

## **Official FAQs on DBE Program Regulations (49 CFR 23)**

### **Overview**

The General Counsel of the Department of Transportation has reviewed these questions and answers and approved them as consistent with the language and intent of 49 CFR Part 23. These questions and answers therefore represent the institutional position of the Department of Transportation.

These questions and answers provide guidance and information for compliance with the provisions under 49 CFR part 23, pertaining to the implementation of the Department's disadvantaged business enterprise program. Like all guidance material, these questions and answers are not, in themselves, legally binding or mandatory, and do not constitute regulations. They are issued to provide an acceptable means, but not the only means, of compliance with Part 23. While these questions and answers are not mandatory, they are derived from extensive DOT, recipient, and contractor experience and input concerning the determination of compliance with Part 23.

### **Q&A**

Additional guidance:

[FAA Guidance on Airport Concession Requirements](#)

[FY 2001 Concession Goals Under 49 CFR Part 23 - Attachment 1A](#)

[Additional Guidance on Airport Concessions](#)

[Overall Disadvantaged Business Enterprise Concession Goal](#)

## ***Questions and Answers***

### **Section 23.75**

**Question: Can recipients enter into long-term, exclusive agreements with concessionaires?**

The purpose of this guidance on Long-Term, Exclusive (LTE) agreements for concessions is to provide information and direction to airport sponsors, ACDBE program staff, stakeholders, and all other interested parties on how to determine whether an agreement is considered a LTE agreement subject to the prohibition against such agreements in the ACDBE program rules.

[Long-Term, Exclusive \(LTE\) Guidance](#)

### **Section 23.31; 26.67(b)(2) - Personal Net Worth**

**Question: If the owner of a DBE or ACDBE certified firm or applicant firm has a personal net worth of less than \$1.32 million, does that necessarily mean that the recipient must regard the owner as being economically disadvantaged?**

**Answer:** No. A person cannot be regarded as economically disadvantaged if he or she exceeds the \$1.32 million personal net worth (PNW) cap. However, there may be some cases in which an individual whose PNW is less than \$1.32 million may properly be regarded as not being economically disadvantaged.

- The legal and policy rationale behind the PNW provision of the rule is that a program designed to assist United States Department of Transportation Official FAQs on DBE Program Regulations (49 CFR 23) | Department of Transportation socially and economically disadvantaged individuals should not include people who can reasonably be regarded as having accumulated wealth too substantial to need the program's assistance.
- Consequently, in determining whether an individual is economically disadvantaged, a recipient is entitled to look not only at the individual's PNW but also at his or her overall economic situation to make a reasonable determination of whether the individual is fairly regarded as being economically disadvantaged.
- Consistent with Small Business Administration practice in the 8(a) program, it is appropriate for recipients to review the total fair market value of the individual's assets and determine if that level appears to be substantial and indicates an ability to accumulate substantial wealth.
- For example, an individual with very high assets and significant liabilities may, in accounting terms, have a PNW of less than \$1,320,000. However, the person's assets (e.g., a very expensive house, a yacht, extensive real or personal property holdings) may lead to a conclusion that he or she is not economically disadvantaged. The recipient can rebut the individual's presumption of economic disadvantage under these circumstances, as provided in sec. 26.67(b)(2).

This guidance applies to determinations of economic disadvantage under both 49 CFR Part 23 and 49 CFR Part 26.

### **Section 23.3 - Net Worth and the ACDBE Program (ARCHIVED)**

**Question: In the ACDBE program, what financial obligations may be counted toward the personal net worth exclusions for assets supporting business financing?**

**Answer:** The definition of personal net worth (PNW) in the ACDBE regulation is the following: 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:

- The individual's ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification;
- the individual's equity in his or her primary place of residence; and

- 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 [emphasis added].

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.

Only assets supporting obligations for which the individual is currently liable, which are properly documented, and for which his or her personal assets are encumbered, should be counted toward this exclusion.

EXAMPLE 1: Smith has \$3 million line of credit from a bank to initiate an airport concession project for Firm X. His personal assets are pledged as security for the entire \$3 million line of credit. At the time the Firm X applies for certification as an ACDBE, Smith has drawn \$600,000 from the line of credit. Because his only obligation at the time of application is to repay the \$600,000 draw from the line of credit, the proper amount to be excluded from the PNW calculation for Smith is \$600,000.

EXAMPLE 2: Two years ago, Jones got a \$2 million loan to expand his airport concession business. His personal assets were pledged as security for the loan. Firm Y applied for ACDBE certification at the same time as Jones received his loan, and the \$2 million was properly excluded from his PNW certification. By today, however, Jones has paid off \$1.2 million of the loan. Only \$800,000 is now properly excluded from today's PNW calculation, if proper documentation is provided. (Annual affidavits should reflect the current balance remaining to be paid on the loan, not the original amount of the loan.)

EXAMPLE 3: Brown received a loan from a bank for \$1.5 million in connection with starting a concession. At the time her firm applies for certification, however, the assets securing the loan appear to be those of a concession corporation, as distinct from her own personal assets. The \$1.5 million is not properly excluded from Brown's PNW calculation.

The initiation or expansion of a concession concerning which an owner seeks this exclusion should be real and present rather than a possibility that is speculative or well into the future. For example, assets supporting a loan or line of credit obtained today for a projected expansion of a concession three years from now would not be a reasonable basis for excluding the assets from today's PNW calculation.

Assets eligible for this exclusion from the PNW calculation are properly excluded from an owner's PNW calculation regardless of the location of concession for which the financing in question was arranged.

EXAMPLE 1: Williams got a loan of \$1 million from Bank X to start a concession business at Airport 1. Her personal assets were pledged as security for the loan. Airport 1 properly excluded \$1 million when it calculated Williams' PNW. Now Williams is starting Firm B at Airport 2. When Firm B applies to Airport 2 for ACDBE certification, \$500,000 remains to be paid off on the loan to Bank X. Airport 2 should exclude \$500,000 in calculating Williams' PNW, assuming proper documentation is provided.

EXAMPLE 2: Williams also got a \$1.3 million loan from Bank Y to help finance the concession at Airport 2. Her personal assets, above and beyond those pledged as security for the \$1 million loan from Bank X, are pledged as security for the loan from Bank Y. Airport 2 would properly exclude \$1.3 million in calculating Williams' PNW, in addition to the \$500,000 excluded in Example 1, for a total of \$1.8 million. The total assets excluded under this provision of the rule could never exceed \$3 million.

Since an ACDBE applicant bears the burden of demonstrating its eligibility, it is reasonable for recipients to request all supporting documentation for each financial obligation claimed by the applicant, including loan agreements, supporting lien and/or letter of credit documents, and specification of the assets used to secure a loan or line of credit.

Recipients should pay particular attention to the terms of a financial obligation, determine the extent to which the individual owner, as distinct from a corporation or other party, is obligated to repay, or is repaying, the obligation. The recipient should make appropriate inquiries into whether there are any additional borrowers or other factors that may affect the size or duration of the individual owner's debt.

***NOTE: The guidance in this Q &A applies only to 49 CFR Part 23. It does not apply to 49 CFR Part 26.***

**Question: May a recipient or UCP require a firm certified as a DBE under Part 26 to complete an entire new application to be certified as an ACDBE under part 23? (Section 23.37) (12/9/2011)**

**Answer:** No. Section 23.37 provides that as a recipient or UCP, you are required to presume that a firm certified in your State as a DBE under Part 26 meets size, disadvantage, ownership, and control requirements for certification as an ACDBE under Part 23.

- A recipient or UCP must check to make sure a Part 23 applicant meets the Part 23 PNW cap.
- There is only one additional determination that you need to make in order to certify such a firm as an ACDBE: whether the disadvantaged owners of the Part 26-certified

firm can control the activities of the firm with respect to its participation in the ACDBE program.

- You are not required to certify a DBE firm as an ACDBE if the firm does not do work relevant to the airport concessions program (e.g., operating a concession or providing goods and services to concessions).
- In summary, when you receive an ACDBE application that has a current Part 26 DBE certification in your State, you should only seek information on two subjects: the firm owner's PNW and the disadvantaged owner's ability to control the firm with respect to airport concession activities. You may not require the firm to file a complete new application.

[Back to Top](#)

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#### **WHAT ARE THE GOOD FAITH EFFORTS OBLIGATIONS OF CAR RENTAL COMPANIES TO MEET ACDBE GOALS AT AN AIRPORT?**

- Airport recipients are required to establish an annual overall ACDBE goal for car rental concession opportunities pursuant to 49 C.F.R. § 23.41(a) (2016).
- Once the overall ACDBE goal for car rental concession operations is established, individual goals are set by the airport for each car rental company operating at the airport.
- By statute (49 U.S.C. § 47107(e) (2014)), a car rental company must make a good faith effort to meet its ACDBE goal by exploring all options available to meet the goal to the maximum extent possible. The variety of options include the purchase of goods and services from ACDBE vendors. This, in turn, includes, but is not limited to, the purchase or lease of vehicles from an ACDBE vendor, vehicle repair services provided by ACDBEs, janitorial services, insurance, and management fees or commissions earned by ACDBEs.
- Under the statute cited above, a car rental company cannot be required to change its corporate structure to provide for direct ownership arrangements with ACDBEs to meet its ACDBE goal. However, a car rental company may choose to meet all or some portion of its goal through direct ownership arrangements with ACDBEs to comply with its good faith efforts obligation. In other words, a car rental company may engage in joint ventures, franchises, or subleases with an ACDBE to meet its ACDBE goal but cannot be required to do so.

- The ACDBE program regulation at 49 C.F.R. § 23.25(f) (2016) is intended to implement the statutory good faith efforts obligation. It states that: “[Recipients’] 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.
- As explained by the Department in the preamble to the final rule adopting section 23.25(f): “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 [at] a business or airport comes not only through goods and services purchases but also through concessions run by ACDBEs.” This speaks to encouraging the participation of car rental concessions owned and operated by ACDBEs in addition to the purchase of goods and services from ACDBEs. See 70 Fed. Reg. 14496 (March 22, 2005).
- The parenthetical language in 49 C.F.R. § 23.25(f) (2016) does not excuse car rental companies from the general obligation imposed on businesses subject to ACDBE goals to make good faith efforts to meet the goal. The parenthetical “except car rental companies” is intended only to implement the statutory limitation in 49 U.S.C. § 47107(e)(4) (2014) against requiring car rental companies to change their corporate structure to include direct ownership arrangements as a means of meeting ACDBE goals. See *id.*
- Airports are expected to rigorously review the quality, quantity and intensity of the good faith efforts made by the car rental companies to meet their ACDBE goal on a regular basis to ensure compliance. Airports should review 49 C.F.R. Part 26, Appendix A “Guidance Concerning Good Faith Efforts” that is made applicable to concession specific goals pursuant to 49 C.F.R. § 23.25(e) (2016). Many of the efforts described in Section IV of Appendix A would also apply to car rental companies. A failure by the car rental company to demonstrate sufficient good faith efforts may result in a finding of non-compliance with ACDBE program requirements and must be enforced by the airport. Failure by the airport to do so may result in a finding of non-compliance against the airport.

**Updated: February 9, 2017**

[Back to Top](#)

# ***FAA Guidance on Airport Concession Requirements***

## **Background**

Regulations of the U.S. Department of Transportation (DOT) require primary airports to implement and annually update a disadvantage business enterprise (DBE) concession plan (49 CFR Part 23, Subpart F, Section 23.93(b)(2)). Set forth below is guidance on updating your plan for Fiscal Year (FY) 02.

Each primary airport should submit the information in items 1 through 4 to the FAA Regional Civil Rights Office by February 1, 2002.

## **Required Reports**

1. Accomplishment report. This report is authorized by 49 CFR Section 23.95(d) and should be submitted in the format of Appendix 4 to the Federal Aviation Administration's (FAA) "Sample DBE Concession Plan." Guidance to assist recipients in completing the report is found on page 7 of the "Sample DBE Concession Plan."

It refers to recipients who calculated goals as a percentage of the gross receipts from all concessions. Indicate the actual DBE participation achieved during the period October 1, 2000, through September 30, 2001, by making the calculation shown on the bottom of Appendix 4.

If your previous year overall goal was calculated as a percentage of the number of concession agreements, rather than as a percentage of gross receipts, please refer to Page 7 of the "Sample DBE Concession Plan" on how to determine actual DBE participation. In either case, the report should reflect businesses operating as concessionaires only.

2. Report of certified DBE concessionaires counted toward the goals (Attachment 2). Each recipient should complete this report in accordance with the instructions provided.

3. Explanation. If applicable, attach an explanation why the previous year goal was not met.

4. FY-01 overall DBE goal.

(a) Due to the pending changes to the DBE rule, FAA is not establishing a multi-year concession plan at this time. As with FY-01, we are requesting that recipients submit an overall goal for one year only. It should cover FY-02 (October 1, 2001 through September 30, 2002) and be submitted by February 1. Do not submit goals for years beyond that date. If a recipient previously received approval to calculate overall goals as a percentage of the number of concession agreements, the same procedure may be used for the FY-02 goal. A rationale as specified in 49 CFR Section 23.99 need not be resubmitted. Only businesses meeting the definition of "concession" in Subpart F, 49 CFR Part 23, are included in the overall goal calculation. Do not include management contracts or subcontracts

with DBEs, or the purchases or leases of goods or services from off-airport DBEs in the overall goal.

(b) DOT and FAA have advised airports that in order to operate a concession program that meets current constitutional standards, the goal-setting process must be narrowly tailored. As such, the goals must reflect the relative availability of ready, willing, and able DBEs. The overall goal-setting process of 49 CFR Part 26, to which Section 23.95 refers, has sufficient flexibility to cover situations in which procurements are made on a national, as well as on a local, basis. Additional guidance on setting overall goals is included in Attachment 1A. It is identical to the guidance we provided for developing the FY-01 goal and supersedes the guidelines in the FAA's "Sample DBE Concession Plan" (July 1992).

(c) The FAA has determined that recipients are not required to provide for public participation, as specified in 49 CFR Section 26.45(g), in setting their overall FY-02 concession goal.

Updated: Tuesday, June 25, 2013

[Back to Top](#)



## ***FY 2001 Concession Goals Under 49 CFR Part 23 - Attachment 1A***

### **1. Background.**

Department of Transportation regulations require that overall concession goals be calculated consistent with the process in Section 26.45 for setting goals under DOT- assisted projects (49 CFR Section 23.95(a)). The FAA offers the following approach as one way to apply Section 26.45 to setting the airport's overall FY-02 concession goal. Other methods can be used, subject to approval of the FAA.

### **2. One approach to setting goals.**

a. This guidance considers a recipient who expresses its overall goal as a percentage of gross receipts to be earned by all concessionaires (Section 23.95(a)(2)(i)), rather than as a percentage of the total number of concession agreements operating at the airport during the goal period (Section 23.95(a)(2)(ii)).

$\text{Overall DBE Goal} = \frac{\text{Estimated Gross Receipts from DBEs (\$)}}{\text{Estimated Gross Receipts from All Concessions (\$)}}$
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b. Except for those concession agreements referenced in Paragraph c, include in the numerator and denominator, as appropriate, gross receipts to be earned by existing DBEs and/or non-DBEs that will participate in the concession agreements.

c. Consistent with the two-step process outlined in 49 CFR Section 26.45, determine the relative availability of DBEs ready, willing, and able to perform work for each "concession opportunity" that will occur during the goal period. A "concession opportunity" includes any of the following actions by a recipient—

- (1) awarding a new concession agreement;
- (2) exercising an option to renew an existing agreement; or
- (3) making a material amendment to an existing agreement.

d. Under "Step 1" of the two-step process (Section 26.45(c)), use available sources of data or information to determine the base figure. (See Paragraph e.) A combination of sources can also be used. Recipients are not restricted to the methods listed in Section 26.45(c). Moreover, the FAA's own review indicates that the industrial classifications in the Census Bureau's County Business Pattern data base, referenced in 26.45(c)(1), in some instances do not correspond to the types of businesses operated as concessions and thus, may not provide adequate data. A recipient can also employ a different method for each "concession opportunity" if the method best suits a given procurement. Any methodology chosen must be based on demonstrable evidence of market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in the recipient's market.

e. Sources of data that the recipient may consider using in determining a base figure include, but are not limited to the following--

- (1) DBE directories.
- (2) Lists of bidders, proposers, or other firms who previously competed for a concession contract.
- (3) Firms who previously expressed interest in operating a concession, e.g., attendees at pre-solicitation conferences, firms who purchased Request for Proposal documents, etc.
- (4) Information on DBEs and non-DBEs currently performing the same or a similar type of concession at the recipient's airport or other airports in the recipient's market area.
- (5) Any pertinent data maintained by FAA regional offices.
- (6) Data derived from a valid, applicable disparity study.

f. Make appropriate adjustments to the base figure using an approach consistent with "Step 2" as outlined in 49 CFR Section 26.45(d).

g. After determining the relative availability of DBEs for a concession opportunity, multiply the percentage figure by the total projected gross receipts from the concession. The resulting figure represents estimated DBE participation and is added to the numerator, while the total estimated gross receipts from the concession is added to the denominator.

### **3. Example applying the approach.**

a. Figure 1 lists concession agreements to be operated at a hypothetical primary airport during FY-02. The first seven agreements shown will carry over from previous years, and none will be materially amended or renewed during FY-02. As such, none represents a "concession opportunity." The projected gross receipts for the DBE and non-DBE participants are included in the numerator and denominator, as applicable, as shown in Figure 2.

b. Each of the last four agreements listed in Figure 1 offers a concession opportunity--three new ones will be awarded, while the term of the lease with "The News Shop" (a non-DBE) will be extended 5 years. Consistent with the two-step process outlined in 49 CFR Section 26.45(b) through (d), the recipient determines the relative availability of DBEs for each of these opportunities.

(1) The recipient determines that the relative availability of DBEs to operate the new bookstore is 14%. Thus, \$50,700 (14% of \$362,000) represents projected DBE gross receipts and is included in the numerator, while the total receipts (\$362,000) are added to the denominator (Figure 2).

(2) As a condition of extending The News Shop's lease for 5 additional years, the airport imposes a requirement on this firm to make good faith efforts to sublease one of its locations in the midfield terminal to a DBE. The sublease is expected to generate approximately \$90,000 in revenues. The recipient determines that the

relative availability of DBEs to perform the work of the concession is 16.2%. Projected DBE participation in this instance is 16.2% x \$90,000 or \$14,600. Thus, \$14,600 is added to the numerator, while total estimated gross receipts (\$882,000) is included in the denominator (Figure 2).

**(3)** The recipient determines that the relative availability of DBE firms in its market area (in this case, the entire country) that provide baggage cart services is zero. Following a review of information consistent with the two-step process, the recipient determines that the only firm that provides such services is a non-DBE. Consequently, none of the projected gross receipts from this concession are added to the numerator, while the total (\$119,000) is included in the denominator (Figure 2).

**(4)** A food court consisting of 4 businesses begins operation during FY-01. The relative availability of DBE food/beverage operators is determined by the recipient to be 18 percent. Projected DBE gross receipts is calculated to be \$264,800 (18% x \$1,471,000 total), and the appropriate figures are added to the numerator and denominator (Figure 2).

#### **4. Setting Contract goals.**

**a.** Contract goals are authorized by 49 CFR Section 23.103(a), but the rule does not require that one be set for each concession.

**b.** The relative availability percentage for each concession opportunity, as described above, is the appropriate figure to use as the contract goal. For example, a contract goal for the Bookstore would be 14%.

**c.** DOT/FAA recommends that recipients implement race-neutral mechanisms, whenever possible, if doing so will result in achieving the overall goal.

**d.** Imposing a contract goal on a car rental is subject to the provisions of 49 U.S.C. Section 47107(e)(4)(C), which states:

*"This subsection does not require a car rental firm to change its corporate structure to provide for a direct ownership arrangement to meet the requirements of this subsection."*

Direct ownership arrangements include joint ventures, franchises, and subleases. The FAA has advised recipients that the above provision is in effect.

Updated: Thursday, June 27, 2013

[Back to Top](#)

## **Additional Guidance on Airport Concessions**

Under 49 CFR Part 26, a DOT recipient is not authorized to require submission of a statement of personal net worth (PNW) from a firm seeking to participate in the DBE program only as a concessionaire. On June 28, 1999, DOT published a "Final rule; correction" to Part 26 in the Federal Register (64 F.R. 34569). The amendment specifies that the disadvantaged owners of airport concessionaires are not required to submit PNW statements. In the preamble, DOT clarified that the PNW cap in 49 CFR Section 26.67, which is applicable to DOT-assisted contractors, does not apply to concessionaires.

A supplemental Notice of Proposed Rulemaking (SNPRM) published September 8, 2000, proposed establishing a PNW cap for the airport concession program (65 F.R. 54454). The comments submitted to the proposal are currently under review by DOT. A final rule has not been issued. FAA will notify recipients upon publication of a final rule establishing a PNW cap for the concessionaires. Until such time as that occurs, recipients must refrain from requesting PNW information from the disadvantaged owner of a concession, unless the firm also applies for certification as a DOT-assisted contractor.

Updated: Tuesday, June 25, 2013

[Back to Top](#)

## Overall Disadvantaged Business Enterprise Concession Goal

Overall Disadvantaged Business Enterprise Concession Goal Period: From 10/1/01 through 9/30/02

Figure 1 - Overall DBE Concession Goal					
Goal Period: From <u>10/1/01</u> Through <u>9/30/02</u>					
<u>Name of Concessionaire</u>	<u>Business Type</u>	<u>Estimated Gross Receipts</u>	<u>Estimated DBE Gross Receipts</u>	<u>Date Lease Begins</u>	<u>Date Lease Expires</u>
First Dominion	ATM/Money Exchange	7.0 *		1/1/97	12/31/02
Indian Crafters	Gift Shop	167.0	167.0	1/1/97	12/31/02
Telephonic	Local Pay Telephone	265.0		5/1/98	4/30/02
Vendomatic	Vending	225.0		1/1/98	12/31/03
Pizzeria	Italian Food	875.0	105.0 **	1/1/99	12/31/04
Fun Company	Game Room	82.0		6/1/99	5/31/03
Town Rental	Car Rental	1269.0		6/1/99	5/31/03
New Agreement	Bookstore	362.0	50.7	1/1/01	12/30/06
The News Shop	News/Retail	882.0	14.6	2/1/01	1/31/06
New Agreement	Baggage Carts	119.0		2/1/01	1/31/06
New Agreement	Food Court (4 locations)	1471.0	264.8	3/1/01	2/28/06
<b>Total</b>		<b>\$ 5,724.0</b>	<b>602.1</b>		
* Net payment to the airport.					
** DBE is a 12% joint venture partner.					
Overall DBE Goal = $\frac{\$ 602.1}{\$5,724.0} = 10.5\%$					
Note: Gross receipts in thousands (000's).					

Updated: Tuesday, June 25, 2013

[Back to Top](#)