

**PRINCIPLES FOR EVALUATING LONG-TERM,
EXCLUSIVE AGREEMENTS IN THE ACDBE
PROGRAM**

GUIDANCE



**FEDERAL AVIATION ADMINISTRATION
OFFICE OF CIVIL RIGHTS**

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The General Counsel of the Department of Transportation has reviewed this document and has approved it as consistent with the language and intent of 49 C.F.R. Part 23.

PURPOSE

The Federal Aviation Administration (FAA) is responsible for overseeing and monitoring airport compliance with the Airport Concession Disadvantaged Business Enterprise (ACDBE) program rules set forth at 49 C.F.R.. Part 23. The purpose of this guidance on Long-Term, Exclusive (LTE) agreements for concessions is to provide information and direction to airport sponsors,¹ ACDBE program staff, stakeholders, and all other interested parties on how to determine whether an agreement is considered a LTE agreement subject to the prohibition against such agreements in the ACDBE program rules. The guidance is designed to assist sponsors in structuring their leasing activities, consistent with the requirements of 49 C.F.R. Part 23, so that ACDBEs have an opportunity to participate in airport concessions; it is not intended to obstruct airport concession business operations.

This guidance supersedes all previous guidance on LTE agreements and addresses circumstances not previously covered.

WHY LONG-TERM, EXCLUSIVE AGREEMENT GUIDANCE?

Title 49 C.F.R. § 23.75 prohibits sponsors (e.g., airports) from entering into LTE agreements for the operation of concessions except under very limited conditions and subject to FAA review and approval. The reason for this general prohibition is to limit the situation where an entire category of business activity is not subject to competition for an extended period of time through the use of a LTE agreement. **The FAA must approve all LTE agreements before award.** Permitting agreements of this kind is inconsistent with creating a level playing field in which ACDBEs are afforded an opportunity to fairly

¹ The FAA refers to recipients of AIP grants as “sponsors”. In general, a sponsor may be a public agency, a private owner, or a State entity that is associated with a public-use airport. Sponsors must be legally, financially, and otherwise able to carry out the assurances and obligations contained in the project application and grant agreement.

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compete for federally-funded contracts. LTE agreements create barriers to opportunities and impact the ability of sponsors to make good faith efforts to meet ACDBE goals based on the relative availability of ACDBEs in the local contracting market.

The FAA is aware that there may be existing LTE agreements that have not been approved by FAA. These agreements raise serious compliance concerns and should be immediately submitted to FAA for review. Through this guidance, we seek to clarify existing requirements and address questions raised regarding existing and future LTE agreements to ensure compliance and avoid potential problems. This guidance does not create new legal mandates, but merely clarifies the U.S. Department of Transportation's (DOT's) statutory and regulatory authorities. It is solely intended to provide guidance to interested parties and the public on the application of the provisions governing LTE agreements in the ACDBE program as stated in 49 C.F.R. § 23.75.

TO WHOM DOES THIS GUIDANCE APPLY?

This guidance applies to sponsors that enter into LTE agreements, as defined in 49 C.F.R. § 23.75 and described herein. Section 23.75 places significant interest in ensuring ACDBE participation in any LTE concessions agreement and that is the focus of this guidance.² All sponsors should review this guidance to determine whether any leases and/or contracts with prime concessionaires are LTE agreements that require FAA approval.

² The *Western States Paving Company* vs. *Washington State Department of Transportation*, 407 F.3rd.983 (9th Cir. 2005), decision is not applicable to the ACDBE programs under 49 C.F.R. part 23. See DOT guidance on *Western States Paving* posted at <http://osdbu.dot.gov/DBEProgram/dbeqna.cfm>. Thus, this guidance applies to airports located in states within the Ninth Circuit that are subject to ACDBE program requirements, including airports that may be implementing a race and gender-neutral program.

SECTION 1 DEFINITIONS

In this section, the terms “concession,” “exclusive,” and “long-term agreement” are defined in reference to sponsor agreements in the airport concession environment.

1.1 “Concession”

The definition of a “concession” is found at 49 C.F.R. § 23.3. It provides, in part, as follows:

“Concession means one or more of the types of for-profit businesses listed in paragraph (1) or (2) of this definition: (1) A business, located on an airport subject to this part, that is engaged in the sale of consumer goods or services to the public under an agreement with the recipient, another concessionaire, or the owner or lessee of a terminal, if other than the recipient. (2) A business conducting one or more of the following covered activities, even if it does not maintain an office, store, or other business location on an airport subject to this part, as long as the activities take place on the airport: management contracts and subcontracts, a web-based or other electronic business in a terminal or which passengers can access at the terminal, an advertising business that provides advertising displays or messages to the public on the airport, or a business that provides goods and services to concessionaires....”

Thus, any business located on an airport that is engaged in the sale of consumer goods or services to the general public via an agreement with the sponsor, another concessionaire, or owner/lessee (if not the sponsor) is considered an airport concession.

1.2 “Exclusive”

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For purposes of this guidance and in accord with 49 C.F.R. § 23.75, the term “exclusive” is defined as a type of business activity that is conducted solely by a single business entity on the entire airport. In the context of this guidance, the concept of “exclusive” includes the absence of any ACDBE participation. This is consistent with previous DOT guidance on LTE agreements.³ An airport’s use of the word “exclusive” in describing the rights of a concessionaire is not controlling as to whether the enterprise has a LTE agreement under the ACDBE program rule.

The list below provides examples of categories of business activity and is not exhaustive.

Sample Categories

<i>Management Contracts, Sub Contracts</i>	
<i>Web-based or Electronic Business</i>	
<i>Advertising</i>	<i>Lodging</i>
<i>Duty Free</i>	<i>Retail</i>
<i>Car Rental</i>	<i>Food Service</i>
<i>Parking</i>	<i>Dining Service</i>
<i>Transportation</i>	

A LTE agreement that was not exclusive at the time it was executed but which became the sole agreement of its kind resulting from circumstances beyond the control of the lessee, the sponsor, State, or local authorities may not be determined by FAA to fall within the scope of the prohibition against LTE agreements and consequently may not require modification during the initial lease agreement term. For example, three food and beverage operators are in business at airport A and all have long-term leases. Two operators, with ACDBE participation, go out of business due to an airline tenant leaving

³ As noted in the Section-by-Section Analysis of the 2005 final rule, 49 C.F.R. § 23.75 “continues the long-standing requirement that long-term, exclusive leases are prohibited, except where the airport obtains FAA approval. The section includes a procedure for obtaining such approval, including a list of information FAA needs before it can grant this approval. ACDBE participation is a key part of this information.” See 70 FR 14496-01. Similarly, the predecessor to section 23.75 was described as follows: “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.” See 57 FR 18400-01.

the airport. The surviving food and beverage operator has 8 years remaining on the lease and has no ACDBE participation. The airport sponsor is not pursuing another food and beverage operator as the sponsor does not believe there is sufficient business to support two food and beverage concessionaires. The surviving operator has a LTE agreement (as defined by the rule) resulting from circumstances beyond its control but is not considered in violation of the LTE prohibition. However, the airport sponsor should always consider opportunities to add ACDBE participation when circumstances warrant such action.

1.3 “Long-Term Agreement”

For purposes of this guidance and in reference to § 23.75, a “long-term agreement” is defined as any agreement between a sponsor and a single concessionaire or multiple consecutive concessionaires that has a term of more than five years in duration. “More than five years” includes any combination of base term and options (e.g., options to extend the term of the lease agreement, or to expand the scope of the agreement to a new section or terminal, or to enter into a new contract etc.) if the effect is a lease period of more than five years.

SECTION 2 LIMITATIONS AND APPROVAL

In this section, the exception to the prohibition on entering into LTE agreements and the required FAA approval process are discussed. The FAA must approve all LTE agreements before award. This section provides the information sponsors are required to provide when requesting approval of a LTE agreement. (A checklist, *Appendix A*), is provided at the end of this guidance).⁴ Though the regulations prohibit LTE agreements (except with FAA approval), there may be special local circumstances warranting a LTE agreement.

⁴ A checklist is available to assist sponsors in providing the necessary information (business type, lease documents, investment information, gross receipts/ net profit, joint venture structure, etc.) required by FAA when a request for approval of a LTE agreement is made.

2.1 Limitations on Entering into Long-Term, Exclusive Agreements

Reference 49 C.F.R. § 23.75

Section 23.75 prohibits sponsors from entering into LTE agreements for concessions or activities for the provision of goods and services on the airport or to the public on the facility except under very limited conditions.

2.2 Approving Long-Term, Exclusive Lease Agreement Requests

Reference 49 C.F.R. § 23.75(c)

As outlined in § 23.75, in order to obtain FAA approval of a LTE concession agreement, a sponsor must submit a written request together with the required information and documents to the FAA Regional Office of Civil Rights. Incomplete applications will be returned unprocessed. The responsible FAA Regional Office of Civil Rights will promptly respond to the request.

Required Information -

- 1) A description of the special local circumstances that warrant a LTE agreement.
- 2) A copy of the draft lease, subleases, and other pertinent or related documents.⁵ The LTE agreement shall provide that:
 - a) ACDBEs are included to the extent (must be identifiable at time of request) that they reasonably reflect their availability in your market area, in the absence of discrimination, to do the types of work required, will participate as

⁵ FAA staff will make an initial determination based on the information received. A copy of the final lease and sublease should be provided at least 45 days prior to signing. It should be noted that the FAA reserves the right to review final documents i.e., final lease, subleases, and other pertinent and related documents to ensure that all required information is included. The Checklist at the end of this guidance may be used to ensure that all required information is submitted.

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concessionaires throughout the term of the agreement, and account for a percentage of the estimated annual gross receipts equivalent to a level set in accordance with § 23.47 through § 23.49 (establishing the base for a sponsor's goal).

- b) You will review the extent of ACDBE participation before the exercise of each renewal option to consider whether an increase or decrease in ACDBE participation is warranted (to reflect ACDBE availability in a sponsor's market area or is consistent with an approved overall goal).
 - c) An ACDBE concessionaire that is unable to perform successfully will be replaced by another ACDBE concessionaire, if the remaining term of the agreement makes this feasible. In the event that such action is not feasible, the sponsor will require the prime concessionaire to make good faith efforts during the remaining term of the agreement to encourage ACDBEs to compete for purchases and/or leases of goods and services to be made by the prime concessionaire.
- 3) Assurances that any ACDBE participation will be in an acceptable form, such as a sublease, joint venture, or partnership (or any legal structure that meets federal and state legal requirements which results in bona fide ownership and control by the ACDBE (see § 23.55)).⁶
 - 4) Documentation that ACDBE participants are properly certified;
 - 5) A description of the type of business or businesses to be operated – (e.g., location, storage and delivery space, “back-of-the-house facilities” such as kitchens, window

⁶ Though financially beneficial to the ACDBEs, employment arrangements, purchases of financial stocks, and other similar forms of involvement by ACDBEs are not considered adequate participation for counting purposes, due to the absence of control, capital contribution, and management by the ACDBE regarding the operations of the business.

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display space, advertising space, and other amenities that will increase the ACDBE's chance to succeed).

- 6) Information on the estimated investment required on the part of the ACDBE and any unusual management or financial arrangements between the prime concessionaire and the ACDBE.
- 7) Information on the estimated gross receipts and net profit to be earned by the ACDBE.
- 8) In the case of a joint venture arrangement, identify the structure of the joint venture and the role of the ACDBE. Any joint venture agreement should be consistent with the *ACDBE Joint Venture Guidance*, issued on July 17, 2008 (http://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/media/JVGuideFinal508.pdf). All ACDBEs, whether engaged in a joint venture or other arrangement, shall remain an independent business as required by 49 C.F.R. §§ 26.71, 23.31. Other measures of an ACDBE's participation include capital contribution, control, management, risk assumed, and profits received.

SECTION 3 EVALUATING LONG-TERM, EXCLUSIVE AGREEMENTS

In this section, the guidance addresses various principles for evaluating whether agreements are LTE through examples of different scenarios. Business categories and locations, competitors' goods and services, short-term agreements and options, special local circumstances, obligations of private operators/owners, and good faith efforts in reference to the requirements of the ACDBE Program are covered. After reviewing the examples, sponsors and all interested parties should have a better understanding of what constitutes a LTE agreement and how to review whether the submitted documentation is adequate to meet the requirements of § 23.75.

3.1 Evaluating Whether a Lease is Exclusive: Business Categories

Evaluating whether an agreement is “exclusive” requires examining the agreement in reference to the type of business covered (management contract, advertising, web-based or electronic businesses, food and beverage, parking, etc.).

A sponsor’s use or non-use of the word “exclusive” in describing the rights of a concessionaire is not controlling as to whether the enterprise has an exclusive lease under the ACDBE regulations or this guidance. The totality of the circumstances will be used to make this determination.

3.2 Evaluating Whether a Lease is Exclusive: Competitors’ Goods and Services

There is no requirement that competitors offer identical goods, services, or benefits, to avoid violating the prohibition against LTE agreements. However, if the difference between the types of goods and services offered by two businesses is so great that they are in fact two different kinds of businesses, this will affect the determination of whether an agreement is exclusive, as described below in the *Examples*.

Example 1: *A full-service restaurant, with a lease agreement for seven years, has the sole right to operate a sit-down establishment, while a second business has the sole right to sell hot dogs, pizza, and other carryout items at the airport, also for seven years). Neither has an “exclusive” agreement under the ACDBE regulations, since there are two different food providers and FAA approval would not be required. The determining factor is that both food operators provide meal items.*

Example 2: *One concessionaire, with an eight-year lease agreement, operates the only restaurant, only lounge, all vending machines, and all carryout food stands. A second concessionaire is allowed to sell candy, along with newspaper items. Although candy may be termed a “food,” it is not the type that is ordinarily part of a meal. The goods*

and services that the restaurant offers differ enough from that of the candy/newspaper vendor that the restaurant can be said to have an “exclusive” agreement subject to FAA approval. Note that the candy/newspaper vendor is not considered exclusive unless it is the sole concessionaire allowed to sell candy along with newspaper items.

Example 3: *One concessionaire has the only agreement to operate a restaurant and snack bar at the airport, but the agreement specifically excludes vending machines. A second concessionaire is the sole operator of vending machines, which offer some of the same types of food items (e.g., sandwiches, soft drinks, etc.) as the restaurant/snack bar. The contract term is ten years for both operators. The agreement for the vending machines is considered long-term, exclusive because vending machines represent a different category of concession than restaurants and snack bars. Therefore, both agreements are subject to FAA approval.*

3.3 Evaluating Whether a Lease is Long-Term: Short-Term Agreements and Options

If the sponsor awards a short-term (five years or less) exclusive agreement, but also provides an option or options to renew exercisable by the sponsor and/or the concessionaire that together exceed five years, then the agreement would generally be considered “long-term.” As a LTE agreement, it is subject to the prohibition in § 23.75 if it is exclusive. Airport sponsors should review all exclusive agreements with a base term and option years that combined exceed five years to ensure that they are not de facto LTE agreements and the FAA will examine any such agreements.

Example 1: *A candy shop is given the exclusive right to sell candy for two years, but the lease gives full authority to the lessee to exercise two, two-year options to continue operations. The airport has no control over the exercise of that option (assuming the lessee has not violated any parts of the agreement). As a result, the*

lessee actually has a LTE agreement because the consecutive two, two-year options plus the original two-year term equate to more than five years. The FAA will review this lease because it is a LTE agreement.

Example 2: *An airport gives an exclusive lease agreement of four years, 364 days, and retains for itself the option to renew the agreement for the same period of time. It exercises the option without considering the opportunities for ACDBE participation. This practice is considered to be subject to the LTE agreement provisions because the renewal of the option is consecutive in nature (equating to more than five years with no break). In addition, there is no regard for the inclusion of ACDBEs. FAA approval would be required.*

3.4 Evaluating Special Local Circumstances

Under Part 23, an application for FAA approval of a LTE agreement shall include a description of special local circumstances that support the request. Examples of special local circumstances supporting such a request include: the market size relative to the number of available vendors, reduced enplanements, an extreme act of nature, new business concepts, and severe economic factors (for instance, an airline goes out of business). However, a “special local circumstance” cannot be shown simply by the fact that it may take longer than five years to recoup the initial investment or build out. Additional justification to support the special local circumstances provision will be necessary. A concessionaire’s ability to amortize its investment given the overall specifics of the business opportunity (term, capital, rent, staffing levels, cost of goods sold, etc.) are key factors when confirming special local circumstances. The FAA realizes that hotels and concessions such as marketplace concepts and full-kitchen restaurants require more costly development and need longer amortization. These factors will be given careful consideration during the review process.

Example 1: *An airport wants to award a ten-year exclusive lease agreement to a men's clothing concessionaire based on reasonable assumptions regarding passenger traffic growth, projected net income, and return on investment. Due to an aggravated economic situation and slow business recovery in the region (because of severe hurricane damage), revenue potential for this concession has been substantially reduced. In this example, it is believed that a customary rate of return for this industry will not be achieved within a five-year term. Therefore, a LTE agreement supports a showing of a special local circumstance because of the adverse economic impact caused by the severe "act of nature."*

Example 2: *An Airport Authority desires to enter into an exclusive lease with a news/gift/specialty retail concession for six years. Based on a reasonable projection of an economic recovery, the Authority anticipates traffic conditions to be such that in five to six years, the influx would warrant a sizable modification and expansion of the terminal building of the Airport. The expiration of the concession agreement at that specific time would allow the Authority to prudently plan additional locations for retail outlets in the expanded terminal. Therefore, the Authority has determined that the best time to end the agreement for the concession is at the end of the sixth year – to coincide with the anticipated traffic increase. In addition, the six-year lease allows adequate time to depreciate the capital investment by the concessionaire, which would not be feasible with a shorter-term lease. This is a LTE agreement, but the local circumstances described (traffic conditions, capital investment) may warrant an exception after a review of all relevant facts including participation by ACDBEs.*

Example 3: *There were two ice cream shops on the Airport and one of them closed because of reduced enplanements. The airport could not sustain two ice cream shops. The sponsor and prime concessionaire negotiate a LTE agreement with the requirement for ACDBE participation or good faith efforts to achieve it, subject to FAA approval. At*

the end of the lease term, the sponsor should evaluate the prospects for more than one ice cream shop and seek the inclusion of ACDBE participation in any lease agreements going forward in accordance with Part 23 and this guidance.

3.5 Private Operators/Owners

Reference 49 C.F.R. § 23.73

Concession agreements made by private owners of terminal buildings on airports are subject to Part 23 and related DOT/FAA guidance. Private owners are prohibited from discriminating in the award or performance of subleases and contracts based on race, color, sex, or national origin. The sponsor should apply all applicable federal requirements on the owner managing the concession through the agreement between the two parties. If the private owner awards a LTE sublease, for example, for food service, the sublease is subject to FAA approval even though the private owner, and not the airport, awarded it.

When the sponsor turns over the operation of the entire airport to a private operator, that operator will stand in the place of the public airport operator and is subject to all the federal requirements applicable to the sponsor, including the setting and achievement of goals. The private operator is considered to have the same obligations as the sponsor to determine the long-term, exclusive nature of lease agreements and to ensure ACDBE participation as the market dictates. If a sponsor executes a long-term lease to a prime concessionaire to manage all the airport concessions, and the prime concessionaire **operates** some or all the concessions, this agreement is, exclusive and subject to FAA approval. Below is an example concerning private operators.

Example: *An airport awards a long-term contract to a private operator to manage its concession operations. The private operator's responsibilities include the preparation*

of requests for proposals and all other steps, including the selection of the various concessionaires/lessees (but it does not operate any concessions itself). The private operator carries out solicitations that will include ACDBE goals set by the sponsor, which are in accordance with all requirements of Part 23 and no concession category is operated exclusively by one concessionaire. In this case, the lease agreement between the airport and the private operator does not require FAA review because neither the private operator nor any other concessionaire is exclusively “operating” any concessions.

3.6 Good Faith Efforts

The prime concessionaire must make good faith efforts to ensure ACDBE participation for the term of the lease through subleasing, joint venture, partnership, or other suitable forms of agreements. As stated in Section 2.2 of this guidance, an ACDBE concessionaire that is unable to perform successfully in a LTE agreement will be replaced by another ACDBE concessionaire, if the remaining term of the agreement makes this feasible. When a new ACDBE is found, the sponsor will require information in reference to the investment required on the part of the ACDBE, as well as financial and management arrangements between the prime concessionaire and the ACDBE. In the event this is not feasible, the sponsor will require the concessionaire to make good faith efforts during the remaining term of the agreement to retain ACDBEs for the purchase and/or lease of goods and services to be made by the concessionaire.

Example 1: *An airport awards a 10-year exclusive lease to a prime concessionaire who has an ACDBE subcontractor. The request was approved by the FAA. After only two years, the ACDBE requests (from the sponsor) to be released from its contractual obligations because of a severe economic downturn that will make it difficult for the ACDBE to maintain financial viability. The request is approved. The prime concessionaire has made offers to several ACDBEs to replace the original ACDBE, but*

because of current conditions and the economic situation, they have all declined. Although these actions are likely good faith efforts, the prime concessionaire is required to continue to make good faith efforts during the remaining term of the agreement to encourage ACDBEs to compete for purchases and/or leases of goods and services to be made by the concessionaire. In addition, the prime concessionaire and the sponsor should continue to explore ways to make direct participation by an ACDBE viable again and to respond to any improvement in the economy. Failure to make continued good faith efforts will result in non-compliance with § 23.75.

Example 2: *A prime concessionaire with an ACDBE subcontractor has a ten-year exclusive lease. The request was approved by the FAA. In year two of the lease, the ACDBE is terminated because of its inability to perform its duties up to the standards of the contract. The prime concessionaire immediately performs a cursory review of the State ACDBE database seeking a replacement. Fearing that it would not be able to find an ACDBE willing and capable of performing the work, the prime decides that it is better to wait a year before searching the state database again. There are seven years remaining on the lease. In this example, the scope and intensity of the search is not adequate. The prime concessionaire is not making a good faith effort to find a replacement ACDBE. The prime concessionaire will be expected to make additional efforts, such as soliciting the interest of ACDBEs who have the capability to perform the work, to find a replacement ACDBE or risk being in noncompliance with Part 23.*

SUMMARY

As outlined in this guidance, absent limited circumstances, sponsors are prohibited from entering into LTE agreements for concessions. Compliance with the DBE and ACDBE regulations are a condition of continued financial assistance. Sponsors who are uncertain whether potential lease agreements would be long-term, exclusive in light of this guidance should contact the FAA for assistance. The FAA expects sponsors to comply with Part 23 as it pertains to long-term, exclusive agreements in their concession program throughout the entire airport.

FAA Office of Civil Rights
National Airport Civil Rights Policy and Compliance

June 10, 2013

Appendix A

CHECKLIST

**Required Information to Request Approval of
Long-term, exclusive Agreements in the ACDBE Program**

<input type="checkbox"/>	1) Description of the special local circumstances that warrant a long-term, exclusive agreement.
<input type="checkbox"/>	2) Copy of the draft lease, subleases, and other pertinent or related documents. A copy of the final lease and sublease (provided at least 45 days prior to signing or 60 days prior to the effective date of the term).
<input type="checkbox"/>	3) ACDBE participation is in an acceptable form, such as a sublease, joint venture, partnership, or any legal structure that meets federal and state legal requirements which results in bona fide ownership and control by the ACDBE (see 49 C.F.R. § 23.55).
<input type="checkbox"/>	4) Documentation that ACDBE participants are properly certified.
<input type="checkbox"/>	5) Description of the type of business or businesses to be operated – (e.g., location, storage and delivery space, “back-of-the-house facilities” such as kitchens, window display space, advertising space, and other amenities).
<input type="checkbox"/>	6) Information on the estimated investment required on the part of the ACDBE and any unusual management or financial arrangements between the prime concessionaire and the ACDBE.
<input type="checkbox"/>	7) Information on the estimated gross receipts and net profit to be earned by the ACDBE.
<input type="checkbox"/>	8) For joint ventures, structure of the joint venture and the role of the ACDBE; any joint venture agreement should be consistent with the current ACDBE Joint Venture Guidance.