

# MEMPHIS – SHELBY COUNTY AIRPORT AUTHORITY

## ACDBE PROGRAM

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### Policy Statement from President and CEO

The Memphis Shelby County Airport Authority (MSCAA) has established an Airport Concession Disadvantaged Business Enterprise (ACDBE) Program in accordance with the regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 23. The MSCAA is a primary airport that receives federal funds authorized for airport development and has signed airport grant assurances that it will comply with 49 CFR Part 23.

It is the policy of the MSCAA to ensure that ACDBEs, as defined in 49 CFR Part 23, have an equal opportunity to receive and participate in concessions opportunities at the MSCAA's airports. To that end, the objectives of the MSCAA are:

1. To ensure nondiscrimination in the awarding and administration of opportunities for concessions;
2. To create a level playing field on which ACDBEs can compete fairly for concessions opportunities;
3. To ensure that the MSCAA's ACDBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 23 eligibility standards are permitted to participate as ACDBEs;
5. To help remove barriers to the participation of ACDBEs in opportunities for concessions; and
6. To provide appropriate flexibility to the MSCAA's employees in establishing and providing opportunities for ACDBEs.

The MSCAA is committed to successfully operating its ACDBE Program in a nondiscriminatory manner. In meeting the MSCAA's objectives, Joe Claiborne, Sr. Manager of the Business Diversity Development Office, is designated as the ACDBE Liaison Officer (ACDBELO). In that capacity, Mr. Claiborne is responsible for implementing all aspects of the ACDBE Program with assistance from staff. Implementation of the ACDBE Program is accorded the same priority as compliance with all other legal obligations incurred by the MSCAA in its financial assistance agreements with the DOT.

This Policy Statement will be circulated to members of the MSCAA's Board of Commissioners, employees of all Divisions and Departments, and the ACDBE and non-ACDBE communities who perform work on federally-funded contracts at the MSCAA's airports. Additionally, the MSCAA will circulate this Policy Statement by, among other things, posting a copy on the MSCAA's [website](#) and distributing copies to each attendee at informational and pre-bid meetings dealing with concessions opportunities and each entity that enters into a concessions agreement with the MSCAA.

*Scott A Brockman*  
Scott A Brockman (Apr 2, 2020)

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Scott A. Brockman, A.A.E.

04/02/2020

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Date

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# ACDBE PROGRAM

## Part A. General Requirements

### 1. Objectives (Reference: 49 CFR Section 23.1)

The objectives of the Memphis-Shelby County Airport Authority (MSCAA) under this Airport Concession Disadvantaged Business Enterprise (ACDBE) Program are listed in the Statement of the President and CEO to this ACDBE Program (Program).

### 2. Definitions (Reference: 49 CFR Section 23.3)

The MSCAA will use terms in this Program that have the meaning defined in 49 CFR Sections 23.3 and 26.5, where applicable.

### 3. Applicability (Reference: 49 CFR Sections 23.5 and 23.7)

The MSCAA is required to adopt this Program because it is a primary airport and the recipient of federal funds authorized for airport development after January 1988 pursuant to Title 49 of the United States Code. The MSCAA will modify this Program when required by the U.S. Department of Transportation (DOT).

### 4. Nondiscrimination Requirements (Reference: 49 CFR Sections 23.9 and 26.7)

- a. The MSCAA will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any concessions agreement or other agreement covered by 49 CFR Part 23 on the basis of race, color, sex, or national origin.
- b. In administering this Program, the MSCAA will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of this Program with respect to individuals of a particular race, color, sex or national origin.
- c. The MSCAA acknowledges these representations of nondiscrimination are also made in accordance with the obligations contained in its grant assurances related to the civil rights of ACDBEs.
- d. The MSCAA will include the following assurances in all concession agreements and management contracts that it executes:
  - (1) This agreement is subject to the requirements of DOT regulations, 49 CFR Part 23. The concessionaire or contractor agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement, management contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR Part 23.

- (2) The concessionaire or contractor agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR Part 23, that it enters and cause those businesses to similarly include the statements in further agreements.

## **5. Compliance and Enforcement (Reference: 49 CFR Section 23.11)**

- a. The MSCAA will comply with the provisions of 49 CFR Sections 26.101, 26.105, and 26.107 and 2 CFR Parts 180 and 1200. The MSCAA is subject to formal enforcement action under Section 26.105 or appropriate plan sanctions, such as the suspension or termination of federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Plan sanctions may include actions consistent with 49 USC Sections 47106(d), 47111(d), and 47122.
- b. Any person who knows of a violation of this Program by the MSCAA may file a complaint under 14 CFR Part 16 with the Federal Aviation Administration (FAA) Office of Chief Counsel.
- c. The following enforcement actions apply to firms participating in this Program:
  - (1) If a firm does not meet the eligibility criteria of Subpart D of 49 CFR Part 26 and attempts to participate in this Program as an ACDBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the DOT or FAA may initiate suspension or debarment proceedings against the firm under 2 CFR Parts 180 and 1200.
  - (2) In order to meet ACDBE contract goals or other requirements of this Program, if a firm uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of 49 CFR Part 26, the DOT or FAA may initiate suspension or debarment proceedings against the firm under 2 CFR Parts 180 and 1200.
  - (3) Enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, may be taken by the DOT or FAA against any firm participating in this Program whose conduct is subject to action under 49 CFR Part 31.
  - (4) The DOT or FAA may also refer to the U.S. Department of Justice, for prosecution under 18 USC Section 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of an ACDBE in this Program or otherwise violates applicable federal statutes.
- d. The FAA may review the MSCAA's compliance with 49 CFR Part 26 at any time, including but not limited to, reviews of paperwork and on-site reviews. The FAA may also review the MSCAA's monitoring and enforcement mechanism, as appropriate. Further, the FAA Office of Civil Rights may initiate a compliance review based on complaints received.

## **Part B. Administration of Program**

### **1. Program Updates** (Reference: 49 CFR Section 23.21)

- a. The MSCAA will submit this Program and its overall ACDBE goals to the FAA in accordance with Part D of this Program. The MSCAA will follow this Program until such time as any revisions or amendments are submitted to, and approved by, the FAA, except with respect to any provision that is contrary to 49 CFR Part 23.
- b. This Program will be implemented at the Memphis International Airport. The MSCAA owns two general aviation (GA) airports: Charles W. Baker Airport and General DeWitt Spain Airport. There are no concessions opportunities at either of the GA airports. There are, however, two fixed based operators (FBOs) that lease terminals from the MSCAA: Signature Flight Services and Wilson Air Center. In terms of concessions opportunities, Signature operates a single small restaurant and Wilson has a small vending area. MSCAA's attempt to conduct a full goal-setting analysis for these FBOs has been unsuccessful as MSCAA has identified few or no DBEs, in the wholesale food, paper products, or vending machine industries. For this reason, the FBOs will be required to make good faith efforts to utilize ACDBEs, but MSCAA will not impose a goal at this time. Instead, the MSCAA will seek to identify potential ACDBEs in the necessary specialty areas and revisit the goal-setting question when MSCAA submits new goals.

### **2. Administrative Provisions** (Reference: 49 CFR Sections 23.23 and 26.31)

- a. The MSCAA's ACDBE Liaison Officer (ACDBELO) is responsible for implementing all aspects of this Program and ensuring that the MSCAA complies with all provisions of 49 CFR Part 23. The ACDBELO has direct, independent access to the President and CEO of the MSCAA concerning this Program. The MSCAA's organizational chart displaying the ACDBELO's position in the organization can be viewed [here](#), the chart of which is incorporated herein by reference.
- b. The MSCAA's Business Diversity Development Office has four (4) employees assigned to assist the ACDBELO in the administration of this Program. The current titles and duties of the employees with responsibilities for this Program are as follows:
  - (1) Two (2) DBE Program Administrators who are responsible for the administration of the in-house ACDBE, DBE, and SBE program, attending pre-bid meetings to explain the Diversity forms that must be submitted with each bid or proposal, preparing required FAA reports, auditing contract payments for compliance, and assisting with budgeting tasks.
  - (2) One (1) Contract Compliance Coordinator who performs on-going site progress inspections of construction projects and prepares a summary of findings. The Coordinator also attends engineering and other construction meetings, plans and coordinates outreach activities with other divisions and departments of the MSCAA as well as external community organizations and small business owners.

- (3) One (1) Program Certification Specialist is responsible for the intake component of the in-house certification process and assisting with administrative tasks.
- c. Through the Tennessee Uniform Certification Program (TNUCP), the MSCAA maintains a directory identifying all firms eligible to participate as ACDBEs in this Program. The directory lists the firm's name, address, phone number, date of the most recent certification, and the types of work the firm has been certified to perform as an ACDBE. The TNUCP lists each type of work by using the most specific NAICS codes available to describe each type of work. The TNUCP makes weekly updates to its directory, so as to meet the requirements of 49 CFR Section 26.31. Access to the TNUCP directory may be viewed [here](#).
- d. The MSCAA will make the TNUCP directory available to the public electronically on the internet as well as in print by doing the following, among other things:
- (1) Posting a link to the TNUCP directory on MSCAA's website, which can be found [here](#);
  - (2) Posting a link to the directory on the website of Memphis area advocacy agencies;
  - (3) Distributing a list of ACDBEs for a specific industry classification during pre-bid meetings; and
  - (4) Providing a list of ACDBEs for a specific industry classification or a website link to the entire directory upon written and oral request from any contractor or advocacy group at any time.

### **3. Nondiscriminatory Participation** (Reference: 49 CFR Section 23.25)

- a. The MSCAA will take the following measures to ensure nondiscriminatory participation of ACDBEs in concessions and other activities:
- (1) The MSCAA will follow all federal, state and local nondiscrimination laws, as well as comply with all of its own policies and procedures that are designed to ensure nondiscrimination. These laws, policies, and procedures include, but are not limited to, the U.S. Department of Transportation's regulations found at 49 CFR Parts 23 and 26 and the MSCAA's Policies No. 107 -- Business Diversity Development, No. 607 -- Concessions Program, No. 703 -- Construction Related Contracts, and No. 704 -- Debarment of Contractors.
  - (2) The MSCAA will ensure that all concessionaires and businesses that work with concessionaires have a fair and equal opportunity to participate in concessions opportunities offered by the MSCAA.
  - (3) The MSCAA will ensure that this Program is narrowly tailored to address past and present discrimination. Its Program operates to promote fair and equal opportunities for all to participate in concessions opportunities at the MSCAA's airports.

- (4) The MSCAA will ensure that its employees with responsibility for the administration of this Program engage in appropriate continuing education, including attendance at annual training seminars and professional conferences.
- b. The MSCAA will seek ACDBE participation in all types of concessions activities, rather than concentrating participation in one category or a few categories to the exclusion of others. The MSCAA's overall goal methodology and a description of the race-neutral measures it will take to meet overall goals are described in Part D of this Program. The overall goals as set are consistent with the requirements of Subpart D of 49 CFR Part 23. If race-neutral measures, alone, are not sufficient to meet an overall goal for a contract, the MSCAA will use race-conscious measures as described in Part D of this Program.
- c. With the exception of car rental companies, the MSCAA will require all firms subject to ACDBE goals to make good faith efforts to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with ACDBEs.

#### **4. Reporting Requirements** (Reference: 49 CFR Section 23.27)

The MSCAA will retain sufficient basic information about implementation of this Program, ACDBE certification, and the award and performance of concession agreements and contracts to enable the FAA to determine its compliance with 49 CFR Part 23. This data will be retained for a minimum of three (3) years following the end of each such concession agreement or other covered contract. Additionally, the MSCAA will submit to the FAA Regional Civil Rights Office, an annual ACDBE participation report in accordance with Appendix A of 49 CFR Part 23.

#### **5. Monitoring and Compliance Procedures** (Reference: 49 CFR Section 23.29)

The MSCAA will implement the following monitoring and compliance mechanisms to ensure compliance by all participants in this Program with 49 CFR Part 23:

- (1) The MSCAA will bring to the attention of the DOT any false, fraudulent, or dishonest conduct in connection with this Program, so that the DOT can take the steps provided in 49 CFR Section 26.107 (e.g. referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules).
- (2) The MSCAA will consider similar action under its own legal authorities, including responsibility determinations in future concession contracts. The regulations, provisions, and contract remedies available to the MSCAA in the event of non-compliance with this Program by a firm include, but are not limited to, auditing the records of the firm and/or ACDBE, issuing an order to stop all or part of the work being performed by, or the payments to be made to, the firm; filing a breach of contract or other action pursuant to statutory or common law; and terminating the firm's concession contract.

- (3) The MSCAA will verify that work committed to ACDBEs at contract award is actually performed by the ACDBEs by monitoring the work on-site. The MSCAA will also review records of all contracts, leases, joint venture agreements, or other concession-related agreements to ensure inclusion of all required contract provisions and the firm's commitment to the ACDBE's participation level. Additionally, the MSCAA maintains a running tally of actual payments made to ACDBE and compares such payments to the firm's accomplishment statements, which indicate gross revenues with amount attributable to ACDBE participation.
- (4) In order to meet ACDBE contractual commitments, MSCAA has implemented a written mechanism that documents and ensure all contracts, leases, Joint Ventures and concession related agreements are monitored. MSCAA's Properties Department conduct daily checks followed by quarterly inspections and visits of spaces in accordance with the terms outlined in the leased agreement found in Section IX, Operational Standard, see attached [here](#).

### **Part C. Certification and Eligibility**

#### **1. Certification Standards (Reference: 49 CFR Section 23.31)**

- a. The MSCAA will use the procedures and standards of 49 CFR Sections 26.61 through 26.91, except as provided in 49 CFR Section 23.31, for certification of ACDBEs to participate in this Program, all of which are incorporated herein by reference. More information on the certification process can be viewed [here](#).
- b. The MSCAA participates in the Tennessee Unified Certification Program (TNUCP), which is administered by the State of Tennessee. MSCAA will make ACDBE certification decisions and is authorized to certify firms as defined in the TNUCP Agreement, a copy of which can be viewed [here](#). The TNUCP's directory specifies whether a firm is certified as an ACDBE for purposes of 49 CFR Part 23 or a disadvantage business enterprise (DBE) for purposes of 49 CFR Part 26, or both. Information about the MSCAA's DBE Program can be viewed [here](#).
- c. Prior to entering into a new contract, extension, or option with a currently certified ACDBE, the MSCAA will review the ACDBE in accordance with 49 CFR Section 23.31(c). At that time, all currently certified ACDBE's will be required to submit to the MSCAA an affidavit of no change.

#### **2. Eligibility Standards (Reference: 49 CFR Sections 23.33, 23.35, and 23.37)**

- a. The MSCAA is required to follow 49 CFR Section 23.39 in determining whether a firm is an eligible ACDBE. With the exception of the eligibility of Alaska Native Corporation-owned firms, which is governed by 49 CFR Section 26.73(h), the MSCAA will do the following, among other things, to determine the eligibility of ACDBEs to be awarded a concession contract or to provide goods and services to a concessionaire:
  - (1) Obtain resumes or work histories of the principal owners of the firm and personally interview those individuals;

- (2) Analyze the ownership of stock of any firm that is a corporation;
  - (3) Analyze the bonding and financial capacity of the firm;
  - (4) Determine the work history of the firm, including any concession contracts or other contracts it may have received;
  - (5) Compile a list of the licenses of the firm and its key personnel to perform the concession contracts or other contracts the firm wishes to receive;
  - (6) Obtain a statement from the firm of the types of concessions it prefers to operate or the types of other contracts it prefers to perform; and
  - (7) Ensure that the firm meets the applicable standards for eligibility.
- b. The eligibility standards include size, personal net worth, and ownership and control.
- (1) Size standard. The MSCAA will treat a firm as a small business eligible to be certified as an ACDBE if its gross receipts, averaged over the firm's previous three (3) fiscal years do not exceed \$56.42 million for non-car rental ACDBEs and \$75.23 million for car rental ACDBEs. The size standard for banks and other financial institutions is \$1 billion in assets, for pay telephone companies it is 1500 employees, and for ACDBE automobile dealers it is 350 employees.
  - (2) Personal net worth standard. The personal net worth (PNW) standard used in determining eligibility to be certified as an ACDBE is \$1.32 million. PNW is the net value of the assets of an individual remaining after total liabilities are deducted and only includes their own share of assets held jointly or as community property with the individual's spouse.
    - (a) An individual's personal net worth does not include (i) the individual's ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification; (ii) the individual's equity in his or her primary place of residence; or (iii) other assets that the individual can document are necessary to obtain financing or a franchise agreement for the initiation or expansion of his or her ACDBE firm (or have in fact been encumbered to support existing financing for the individual's ACDBE business) to a maximum of \$3 million.
    - (b) The effectiveness of the PNW definition exclusion described in paragraph (2)(a)(iii) is suspended with respect to any application for ACDBE certification made, or any financing or franchise agreement obtained, after June 20, 2012.
    - (c) Any person who has a personal net worth exceeding \$1.32 million dollars is not a socially and economically disadvantaged individual, even if a member of a group is otherwise presumed to be disadvantaged.

- (3) Ownership and control standard. The MSCAA will presume that a firm that is certified as a DBE under 49 CFR Part 26 is eligible to participate in this Program as an ACDBE. However, before certifying such a firm, the MSCAA will ensure that the disadvantaged owners of the DBE are able to control the firm with respect to its activity in this Program. The MSCAA is not required to certify a Part 26 DBE as an ACDBE if the firm does not do work relevant to this Program.
- c. When the eligibility of a firm is removed after the firm enters into a concession contract with the MSCAA, because the firm exceeds the size standard or the owner has exceeded the PNW standard and the firm in all other respects remains an eligible DBE, the MSCAA may continue to count the firm's participation toward ACDBE goals during the remainder of the current concession contract. The MSCAA will not, however, count the firm's participation toward ACDBE goals beyond the termination date for the concession contract in effect at the time of the firm's decertification.

## **D. GOALS, GOOD FAITH EFFORTS, AND COUNTING**

### **1. Basic Overall Goal Requirements (49 CFR Section 23.41)**

- a. The MSCAA establishes two (2) separate overall ACDBE goals that provide for participation by all certified ACDBEs and are not subdivided into group-specific goals. The first goal is for car rentals and the second is for concessions other than car rentals. The overall goals cover a 3-year period, which are reviewed annually to make sure they continue to fit the MSCAA's circumstances appropriately. Any significant adjustments to the overall goals are reported to the FAA, if made by the MSCAA before the next required submission.
- b. If the average annual concession revenues over the preceding three (3) years do not exceed \$200,000, whether for car rental concessions or for concessions other than car rentals, the MSCAA is not required to submit an overall goal for such concession. If a new concession opportunity arises at a time that falls between the submission dates for overall goals, however, and the estimated average annual gross revenues are anticipated to be \$200,000 or more, the MSCAA will submit an appropriate adjustment to its overall goals to the FAA for approval no later than ninety (90) days before issuing the solicitation for the new concession opportunity. For purposes of this paragraph, *revenue* means the total revenue generated by concessions, not the fees received by the MSCAA from concessionaires.

### **2. Consultation with Stakeholders (Reference: 49 CFR Section 23.43)**

The MSCAA consults with stakeholders before submitting the overall goals to the FAA. Stakeholders include, but are not limited to, minority and women's business groups, community organizations, trade associations representing concessionaires currently located at the Airport, as well as existing concessionaires themselves and other officials or organizations that could be expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for ACDBEs, and the MSCAA's efforts to increase participation of ACDBEs.

**3. Overall Goals Established** (Reference: 49 CFR Sections 23.45, 23.47, 23.49, and 23.51)

- a. As a condition of eligibility for FAA financial assistance, the MSCAA will submit its overall goals to the FAA Regional Civil Rights Office for approval according to the following schedule:

Primary Airport Size	Region	Submission Date	Period Covered
Medium Hub	All	October 1, 2014	2015 - 2017
		October 1, 2017	2018 - 2020

- b. The MSCAA establishes its overall goals in accordance with the 2-step process specified in 49 CFR Section 23.51. After determining the total gross receipts for the concession activity, the first step is to determine the relative availability of ACDBEs in the market area, which is the “base figure”. The second step is to examine all relevant evidence reasonably available in the MSCAA’s jurisdiction to determine if an adjustment to the base figure is needed so that the goals reflect as accurately as possible the ACDBE participation the MSCAA would expect in the absence of discrimination and its effects. The MSCAA will examine evidence such as, but not limited to, past participation by ACDBEs; any available disparity study; and evidence from related fields that affect ACDBE opportunities to form, grow, and compete like statistical disparities in ability to get required financing, bonding, or insurance; or data on employment, self-employment, education, training and union apprenticeship.
- c. The data, calculations, assumptions, and reasoning used in establishing the MSCAA’s current overall goals more fully described in the MSCAA’s submission to the FAA. The MSCAA’s most recent submission for concessions other than car rentals can be viewed [here](#). The MSCAA’s most recent submission for car rentals can be viewed [here](#). Both goal submissions are reviewed by the MSCAA annually to ensure they continue to fit the MSCAA’s circumstances appropriately.

**4. Estimated Race-Neutral and Race-Conscious Participation** (Reference: 49 CFR Sections 23.25(d)-(e) and 23.45(f))

The MSCAA will maximize the use of race-neutral measures to obtain as much as possible of the ACDBE participation needed to meet overall goals. The MSCAA will use race-conscious measures, however, when race-neutral measures alone are not projected to be sufficient to meet an overall goal. The MSCAA’s projection of the portion of its overall goals to be met through use of race-neutral and race-conscious participation and the basis for making such projection is described in its overall goals submission to the FAA, which can be viewed [here](#) for concessions other than car rental and [here](#) for car rentals. The FAA may, however, adjust the MSCAA’s race-neutral/race-conscious split in accordance with 49 CFR 23.45(h).

**5. Concession-Specific Goals** (Reference: 49 CFR Section 23.25(e)(1))

- a. The MSCAA will use concession specific goals to meet any portion of its overall goals that it does not project being able to meet using race-neutral means. Concession specific goals are established so that, over the period to which the overall goals apply, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race-neutral means.
- b. With the exception of car rentals, the MSCAA will establish concession specific goals only on those concessions that have direct ownership arrangements, sublease, or subcontracting possibilities and will require businesses subject to ACDBE goals to make good faith efforts to explore all available options to meet established goals, to the maximum extent practicable, through direct ownership arrangements with DBEs. Car rental firms are not required to change their corporate structure to provide for direct ownership arrangements. In the case of a car rental goal, where it appears that all or most of the goal is likely to be met through a car rental company's purchase of vehicles or other goods or services from ACDBEs, one permissible alternative is to structure the goal entirely in terms of purchases of goods and services.
- c. The MSCAA is not required to establish a concession specific goal on every such concession. The size of concession specific goals will be adapted to the circumstances of each such concession, including, but not limited to, the type and location of concession and availability of ACDBEs.
- d. If the objective of a concession specific goal is to obtain ACDBE participation through direct ownership with an ACDBE, the MSCAA will calculate the goal as a percentage of the total estimated annual gross receipts from the concession.
- e. If the concession specific goal applies to purchases and/or leases of goods and services, the MSCAA will calculate the goal by dividing the estimated dollar value of such purchases and/or leases from ACDBEs by the total estimated dollar value of all purchases to be made by the concessionaire.

**6. Good Faith Efforts** (References: 49 CFR Sections 23.25(e)(1)(iii) and 26.53)

- a. To be eligible to be awarded a contract that has a concession specific goal, a firm must make good faith efforts to meet the goal, which is a matter of responsiveness. A firm may do so either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so. The MSCAA will follow the guidance concerning examples of good faith efforts found in Appendix A to 49 CFR Part 26, which is incorporated herein by reference. The administrative procedures applicable to contract goals found in 49 CFR Sections 26.51 and 26.53 apply to the MSCAA's concession-specific goals.
- b. Each solicitation for which a contract goal has been established by the MSCAA will, at a minimum, require the firm to submit the following information, which is a condition of contract award:

- (1) The names and addresses of ACDBE firms or suppliers of goods and services that will participate in the contract;
  - (2) A description of the work that each ACDBE will perform;
  - (3) The dollar amount of the participation of each ACDBE firm or supplier participating;
  - (4) Written and signed documentation of the firm's commitment to use an ACDBE subcontractor whose participation it submits to meet a contract goal;
  - (5) Written and signed confirmation from the ACDBE that it is participating in the contract as provided in the firm's commitment; and
  - (6) If the contract goal is not met, evidence of good faith efforts.
- c. If the apparent successful firm is not responsive because it has not documented sufficient good faith efforts, the MSCAA will provide the concessionaire an opportunity for administrative reconsideration before awarding the contract. Within five (5) business days of receiving notice of nonresponsiveness, on the basis of good faith efforts only, the firm may submit a written request for administrative reconsideration to the MSCAA's reconsideration official by mail or email as follows: Scott A. Brockman, A.A.E., President and CEO, Memphis - Shelby County Airport Authority, 2491 Winchester Rd., Ste. 113, Memphis, TN 38116; or [bdd@flymemphis.com](mailto:bdd@flymemphis.com), return receipt required.
- (1) If necessary, the reconsideration official may designate another employee of the MSCAA to act as the reconsideration official so long as such employee did not play any role in the original determination that the firm did not meet the goal or make adequate good faith efforts to do so.
  - (2) As part of the reconsideration process, the firm will have the opportunity to provide written documentation or argument concerning the issue of whether the concessionaire met the goal or made adequate good faith efforts to do so. The firm will have the opportunity to meet in person with the MSCAA's designated reconsideration official to discuss the issue of whether the firm met the goal or made adequate good faith efforts to do so. The reconsideration official will send the firm a written decision, explaining the basis for finding that the firm did or did not meet the goal or make adequate good faith efforts to do so within five (5) business days after meeting with the firm. The result of the reconsideration process is not administratively appealable to the DOT.
- d. Whether pre-contract or post-contract award, a firm is prohibited from substituting or terminating an ACDBE subcontractor without the prior written consent of the MSCAA for good cause shown. For purposes of this paragraph, *good cause shown* shall include the circumstances described in 49 CFR Section 26.53(f)(3), which are incorporated herein by reference.

- (1) Prior to requesting substitution or termination, however, the firm must give written notice to the ACDBE of its intent to request same and the reason for the request. The firm must copy the MSCAA on such notice to the ACDBE. The ACDBE will have five (5) days to respond to the notice and advise the firm and the MSCAA of the reasons, if any, why it objects to the substitution or termination and why the MSCAA should not approve the firm's request. A response period of less than five (5) days may be provided as a matter of public necessity at the discretion of the MSCAA.
- (2) After approving a request for substitution or termination, the firm is required to make good faith efforts to find another ACDBE, to substitute for, and perform at least the same amount of work under the concession contract as the original ACDBE, to the extent needed to meet the concession specific goal. The firm must obtain the prior written approval of the substitute ACDBE from the MSCAA and provide copies of new or amended subcontracts or documentation of good faith efforts. Each firm's concession contract will include a provision for appropriate administrative remedies that the MSCAA will invoke if the firm fails to comply with the requirements of this Section, which will include, but not be limited to, an order to stop all or part of the work being performed by, or the payments to be made to, the firm and termination of the firm's concession contract.

**7. Counting ACDBE Participation** (Reference: 49 CFR Sections 23.53 and 23.55)

The MSCAA counts only ACDBE participation that results from a commercially useful function, as defined in 49 CFR Section 23.55. The MSCAA counts such ACDBE participation toward overall goals for car rental concessions and concessions other than car rentals as provided in 49 CFR Sections 23.53 and 23.55, respectively.

**8. Goal Shortfall Accountability** (Reference: 49 CFR Section 23.57(b))

- a. At the end of any fiscal year, if the awards and commitments on the MSCAA's Uniform Report of ACDBE Participation, required by Appendix A to 49 CFR Part 23, are less than the overall goals applicable to the fiscal year, the MSCAA will:
  - (1) Analyze in detail the reasons for the difference between the overall goals and the MSCAA's awards and commitments in the fiscal year;
  - (2) Establish specific steps and milestones to correct the problems the MSCAA identifies in its analysis to enable the MSCAA to fully meet its goals for the new fiscal year; and
  - (3) Submit the analysis and corrective actions to the FAA for approval within ninety (90) days of the end of the fiscal year.
- b. If information comes to the attention of the FAA that demonstrates that current trends make it unlikely that the MSCAA will achieve ACDBE awards and commitments that would be necessary to allow the MSCAA to meet its overall goals at the end of the fiscal year, the FAA may require the MSCAA to make further good faith efforts, such

as modifying its race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

**9. Quotas and Set-Asides Prohibited** (Reference: 49 CFR Section 23.61)

The MSCAA does not use race or gender conscious quotas or set-asides as a means of obtaining ACDBE participation in this Program.

**E. Other Provisions**

**1. Existing Agreements** (49 CFR Section 23.71)

The MSCAA assesses the potential for ACDBE participation when an extension or option to renew an existing agreement is exercised, or when a material amendment is made. The MSCAA may use any means authorized by 49 CFR Part 23 to obtain a modified amount of ACDBE participation in renewed or amended agreements in accordance with its concession contract with any firm.

**2. Privately-Owned or Leased Terminal Buildings** (Reference: 49 CFR Section 23.73)

Applicable provisions of 49 CFR Part 23 are passed through by the MSCAA to all private terminal owners and lessees through its agreement with such owners and lessees, who are required to comply with such provisions. All private terminal owners and lessees are also required to provide the goals and other elements of this Program required under Part 23 to the MSCAA, all of which will be submitted to the FAA and deemed part of this Program.

**3. Long-Term, Exclusive Agreements** (Reference: 49 CFR Section 23.75)

The MSCAA will not enter into a long-term, exclusive agreement for concessions. For purposes of this Section, a “long-term” agreement is one having a term of more than five (5) years and an “exclusive” agreement is one in which an entire category of a particular business opportunity is limited to a single business entity. If special, local circumstances exist that make it important to enter into a long-term, exclusive agreement, the MSCAA will submit the necessary information to the FAA Regional Civil Rights Office for review and approval.

**4. Local Geographic Preferences Prohibited** (Reference: 49 CFR Section 23.79)

The MSCAA does not use a local geographic preference in awarding concession contracts. For purposes of this Section, “local geographic preference” means any requirement that gives an ACDBE located in one place an advantage over ACDBEs from other places in obtaining business as a concessionaire or with a firm that is a concessionaire at the MSCAA’s airports, or such other meaning ascribed to it by 49 CFR Section 23.79.

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