

§ 23.95 Elements of Disadvantaged Business Enterprise (DBE) concession plan.

(a) *Overall annual DBE goals.* (1) The sponsor shall establish an overall goal for the participation of DBE's in concessions for each 12-month period covered by the plan. The goals shall be consistent with the process for setting overall goals set forth in 49 CFR 26.45.

(2) Sponsors shall calculate the overall DBE goal as a percentage of one of the following bases:

(i) The estimated gross receipts that will be earned by all concessions operating at the airport during the goal period. (Where the terms of a concession agreement do not provide for the sponsor to know the gross receipts, the sponsor shall use the net payment to the airport for such agreements and combine these figures with the estimated gross receipts from other agreements, for purposes of making this calculation. The plan shall indicate which concession agreements do not provide for the sponsor to know the gross receipts.)

(ii) The total number of concession agreements operating at the airport during the goal period.

(3) The plan shall state which base the sponsor proposes to use for calculating the overall goals. Sponsors proposing to use the base described in paragraph (a)(2)(i) of this section shall submit a rationale as required by § 23.99.

(4) Sponsors who will employ the procedures of paragraph (a)(2)(i) of this section shall exclude from the overall goal any portion of a firm's estimated gross receipts that will not be generated from a concession activity.

Example. A firm operates a restaurant in the airport terminal which services the travelling public and under the same lease agreement, provides in-flight catering service to the 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 service are excluded.

(5) Sponsors who will employ the procedures of paragraph (a)(2)(i) of this section shall use the net payment to the airport for banks and banking services, including automated teller ma-

chines (ATM) and foreign currency exchanges.

(6) To the extent practicable, sponsors shall seek to obtain DBE participation in all types of concession activities and not concentrate participation in one category or a few categories to the exclusion of others.

(7) Airport sponsors may establish an overall annual goal exceeding 10 percent.

(b) *Goal methodology.* (1) The plan shall contain a description of the methodology used in establishing each of the overall DBE goals. The methodology shall include information on the concessions that will operate at the airport during the period covered by the plan and the potential for DBE participation. For each concession agreement, the sponsor shall provide the following information, together with an additional information requested by the Regional Civil Rights Officer:

(i) Name of firm.

(ii) Type of business (e.g. bookstore, car rental, baggage carts).

(iii) Beginning and expiration dates of agreement, including options to renew.

(iv) For new agreements, method of solicitation proposed by sponsor (e.g. request for proposals, invitation for bids).

(v) Dates that material amendments will be made to the agreement (if known).

(vi) Estimated gross receipts for each goal period established in the plan.

(vii) Identification of those concessionaires that have been certified under this subpart as DBE's.

(viii) An indication of those concessions having potential for participation by DBE's.

(2) The plan shall include a narrative description of the types of efforts the sponsor intends to make, in accordance with paragraph (h) of this section, to achieve the overall annual goals.

(3) Sponsors who will include a DBE contract goal or other requirements in solicitations for concession agreements shall state those requirements in the plan.

(4) If none of the overall goals set under paragraph (a)(2)(i) or (a)(2)(ii) of this section is 10 percent or more, the sponsor shall submit the information

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and follow the procedures outlined in § 23.101.

(c) *DBE set-asides.* (1) Where not prohibited by state or local law and determined by the sponsor to be necessary to meet DBE goals, procedures to implement DBE set-asides shall be established. The DBE plan shall specify the concessions to be set-aside.

(2) If a state or local law prohibits the use of set-asides in the award of concessions, a citation of the appropriate authority shall be included in the plan.

(d) *Accomplishments in achieving DBE goals.* The plan shall contain an analysis of the accomplishments made by the sponsor toward achieving the previous year's goal. The plan shall show the effect of those results on the overall level of DBE participation in the airport's concessions.

(e) *Explanation for not achieving a goal.* (1) If the analysis required under paragraph (d) of this section indicates that the sponsor failed to meet the previous year's overall goal, the plan shall include a statement of the reasons demonstrating why failure to meet the goal was beyond the sponsor's control.

(2) If the FAA determines that the reasons given by the sponsor are not sufficient justification, or if the sponsor fails to state any reasons, the FAA may require the sponsor to implement appropriate remedial measures. Such measures may include an adjustment to the overall goals of the concession plan.

(f) *Certification procedures.* (1) The certification procedures set forth in 49 CFR part 26, subpart E are applicable to this subpart. Sponsors may count toward their overall goals only those firms that have been certified in accordance with the procedures of that section.

(2)-(3) [Reserved]

(4) Prior to making a certification determination, the sponsor shall perform an on-site visit to the offices of the firm and to any of its facilities that may be necessary to validate the certification information obtained from the firm.

(g) *Certification standards.* (1) Sponsors shall use the same standards for ownership and control as contained in 49 CFR part 26, subpart D in deter-

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mining whether a firm may be certified as a DBE.

(2) Businesses operating under the following structures may be eligible for certification as DBE's under this subpart:

(i) Sole proprietorships.

(ii) Corporations.

(iii) Partnerships.

(iv) Other structures that provide for ownership and control by the socially and economically disadvantaged owners.

(3) A business operating under a franchise (or license) agreement may be certified if it meets the standards in this section and the franchisor is not affiliated with the franchisee.

In determining whether affiliation, as defined in § 23.89, exists, the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on a franchisee by its franchise agreement generally shall not be considered, provided that the franchisee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee may not be controlled by the franchisor by virtue of such provisions in the franchise agreement, control, and, thus, affiliation could arise through other means, such as common management or excessive restrictions upon the sale of the franchise interest.

(4) Joint ventures described in § 23.53(d) are eligible for certification as DBE's under this subpart.

(h) Businesses operating under the following arrangements are not eligible for certification as DBE's under this subpart:

(1) Limited partnerships, in which a non-DBE is the general partner.

(2) Other arrangements that do not provide for ownership and control by the socially and economically disadvantaged owners.

(i) *Good faith efforts.* The sponsor shall make good faith efforts to achieve the overall goals of the approved plan. The efforts shall include:

(1) Locating and identifying DBE's who may be interested in participating as concessionaires;

(2) Notifying DBE's and other organizations of concession opportunities and

encouraging them to compete, when appropriate;

(3) Informing competitors for concession opportunities of any DBE requirements during pre-solicitation meetings;

(4) Providing information concerning the availability of DBE firms to competitors to assist them in meeting DBE requirements; and

(5) When practical, structuring contracting activities so as to encourage and facilitate the participation of DBE's.

[Amdt. 1, 57 FR 18410, Apr. 30, 1992, as amended at 64 FR 5126, Feb. 2, 1999; 64 FR 34570, June 28, 1999]

§ 23.97 Appeals of certification denials.

The procedures concerning the appeal of a denial of certification set forth in 49 CFR 26.89 are applicable to this subpart.

[Amdt. 1, 57 FR 18410, Apr. 30, 1992, as amended at 64 FR 5126, Feb. 2, 1999]

§ 23.99 Rationale for basing overall goals on the number of concession agreements.

(a) A sponsor who proposes to calculate the overall DBE goals as a percentage of the number of concession agreements shall submit information with the DBE plan to demonstrate that one of the following applies to the airport:

(1) In order to attain an overall DBE goal of 10 percent on the basis of gross receipts, the airport would need to award a disproportionate percentage of the opportunities to DBE's. This rationale may address a time period that extends beyond that covered by the current plan; or

(2) Other circumstances at the airport exist that do not make it feasible to use gross receipts as the basis for calculating the goals.

(b) If the FAA approves of the request, the sponsor shall not be required to provide further justification during subsequent years of the plan, unless requested by the FAA to do so.

(c) If the FAA determines that the information submitted by the sponsor fails to justify the requested goal-setting procedure, the sponsor shall resubmit the plan. The goals in the revised plan shall be calculated as a percent-

age of gross receipts, as outlined in paragraph (a)(2)(i) of § 23.95.

§ 23.101 Information required when none of the overall annual goals is 10 percent or more.

(a) A sponsor requesting approval for a concession plan in which none of the overall annual DBE goals is 10 percent or more shall provide information on the following points:

(1) The sponsor's efforts to locate DBE's in the relevant geographic area that are capable of operating the concessions that will become available;

(2) The sponsor's efforts to notify DBE's of concession opportunities and to encourage them to compete;

(3) Any consideration given by the sponsor, when practical, to structuring contracting procedures so as to encourage and facilitate DBE participation. For example, a sponsor may consider using competitive means to award a concession that would otherwise be renegotiated without competition.

(4) If appropriate, an explanation why the nature of a particular concession makes DBE participation through a sublease, joint venture, partnership, or other arrangement not economically feasible.

(b) The FAA regional civil rights officer approves a plan which does not contain any overall goals of at least 10 percent if he or she determines that based on the information submitted by the sponsor under paragraph (a) of this section and any other available information;

(1) The sponsor is making all appropriate efforts to increase DBE participation in its concessions to a level of 10 percent; and

(2) Despite the sponsor's efforts, the goals submitted by the sponsor represent the reasonable expectation for DBE participation, given the availability of DBE's.

§ 23.103 Obligations of concessionaires and competitors.

(a) Sponsors may impose requirements on competitors for concession agreements as a means of achieving the DBE goals or a portion of the goals established under paragraph (a) of § 23.91 of this subpart, provided that the DBE