



March 24, 2016

Wilbur Barham
Deputy Director
National Policy and Compliance
Federal Aviation Administration
Office of Civil Rights
800 Independence Avenue, SW
Washington, D.C. 20591

Dear Mr. Barham:

The Business Diversity Committee of Airports Council International – North America (ACI-NA) appreciates the support of FAA in working with our airport and associate members to understand federal regulatory requirements. We are again seeking your assistance to resolve issues that continue to arise regarding long-term exclusive agreements.

49 CFR Part 23, section 23.75 provides requirements for entering into long-term exclusive agreements with concessionaires. In June 2013, the FAA issued guidance entitled “Principles for Evaluating Long-Term, Exclusive Agreements in the ACDBE Program.” Both the regulation and guidance have been difficult to implement at airports for a number of reasons as follows:

1) The term “exclusive” is not defined in the regulation; however guidance issued in June 2013 provides the following definition of exclusive:

*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. 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. (emphasis added)*

The sentence “**In the context of this guidance, the concept of “exclusive” includes the absence of any ACDBE participation**” can be interpreted to mean that if there is ACDBE participation in a contract, it is not exclusive. However, the guidance states that the FAA must approve “all LTE agreements before award” and given the requirement to submit information about ACDBE participation in a request to enter into a long-term, exclusive agreement, this does not seem to be the case. This should be clarified. It would seem that long-term, exclusive agreements that contain an ACDBE goal that has been appropriately set and provide for

continued participation or good faith efforts and, in fact, have a commitment from the successful proposer to meet the goal, would not require the same level of scrutiny as an agreement that does not contain a goal and commitment to meet the goal. Can FAA accommodate a streamlined process for such contracts?

In addition, under the definition of “exclusive,” it is unclear in a situation where, for instance, two non-ACDBEs working together (with or without a JV agreement) control one area of concession business at the airport, whether FAA would view this as an LTE lease, since more than a single business entity would be involved, but ACDBEs were nonetheless effectively excluded.

There also exists a situation in which “Developer” contracts are awarded, sometimes to companies who will not operate any concessions and sometimes to companies who will operate a limited number of concessions and be required to sublease the balance of the concessions. Although the agreement is with a single entity, that entity is required to include other businesses in its operations. Would FAA consider this to be an LTE agreement?

2) “Long-term” is defined in the regulation as more than five (5) years. The term of a concession agreement is driven by many factors, the most significant of which is the required capital investment. Agreements for business types that require high capital investment, such as food/beverage, frequently require lease terms of more than five years. Hotel agreements are included in the list of Sample Categories in the Guidance. Hotel agreements can be for a term of 99 years and are almost certainly always more than five years. In the case of a hotel, every airport that has only one hotel on airport property would have to seek approval for its agreement. Some of the requirements in the regulation may not be able to be met for these types of leases. For example, the regulation requires that a long-term, exclusive agreement must provide a number of ACDBEs that reasonably reflects their availability in your market area, in the absence of discrimination, to do the types of work required will participate as concessionaires throughout the term of the agreement and account for a percentage of the estimated annual gross receipts equivalent to a level set in accordance with §§23.47 through 23.49 of this Part. In the event that an airport has a single hotel operation, it may not be possible to provide for ACDBE participation in this manner as there may not be opportunities for subcontracting in such a situation. In such a case, ACDBE participation could potentially be achieved through the purchase of goods and services, however this would have no impact on its classification as an LTE agreement.

We believe FAA needs additional information on this issue and would suggest that a survey be conducted regarding the typical lease term for each business type. This would provide important information showing that not every business type is the same in terms of capital investment, operating expenses, etc., and therefore a single definition for “long-term” may not be applicable to all business types.

3) The regulation states that an airport may enter into a long-term, exclusive concession agreement only under certain conditions. The first condition is that special local circumstances exist that make it important to enter such agreement. The Guidance provides further information regarding “special local circumstances” as follows:

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.

These examples are not clear. The airport may not be aware of rent, staffing levels, cost of goods sold, etc. before proposals are submitted as those items are dependent upon which firm submits a proposal for the concession opportunity. The fact is that the lease term is often driven by capital investment and historical revenue production balanced by the level of risk involved. Many of the examples may not be factors in the determination of lease term at all. While we understand the need for FAA to have a specific reason to grant an exemption, the reality of how term length decisions are made by airports won’t always comport with the requirements. Perhaps redefining “long-term” by business type would help alleviate the confusion.

4) Seeking approval for a long-term, exclusive agreement is very difficult and time-consuming because of the amount and type of information required as follows:

- a) Description of the special local circumstances that warrant a long-term, exclusive agreement.

This was discussed in number 3 above.

- b) 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).

While the draft lease is usually available when the Request for Proposals is released, subleases are not available until proposers submit their proposals, and sometimes not until after the proposer is selected. Once the RFP is released, it is too late to change the term. Approval is needed in advance of the solicitation. Therefore, subleases submitted by proposers cannot be considered. However, FAA could issue requirements for sublease agreements and Guidance for Evaluating the Agreements similar to the Joint /venture guidance. In addition, airports could specify sublease, joint venture or other types of participation requirements in the solicitation. Approval of the proposed agreement(s) could then be contingent on meeting the requirements and receiving ultimate FAA approval.

- c) 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).

There may be instances when ACDBE participation through “direct ownership” arrangements is not feasible (e.g. in the case of certain hotel or advertising leases). In these cases, goals are sometimes met based on purchase of goods and services. Would FAA consider such an

arrangement acceptable?

In addition, whether or not proposers will, in fact, meet the goal is not known until the proposals are submitted. On occasion, good faith efforts are accepted. Under 23.25(e)(1)(iii), competitors for a concession that contains an ACDBE goal must make good faith efforts to meet this goal either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so. If such language were required in solicitations, perhaps this would insure that proposers for LTE agreements would not be awarded the concession without meeting these requirements. LTE opportunities not containing race-conscious ACDBE goals could be subject to additional FAA scrutiny before the release of the RFP.

- d) Documentation that ACDBE participants are properly certified.

Proposed ACDBE participants are not known until proposals are received. Approval for a long-term, exclusive is needed before the opportunity is solicited. There is a timing issue here. Requiring participants to be properly certified is addressed elsewhere in the regulation. Perhaps FAA could condition its approval on the airport's proper implementation of this requirement.

- e) 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).

It is unclear why this information is required. The time and effort required to provide the information is significant and the information appears to be irrelevant to the decision of whether or not ACDBE participation is real or meaningful. For example, an ACDBE may operate facilities that require little or no “back of the house facilities,” such as an ice cream concession or a coffee concession while the non-ACDBE may operate concepts requiring back of the house preparation. The percentage participation in terms of gross revenues and profit potential is often not impacted by the facility requirements. The important factor here is whether or not the type of business (location, concept) provides a real opportunity and that risk is spread fairly (i.e. the ACDBE is not relegated to inferior locations or concepts). Perhaps this could be addressed in the solicitation.

- f) 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.

Again, this information is not known until the proposals are received yet the approval is required prior to the opportunity even being solicited. Timing is a problem again in this situation. Guidance for evaluating investment requirements and management and financial arrangements is included in the FAA's Joint Venture Guidance. Perhaps Guidance for evaluating these elements in other types of arrangements could be provided and compliance with the Guidance could be a requirement of the

solicitation as it often is with Joint Venture arrangements. The important issue here is to make sure that the ACDBE's participation is real and that the ACDBE is not performing a passive role. This could be achieved using Proposal Requirements.

- g) Information on the estimated gross receipts and net profit to be earned by the ACDBE.

Estimated gross receipts to be earned by the ACDBE will not be known until the proposals are submitted and the details of ACDBE participation proposals are known. Estimated net profit earned by the ACDBE is not information that is typically solicited; further it is not solicited from non-ACDBEs. Since the goal and subsequent achievement is based on a percentage of gross revenue and the selection of the concession operator is conditioned on its commitment to meet the goal or make good faith efforts to do so, could the evaluation be based on the percentage goal set and solicitation language requiring that Proposers meet the percentage goal or make good faith efforts to do so rather than on estimated gross receipts and net profit?

- h) 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.

Until proposals are submitted, it is not know if joint ventures will be proposed. Requirements to comply with the regulation and Guidance for Joint Ventures and to obtain prior approval from the airport for Joint Venture participation to count could be included in RFP language to satisfy this point.

Overall, as currently written, the long-term, exclusive process does not work well for airports. While we agree that there should be requirements relating to long-term, exclusive leases, the current requirements do not take into consideration the timing and process of soliciting airport concession proposals or the potential variations in types of concessions. In addition, the current guidance requests information that is not always available pre-award and does not seem relevant to the approval process. We would be happy to work with FAA to revise the guidance and provide a more efficient way to accomplish the agency's objectives.

Thank you for your assistance.

Sincerely,



Deborah C. McElroy
Executive Vice President

cc: Michael Freilich, Director, National External Operations Program, DBE/ACDBE
Program Compliance Team, FAA
Gene Roth, National Team Lead- DBE/ACDBE Program, FAA