the FAA's overall goal submission schedule?
11. When and how should recipients address the revised ACDBE stakeholder consultation requirement?
12. What are the new ongoing monitoring requirements for continued counting of ACDBEs decertified during the term of agreements?
13. When and how should recipients adhere to the new requirement that they investigate the full extent of services offered by financial institutions?
14. When do the new requirements for setting non-car rental goods and service concession-specific goals become effective?
15. When does the Final Rule's shortfall analysis take effect and how will it impact pending shortfall analysis submissions?
16. Are there set deadlines for the significant changes to the Final Rule to be included in ACDBE Program Plans (i.e., small business element)?
17. When should FAA recipients begin to implement the Final Rule's revised certification standards?

Questions?