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Office of the Secretary

49 CFR Part 23

RIN 2105-AB70

[Docket No. 64; Amdt. 1]

Participation by Disadvantaged Business Enterprises in Airport Concessions

AGENCY: Office of the Secretary (OST),
DOT.

ACTION: Final rule.

SUMMARY: The Department of Transportation (DOT) is issuing a final rule to implement a provision in the Airport and Airway Improvement Act of 1982, as amended in 1987 (AAIA). The final rule establishes requirements for the participation of disadvantaged business enterprises (DBE) in airport concessions. It also amends the existing DOT DBE regulation.

EFFECTIVE DATE: This rule is effective June 1, 1992.

FOR FURTHER INFORMATION CONTACT: Ms. Irene H. Miels, General Legal Services Division (AGC-100), Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591. Telephone: (202) 267-3473.

SUPPLEMENTARY INFORMATION:

Availability of Final Rule

Any person may obtain a copy of this final rule by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-430, 800 Independence Avenue, SW, Washington, DC 20591, or by calling (202) 267-3464. Requests must identify the docket number of this final rule.

Persons interested in being placed on the mailing list for future notices of proposed rulemaking (NPRM's) should request from the above office a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distributing System, which describes the application procedure.

Background Information

Section 109, "Project Sponsorship," of the Airport and Airway Safety and Capacity Expansion Act of 1987 (AASCEA) amended section 511(a) of the AAIA to require recipients of

Federal assistance under the AAIA (sponsors) to provide an assurance relating to DBE's. Section 109 states:

(h) ASSURANCE RELATING TO DISADVANTAGED BUSINESS ENTERPRISES—Section 511(a) is further amended by adding at the end thereof the following new paragraph:

(17) the airport owner or operator will take such action as may be necessary to ensure that, to the maximum extent practicable, at least 10 percent of all businesses at the airport which sell food, beverages, printed materials, or other consumer products to the public are small business concerns (as defined by the Secretary by regulation) owned and controlled by socially and economically disadvantaged individuals (as defined under section 505(d)(2)(B) [of the AAIA, as amended]).

Section 505(d)(2)(B) defines socially and economically disadvantaged individuals as follows:

(B) SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS—The term 'socially and economically disadvantaged individuals' has the meaning such term has under section 8(d) [of the Small Business Act (15 U.S.C. Section 637(d))] and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged for purposes of this subsection.

In amending the AAIA, Congress also established a DBE program for Federally-assisted contracting on airports. See section 105(f) of the AASCEA, amending section 505 of the AAIA. This requirement, as set forth in section 505, was implemented by amending subpart D of the Department of Transportation's regulations, 49 CFR part 23, to add the Federal Aviation Administration (FAA). See 53 FR 18285, May 23, 1988. Previously, subpart D applied only to the Urban Mass Transportation (UMTA) and Federal Highway (FHWA) Administrations, implementing section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) (Pub. L. 100-17). See 52 FR 39225, Oct. 21, 1987.

It was not possible to implement section 109, the DBE concession amendment, in the same manner, since 49 CFR part 23 contains no DBE concession requirements. (Only the Federal Aviation Administration (FAA) has extensive concession activity, so the legislation applicable to UMTA and FHWA, which resulted in subpart D, addressed only Federally-assisted contracting.) Part 23 does set requirements for Minority Business Enterprise (MBE) and Women's Business Enterprise (WBE) programs, but these were established under other legislation. The MBE/WBE program has

been superseded, in the case of the FAA, by the DBE program now being established under section 109. Therefore, the Department has amended part 23 to implement section 109 by adding a new subpart F to establish requirements for a DBE concession program on airports.

In issuing this final rule, the Department has taken into account questions and issues raised about concession participation since 1980, when the MBE/WBE concession program was established through issuance of part 23, as well as numerous comments from airport sponsors that are recipients of DOT financial assistance; DBE and non-DBE entities; industry associations and representatives; and members of the United States Congress.

Summary of Contents of Final Rule

For the convenience of readers, the following is a short summary of the highlights of this final rule:

- The rule applies to any sponsor that has received a grant for airport development authorized by the AAIA, as amended by the AASCEA.

- Concession plans must be prepared and implemented by all primary airports (commercial service airports which have been determined by the Secretary to have more than 10,000 passengers enplaned annually). In addition, primary airports are subject to 3 general requirements set forth in § 23.93(a).

- Nonprimary airports (commercial service airports that are not primary airports, general aviation (GA), or reliever airports) are not required to prepare concession plans but shall take appropriate outreach steps to encourage available DBE's to participate as concessionaires whenever there is a concession opportunity. In addition, these airports are subject to the 3 general requirements set forth in § 23.93(a).

- A nondiscrimination statement shall be included by the sponsor in all concession agreements, and concessionaires must agree that a nondiscrimination statement will be included in any subsequent agreements, such as subleases, into which the concessionaire enters relative to its business on the airport.

- *Concession* means a for-profit enterprise, located on an airport subject to this subpart, that is engaged in the sale of consumer goods or services to the public under an agreement with the sponsor, another concessionaire, or the owner of a terminal, if other than the sponsor. Appendix A contains a listing of the types of businesses that frequently are operated as concessions

The term "concession" does not include aeronautical activities such as scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight carrying capacities; fixed base operators (FBO); flight schools; and sky-diving, parachute-jumping, flying guide services, and helicopter or other air tours.

Examples of other entities that do not meet the definition of a concession include suppliers, flight kitchens and in-flight caterers servicing air carriers; other businesses servicing airlines through the provision of fuel, skycap services, baggage handling, etc.; government agencies; industrial plants; farm leases; individuals leasing hangar space; custodial and security contracts; individual taxis with permits; telephone, electricity, gas, and other utilities; and management contracts. Concessions may be operated under leases, licenses, subleases, permits, contracts, and other instruments or arrangements. It is the nature of the operation, rather than the legal document, which determines the status of the enterprise.

- Except in the case of car rental agencies, pay telephone concessions, and banks, the standard for a "Small business concern" shall be the average of the preceding 3 years' annual gross receipts, not to exceed \$30,000,000 (adjusted periodically for inflation). The standard for pay telephone concessions shall be the employment of not more than 1,500 employees; and the standard for car rental agencies shall be the average of the preceding 3 years' annual gross receipts, not to exceed \$40,000,000 (adjusted periodically for inflation). The standard for banks shall be total assets of not more than \$100,000,000.

- Firms certified as MBE's/WBE's/or DBE's prior to the effective date of this subpart, pursuant to a requirement in § 23.43(d) or pursuant to DOT/FAA guidance, that have exceeded the size standard may be counted as DBE participation until the current agreement, including the exercise of options, expires, provided the firm remains otherwise eligible.

- Goals shall be based on gross receipts, except in those instances where the sponsor provides an acceptable rationale for calculating the goals as a percentage of the total number of concession agreements operating at the airport during the goal period.

- For purposes of calculating the goal as a percentage of the gross receipts, sponsors shall exclude from the calculation any portion of a firm's estimated gross receipts that will not be generated from a concession activity.

- The certification procedures set forth in § 23.51 of this part 23 are applicable to this subpart.

- On-site visits for certification purposes are not mandatory but may be performed to validate the certification information obtained from a DBE firm.

- Businesses operating as limited partnerships, in which a non-DBE is the general partner, and other arrangements that do not provide for ownership and control of a specified part of the business or a particular activity by the socially and economically disadvantaged owners are not eligible for certification as DBE's under this subpart.

- Sponsors may impose requirements on competitors for concession agreements as a means of achieving DBE goals.

- Awards of concession agreements that are made by private owners of terminal buildings are covered by this subpart. Airport sponsors subject to this subpart shall levy the applicable requirements on the terminal owner through the agreement or by other means, except that certifications shall be performed by the airport sponsor.

- A long-term, exclusive concession agreement is permitted under this subpart, provided that the FAA approves a plan for ensuring adequate DBE participation throughout the term of the agreement. The required elements of the plan are set forth in § 23.108 of this subpart and a plan must be submitted whether a DBE or a non-DBE enterprise is the prime concessionaire being considered for award of an exclusive, long-term lease. It no longer is necessary to apply to the Secretary of Transportation for an exemption from the prohibition against exclusive, long-term leases.

- Compliance with the requirements in this subpart is enforced through section 519 of the AAIA of 1982, as amended and any regulations issued pursuant thereto, and not through subparts D and E of this part.

Comments on Legal and Other Issues

The FAA received comments on the DBE concession NPRM from 163 persons and organizations. Commenters include 34 airport operators/owners: 92 fixed base operators (FBO's) and their representatives, including the National Air Transportation Association (NATA); 4 members of Congress; 2 airport industry associations—the Airport Operators Council, International (AOCI) and the American Association of Airport Executives (AAAE); 5 car rental agencies and their representatives, including the American Car Rental Association (ACRA); 4 other non-DBE

concessionaires; 3 DBE associations and consultants, including the Airport Minority Advisory Council (AMAC); and 6 DBE's.

The FAA also received comments from 15 architectural and engineering firms. These firms do not function as concessionaires, but as Federally-assisted contractors when hired by a recipient to perform on Federally-assisted projects. All of their comments concern the issue of the size limitations on DBE's.

The concessionaires that commented included the 92 FBO's; 1 baggage and cart service; 1 book seller; 5 car rental companies; 1 duty free establishment; 4 food services; 1 news and gift vendor; and 2 who did not identify their businesses.

Some commenters address single issues; others comment on a variety of issues. For ease of reference, comments are discussed in the order of the issues as they appeared in the NPRM, and related section numbers in the final rule are provided.

1. Is the Proposed Rule Constitutional?

Comments—Various commentors raise the issue of whether the proposed rule is constitutionally infirm because the statute itself is unconstitutional under the Fifth and Fourteenth Amendments of the United States Constitution.

DOT/FAA Response—It is the view of the Department that in enacting section 511(a)(17) to establish the DBE concession program on airports that are subject to the AAIA, Congress appropriately exercised its unique remedial powers. Congress' findings, establish a sufficiently "strong basis in evidence for its conclusion that remedial action was necessary," *Wygant (v. Jackson Bd. of Educ.)*, 476 U.S., at 277 (1986) (plurality opinion). *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). Moreover, the framework is "narrowly tailored to remedy prior discrimination." *Id.* at 507. Therefore, the statute and regulation are constitutional.

2. Should the Definition of "Concession" include Services as Well as Products? (Section 23.89)

Comments—The FAA received 163 comments on the definition of "concession." Sixteen commenters find the proposed definition acceptable. Of these, 10 specifically support the inclusion of concessions that sell services as well as those that sell consumer goods. This group includes AMAC, an organization representing DBE's; major non-minority concessionaires such as DFS; and both

large and small DBE's. Commenters against the inclusion of service businesses include AOCI, AAEA, and two individual airports. One commenter supports the inclusion of FBO's in the service concessions.

Four are adverse to the inclusion of any service concessions, with 91 specifically opposing the inclusion of FBO's, and 5 opposing the inclusion of car rental companies. One of the 5 opponents to the inclusion of car rental companies is ACRA, which represents most of the nation's car rental companies, including Avis, Inc., National Car Rental System, Inc., Budget Rent-A-Car Corporation, Alamo Rent-A-Car, Thrifty Rent-A-Car System, Inc., and Enterprise Rent-A-Car, their licensees and franchisees, as well as smaller independent companies. Many of their members operate airport concessions.

ACRA, in behalf of its members, objects to inclusion of car rental companies on the following bases:

a. Inclusion of car rental companies is impracticable, since they derive 90 percent or more of their rentals through prior off-airport reservations; they do not lend themselves to leasing subdivisions; joint ventures raise difficult legal questions regarding who owns, maintains, insures, and defends and prosecutes lawsuits involving the fleet of vehicles; and gross receipts are difficult to forecast in view of the competition between car rental companies.

b. Inclusion of car rental companies will dilute corporate control and identity of the firms, since the regulation could force them into arrangements with licensees or franchisees that would be less suitable than company-owned operations.

c. The statute does not authorize DOT to include car rental companies within the scope of the rule. (The AOCI and the AAEA, all of the FBO's, and two airports join ACRA in criticizing the inclusion of service concessions on this basis.)

Alamo Rent-A-Car supplemented ACRA's comments, as follows:

a. Expansion to include DBE ownership could result in its loss of Chapter "S" corporate status and exposure to substantially higher tax liability.

b. The DBE rule may be in conflict with state laws which prohibit requirements that would preclude a business from submitting bids or entering into contracts for rental concessions.

NATA and 91 FBO's also oppose inclusion of fixed based operators within the concession definition. In

addition to concurring with the car rental agencies generally, regarding coverage of the rule, this group favors exclusion for the following reasons:

a. The FBO's constitute the only aeronautical activity singled out for inclusion in the definition of concessions.

b. The sponsor assurances already ensure that there will be no discrimination in the provision of aeronautical services on airports.

c. The requirement to consider opportunities for DBE's whenever a lease is amended for any purpose will impede the development of FBO facilities, prevent changes in lease rates, and delay compliance with environmental regulations.

DOT/FAA Response—In regard to including service concessions in the coverage of the regulation, the language of section 511(a)(17) speaks in terms of businesses that sell "food, beverages, printed materials, and other consumer products," and the term "consumer products" is not defined in the statute. While several commenters provided dictionary and other definitions which describe "products" solely in terms of "goods," rather than services, the Department is not convinced that Congress defined "products" narrowly, given the legislative history of this section and the history of its forerunner, the MBE/WBE program.

The sponsor of this provision specifically state that section 109 was added to cover businesses at airports that provide consumer goods and services:

Mr. Chairman, as reported by the Public Works and Transportation Committee, H.R. 2310 (which was enacted as the Airport and Airway Safety Capacity and Expansion Act of 1987, amending the Airport and Airway Improvement Act of 1982) provides for minority and female participation in airport improvement and development projects. However, it does not address the issue of minority and female participation in airport concessions and services.

As airports continue to expand and grow across this country, more and more opportunities are becoming available for businesses which provide consumer goods and services. This represents a significant potential for the creation of jobs and additional revenues for small firms. I believe that there should be at least a minimum level of commitment to these small minority and women-owned firms.

To date, this commitment simply has not been made in view of increased business opportunities at airports. Airports sometimes give a long-term lease to a single business concern to conduct all food service or ground transportation activity. The exclusive nature of these contracts prohibits any other business including, by definition, any

minority or women-owned businesses, from participating in that activity in any way. Similarly, rental car companies, which are tenants at virtually every airport, generate significant revenues but seldom have minority or female participation. My amendment would open up the business opportunities to minorities and females and encourage the larger airport tenants, such as rental car companies, to subcontract or establish partnerships with female and minority firms.

133 CONG. REC. H8014 (October 1, 1987) (extended remarks of Rep. Collins).

Rep. Norman Mineta also addressed this point, as follows:

Mr. Chairman, I rise in support of the [Rep. Collins'] amendment * * *. The provision of food and retail services to airline passengers in terminals is an area where opportunities for DBE's should be encouraged.

133 CONG. REC. H8014 (October 1, 1987) (statement of Rep. Mineta).

The history of the program also militates against exclusion of the service concessions. Since its inception in 1980, the forerunner MBE/WBE program included the following service concessions: Car rental agencies, FBO's, telephone services, secretarial services, advertising, lockers, televisions, baggage carts, ground transportation, flight schools, insurance, and hotels and motels. Coverage of these concessions, and, in fact, all concessions by the FAA, was based on section 30 of the Airport and Airway Development Act of 1970, as amended (48 U.S.C. 1730), which stated:

The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this title. The Secretary shall promulgate such rules as he deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of title VI of the Civil Rights Act of 1964.

Section 30 now appears as section 520 in the AAIA, as amended, but no longer serves as a basis for the concession program, due to the enactment of section 511(a)(17). Instead, section 30 serves to ensure nondiscrimination in employment and in the provision of services and benefits on airports receiving FAA financial assistance. In so doing, section 30 functions as an addition to title VI of the Civil Rights Act by prohibiting such discrimination on the bases of sex and creed, as well as

on the bases of race, color, and national origin. Title VI prohibits discrimination only on the 3 latter bases.

Service concessions mentioned above offer opportunities for DBE's, and elimination of these opportunities effectively would halve the program. The Department considers it significant that section 511(a)(17) does not explicitly eliminate coverage of service concessions. This fact, combined with the legislative and implementation history, leads the Department to believe that coverage of service concessions is warranted.

The Department agrees, however, that FBO's should be excluded from coverage of this final rule. As commenters pointed out, other aeronautical activities are not covered by this final rule and were not covered by the forerunner MBE/WBE rule, even though FBO's were. The Department concurs with FBO commenters that the sponsor assurances in the grant agreements already ensure that there will be no economic discrimination in the provision of aeronautical services on airports. While DBE interest in FBO's has proved minimal during the decade of experience with the MBE/WBE/DBE programs, these assurances protect DBE's that do wish to enter the field, just as they protect DBE's wishing to enter other aeronautical enterprises.

FBO commenters made a number of points which are applicable to concessions generally and have been accepted by the Department. The definition of "material amendment" in § 23.89 of this final rule responds to a comment that the need to consider DBE participation when a lease is amended for any purpose, as required by § 23.103(b) of this final rule, will cause significant disruption in the businesses of prime concessionaires. The new definition clarifies that the need to consider DBE participation will arise only when an amendment changes the basic rights or obligations of the parties to a concession agreement. Routine changes such as changes in name, rates, decor, and signage will not give rise to the need to consider DBE participation. Usually, a "material amendment" will concern a term outside the original scope of the agreement.

In response to the concern of the car rental agencies that the rule requires reorganization of their business structures, it also is not the intent of the Department to force businesses into new structures. The need to change the structure will arise, ordinarily, only when an enterprise seeks an exclusive, long-term lease. In those instances, a business may find it necessary to sublease or to form a joint venture in

order to provide for DBE participation. It is standard for a number of car rental agencies to operate at each airport. The exclusivity issue, therefore, should not arise for car rental agencies.

It is conceivable that an airport sponsor may require new bidders to include provisions for the participation of DBE's. Organizing accordingly, in order to obtain a concession award, would not be as onerous as reorganizing during an ongoing lease term. The same possibility exists for businesses that sell goods instead of services, and the FAA believes that the impact upon the latter should be no greater than upon the former.

Further, the airport sponsor has the option of using a set-aside process, where not prohibited by State or local law. Instead of requiring DBE participation within a non-minority or car rental agency, the airport sponsor can select the set-aside mechanism to achieve DBE participation.

There also arises the question of fundamental fairness. While this cannot be the determining factor, of course, in deciding whether to include service concessions in the coverage of the rule, this point was raised by concessionaires such as DFS. This duty-free concessionaire and other large and small product concessionaires indicate that they believe themselves to be carrying the major responsibility for implementation of the DBE program. They urge airport sponsors to focus on opportunities for DBE service concessions, as well as on those for the sellers of goods.

Other commenters urge expansion of the rule's coverage even beyond product and service concessions. Miami International Airport, for example, strongly recommends inclusion of management contracts. Miami also recommends that credit be given for DBE participation in all aeronautical services and custodial agreements, whether the services are provided to the public, the airlines, the concessionaires, or the airport itself. As previously stated, the Department believes that aeronautical activities do not warrant coverage. Additional forms of agreements require further study and, possibly, legislative action before coverage can be undertaken.

General Mitchell International Airport, Milwaukee, Wisconsin, advocates the inclusion of off-airport suppliers and providers of services to concessionaires. This airport maintains that there is little difference between such suppliers and many of the businesses now deemed concessions, such as the self-service insurance counters, coin-operated TV's, game rooms, coin-

operated lockers, vending machines, and pay telephones. Expansion of the rule to cover off-airport services would go beyond the scope of the NPRM. Further, the Department believes that further study is needed prior to proposing inclusion of suppliers in the DBE program and that it may not be possible to accomplish this without legislative action.

In general, the Department wishes to emphasize that nothing in the rule will require car rental agencies or any other enterprises to change their forms of business (except in the case of exclusive, long-term leases, perhaps). The DBE program is intended to be a flexible, not rigid, one that will result in opportunities for DBE's without undue impact upon non-DBE's. For example, the rule requires an overall goal, not specific contract goals. Thus, there is no requirement for the sponsor to set goals for each car rental business. Moreover, sponsors may elect to seek prime DBE's, rather than to meet goals through subleasing. Finally, the rule provides for a "good faith efforts" waiver, as set forth in § 23.101.

In addition to requesting clarification on the status of aeronautical services and management contracts (provided above), the State of Alaska Department of Transportation and Public Facilities requests clarification regarding the status of the following:

1. In-terminal, non-exclusive, non-bid leases for meet and greet tour group operators;
2. Telephone utilities (not pay telephone concessions) and electrical utility companies; and
3. Non-exclusive permits for cab drivers and tour bus companies.

Section 23.89 of this final rule responds in large measure to Alaska's request for clarification. It is the activity and location of the business that governs, not the nature of the revenue producing agreement with the sponsor. Since businesses operating telephone and electrical utilities and meet and greet tour companies have no permanent office or place of operation on the airport, these are not covered. The coverage of taxi and tour bus operations depends on this same factor. If the firm has a permanent office or place of operation on the airport, it is covered. If the license simply permits pickup and discharge, without an office or place of operation on the airport, then the licensee would not be considered a concessionaire.

3. How should a "Small and Disadvantaged Business Enterprise" Be Defined? (Section 23.89)

Comments—The Department provided 3 alternatives for comment in the NPRM, for defining a "small" disadvantaged business enterprise. Briefly stated, the alternatives are:

a. Retain the current size standards, adjusted periodically for inflation, but require DBE's who have exceeded the size standards and who currently have leases to act as "mentors" to smaller DBE's when their leases are renewed or extended;

b. Adopt new size standards, periodically adjusted for inflation, as shown in appendix B to the NPRM;

c. Retain the present system, using the size standards listed in what should have been designated appendix C to the NPRM (erroneously designated appendix A in the second column on page 11973 of the NPRM), adjusted periodically for inflation.

Thirty commenters, including the AOCI and the AAEE, select Alternative No. 1, the mentor approach, while 2 specifically oppose it. Five favor Alternative No. 2, and 3 oppose it. Only 2 choose Alternative No. 3, with 4 specifically opposing it.

Opponents of the mentor approach raise 3 objections:

(1) The mentor approach would place DBE's in the position of having to negotiate with their minority and female competitors for participation opportunities;

(2) The graduated DBE would be in a controlling position, with respect to the joint venture, partnership, etc.; and

(3) The approach would severely limit the number of new firms that could participate in the program, since there is no time limit after which the graduated DBE would be required to depart.

The Department of Aviation of the City of Chicago favors Alternative No. 2 because it would increase the size standard (Chicago considers the present standards too restrictive); it would be relatively easy to administer; and it has the advantage of familiarity, mirroring as it does the standards for Federally-assisted contracting under section 505(d)(2)(A) of the AIA, as amended. Chicago comments that the mentor approach would require burdensome monitoring and additional personnel.

Some commenters found none of the alternatives satisfactory. The representative for DFS comments that none of the alternatives appear designed to allow the DBE concessionaire to grow and prosper. This commenter felt that the 3 alternatives were useful only for initial determinations regarding the DBE

status of a firm and recommends a fourth alternative. Where a recipient cannot locate DBE firms that are both qualified and within the size standards, it should be allowed to make a finding that it (a) cannot meet the goal as a result of this problem, or (b) that it should be allowed to select a DBE that is above the usual size standard. This commentator's rationale is as follows:

For example, suppose that concession operations at Airport X may generate a total of \$500 million in annual gross receipts, \$100 million of which are attributable to a large retail goods concession. If one DBE participates as a joint venture partner in that one concession at the twenty percent level, the DBE ordinarily would lose its eligibility in 3 years, but would have neither sufficient experience nor sufficient capital reserves to survive independently. * * * Such a result is fundamentally at odds with the objective of the DBE program.

* * * * *

In the hypothetical example above, it might appear that the non-DBE joint venturer or the prime concessionaire could divide the twenty percent participation among several DBE joint venture partners or sublessees in order to overcome the size limitation. In our view, however, that strategem creates additional and serious difficulties. * * * If adopted, the suggested subdivision might well lead to multiple DBE partners with limited or no active involvement simply because one cannot manage a business with so many 'chiefs.'

* * * * *

In addition, sponsors are under some pressure to establish substantial DBE goals but do not always receive a sufficient number of bids from qualified DBE's or DBE joint ventures to meet those goals. Those same sponsors certify the eligibility of prospective DBE's, and they have a great deal of discretion in reviewing competency, capitalization, and other qualifications. The tension between the goal setting and certification processes creates an incentive for sponsors to take an uncritical view toward competency requirements for DBE's. * * * Moreover, the pressure to relax competency requirements could create situations in which less scrupulous concession operators might be tempted to install wholly unqualified 'fronts' as 'DBE' partners, which is antithetical to the statutory purpose of the DBE program.

One DBE, Benjamin Books, provides comments similar to those of the DFS representative. The president of that company states:

My personal experience and the experience of other DBE firms of my size or larger indicate that \$14 million is not a realistic size standard if the goal is to allow companies to grow to a competitive size in the airport concession industry. Based on my continuing efforts to compete, I feel that a minimum sales volume level of \$50 million is necessary considering that revenues of four of the five major companies who dominate this industry are more than 20 times this number.

The president of this DBE firm recommends that the Secretary conduct a study to determine what it takes to compete for airport concession contracts, including:

1. A review of the qualifications in terms of size and experience required by most airport authorities before a company is even allowed to compete for prime concession contracts.
2. A review of the capital requirements for the development of concession space.
3. A review of required bonds.
4. An analysis of the costs to develop a competitive proposal.
5. An overall analysis of market penetration by current DBE firms.

Mack and Bernstein, Attorneys at Law, as the representative of various small food industry companies, including franchisees, which operate businesses at airports around the country, also disapproves of the graduation approach. This commenter states that in addition to the impact upon the DBE (inability to compete with the very large non-DBE's), the graduation principle also is detrimental to airport efforts at raising revenue. This commenter feels that the artificial monetary ceiling discourages DBE's from sales building, thus depriving airports of substantial revenue.

Mack and Bernstein suggests that if the graduation principle does remain in the final rule, the \$14,000,000 should be adjusted upward to \$30,000,000 over the preceding three fiscal years; gross receipts should be counted only at each airport and not in the DBE's entire business operation; and even if graduated, the DBE should maintain its status for the remainder of the lease and any option to renew. MACI, a DBE transportation consultant, also recommends an adjustment to \$30,000,000, stating that the American Management Association defines a "small" business as "one with an annual income of \$30 million or less and/or 300 employees." This commenter finds the mentor approach most satisfactory, but believes that the mentor should retain its DBE status as long as it maintains or obtains DBE participation.

Cantu Services, Inc., a DBE full-service food company, also selects the mentor approach and comments in detail on the size limitations. Cantu believes the size limit should be raised to 4 or 5 times the \$14,000,000 proposed, since earnings of that size are necessary to compete with the mega-corporations that now dominate the concession field. Airport Concession Consultants recommends a size limit of \$50 to \$75 million.

Cantu suggests that if the \$14,000,000 is retained, the earnings of off-airport

activities of the concessionaire should not be included. Cantu also states that in the food industry, the gross receipts are misleading, stating that it is a labor-intensive industry, and the profit margin is low. Finally, Cantu alleges that many airports give local preference when dealing with small firms, although this seldom is acknowledged. That is not the case with large firms. According to Cantu, the result is that growing DBE firms no longer benefit from local preference, but cannot continue growing to compete on a national scale.

AMAC, the organization representing DBE's, finds Alternative No. 1 most acceptable (mentor approach), but comments that all three alternatives consider a size standard (gross receipts) which is unrealistic in the airport environment. AMAC provided the results of a study that calls for a further study to determine the economically appropriate benchmark size standards for airport concessions.

The Metropolitan Airports Commission of Minneapolis-St. Paul favors combining Alternatives No. 1 and No. 2, providing for the mentor approach and generally increasing the size limit. It also suggests that new DBE's, who are above the size limit but who agree to become mentors, should be allowed in the program.

DOT/FAA Response—Because the issue of a size standard for "small and disadvantaged" businesses was one that drew extensive comment, with a wide range of opinion, the Department has reproduced the different viewpoints in detail herein. On the basis of "votes," it is clear that the mentor approach is viewed most favorably, and the Department's initial reaction was to select this option.

Mentoring, however, would involve joint venturing to a high degree. While joint ventures are appropriate in some circumstances, in others they lead to problems. The ownership and control of the parties may become difficult to distinguish. Even with the best intentions, the larger contributor to the venture may "swallow" the lesser contributor. In some enterprises, the role of the lesser contributor may deteriorate to that of a limited partner. Oversight also is difficult.

In analyzing the comments, the Department concluded that one of the chief appeals of the mentor approach was the stability it offered. Prime concessionaires would have an opportunity to grow, airport sponsors would be faced less often with the need to search for new DBE's to replace those graduating, and small DBE's still would be offered opportunities within the enterprise of the prime concessionaire.

The Department has concluded that stability of these terms does not outweigh the problems. In addition to the problems already stated, the mentor approach could result in the permanent presence of a small number of large DBE's and limited opportunity for the developing DBE's to grow and compete for prime concession contracts. The Department believes that stability can be achieved, instead, by raising the limitation on gross receipts, thereby giving DBE's an opportunity to establish themselves. Accordingly, the Department has reset the limitation to a \$30,000,000 average for the 3 preceding years for all businesses except car rental agencies, pay telephones, and banks. In the case of car rental agencies, the limitation is a \$40,000,000 average for the 3 preceding years, while the limitation for pay telephones is based on the number of employees (1,500). The standard for banks is total assets of not more than \$100,000,000. In determining the gross receipts, those of all affiliates, whether non-profit or for-profit and whether located on the airport or off, are included.

While these limitations are high enough to enable an enterprise to expand to several airports, they are sufficiently low to require graduation after a reasonable time and to prevent total absorption of the market by any one firm.

4. What Should Be the Basis for Setting the DBE Concession Goals? (Section 23.95)

Comments—Commenters are divided fairly evenly on the question of how DBE goals should be set in the concession program. Twelve recommend setting goals on the basis of the total gross receipts earned by the concessions on the airport. Two specifically oppose this method. Eleven would like to see goals set on the basis of the number of concessions on the airport, with one specifically opposing this approach. For convenience, these methods will be referred to as "gross receipts" and "numbers" in the discussion that follows.

Proponents of each method included airports and DBE concessionaires. MWAA, for example, strongly supports using numbers, due to its car rental, parking, and certain other high revenue concessions essential to the airport and the untenable result of having to award all other concession contracts to DBE's in order to achieve 10 percent of the gross receipts.

The Department of Transportation of Pennsylvania (Penn DOT), on the other hand, strongly favors gross receipts, pointing out that DBE's may be relegated

to operating very small concessions such as the shoe shine parlors or vending carts. The comments of the DBE's on the two alternatives were similar to those of the airports. Mark and Bernstein, on behalf of its small food concessionaires, comments similarly, stating that the use of numbers could result in only trifling monetary amounts for DBE's.

The Department of Aviation, City of Houston, points out two difficulties in using gross receipts: (1) High revenue concessions such as hotels also have long terms. To the extent that the original agreements did not include at least 10 percent participation, the need to make up the shortfall will skew the appropriate goals in other areas, and (2) the gross receipts method does not make provision for receipts paid to the airport by firms whose gross receipts are unknown to the airport. In some instances, the revenue earned has little relationship to the gross receipts of the firm, as in the case of revenues earned entirely from land leases.

The Department of Aviation, Chicago, Illinois, favors use of either method at the option of the sponsor, without the need for justification.

Some commenters favor a hybrid, combining both of the proposed methods, or point out that Congress suggested that "a percentage of new concessions (should be) awarded to DBE's * * * DFS, a duty free concessionaire, states:

By itself, the gross receipts method focuses entirely on overall DBE goals and does not provide incentives to extend the range of opportunities for participation in different concession categories. The number-of-concessions method is too easily manipulated to provide a useful measure of real opportunities for DBE participation. In addition, measurement by "a percentage of the total number of concession agreements operating at the airport during the goal period," 55 FR at 11967, is not what the House Conference Committee had in mind. While the law certainly grants the Secretary discretion to determine how the 10 percent goals should be measured, the Conference suggested "a percentage of new concessions awarded to DBE's * * * H. Conf. Rep., quoted in NPRM, 55 FR at 11967.

DFS, as well as other commenters, point out that one problem with the gross receipts approach is that it causes airports simply to raise the goals for participation in the large concessions (as gross receipts increase) and does not encourage participation in all types of concessions. As part of its comment, DFS submits a detailed plan for a third alternative. This would include the following:

1. If no bidders for a particular concession are DBE's, the other bidders would have to propose reasonable DBE participation through franchises, subleases, joint ventures, or other means; or, explain why the intrinsic nature of the concession makes DBE participation not feasible. This could be submitted by the sponsor in lieu of Paragraph viii of the sponsor's DBE concession plan (Proposed § 23.92(b)(1)(viii)).

2. If low DBE goals require a submission from the sponsor to the FAA under proposed § 23.94, the sponsor could require holders of large concessions involving little or no DBE participation to assume the burden to explain why efforts to recruit DBE partners have been unsuccessful.

3. If a sponsor determines that DBE participation in a given concession is not practicable, the sponsor might be given limited discretion to exempt that concession (but not necessarily the entire concession category), with concurrence by the FAA, from participation in the program. The exempt concession's revenue then would be excluded from the total gross receipts base from which the overall DBE goal is calculated.

4. Proposed § 23.94 should be revised, as follows: (1) If no overall goal reaches 10 percent or if the annual goal is based on DBE participation in a disproportionately small number of concession categories (even if the goal is more than 10 percent), the plan would not be automatically in compliance and additional information under proposed § 23.94 would be required; and (2) at the sponsor's option, the information provided to the FAA under proposed § 23.94(a) would include a report from the large, non-participating concessions, addressing its efforts and inability to arrange DBE participation; and (3) any potential alteration in contracting procedures, including the opening of a concession previously awarded through negotiation to competitive bidding, should be required to focus first on bidding for large concessions in categories with few or no DBE partnerships, subleases, etc.

The AOCI and the AAEE prefer using the "hybrid" in the NPRM, *i.e.*, using gross receipts except when high-revenue concessions skew the result and call for basing the percentage upon the numbers of concessions. The AOCI and the AAEE, however, believe that the intent of Congress was that the Department count a percentage of new concessions and not existing ones. The AOCI and the AAEE state that airports would have to award all new contracts to DBE's in order to bring the percentage of

total contracts up to at least 10 percent, unless the FAA focuses on new contracts only, and that again would result in a disproportionate number of contracts to DBE's in any contractual cycle.

The Port of Portland comments that to correspond to the statutory requirement, the goal should take into account current DBE participation in concessions that will not be renewed during the goal period, as well as the anticipated DBE participation in concession opportunities to be created or renewed during the goal period.

Portland states that the statute provides no authority for setting goals on the basis of gross receipts. It comments further, however, that if the Department of Transportation can be said to have this authority, there still is no authority to require the provision of a "rationale" by the recipient, should it be decided to set the goals on the number of concessions. Two other commenters concur with Portland's view on the provision of a rationale.

San Francisco International Airport favors basing the goals on a percentage of the square footage available for concessions.

DOT/FAA Response—Commenters are divided fairly evenly on the question of whether to use a percentage of the gross receipts of the covered enterprises or a percentage of the number of concessions on the airport, with both airports and DBE concessionaires on each side. As the foregoing comments indicate, there are divisions within each group, regarding the gross receipts or the concessions that should be used as the basis for the calculation. While many of the suggested approaches were innovative, they also were relatively complex.

The Department believes that the process set forth in the NPRM, with the percentage based upon gross receipts, except where an airport can justify to the FAA that it should be based upon the number of concessions, has the most virtues. It has the advantage of familiarity, is simple, and is sufficiently flexible to accommodate the problems an airport might have with a strict gross receipts approach. In essence, it is a compromise between the positions of the advocates of the gross receipts and the numbers approaches.

Congress provided examples of how goals could be calculated rather than fixed alternatives and gave to the Secretary the discretion to select a workable and fair methodology. The "Joint Explanatory Statement of the Committee of Conference" on the 1987 amendments to the AAIA explained that under Section 511(a)(17), the Secretary

would have the discretion to determine the basis on which the 10 percent DBE requirement would be measured.

The Department wishes to make clear that goal setting does not require the abrogation of existing concession leases. This was not the case under the MBE/WBE program, and it is not the case now. Both long term and short term goals are set in accordance with available opportunities; that is, in accordance with opportunities that can be created, which arise, or which should be considered when there is a material amendment to the lease.

Further, in appropriate circumstances, the sponsor may request approval for a concession plan in which none of the overall annual DBE goals is 10 percent or more. Section 23.101(a)(4) allows the sponsor to explain why the nature of a particular concession makes DBE participation not economically feasible. Such explanation may serve as one basis for submitting a plan in which none of the goals is 10 percent or more.

It should be noted, however, that the non-abrogation of leases applies only to those that are in compliance with the regulation. If a sponsor awards an exclusive, long-term lease to a concessionaire, without requiring adequate DBE participation for the term of the lease and without FAA approval, that lease becomes subject to amendment to include DBE participation, despite the fact that it "exists" at the time noncompliance is discovered. Refusal to cure the problem could result in action to abrogate.

The Department also wishes to make clear that the methodology does not deprive the sponsor of credit for existing DBE's on the airport, when the sponsor determines what its goal should be. If the long-term goal of a sponsor is to achieve a 25 percent DBE representation on the airport, and it already has 10 percent, then the sponsor already has achieved that portion of its goal. In achieving the 10 percent, the sponsor has met the floor set in section 511(a)(17) of the AAIA, as amended. The sponsor, however, is not prevented from setting higher goals.

While the Department received no comments on the NPRM regarding goals higher than 10 percent, some sponsors recently have asked whether the Supreme Court's decision in *City of Richmond v. J.A. Croson Company* requires sponsors to make local or State findings of discrimination before setting goals above 10 percent. The Department believes that the language of section 511(a)(17), which calls for goals of "at least 10 percent of all businesses at the airport * * *," responds to that

question. The term "at least" is clear on its face, denoting a floor rather than a cap for the goal-setting.

The Department's position is in accord with that it took earlier in regard to section 505(d)(1) of the AAIA, as amended. This section, dealing with DBE contracting rather than leasing, calls for goals of "not less than 10 percent * * *." Like the term "at least," the words "not less than" indicate that the 10 percent requirement is intended as a minimum, not a maximum.

5. What Should the Certification Requirements Be? (Section 23.95)

Comments—Most of the comments on certification touch upon three questions:

(1) Whether certifications should be performed by the airport owner/operator;

(2) Whether airport owners/operators should perform on-site visits as part of the certification procedure; and

(3) Whether franchises should be included in the program.

In addition, these questions were raised:

(1) Should the certification period be lengthened to 2 years, instead of the present 1-year period?

(2) Should certification requirements for small airports be different than for large?

Seven commenters support retention of the certification process by airport owners/operators, while 8 oppose it. Two commenters support on-site visits, while 4 oppose them. Nineteen commenters favor inclusion of franchises as business opportunities for DBE's, and only 1 commenter opposes inclusion.

A number of small airports such as Palm Springs Regional Airport, Central Wisconsin Airport, and Yakima Air Terminal point out that small airports find the paperwork related to certification extremely burdensome and sometimes physically impossible, given their resources. Comments also were received from large recipients, such as MWAA, which favor reducing the burden. MWAA recommends increasing the certification period from 1 to 2 years, with a provision for interim certifications if deemed necessary by airport staff.

Dallas/Ft. Worth, MWAA, and AMAC support the proposal to eliminate mandatory on-site visits and to allow the airport to make visits only when necessary to validate information received through other means.

Penn DOT, on the other hand, strongly objects to the elimination of mandatory on-site visits, as well as to the elimination of the requirement for a listing of equipment. Penn DOT has

found both requirements useful in determining the eligibility of DBE's. The State of Oregon also supports mandatory on-site visits, which at present are part of a centralized certification process established by the State.

Supporters of franchises included DBE's such as Benjamin Books; airport operators and their representatives (MWAA, Penn DOT, the AOCI, the AAEE, Dallas/Ft. Worth International Airport, Minneapolis-St. Paul Metropolitan Airports Commission, Department of Aviation, City of Houston, Texas); Mack and Bernstein, representatives of small food concessions; individual food concessions such as Snack n' Run (SJ& Enterprises, Inc.); and AMAC, representing DBE's. A number of non-DBE's, such as DFS, support the inclusion of franchises indirectly by advocating that all retail businesses at an airport be made part of the program.

In general, these commenters feel that the franchise is a modern and legitimate form of enterprise and note that more and more airports are adopting the use of brand name concepts. These supporters of franchises believe that it would be inappropriate to eliminate what is becoming a large segment of airport opportunities.

DOT/FAA Response—Commenters were divided almost evenly on the question of certification, with small airports especially vocal regarding the burdens of certification. The paperwork requirements in regard to certification, however, relate only to primary airports. Airports with enplanements below the number needed to qualify for primary status do not have to set goals and do not have to certify DBE's. Their only requirements are to make suitable outreach efforts to include DBE's in the concession activity and to practice nondiscrimination.

The DBE's on small airports that are primary airports must be certified somewhere, however, and the recipients do have this responsibility. Small airports tend to have few concessions, so this responsibility should not be onerous. Further, many concessionaires are loathe to locate on small airports unless they are guaranteed exclusivity and a long lease to amortize their investments. In view of this, the initial certification process occurs less frequently than on large airports, and annual recertification is relatively simple due to the small numbers involved.

Under the MBE/WBE regulation, all airports were required to accept SBA certifications without question, except where the size of the DBE was an issue.

Given the gross receipts elevation, even this question should be rare. Sponsors shall continue to accept an SBA certification unless a DBE's Schedule A certification submission indicates that it has exceeded the applicable size standard of this final rule. This also serves to reduce the certification workload.

Finally, this rule reduces the certification burden considerably, by requiring that on-site visits be made only where it is necessary to verify information received through documents supplied by the DBE.

Franchises received virtually universal support, with only 1 commenter adverse, and the Department shares the position supporting franchises.

As a result, the final rule departs from the position taken recently by the SBA. On August 21, 1989, the SBA issued a final rule, 13 CFR part 124, in which it reversed its position on the eligibility of franchisees under its Minority Small Business and Capital Ownership Development Program authorized by sections 7(j)(10) and 8(a) of the Small Business Act (15 U.S.C. sections 636(j)(10) and 637(a)). In the preamble, the SBA stated:

SBA * * * has decided to retain the prohibition (against franchisees) because of concern that the franchisor-franchisee arrangement, by its nature, gives the franchisor more control over the management, daily business operations, and business development of the franchisee than is appropriate in light of the business development goals of the 8(a) program and the statutory requirement of control by disadvantaged individuals.

54 FR 34692 at 34697, August 21, 1989.

Accordingly, 13 CFR 124.109(b) reads:

Franchisees. Except for those admitted to the 8(a) program prior to the effective date of these regulations, franchisees are ineligible to participate in the section 8(a) program.

While the FAA is bound, under section 505(d)(2)(B) of the AAIA, to the SBA's definition of "socially and economically disadvantaged individuals," it is not bound by law to other sections of the Small Business Act or the SBA's implementing regulations. While the Department believes there is merit in patterning the grant program after the SBA's direct contracting program to the extent possible, it also recognizes that the airport concession world has unique characteristics which may call for different approaches.

The Department believes that franchise agreements must be read carefully to screen out arrangements that are nothing more than employment arrangements, limited partnerships, or

other forms of agreements that do not result in the required ownership and control by DBE's. FAA review of franchise agreements to date, however, have shown that the *bona fide* franchises call for considerable investment on the part of the DBE, opportunity for profit as well as the risk of failure, and in some cases, even the right to devise the DBE interest to a designated heir. The final rule includes franchises, therefore, as an acceptable form of participation in the DBE program.

6. What Should Be the Obligations of Concessionaires and Competitors in Regard to Setting and Meeting Goals? (Section 23.103)

Comments—Five commenters dealt with the question of whether an airport may impose requirements for DBE participation upon competitors for concession agreements in order to meet the goals of the airport. Two commenters favor imposing such requirements, while three provide adverse comments on various aspects of such a practice.

Hayes Leasing Co., Inc., an Avis licensee, objects to the imposition of any requirements that would call for a set-aside or force a firm to alter its form of doing business or of ownership or of conducting business solely for the purpose of achieving DBE participation.

Alaska International Airport System, while not objecting to the imposition of requirements upon concessionaires *per se*, does object to consideration of DBE participation "when the agreements are amended for any purpose." Alaska points out that when strictly read, this could mean "a contract amendment to change the premises description after construction or to change a due date or room number" or something else of a trivial nature. Concession Air provides a similar comment, recommending that reevaluations of DBE participation in a prime contract or lease should be made only when there is a "material" amendment. Concession Air suggests this should be defined as a substantial change in the rights or obligations between the sponsor and the concessionaire, such as an extension of term when none was originally provided for or a substantial increase in the scope of the concession rights. This commenter points out that otherwise, sponsors and concessionaires would be subjected to economic uncertainty and disruption of services for every routine amendment. The above comments are in accord with those made by the FBO's.

The law firm of Mack and Bernstein, writing in behalf of small food concessions, favors the proposal.

DOT/FAA Response—As previously discussed, it is not the aim of the FAA to force a firm to alter its form of doing business, unless an exclusive, long-term lease is being considered or has resulted from noncompliance with the regulation, and DBE participation cannot be achieved by any other means in that situation. Further, in really unusual situations, the difficulties of making a business alter its form of doing business might serve as the basis for justifying a goal of less than 10 percent.

In regard to the consideration of DBE participation only when there is a "material" amendment, the FAA concurs with this recommendation, as previously discussed.

7. Should Privately-Owned Terminals Have Responsibility for DBE Participation? (Section 23.105)

Comments—Ten commenters favor this proposal, which would put a current practice into regulatory form. The AOCI and the AAEE raises the point that airport owners/operators may not have authority to require the owners of private terminals with existing leases to assume responsibility for DBE participation. Of the 34 individual airports that commented, however, 2 specifically favor DBE responsibilities for the owners of private terminals, and the rest of the commenters have no comment on this issue.

DOT/FAA Response—The final rule requires that the private owners of terminals carry out the responsibilities that would have been those of the airport owner/operator in a publicly-owned terminal. It has been the FAA's experience that most local or State governments include clauses in leases or other agreements which call for the other party to the agreement to follow relevant Federal laws and regulations. Further, it also has been the FAA's experience that airport sponsors usually continue to play some role in the activities of privately-owned terminals. Often, the airport sponsor is involved in determining the types of concessions that will be needed in the privately-owned terminal and receives a share of the gross receipts or other forms of revenue. In all cases, the airport sponsor retains title to the land, and in many cases, the terminal becomes airport property upon termination of the lease of the land by the private owner. At that point, both the land and the terminal may be leased back to an airline or other private entity.

This position is supported by section 511(a)(17). It states:

(17) the airport owner or operator will take such action as may be necessary to ensure that to the maximum extent practicable, at

least 10 percent of all businesses at the airport which sell food, beverages, printed materials, or other consumer products to the public are small business concerns (as defined by the Secretary by regulation) owned and controlled by socially and economically disadvantaged individuals (as defined under section 505(d)(2)(B))." (Emphasis added).

The statute requires the airport owner or operator to set goals for *all* businesses. No exclusion is made for businesses in privately-financed or -owned terminals. As in the case of other obligations placed upon lessees, the airport owner can incorporate the DBE requirements in the leasing agreements.

Where the private owners of terminals are not already following the DBE regulation, the FAA anticipates no immovable barriers, therefore, to bringing them into compliance. Further, this would not involve undue burdens. As in the case of the airport owner/operator, the private operator would not be asked to disturb existing concession leases (except those resulting from noncompliance with the regulation, as previously discussed) but would be required to set goals for upcoming opportunities and to consider opportunities as leases are amended, renegotiated, etc.

8. What Requirements Should Be Imposed in Regard to Exclusive, Long-Term Leases? (Section 23.107)

Comments—In the NPRM, the Department proposed to impose direct requirements concerning exclusive, long-term leases upon the airport sponsor instead of requiring an exemption from the prohibition against such leases in § 23.43(d)(1) of 49 CFR part 23. In the preamble to the NPRM, the Department also discussed the structure and contents of the oversight mechanism contemplated by the FAA and asked specifically whether this mechanism should appear within the final rule or in guidance. Seven commenters favor publication in the final rule, while 2 consider it satisfactory to receive guidance documents.

In general, 14 commenters favor prohibitions against exclusive, long-term leases. Thirty-one other commenters criticize one or more aspects of proposed § 23.99.

MWAA comments that airports should not be required to submit either the draft or final leases and subleases to the FAA. MWAA believes that airports have the capacity to ensure meaningful DBE participation and that the submission of papers to the FAA results in unnecessary delay. Minneapolis-St.

Paul points out that this is especially true when a concession fails and must be replaced quickly.

One commenter, in contrast, believes that the FAA should increase its oversight of DBE participation in exclusive, long-term leases to ensure that DBE sublessees, joint venturers, partners, etc., play meaningful roles in the business. This commenter advocates requiring all DBE's to work a full 40-hour week in the business. This commenter also advocates that the participation be in the nature of a 2-year training period, after which the DBE would be required to establish an independent business or operate as a prime. This individual also favors limiting the DBE to involvement with only one prime at a time to ensure that the benefits of the program do not go solely to a select few.

The law firm of Patton, Boggs, and Blow, representing DFS, states that some of the oversight criteria, specifically the one relating to the DBE's financial return, should be revised. DFS recommends focusing solely on gross receipts, since the net profits reflect a number of subtle factors relating to the firm's bookkeeping practices and management efficiency and are virtually meaningless.

Dallas/Ft. Worth, the Port of Portland, and the AOCI comment that paragraph (b) of § 23.99 is confusing, since it references "conditions set forth in paragraph (b)(1) through (b)(3) of this section under the definition of a 'small business concern' in § 23.89, instead of actually including the conditions of (b)(1) through (b)(3) in § 23.99."

Concession Air, a non-DBE concessionaire, believes net profits should not be required to be disclosed, since this information ordinarily is treated as confidential and proprietary.

Palm Springs Regional Airport recommends that the period for a long-term lease term be changed to more than 5 years rather than 5 years or more, since it is cumbersome to keep leases within the "short" term by writing leases for "four years, three hundred sixty-four days."

DOT/FAS Response—A number of the 31 commenters who provided adverse comments on various aspects of the prohibition against exclusive, long-term leases appear to be under the impression that all long-term leases of five years or more are prohibited. This, of course, was not the case under the MBE/WBE regulation, and it is not the case in this final DBE concession rule. Only long-term, exclusive leases are affected, and even these are not prohibited as long as arrangements are made for adequate DBE participation throughout the lease.

In regard to requiring information on net profits, the FAA concurs that information on the gross receipts of the prime concessionaire may be more useful than information on net profits. In fact, it has not been the practice of the FAA to inquire about the net profits of the prime concessionaire in the past. The FAA has inquired, however, as to the potential net profits for a DBE sublessee to safeguard the interests of the DBE. Gross receipts in certain businesses, such as labor intensive ones, may provide a misleading picture of the potential for the success of the DBE. While the FAA does not anticipate that it will be necessary to inquire about the net profits of the prime concessionaire, it may look to the prime for an educated estimate on the net profits the DBE may expect, in light of business conditions and sound practices.

The Department concurs that a "long-term" lease should be defined as one that is "more than 5 years in length," rather than as one that is 5 years or more.

The Department also concurs that the oversight mechanism should be part of the regulation, rather than issued as a guidance document, and has included the mechanism in this final rule.

In regard to lack of clarity in the NPRM, regarding the conditions that must be met by the sponsor when awarding an exclusive, long-term lease, the Department concurs that this was a problem, and § 23.107 of this final rule clearly states the requirements.

The Department does not concur, however, that submission of the leases, subleases, and other relevant documents to the FAA for its approval is unduly burdensome. The final rule represents a significant reduction in review levels and an increase in specificity on the requirements, which together should help expedite the process. Exclusive, long-term leases and the participation of DBE's continue to present fairly complex and novel situations, however, and the FAA believes that review of the leases and other relevant documents is necessary.

In order to describe more clearly the obligations of airport sponsors, § 23.95, "Elements of DBE Concession Plan," now contains several paragraphs that stood alone in the NPRM. These include paragraph (e), "Certification procedures;" paragraph (f), "Certification standards;" and paragraph (g), "Good faith efforts." In addition, the sections throughout this final rule have been renumbered to correct errors that were made in the NPRM.

Economic Assessment

This final rule makes only minor substantive changes to the requirements currently applicable under part 23 to the concession programs of recipients of FAA financial assistance. In developing this final rule, as previously stated herein, the Department has taken into account numerous questions and issues raised about the concession program since 1980, when the MBE/WBE concession program was established through issuance of part 23. In addition, this final rule formalizes many of the practices and procedures established during that time through a Departmental Notice of Policy and various guidance memoranda.

The final rule is not expected to change in any significant degree the concession programs already operated by recipients of FAA financial assistance, but would result in greater consistency of implementation by the recipients. For this reason, it has been determined that the expected economic impact of the proposed amendment is so minimal that a full Regulatory Evaluation is not warranted.

Trade Impact

The activities associated with this concession program will occur in the United States and will not involve an increase or decrease in the purchase of foreign goods or services. The amendment will have no impact, therefore, on trade opportunities for United States firms doing business overseas or on foreign firms doing business in the United States.

Regulatory Flexibility Determination

Under this regulation, nonprimary airports (commercial service airports that are not primary airports, general aviation, or reliever airports) must take appropriate outreach steps to encourage available DBE's to participate as concessionaires whenever there is a concession opportunity. They no longer are required to set goals for concession (leasing) activity. This will relieve approximately 600 to 700 sponsors of this burden. The impact upon small recipient airports will be negligible, however, since such recipients have a limited number of concessions, many of which have been given long-term leases to attract them to the airports. Goal-setting was minimal due to the minimal number of opportunities.

The impact upon non-DBE small businesses similarly will be negligible. Under the AAIA, the required goals are reasonable, and the recipient airports are afforded considerable flexibility in regard to how and when the goals are

attained. The majority of the opportunities still will be available to non-DBE's. While there will be a positive economic impact upon small and disadvantaged businesses, the modest nature of the goals does not result in a significant economic impact.

Since there will be only negligible cost associated with this rule for a small recipient of FAA financial assistance, and only insignificant impacts upon other small entities affected, the Department has determined that this final rule will not have a significant economic impact, positive or negative, on a substantial number of small entities.

Federalism Implications

This final rule will not have substantial, direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, above and beyond the effects which result from the MBE/WBE concession program, parts of which already are being phased out and which will be replaced by the DBE concession program. Thus, in accordance with Executive Order 12612, it is determined that this regulation does not have federalism implications warranting the preparation of a Federalism Assessment.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), the new record keeping and reporting provisions in this proposal have been submitted for approval to the Office of Management and Budget (OMB). Comments on these requirements should be submitted to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building, room 3001, Washington, DC 20503; Attention: FAA Desk Officer (Telephone: (202) 395-7313). A copy should be submitted to the FAA Docket.

Conclusion

For the reasons discussed in the preamble and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Analysis, the Department has determined that this final rule is not major under Executive Order 12291 and certifies that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This rule is considered significant under Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February

26, 1979). This rule will make only minor substantive changes to the requirements currently applicable under part 23 to the concession programs of recipients of FAA financial assistance. For this reason, the Department has determined that the expected impact of this final rule is so minimal that it does not warrant a full regulatory evaluation.

List of Subjects in 49 CFR Part 23

Administrative practice and procedure, Disadvantaged business enterprise, Government contracts, Mass transportation, Minority business, and Reporting and recordkeeping requirements.

Issued this 21st day of April, 1992, at Washington, DC.

Andrew H. Card, Jr.,
Secretary of Transportation.

Final rule

Accordingly, the DOT amends 49 CFR part 23, as follows:

1. The authority citation for part 23 is revised to read as follows:

Authority: Sec. 905 of the Regulatory Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803); sec. 520 of the Airport and Airway Improvement Act of 1982, as amended (49 U.S.C. APP. 2219); sec. 19 of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1615); sec. 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (49 U.S.C. App. 1601 note); sec. 505(d) and sec. 511(a)(17) of the Airport and Airway Improvement Act, as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100-223); Title 23 of the U.S. Code (relating to highways and traffic safety, particularly sec. 324 thereof); Title VI of the Civil Rights Act (42 U.S.C. 2000d *et seq.*); Executive Order 12285; Executive Order 12138.

2. Subpart F is added to read as follows:

Subpart F—Implementation of Section 511(a)(17) of the Airport and Airway Improvement Act of 1982, as Amended

- Sec.
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Appendix A—Size Standards for Airport Concessionaires

Subpart F—Implementation of Section 511(a)(17) of the Airport and Airway Improvement Act of 1982, as Amended

§ 23.89 Definitions.

Affiliation has the same meaning the term has in regulations of the Small Business Administration, 13 CFR part 121. Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly

(a) One concern controls or has the power to control the other, or

(b) A third party or parties controls or has the power to control both, or

(c) An "identity of interest" between or among parties exists such that affiliation may be found.

In determining whether affiliation exists, consideration shall be given to all appropriate factors, including common ownership, common management, and contractual relationships.

Concession means a for-profit business enterprise, located on an airport subject to this subpart, that is engaged in the sale of consumer goods or services to the public under an agreement with the sponsor, another concessionaire, or the owner of a terminal, if other than the sponsor. Businesses which conduct an aeronautical activity are not considered concessionaires for purposes of this subpart. Aeronautical activities include scheduled and nonscheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight-carrying capacities; fixed base operators, flight schools; and sky-diving, parachute-jumping, flying guide services, and helicopter or other air tours.

(a) Appendix A to this subpart contains a listing of the types of businesses that are frequently operated as concessions.

(b) Examples of entities that do not meet the definition of a concession include suppliers, flight kitchens and in-flight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, individual taxis with permits, telephone and electric utilities, skycap services under contract with an air carrier, and management contracts.

(c) Concessions may be operated under the following types of agreements:

- (1) Leases.
- (2) Subleases.
- (3) Permits.
- (4) Contracts.

(5) Other instruments or arrangements.

Concessionaire means one who operates a concession.

Disadvantaged business shall have the same meaning as set forth in § 23.61 of subpart D of this part, except it shall be a small business concern, as defined in this subpart, not as defined in § 23.61.

Material amendment means a substantial 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.

Primary airport means a commercial service airport which is determined by the Secretary to have more than 10,000 passengers enplaned annually.

Small business concern means a firm, including all its domestic and foreign affiliates, that qualifies under the applicable size standard set forth in appendix A to this subpart. In making a size determination, all affiliates, regardless of whether organized for profit, must be included. A firm qualifying under this definition that exceeds the size standard after entering a concession agreement, but that otherwise remains eligible, may continue to be counted as DBE participation until the current agreement, including the exercise of options, expires.

(a) The Secretary may periodically adjust the size standards in appendix A to this subpart for inflation.

(b) A firm that was certified as a minority/woman/or disadvantaged business enterprise (MBE/WBE/DBE) prior to the effective date of this subpart, pursuant to a requirement in § 23.43(d) or FAA guidance implementing section 511(a)(17) of the Airport and Airway Improvement Act of 1982, as amended, that has exceeded the size standard, may be counted as DBE participation until the current agreement, including the exercise of options, expires, provided that the firm remains otherwise eligible.

Socially and economically disadvantaged individuals shall have the same meaning as set forth in § 23.61 of subpart D of this part.

Sponsor means the recipient of an FAA grant.

§ 23.91 Applicability.

This subpart applies to any sponsor that has received a grant for airport development authorized by the Airport

and Airway Improvement Act of 1982, as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987.

23.93 Requirements for airport sponsors.

(a) *General requirements.* (1) Each sponsor shall abide by the nondiscrimination requirements of § 23.7 with respect to the award and performance of any concession agreement covered by this subpart.

(2) Each sponsor shall take all necessary and reasonable steps to foster participation by DBE's in its airport concession activities.

(3) The following statements shall be included in all concession agreements executed between the sponsor and any firm after the effective date of this subpart.

(i) "This agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR part 23, subpart F. The concessionaire 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 covered by 49 CFR part 23, subpart F.

(ii) "The concessionaire agrees to include the above statements in any subsequent concession agreements that it enters and cause those businesses to similarly include the statements in further agreements."

(b) *Additional requirements for primary airports.* (1) Sponsors of primary airports shall implement a disadvantaged business enterprise (DBE) concession plan containing the elements listed in § 23.95. Sponsors of more than one primary airport shall implement a separate plan for each location that has received assistance for airport development. The plan shall be submitted to the appropriate FAA Regional Office for approval.

(2) The sponsor shall review and update the plan at least annually. The updated plan shall include any information required under § 23.95 that was not available to the sponsor when the previous submission was made. Updated plans shall be submitted to the appropriate FAA Regional Office for approval.

(c) *Additional requirements for nonprimary airports.* Sponsors of commercial service airports (except primary), general aviation and reliever airports are not required to implement a DBE concession plan but shall take appropriate outreach steps to encourage available DBE's to participate as concessionaires whenever there is a concession opportunity.

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

(a) *Overall annual DBE goals.* (1) The sponsor shall establish an overall goal for the participation of DBE's in concessions for each 12-month period covered by the plan. The goals shall be based on the factors listed in § 23.45(g)(5).

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

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

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

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

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

Example. A firm operates a restaurant in the airport terminal which services the travelling public and under the same lease agreement, provides in-flight catering service to the air carriers. The projected gross receipts from the restaurant are included in the overall goal calculation, while the gross receipts to be earned by the in-flight catering service are excluded.

(5) Sponsors who will employ the procedures of paragraph (a)(2)(i) of this section shall use the net payment to the airport for banks and banking services, including automated teller machines (ATM) and foreign currency exchanges.

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

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

(b) *Goal methodology.* (1) The plan shall contain a description of the

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

- (i) Name of firm.
 - (ii) Type of business (e.g. bookstore, car rental, baggage carts).
 - (iii) Beginning and expiration dates of agreement, including options to renew.
 - (iv) For new agreements, method of solicitation proposed by sponsor (e.g. request for proposals, invitation for bids).
 - (v) Dates that material amendments will be made to the agreement (if known).
 - (vi) Estimated gross receipts for each goal period established in the plan.
 - (vii) Identification of those concessionaires that have been certified under this subpart as DBE's.
 - (viii) An indication of those concessions having potential for participation by DBE's.
- (2) The plan shall include a narrative description of the types of efforts the sponsor intends to make, in accordance with paragraph (h) of this section, to achieve the overall annual goals.

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

(4) If none of the overall goals set under paragraph (a)(2)(i) or (a)(2)(ii) of this section is 10 percent or more, the sponsor shall submit the information and follow the procedures outlined in § 23.101.

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

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

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

(e) *Explanation for not achieving a goal.* (1) If the analysis required under

paragraph (d) of this section indicates that the sponsor failed to meet the previous year's overall goal, the plan shall include a statement of the reasons demonstrating why failure to meet the goal was beyond the sponsor's control.

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

(f) *Certification procedures.* (1) The certification procedures set forth in § 23.51 are applicable to this subpart. Sponsors may count toward their overall goals only those firms that have been certified in accordance with the procedures of that section.

(2) Except as provided in § 23.51(c), each business, including the DBE partner in a joint venture, wishing to participate as a DBE under this subpart in a concession shall complete and submit Schedule A. Each entity wishing to participate as a joint venture DBE under this subpart shall in addition complete and submit Schedule B. (Schedules A and B are reproduced at the end of this part.)

(3) Sponsors shall take at least the following steps in determining whether a firm is an eligible DBE:

(i) Obtain the resumes or work histories of the principal owners of the firm and personally interview these individuals;

(ii) Analyze the ownership of stock in the firm, if it is a corporation;

(iii) Analyze the bonding and financial capacity of the firm;

(iv) Determine the work history of the firm, including any concession contracts it may have received;

(v) Obtain or compile a list of the licenses of the firm and its key personnel to perform the concession contracts it wishes to receive; and

(vi) Obtain a statement from the firm of the type of concession it prefers to operate.

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

(5) The challenge procedure set forth in § 23.69 are applicable to this subpart.

(g) *Certification standards.* (1) Sponsors shall use the same standards for ownership and control as contained in § 23.53 in determining whether a firm may be certified as a DBE.

(2) Businesses operating under the following structures may be eligible for

certification as DBE's under this subpart:

- (i) Sole proprietorships.
- (ii) Corporations.
- (iii) Partnerships.
- (iv) Other structures that provide for ownership and control by the socially and economically disadvantaged owners.

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

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

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

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

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

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

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

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

(2) Notifying DBE's and other organizations of concession opportunities and encouraging them to compete, when appropriate;

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

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

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

§ 23.97 Appeals of certification denials.

The procedures concerning the appeal of a denial of certification set forth in § 23.55 are applicable to this subpart.

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

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

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

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

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

(c) If the FAA determines that the information submitted by the sponsor fails to justify the requested goal-setting procedure, the sponsor shall resubmit the plan. The goals in the revised plan shall be calculated as a percentage of gross receipts, as outlined in paragraph (a)(2)(i) of § 23.95.

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

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

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

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

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

(4) If appropriate, an explanation why the nature of a particular concession makes DBE participation through a sublease, joint venture, partnership, or

other arrangement not economically feasible.

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

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

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

§ 23.103 Obligations of concessionaires and competitors.

(a) Sponsors may impose requirements on competitors for concession agreements as a means of achieving the DBE goals or a portion of the goals established under paragraph (a) of § 23.91 of this subpart, provided that the DBE participation specified in the solicitation or other request is an eligible arrangement, as defined in this subpart.

(b) Nothing in this subpart shall require any sponsor to modify or abrogate an existing concession agreement (one executed prior to the date the sponsor became subject to this subpart) during its term. When options to renew such agreements are exercised or when a material amendment is made to the agreement, the sponsor shall assess the potential for DBE participation and include any opportunities in the goals established under paragraph (a) of § 23.95.

§ 23.105 Privately-owned terminal buildings.

(a) Awards of concession agreements that are made by private owners of terminal buildings are covered by this subpart. Airport sponsors subject to this subpart shall levy the applicable requirements on the terminal owner through the agreement with the owner or by other means, except that certification shall, in the case of primary airports, be performed by the airport sponsor. The sponsor shall ensure that the terminal owner complies with these requirements.

(b) If the terminal building is at a primary airport, the sponsor shall obtain from the terminal owner the overall goals and other elements of the DBE concession plan required under § 23.95. This information shall be incorporated into the concession plan and goals established by the sponsor and

submitted to the FAA in accordance with this subpart.

(c) If the terminal building is at a commercial service airport (except primary), general aviation, or reliever airport, the sponsor shall ensure that the owner complies with the requirements in paragraph (c) of § 23.93.

§ 23.107 Prohibition on long-term, exclusive concession agreements.

(a) Except as provided in paragraph (b) of this section, sponsors shall not enter into long-term, exclusive agreements for the operation of concessions. For purposes of this section, a long-term agreement is one having a term in excess of five years. Guidelines for determining whether an agreement is exclusive, as used in this section, have been included in the FAA's "DBE Program Development Kit for Airport Grant-in-Aid Recipients." This publication can be obtained from any FAA Regional Civil Rights Officer or from the FAA Office of Civil Rights, 800 Independence Avenue, SW., Washington, DC 20591, Attention, ACR-4.

(b) A long-term, exclusive agreement is permitted under this subpart, provided that:

(1) Special local circumstances exist that make it important to enter such agreement, and

(2) The responsible FAA regional civil rights officer approves of a plan for ensuring adequate DBE participation throughout the term of the agreement.

(c) Approval of the plan referenced in paragraph (b)(2) of this section relieves the sponsor of the need to obtain an exemption under the procedures of § 23.41(f) and the Notice of Policy (45 FR 45281, July 3, 1980). The Notice of Policy can be obtained from the FAA Office of Civil Rights at the address given in paragraph (a) of this section.

(d) Sponsors shall submit the following information with the plan referenced in paragraph (b)(2) of this section:

(1) A description of the special local circumstances that warrant a long-term, exclusive agreement, e.g., a requirement to make certain capital improvements to a leasehold facility.

(2) A copy of the draft and final leasing and subleasing or other agreements. The long-term, exclusive agreement shall provide that:

(i) One or more DBE's will participate throughout the term of the agreement and account for at least 10 percent of the annual estimated gross receipts.

(ii) The extent of DBE participation will be reviewed prior to the exercise of each renewal option to consider

whether an increase is warranted. (In some instances, a decrease may be warranted.)

(iii) A DBE that is unable to perform successfully will be replaced by another DBE, if the remaining term of the agreement makes this feasible.

(3) Assurances that the DBE participation will be in an acceptable form, such as a sublease, joint venture, or partnership.

(4) Documents used by the sponsor in certifying the DBE's.

(5) A description of the type of business or businesses to be operated, 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 DBE's chance to succeed.

(6) Information on the investment required on the part of the DBE and any unusual management or financial arrangements between the prime concessionaire and DBE.

(7) Information on the estimated gross receipts and net profit to be earned by the DBE.

§ 23.109 Compliance procedures.

In the event of noncompliance with this subpart by a sponsor, the FAA Administrator may take any action provided for in section 519 of the Airport and Airway Improvement Act of 1982, as amended.

§ 23.111 Effect on § 23.43(d).

Except for commitments made prior to issuance of this subpart as a condition of receiving an exemption from § 23.43(d)(1), which prohibits certain long-term, exclusive agreements, the provisions of § 23.43(d) shall not apply to any airport, its lessees, concessionaires, or other organizations, if the airport sponsor is covered by the requirements in this subpart. Leasing goals established in accordance with § 23.43(d)(2) and approved by the FAA prior to the effective date of this subpart shall terminate as set forth below:

(a) For primary airports, upon FAA approval of a DBE concession plan required under § 23.93(b).

(b) For nonprimary airports, at the conclusion of the period to which the leasing goal applies.

Appendix A to Subpart F—Size Standards for Airport Concessionaires

MAXIMUM AVERAGE ANNUAL GROSS RECEIPTS IN PRECEDING 3 YEARS

[In millions of dollars]

Concession	Amount
Food and beverage.....	30.00
Book stores.....	30.00
Auto rental.....	40.00
Banks.....	¹ 100.00
Hotels and motels.....	30.00
Insurance machines and counters.....	30.00
Gift, novelty, and souvenir shop.....	30.00

MAXIMUM AVERAGE ANNUAL GROSS RECEIPTS IN PRECEDING 3 YEARS—Continued

[In millions of dollars]

Concession	Amount
Newstands.....	30.00
Shoe shine stands.....	30.00
Barber shops.....	30.00
Automobile parking.....	30.00
Jewelry stores.....	30.00
Liquor stores.....	30.00
Travel agencies.....	30.00
Drug stores.....	30.00
Pastries and baked goods.....	30.00
Luggage cart rental.....	30.00
Coin-operated T.V.'s.....	30.00
Game rooms.....	30.00
Luggage and leather goods stores.....	30.00
Candy, nut, and confectionery stores.....	30.00
Toy stores.....	30.00
Beauty shops.....	30.00
Vending machines.....	30.00
Coin-operated lockers.....	30.00
Florists.....	30.00
Advertising.....	30.00
Taxicab.....	30.00
Limousines.....	30.00
Duty free shops.....	30.00
Pay telephones.....	² 1,500
Gambling machines.....	30.00
Other concessions not shown above.....	30.00

¹ As measured by total assets

² As measured by number of employees.

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