

**DEPARTMENT OF TRANSPORTATION  
ACDBE PROGRAM – 49 CFR PART 23  
Airport Concessions DBE PROGRAM**

**Section 23.1,23.23 Objectives/Policy Statement**

The Memphis Shelby County Airport Authority (MSCAA) has established this Airport Concession Disadvantaged Business Enterprise (ACDBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 23 (appended at Attachment 9). The MSCAA is a primary airport and has received federal funds authorized for airport development after January 1988 (authorized under Title 49 of the United States Code). The MSCAA 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 Part 23, have an equal opportunity to receive and participate in concession opportunities. It is also our policy:

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

Anthony Brown, Vice President for Business Diversity Development and Government Affairs, has been designated as the ACDBE Liaison Officer (ACDBELO). In that capacity, Anthony Brown is responsible for implementing all aspects of the ACDBE program. Implementation of the ACDBE program is accorded the same priority as compliance with all other legal obligations incurred by MSCAA in its financial assistance agreements with the Department of Transportation.

The MSCAA has disseminated this policy statement to the members of the MSCAA Board of Commissioners and all of the components of our organization. We will distribute this statement to ACDBE and non-ACDBE concessionaire communities in our area in the following ways:

1. A copy of this policy statement will be posted on the MSCAA website.
2. A copy of this policy will be made available to each attendee of all informational and pre-bid meetings dealing with concessions opportunities.
3. This policy statement will be provided to each and every entity that enters into a concession agreement with the MSCAA .
4. This policy statement and the entire program will be made an appendix to the MSCAA General Policies and Procedures Manual.

---

Larry Cox, President  
Memphis Shelby County Airport Authority

---

Date

## SUBPART A – GENERAL REQUIREMENTS

### **Section 23.1 Objectives**

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

### **Section 23.3**

The MSCAA will use terms in this program that have the meaning defined in Section 23.3 and Part 26 Section 26.5 where applicable.

### **Section 23.5 Applicability**

The MSCAA is a primary airport and the MSCAA of federal airport funds authorized for airport development after January 1988 that was authorized under Title 49 of the United States Code.

### **Section 23.9 Non-discrimination Requirements**

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 concession agreement, management contract or subcontract, purchase or lease agreement or other agreement covered by 49 CFR Part 23 on the basis of race, color, sex, or national origin.

In administering its DBE 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 the ACDBE program with respect to individuals of a particular race, color, sex or national origin.

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

The MSCAA will include the following assurances in all concession agreements and management contracts it executes with any firm after April 21, 2005:

1. This agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR Part 23. The concessionaire or contractor agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement, management contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR Part 23.
2. The concessionaire or contractor agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR Part 23, that it enters and cause those businesses to similarly include the statements in further agreements.

## **Section 23.11 Compliance and Enforcement**

The MSCAA will comply with and is subject to the provisions of 49 CFR Part 26 (§§ 26.101 and 26.105 through 26.107).

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

The MSCAA compliance with all requirements of this part is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

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

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

The following enforcement actions apply to firms participating in the MSCAA's ACDBE program:

- a) For a firm that does not meet the eligibility criteria of subpart C of this part and that attempts to participate as an ACDBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department of Transportation (DOT) or the Federal Aviation Administration (FAA) may initiate suspension or debarment proceedings against you under 49 CFR part 29.
- b) For a firm that, in order to meet ACDBE goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart C of this part, DOT or FAA may initiate suspension or debarment proceedings against you under 49 CFR part 29.
- c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the FAA may consider the fact that a purported ACDBE has been certified. However, such certification does not preclude DOT from determining that the purported ACDBE, or another firm that has used or attempted to use it to meet ACDBE goals, should be suspended or debarred.
- d) DOT may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the ACDBE program whose conduct is subject to such action under 49 CFR part 31.
- e) DOT may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of an ACDBE in the MSCAA's ACDBE program or otherwise violates applicable Federal statutes.

## SUBPART B – ACDBE PROGRAMS

### **Section 23.21 ACDBE Program Updates**

Since the MSCAA is a medium hub primary airport we are required to have an ACDBE program. As a condition of eligibility for FAA financial assistance, the MSCAA will submit its ACDBE program and overall goals to FAA according to the following schedule:

<b>Type of Airport</b>	<b>Initial Program And Goal Due</b>	<b>Second Goal Due</b>	<b>Subsequent Goals Due</b>
Large/Medium Hub Primary	January 1, 2006	October 1, 2008	Every 3 years on October 1
Small Hub Primary	October 1, 2006	October 1, 2009	Every 3 years on October 1
Nonhub Primary	October 1, 2007	October 1, 2010	Every 3 years on October 1

Until our new ACDBE program is submitted and approved we will continue to implement our concessions DBE program that was in effect before April 21, 2005, except with respect to any provision that is contrary to 49 CFR Part 23.

This ACDBE program will be implemented at the Memphis Shelby County Airport. The MSCAA owns two General Aviation Airports, the Charles W. Baker General Aviation Airport and the General DeWitt Spain General Aviation Airport. There are no concessions opportunities at either of these General Aviation airports. There are, however, two Fixed Based Operators that lease terminals from the MSCAA. These are Signature Flight Services and Wilson Air Center. In terms of concession opportunities, Signature operates a single small restaurant and Wilson has a small vending area. Our attempt to conduct a full goal-setting analysis for these FBOs has been unsuccessful as we have identified few or no DBEs, MBEs or WBEs in the wholesale food, paper products or vending areas. For this reason, these two FBOs will be required to make good faith efforts to utilize AC/DBEs but we will not impose a goal at this time. Instead, the MSCAA will seek to identify potential AC/DBEs in the necessary specialty areas and revisit the goal-setting question when we submit new goals on October 1, 2008. [Please see the more extended discussion of this issue at Attachment 10.]

When the MSCAA determines that it will be making significant changes to its ACDBE program, the MSCAA will provide the proposed changes to the FAA for approval prior to implementing the changes.

### **Section 23.23 Administrative Provisions**

**Policy Statement:** The MSCAA is committed to operating its ACDBE program in a nondiscriminatory manner. The MSCAA's Policy Statement is elaborated on the first page of this program.

**ACDBE Liaison Officer (ACDBELO):** We have designated the following individual as our ACDBELO: Anthony Brown, Vice President for Business Diversity Development and Government Affairs, 2491 Winchester Road, Suite 113, Memphis, Tennessee 38116-3956, (901) 922-8000, [busdiversity@mscaa.com](mailto:busdiversity@mscaa.com).

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

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

1. Gathers and reports statistical data and other information as required by FAA or DOT.

2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Works with all departments to set overall annual goals.
4. Ensures that bid notices and requests for proposals are available to ACDBEs in a timely manner.
5. Identifies contracts and procurements so that ACDBE goals are included in solicitations (both race-neutral methods and contract specific goals)
6. Analyzes MSCAA's progress toward attainment and identifies ways to improve progress.
7. Participates in pre-bid meetings.
8. Advises the CEO/governing body on ACDBE matters and achievement.
9. Chairs the ACDBE Advisory Committee.
10. Provides ACDBEs with information and assistance in preparing bids, obtaining bonding, financing, and insurance; acts as a liaison to the OSDBU-Minority Resource Center (MRC).
11. Plans and participates in ACDBE training seminars.
12. Acts as liaison to the Uniform Certification Process in Tennessee.
13. Provides outreach to ACDBEs and community organizations to advise them of opportunities.
14. Maintains the MSCAA's updated directory on certified ACDBEs and distinguishes them from DBEs.

The specific duties of other airport staff with responsibilities for the ACDBE Program are listed below:

Manager of Contract Compliance: Oversees the daily operation of the contract compliance department.

DBE Accountant: Prepares FAA reports and audits compliance.

Contract Analyst: Prepares analysis of bid process and assists with monitoring of MMBC (our certification consultant) activities.

Contract Compliance Coordinator: Plans and coordinates outreach activities with internal departments and external community organizations/small business owners.

Executive Secretary: Assists with budgeting and administrative tasks for the Contract Compliance Department.

**Directory:** The MSCAA is a participant in the Tennessee Uniform Certification Program (known as the Tennessee State Certification Committee or TSCC). The TSCC is just getting up and running, but eventually it will maintain a directory identifying all firms eligible to participate as ACDBEs. The TSCC Directory will list the firm's name, address, phone number, date of the most recent certification, and the type of work the firm has been certified to perform as an ACDBE. The TSCC will revise the Directory monthly. We will make the Directory available on the Airport's website <http://www.memphisairport.org/>. In the meantime, while the TSCC directory is still under construction, the MSCAA Directory may be found in Attachment 2 to this program document.

### **Section 23.25 Ensuring Nondiscriminatory Participation of ACDBEs**

The MSCAA will take the following measures to ensure nondiscriminatory participation of ACDBEs in concession, and other covered activities (23.25(a)):

1. We will follow all federal, state and local nondiscrimination laws, as well as comply with all MSCAA policies and procedures designed to ensure nondiscrimination. These laws, policies and procedures include but are not limited to: Title VI, the regulations found at 49 CFR Parts 23 and 26, and the Memphis-Shelby County Airport Authority General Policies & Procedures No. 111 regarding Business Diversity Development; No. 602 regarding Concession and Consumer Service Privileges Agreements; and No. 704 regarding Construction Contracts and Changes.
2. We will ensure that all concessions businesses, and businesses that work with concessionaires, have a fair and equal opportunity to participate in concessions opportunities offered by the MSCAA.
3. We will ensure that our ACDBE program is narrowly tailored to address past and present discrimination and that it operates to promote fair and equal opportunities for all to participate in concessions opportunities at the MSCAA.
4. We will ensure that the MSCAA personnel with responsibility for the administration of this program will engage in appropriate continuing education, including attendance at annual training seminars and professional conferences.

The MSCAA will include the following language in all concession agreements and management contracts executed with any firm after April 21, 2005:

(1) This agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR part 23. The concessionaire or contractor agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concessions 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.

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

The MSCAA's overall goal methodology, a description of the race-neutral measures it will take to meet the goals are described in Section 23.41 and Attachments 4 and 5 of this plan. The goals are set consistent with the requirements of Subpart D. (23.25(b), (d))

If the MSCAA projects that race-neutral measures, standing alone, are not sufficient to meet an overall goal, it will use race-conscious measures as described in Section 23.41 and Attachments 4 and 5 of this plan. (23.25(e))

The MSCAA will require businesses subject to ACDBE goals at the airport (except car rental companies) to make good faith efforts to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with ACDBEs. We will not use set-asides or quotas as a means of obtaining ACDBE participation. (23.25(g))

### **Section 23.27 Reporting**

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

Beginning March 1, 2007 we will submit to the FAA Regional Civil Rights Office, an annual ACDBE participation report on the form in Appendix A of Part 23.

### **Section 23.29 Compliance and Enforcement Procedures**

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

1. We will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (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) provided in 26.107.
2. We will consider similar action under our own legal authorities, including responsibility determinations in future contracts. Attachment 3 lists some of the the regulations, provisions, and contract remedies available to us in the events of non-compliance with the ACDBE regulation by a participant in our procurement activities.
3. We will also implement a monitoring and enforcement mechanism to ensure that work committed to ACDBEs at contract award is actually performed by the ACDBEs. This mechanism will provide for a running tally of actual ACDBE attainments (e.g. payment actually made to ACDBE firms), including a

means of comparing these attainments to commitments. This is currently accomplished by the steps outlined below:

The Contract Compliance Department employs a DBE Accountant and Compliance Coordinator to specifically monitor the compliance of DBEs in addition to prime concessionaires, and other sub-prime concessionaires in the Food and Beverage and News and Gift areas.

Prime Concessionaires are required to submit accomplishment reports to the Airport Authority Property's Department indicating gross revenues with amounts attributable to ACDBE participation.

The Contract Compliance Accountant enters the revenue data detailing ACDBE Accomplishments into the Contract Compliance Department database tracking concessions activity.

The Contract Compliance Accountant calculates the percentage and dollar amount of DBE participation. Each Prime Concessionaire's ACDBE participation is tracked and compared with Concessions Program goals and contract provisions to determine compliance.

If it appears that ACDBE Participation is not consistent with the Goal, then the Contract Compliance Department contacts the Prime Concessionaires to confirm the accuracy of revenue data received.

If it is determined that a problem exists, then the Contract Compliance Department in conjunction with the Property's Division works with the Prime Concessionaires in resolving the issue.

If necessary the Contract Compliance DBE Accountant and the Contract Compliance Coordinator will visit Prime Concessionaire(s) to obtain any records necessary to confirm compliance with DBE regulations and/or policies.

4. The MSCAA will include in all future concessions agreements a right to audit, at MSCAA expense, concessionaires records to facilitate monitoring and ensure compliance with Part 23.
5. In our reports of ACDBE participation to FAA, we will show both commitments and attainments, as required by the DOT reporting form.

## SUBPART C – CERTIFICATION AND ELIGIBILITY

**Section 23.31** We will use the procedures and standards of Part 26, except as provided in 23.31, for certification of ACDBEs to participate in our concessions program and such standards are incorporated herein. We are a member of a Unified Certification Program (UCP) administered by the Tennessee State Certification Committee (TSCC) and all of the TSCC members which will make certification decisions on behalf of the MSCAA for ACDBEs.

The TSCC's directory of eligible DBEs will specify whether a firm is certified as a DBE for purposes of part 26, and ACDBE for purposes of part 23, or both.

We will review the eligibility of current ACDBEs to make sure that they will meet the standards of part 23. We will complete these reviews as soon as possible but in no case later than April 21, 2006 or three years from the anniversary date of each firm's most recent certification, whichever is later. Also, prior to entering into a new contract, extension, or option with a currently certified ACDBE, we will review their eligibility at that time (i.e., "as soon as possible") rather than waiting until the latest date allowed under Part 23. Our schedule for this review process will be as follows:

1. We will direct all currently certified ACDBEs to submit by April 21, 2006, a personal net worth statement, a certification of disadvantage, and an affidavit of no change. The application form for this interim certification requirement, which we are calling a "compliance review" is attached at attachment 7. We have already sent letters to all currently certified concessionaires making them aware of the change and urging them to fill out the compliance review application as soon as possible. Should many currently certified ACDBEs apply for compliance reviews at once, we will focus first on all currently certified firms that are seeking new (if any) concession opportunities at the airport. Second, we will focus on all current ACDBES with concession contracts at the airport. Third, we will focus on currently certified ACDBEs not presently doing business at the airport.
2. We will ensure that all currently certified ACDBEs are recertified by April 21, 2006 or the third anniversary of their last certification or re-certification whichever is later. We have already sent a letter to all currently certified concessionaires making them aware of their obligations for re-certification and compliance review under the new rule.
3. We 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 fiscal years do not exceed \$30 million. The size standard for banks and other financial institutions is \$275 million in assets, for car rental companies it is \$40 million, and for pay telephone companies the standard is 1,500 employees. (23.33) The personal net worth standard used in determining eligibility for purposes of part 23 is \$750,000 and any person who has a personal net worth exceeding this amount is not a socially and economically disadvantaged individual, even if a member of a group is otherwise presumed to be disadvantaged. (23.35)

We will presume that a firm that is certified as a DBE under part 26 is eligible to participate as an ACDBE. However, before certifying such a firm, we will ensure that the disadvantaged owners of a DBE certified under part 26 are able to control the firm with respect to its activity in our concessions program. We are not obligated to certify a part 26 DBE as an ACDBE if the firm does not do work relevant to our concessions program. (23.37)

We recognize that the provisions of part 26, sections 26.83(c) (2-6) do not apply to certifications for purposes of part 23. We will obtain resumes or work histories of the principal owners of the firm and personally interview these individuals. We will analyze the ownership of stock of the firm, if it is a corporation. We will analyze the bonding and financial capacity of the firm. We will determine the work history of the firm, including any concession contracts or other contracts it may have received. We will compile a list of the licenses of the firm and its key personnel to perform the concession contracts or other contracts it wishes to receive. We will obtain a statement from the firm of the types of concessions it prefers to operate or the type of other contracts it prefers to perform. We will ensure that the ACDBE firm meets the applicable size standard. (23.39(a)(b)).

We acknowledge that a prime contractor includes a firm holding a prime contract with an airport concessionaire to provide goods or services to the concessionaire or a firm holding a prime concession agreement with a



recipient. We recognize that the eligibility of Alaska Native Corporations (ANC) owned firms for purposes of part 23 is governed by part 26 section 26.73(h). (23.39(c)(d))

We will use the certification standards of part 23 to determine the ACDBE eligibility of firms that provide goods and services to concessionaires. (23.39(i))

In instances when the eligibility of a concessionaire is removed after the concessionaire has entered into a concession agreement because the firm exceeded the size standard or the owner has exceeded the PNW standard, and the firm in all other respects remains an eligible DBE, we may continue to count the concessionaire's participation toward ACDBE goals during the remainder of the current concession agreement. We will not count the concessionaire's participation toward ACDBE goals beyond the termination date for the concession agreement in effect at the time of the decertification. (23.30(e))

We will use the Uniform Application Form found in appendix F to part 26, with additional instruction as stated in 23.39(g). The forms that we intend to use for certification of new ACDBEs and for re-certifications, as well as the forms that we will use to conduct compliance checks on all currently certified ACDBEs are appended at Attachment 7.

We will remove certifications from ACDBEs that are no longer eligible to participate as outlined in Attachment 8.

**SUBPART D – GOALS, GOOD FAITH EFFORTS, AND COUNTING**

**Section 23.41 Basic Overall Goal Requirement**

The MSCAA will establish two separate overall ACDBE goals; one for car rentals and another for concessions other than car rentals. The overall goals will cover a three year period and the MSCAA will review the goals annually to make sure the goal continues to fit the MSCAA’s circumstances. The MSCAA will report any significant overall goal adjustments to the FAA.

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

The MSCAA’s overall goals will provide for participation by all certified ACDBEs and will not be subdivided into group-specific goals, unless specific waiver approval is obtained from the US DOT.

**Section 23.43 Consultation in Goal Setting**

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

In its submission of its overall goals, the MSCAA will identify the stakeholders that it consulted with and provide a summary of the information obtained from the stakeholders.

**Section 23.45 Overall Goals**

The MSCAA is a medium hub primary airport. As a condition of eligibility for FAA financial assistance, the MSCAA will submit its overall goals according to the following schedule:

<b>Type of Airport</b>	<b>Initial Goal Due</b>	<b>Second Goal Due</b>	<b>Subsequent Goals Due</b>
Large/Medium Hub Primary	January 1, 2006	October 1, 2008	Every 3 years on October 1
Small Hub Primary	October 1, 2006	October 1, 2009	Every 3 years on October 1
Nonhub Primary	October 1, 2007	October 1, 2010	Every 3 years on October 1

If a new concession opportunity arises at a time that falls between the normal submission dates above and the estimated average of annual gross revenues are anticipated to be \$200,000 or greater, the MSCAA will submit an appropriate adjustment to our overall goal to FAA for approval at least six months before executing the new concession agreement.

The MSCAA will establish overall goals in accordance with the 2-Step process as specified in section 23.51. After determining the total gross receipts for the concession activity, the first step is to determine the relative availability of ACDBEs in the market area, “base figure”. The second step is examine all relevant evidence reasonably available in the MSCAA’s jurisdiction to determine if an adjustment to the Step 1 ‘base figure’ is necessary so that the goal reflects as accurately as possible the ACDBE participation the MSCAA would expect in the absence of discrimination. Evidence may include, but is not limited to past participation by ACDBEs, a disparity study, evidence from related fields that affect ACDBE opportunities to form, grow, and compete (such

as statistical disparities in ability to get required financing, bonding, insurance; or data on employment, self-employment, education, training and union apprenticeship).

A description of the methodology, in this case accompanied by a request for a waiver, to calculate the overall goal for car rentals, the goal calculations, and the data we relied on can be found in Attachment 5 to this program.

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

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

Those attachments also include the breakout of estimated race-neutral and race-conscious participation for each category of concessions agreement. These sections of the program will be reviewed annually when the goal calculation is reviewed under 23.4 1 (c).

### **Concession Specific Goals (23.25(e)(iv)(c))**

The MSCAA will use concession specific goals to meet any portion of the overall goals MSCAA 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.

We will establish concession specific goals only on those concessions that have direct ownership arrangements (except car rentals), sublease, or subcontracting possibilities. In the case of a car rental goal, where it appears that all or most of the goal is likely to be met through the purchases by car rental companies of vehicles or other goods or services from ACDBEs, one permissible alternative is to structure the goal entirely in terms of purchases of goods and services.

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

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

If the concession specific goal applies to purchases and/or leases of goods and services, the MSCAA will calculate the goal by dividing the estimated dollar value of such purchases and/or leases from by the total estimated dollar value of all purchases to be made by the concessionaire. (23.25(e)(1)(ii))

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

To be eligible to be awarded a concession that has a concession specific goal; competitors must make good faith efforts to meet the goal. A competitor may do so either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so. (23.35(e)(1)(iv)). Examples of good faith efforts are found in Appendix A to 49 CFR Part 26. The procedures applicable to 49 CFR Part 26.51-3, regarding contract goals apply to the MSCAA's concession specific goals. Specifically,

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

The following personnel are responsible for determining whether a concessionaire who has not met the concession specific goal has documented sufficient good faith efforts to be regarded as responsive: Anthony Brown, AC/DBELO, makes the initial determination in consultation with Airport Counsel, Grattan Brown.

We will ensure that all information is complete and accurate and adequately documents the concessionaire's good faith efforts before we commit to the concession agreement with the bidder/offeror.

#### Information to be submitted (26.53(b))

The MSCAA treats concessionaire's compliance with good faith efforts' requirements as a matter of responsiveness.

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

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

#### Administrative reconsideration (26.53(d))

Within five (5) business days of being informed by MSCAA that it is not responsive because it has not documented sufficient good faith efforts, a concessionaire may request administrative reconsideration. Concessionaire should make this request in writing to the following reconsideration official: Larry D. Cox, President and CEO, Memphis Shelby County Airport Authority, 2491 Winchester Road, Suite 113, Memphis, Tennessee 38116, (901) 922-8000, [larryc@mscaa.com](mailto:larryc@mscaa.com).

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

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

efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

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

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

In this situation, we will require the concessionaire to obtain our prior approval of the substitute ACDBE and to provide copies of new amended subcontracts, or documentation of good faith efforts.

If the concessionaire fails or refuses to comply in the time specified, our contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the concessionaire still fails to comply, the contracting officer may issue a termination for default proceeding.

Sample Proposal/Bid Specification:

The requirements of 49 CFR Part 23, regulations of the U.S. Department of Transportation, applies to this concession. It is the policy of the Memphis Shelby County Airport Authority to practice nondiscrimination based on race, color, national origin, religion, sex, age, marital status, veteran status, sexual orientation or disability in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this concession will be conditioned upon satisfying the requirements of this proposal/bid specification. These requirements apply to all concessions firms and suppliers, including those who qualify as an ACDBE. An ACDBE concession specific goal of \_\_\_\_\_percent of (annual gross receipts; value of leases and/or purchases of goods and services) has been established for this concession. The concession firm shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26 (Attachment 1), to meet the concession specific goal for ACDBE participation in the performance of this concession.

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

[Note: When a concession specific goal is established pursuant to the MSCAA's ACDBE program, the sample proposal/bid specification can be used to notify concession firms of the requirements to make good faith efforts. The forms found at Attachment 6 can be used to collect information necessary to determine whether the concession firm has satisfied these requirements. A proposal/bid specification is required only when a concession specific goal is established.

**Section 23.53                      Counting ACDBE Participation for Car Rental Goals**

We will count ACDBE participation toward overall goals for car rentals as provided in 49 CFR 23.53 as modified, if necessary, by our waiver request if approved.

**Section 23.55                      Counting ACDBE Participation for Concessions Other than Car Rentals**

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

**Section 23.61                      Quotas or Set-asides**

We will not use quotas or set-asides as a means of obtaining ACDBE participation.

## **SUBPART E – OTHER PROVISIONS**

### **Section 23.71                      Existing Agreements**

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

### **Section 23.73                      Privately-Owned or Leased Terminal Buildings**

We will pass through applicable provisions of part 23 to private terminal owner or lessee via our agreement with the owner or lessee. We will ensure that the owner or lessee complies with part 23. We will obtain from the owner or lessee the goals and other elements of the ACDBE program required under part 23 and it is incorporated herein and submitted as Attachment 10.

### **Section 23.75                      Long-Term Exclusive Agreements**

We will not enter into a long-term exclusive agreement for concessions without prior approval of the FAA Regional Civil Rights Office. We understand that a “long-term” agreement is one having a term of longer than 5 years. We understand that an “exclusive” agreement is one in which an entire category of a particular business opportunity is limited to a single non-ACDBE business entity. If special, local circumstances exist that make it important to enter into a long-term and exclusive agreement, we recognize that we must submit detailed information to the FAA Regional Civil Rights Office for review and approval.

### **Section 23.79                      Geographic Preferences**

We will not use a: “local geographic preference,” i.e., any requirement that gives an ACDBE located in one place (i.e., our local area) an advantage over ACDBEs from other places in obtaining business as, or with, a concession at our airport.

## **ATTACHMENTS**

- Attachment 1    Organizational Chart
- Attachment 2    ACDBE Directory
- Attachment 3    Monitoring and Enforcement Mechanisms
- Attachment 4    Overall Goal for Concessions other than Car Rental Calculation, Consultation, Breakout of Estimated Race-Neutral & Race-Conscious Participation
- Attachment 5    Request For A Waiver with Respect to Car Rental Goals Calculations and Supporting Justification.
- Attachment 6    Form 1 & 2 for Demonstration of Good Faith Efforts
- Attachment 7    Certification Application Forms
- Attachment 8    Procedures for Removal of an ACDBE’s Eligibility
- Attachment 9    Regulations 49 CFR Part 23
- Attachment 10    Goals and Elements for Privately-owned or leased Terminal Buildings

**Attachment 1**

**Organizational Chart**



**Attachment 2**

**ACDBE Directory**

A complete and current ACDBE/DBE directory is located on the Memphis International Airport website at <http://www.mscaa.com>.

## **Attachment 3**

### **Monitoring and Enforcement Mechanisms**

The Airport Authority has available several remedies to enforce the ACDBE requirements contained in its contracts, including, but not limited to, the following:

1. Breach of contract action, pursuant to the terms of the contract;
2. Breach of contract action, pursuant to state statutory and common law];
3. Actions for tortious interference with contractual relations, tortious interference with prospective business or economic advantage, suit for specific performance, actions for injunctive and other equitable relief, actions for money damages, including special and consequential damages pursuant to state statutory and common law.
4. The Authority also reserves the right to exercise all powers provided under T.C.A. Section 42-4-107.

In addition, the federal government has available several enforcement mechanisms that it may apply to firms participating in the ACDBE problem, including, but not limited to the following:

1. Suspension or debarment proceedings pursuant to 49 CFR part 23;
2. Enforcement action pursuant to 49 CFR part 31; and
3. Prosecution pursuant to 18 USC 1001.

In addition, the MSCAA has several enforcement mechanisms available to it under MSCAA policies and procedure, including but not limited to:

1. Cancellation, termination or suspension of the agreement pursuant to MSCAA policies and procedures.

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

1. We will insert the following provisions into concessions agreements and management contracts:  
The MSCAA reserves the right to audit, at its own expense, the records of any contractor or subcontractor, to ensure compliance with Part 23.

2. We will implement our compliance and monitoring procedures as follows:  
The Contract Compliance Department employs a DBE Accountant and Compliance Coordinator to specifically monitor the compliance of DBEs in addition to prime concessionaires, and other sub-prime concessionaires in the Food and Beverage and News and Gift areas.

Prime Concessionaires are required to submit accomplishment reports to the Airport Authority Property's Department indicating gross revenues with amounts attributable to ACDBE participation.

The Contract Compliance Accountant enters the revenue data detailing ACDBE Accomplishments into the Contract Compliance Department database tracking concessions activity.

The Contract Compliance Accountant calculates the percentage and dollar amount of DBE participation. Each Prime Concessionaire's ACDBE participation is tracked and compared with Concessions Program goals and contract provisions to determine compliance.

If it appears that ACDBE Participation is not consistent with the Goal, then the Contract Compliance Department contacts the Prime Concessionaires to confirm the accuracy of revenue data received.

If it is determined that a problem exists, then the Contract Compliance Department in conjunction with the Property's Division works with the Prime Concessionaires in resolving the issue.

If necessary the Contract Compliance DBE Accountant and the Contract Compliance Coordinator will visit Prime Concessionaire(s) to obtain any records necessary to confirm compliance with DBE regulations and/or policies.

**Attachment 4**

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

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

**I. Amount of Goal**

Memphis International Airport’s overall goal for concessions other than car rental (i.e. non-car rental) during the period beginning January 1, 2006 and ending September 30, 2008 is the following: **18.9%** of the total gross receipts for concessions at the Airport. The following are not included in the total gross receipts for concessions: (a) the gross receipts of car rental operations, (b) the dollar amount of a management contract or subcontract with a non-ACDBE, (c) the gross receipts of business activities to which a management contract or subcontract with a non-ACDBE pertains, and (d) any portion of a firm’s estimated gross receipts that will not be generated from a concession.

There are concession opportunities anticipated during this goal period for all non-car rental concessions with estimated gross receipts revenue of \$ **119,381,080**. If a new concession opportunity arises prior to the end of this goal period and the estimated average of annual gross revenues are anticipated to be \$200,000 or greater, the Airport will submit an appropriate adjustment to the overall goal. This will be submitted to FAA for approval at least 6 months before executing the new concession agreement. (23.45(i)).

The Airport has determined that its market area is the **Memphis MSA and National**. This is the geographical area in which the substantial majority of firms which seek to do concessions business with the airport are located and the geographical area in which the firms receive a substantial majority of concessions related revenues are located.

**A. Projected Concessions Opportunities: January 1, 2006 – September 30, 2008.**

Concessions revenue opportunity for the 3-year period is based upon the gross receipts for the preceding three years. The table below describes the gross receipts of non-car rental concessions for that period.

**Table 1: Gross Receipts for “All Other” (Non-Car Rental Concessions) for FY 2003-2005**

<b>Fiscal Year</b>	<b>Concessions (excluding car rentals)</b>
FY 2003	<b>\$34,638,992</b>
FY 2004	<b>\$34,970,002</b>
FY 2005	<b>\$44,087,273</b>
	<b>\$113,696,267</b>

**Source: Airport; compiled by KWA**

Based on the information provided in the table above, the total gross receipts for the preceding three (3) year period for “all other” (non-car rental) concessions is

\$113,696,267. This base number was multiplied by 5.00% expected growth in non-car rental concessions revenue at the airport for a total **non-car rental concessions base** of **\$119,381,080**.

**B. Determination of Market Area**

The market area is defined by the geographical area in which the substantial majority of firms which seek to do concessions business with the airport are located and the geographical area in which the firms which receive the substantial majority of concessions-related revenues are located.

Based on the addresses provided by firms who attended an airport concession open house and/or a food & beverage smoking concession pre-bid meeting, 33 out of 38 firms interested in doing business at the airport are located in the Memphis MSA. A review of available information about these firms suggests that most of these firms were interested in food and beverage or news and gift concession opportunities.

The location of non-car rental concessions was determined to be both local and national. Although concessions are physically located in the airport, their underlying business concern is not necessarily locally based. For example, a concessionaire who operates in many airports throughout the country could not accurately be described as “Memphis based” – especially if their principal offices are not in Memphis and the firm does not receive a substantial portion of its overall revenues from Memphis. To determine the location for concessions, we examined several factors such as current address, other locations, headquarters, and percent of revenue generated in Memphis.

The area in which a firm is estimated to receive most of its concession-related revenue was determined to be the “location” of that firm. The market areas for each NAICS code or concession type was then determined to be the area in which the substantial majority of current or interested firms are located. Below is the determined market area for each concession type.

**Table 2: Market Area for Non-Car Rental Concessionaires, Memphis International Airport**

<b>Local</b>	<b>National</b>
Beauty Salon	Advertising
Shoe Shine	Flight Insurance
Shuttle Service	Hotel
Taxi	Luggage cart rental
Food & Beverage	Banking services
News & Gifts	Telephone services
	Parking services

## II. Methodology used to Calculate Overall Goal

### A. Goods and Services

The Airport can meet the percentage goal by including the purchase from ACDBEs of goods and services used in business conducted at the airport. The Airport, and the businesses at the airport, should make good faith efforts to explore all available options to achieve, to the maximum extent practicable, compliance with the goal through direct ownership arrangements, including joint ventures and franchises. The dollar value from purchases of goods and services from ACDBEs may be added to the numerator, and the dollar value from purchases of goods and services from all firms (ACDBEs and non-ACDBEs) may be added to the denominator.

### B. Management Contract or Subcontract

We can meet the percentage goal by including any business operated through a management contract or subcontract with an ACDBE. We, and the businesses at the airport, will add the dollar amount of a management contract or subcontract with an ACDBE to the total participation by ACDBEs in airport concessions (both the numerator AND the denominator) and to the base from which the airport's percentage goal is calculated. However, the dollar amount of a management contract or subcontract with a non-ACDBE and the gross revenue of business activities to which the management contract or subcontract pertains will not be added to this base in either the numerator or denominator. While we realize that this appears to go against the normal rules and rationale for goal-setting, we understand that this method is nevertheless required by statute.

### C. Step 1: 23.51 (c)

We determined the base figure for the relative availability of ACDBEs other than car rentals. The base figure was calculated as follows:

The Step 1 DBE Base Figure was determined by dividing the number of ACDBE firms available by the total number of firms available to determine the relative availability of ACDBEs for each concession type. That relative availability was multiplied by the percentage of total estimated revenue to determine the weighted availability of ACDBEs in the Airport's market area for each concession type as indicated in **Table 3** below.

**Table 3: Determination of Relative Availability of ACDBEs (Non-Car Rental)**

NAICS Codes	Concession Type/Group	# of DBE Firms in Market Area	/	Total # of Firms in Market Area	=	Relative Availability of DBEs in Market Area	x	Percentage of Estimated Gross Receipts per Concession Opportunity	=	Weighted availability
722	Food & Beverage	73	/	1,619	=	4.5%	x	49.9%	=	2.2%
453220	News & Gifts	12	/	124	=	9.7%	x	25.0%	=	2.4%
54	Advertising	179,990	/	719,397	=	25.0%	x	1.9%	=	0.5%
52	Flight Insurance	44,574	/	237,627	=	18.8%	x	3.5%	=	0.7%
72	Hotel	170,701	/	432,010	=	39.5%	x	10.1%	=	4.0%
81	Luggage Cart Rental	128,050	/	384,848	=	33.3%	x	0.2%	=	0.1%
812112	Beauty Salon	20	/	231	=	8.7%	x	0.0%	=	0.0%
812990	Shoe shine	1	/	67	=	1.5%	x	0.0%	=	0.0%
52	Banking Services	44,574	/	237,627	=	18.8%	x	0.3%	=	0.1%
81	Telephone services	128,050	/	384,848	=	33.3%	x	1.1%	=	0.4%
81	Parking	128,050	/	384,848	=	33.3%	x	7.3%	=	2.4%
485999	Shuttle Service	0	/	4	=	0.0%	x	0.2%	=	0.0%
485310	Taxicab	7	/	12	=	58.3%	x	0.5%	=	0.3%
<b>Totals</b>		<b>824,102</b>		<b>2,783,262</b>				<b>100.0%</b>		<b>13.1%</b>

**Source:**

1. Tennessee Department of Transportation Certified Disadvantaged Business Enterprise Listing
2. Black Business Association of Memphis Membership Directory
3. Uniform Certification Agency DBE List
4. Memphis Women's Yellow Pages
5. Black Business Directory, Memphis
6. US Census Bureau, 2002 MSA Business Patterns
7. US Census Bureau, 2002 Survey of Business Owners

In the case of “local” DBE searches, the US Census Bureau County Business Pattern data from 2002 was utilized; data is available on the MSA level from the County Business Patterns database. In the case of “national” DBE searches, US Census Bureau’s 2002 Survey of Business Owners was utilized since this is the only known database that collects this type of data on a national level. The Survey of Business Owners only utilizes the two-digit NAICS codes, codes which are substantially broader in their scope than the six-digit codes available in the County Business Pattern data. While this situation is not ideal, this is the best data available for determining the availability of ACDBEs in the national market and therefore, for the purposes of the national searches, the two-digit Survey of Business Owners data were utilized. In order to minimize the problems caused by using the 2-digit codes, we used the data related to firms with paid employees. It should be noted that the data taken from the two-digit Survey of Business Owners accounts for less than 25% of the work projected to be performed by the airport. For this reason, we expect that any

distortions caused by the utilization of the broader two-digit codes will be unlikely to significantly distort the overall goal.

**NOTES:**

1. For concessions whose market area is national: The US Census Bureau’s 2002 Survey of Business Owners was used to determine both the number of all firms and DBEs. The number of DBEs was reduced by 2.4% because business owners were able to select more than one race. The number of firms was reduced by 2.4%, because in the 2000 population census, 2.4 percent of the population reported more than one race. Therefore without more reliable data we will assume that the 2.4% of the business reported more than one race.
2. The more general 3 digit code 722 was used for Food & Beverage to capture the wide variety of concession types. Numbers for cafeterias, caterers, and mobile food services were not used because they did not represent the type of Food & Beverage concessions at the airport.

The Step 1 base goal for “all other” (i.e. non-car rental) ACDBEs is **13.1%**.

**D. Step 2: 23.51(d)**

After calculating a base figure of the relative availability of ACDBEs, we examined evidence to determine what adjustment was needed to the base figure in order to arrive at the overall goal.

In order to reflect as accurately as possible the ACDBE participation we would expect in the absence of discrimination we have adjusted our base figure by 5.8%. Our overall goal for non-car rental concessions is 18.9%.

The data used to determine the adjustment to the base figure was:

**1. Past participation**

We evaluated the current capacity of ACDBEs to perform work in our concessions program by measuring the volume of work ACDBEs have performed in the past.

The historical ACDBE accomplishments at the Airports in recent years were examined relative to the above consideration (i). Specifically, the annual “Concessions Activity Report” for the reporting periods listed below was assessed. Notice the annual DBE percent accomplishment for each year, and the annual median for the periods reported.

**Table 4: Memphis International Airport ACDBE Accomplishments for FY 2003-FY 2005**

<b>Report Period</b>	<b>Goal</b>	<b>Accomplishment</b>	<b>Over/Under</b>
FY 2003	19.3%	24.7%	5.4%
FY 2004	21.8%	22.3%	0.5%
FY 2005	24.6%	29.7%	5.1%
<b>Median</b>	<b>21.8%</b>	<b>24.7%</b>	<b>5.1%</b>

Source: Concession Activity Reports, Memphis International Airport (FY 2003-2005)

Note: For the reporting periods in Table 4 there was not a separate goal/accomplishment for car rental and non-car rental concessions. Table 4 is an estimate of what the non-car rental goals/accomplishments would have been for the reporting periods above.



The median ACDBE accomplishment for each of the reporting periods as shown above is **24.7%**, compared to the Step 1 DBE base figure for the airport of **13.1%**. This may indicate that the Step 1 base figure underestimates ACDBE capacity at the Airport.

The Airport will adjust the Step 1 DBE base figure of 13.1% by adding it to the annual historic median DBE participation noted in Table 4, above (24.7%) for a total of 37.8% and averaging this total, for a final adjusted overall goal of **18.9%**.

## 2. **Disparity Study**

In 2002, the firm, DJ Miller Associates, Inc., completed an update to a previous Disparity study, which was originally conducted in 1995 and updated in 1999 (**DS-II**). The 2002 update, referenced here as **DS-III**, concluded that in general, there still exists underutilization of DBE firms in the Memphis International Airport's procurement. Nevertheless, this study, and the data upon which it was based, are now significantly out of date, and the study examined project types dissimilar to concessions. Therefore we have chosen not to make any adjustment based on the DJ Miller study.

In 2004, the Memphis Shelby County Airport Authority awarded a contract to N.E.R.A. to update the airport's disparity study. The new disparity study has begun and is scheduled to be completed in 2006. At this time no information is available from this study.

## **E. Adjustment of the Step 1 Goal**

The reason we chose to adjust our figure using this data was because past participation by ACDBEs indicated that the step 1 goal underestimates ACDBE capacity at the Airport. In order to reflect as accurately as possible the ACDBE participation we would expect in the absence of discrimination, we have adjusted our base figure by 5.8%. Our overall goal for non-car rental concessions is 18.9%.

## **III. Consultation with Stakeholders (23.43)**

The regulations also require that the Airport consult with stakeholders before submitting its ACDBE goals to the FAA. Stakeholders who could be consulted include, but are not limited to:

*(b) minority and women's business groups, community organizations, trade associations representing concessionaires currently located at the airport, as well as existing concessionaires themselves, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for ACDBEs, and the recipient's efforts to increase participation of ACDBEs.*

The Airport consulted with current concessionaires, potential concessionaires and local organizations interested in the ACDBE program. Attached are lists of all those who were invited to these stakeholder meetings as well as all those who attended the meetings. Immediately below, is a summary of the points made by meeting attendees about both the new rule, the availability of AC/DBEs and the ongoing problems of discrimination against businesses owned by women and minorities:

1. The PNW cap puts another barrier in the path of DBEs – one that is not imposed on non-DBE contractors.
2. The certification process itself is too burdensome – requiring the revelation of too much personal and business financial information.
3. The PNW cap imposes an unrealistic constraint on businesses given the substantial capital required to start and operate an ACDBE.
4. The concessions PNW should not mirror the construction PNW because the two industries are exceedingly different and capital requirements for each are different.
5. PNW should not be based on an arbitrary number like \$750,000, but instead should be based on some sort of mathematical formula that is related to the costs involved in opening/expanding/operating an ACDBE concession.
6. The PNW cap is problematic in part because it is based on a number that was originally set in the 1970's and has not been updated to reflect inflation or other business realities.
7. This regulation poses serious problems for ACDBEs and DBEs that have had some success, and thus may have exceeded either the size limitation or the PNW cap, but that still face discrimination and other serious obstacles.
8. Discrimination is still a problem. Several examples were given including, primes requiring more significant financial contributions from ACDBEs and DBEs than from other subs; a tendency of some primes to try to want to give ACDBEs the least desirable/most risky locations from which to operate; tendency of primes to be unwilling to work with ACDBEs and DBEs once those firms have “graduated” (either by PNW or size) from the program.
9. Concern that ACDBEs and DBEs take risks, come up with new ideas and models and then, when they are successful their ideas and models are appropriated by others and the ACDBEs and DBEs are moved out of the program.
10. Concern that the current models of operation essentially force ACDBEs and DBEs to associate with primes and do not provide any avenues for the transition to being a prime.
11. Concern that when minority businesses speak out against unfair practices they risk being labeled as complainers or malcontents.
12. Concern that some banks will not make loans, or make it difficult to obtain loans, for businesses that are doing business at airports since the actual business locations are owned by the government agency and not by the business owner. This problem also implicates the PNW cap since when banks cannot use the business location as collateral they may seek personal assets as collateral instead.

13. Concern about general discrimination against minority businesses in the larger Memphis community.
14. Concern that programs like the ACDBE program, because of size limitations and PNW caps, appear to be aimed at ensuring that AC/DBEs don't become "too successful." This appeared to be a concern about a glass ceiling type of effect.

### **Breakout of Estimated Race-Neutral & Race-Conscious Participation**

#### **Section 23.51**

The Airport will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating ACDBE participation. The Airport uses the race-neutral measures below to increase ACDBE participation. We understand that we will be expected to actually take these steps, and this is not merely a paper exercise.

1. Locating and identifying ACDBEs and other small businesses who may be interested in participating as concessionaires under 49 CFR Part 23;
2. Notifying ACDBEs of concession opportunities and encouraging them to compete, when appropriate;
3. When practical, structuring concession activities so as to encourage and facilitate the participation of ACDBEs;
4. Providing technical assistance to ACDBEs in overcoming limitations, such as inability to obtain bonding or financing;
5. Ensuring that competitors for concession opportunities are informed during pre-solicitation meetings about how the MSCAA's ACDBE program will affect the procurement process;
6. Providing information concerning the availability of ACDBE firms to competitors to assist them in obtaining ACDBE participation; and
7. Establishing a business development program (see 49 CFR Part 26:35); technical assistance program or taking other steps to foster ACDBE participation in concessions.

We estimate that, in meeting our overall goal of **18.9%**, we will obtain **5.1%** from race-neutral participation and **13.8%** through race-conscious measures.

The following is a summary of the basis of our estimated breakout of race-neutral and race-conscious ACDBE participation: The Airport Authority proposes a race-conscious goal of 13.8% and a race-neutral goal of 5.1%, for a total of 18.9%. The reason for this projected split is that the historical information on DBE participation showed that the median annual ACDBE accomplishment is above the median established annual goal. The median annual DBE participation was 24.7%, while the median goal was 21.8%. The median amount by which the goal was exceeded was 5.1%. Therefore, the Airport expects to meet 5.1% of its overall goal using race-neutral means. The balance of the goal (13.8%) is projected to be met using race-conscious means.

If we project that race-neutral measures, standing alone, are not sufficient to meet an overall goal, we will use the following race-conscious measures to meet the overall goal:

1. We will establish concession-specific goals for particular concession opportunities;
2. Negotiate with potential concessionaires to include ACDBE participation through direct ownership arrangements or measures, in the operation of the concession; and
3. With prior FAA approval, other methods that take a competitor's ability to provide ACDBE participation into account in awarding a concession

In order to ensure that our ACDBE program will be narrowly tailored to overcome the effects of discrimination, if we use concession specific goals we will adjust the estimated breakout of race-neutral and race-conscious participation as needed to reflect actual ACDBE participation (see 26.51(f)) and we will track and report race-neutral and race conscious participation separately. For reporting purposes, race-neutral ACDBE participation includes, but is not necessarily limited to the following: ACDBE participation through a prime contract that an ACDBE obtains through customary competitive procurement procedures, ACDBE participation through a subcontract on a prime contract that does not carry ACDBE goal; ACDBE participation on a prime contract exceeding a concession specific goal; and ACDBE participation through a subcontract from a prime contractor that did not consider a firm's ACDBE in making the award.

We will maintain data separately on ACDBE achievements in those contracts with and without concession specific goals, respectively.

**Stake Holders Meetings  
March 15, 2006  
Invitation List  
49 CFR Part 23**

**Current Concessionaires (Prime and Sub)**

William Anton, Chairman	Anton Air Foods	Washington, DC
Mike Jones, Vice President	Anton Air Foods	Washington, DC
Richard Moore, Vice President	CA One Services, Inc.	Freehold, NJ
Nick Liberto, Vice President	CA One Services, Inc.	Buffalo, NY
Burt Greenspan, Attorney	CA One Services, Inc.	Buffalo, NY
Joseph DiDominzio, Exec. VP	Hudson Group Retail	East Rutherford, NJ
Dick Dickson, President	Paradies Shops	Atlanta, GA
Greg Paradies, Vice President	Paradies Shops	Atlanta, GA
Elvis Harvey, MEM GM	Anton Air Foods	Memphis, TN
Steve Bass, MEM GM	CA One Services, Inc.	Memphis, TN
William Dodd, MEM GM	Creative Host	Memphis, TN
Delia Jackson, MEM GM	Hudson News	Memphis, TN
Robin Shipp, MEM GM	Paradies Shops	Memphis, TN
Andrea Herendon, GM, ACDBE	Edy's Ice Cream	Memphis, TN
Jim Neely, Owner, ACDBE	Interstate Barbeque	Memphis, TN
Edith Kelly-Green, GM, ACDBE	Lenny's	Memphis, TN

**Rental Car Agencies**

Bert Sheppard	Alamo/National	Ft. Lauderdale, FL
Renee Tedescor	Alamo/National	Tulsa, OK
Randy Phillips	Alamo/National	Memphis, TN
Tony Long	Avis	Memphis, TN
Harold Callahan	Avis	DFW Airport, TX
Bill Schultz	Budget	Memphis, TN
Howard Steinberg	Budget	Marietta, GA
Joe Olivera	Dollar/Thrifty	Tulsa, OK
Dominic D'Amico	Dollar/Thrifty	Memphis, TN
Michael Souza	Dollar/Thrifty	Tulsa, OK
Russell Jones	Enterprise	Memphis, TN
Karl Koch	Enterprise	Memphis, TN
Corporate Office	Enterprise	St. Louis, MO
Trey Clark	Hertz	Memphis, TN
Mark McBee	Hertz	Atlanta, GA
Jeff Heyward	Hertz	Atlanta, GA
Tammy Branham	Thrifty	Tulsa, OK

## **Certified ACDBEs**

John De Berry Jr.	John DeBerry & Associates
Carolyn Perez Anderson	Illum Associates, Inc.
David Porter	David Porter
Edith Kelly-Green	HK Mem, LLC
Sheldon Poole	JQ Enterprises, Inc.
Edith Kelly-Green	Kelly Green Enterprises, LLC
Kim Peacock	Kim Peacock of Memphis
Marlin Harris	Lenny's of French Village, LLC
Terrell Walker	Riise Management Group, Inc.
Bennie Marshall	Seymour, Motley, Marshall & Banks Food Service
Herman Montalvo	Intersky, Inc.
Treva D. Metoyer-Walker	TDM, Inc.
Corliss Stone-Little	ARP Consulting, LLC

## **Advocates Group**

Saundra Jackson	Small Business Assoc	Memphis, TN
Lou Garza, Jr.	Hispanic Business Alliance	Memphis, TN
Theresa Bernhardt	Hispanic Chamber	Memphis, TN
	Nat'l Assoc. of WBO	Memphis, TN
Jose Luis Escobar	Sports Hispanic Institute	Memphis, TN
Carlee McCullough	M/W Business Enterprises	Memphis, TN
	Women in Aviation Int.	Daytona Beach, FL
Cyd Mosteller	Network of Memphis	Memphis, TN
Carlene I. Leaper	Mid South Arc	Memphis, TN
Daniel J. Belcher, Jr.	Belstar, Inc	Memphis, TN
Luke Yancy	MMBC	Memphis, TN
Doris Gordon	MMBC	Memphis, TN
Gary L. Rowe	Memphis Business	Memphis, TN
	Development Corporation	
Janet Hooks	Multi-Cultural Committee	Memphis, TN
	City of Memphis Government	
Lolitha Noel	Renaissance Bus. Center	Memphis, TN
Jose Velasquez	Latino Memphis	Memphis, TN
Roby Williams	Black Business Assoc	Memphis, TN
	Memphis Regional	Memphis, TN
	Chamber of Commerce	
Melvin Jones	Black Business Directory	Memphis, TN
David Doyle	TN SB Develop Center	Memphis, TN
	Memphis Technical	Memphis, TN
	Assistance & Resource Center	
Mike Eskridge	Memphis Area Minority	Memphis, TN
	Contractors Association	

Willie Nelson	Hispanic Business Alliance National Association Of Minority Contractors	Memphis, TN Memphis, TN
Marie Kohn	National Association Of Women in Construction	Memphis, TN
Helen Riggs	American Association of University Women	Memphis, TN
Charlotte Sanders	National Coalition of One Hundred Black Women Business & Professional Women	Memphis, TN Memphis, TN
Charles Blatteis	Attorney Women in Community Service	Memphis, TN Memphis, TN

**Stakeholders Meeting  
Attendees  
MSCAA Concessions Program  
49 CFR Part 23**

<b>Melissa Partee</b>	<b>DNC THS</b>	<b>F&amp;B</b>	<a href="mailto:mpartee@dncinc.com">mpartee@dncinc.com</a>
Edith Kelly-Green	Lenny's	F&B	<a href="mailto:EKG101@aol.com">EKG101@aol.com</a>
Jayna Kelly	Lenny's	F&B	<a href="mailto:allstar01@aol.com">allstar01@aol.com</a>
Marlin Harris	Lenny's	F&B	<a href="mailto:mharris@lennyssubshop.com">mharris@lennyssubshop.com</a>
Robin Shipp	Paradies-MEM LLC	Retail	<a href="mailto:robin.shipp@theparadiesshops.com">robin.shipp@theparadiesshops.com</a>
Leila Prioleau	Paradies Shops	Retail	<a href="mailto:leila.prioleau@theparadiesshops.com">leila.prioleau@theparadiesshops.com</a>
Luke Yancy III	MMBC		<a href="mailto:lyancy@mmbc-memphis.org">lyancy@mmbc-memphis.org</a>
Derryl Benton	Hudson News	Retail	<a href="mailto:dbenton@hudsongroup.com">dbenton@hudsongroup.com</a>
James Wilson	Hudson News	Retail	<a href="mailto:jwilson@hudsongroup.com">jwilson@hudsongroup.com</a>
Marvell Mitchell	M&C Airport Ventures	Retail	<a href="mailto:MARVELL@MTCLLC.com">MARVELL@MTCLLC.com</a>
Jeremy Stephan	Enterprise	Car Rental	<a href="mailto:Jeremy.D.Stephan@ERAC.com">Jeremy.D.Stephan@ERAC.com</a>
Russell Jones	Enterprise	Car Rental	<a href="mailto:Russell.R.Jones@ERAC.com">Russell.R.Jones@ERAC.com</a>
Don Austin	Enterprise	Car Rental	<a href="mailto:donald.e.austin@erac.com">donald.e.austin@erac.com</a>
Randy Phillips	Vanguard	Car Rental	<a href="mailto:PhillipsR2@vanguardcar.com">PhillipsR2@vanguardcar.com</a>
Keith Cobb	Hertz	Car Rental	<a href="mailto:Kcobb@HERTZ.com">Kcobb@HERTZ.com</a>
Bill Schultz	Budget	Car Rental	<a href="mailto:Bills@budgetatl.com">Bills@budgetatl.com</a>
Dominic D'Amico	Dollar/Thrifty	Car Rental	<a href="mailto:Dominic.Damico@DTAG.com">Dominic.Damico@DTAG.com</a>
Michael Souba	Dollar/Thrifty	Car Rental	<a href="mailto:Mike.Souba@DTAG.com">Mike.Souba@DTAG.com</a>
Jeff Hayward	Hertz	Car Rental	<a href="mailto:jheyward@HERTZ.com">jheyward@HERTZ.com</a>
Ken Weeden	Weeden & Assoc		<a href="mailto:Kenneth-Weeden@kwaplanning.com">Kenneth-Weeden@kwaplanning.com</a>
David Porter		F&B	



## **Attachment 5**

### **Section 23.45: Overall Goal Calculation for Car Rentals**

#### **REQUEST FOR 23.13 (d) WAIVER and JUSTIFICATION**

for

Establishing the 2006-2009 Airport Concessionaires Disadvantaged Business Enterprise (ACDBE) Car Rental Goal for:

Memphis Shelby Airport Authority  
Memphis, Tennessee

#### **I. Proposed Car Rental Goal Program : Summary**

In compliance with the U.S. Department of Transportation regulations 49 CFR Part 23, issued March 22, 2005, and effective April 21, 2005 (“ACDBE Regulations”), the Memphis Shelby County Airport Authority hereby requests a waiver under 49 CFR 23.13(d) in order to use an alternative method to set goals for car rentals. We propose to have each car rental concessionaire at our airport set their own goal, with out help, consistent with Part 23, for the participation of ACDBEs and DBEs in their concessions activity at our airport. We propose that the base for the goal be the estimated annual amount that car concessionaires spend to contract for goods and services. The following sections outline all of the supporting information and rationale for our waiver request and for our preferred approach to the challenge of setting car rental goals at the airport. This waiver is initially requested only to cover this first 3 year period. At the end of that period, we will have additional information from our ongoing disparity study as well as the results of this three year experiment. At that point, we expect to have more information about how best to set car rental goals in the future.

#### **II. Background and Need for the Waiver Request.**

In setting out to comply with the new Part 23 regulation we sought to devise a goal-setting system that would provide a creative new approach to the past difficulties involved in goal setting for car rental concessionaires. We also sought a system that would allow us to work as partners with our car rental concessionaires to ensure that we used the most accurate data available and set goals that were accurate, fair and narrowly tailored. The process through which we came to our decision to submit a waiver request is set out below.

##### **A. Determination of Market Area**

Our market area is defined by the geographical area in which the substantial majority of firms which seek to do concessions business with the airport are located and the geographical area in which the firms that receive the substantial majority of concessions-related revenues are located.

Based on a list of current car rentals at the airport, the market area for car rental concessions at Memphis International Airport was determined to be nationwide. This market area was established based on the fact that car rental concession businesses at the Airport are all national or even multinational companies doing business across the country and around the globe. Even though each company may legally reside in particular states due to the geographic site of their incorporation or the location of their headquarters, it is our conclusion that the car rental business should be viewed as having a national market area. The current car rental concessionaires at the airport include: Alamo, Avis, Budget, Dollar, Enterprise, Hertz, National and Thrifty. Each of these companies is national or international in its business scope. For this reason, the airport's market area for car rental concessions is national

### **B. The Challenges Confronting MSCAA in Attempting to Set a Car Rental Goal for the Airport and A Proposed Solution.**

Establishing a goal for car rental concessionaires poses special barriers for the MSCAA and for airports across the nation. As is described below, we have surveyed the best available data and various methodologies in hopes of coming up with a goal setting methodology that is narrowly-tailored and seeks to provide ACDBEs with a full and fair opportunity to do business at the airport. As our ACDBE program documents make clear, this is a special challenge for MSCAA because we have recently been involved in litigation about our contracting affirmative action programs. While we have done our best to come up with a solution to this problem with this submission, we respectfully request that the FAA consider establishing a national goal for car rental concessions at airports or work with car rental companies to set goals for their own airport related contracting. We believe that the DOT and the FAA could use the enhanced negotiating position of the federal government to work with the Census Bureau and or the car rental companies to obtain the requisite data for the purposes of car rental goal-setting and could provide this data to airports around the country. Pending the establishment of FAA established car rental goals, and/or the development of new data from our on-going disparity study, the MSCAA requests a waiver under 49 CFR 23.13(d) in order to take a new and creative approach for the reasons outlined below.

In order to explain our methodology, we must first set forth some observations about the car rental business and the availability of data. First, a few comments on the car rental business. As the accompanying explanatory notes for the new Part 23 Rule state: "The issue of how to assign DBE Credit to car rental companies is the longest-running, most divisive issue in the history of part 23." (70 Fed. Reg. 14499) The issue is problematic for several reasons. First, our research suggests that there are exceedingly few ACDBEs certified as car rental agencies. Those that may exist apparently do not serve a national market. For this reason, the usual method of simply setting goals for ACDBE car rental companies does not work. Congress recognized this problem in 1992 when it amended the original 49 USC 47107 (e) to allow car rental companies to meet goals through their expenditure of resources with DBE car dealerships. Whether or not Congress chose the best solution to the

problem, the problem itself was obvious: because huge national car rental companies dominate the airport car rental business, it is very difficult for minority and women owned companies to break into the business.

Of course, neither airports nor the federal government can or should accept the permanent exclusion of women and minority owned businesses from the car rental field simply because the field is dominated by huge public and multi-national corporations many of which were established at a time when women and minorities confronted massive discrimination in their efforts to establish and grow businesses. Instead, car rental companies, and their congressional allies have advocated counting DBE participation based upon achieving diversity in the business conducted by car rental companies as opposed to among the various car rental concessionaires at a particular airport. Specifically, the car rental companies have advocated, and Congress has enacted, a requirement that when recipients consider whether car rental companies have met DBE goals, recipients should count the entire value of automobiles purchased by car rental companies from DBE dealerships. Whether or not counting the entire value of cars purchased from DBE dealerships is a good idea, it is included in the statute. What is quite clearly a good idea is to ensure that car rental companies that participate in federally funded airport activity seek to do business with DBEs.

Unfortunately, various data availability challenges limit the possibility of setting accurate and constitutionally sustainable car rental goals for the participation of ACDBE car rental companies in the Memphis area. The availability of data to use for setting ACDBE goals for car rentals poses a number of problems. Because the market area for car rentals is national, there is in effect only one currently available, recent and reliable source of data about the number of ACDBEs in the car rental field. This data source is the United States Census Bureau's 2002 Survey of Business Owners (2002 SBO).<sup>1</sup> 2002 SBO data is currently available broken down only to two-digit NAICS codes. This poses very significant problems because car rental activities, and car sales activities, are only subparts of the two digit codes. Each of these codes also include a significant number of other types of industries that are not necessarily related to the car rental business. For instance, new car dealerships – the businesses from which car rental concessionaires might purchase cars if they sought to business with DBEs – is included in NAICS codes 44-45 which also include all of retail trade! And car rental companies themselves are included in NAICS code 53

---

<sup>1</sup> Another option for identifying national numbers for minority-owned car rental companies would be to collect and compile a list of ACDBE car rental companies from DBE directories from all airports across the country. The problem with this approach is that MSCAA is not in a position, in terms of either financial or human resources to conduct such an undertaking. It might be possible for the FAA or DOT to collect this data, but it is beyond the current capacity of the MSCAA. Of course, even if the federal government did collect the data, it would have to take steps to ensure that the data did not underestimate or overestimate the potential availability of DBE car rental companies. For instance we would be concerned that the use of DBE directories alone would tend to exclude any companies that might be capable of doing the work but have become discouraged due to the market dominance of huge national and multinational companies. Likewise, such an approach would have to guard against inadvertently overestimating availability by counting car rental companies that serve one airport or one region, but do not actually serve a national market.

which includes all of Real Estate, Rental and Leasing. Clearly, these codes include far more than just those firms that handle new car sales or rental cars. This raises concerns about whether availability estimates based on these codes would be as accurate as we would like. Despite these concerns, we did analyze availability based on each of these codes.

The relevant data for these two codes is outlined in Table 2 below.

**Table 1: 2002 Survey of Business Owners Data for NAICS Codes 44-45 and 53**

<b><u>2002 Survey of Business Owners</u></b> NAICS Code	<b><u>Column 1: All Firms</u></b>	<b><u>Column 2: Minority-Owned Firms</u></b>	<b>Column 3: White Women-Owned Firms</b>	<b>Column 4: Minority and Women owned Firms</b>	<b>Column 5: Percent Availability Column 4 divided by Column 1</b>
44-45: Retail Trade	2577011	428915	844096	1273011	49%
53: Real Estate Rental and Leasing	2143394	207448	461155	668603	31%

Source: 2002 Economic Census, Survey of Business Owners, Preliminary Estimates of Business Ownership by Gender, Hispanic or Latino Origin, and Race: 2002, <http://www.census.gov/csd/sbo/sector/sec44.HTM> and <http://www.census.gov/csd/sbo/sector/sec53.HTM>.

While this analysis does provide a potential step one relative availability figure – either 49% or 31% -- we are concerned that this database is not sufficiently refined to meet the exacting standards we must impose in the litigious environment in which we currently operate. NAICS code 44-45 includes not only new car dealers that might make fleet sales to car rental companies, but all retail trade businesses – including everything from clothing stores to confectionary and nut stores. NAICS code 53 includes not only car rental companies, but all offices of real estate agents and brokers as well as all firms that rent formal wear. Such a broad data set hardly provides confidence that the 49% and 31% step one availability figures derived in Column 5 of Table 1 would be transferable to each subcategory of each industry sector.

It is also notable that our own recent experience suggests that a goal of either 49% or 31% may be extremely unrealistic given past participation. As Table 2 below makes clear, despite significant goals, we have been unable to attract ANY ACDBE car

rental participation in the last two years. In 2003 we had 5.2% participation, but the company that accounted for that participation is no longer certified. In sum, despite the use of race conscious goals and concerted effort by the airport, we have had an extremely difficult time attracting ACDBE participation in car rental concessions.

**Table 2: Memphis International Airport ACDBE Accomplishments for FY 2003-FY 2005**

<b>Report Period</b>	<b>Goal</b>	<b>Accomplishment</b>	<b>Over/Under</b>
FY 2003	12.0%	5.2%	-6.8%
FY 2004	11.9%	0.0%	-11.9%
FY 2005	11.9%	0.0%	-11.9%
<b>Median</b>	<b>11.9%</b>	<b>0.0%</b>	<b>-11.9%</b>

Source: Concessions Activity Report, Memphis International Airport (2003-2005)

**Note: For the reporting periods in Table 2 there was not a separate overall goal for car rental and non-car rental concessions. To better represent past participation the accomplishments car rental accomplishments were used.**

Finally, even if we were able to develop an appropriate goal based upon NAICS code 44-45, for fleet purchases as well as other purchases of goods and services by car rental companies, we do not have access to the expenditures records of the car rental companies. We do not know, for instance, how much money they spend on fleet purchases associated with our airport as opposed to expenditures for office supplies, advertising, and other goods and services at MSCAA. Not only do we not have access to this information, we suspect that it may vary from one company to the next. Obviously, some knowledge of these internal expenditure details would be necessary in order for the airport to properly set goals for car rental companies. We are concerned that requests for this data may be unavailing as car rental companies have little incentive to open their books to us in this manner. While making car rental services available to our travelers is of paramount importance to MSCAA, we suspect that the portion of revenue garnered at MSCAA, while significant, may not be sufficiently large to compel each company to open its internal books to us as a condition of doing business with the airport.

**While the car rental data situation is irresolvable for MSCAA, we would respectfully submit that the situation might be better addressed by the FAA and DOT working cooperatively with the Census Bureau and/or the car rental companies. While the Census Bureau will not make more detailed data national data available to an individual airport, they would likely do so based on a request from a federal agency. In fact, such a process would allow the FAA and DOT to jointly set a national car rental goal that could be used for all airports across the country. Likewise, while each individual airport does not have the bargaining power to force the car rental companies to release the information about their own internal contracting necessary to set goals for DBE participation**

**by car rental companies, the FAA most assuredly does have this negotiating power. Moreover, the FAA could work cooperatively with car rental companies to set goals for DBE participation at each airport, or could set national goals for DBE participation in contracting by car rental companies on a model similar to that employed by the Transit Vehicle Manufacturers. Either approach would immensely simplify the task for all involved and likely result in more accurate and legally defensible goals.**

In the meantime, however, we are left with the dilemma of how to meet our obligation to set a car rental goal for 2006 - 2008. Given the deficiencies in the data, we believe that it is appropriate to follow Congress' lead and seek to obtain ACDBE participation in the car rental sector through the efforts of the car rental companies themselves. Therefore, while we await the results of our on-going disparity study, which may shed further light on appropriate goals for the car rental sector, we hereby request a waiver under 49 CFR 23.13(d) dealing with the car rental portions of 49 CFR 23(D) so that we can try a new approach. Instead of setting one goal for car rental concessions at MSCAA, we would like to request that each car rental company with a concession at the airport set their own goal for ACDBE participation. We would direct that each company set their goal with guidance from 49 CFR parts 23 and 26 and with our assistance. We would require that such goals would be based upon demonstrable evidence of the relative availability of DBEs and ACDBEs to do business with the car rental company and would be calculated on a base of the anticipated expenditures the car rental concessionaire anticipates contracting for goods and services over a year period. We would not, of course, penalize car rental companies for not meeting their own self-imposed goals so long as they made good faith efforts to meet the goals. And we would require that each company submit a narrative to the airport describing the steps they took to set the goals and the rationale behind the establishment of the goal. Goals will be accepted and approved by the airport unless there is evidence that they were not set in good faith.

We have discussed this approach, in detail, with the car rental concessionaires at our airport and received a very positive response. On March 15, 2006 we held a stakeholders' meeting dealing specifically with car rental concessions issues. All of the car rental concessionaires currently doing work at the airport were invited. Representatives of Vanguard, Thrifty-Dollar, Hertz, Budget and Enterprise – representing an overwhelming majority of car rental concessionaires at the airport – attended the meeting. Because we approached these issues in a collaborative way and made clear that we sought a partnership with our car rental concessionaires in order to best comply with both the spirit and letter of the ACDBE regulation, the meeting was very productive. Our car rental concessionaires made clear that they would like to comply with both the spirit and the letter of Part 23, but that they have been concerned that past efforts to set goals have not resulted in appropriate goals. Interestingly, they also made clear that because of both the new PNW cap and the size standards that apply to car dealerships, even counting the purchases of car through a local dealership may not solve the problem. They noted that it is not cost effective for them to invoice cars through hundreds of different dealerships and the act of

purchasing cars through one dealership for even a few airports might well put that dealership over the size cap – or put the owner over the PNW cap. It was also noted that this problem with size and PNW limitations also posed an issue for other types of DBEs, for instance body shops which might actually exceed the limitations even if they only serviced one or two of the car rental companies. They also voiced concern that setting their goals based on their gross revenues did not make sense and that they preferred to use a base related to the estimated annual amounts that the car rental concession will contract for goods and services. They also stated that it is difficult to find certified DBEs to do the types of things that car rental concessions need. There was general discussion and agreement among the meeting participants that more could be done, with the airport and the concessionaires working together, to attempt to identify potential DBEs and assist them in learning about the benefits of certification. One concessionaire asked about the possibility of getting credit for using DBEs as second-tier subcontractors used by large suppliers like Office Depot. Participants and Authority staff agreed that this is a question that merits more discussion and attempts to discern how such credit could be applied. Finally, some concessionaires voiced concern that they need to consider price in determining the subcontractors with whom they will work. In addition to voicing these concerns, participants at the meeting voiced support for an approach like the one outlined in this waiver request and appeared very willing to work with the Authority staff to ensure that this waiver approach is successful.

Consistent with 49 CFR 23.13(d)(2)(i-iv), we believe that this approach is the one most likely to meet the goals of 49 CFR 23, to be narrowly tailored to achieve a compelling interest, and to reduce the risk of further litigation at the airport. With respect to 49 CFR 23.13(d)(i) we anticipate that asking each car rental company doing business at the airport to set their own goals with the best data available to them is likely to achieve the most full and fair level of ACDBE and DBE participation in the car rental sector at the MSCAA. With respect to 49 CFR 23.13(d)(ii) we would note that several conditions at our airport make this approach both promising and advisable. First of all, our airport has consistently demonstrated a commitment to the DBE and ACDBE programs and admirable levels of participation by ACDBEs and DBEs. There can be little doubt of our commitment to equal opportunity for all who seek to do business at the airport. Secondly, our recent history of litigation suggests that a careful, thorough and thoughtful approach to goal-setting is imperative and would serve the best interests of our contracting community, the Authority and our operating administration. With respect to 49 CFR 23.13(d)(iii-iv), this approach to addressing our car rental goals will best prevent discrimination against any individuals or groups in access to concession opportunities and other benefits of our program and is consistent with the applicable law and FAA program requirements. Finally, we hope that this approach will allow us to learn more about the various car rental company's contracting activities at our airport and will allow us to assist them in setting fair and effective goals.

### III. Public Participation

The regulations also require that the Airport consult with stakeholders before submitting its ACDBE goals to the FAA. Stakeholders who could be consulted include, but are not limited to:

*(b) minority and women's business groups, community organizations, trade associations representing concessionaires currently located at the airport, as well as existing concessionaires themselves, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for ACDBEs, and the recipient's efforts to increase participation of ACDBEs.*

Before submitting this new car rental ACDBE goal-setting approach the Airport consulted with current car rental concessionaires at the airport. Some of the comments provided during that meeting are outlined above. We also conducted separate meetings to which all other current concessionaires at the airport were invited as well as a meeting to which community organizations and concessionaires who have interest in doing work at the airport were invited. Attached are lists of all those who were invited to these stakeholder meetings as well as all those who attended the meetings. Immediately below, is a summary of the points made by meeting attendees about both the new rule, the availability of AC/DBEs and the ongoing problems of discrimination against businesses owned by women and minorities:

1. The PNW cap puts another barrier in the path of DBEs – one that is not imposed on non-DBE contractors.
2. The certification process itself is too burdensome – requiring the revelation of too much personal and business financial information.
3. The PNW cap imposes an unrealistic constraint on businesses given the substantial capital required to start and operate an ACDBE.
4. The concessions PNW should not mirror the construction PNW because the two industries are exceedingly different and capital requirements for each are different.
5. PNW should not be based on an arbitrary number like \$750,000, but instead should be based on some sort of mathematical formula that is related to the costs involved in opening/expanding/operating an ACDBE concession.
6. The PNW cap is problematic in part because it is based on a number that was originally set in the 1970's and has not been updated to reflect inflation or other business realities.
7. This regulation poses serious problems for ACDBEs and DBEs that have had some success, and thus may have exceeded either the size limitation or the PNW cap, but that still face discrimination and other serious obstacles.
8. Discrimination is still a problem. Several examples were given including, primes requiring more significant financial contributions from ACDBEs and



DBEs than from other subs; a tendency of some primes to try to to want to give ACDBEs the least desirable/most risky locations from which to operate; tendency of primes to be unwilling to work with ACDBEs and DBEs once those firms have “graduated” (either by PNW or size) from the program.

9. Concern that ACDBEs and DBEs take risks, come up with new ideas and models and then, when they are successful their ideas and models are appropriated by others and the ACDBEs and DBEs are moved out of the program.
10. Concern that the current models of operation essentially force ACDBEs and DBEs to associate with primes and do not provide any avenues for the transition to being a prime.
11. Concern that when minority businesses speak out against unfair practices they risk being labeled as complainers or malcontents.
12. Concern that some banks will not make loans, or make it difficult to obtain loans, for businesses that are doing business at airports since the actual business locations are owned by the government agency and not by the business owner. This problem also implicates the PNW cap since when banks cannot use the business location as collateral they may seek personal assets as collateral instead.
13. Concern about general discrimination against minority businesses in the larger Memphis community.
14. Concern that programs like the ACDBE program, because of size limitations and PNW caps, appear to be aimed at ensuring that AC/DBEs don't become “too successful.” This appeared to be a concern about a glass ceiling type of effect.

**Stake Holders Meetings  
March 15, 2006  
Invitation List  
49 CFR Part 23**

**Current Concessionaires (Prime and Sub)**

William Anton, Chairman	Anton Air Foods	Washington, DC
Mike Jones, Vice President	Anton Air Foods	Washington, DC
Richard Moore, Vice President	CA One Services, Inc.	Freehold, NJ
Nick Liberto, Vice President	CA One Services, Inc.	Buffalo, NY
Burt Greenspan, Attorney	CA One Services, Inc.	Buffalo, NY
Joseph DiDominzio, Exec. VP	Hudson Group Retail	East Rutherford, NJ
Dick Dickson, President	Paradies Shops	Atlanta, GA
Greg Paradies, Vice President	Paradies Shops	Atlanta, GA
Elvis Harvey, MEM GM	Anton Air Foods	Memphis, TN
Steve Bass, MEM GM	CA One Services, Inc.	Memphis, TN
William Dodd, MEM GM	Creative Host	Memphis, TN
Delia Jackson, MEM GM	Hudson News	Memphis, TN
Robin Shipp, MEM GM	Paradies Shops	Memphis, TN
Andrea Herendon, GM, ACDBE	Edy's Ice Cream	Memphis, TN
Jim Neely, Owner, ACDBE	Interstate Barbeque	Memphis, TN
Edith Kelly-Green, GM, ACDBE	Lenny's	Memphis, TN

**Rental Car Agencies**

Bert Sheppard	Alamo/National	Ft. Lauderdale, FL
Renee Tedescor	Alamo/National	Tulsa, OK
Randy Phillips	Alamo/National	Memphis, TN
Tony Long	Avis	Memphis, TN
Harold Callahan	Avis	DFW Airport, TX
Bill Schultz	Budget	Memphis, TN
Howard Steinberg	Budget	Marietta, GA
Joe Olivera	Dollar/Thrifty	Tulsa, OK
Dominic D'Amico	Dollar/Thrifty	Memphis, TN
Michael Souza	Dollar/Thrifty	Tulsa, OK
Russell Jones	Enterprise	Memphis, TN
Karl Koch	Enterprise	Memphis, TN
Corporate Office	Enterprise	St. Louis, MO
Trey Clark	Hertz	Memphis, TN
Mark McBee	Hertz	Atlanta, GA
Jeff Heyward	Hertz	Atlanta, GA
Tammy Branham	Thrifty	Tulsa, OK

## **Certified ACDBEs**

John De Berry Jr.	John DeBerry & Associates
Carolyn Perez Anderson	Illum Associates, Inc.
David Porter	David Porter
Edith Kelly-Green	HK Mem, LLC
Sheldon Poole	JQ Enterprises, Inc.
Edith Kelly-Green	Kelly Green Enterprises, LLC
Kim Peacock	Kim Peacock of Memphis
Marlin Harris	Lenny's of French Village, LLC
Terrell Walker	Riise Management Group, Inc.
Bennie Marshall	Seymour, Motley, Marshall & Banks Food Service
Herman Montalvo	Intersky, Inc.
Treva D. Metoyer-Walker	TDM, Inc.
Corliss Stone-Little	ARP Consulting, LLC

## **Advocates Group**

Saundra Jackson	Small Business Assoc	Memphis, TN
Lou Garza, Jr.	Hispanic Business Alliance	Memphis, TN
Theresa Bernhardt	Hispanic Chamber	Memphis, TN
	Nat'l Assoc. of WBO	Memphis, TN
Jose Luis Escobar	Sports Hispanic Institute	Memphis, TN
Carlee McCullough	M/W Business Enterprises	Memphis, TN
	Women in Aviation Int.	Daytona Beach, FL
Cyd Mosteller	Network of Memphis	Memphis, TN
Carlene I. Leaper	Mid South Arc	Memphis, TN
Daniel J. Belcher, Jr.	Belstar, Inc	Memphis, TN
Luke Yancy	MMBC	Memphis, TN
Doris Gordon	MMBC	Memphis, TN
Gary L. Rowe	Memphis Business	Memphis, TN
	Development Corporation	
Janet Hooks	Multi-Cultural Committee	Memphis, TN
	City of Memphis Government	
Lolitha Noel	Renaissance Bus. Center	Memphis, TN
Jose Velasquez	Latino Memphis	Memphis, TN
Roby Williams	Black Business Assoc	Memphis, TN
	Memphis Regional	Memphis, TN
	Chamber of Commerce	
Melvin Jones	Black Business Directory	Memphis, TN
David Doyle	TN SB Develop Center	Memphis, TN
	Memphis Technical	Memphis, TN
	Assistance & Resource Center	
Mike Eskridge	Memphis Area Minority	Memphis, TN
	Contractors Association	

Willie Nelson	Hispanic Business Alliance National Association Of Minority Contractors	Memphis, TN Memphis, TN
Marie Kohn	National Association Of Women in Construction	Memphis, TN
Helen Riggs	American Association of University Women	Memphis, TN
Charlotte Sanders	National Coalition of One Hundred Black Women Business & Professional Women	Memphis, TN Memphis, TN
Charles Blatteis	Attorney Women in Community Service	Memphis, TN Memphis, TN

**Stakeholders Meeting  
Attendees  
MSCAA Concessions Program  
49 CFR Part 23**

<b>Melissa Partee</b>	<b>DNC THS</b>	<b>F&amp;B</b>	<a href="mailto:mpartee@dncinc.com">mpartee@dncinc.com</a>
Edith Kelly-Green	Lenny's	F&B	<a href="mailto:EKG101@aol.com">EKG101@aol.com</a>
Jayna Kelly	Lenny's	F&B	<a href="mailto:allstar01@aol.com">allstar01@aol.com</a>
Marlin Harris	Lenny's	F&B	<a href="mailto:mharris@lennyssubshop.com">mharris@lennyssubshop.com</a>
Robin Shipp	Paradies-MEM LLC	Retail	<a href="mailto:robin.shipp@theparadiesshops.com">robin.shipp@theparadiesshops.com</a>
Leila Prioleau	Paradies Shops	Retail	<a href="mailto:leila.prioleau@theparadiesshops.com">leila.prioleau@theparadiesshops.com</a>
Luke Yancy III	MMBC		<a href="mailto:lyancy@mmbc-memphis.org">lyancy@mmbc-memphis.org</a>
Derryl Benton	Hudson News	Retail	<a href="mailto:dbenton@hudsongroup.com">dbenton@hudsongroup.com</a>
James Wilson	Hudson News	Retail	<a href="mailto:jwilson@hudsongroup.com">jwilson@hudsongroup.com</a>
Marvell Mitchell	M&C Airport Ventures	Retail	<a href="mailto:MARVELL@MTCLLC.com">MARVELL@MTCLLC.com</a>
Jeremy Stephan	Enterprise	Car Rental	<a href="mailto:Jeremy.D.Stephan@ERAC.com">Jeremy.D.Stephan@ERAC.com</a>
Russell Jones	Enterprise	Car Rental	<a href="mailto:Russell.R.Jones@ERAC.com">Russell.R.Jones@ERAC.com</a>
Don Austin	Enterprise	Car Rental	<a href="mailto:donald.e.austin@erac.com">donald.e.austin@erac.com</a>
Randy Phillips	Vanguard	Car Rental	<a href="mailto:PhillipsR2@vanguardcar.com">PhillipsR2@vanguardcar.com</a>
Keith Cobb	Hertz	Car Rental	<a href="mailto:Kcobb@HERTZ.com">Kcobb@HERTZ.com</a>
Bill Schultz	Budget	Car Rental	<a href="mailto:Bills@budgetatl.com">Bills@budgetatl.com</a>
Dominic D'Amico	Dollar/Thrifty	Car Rental	<a href="mailto:Dominic.Damico@DTAG.com">Dominic.Damico@DTAG.com</a>
Michael Souba	Dollar/Thrifty	Car Rental	<a href="mailto:Mike.Souba@DTAG.com">Mike.Souba@DTAG.com</a>
Jeff Hayward	Hertz	Car Rental	<a href="mailto:jheyward@HERTZ.com">jheyward@HERTZ.com</a>
Ken Weeden	Weeden & Assoc		<a href="mailto:Kenneth-Weeden@kwaplanning.com">Kenneth-Weeden@kwaplanning.com</a>
David Porter		F&B	

**Attachment 6**

**Forms 1 & 2 for Demonstration of Good Faith Efforts**

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

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

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

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

It is the present intent of the bidder/offeror to utilize the specific ACDBE firms identified in this bid/offer in the execution of this contract. If for any reason, one or more of the ACDBEs or DBEs identified here are unable or unwilling to participate, the bidder/offeror will make good faith efforts to replace those ACDBEs or DBEs with similar ACDBEs or DBEs.

Name of bidder/offeror's firm \_\_\_\_\_

State Registration No. \_\_\_\_\_

By \_\_\_\_\_  
(Signature) Title

**FORM 2: LETTER OF INTENT**

Name of bidder/offeror's firm: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Name of ACDBE Firm: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_

Description of work to be performed by ACDBE firm: \_\_\_\_\_

---

---

---

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

**Affirmation**

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

By: \_\_\_\_\_  
(Signature) (Title)

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

(Submit this page for each ACDBE subcontractor.)

## **Attachment 7**

### **Certification Application Forms and Compliance Review Forms**

The Certification Application and Compliance Review forms are located on the MMBC web site at <http://www.mmbc-memphis.org/forms/>



## **Attachment 8**

### **Procedures for Removal of ACEDBEs Eligibility**

#### **The Uniform Certification Agency Procedures for Decertification of Ineligible ACDBEs and DBEs on behalf of the Memphis Shelby County Airport Authority (MSCAA)**

The Uniform Certification Agency (UCA) will follow the guidelines of the 49 CFR Part 26.87. At such time as the Tennessee Unified Certification Program establishes uniform decertification guidelines, we will substitute those guidelines. In the meantime, we will adhere to the following procedures:

1. The UCA will accept complaints from anyone alleging ineligibility of a certified ACDBE or DBE firm.
  - Complaints must be in written form and signed by the complainant.
  - Complaints must be specific in the reason for the alleged ineligibility.

The UCA will review general allegations and anonymous complaints on a case-by-case basis. At a minimum, we will respond to such allegations by reviewing the allegedly ineligible company's file. The alleged allegation, any investigation and the outcome of such investigation will be documented in the company's file.

The UCA will maintain the confidentiality of the complainant following the regulations in § 26.109

2. The UCA will review information contained in the allegedly ineligible firm's file against the allegation(s) lodged by the complainant. If there is cause for further investigation, the UCA will notify the allegedly ineligible firm of the received complaint and request additional information if needed. Further investigation, not excluding an unannounced on-site review, will be conducted.
3. Prior to determination of ineligibility, the allegedly ineligible firm will be given the opportunity for an informal hearing or to respond in writing to argue their eligibility qualification. The UCA bears the burden of proving, by a preponderance of the evidence, that the firm in question does not meet the certification standards of Part 23 and/or Part 26.
4. The UCA will maintain a complete record of the hearing to include documentation, documents and audio recording, as admissible by state law, including informing the allegedly ineligible firm's owner of the recording of the hearing.
5. Failure on the part of the allegedly ineligible firm to rebut allegations in person or in writing on their eligibility qualifications will result in the proceedings listed in number seven (7).

6. The UCA will notify the MSCAA DBELO of the result of the investigation and the hearing and will proceed as directed. The UCA will provide to the MSCAA DBELO copies of: the findings, any evidence obtained during the investigation, and the verbatim record of the hearing/written argument upon request. The UCA will retain the original documentation and recordings. A copy will be provided to the allegedly ineligible firm upon request, provided that the firm pays for copying whatever records are requested.
7. After the MSCAA DBELO makes the final decision, the UCA will provide the firm that was the target of the investigation with written notice of the determination. This notification will include the reason for the decision and specific reference to the evidence in the record on which the decision was based. The firm will also be informed of the availability of an appeal to the U.S. Department of Transportation.

\* The UCA Advisory Board consists of representatives from local and federal government agencies and public corporation and such as ; the Memphis/Shelby County Airport Authority, the Memphis Area Transit Authority, City of Memphis, Memphis City School System, Memphis Light, Gas and Water and the Tennessee Valley Authority.

**Attachment 9**

**Regulations: 49 CFR Part 23**

## Attachment 10

### Goals and Elements for Privately-Owned or Leased Terminal Buildings

There are two Fixed Based Operators (FBO) leasing terminals from the MSCAA. These are Signature Flight Services and Wilson Air Center. In terms of concession opportunities, Signature operates a single small restaurant and Wilson has a small vending area.

Our attempt to conduct a full goal-setting analysis for these FBOs has been unsuccessful. While the market area for both businesses is likely the Memphis MSA, our review of lists and other sources of certified DBEs and other potential DBEs such as certified MBEs and WBEs, have revealed few or none in the areas of vending machines, wholesale food sales and wholesale sales of paper products. This problem highlights an area in which MSCAA must make new efforts to seek out and certify new DBEs. Still, in the short term it also poses significant difficulties for the MSCAA in setting goals.

For this reason, we have decided not to require the two FBOs to set numerical goals at this time. Instead, we will require the two FBOs to make good faith efforts to utilize AC/DBEs but we will not impose a goal at this time. Instead, the MSCAA will seek to identify potential AC/DBEs in the necessary specialty areas and revisit the goal-setting question when we submit new goals on October 1, 2008..

