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## Airport Law Alert: DOT Proposes Changes to ACDBE and DBE Programs

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Under the Biden Administration, the U.S. Department of Transportation has prioritized efforts to promote diversity, equity, and inclusion in all aspects of the transportation sector, including in the airport industry. On July 21, 2022, the Department took a significant step toward that goal by issuing a [notice of proposed rulemaking](#) (NPRM) regarding two related programs: the Disadvantaged Business Enterprise (DBE) program and the Airport Concession Disadvantaged Business Enterprise (ACDBE) program, administered by the FAA. *Comments on the proposed new rules are due September 19.*

Through both programs, the Department seeks to assist small businesses by preventing discrimination, and remedying past discrimination, in federally assisted transportation contracts. The NPRM proposes numerous changes to the program regulations; while some such changes are minor, others would significantly expand program eligibility and alter airport sponsors' regulatory duties. ***This Airport Law Alert highlights several proposals in the NPRM that could prove especially relevant to airport sponsors.***

### **The ACDBE Program (Part 23)**

**Definitions.** The NPRM proposes several changes to the definitions under the ACDBE program, [Title 49 of the Code of Federal Regulations, Part 23](#). The proposed changes would redefine what kind of entity qualifies as an "ACDBE" to clarify that a firm need not have provided the type of concession it proposes to provide in order to apply for certification. Because the Department believes it would be overly limiting to restrict ACDBE eligibility to past or current concessionaires, the Department proposes to expand the definition to include concessionaires that have not had previous experience.

**Definition of Concessions.** The Department also proposes to define "concession" to clarify that eligible concessions must specifically provide service to the "traveling public," rather than being focused on the public at large, including customers who are not coming onto the airport for travel. Although it is not entirely clear which businesses would not be considered as concessions subject to the ACDBE program, it appears that businesses not designed to generally serve the traveling public, such as gas stations, mini-marts or fast food restaurants open to the general public would be excluded from the definition of concessions, even if located within the airport boundary, although hotels apparently would continue to meet this requirement.

**Personal Net Worth.** Perhaps most significantly, the NPRM proposes increasing the personal net worth (PNW) cap for DBE and ACDBE owners to \$1.6 million, and makes this definition applicable to both Parts 23 and 26. The NPRM would also exclude the full balance of the

business owner's retirement accounts when calculating PNW and would make calculations of personal-property ownership among couples nationally consistent.

Small Business Program Element. The NPRM establishes a new requirement for airport sponsors that obligates them to add a small business participation element to their programs. This element must be submitted to FAA for approval as part of the ACDBE program, although it is intended to be race neutral and apply to all small businesses. The element must facilitate competition by small businesses through active measures, such as a small business set-aside, requiring subleasing opportunities for small businesses, and identifying alternative concession contracting approaches that facilitate participation by small businesses.

Long Term Exclusive Agreements. The NPRM proposes to clarify what constitutes a "long-term, exclusive agreement" under the ACDBE regulations. Currently, the regulations forbid sponsors from entering into "long-term, exclusive agreements" with concessionaires without prior FAA approval. The NPRM proposes to clarify that a "long-term agreement" exists if a concessionaire's lease term, *including options*, if exercised, would exceed five years, but the NPRM seeks comment on whether the period should be extended to 10 years and whether holdovers should also be included in the term. It also proposes to define an exclusive agreement as one conducted solely by a single business entity on the entire airport, irrespective of ACDBE participation.

Decertification. The NPRM clarifies that if an ACDBE firm becomes disqualified because the firm has exceeded the owner's PNW cap or has exceeded the small business size standard, the firm can continue to provide services as an ACDBE and have its participation counted towards the airport sponsor's ACDBE goals. However, if the firm is no longer qualified because of failure to meet its ownership and control eligibility requirements, it immediately ceases to be counted as an ACDBE. The NPRM would require firms that are decertified for exceeding PNW or size standards to provide certifications notices of change to the airport sponsor.

Direct Ownership. The NPRM proposes calculations for determining whether a concessionaire satisfies the ACDBE program's direct-ownership goals. Under the ACDBE program, airport sponsors must make good faith efforts to maximize "direct ownership" of concessionaires (49 U.S.C. § 47107(e)(3)). The NPRM proposes a means of calculating whether a concessionaire has satisfied a direct-ownership goal and would require concessionaires either to meet such goals or document sufficient good faith efforts to do so.

Reporting Requirements. The NPRM proposes additional reporting requirements for airport sponsors. The NPRM would require sponsors to include in their ACDBE programs "an element ... specifically designed to foster small business participation," and to periodically report their implementation of strategies to promote such participation. And, similar to the NPRM's requirement that recipients of grant funding compile a nationwide "bidders list" of DBE bidders, the NPRM would require sponsors to submit information about actual and prospective ACDBE participants to a national "active participants" database specified by the FAA.

Construction of Concessions Excluded. The NPRM would specify that firms that intend to perform work “exclusively related to the renovation, repair, or construction of a concession facility ... for which participation cannot be counted toward an ACDBE goal” would not be considered ACDBEs.

Local Preferences Rejected. Finally, the NPRM reiterates that a local geographic preference is not permissible. While sponsors may solicit concessions “concepts” that emphasize the culture of the airport’s region, a sponsor may not prefer local businesses for such contracts. As the NPRM explains, the ACDBE program is a national program, and local geographic preferences are not permitted regardless of concession certification status.

### **The DBE Program (Part 26)**

The bulk of the NPRM addresses the DBE program, which is regulated under [Part 26 of Title 49 of the Code of Federal Regulations](#). The NPRM proposes several changes to definitions in Part 26. The NPRM proposes to make permanent a procedural change implemented during the COVID-19 pandemic: federal grant recipients and DBEs would no longer have to submit certain documents with a sworn, notarized affidavit, but may instead submit unsworn declarations under penalty of perjury. Most significantly, as discussed in more detail below, the NPRM proposes to change the definition of “Personal Net Worth” to increase the maximum qualifying net worth for a DBE owner and exclude certain assets from that calculation.

Personal Net Worth. Some of the NPRM’s most substantial proposals concern determining which business owners qualify as a “disadvantaged persons,” such that their firms can qualify as DBEs. As previously referenced, the NPRM proposes to raise the personal net worth (PNW) cap for qualifying DBE (and ACDBE) owners from \$1.32 million to \$1.6 million.

Purchases of Goods and Services. Importantly, the NPRM proposes changes to the percentage of a contract’s DBE goals that the prime contractor may satisfy by purchasing supplies. Currently, the prime may satisfy up to 60 percent of that goal through purchases from DBE suppliers, such as manufacturers, regular dealers, distributors, and transaction facilitators. The NPRM proposes generally reducing that maximum to 50 percent. However, acquisitions from bona fide DBE “regular dealers,” as defined by the NPRM, would continue to satisfy up to 60 percent of the prime’s DBE goal, while purchases from a DBE that does not actually maintain most of the inventory it sells would qualify for up to 40 percent of the goal. In revising these requirements, the Department explains that it does not want contractors to receive substantial DBE credit for using DBEs that provide only a gratuitous, pass-through function.

DBE Certification. The NPRM proposes to facilitate the process of certifying DBEs. Most significantly, the NPRM would establish national reciprocity for state uniform certification programs (UCP) DBE certification. Under the proposal, a UCP must recognize another state UCP certification of a DBE and would only have ten business days to verify that other certification. The proposal would apply to all DBEs. Mitigating the administrative burden on DBE certifiers, the NPRM proposes to make permanent a pandemic-era policy allowing certifiers to conduct virtual “on-site” visits with DBEs seeking certification. And the NPRM

would also reduce the duration of an extension that a certifier could give itself to certify a DBE, from 60 to 30 days.

Further, the NPRM would modify the procedural protections for DBEs subject to decertification, by generally requiring the UCP to meaningfully explain any proposal to decertify a DBE, changing the requirements for decertification hearings, and addition procedural requirements regarding certification appeals to the Department.

Additional Reporting. The NPRM proposes to require federal grant recipients to report more information about DBEs in the Uniform Reports and MAP-21 data reports they submit, including additional data regarding the demographics of DBEs that the funding recipient decertifies, summarily suspects, or denies certification. (The NPRM would also require state departments of transportation to include ADCBE data in their annual reports to the Department's Office of Civil Rights.) And the NPRM would obligate funding recipients to obtain and submit data about their contractor bidders to a central, national database. Likewise, the NPRM would require states' UCPs, which handle all DBE certification for their respective states, to allow DBEs and ACDBEs to include more information about themselves in the UCP directories.

Monitoring. The NPRM proposes several requirements intended to improve contractor compliance with program obligations. The NPRM would impose new requirements regarding how funding recipients monitor DBEs and would obligate recipients to keep a "running tally" of their own DBE goal attainment and that of its contractors. The NPRM would also require recipients to ensure that prime contractors are paying their subcontractors promptly.

Design-Build. The NPRM would ease the burden for funding recipients soliciting design-build proposals by allowing bidders to submit a DBE performance plan with its proposal, in lieu of committing to hire specific DBEs or submitting a good-faith-efforts statement. And the NPRM proposes to clarify that, if a prime contractor or concessionaire wishes to terminate or substitute a DBE or ACDBE, it must give the (AC)DBE a chance to respond and then obtain the recipient's concurrence.



Comments are due to the Department by September 19, 2022, although at least two industry groups have requested that the Department extend that deadline. The Department advises that it will consider comments filed after that deadline to the extent practicable.

We remind airport sponsors that this *Airport Law Alert* is only an overview of several notable provisions of the NPRM. Sponsors and other interested parties should review the NPRM itself in detail and consult with legal counsel regarding how the proposed regulatory revisions might affect them. Airport sponsors who would like assistance submitting comments or who have questions regarding the proposed revisions are welcome to contact their Kaplan Kirsch & Rockwell lawyer or firm partners Dave Bannard or Eric Smith.