



Airport Concessions Disadvantaged Business Enterprise Program (ACDBE)

Paine Field Snohomish County Airport

FAA Approved - December 2019

Finance & Business Development

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Snohomish County Airport/Paine Field
ACDBE Program Policy Statement

Section 23.1, 23.23: Objectives/Policy Statement

The Snohomish County Airport/Paine Field Administration ("Administration") has established an Airport Concession Disadvantaged Business Enterprise ("ACDBE") program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 23. The Snohomish County Airport/Paine Field ("PAE") is a Non-hub Primary Airport and has received federal funds authorized for airport development after January 1988 (authorized under Title 49 of the United States Code). Paine Field has signed airport grant assurances that it will comply with 49 CFR Part 23.

It is the policy of the Administration to ensure that ACDBEs as defined in Part 23, have an equal opportunity to receive and participate in terminal and terminal related concession opportunities. It is also the Administration's policy:

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

The Airport Business Manager has been designated as the ACDBE Liaison Officer (ACDBELO). The ACDBELO is currently responsible for implementing all aspects of the ACDBE program. Implementation of the ACDBE program is accorded the same priority as compliance with all other legal obligations incurred by Snohomish County Airport/Paine Field in its financial assistance agreements with the Department of Transportation.

The Administration has disseminated this policy statement to all of the components of their organization. The Administration has distributed this statement to ACDBE and non-ACDBE concessionaire communities in the area, utilizing the Snohomish County website.



Arif Ghouse, Paine Field Airport Director

10-02-2019
Date

SUBPART A – GENERAL REQUIREMENTS

Section 23.1: Objectives

The objectives are found in the policy statement on the first page of this program.

Section 23.3: Definitions

The Administration will use terms in this program that have the meaning defined in Section 49 CFR §23.3 and 49 CFR §26.5 where applicable. For your convenience, the definitions of concessions and concessionaires from 49 CFR §23.3 are provided below.

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 Administration, another concessionaire, or the owner or lessee of a terminal, if other than the Administration.
- (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 Administration, 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.

Terminal Operator is the private entity that is operating the terminal.

Snohomish County Purchasing is a Snohomish County division that the Airport Administration leverages to help facilitate purchasing contracts and compliance. The Administration is ultimately responsible for the outcomes of these programs.

The following acronyms are used throughout the Program.

ACDBE	Airport Concessions Disadvantaged Business Enterprise
ACDBELO	Airport Concessions Disadvantaged Business Enterprise Liaison Officer
CFR	Code of Federal Regulations
DOT	Department of Transportation
FAA	Federal Aviation Administration
OMWBE	Washington State Office of Minority and Women's Business Enterprises
UCP	Unified Certification Program
OMWBE	Office of Minority and Women's Business Enterprises

Section 23.5: Applicability

The Administration is subject to regulations found in 49 CFR Part 23 because it is a primary airport that has received federal airport funds authorized for airport development after January 1988 that was authorized under Title 49 of the United States Code.

Section 23.9: Non-discrimination Statement

The Administration will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any concession agreement, management contract or subcontract, purchase or lease agreement or other agreement covered by 49 CFR Part 23 on the basis of race, color, sex, or national origin.

In administering its ACDBE program, the Administration will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the ACDBE program with respect to individuals of a particular race, color, sex, or national origin.

The Administration acknowledges these representations are also in accordance with obligations contained in its Civil Rights, DBE and ACDBE Airport grant assurances.

The Administration will ensure all concession agreements and management contracts including that with the Terminal Operator includes the following assurances in all concession agreements and management contracts it executes with any firm after October 1, 2019:

- (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."

Section 23.11: Compliance and Enforcement

The Administration will comply with and is subject to the provisions of 49 CFR Part 26 (§§ 26.101 and 26.105 through 26.109 and 2 CFR parts 180 and 1200).

The Administration will comply with this part or be subject to formal enforcement action under §26.105 or appropriate program sanctions, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include actions consistent with 49 U.S.C. §§ 47106(d), 47111(d), and 47122.

2 CFR Part 180, Government-wide Debarment and Suspension (Non-procurement), effective November 15, 2006, adopted and supplemented by DOT at 2 CFR Part 1200, effective June 2, 2008, provides Office of Management and Budget (OMB) guidance for Federal agencies on the government-wide debarment and suspension system for non-procurement transactions, programs and activities. 2 CFR Part 1200 adopts the OMB guidance in subparts A through I of 2 CFR part 180, as supplemented by part 1200, as the Department of Transportation policies and procedures for non-procurement suspension and debarment.

The Administration's compliance with all requirements of this part is enforced through the procedures of Title 49 of the United States Code, including 49 USC 47106(d), 47111(d), and 47122, and regulations implementing them.

The following enforcement actions apply to firms participating in the Snohomish County Airport's ACDBE program:

- (a) For a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate as an ACDBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department of Transportation (DOT) or the Federal Aviation Administration (FAA) may initiate suspension or debarment proceedings against the firm under 2 CFR parts 180 and 1200.
- (b) For a firm that, in order to meet ACDBE goals or other AC/DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, DOT or FAA may initiate suspension or debarment proceedings against the firm under 2 CFR parts 180 and 1200.
- (c) DOT may take enforcement action under 49 CFR Part 31 Program Fraud and Civil Remedies, against any participant in the ACDBE program whose conduct is subject to such action under 49 CFR Part 31.
- (d) DOT may refer to the Department of Justice, for prosecution under 18 USC §§ 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of an ACDBE in the Snohomish County Airport's ACDBE program or otherwise violates applicable Federal statutes.

Compliance reviews: The FAA may review the Administration's compliance with this part at any time, including but not limited to, reviews of paperwork, on-site reviews, and review of the airport Administration's monitoring and enforcement mechanism, as appropriate. The FAA Office of Civil Rights may initiate a compliance review based on complaints received.

Any person who knows of a violation of this part by the Administration may file a complaint under 14 CFR Part 16 with the Federal Aviation Administration Office of Chief Counsel.

SUBPART B – ACDBE PROGRAMS

Section 23.21: ACDBE Program Updates

Snohomish County Airport/Paine Field is a non-hub primary airport required to have an ACDBE program.

As a condition of eligibility for FAA financial assistance, the Administration will submit its ACDBE program and overall goals to the FAA according to 23.45(a) of this section.

Type of Airport	Initial Program and Goal Due	Subsequent Goals Due
Non-Hub Primary Airport	October 1, 2019	Every 3 years on October 1

Until PAE's new ACDBE program is submitted and approved, the Administration will continue to implement the ACDBE program that was in effect previously, except with respect to any provision that is contrary to 49 CFR Part 23.

When the Administration makes significant changes to its ACDBE program, the Administration will provide the amended program to the FAA for approval prior to implementing the changes.

Section 23.23: Administrative Provisions

Policy Statement: The Snohomish County Airport's Policy Statement is elaborated on the first page of this program.

ACDBE Liaison Officer (ACDBELO): PAE has appointed an ACDBELO. Please use the contact information below to obtain the direct contact information of the current ACDBELO.

Snohomish County Airport/Paine Field
Attn: ACDBE Liaison Officer

10108 32nd Ave W, Suite J
Everett, WA 98204
Phone: (425) 388-5103

In that capacity, the ACDBELO is responsible for implementing all aspects of the ACDBE program and ensuring that the Administration complies with all provision of 49 CFR Part 23. The ACDBELO has direct, independent access to the Airport Director concerning ACDBE program matters. An organizational chart displaying the ACDBELO's position in the organization is found in Attachment 1 to this program.

The ACDBELO is responsible for developing, implementing and monitoring the ACDBE program, in coordination with other appropriate officials. The ACDBELO has the appropriate airport and county administration staff to assist in the administration of the program. The duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required by FAA or DOT.
2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Works with all departments to set overall annual ACDBE goals.
4. Ensures that bid notices and requests for proposals are available to ACDBEs in a timely manner in coordination with The Snohomish County Purchasing Division.
5. Identifies contracts and procurements so that ACDBE goals are included in solicitations (both race-neutral methods and contract specific goals) in coordination with The Snohomish County Purchasing Division.
6. Analyzes The Administration's progress toward attainment and identifies ways to improve progress in coordination with The Snohomish County Purchasing Division.
7. Participates in consultation meetings prior to concessionaire agreements when appropriate.
8. Advises the Airport Director on ACDBE matters and achievement.
9. Coordinates with the Snohomish County Purchasing Division to provide ACDBEs with information and assistance in preparing bids, obtaining bonding, financing, and insurance; and acts as a liaison to the DOT's Office of Small and Disadvantaged Business Utilization-Minority Resource Center (OSDBU-MRC).
10. Works with the Terminal Operator to determine if the concessions program may be adjusted to encourage ACDBE participation.
11. Plans and participates in ACDBE training seminars in coordination with the Snohomish County Purchasing Division.
12. Acts as liaison along with the Snohomish County Purchasing Division to the Unified Certification Program (UCP) in Washington .
13. Works with the Snohomish County Purchasing Division and the Terminal Operator to provide outreach to ACDBEs and community organizations to advise ACDBE's of opportunities.

Section 23.25: Ensuring Nondiscriminatory Participation of ACDBEs

The Administration will take the following measures to ensure nondiscriminatory participation of ACDBEs in concessions, and other covered activities (49 CFR §23.25(a)).

1. The Administration in coordination with the Snohomish County Purchasing Division and the Terminal Operator will send notice to OMWBE certified and Snohomish County Title VI registered businesses of upcoming Snohomish County Airport concession opportunities.
2. The Administration, will audit ACDBE participation and investigate reports of noncompliant businesses.
3. The Administration will implement an ACDBE participation goal for the 10/01/2019 to 10/01/2022 goal period, restricting concession space on terminal and terminal related land entered into on or after October 1, 2019 to businesses who have at a minimum demonstrated good faith efforts to meet the goal.

The Administration will seek ACDBE participation in all types of concession activities, rather than concentrating participation in one category or a few categories to the exclusion of others. (49 CFR §23.25(c))

The Administration's overall goal methodology and a description of the race-neutral measures it will use to meet the goals are described in Section 23.25 and Attachment 4 of this plan. The goals are set consistent with the requirements of Subpart D. (49 CFR §23.25(b), (d))

If the Administration projects that race-neutral measures alone are not sufficient to meet an overall goal, it will use race-conscious measures as described in Section 23.25 (e) (1-2) and Attachment 4 of this plan. (23.25(e))

The Administration will 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 ACDBEs. (23.25(f))

The Administration will not use set-asides or quotas as a means of obtaining ACDBE participation. (23.25(g)).

Section 23.27: Reporting

The Administration will retain sufficient basic information about the Administration's ACDBE program implementation, ACDBE certification and the award and performance of agreements and contracts to enable the FAA to determine the Administration's compliance with Part 23. This data will be retained for a minimum of 3 years following the end of the concession agreement or other covered contract.

Beginning October 1, 2019, the Administration will submit to the FAA Regional Civil Rights Office, an annual ACDBE participation report on the form in Appendix A of Part 23.

Section 23.29: Compliance and Enforcement Procedures

The Administration will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 23.

1. The Administration will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program.
2. The Administration will consider similar action under the Administration's own legal authorities, including responsibility determinations in future contracts. (26.37)
3. The Administration will require a monthly report from the terminal operator outlining concessionaire gross receipts to provide a running tally of actual ACDBE attainments.
4. The Administration will keep a written certification that the administration has reviewed records of all contracts, leases, joint venture agreements, or other concession-related agreements and monitored the work on-site at the terminal for this purpose.

SUBPART C – CERTIFICATION AND ELIGIBILITY

Section 23.39(f): Washington State UCP

The Washington State Office of Minority and Women Business Enterprises serves as the UCP for Washington State.

In instances when the eligibility of a concessionaire is removed after the concessionaire has entered into a concession agreement because the firm exceeded the size standard or the owner has exceeded the PNW standard, and the firm in all other respects remains an eligible DBE, the Administration may continue to count the concessionaire's participation toward ACDBE goals during the remainder of the current concession agreement. The Administration will not count the concessionaire's participation toward ACDBE goals beyond the termination date for the concession agreement in effect at the time of the decertification. (23.39(e))

SUBPART D – GOALS, GOOD FAITH EFFORTS, AND COUNTING

Section 23.41 Basic Overall Goal Requirement

The Administration will establish two separate overall ACDBE goals; one for car rentals and another for concessions other than car rentals. The overall goals will cover a three year period and the Administration will review the goals annually to make sure the goal

continues to fit the Administration's circumstances. The Administration will report any significant overall goal adjustments to the FAA.

If the average annual concession revenues for car rentals over the preceding 3 years do not exceed \$200,000, the Administration need not submit an overall goal for car rentals. Likewise, if the average annual concession revenues for concessions other than car rentals over the preceding 3 years do not exceed \$200,000, the Administration need not submit an overall goal for concessions other than car rentals. The Administration understands that "revenue" means total revenue generated by concessions, not the fees received by the airport from concessionaires.

The Administration's overall goals will provide for participation by all certified ACDBEs and will not be subdivided into group-specific goals.

Section 23.43 Consultation in Goal Setting

The Administration will consult with stakeholders before submitting the overall goals to the FAA. Stakeholders will include, but not be 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 Administration's efforts to increase participation of ACDBEs.

When submitting the Administration's overall goals, the Administration will identify the stakeholders that the administration consulted with and provide a summary of the information obtained from the stakeholders.

Section 23.45 Overall Goals

Paine Field is a non-hub primary airport. As a condition of eligibility for FAA financial assistance, Paine Field will submit its overall goals according to the following schedule:

Primary Airport Size	Region	Date Due	Period Covered	Next Goal Due
Non-Hub Primary	All regions	October 1, 2019	2020/2021/2022	October 1, 2021 (2023/2024/2025)

If a new concession opportunity arises at a time that falls between the normal submission dates above and the estimated average of annual gross revenues are anticipated to be \$200,000 or greater, the Administration will submit an appropriate adjustment to the Administration's overall goal to FAA for approval no later than 90 days before issuing the solicitation for the new concession opportunity. (23.45i)

The Administration will establish overall goals in accordance with the 2-Step process as specified in section 23.51. After determining the total gross receipts for the concession activity, the first step is to determine the relative availability of ACDBEs in the market area, "base figure". The second step is to examine all relevant evidence reasonably available in the Administration's jurisdiction to determine if an adjustment to the Step 1 "base figure" is necessary so that the goal reflects as accurately as possible the ACDBE participation the Administration would expect in the absence of discrimination. Evidence may include, but is not limited to past participation by ACDBEs, a disparity study, evidence from related fields that affect ACDBE opportunities to form, grow, and compete (such as statistical disparities in ability to get required financing, bonding, insurance; or data on employment, self-employment, education, training and union apprenticeship)

Paine Field in coordination with Snohomish County and the terminal operator. will arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by ACDBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under § 26.39 of this part.

A description of the methodology to calculate the overall goal for concessions other than car rentals, the goal calculations, and the data the Administration relied on can be found in Attachment 4 to this program.

Projection of Estimated Race-Neutral & Race-Conscious Participation (23.45(f), 23.25(d-e))

The breakout of estimated race-neutral and race-conscious participation can be found with the goal methodology in Attachments 4 to this program. This section of the program will be reviewed annually when the goal calculation is reviewed under 23.41(c).

Concession Specific Goals (Also include this language in the DBE goal attachment) (23.25 (c)(e)(1)(iv))

The Administration will use concession specific goals to meet any portion of the overall goals it does not project being able to meet using race-neutral means. Concession specific goals are established so that, over the period to which the overall goals apply, they will cumulatively result in meeting any portion of the Administration's overall goal that is not projected to be met through the use of race-neutral means.

The Administration will establish concession specific goals only on those concessions that have direct ownership arrangements (except car rentals), sublease, or subcontracting possibilities. The Administration will 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 (23.25 (f)). Car rental firms are not required to change their corporate structure to provide for direct ownership arrangements. 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.)

The Administration need not establish a concession specific goal on every such concession, and the size of concession specific goals will be adapted to the circumstances of each such concession (e.g., type and location of concession, availability of ACDBEs.)

If the objective of a concession specific goal is to obtain ACDBE participation through direct ownership with an ACDBE, the Administration will calculate the goal as a percentage of the total estimated annual gross receipts from the concession. (23.25(e)(1)(i))

If the concession specific goal applies to purchases and/or leases of goods and services, the Administration will 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. (23.25(e)(1)(ii))

Good Faith Efforts on Concession Specific Goals (23.25(e)(1)(iii), (iv))

To be eligible to be awarded a concession that has a concession specific goal, bidders/offerors must make good faith efforts to meet the goal. A bidder/offeror 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. (23.25(e)(1)(iv)). Examples of good faith efforts are found in Appendix A to 49 CFR Part 26. The procedures applicable to 49 CFR

Sections 26.51 and 26.53, regarding contract goals apply to the Administration's concession specific goals. Specifically,

Demonstration of good faith efforts (26.53(a) & (c))

The ACDBELO or Designated Representative determines whether a concessionaire who has not met the concession specific goal has documented sufficient good faith efforts to be regarded as responsible¹.

The Administration will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before The Administration and Terminal Operator commit to the concession agreement with the bidder/offeror.

Information to be submitted (26.53(b))

The Administration treats bidder/offeror's compliance with good faith effort requirements as a matter of responsibility.

Each solicitation for which a concession specific goal has been established will require the concessionaires to submit the following information:

1. The names and addresses of ACDBE firms or ACDBE suppliers of goods and services that will participate in the concession;
2. A description of the work that each ACDBE will perform;
3. The dollar amount of the participation of each ACDBE firm/supplier participating;
4. Written and signed documentation of commitment to use a ACDBE whose participation it submits to meet a contract goal;
5. Written and signed confirmation from the ACDBE that it is participating in the concession as provided in the prime concessionaire's commitment and
6. If the contract goal is not met, evidence of good faith efforts.

Administrative reconsideration (26.53(d))

Within 7 days of being informed by the Airport Administration that it is not responsible because it has not documented sufficient good faith efforts, a concessionaire may request

¹ 23.25(e)(1)(iv) The administrative procedures applicable to contract goals in part 26, § 26.51-53, apply with respect to concession-specific goals. [A bidder/offeror must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by ACDBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve an ACDBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient ACDBE participation, even if it were not fully successful.]

administrative reconsideration. Concessionaire should make this request in writing to the following reconsideration official:

Bramby Tollen
 Purchasing Manager
 Snohomish County Purchasing Division
 3000 Rockefeller Avenue, M/S 507
 Everett, Washington 98201

The reconsideration official will not have played any role in the original determination that the concessionaire did not document sufficient good faith efforts.

As part of this reconsideration, the concessionaire will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The concessionaire will have the opportunity to meet in person with the Administration's reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The Administration will send the concessionaire a written decision on reconsideration, explaining the basis for finding that the concessionaire did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

Good Faith Efforts when an ACDBE is replaced on a concession (26.53(f))

The Administration will require a concessionaire to make good faith efforts to replace an ACDBE that is terminated or has otherwise failed to complete its concession agreement, lease, or subcontract with another certified ACDBE, to the extent needed to meet the concession specific goal. Both the Terminal Operator and Airport Administration will require the concessionaire to notify the ACDBELO immediately of the ACDBEs inability or unwillingness to perform and provide reasonable documentation.

In this situation, The Administration and Terminal Operator will require the concessionaire to obtain the Administration's prior approval of the substitute ACDBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts.

Should the concessionaire fail or refuse to comply within the specified time the terminal operator will be responsible for enforcing corrective action until satisfactory action has been taken. Should the concessionaire remain out of compliance for 90 consecutive days, the Airport Administration will review the terminal operator's compliance with section 9.04 of their lease.

Sample Proposal/Bid Specification:

The requirements of 49 CFR Part 23, regulations of the U.S. Department of Transportation, applies to this concession. It is the policy of Snohomish County to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this concession will be conditioned upon satisfying the

requirements of this proposal/bid specification. These requirements apply to all concessions firms and suppliers, including those who qualify as an ACDBE. An ACDBE concession specific goal has been established for this concession. The concession firm shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26 (Attachment 8), to meet the concession specific goal for ACDBE participation in the performance of this concession.

The concession firm will be required to submit the following information: (1) the names and addresses of ACDBE firms and suppliers that will participate in the concession, (2) A description of the work that each ACDBE will perform; (3) The dollar amount of the participation of each ACDBE firm participating; (4) Written and signed documentation of commitment to use a ACDBE whose participation it submits to meet a contract goal; (5) Written and signed confirmation from the ACDBE that it is participating in the concession as provided in the prime concessionaire's commitment; and (6) If the contract goal is not met, evidence of good faith efforts.

Section 23.53 Counting ACDBE Participation for Car Rental Goals

The Administration will count ACDBE participation toward overall goals other than car rental as provided in 49 CFR 23.53.

Section 23.55 Counting ACDBE Participation for Concessions Other than Car Rentals

The Administration will count ACDBE participation toward overall goals other than car rental as provided in 49 CFR 23.55.

Section 23.57 (b) Goal shortfall accountability. If the awards and commitments on the Administration's Uniform Report of ACDBE Participation (found in Appendix A to this Part) at the end of any fiscal year are less than the overall goal applicable to that fiscal year, The Administration will:

- (1) Analyze in detail the reasons for the difference between the overall goal and the Terminal Operator's awards and commitments in that fiscal year;
- (2) Establish specific steps and milestones to correct the problems the administration has identified in their analysis to enable the administration to fully meet their goal for the new fiscal year;
- (3) (i) CORE 30 or other Airport designated by FAA: We will submit within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (b)(1) and (2) of this section to the FAA for approval. If the FAA approves the report, we will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

- (ii) As an airport not meeting the criteria of paragraph (b)(3)(i) of this section, we will retain analysis and corrective actions in our records for three years and make it available to the FAA, on request, for their review.
- (4) We understand the FAA may impose conditions as part of its approval of our analysis and corrective actions including, but not limited to, modifications to our overall goal methodology, changes in our race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.
- (5) We understand we may be regarded as being in noncompliance with this part, and therefore subject to the remedies in § 23.11 of this part and other applicable regulations, for failing to implement our ACDBE program in good faith if any of the following things occur:
- (i) We do not submit our analysis and corrective actions to FAA in a timely manner as required under paragraph (b)(3) of this section;
- (ii) FAA disapproves our analysis or corrective actions; or
- (iii) We do not fully implement:
- (A) The corrective actions to which we have committed, or
- (B) Conditions that FAA has imposed following review of our analysis and corrective actions.
- (C) If information coming to the attention of FAA demonstrates that current trends make it unlikely that we, as an airport, will achieve ACDBE awards and commitments that would be necessary to allow us to meet our overall goal at the end of the fiscal year, FAA may require us to make further good faith efforts, such as modifying our race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

Section 23.61 Quotas or Set-asides

Both the Administration and the Terminal Operator will not use quotas or set-asides as a means of obtaining ACDBE participation.

SUBPART E – OTHER PROVISIONS

Section 23.71 Existing Agreements

Both the Administration and the Terminal Operator will assess potential for ACDBE participation when an extension or option to renew an existing agreement is exercised, or when a material amendment is made. Working with the Administration, the Terminal Operator will use any means authorized by part 23 to obtain a modified amount of ACDBE participation in the renewed or amended agreement.

Section 23.73 Privately-Owned or Leased Terminal Buildings

The Administration will pass through applicable provisions of Part 23 to private terminal owner or lessee via the Administration's agreement with the owner or lessee. The Administration will ensure that the owner or lessee complies with part 23. The Administration will obtain from the owner or lessee the goals and other elements of the ACDBE program required under Part 23 and it is incorporated herein.

Section 23.75 Long-Term Exclusive Agreements

The Terminal Operator will not enter into a long-term and exclusive agreements for concessions without prior approval of the Administration and FAA Regional Civil Rights Office. The Administration understands that a "long-term" agreement is one having a term of longer than 5 years. The Administration understands that an "exclusive" agreement is one in which an entire category of a particular business opportunity is limited to a single business entity. If special, local circumstances exist that make it important to enter into a long-term and exclusive agreement, the Administration will submit detailed information to the FAA Regional Civil Rights Office for review and approval.

Section 23.79 Geographic Preferences

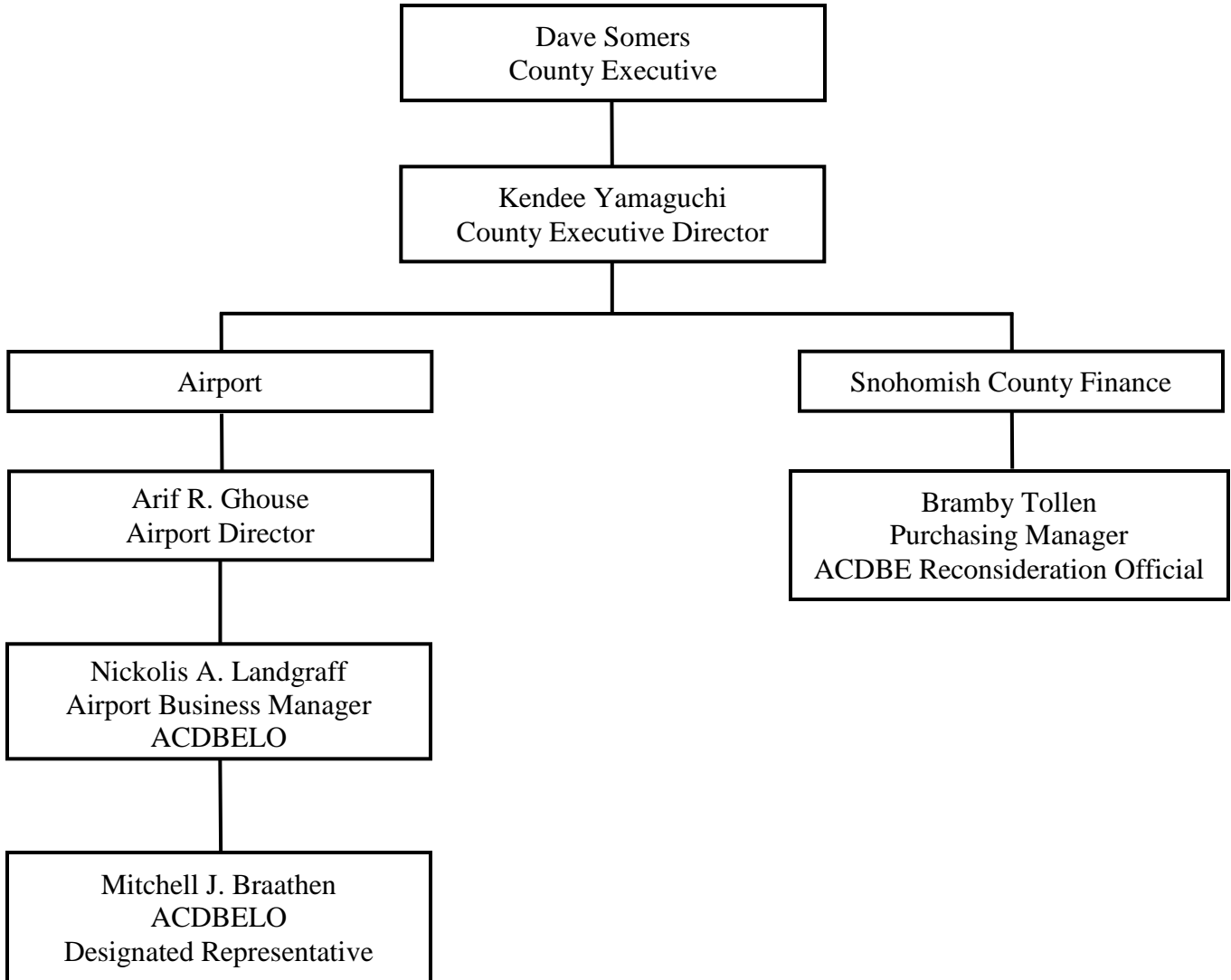
Both the Administration and Terminal Operator will not use a “local geographic preference”, i.e., any requirement that gives an ACDBE located in one place (e.g., Everett) an advantage over ACDBEs from other places in obtaining business as, or with, a concession at your airport.

ATTACHMENTS

Attachment 1	Organizational Chart
Attachment 2	DBE/ACDBE Directory
Attachment 3	Monitoring and Enforcement Mechanisms
Attachment 4	Overall Goal for Concessions other than Car Rental Calculation, Consultation, Breakout of Estimated Race-Neutral & Race-Conscious Participation
Attachment 5	Form 1 & 2 for Demonstration of Good Faith Efforts
Attachment 6	Certification Application Forms
Attachment 7	State’s UCP Agreement
Attachment 8	Regulations: 49 CFR Part 23
Attachment 9	ACDBE Utilization Form
Attachment 10	Certification and Outreach Contacts

Attachment 1

Organizational Chart



Attachment 2

Company Name	Location
Acadia LLC	Seattle, WA
Advanced Tribal, LLC.	Salem, OR
Airport Enterprises Vegas	Las Vegas, NV
Airport Field Services LLC	Fort Worth, TX
AirWorks Concessions and ConRac Supplies LLC	Haymarket, VA
Albright International Inc.	LOS ANGELES, CA
Aldevra LLC	Kalamazoo, MI
Amber Janitorial Inc.	Kent, WA
BACKDRAFT LLC	SEATTLE, WA
Baggage Claim Coffee LLC	Seattle, WA
BF FOODS LLC	Seattle, WA
Bite Me, Inc.	Lakewood, WA
Capers Cafe & Catering Company	Portland, OR
CATCO Business Consulting, LLC	Tallahassee, FL
Chandler & Campbelle Investment Group LLC	Palm Beach Gardens, FL
Cielo Concessions LLC	Chicago, IL
Concourse Concessions LLC	Des Moines, WA
Convergence Architecture, Inc.	Portland, OR
Cyclo Corporation	Seattle, WA
Cylvale, LLC	Dallas, TX
DES Wholesale, LLC	Roswell, GA
Devil Dog Installations LLC	Seattle, WA
DF Express, LLC	Coral Gables, FL
Dilettante Chocolates, Inc.	Tukwila, WA
Diversity Food Brands, LLC	Montclair, NJ
Ellyn, LLC	OKLAHOMA CITY, OK
eStudio, LLC	Houston, TX
Excel Gloves & Safety Supplies, Inc.	FIFE, WA
Firehouse Express LLC	Seattle, WA
Flying Leap, Inc.	ATLANTA, GA
Ford of Santa Monica, Inc.	Santa Monica, CA
FWW Management, Inc.	Atlanta, GA
Gilly National	MIAMI, FL
Global Concessions Group LLC	Orlando, FL
Greene US	Seattle, WA
Heigh Connects LLC	Seattle, WA
Hilltop Concessions, LLC	Renton, WA
HWCC, LLC	Snoqualmie, WA

Hyde Park Hospitality, LLC	Chicago, IL
Hyflyers LLC	Seattle, WA
Innovative Retail Group, LLC	Aurora, CO
Janelle Boyd Design	Renton, WA
JCM1, LLC	Red Bank, NJ
JDDA Concession Management, Inc.	Houston, TX
KBS MERCHANT SERVICES	Denver, CO
Kind Hospitality Inc.	MESA, AZ
Lavaille Lavette Company	Houston, TX
LEEKA, Inc.	PORTLAND, OR
Leslie Saunders Insurance Agency, Inc.	Lutz, FL
Longhouse Inventory Solutions LLC	CLAREMORE, OK
Love By The Slice Baking & Catering Company LLC	Tacoma, WA
Love From USA Group, Inc.	Chicago, IL
Lucky Shines	Seattle, WA
Luther DeHart	Tacoma, WA
Massage Bar, Inc.	Seattle, WA
MCSB, Inc.	Seattle, WA
MESSINA CONSULTARES INC	WILMINGTON, MA
Mobility Innovation, Inc.	Naperville, IL
Nathan Bacford Management, LLC	ATLANTA, GA
Nexo Services, LLC	Bellevue, WA
On the House Restaurant Group, LLC	Maple Valley, WA
Optimal Concessions, LLC	Centennial, CO
Palladium Holdings LLC	Broomfield, CO
Paracom, Inc.	Des Moines, WA
Parr Industries II, Inc.	Pulaski, TN
PIE Management, LLC	Detroit, MI
PinKU Restaurant Group, LLC	Minneapolis, MN
Piraas, LLC	Seattle, WA
Planewater LLC	Enumclaw, WA
Planewear LLC	Enumclaw, WA
Pleasant News, Inc.	Conshohocken, PA
Plum Project Services LLC	Seattle, WA
Richards Corporation	Mercer Island, WA
RMD Holdings LLC	Baltimore, MD
RMES Communications, Inc.	Denver, CO
Robinson Hill Inc.	Chicago, IL
Rosario & Rosario, LLC	Port Orchard, WA
Rylo Management LLC	San Rafael, CA
SAAS Hot Sauce, LLC	Bellevue, WA

SETUCY L.L.C.	Seattle, WA
Shrewsberry & Associates, LLC	Indianapolis, IN
Skyview Concessions, Inc.	HARBOR CITY, CA
Soaring Food Group, LLC	Berkeley, CA
Something Silver Inc.	Seattle, WA
Stewart Manhattan Investments Inc.	Palos Verdes Peninsula, CA
Sublime Gifts and Finds LLC	Shoreline, WA
Sun's Inc.	SEATTLE, WA
SYLVESTER SMOOTHIES LLC	SHORELINE, WA
T & L Vending Inc.	Tacoma, WA
The Juicy Eatery	Seattle, WA
THE URBAN BUGGY LLC	Seattle, WA
TMG Services LLC	Phoenix, AZ
Transglobal Concessions, LLC	Orlando, FL
Warren's News & Gift Inc.	Tukwilla, WA
WDB, Inc.	Federal Way, WA
Whayne and Sons Enterprises, Inc.	Denver, CO
Z Venture Capital Frontiers, Inc.	Los Angeles, CA

Attachment 3

Sample Monitoring and Enforcement Mechanisms

The Administration is able to enforce ACDBE requirements through lease default terms found in Article VII of the terminal operator's lease. In addition, the federal government has available several enforcement mechanisms that it may apply to firms participating in the ACDBE program, including, but not limited to, the following:

1. Suspension or debarment proceedings pursuant to 49 CFR part 23 and 2 CFR parts 180 and 1200
2. Enforcement action pursuant to 49 CFR part 31, which outlines the procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to the authority or to certain others.
3. Prosecution pursuant to 18 USC 1001, which makes it a crime to knowingly and willfully make any materially false, fictitious or fraudulent statement or representation in any matter within the jurisdiction of the executive, legislative or judicial branch of the United States.

The Administration will implement various mechanisms to monitor program participants to ensure they comply with Part 23, including, but not limited to the following:

1. The Administration will implement the following additional monitoring and compliance procedures:
 - A. Monthly breakdown of terminal concession gross revenue.
 - B. Annual review of ACDBE eligibility.
 - C. Random visits quarterly.
 - D. ACDBELO discretionary audit of concessionaire books.

Attachment 4

Section 23.45: Overall Goal Calculation for Concessions Other Than Car Rentals

Submitted Separately

Attachment 5

Forms 1 & 2 for Demonstration of Good Faith Efforts

[Forms 1 and 2 should be provided as part of the solicitation documents.]

FORM 1: AIRPORT CONCESSION DISADVANTAGED BUSINESS ENTERPRISE (ACDBE) UTILIZATION

The undersigned bidder/offeror has satisfied the requirements of the bid/proposal specification in the following manner (please check the appropriate space):

_____ The bidder/offeror is committed to a minimum of _____ % ACDBE utilization on this contract.

_____ The bidder/offeror (if unable to meet the ACDBE goal of _____%) is committed to a minimum of _____% ACDBE utilization on this contract and submitted documentation demonstrating good faith efforts.

Name of bidder/offeror's firm: _____

State Registration No. _____

By _____ Title _____
(Signature)

FORM 2: LETTER OF INTENT

Name of bidder/offeror's firm: _____

Address: _____

City: _____ State: _____ Zip: _____

Name of ACDBE firm: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____

Description of work to be performed by ACDBE firm:

The bidder/offeror is committed to utilizing the above-named ACDBE firm for the work described above. The estimated dollar value of this work is \$ _____.

Affirmation

The above-named ACDBE firm affirms that it will perform the portion of the contract for the estimated dollar value as stated above.

By _____
(Signature) (Title)

If the bidder/offeror does not receive award of the prime contract, any and all representations in this Letter of Intent and Affirmation shall be null and void.

(Submit this page for each ACDBE subcontractor.)

Attachment 6

ACDBE Certification Application Form

ACDBE certification is handled online in Washington State through the Office of Minority and Women Business Enterprises.

<https://omwbe.wa.gov/certification>

ATTACHMENT 7

Washington State UCP Agreement

https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/POST_Washington_UCP_Final_Report_2.1.13.pdf

FTA

FEDERAL TRANSIT ADMINISTRATION

Washington Unified Certification Program Final Report

February 2013

Federal Transit Administration

PREPARED BY
Milligan & Company, LLC



U.S. Department of Transportation
Federal Transit Administration

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Section 1 – General Information

Hosting Grant Recipient: Washington State Department of Transportation
355 Capitol Street, NE

City/State: Olympia, WA

Executive Official: Paula J. Hammond
CEO and Secretary of Transportation

On Site Liaison: Brenda Nnambi
Director, Office of Equal Opportunity
(360) 507-0869

Report Prepared by: MILLIGAN AND CO., LLC
105 N. 22nd Street, 2nd Floor
Philadelphia, PA 19103
(215) 496-9100

Site Visit Dates: September 20–22, 2011

Compliance Review Team
Members: Benjamin Sumpter, Lead Reviewer
Habibatu Atta

Section 2 – Jurisdiction and Authorities

The Federal Transit Administration (FTA) Office of Civil Rights is authorized by the Secretary of Transportation to conduct civil rights compliance reviews. The reviews are undertaken to ensure compliance of applicants, recipients, and sub-recipients with Section 12 of the Master Agreement, Federal Transit Administration M.A. (17), October 1, 2010 and 49 CFR Part 26, “Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs.”

The federal Transit Administration (FTA) of the U.S. Department of Transportation (DOT) provides financial assistance to transit agencies, metropolitan planning organizations (MPOs) and State Departments of Transportation. These recipients are required to comply with federal civil rights provisions. The FTA Office of Civil Rights (TCR) oversees grantee compliance with these provisions through compliance reviews, which are conducted at TCR’s discretion.

The Washington State Unified Certification Program (WA UCP) members, which are direct or indirect recipients of FTA funding assistance, are subject to the Disadvantaged Business Enterprise (DBE) compliance conditions associated with the use of these funds pursuant to 49 CFR Part 26. These regulations define the components that must be addressed and incorporated in WA UCP’s agreement and were the basis for the selection of compliance elements that were reviewed.

Section 3 – Purpose and Objectives

Purpose

The FTA Office of Civil Rights periodically conducts discretionary reviews of grant recipients and sub-recipients to determine whether they are honoring their commitment, as represented by certification to FTA, to comply with their responsibilities under 49 CFR Part 26. In keeping with its regulations and guidelines, FTA has determined that a compliance review of WA UCP is necessary.

The primary purpose of the compliance review is to determine the extent to which WA UCP has met its DBE certification program goals and objectives, as represented to DOT in its UCP agreement. This compliance review is intended to be a fact-finding process to (1) examine the WA UCP and its implementation, (2) make recommendations regarding corrective actions deemed necessary and appropriate, and (3) provide technical assistance.

This compliance review is not to directly investigate whether there has been discrimination against disadvantaged businesses by the grant recipient or its subrecipients, nor to adjudicate these issues in behalf of any party.

Objectives

The objectives of UCPs, as specified in 49 CFR Part 26, are to:

- follow the certification procedures and standards and the non-discrimination requirements of 49 CFR Parts 26 and 23
- cooperate fully with all oversight, review, and monitoring activities of USDOT and its operating administrations
- implement USDOT directives and guidance on DBE certification matters
- make all certification and decertification decisions on behalf of all UCP members with respect to participation in the USDOT DBE Program; certification decisions by the UCP shall be binding on all UCP members; certification decision must be made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE
- provide a single DBE certification that will be honored by all UCP members
- maintain a unified DBE directory containing at least the following information for each firm listed: address, phone number, and the types of work the firm has been certified to perform; the UCP shall make the directory available to the public electronically, on the Internet, and in print; the UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made
- ensure that the UCP agreement shall commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of 49 CFR Part 26 and 23

The objectives of this compliance review are to:

- determine whether the WA UCP is honoring the UCP agreement submitted to the Secretary of Transportation
- examine the required certification procedures and standards of the WA UCP against the DBE program compliance standards set forth in the regulations and to document the compliance status of each component
- gather information and data regarding the operation of the WA UCP from certifying members through interviews and certification file review

Section 4 – Background Information

Prior to the 1999 DBE Final Rule 49 CFR Part 26, applicants seeking participation on DOT-assisted projects as a DBE could be required to be certified by multiple DOT recipients in a state. Subpart E of 49 CFR Part 26.81 now requires DOT recipients to participate in a UCP that shall provide one-stop shopping to applicants for DBE certification. An applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

An agreement establishing the UCP for Washington State was to be submitted to the Secretary of Transportation within three years of March 4, 1999. The agreement was to provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of Part 26, on the same basis as recipients. The UCP is also required to cooperate fully with oversight, review, and monitoring activities of DOT and its operating administration.

Washington State Unified Certification Program

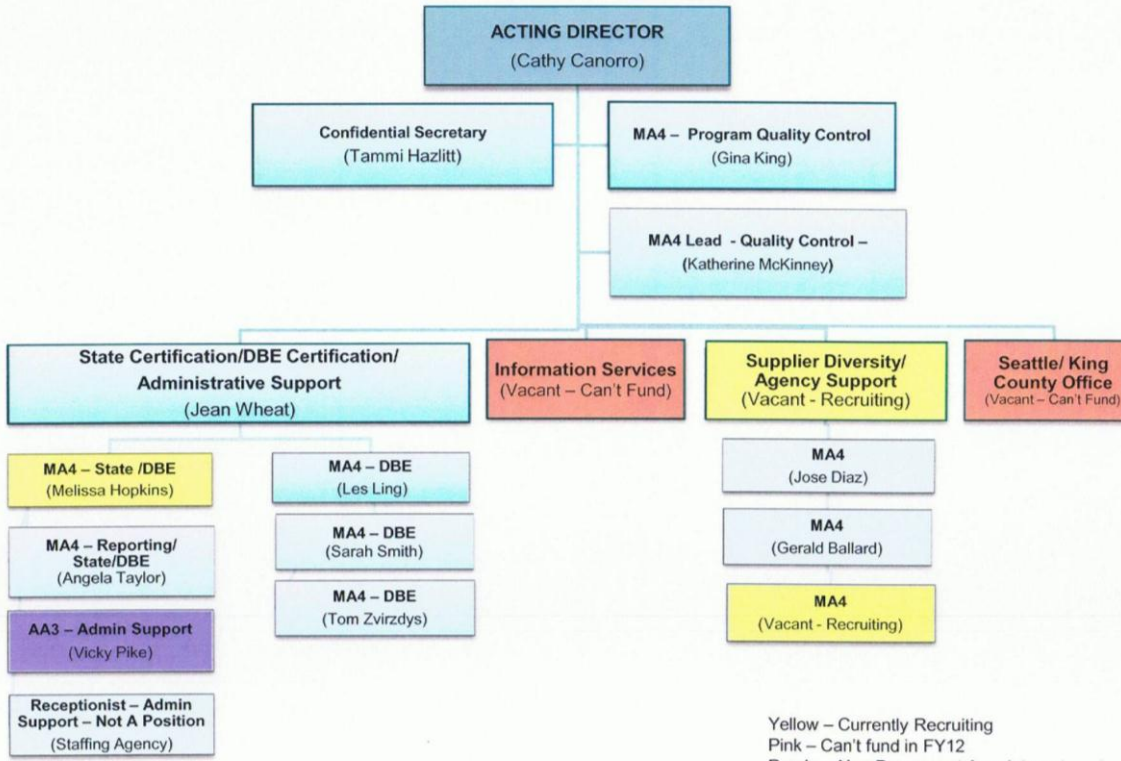
The Washington Office of Minority and Women Business Enterprises (OMWBE) opened its doors in 1983 to offer certification for the state's small businesses that meet the criteria for minority and women-owned business enterprises (M/WBE). The purpose of the certification was to help these historically under-used businesses to get contracts with state and local agencies and schools. Before OMWBE was created, local jurisdictions and the Washington State Department of Transportation (WSDOT) each certified the firms they used for meeting their minority, women, and disadvantaged business enterprises participation goals.

In January 1984, WSDOT transferred its federal DBE certification activities to OMWBE. Small businesses certified as DBEs count toward participation goals set on federal highway, transit, and aviation projects administered by state, local, and other jurisdictions in Washington.

In 1987, the Washington State Legislature adopted statewide one-stop certification, establishing OMWBE as the only agency responsible for processing applications for certification. OMWBE's certification is used by all state and local agencies, offices, and schools that have M/WBE and DBE programs.

Under an Interagency agreement, OMWBE is responsible for the certification, recertification, and removal of firms wishing to participate or continue to participate in USDOT-related activities identified in 49 CFR Parts 23 and Part 26. OMWBE also must designate four full-time equivalent persons (FTEs), three of whom shall work exclusively on USDOT transportation-related DBE requirements (see organizational chart on next page). This agreement between WSDOT and OMWBE is updated every year. The most current agreement provided during the review was executed by all parties in January 2011. The agreement period of performance states, "This agreement shall be effective July 1, 2010, regardless of the date of execution of this agreement, and terminate on June 30, 2011." The OMWBE representative indicated that it is in the process of finalizing the current agreement.

**Office of Minority and Women's Business Enterprises
Organizational Chart - September 2011**



Listing of Signed MOUs

UNIFIED CERTIFICATION PROGRAM MOUs	
AIRPORT AUTHORITIES	DATE SIGNED
City of Davenport Airport	6/4/2003
Arlington Airport	11/4/2002
Auburn Municipal Airport	11/5/2002
Colville Municipal Airport	10/23/2002
Deer Park Airport	11/4/2002
Lake Chelan Airport	11/7/2002
Omak Airport	10/25/2002
Orcas Island Airport	10/22/2002
Pearson Airport Park	11/19/2002
Pierce County Airport/Thun Field	11/2/2002
Port of Anacortes	4/10/2003
Port of Bellingham	10/24/2002
Port of Ephrata	10/24/2002
Port of Friday Harbor	11/22/2002
Port of Grays Harbor/Bowerman Field	10/27/2002
Port of Lopez	11/22/2002
Port of Pasco	11/14/2002
Port of Skagit County	12/12/2002
Prosser Port of Benton	Not Dated
Quillayute Airport	10/28/2002
Sanderson Park/Port of Shelton	11/25/2002
Spokane International Airport	11/25/2002
Yakima Air Terminal - McAllister Field	11/4/2002
TRANSIT AUTHORITIES	DATE SIGNED
Asotin County Public Transportation Benefit Area	8/20/2010
Ben Franklin Transit	3/23/2010
Central Puget Sound Regional Transit Authority (Sound Transit)	2/5/2008
Skagit County Public Transportation Benefit Area Corporation	11/16/2009
Snohomish County Public Transportation Benefit Area Corporation	6/22/2009
CITIES	DATE SIGNED
City of Seattle	5/9/2008
City of Pullman	11/9/2010
City of University Place	4/14/2010
City of Yakima	12/19/2008

Section 5 – Scope and Methodology

Scope

Implementation of the following eleven required DBE UCP program components specified by the FTA are reviewed in this report.

1. You must rebuttably presume that members of the designated groups identified in 26.67 are socially and economically disadvantaged [49 CFR 26.61].
2. If you have a well founded reason to question the individual's claim of membership in that group, you must require the individual to present additional evidence that he or she is a member of the group [49 CFR 26.63].
3. You must apply current Small Business Administration (SBA) business size standards found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts [49 CFR 26.65].
4. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged [49 CFR 26.67].
5. In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record, viewed as a whole [49 CFR 26.69].
6. In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole [49 CFR 26.71].
7. Other rules affecting certification include not considering commercially useful function issues, evaluating the eligibility of a firm on the basis of present circumstances, and making sure only firms organized for profit may be eligible DBEs [49 CFR 26.73].
8. You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP). You must maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in your program [49 CFR 26.81 and 26.31].
9. You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program [49 CFR 26.83].
10. When you deny a request by a firm to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial [49 CFR 26.86 – 26.89].
11. If you fail to comply with any requirement of this part, you may be subject to formal enforcement action under program sanctions by the concerned operating administration, such as the suspension or termination of federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied [49 CFR 26.101 – 26.109].

Methodology

The initial step in the scope of this Compliance Review consisted of consultation with the FTA Office of Civil Rights and a review of available information from the Unified Certification Program websites and other sources. Subsequent to this review, potential dates for the site visit were coordinated.

An agenda letter was then compiled and sent to the WA UCP by FTA's Office of Civil Rights. The agenda letter notified WA UCP of the planned site visit, requested preliminary documents, and informed WA UCP of additional documents needed and areas that would be covered during the on-site portion of the review.

The documents received prior to the on-site portion of the review were examined and an itinerary for the site visit was developed.

An entrance conference was conducted at the beginning of the Compliance Review with the WA UCP Certifying Members and the review team. Subsequent to the entrance conference, a review was conducted of the WA UCP agreement and other documents submitted to the review team by the WA UCP representative. Interviews were then conducted with selected WA UCP Certifying Member representatives regarding DBE program certification standards and certification procedures. A sample of certification files was then selected and reviewed for the DBE required elements.

At the end of the review, an exit conference was held with the WA UCP Certifying Member representatives and the review team. A list of participants is included at the end of this report. At the exit conference, initial findings and corrective actions were discussed with the representatives.

Following the site visit, the review team prepared the draft report based on the desk review and site visit. Subsequently, the recipient's responses to the draft report were incorporated into this final compliance review report.

NOTE: Materials and information to address the findings and corrective actions in the report should be sent to the attention of:

Christopher Mac Neith
Regional Civil Rights Officer, FTA Region X
915 Second Avenue, Suite 3142
Seattle, WA 98174
Christopher.MacNeith@dot.gov

Office of Minority and Women Business Enterprise

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal	Bioresources, LLC	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N/A	Y	Y	Y	N	N/A
File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification Denial	Alpha 1 Construction	Y	Y	Y	N/A	Y/N	N/A	Y	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N/A	Y	Y	N/A	N/A	N/A
File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification <1 year	AP DesignWorks, LLC	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		N	Y	N/A	Y	Y	N/A	N/A	N/A
File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal	J & B Architectural Signs	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N/A	Y	Y	N	N	N/A
File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification >1 year	Doris Lock & Associates, Inc.	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N/A	Y	Y	N/A	N/A	N/A
File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification Denial	Elite Construction Company	Y	Y	Y	N/A	Y/Y	N/A	Y	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		N	Y	N/A	N/A	Y	N/A	N/A	N/A

		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal	Maben Trucking & Excavating	Y	Y	Y	N	N/N	N/A	Y	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N/A	Y	Y	N	N/A	N/A
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal	Write of Way Technical Consultants, Inc.	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N/A	Y	Y	N	N	N/A
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification >1 year	██████	Y	Y	Y	N	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N/A	N	N	N/A	N/A	N/A
						Concession Business	ACDBE Size Standards	PNW	ACDBE Dir.
						Y	Y	N/A	Y

Section 6 – Issues and Recommendations

1. Burden of Proof

Basic Requirement (49 CFR Part 26.61): UCPs must rebuttably presume that members of the designated groups identified in 26.67(a) are socially and economically disadvantaged. Individuals must submit a signed, notarized statement that they are a member of one of the groups in 26.67.

Discussion: During this UCP Compliance review, no deficiencies were found with requirements for burden of proof.

The OMWBE DBE Certification Procedures Manual indicates that it follows the certification procedures and standards of 49 CFR Part 26 and Part 23. The DBE Certification Application contained a signed, notarized statement from individuals presumed to be socially and economically disadvantaged.

2. Group Membership

Basic Requirement (49 CFR Part 26.63): If a UCP has a well-founded reason to question the individual's claim of membership in that group, you must require the individual to present additional evidence that he or she is a member of the group. You must provide the individual a written explanation of your reasons for questioning his or her group membership. You must take special care to ensure that you do not impose a disproportionate burden on members of any particular designated group.

Discussion: During this UCP Compliance Review, deficiencies were found with the requirement for Group Membership.

The certification file for Alpha Construction, an initial certification denial, was reviewed during the onsite visit. The firm was denied for a number of reasons, one of them being the owner's Group Membership. In the denial letter dated May 4, 2011, OMWBE wrote, "Applicant did not provide proof of Minority origin. The birth certificate provided does not specify the applicant is Hispanic as described in the application. The birth certificate is from the State of New Mexico and while it includes gender information, it does not include race or ethnic information concerning Mr. Martinez's parents. In addition, the birth certificate did not include the origin of either parent."

Mr. Donald Martinez provided a New Mexico certificate of birth indicating his father and mother as Tony J. Martinez and Mary L. Chavez. The applicant firm was also home-state certified as a DBE by the California UCP, which included an onsite visit that should have brought up any issues regarding group membership. According to 49 CFR Part 26.63, if you have a well-founded reason to question an individual's membership claim, then the individual is required to present additional evidence. The applicant must be provided with a written explanation for the UCP questioning his or her group membership.

The review team did not find any OMWBE documentation to support “a well-founded reason” to question Mr. Martinez’s Group Membership in the certification record. There was no evidence in the file that additional information was requested regarding this issue or that the applicant was given the opportunity to rebut the claims prior to the denial letter. When OMWBE’s staff were asked about this matter, they replied that due process is given through the denial letter.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to the FTA’s Office of Civil Rights a plan to appropriately evaluate Group Membership determinations.

OMWBE response: OMWBE’s DBE Certification Manual has been revised to instruct the management analysts to ask for additional information/documentation concerning Group Membership only when there is a well-founded reason for inquiring when indicated by the certification record. Further, the management analysts will inform the applicant in writing of the reason(s) the Group Membership is being questioned. OMWBE’s form letters have also been revised to correspond to this direction.

FTA Response: FTA agrees with OMWBE’s response to the noted deficiency. To close this deficiency by March 4, 2013, OMWBE must submit the revised DBE Certification Manual reflecting the new procedures.

3. Business Size

Basic Requirement (49 CFR Part 26.65): A UCP must apply current SBA business size standard(s) found in 13 CFR Part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts. A firm is not an eligible DBE in any federal fiscal year if the firm (including its affiliates) has had average annual gross receipts during the firm’s previous three fiscal years in excess of \$22.41 million.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement of business size. However, an advisory comment was made.

The [REDACTED], was initially certified as an ACDBE. Upon receipt of the No Change Affidavit in 2011, the certification specialist drafted a file summary on August 11, 2011, incorrectly concluding that the firm was close to graduating from NAICS code 424490, Coffee Merchant Wholesalers–100 employees, if it hired more employees.

The OMWBE ACDBE No Change Affidavit requires the firm to swear that it continues to meet SBA business size criteria and the overall gross receipts cap of 49 CFR Part 26 and 49 CFR Part 23. The affidavit further requires the firm to write-in a response affirming that the average annual gross receipts/highest number of employee during the previous three fiscal years do not “exceed \$___dollar amount / ___ number of employees.” The firm inserted \$47,780,000 and 100 employees in the blanks on the 2011 affidavit in what appeared to be its attempt to include the size standards for the ACDBE program and its work codes. On the 2010 affidavit, the firm wrote in a dollar amount of \$5,000 and 8 employees. A file summary from 2008 completed by a different specialist

noted that the firm's W-2's indicated that the firm had 32 employees in 2007 and 24 in 2006, and the annual update indicated only 8 full-time and 2 part-time staff. The specialist noted that this difference between the W-2 and annual update amounts could have been from turnover.

The certification record indicated that the firm never had 100 employees or \$47 million in gross receipts. The review team advised the certification staff to accurately review business size requirements for eligibility purposes.

OMWBE response: Additional training for management analysts has been conducted to ensure that the appropriate size standards for ACDBEs and DBEs are used when reviewing files. Also, OMWBE's Quality Control (Certification–Lead) must review all status determinations (annual updates, certification reviews, certifications, denials, intents for removal) and add NAICS codes and other written determinations prior to issuance. If Quality Control identifies incorrect application of size standards, these are pointed out to management analysts and the Certification Division Manager and the file is returned for revision.

4. Social and Economic Disadvantage

A) Presumption of Disadvantage

Basic Requirement (49 CFR Part 26.67 (a)(1)): You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement for presumption of disadvantage. Part 26.61 (c) states that you must presume members of groups identified in Part 26.67(a) are socially disadvantaged. Part 26.67 (a)(1) requires the applicant to submit a signed, notarized certification that the disadvantaged owner is socially and economically disadvantaged. This notarized Affidavit of Certification is part of the Uniform Certification Application found in Appendix F of the DBE regulations. The certification files reviewed by the review team included the statement of disadvantage.

B) Personal Net Worth

Basic Requirement (49 CFR Part 26.67 (a)(2)): A UCP must require each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification to certify that he or she has a personal net worth that does not exceed \$1.32 million.

Discussion: During this UCP Compliance Review, deficiencies were found with the requirement for Personal Net Worth (PNW) statements.

The introductory page of the OMWBE federal application that was provided to the review team states that applicants who are applying for federal certification as a DBE airport concessionaire must complete all sections of the application except the PNW statements. As of 2005, when 49 CFR Part 23 was issued for airport concessionaires, applicants seeking certification as an airport concessionaire must also complete the PNW statement. The OMWBE Director advised the review team that this statement should not have been included in the application and would be removed.

There were certification files that included PNW statements from non-disadvantaged owners or from individuals beyond the 51% owners in the applicant firm whose ownership and control were not relied upon. In the Elite Construction Company certification file, the PNW statement of the non-disadvantaged participants had been collected. It was not clear if the PNW statement of the non-disadvantaged participant was requested or voluntarily submitted; however, the non-disadvantaged participant's PNW was received after receipt of the application and PNW statement of the disadvantaged owner.

Additionally, the OMWBE application includes a State supplement that requires spouses to submit PNW statements for transfers of ownership without adequate consideration. The review team discussed with OMWBE staff that determining adequate consideration for transfers of ownership would most likely be best decided by the certification agency and not the applicant. This requirement could also give the appearance that all spouses must submit PNW statements as part of the submittal package rather than on a case-by-case basis.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan to revise the federal application to require PNW statements for ACDBE applicants and collect PNWs from individuals whose certification status is relied upon and from spouses on a case-by-case basis.

OMWBE Response: The DBE Application Instructions, Section 3. Ownership C. Disadvantaged Status states that only owners claiming disadvantaged status counting toward the 51% ownership must complete that section of the application and submit a PNW statement. However, the DBE Uniform Certification Application Supporting Documents Checklist lists the Personal Financial Statement as a document to be provided by "all applicants." This creates an ambiguity and may explain why some OMWBE files may contain PNW statements from non-disadvantaged owners and applicant spouses as they may have been received with the submittal of the initial application. On advice of OMWBE's assistant attorney general, OMWBE cannot return these or any other documents submitted by an applicant once received. OMWBE has revised its UCP Application Supplemental Document Checklist to inform applicants that spouses of owners upon whom certification status is counted toward the 51% ownership may be asked to provide a PNW only on a case-by-case basis. (See Exhibit 1 FTA Plan, UCP Application Supporting Documents Document Checklist Washington State Supplement.) OMWBE uses the UCP application for ACDBE applicants. OMWBE's DBE Manual has been updated to clearly reflect this.

FTA Response: FTA partially agrees with the response to the noted deficiency. Personal Financial Statements should be submitted by all parties involved whose ownership

interests are being used to validate certification. FTA's instruction on this issue is not intended to stop OMWBE from collecting financial statements from non-disadvantaged owners; rather, OMWBE is instructed to create policies and procedures to request this information in a uniform manner. This new policy should include procedures for fully documenting the reasons for these requests. By March 4, 2013, OMWBE must update the DBE Certification Manual to include a policy for requesting additional Personal Financial Statements and procedures for documenting the reasons for the request. By March 4, 2013, OMWBE must revise its UCP Application Supplemental Checklist to be inclusive of other parties whose financial statements may impact ownership as it relates to the certification of the firm. Also, by March 4, 2013, OMWBE must submit an updated application containing the ACDBE PNW statement revision.

C) Individual determinations of social and economic disadvantage

Basic Requirement (49 CFR Part 26.67 (d)): Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged may apply for DBE certification. UCPs must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged.

Discussion: During the UCP Compliance Review, no deficiencies were found with the requirement of individual determinations.

The OMWBE DBE Certification Procedures Manual indicates that it follows the requirements of Appendix E in the DBE regulations. OMWBE staff mentioned that, at one point, there were six firms in the program that sought social and economic disadvantaged determinations on an individual basis and were accepted. Therefore, staff had some experience in processing these types of applications. There are currently only one or two such firms remaining in the program.

5. Ownership

Basic Requirement (49 CFR Part 26.69): In determining whether the socially and economically disadvantaged participants in a firm own the firm, UCPs must consider all the facts in the record, viewed as a whole. To be an eligible DBE, a firm must be at least 51% owned by socially and economically disadvantaged individuals.

Discussion: During this UCP Compliance Review, deficiencies were found with the requirement of ownership.

When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, the ownership interest in the firm must be deemed to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. A greater portion of joint or community property assets cannot be counted toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification. Since Washington is a community property state, this provision would be applicable in regards to assets and ownership interests. The review team did not find documents in the certification files from spouses legally transferring and renouncing the other spouse's right in community assets to acquire ownership interest in the firm.

There was also a statement in the OMWBE certification manual that community property was irrevocable. This statement was subsequently removed during the onsite review by the OMWBE director.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA Office of Civil Rights a plan to collect appropriate documents for spouse's transferring community property rights.

OMWBE Response: Prior to the FTA audit, OMWBE had already identified certain DBE applications processed prior to 2011 that did not contain adequate documentation establishing that the disadvantaged owner's interest in the applicant (for purposes of establishing 51% ownership and control) derived from an independent source.

These circumstances occurred in certain DBE applications when the ownership interest was community property and the disadvantaged owner's spouse was not also disadvantaged. OMWBE had already been contacting the disadvantaged owner(s) of these firms to inform them of these deficiencies and to remediate, if possible, by providing appropriate documentation, including documentation that establishes that the spouse of the disadvantaged owner has irrevocably renounced his or her ownership interest in the applicant firm and/or assets used to capitalize the applicant firm. OMWBE will continue this process until all the issues in the identified DBE files have been satisfactorily addressed. Additionally, more specific guidance will be inserted into OMWBE's Certification Manual to ensure no analyst overlooks this document in his/her review.

FTA Response: FTA agrees with OMWBE's response to the noted deficiency. To close this deficiency, by March 4, 2013, OMWBE must submit the updated Certification Manual containing the additional guidance pertaining to the transference of assets and property rights. Also by March 4, 2013, OMWBE must submit a status update on the reconciliation process that includes a timeline for completion.

6. Control

Basic Requirement (49 CFR Part 26.71): In determining whether socially and economically disadvantaged owners control a firm, UCPs must consider all the facts in the record, viewed as a whole.

Discussion: During this UCP Compliance Review, deficiencies were found with determining control.

Alpha Construction

The certification file for Alpha Construction was examined by the review team for compliance with certification standards. One of the reasons that the firm was denied acceptance into the DBE program was because OMWBE determined that the owner's ownership of another construction firm in California, Delta 3 Construction Services, represented independence and affiliation issues. Delta 3 had not been certified as a DBE firm. The owner, Mr. Martinez, indicated on the PNW statement that he submitted with his application that he was in the process of closing Delta 3. Also, the certification file included a printout from California Secretary of State's website, dated April 26, 2011, showing that Delta 3 was dissolved.

The denial of certification letter was dated May 4, 2011, and included affiliation with Delta 3 as one of the reasons for denial. When the OMWBE analyst who worked on this file was questioned by the Director during the compliance review, he stated that this issue was one of the reasons for the firm being denied on a prior application to the DBE Program. The review team cited the DBE regulation that states, "You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part." It was clear that the applicant firm, Alpha Construction, had no affiliation with Delta 3 at the time the denial letter was drafted, and this particular reason for denial should have been excluded.

██████████
The certification file for ██████████ revealed some discrepancies regarding control. The firm was certified as an ACDBE firm to perform work at the airport many years ago. The firm has been owned by a disadvantaged female and her non-disadvantaged spouse since the 1970s. The by-laws indicate that these two individuals are the only members of the board of directors and that a majority of the directors must be present at the annual meetings.

The onsite report conducted on February 15, 2006, indicated that the disadvantaged female owned the firm through a community property relationship with her non-disadvantaged husband. The onsite reviewer additionally commented that upon first review the firm appeared to be ineligible as the role of the non-disadvantaged spouse seemed to compromise the control of the disadvantaged female. It was noted that both individuals were officers and directors and did not meet the regulations for control. However, the reviewer felt the firm met the burden of proof and showed that she met control requirements since the non-disadvantaged individual was retired and she controlled the day-to-day operations, was president, and had the respect of all of the employees. The reviewer noted some reservations and recommended to continually confirm that the non-disadvantaged spouse's retirement has removed him from the operations of the firm through verification of W-2 and 1099 documents.

An annual update file summary conducted on May 15, 2008, indicated that the disadvantaged spouse is president and could obtain a quorum on her own. The Certification Specialist followed the recommendation of the 2006 onsite reviewer and collected the W-2 documents from the firm and confirmed that the non-disadvantaged

spouse was retired but played a minor role in the firm. Another onsite visit was conducted on February 9, 2011, and the onsite reviewer (different than the 2006 reviewer) recommended that the firm remain certified but made some comments in the file.

The comments included that the disadvantaged owner indicated that a non-participation agreement was not initially signed or a separate property agreement when the firm was initially certified and that her spouse was “somewhat” retired. The 2011 onsite reviewer requested that the non-participation agreement and separate property agreement be signed and remitted to back to OMWBE. Another comment included that the spouse be removed as an officer in the firm. None of these requested documents from the 2011 onsite reviewer were discovered in the certification files during the onsite compliance review.

Write of Way Technical Consultants

In the certification file for Write of Way Technical Consultants, Inc., the review team noted that the primary NAICS code designation was incorrect. The description of the company in the application and the company brochure did not match the NAICS code selected by OMWBE. The firm provides scientific technical writing for information technology, grant writing, business plans, marketing plans, surveys, forms, brochures and loan packaging. OMWBE selected NAICS code 711510–Independent Artists, Writers, and Performers. This industry comprises independent individuals engaged primarily in performing in artistic productions and in creating artistic and cultural works or productions. The file included a description of the incorrect NAICS code designation that OMWBE staff had printed and added to the file. The owner later made the request for the correct NAICS code designation of 541611–Administrative Management and General Management Consulting Services, which was added as the secondary NAICS code under the incorrect classification. The primary code of 711510 was not removed from the firm’s profile.

A graph for the number of processed requests for additional work codes from firms was provided to the review team. OMWBE processed 37 requests to add work codes in 2009, 81 in 2010, and 157 in 2011.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA’s Office of Civil Rights a plan to ensure that control determinations and work codes are appropriately addressed.

OMWBE Response: Since the FTA audit, OMWBE has undertaken several measures that will ensure more quality determinations and eliminate the issues regarding control determinations and NAICS code assignments raised in Alpha Construction, Rite of Way Consultants, and [REDACTED]. Specifically, since November 2011, OMWBE has designated a Lead Certification Management Analyst to review all DBE status recommendation determinations prior to issuance. OMWBE also adopted an NAICS code template during 2011 that enables analysts to clearly document their analysis for NAICS code assignment. OMWBE also requested NAICS code training from FHWA.

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The firm had previously been identified for review of ownership issues. The review will be conducted during the next Annual Update review (August 2012).

Write of Way Technical Consultants

The U.S. Dept of Census NAICS Code Technical Assistance office advised OMWBE that NAICS code 711510 index entry—Technical Writers, Independent—is the appropriate index entry for this firm, given the nature of its services conveyed to OMWBE, even though this NAICS code index entry is part of the industry for independent writers, artists, and performers. NAICS code 541611 would be appropriate only if the firm was providing business plan advice, counseling firms about their business/marketing plans, etc. Based upon the information in the firm’s file, it appears that the firm does not provide these services. However, OMWBE will contact the firm to review its NAICS code assignment and obtain further information concerning the scope of the firm’s actual services.

FTA Response: FTA partially agrees with OMWBE’s response to the noted deficiency. To close this deficiency, by March 4, 2013, OMWBE must submit a copy of the NAICS code template. Also, by March 4, 2013, OMWBE must either re-evaluate or submit an update on the re-evaluation of the eligibility of ██████████ and Alpha Construction.

7. Other Rules Affecting Certification

Basic Requirement (49 CFR Part 26.73): UCPs must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE. You may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program. DBE firms and firms seeking DBE certification shall cooperate fully with UCP requests for information relevant to the certification process.

Discussion: During this UCP Compliance Review, no deficiencies were found with other rules affecting certification.

The DBE regulations in Part 26.73 initially included provisions for evaluating eligibility of Indian tribes, Alaska Native Corporations (ANCs), and Native Hawaiian organizations in the 1999 issuance. The 2003 amended DBE regulations included a separate evaluation process for ANCs seeking DBE certification. None of the certifying members expressed much experience with processing ANC or Native Hawaiian certification determinations. However, the WADOT representative had indicated that he had experience with such determinations and could provide assistance in these areas.

The OMWBE DBE Certification Procedures Manual has a provision that OMWBE understands that firms owned by an Indian tribe or a Native Hawaiian Organization may be eligible for certification and must also meet the size standard limits and control requirements. The manual includes the process for reviewing requests from ANCs seeking DBE certification.

8. UCP Requirements

A) UCP Agreement

Basic Requirements (49 CFR Part 26.81): All DOT recipients in a state must participate in a UCP. Recipients must sign an agreement establishing the UCP for the state and submit the agreement to the Secretary for approval.

Discussion: During this UCP Compliance Review, deficiencies were found regarding the WA UCP Agreement.

The Washington UCP submitted the Memorandum of Understanding to USDOT in March 2002. A copy of a January 31, 2003, letter from USDOT approving the WA UCP was provided to the review team. All of the signatories to the WAUCP are listed in the background section of this report. Copies of all the signature pages for each DOT recipient were provided to the review team.

One of the requirements for UCPs is that they should have sufficient resources and expertise to carry out the responsibilities outlined for certification. Based on some of the findings and comments in this report, the review team advises that OMWBE staff research the availability of training for certification and the DBE program be administered directly or indirectly by USDOT through webinars and other resources.

WSDOT representatives mentioned during the exit meeting that a change in Directors has led to findings and it is addressing issues from previous directors. A quality control person was hired in June 2011. A person also was hired a week prior to the onsite compliance review to conduct process improvement specifically for DBE issues. WSDOT expressed staff concerns and changes at OMWBE as a contributing factor and committed to more oversight of OMWBE.

The review team additionally advises OMWBE to review its policy regarding joint ventures in the Certification Manual and verify if the joint venture certification/approval language is referencing a state regulation rather than a federal regulation. The OMWBE certification manual states, "Generally, joint ventures are not certified by OMWBE, but federal regulation does specifically indicate joint ventures can be DBE certified for a specific project. In this case, the joint venture does not apply for certification with OMWBE. Joint ventures must be approved by WSDOT in the same way regular dealers are approved." OMWBE must clearly state that regular dealers and joint ventures are not certification issues but rather counting issues as noted in 49 CFR Part 26.55.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan to:

- revise the certification manual to clearly state that regular dealers and joint ventures are not certified as such
- provide training opportunities or webinars to certification staff

OMWBE Response: OMWBE's Certification Manual has been revised to state that OMWBE does not certify regular dealers and joint ventures. (See Exhibit 2, FTA Plan-

Joint Venture Revision). OMWBE has requested webinar training from USDOT and WSDOT.

FTA Response: FTA agrees with OMWBE's response to the noted deficiency. To close this deficiency, by March 4, 2013, OMWBE must submit the revised Certification Manual that establishes OMWBE's policy for all regular dealers and joint ventures. Also by March 4, 2013, submit a listing of certification-related trainings to date in which OMWBE staff have participated.

B) UCP Directory

Basic Requirements (49 CFR Part 26.31 and 26.81(g)): UCPs must maintain a unified DBE directory containing, for all firms certified by the UCP, the information required by 26.31. The listing shall include for each firm, its address, phone number, and the types of work the firm has been certified to perform as a DBE. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

Discussion: During this DBE compliance review, no deficiencies were found with the requirements for the UCP directory. The Washington State UCP directory is maintained by OMWBE and meets all the requirements of 26.31. The new DBE regulation requires that directories include by August 26, 2011, the most specific NAICS that describes the type of work for which a DBE is certified. OMWBE is in compliance with the NAICS designation requirement and other requirements of 26.81 in the DBE regulation. OMWBE is in compliance with the new DBE regulations requiring that the UCP directory include the most specific NAICS code available to describe the type of work provided by the DBE. The UCP directory is also updated as changes occur, as required by Part 26.81 of the DBE regulations.

9. 9. UCP Procedures

A) On-Site Visits

Basic Requirements (49 CFR Part 26.83(c)): UCPs must perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their resumes and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for on-site visits.

The OMWBE DBE Certification Procedures Manual indicates that no application will be approved without the completion of an onsite visit. The manual indicates that the process includes visual inspections of the office if located in the local area and photos of the office, activities, equipment, and vehicle markings.

During the review, the review team verified that onsite visits were conducted with firms seeking DBE certification. The certification files included a completed interview form,

notes about the visit, Google Map printouts and directions to the location, and photos of the site, owner, office and work equipment that was used.

The manual also discusses the procedure for performing job site visits, which includes taking photos of employees on the site, the work that the company is performing, equipment that the company uses, and vehicles, equipment, and uniforms with company markings. Job site visits notes were also found in some of the applicable certification files.

B) Uniform Application

Basic Requirements (49 CFR Part 26.83 (i)): UCPs must use the application form provided in Appendix F of the regulations without change or revision. However, you may provide in your DBE program, with the approval of the concerned operating administration, for supplementing the form by requesting additional information not inconsistent with this part.

Discussion: During this DBE Compliance Review, deficiencies were found with the requirements for using the Uniform Certification Application Form in Appendix F.

There are various certification applications used by OMWBE, including a state application, a state/federal application, and a federal-only application. There is an application fee based on the business structure and type of certification. The state and state/federal application fees are \$50 for sole proprietorships, \$75 for partnerships or limited partnerships, and \$100 for corporations or limited liability companies. The federal-only application is \$25 regardless of business structure.

The federal-only application includes a Washington State Supplement page requesting items such as PNW statements from spouses when transfers occur without adequate consideration, a Washington State Uniform Business Identification Number Certificate, a birth certificate or other document that establishes gender and/or race ethnicity/group membership, proof of citizenship or legal permanent residence, and photo identification. The OMWBE Director indicated that the state supplement was intended to be in the state application but will be reviewed to see if the supplement should stay in the federal-only application. The review team advised OMWBE to consider the issues discussed during the compliance review concerning Group Membership, collecting PNWs from spouses, and state business license requirements when assessing the applicability of the state supplement in the federal only application.

The review team noted that there were certification files in which the certification determination exceeded 90 days. OMWBE received an application for AP Design Works, LLC, on June 9, 2010, and accepted the firm into the program on December 21, 2010. Elite Construction Company applied for certification on May 18, 2010, and was denied on February 7, 2011. The actual processing time could not be determined since the date when all documents were received by OMWBE was not readily available in the certification file. A chart showing the percentage of state and federal applications processed within 90 days from 2008 to 2011 was provided to the review team. The chart showed that the processing time has improved since 2008; however, for some quarters in 2011, the highest percentage that certification determinations were made

within 90 days was 71%. This indicates that, at best, OMWBE still had close to 30% of applications that did not make the 90-day certification determination window.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan to determine the appropriate supporting document list and process to ensure that certification determinations are timely completed as prescribed in the DBE regulations.

OMWBE Response: The Washington State Supplement Document Checklist to the Uniform Application has been revised in accordance with the advice of the FTA auditors (see Exhibit 1). Since the FTA audit, OMWBE has hired a Lead Certification Management Analyst 4 to review all application recommendation determinations prior to issuance. By the end of June 2012, OMWBE expects to hire three additional analysts who will be devoted directly to processing new DBE applications. This is critically necessary if OMWBE is to issue all initial certification determinations within 90 days, given the increased certification application work load since the FTA audit.

FTA Response: FTA agrees with OMWBE's response to the noted deficiency. To close this deficiency, by March 4, 2013, OMWBE must provide additional information on projected staffing, such as number of positions and deployment following the June 2012 hirings. Also, by March 4, 2013, OMWBE must submit an update detailing its progress toward making certification determinations within 90 days.

C) Annual Updates

Basic Requirements (49CFR Part 26.83): Once you have certified a DBE, it shall remain certified until and unless you have removed its certification. If you are a DBE, you must provide to the UCP, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths.

Discussion: During this DBE Compliance Review, deficiencies were found with the requirement for annual updates.

The OMWBE provides the DBE firm a printout of its basic information from a database-driven form, along with a No Change Affidavit for annual updates. The firm makes changes on the printout, if necessary, and returns the form along with the affidavit. Several certification files examined by the review team were missing the annual updates.

Once a DBE has been certified, it remains certified until and unless its certification has been removed, in whole or in part, through the procedures of Section 26.87. DBEs are not required to reapply for certification or to be "recertified." The review team also advised OMWBE to revise its manual procedures and forms to coincide with new DBE requirements. The annual update forms were revised during the onsite review to read "certification review" rather "certification renewal."

The review team also noted that OMWBE should review its certification approval letter. The certification letter indicated that a firm must renew its certification three years from the certification anniversary date. The anniversary date listed in the letter was already

three years from the initial certification date, which would actually be six years from the certification date.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights Officer a plan to ensure that annual updates are collected from DBEs and maintained in the certification files. Additionally, submit a plan to remove any reference to certification renewals or recertifications from manuals and other certification material.

OMWBE Response: Every year after the date of a DBE's original certification date, it is sent an annual update form, except in the third year, when it is sent a Certification Review form. These forms are automatically generated from OMWBE's database according to the DBE's last certification/annual/certification review date. (Note: Although this form is entitled "DBE Certification Review Form," there were references within the form to "renewal." These references have now been deleted. OMWBE's DBE Manual has also been revised to indicate that a certification "review" will be conducted every three years. OMWBE's letters notifying of completion of the Certification Review (also previously containing the term "renewal") have also been revised to eliminate all references to the terms "renewal" and "recertification.")

FTA Response: FTA agrees with OMWBE's response to the noted deficiency. This deficiency is now closed.

10. Denials of Certification

A) Initial Request Denials

Basic Requirement (49 CFR Part 26.86): When a UCP denies a request by a firm that is not currently certified with it, to be certified as a DBE, the UCP must provide the firm with a written explanation of the reasons for the denial, specifically referencing the evidence in the record that support each reason for the denial.

Discussion: During this UCP Compliance Review, deficiencies were found with the requirement for denial of initial certification request.

The review team analyzed two firms that were denied certification, Alpha 1 Construction and Elite Construction Company. The Alpha 1 denial letter was dated May 4, 2011, and the denial letter for Elite Construction was completed February 7, 2011. The denial letters did not include a waiting period, despite a waiting period of 12 months being mentioned in the Certification Manual and in the certification file notes. The OMWBE Director was unaware that no waiting period was communicated in the denial letters and will ensure that this waiting period is included in future denial letters.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan for denial letters to include applicable waiting period as outlined in the OMWBE certification manual.

OMWBE Response: OMWBE's denial letter form has been revised to indicate a 12-month waiting period, per the OMWBE DBE Certification Manual for re-applying for certification.

FTA Response: FTA agrees with OMWBE's response to the noted deficiency. To close this deficiency, by March 4, 2013, OMWBE must submit the revised denial letter templates.

B) Removing Existing Certification

Basic Requirement (49 CFR Part 26.87): If a UCP determines that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination.

Discussion: During this UCP Compliance Review, deficiencies were found with the requirements for removing existing certification.

The review team analyzed three certification files OMWBE removed from the program. The files reviewed were J & B Architectural Signs, Bioresources, and Write of Way Technical Consultants. The removal process of Bioresources included an Intent to Remove letter and Final Removal letter; however, the required information was either incorrect or not present in the letters.

A Letter of Intent to remove the eligibility of Bioresources was sent to the firm on August 27, 2009. OMWBE indicated that the firm failed to submit the annual update in a timely manner. The intent letter had no information pertaining to an informal hearing or number of days to respond to the Intent to Remove letter. The letter stated that the firm could appeal this decision to USDOT but did not include a number of days to submit the appeal. OMWBE sent a final removal letter on October 7, 2009, stating that the August 27, 2009, letter gave the firm 20 days to respond or the decision would become final. The firm was notified that, effective October 7, 2009, it had been removed from the federal program. No USDOT appeal information was included by OMWBE in the final letter. The review team advised OMWBE that the intent letter must include an opportunity for an informal hearing. If the informal hearing concurs with the removal reasons or if the firm does not respond to the intent letter, then a final determination letter would be sent outlining the reasons for removal and that the decision could be appealed to USDOT within 90 days of OMWBE's final determination.

Write of Way Technical Consultants certification was removed on what appeared to be October 19, 2010. The certification record did not include an intent letter or final removal letter but rather a memorandum from the Acting Manager–State Certification to the DBE Certification Manager. The memo indicated that mail addressed to this firm was returned as “undeliverable” and that the State Certification Manager took the actions of calling the primary and secondary telephone numbers and contacting Directory Assistance for a new listing for the firm. The DBE Certification Manager signed the memo approving the removal.

The daughter of the J&B Architectural Signs' owner contacted OMWBE via email to inform it that her mother had passed away. A letter was sent to the firm notifying it that the email was received concerning the passing of the owner and that it no longer qualified for DBE certification and was removed from the federal program.

Prior to the exit meeting, OMWBE provided drafts of revised Intent to Remove letters. The letters included information for an informal hearing that OMWBE referred to as an "informal show cause review" with 20 days to respond. The letter also included information regarding appeal to USDOT if it was decided to affirm the removal determination after the informal show cause review meeting. The letter still did not include the 90-day time frame to appeal to USDOT. There was no revised final determination letter provided to the review team to meet the "notice of decision" requirement in 26.87(g), which must also contain the USDOT appeal information. The review team recommends that these revised letters be amended to reflect an opportunity for an informal hearing in the intent letter and an opportunity for a USDOT appeal in the final determination letter.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights Officer a plan to follow the removal process outlined in 26.87.

OMWBE Response: All of OMWBE's Intent to Remove letters have been revised to include USDOT federal appeal information, including the 90-day time frame to appeal to USDOT, as outlined in 49 CFR 26.87. All of OMWBE's Final Removal letter templates for causes including the death of disadvantaged owner, disadvantaged owner's request to withdraw as DBE, and failure of owner to cooperate/respond have been revised to include USDOT federal appeal information, including the 90-day time frame to appeal to USDOT.

FTA Response: FTA agrees with the response to the noted deficiency. To close this finding, by March 4, 2013, OMWBE must provide the revised Intent to Remove and Final Removal letter templates.

C) Appeals to DOT

Basic Requirement (49 CFR Part 26.89): When USDOT receives an appeal and requests a copy of the recipient's administrative record, the UCP must provide the administrative record, including a hearing transcript, within 20 days of the request.

Discussion: During this UCP Compliance Review, deficiencies were made with the Appeals to USDOT.

If an applicant or firm that had its certification removed wants to appeal to USDOT, the firm must submit this appeal within 90 days of the recipient's final decision. The appeal information in the OMWBE removal letters did not include the number of days the firm had to appeal to USDOT.

Appeals should be sent to the following address: Department of Transportation, Office of Civil Rights, 1200 New Jersey Avenue, SE, Washington, DC 20590. The February 7,

2011, denial letter to Elite Construction Company included the number of days to appeal to USDOT in the letter; however, it included the incorrect appeal address of 400 7th Street SW, Room 5414, Washington, DC 20590.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan to revise and ensure that all denial and removal letters to include the appropriate appeal time frame and correct USDOT address.

OMWBE Response: One of OWMBE's denial letter templates incorrectly listed the mailing address of the USDOT Office of Civil Rights. It has now been corrected to state the correct mailing address: 1200 New Jersey Avenue, SE, Washington, DC 20590. This letter template also has been corrected to include the number of days (90) in which a firm may file a notice of appeal to USDOT.

FTA Response: FTA agrees with OMWBE's response to the noted deficiency. To close this deficiency, by March 4, 2013 OMWBE must provide copies of the denial letter templates.

11. Compliance and Enforcement

A) DBE Enforcement Actions

Basic Requirement (49 CFR Part 26.107): If a firm does not meet the eligibility criteria of subpart D and attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceeding against you under 49 CFR Part 29.

Discussion: During this DBE Compliance Review, no deficiencies were found with DBE Enforcement Actions.

The OMWBE Certification Manual included detailed information concerning complaint requirements and complaint investigations. A list of complaints OMWBE received during FY 2010 and FY 2011 was requested and provided to the review team. OMWBE received 20 complaints regarding eligibility issues with control and other areas. The two complaints received in FY 2010 have been investigated and closed. The remaining 18 complaints were received in FY 2011; 17 are pending and 1 has been completed. The OMWBE Director advised the review team that complaints require more time to process and they have had a difficult time keeping up with the number of complaints received this fiscal year.

B) Confidentiality

Basic Requirement (49 CFR Part 26.109 (a)): Notwithstanding any provision of federal or state law, UCPs must not release information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes for DBE certification and supporting documentation.

Discussion: During this DBE Compliance Review, no deficiencies were found with the confidentiality issues in the Washington UCP.

A list of all Freedom of Information requests was requested and provided to the review team. There were 8 requests for certification file information in FY 2010 and 16 in FY 2011. The list included the date of the request, name of the requester, information requested, and the outcome of the request. The majority of the requests were from attorneys representing their denied clients in the certification process. Other requests from firms seeking information in the certification file of certified businesses were denied because the certified firm did not consent to have the information released and OMWBE correctly cited 26.109(a) as the reason.

C) Cooperation

Basic Requirement (49 CFR Part 26.109 (c)): All participants in the Department's DBE program are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. 49 CFR Part 26.73 (c) DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

Discussion: During this DBE Compliance Review, no deficiencies were made with cooperation.

The WA UCP indicated in its response letter that it had no issues with cooperation from other UCPs. It has also included the interstate certification process in its Certification Manual that requires a prompt response (seven days) to UCPs requesting copies of onsite visit reports. OMWBE has removed and denied firms based on failure to cooperate with requests for information.

Section 7 – Summary of Findings

Requirement of 49 CFR Part 26	Ref.	Site Visit Finding	Description of Deficiencies	Submit Corrective Action for the following:	Response Days/Date
1. Burden of Proof	26.61	ND			
2. Group Membership	26.63	D	Misapplication of questioning group membership	Submit updated Certification Manual with updated procedures	March 4, 2013
3. Business Size	26.65	AC	Ensure that staff thoroughly review file for size eligibility		
4. Social and Economic Disadvantage					
a) Presumption of Disadvantage	26.67	ND			
Personal Net Worth	26.67	D	<ul style="list-style-type: none"> No standardized policy for collecting PNWs on a case by case basis ACDBE application says PNW not required 	<ul style="list-style-type: none"> Update DBE Certification Manual to include policy for requesting additional PNWs from non-disadvantaged owners Submit revised UCP application checklist to inform applicants that PNWs may be requested for non-disadvantaged owners Submit revised ACDBE application to request PNW statements 	<p>March 4, 2013</p> <p>March 4, 2013</p> <p>March 4, 2013</p>
b) Individual determination	26.67	ND			
5. Ownership	26.69	D	No legal document transferring community assets rights in files	<ul style="list-style-type: none"> Submit updated Certification Manual containing guidance regarding community property rights and transfer of assets Submit update on reconciliation process & timeline for completion 	<p>March 4, 2013</p> <p>March 4, 2013</p>
6. Control	26.71	D	<ul style="list-style-type: none"> Misapplication of independence/affiliation rules Disadvantage owner subject to restrictions Incorrect NAICS code designation 	<ul style="list-style-type: none"> Submit a copy of updated NAICS code template. Re-evaluate or submit an update on the re-evaluation of [REDACTED] and Alpha Construction 	<p>March 4, 2013</p> <p>March 4, 2013</p>
7. Other Certification Rules	26.73	ND			

Requirement of 49 CFR Part 26	Ref.	Site Visit Finding	Description of Deficiencies	Submit Corrective Action for the following:	Response Days/Date
8. UCP Requirements a) UCP agreement	26.81	D	<ul style="list-style-type: none"> Invalid statements on regular dealers and joint ventures Training needed for certification staff 	<ul style="list-style-type: none"> Submit updated Certification Manual that includes policy on regular dealers and joint ventures Submit listing of certification trainings attended by OMWBE certifiers 	<p>March 4, 2013</p> <p>March 4, 2013</p>
b) UCP directory	26.31	ND			
9. UCP Procedures a) on-site visit	26.83	ND			
b) Uniform Application	26.83	D	<ul style="list-style-type: none"> Applications not processed in 90 days Review of state supplements needed 	<ul style="list-style-type: none"> Submit update on staffing changes. Submit update on progress of meeting the 90 day certification window. 	<p>March 4, 2013</p> <p>March 4, 2013</p>
c) Annual Updates	26.83	D	<ul style="list-style-type: none"> Annual updates missing in files References to renewals/recertifications 	<ul style="list-style-type: none"> Process to ensure annual updates are collected and maintained in files Plan to remove references to renewal/recertifications in all materials 	<p>Closed</p> <p>Closed</p>
10. Denials a) Initial Request	26.86	D	Inconsistent information about waiting period	Submit revised denial letters	March 4, 2013
b) Remove Existing	26.87	D	Removal letter does not follow 26.87	Revise removal letters for consistency with Part 26.87	March 4, 2013
c) Appeals	26.89	D	Incorrect appeal contact information	Submit revised letter templates that include the correct notice of appeal	March 4, 2013
11. Compliance and Enforcement a) DBE Enforcement Actions	26.107	ND			
b) Confidentiality	26.109	ND			
c) Cooperation	26.109	ND			

Findings at the time of the site visit: ND = No deficiencies found; D = Deficiency; NA = Not Applicable; NR = Not Reviewed

Section 8 – List Of Attendees

Name	Organization	Title	Phone	Email
FHWA:				
Jodi L. Petersen	FHWA – Washington Division	Civil Rights Program Manager	(360) 534-9325	Jodi.petersen@dot.gov
WA UCP Members:				
Brenda R. Nnambi	WSDOT- Office of Equal Opportunity	Director	(360) 507-0869	Nnambib@wsdot.wa.gov
John L. Huff	WSDOT-Office of Equal Opportunity	DMWBE Supervisor	(360) 705-6801	Huffj@wsdot.wa.gov
Gregory Bell	WSDOT- Office of Equal Opportunity	Manager, External Civil Rights Branch	(360) 481-9268	Bellg@wsdot.wa.gov
Cathy Canorro	Office of Minority & Women’s Business Enterprises	Acting Director	(360) 704-1187	Ccanorro@omwbe.wa.gov
Milligan & Co., LLC:				
Benjamin Sumpter	Milligan & Co., LLC	Lead Reviewer	(215) 496-9100	Bsumpter@milligancpa.com
Habibatu Atta	Milligan & Co., LLC	Reviewer	(215) 496-9100	Hatta@milligancpa.com

ELECTRONIC CODE OF FEDERAL REGULATIONS**e-CFR data is current as of May 2, 2019**

Title 49 → Subtitle A → Part 23

Title 49: Transportation

PART 23—PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS**Contents****Subpart A—General**

- §23.1 What are the objectives of this part?
- §23.3 What do the terms used in this part mean?
- §23.5 To whom does this part apply?
- §23.7 Program reviews.
- §23.9 What are the nondiscrimination and assurance requirements of this part for recipients?
- §23.11 What compliance and enforcement provisions are used under this part?
- §23.13 How does the Department issue guidance, interpretations, exemptions, and waivers pertaining to this part?

Subpart B—ACDBE Programs

- §23.21 Who must submit an ACDBE program to FAA, and when?
- §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?
- §23.27 What information does a recipient have to retain and report about implementation of its ACDBE program?
- §23.29 What monitoring and compliance procedures must recipients follow?

Subpart C—Certification and Eligibility of ACDBEs

- §23.31 What certification standards and procedures do recipients use to certify ACDBEs?
- §23.33 What size standards do recipients use to determine the eligibility of ACDBEs?
- §23.35 What is the personal net worth standard for disadvantaged owners of ACDBEs?
- §23.37 Are firms certified under 49 CFR part 26 eligible to participate as ACDBEs?
- §23.39 What other certification requirements apply in the case of ACDBEs?

Subpart D—Goals, Good Faith Efforts, and Counting

- §23.41 What is the basic overall goal requirement for recipients?
- §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?
- §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?
- §23.51 How are a recipient's overall goals expressed and calculated?
- §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?
- §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?

Subpart E—Other Provisions

- §23.71 Does a recipient have to change existing concession agreements?
- §23.73 What requirements apply to privately-owned or leased terminal buildings?
- §23.75 Can recipients enter into long-term, exclusive agreements with concessionaires?
- §23.77 Does this part preempt local requirements?
- §23.79 Does this part permit recipients to use local geographic preferences?

Appendix A to Part 23—Uniform Report of ACDBE Participation

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

SOURCE: 70 FR 14508, Mar. 22, 2005, unless otherwise noted.

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Subpart A—General

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§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.

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§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 (PNW) 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. The effectiveness of this paragraph (3) of this definition is suspended with respect to any application for ACDBE certification made or any financing or franchise agreement obtained after June 20, 2012.

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 (<http://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 §23.33 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).

[70 FR 14508, Mar. 22, 2005, as amended at 72 FR 15616, Apr. 2, 2007; 77 FR 36931, June 20, 2012]

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§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.

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§23.7 Program reviews.

In 2010, and thereafter at the discretion of the Secretary, the Department will initiate a review of the ACDBE program to determine what, if any, modifications should be made to this part.

[75 FR 16358, Apr. 1, 2010]

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§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 April 21, 2005:

(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."

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§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 through 26.109) apply to this part in the same way that they apply to FAA recipients and programs under part 26.

[70 FR 14508, Mar. 22, 2005, as amended at 72 FR 15616, Apr. 2, 2007]

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§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 April 21, 2005, express the official positions and views of the Department of Transportation or the Federal Aviation Administration.

(b) The Secretary of Transportation, Office of the Secretary of Transportation, and the FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or the FAA, 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 through 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.

[70 FR 14508, Mar. 22, 2005, as amended at 72 FR 15616, Apr. 2, 2007]

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Subpart B—ACDBE Programs

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§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 April 21, 2005, 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.

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§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).

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§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.

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§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.

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§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 setting forth 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. This mechanism must include a written certification that you have reviewed records of all contracts, leases, joint venture agreements, or other concession-related agreements and monitored the work on-site at your airport for this purpose. The monitoring to which this paragraph refers may be conducted in conjunction with monitoring of concession performance for other purposes.

[77 FR 36931, June 20, 2012]

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Subpart C—Certification and Eligibility of ACDBEs

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§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 April 21, 2006 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 April 21, 2006, a personal net worth statement, a certification of disadvantage, and an affidavit of no change.

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§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 \$56.42 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*: \$1 billion in assets;

(2) *Car rental companies*: \$75.23 million average annual gross receipts over the firm's three previous fiscal years, as adjusted by the Department for inflation every two years from April 3, 2009.

(3) *Pay telephones*: 1,500 employees;

(4) *Automobile dealers*: 350 employees.

(c) The Department adjusts the numbers in paragraphs (a) and (b)(2) of this section using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment. The Department publishes a FEDERAL REGISTER document informing the public of each adjustment.

[77 FR 36931, June 20, 2012]

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§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 \$1.32 million. 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.

[70 FR 14508, Mar. 22, 2005, as amended at 77 FR 36931, June 20, 2012]

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§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.

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§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.

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Subpart D—Goals, Good Faith Efforts, and Counting

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§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.

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§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.

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§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 April 21, 2005, by January 1, 2006. You must make your next submissions by October 1, 2008.

(2) If you are a small hub primary airport on April 21, 2005, by October 1, 2006.

(3) If you are a nonhub primary airport on April 21, 2005, 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 no later than 90 days before issuing the solicitation for the new concession opportunity.

[70 FR 14508, Mar. 22, 2005, as amended at 77 FR 36931, June 20, 2012]

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§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.

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§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 §23.51(c)(5)(ii), 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.

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§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, <http://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.

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§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.

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§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 April 21, 2005 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.

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§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 the awards and commitments shown on your Uniform Report of ACDBE Participation (found in Appendix A to this Part) at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your ACDBE program in good faith:

(1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;

(2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year;

(3) (i) If you are a CORE 30 airport or other airport designated by the FAA, you must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (b)(1) and (2) of this section to the FAA for approval. If the FAA approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

(ii) As an airport not meeting the criteria of paragraph (b)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to the FAA, on request, for their review.

(4) The FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.

(5) You may be regarded as being in noncompliance with this part, and therefore subject to the remedies in §23.11 of this part and other applicable regulations, for failing to implement your ACDBE program in good faith if any of the following things occur:

(i) You do not submit your analysis and corrective actions to FAA in a timely manner as required under paragraph (b)(3) of this section;

(ii) FAA disapproves your analysis or corrective actions; or

(iii) You do not fully implement:

(A) The corrective actions to which you have committed, or

(B) Conditions that FAA has imposed following review of your analysis and corrective actions.

(c) If information coming to the attention of FAA demonstrates that current trends make it unlikely that you, as an airport, will achieve ACDBE awards and commitments that would be necessary to allow you to meet your overall goal at the end of the fiscal year, FAA may require you to make further good faith efforts, such as modifying your race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

[70 FR 14508, Mar. 22, 2005, as amended at 77 FR 36931, June 20, 2012]

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§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.

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§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.

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Subpart E—Other Provisions

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§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 April 21, 2005) 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.

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§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).

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§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 through 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.

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§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.

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§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 an 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.

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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 Cumulative ACDBE participation	A Total dollars (everyone)	B Total number (everyone)	C Total to ACDBEs (dollars)	D Total to ACDBEs (number)	E RC to ACDBEs (dollars)	F RN to ACDBEs (dollars)	G % of dollars to ACDBEs
Prime Concessions							
Subconcessions							
Management Contracts	XXXXXXXX	XXXXXXXX					XXXXXX
Goods/Services							
Totals							

6. Non-Car rental New ACDBE participation this period	A Total dollars (everyone)	B Total number (everyone)	C Total to ACDBEs (dollars)	D Total to ACDBEs (number)	E RC to ACDBEs (dollars)	F RN to ACDBEs (dollars)	G % of dollars to ACDBEs
Prime Concessions							
Subconcessions							
Management Contracts	XXXXXXXX	XXXXXXXX				XXXXXX	
Goods/Services							
Totals							

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

8. Car rental Cumulative ACDBE participation	A Total dollars (everyone)	B Total number (everyone)	C Total to ACDBEs (dollars)	D Total to ACDBEs (number)	E RC to ACDBEs (dollars)	F RN to ACDBEs (dollars)	G % of dollars to ACDBEs
Prime Concessions							
Subconcessions							
Goods/Services							
Totals							

9. Car rental New ACDBE participation this period	A Total dollars (everyone)	B Total number (everyone)	C Total to ACDBEs (dollars)	D Total to ACDBEs (number)	E RC to ACDBEs (dollars)	F RN to ACDBEs (dollars)	G % of dollars to ACDBEs
Prime Concessions							
Subconcessions							
Goods/Services							

Totals								
10. Cumulative ACDBE participation by race/gender	A Black Americans	B Hispanic Americans	C Asian-Pacific Americans	D Asian-Indian Americans	E Native Americans	F Non-minority Women	G Other	H Totals
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.

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[Need assistance?](#)

Attachment 9
ACDBE Utilization Form

Attachment 10

Certification and Outreach Contacts

DOT Small Business Transportation Resource Center Contact:

<https://www.transportation.gov/osdbu/nw-sbtrc>

Patrick Pierce
Executive Director, SBTRC
Phone: (425)248-4866
Fax: (425) 745-5563
Email: patrick.pierce@economicalliancesc.org

Lily Keefe
Project Director
808 134th St. S.W., Suite 101
Phone: (425) 248-4222
Fax: (425) 745-5563
Email: Lilyk@economicalliancesc.org

Alicia Marselina
Project Coordinator
Phone: (425) 248-4222
Fax: (425) 745-5563
Email: aliciam@economicalliancesc.org

OMWBE contact:

<https://omwbe.wa.gov/about-omwbe/contact-us-directions>

Main: (360) 664-9750
Toll Free: (866) 208-1064
Fax: (360) 586-7079
TTY: (800) 833-6384

Mailing Address:

1110 Capitol Way South, Suite 150 Olympia, WA 98501

Physical Address:

OMWBE
P.O. Box 41160
Olympia, WA 98504-1160

Name: Main Office Contact
Topic: Certification questions and general help
Phone: (360) 664-9750
Phone: (866) 208-1064
Email: technicalassistance@omwbe.wa.gov

Name: Amal Joury
Topic: Certified firm investigations/complaints
Phone: (360) 664-9756
Email: AmalJ@omwbe.wa.gov

Name: Caleb McInville
Topic: Linked deposit loan program
Phone: (360) 664-9751
Email: CalebM@omwbe.wa.gov

Name: Sarah Erdmann
Topic: OMWBE participation in an event
Phone: (360) 664-9771
Email: SarahE@omwbe.wa.gov

Name: Lisa van der Lugt
Topic: Media Inquires
Phone: (360) 664-9750
Email: LisaV@omwbe.wa.gov

Name: Sarah Erdmann
Topic: Legislative Inquiries
Phone: (360) 664-9771
Email: SarahE@omwbe.wa.gov

Name: Elisa Young
Topic: Agencies or educational institutions seeking assistance with supplier diversity
Phone: (360) 664-9759
Email: ElisaY@omwbe.wa.gov

Name: Public Records
Topic: Public records requests
Phone: (360) 664-9756
Email: PublicRecords@omwbe.wa.gov

WSDOT Equal Opportunity Contact:

Mail Address:

PO Box 47314
310 Maple Park
Olympia, WA
98504-7314

Physical Address:

2D08 Transportation Bldg.
310 Maple Park Avenue SE
Olympia, WA
98504-7314

Program emails:

Americans with Disabilities Act:

ADA@wsdot.wa.gov

Civil Rights Program

CRP@wsdot.wa.gov

Disadvantaged Business Enterprises Support Services:

DBESS@wsdot.wa.gov

Diversity Reporting:

DiversityReporting@wsdot.wa.gov

On the Job Training:

OJT@wsdot.wa.gov

Title VI:

TitleVI@wsdot.wa.gov

Phone:

360-705-7090

Toll-Free Phone:

1-888-259-9143