



ACDBE Joint Venture Requirements and Guidance

Proposers who will be meeting an Airport Concession Disadvantaged Business Enterprise (“ACDBE”) goal through the use of a Joint Venture Agreement (“JV Agreement”) with one or more ACDBEs are required to submit an unexecuted JV Agreement with their Proposal. This can be submitted in the form of a Partnership Agreement, Limited Liability Company Operating Agreement, or other arrangement that meets the requirements outlined by the FAA in the 2008 Joint Venture Guidance (the “Guidance”). This JV Agreement must be structured in accordance with 49 C.F.R. Part 23 (the “ACDBE Regulation”) and the Guidance.

The following information is provided to assist with the development of your JV Agreement. Any joint venture submitted to meet an ACDBE goal must be approved before contract award. If the joint venture is found to be deficient, the successful Proposer will have fourteen calendar days to correct any deficiencies. Deficiencies not corrected in this timeframe will result in disqualification of the Proposer, and the City will have the right to award the concession to the next highest scoring responsive Proposer. This information is not a comprehensive account of all joint venture elements that will be reviewed but is meant to provide guidance to Proposers in the development of their JV Agreements.

The final joint venture review prior to contract award will include a detailed review of every contract clause to ensure that the ACDBE(s) included in the agreement will participate in the concession commensurate with their ownership interest. Please note that joint ventures must comply with the definition included in the ACDBE Regulation. A breakdown with further explanation of that definition is included below:

Joint venture means an “association of an ACDBE firm and one or more other firms

The JV Agreement must be between FIRMS, not individuals. Agreements between individuals are not eligible for counting towards ACDBE participation. At least one of the firms involved in the joint venture must be certified as an ACDBE firm with the Colorado Unified Certification Program (“UCP”) in the trade of the contract.

to carry out a single, for profit business enterprise,

The JV Agreement should relate to a specific project or group of projects at a single airport. Agreements that span multiple airports are not considered joint ventures under the ACDBE program, but rather on-going business enterprises.

for which the parties combine their property, capital, efforts, skills and knowledge,

Each of the parties must bring value to the joint venture – a joint venture is not a mentor-protégé program although we anticipate that participating ACDBEs will have an opportunity to gain knowledge from the experience.



and in which the ACDBE is responsible for a distinct, clearly defined portion of the work of the contract

The ACDBE(s) must perform a distinct (defined as separate), clearly defined portion of the work of the contract.

and whose shares in the capital contribution, control, management, risks and profits of the joint venture are commensurate with its ownership interest.”

The participation of the ACDBE(s) in terms of the five areas listed above must be commensurate with its ownership interest. Note that the concept of “commensurate with ownership interest” is evaluated in each of the five listed areas.

The following information is provided to assist you in the development of a joint venture. Note that this is not meant to be a comprehensive list of all terms/conditions, but rather to be a guide relative to certain basic elements that will be reviewed.

- 1) **ACDBE Certified in the Appropriate NAICS Code.** Any ACDBE partner in the joint venture for which ACDBE credit is sought, must be certified in the trade of the contract (i.e., the NAICS codes for the appropriate food/beverage business for a food/beverage opportunity and/or NAICS codes for the appropriate retail business if a retail opportunity). Proposers who include ACDBE firms to meet an ACDBE goal who are not certified in the trade of the contract will be deemed non-responsive and not subject to further joint venture review.
- 2) **General Information.** Every joint venture should clearly spell out basic information such as: (a) the name of the joint venture; (b) the partners or members of the joint venture; (c) the ownership interest of each partner or member; (d) the term of the joint venture, and; (e) the purpose of the joint venture. Please refer to the definition of a joint venture above and note that the joint venture must relate to a specific project or group of projects at Denver International Airport (“DEN”). Also, note that the ownership percentages of each partner should not vary by facility or contract operated by the joint venture. The ownership percentages relate to ownership of the joint venture business entity, and not each individual facility or contract. Attempts to vary ownership percentages based on individual facilities or contracts operated by the joint venture will be rejected as those types of arrangements cannot be effectively monitored as required by DEN’s FAA grant assurances.
- 3) **Capital Contributions.** The amount and source of capital contributions to be made by the members to the joint venture must be addressed in detail in the JV Agreement and must be compliant with Section 3.3 of the Guidance.

If the JV Agreement provides for an initial contribution to be followed by larger contributions such as those needed for construction and working capital, the ACDBE capital contribution must be proportionate to its ownership interest in both the initial and subsequent contributions.

In the event that loans will be made from one member to another or from any/all members to the joint venture, the requirements of Section 3.3 of the Guidance apply.



Any loans between the members or between one or more of the members and the joint venture must be documented, reviewed by DEN, and must meet the requirements of the Guidance, Section 3.3. Any loan agreements must be submitted with the joint venture for review.

Note that the Guidance specifies that the ACDBE(s) should attempt to obtain financing through their own resources but may borrow a maximum of 90% of the total capital required from another partner or member. In the event that the final amount of capital that will be necessary is unknown, an estimate must be provided to the ACDBE and evidenced with the JV Agreement submission.

Events requiring additional capital contributions. The circumstances upon which additional capital contributions not required by the lease or planned in advance during the development of the JV Agreement will be required should be clearly stated in the JV Agreement. One party should not have the sole right to make a capital call outside of the agreed upon reasons for which there may be a capital call such as to cover losses, provide for necessary working capital, unplanned necessary repairs or maintenance, etc. The consequences of not making a required capital contribution must be clear in the JV Agreement. Any termination or substitution of an ACDBE must be approved in writing, in advance, by DEN. Note: Any such consequences will be scrutinized to ensure that they do not impose more stringent requirements for ACDBEs than for non-ACDBEs and that the JV Agreement remains in compliance.

- 4) **Accounting.** The method of accounting, as well as who will be responsible for the accounting, must be included in the JV Agreement. The member who is not responsible for the accounting must have the right to inspect the records. If the records are kept in another state, there should be an accommodation for records to be provided electronically. Each member must receive accounting reports regularly and the full tax return, as opposed to the K1s only, within a reasonable time after filing. In the event that accounting services are provided by the non-ACDBE, the ACDBE has a right under Section 3.5 of the Guidance to participate in deciding how services will be provided to the joint venture. FAA has reinforced the requirement that financial information related to the joint venture must be transparent to all partners.
- 5) **Distributions.** The ACDBE must share in the profits commensurate with their ownership. Distributions must be made at least quarterly and should be determined based on the joint venture's profitability and/or cash flow. The JV Agreement must specify the formula for calculating profit/distributions, as well as the distribution timing. Similarly, losses in the joint venture must be shared commensurate with ownership. There should be no fees or charges that serve to distort the profitability of the joint venture. There must not be anything in the JV Agreement that guarantees distributions to one of the parties in the absence of profits. In the event that reserves are to be withheld from distributions, the amount and purpose for any such reserves should be specified and should be reasonable in light of upcoming expenses. The JV Agreement should specify any other items applicable to distributions. For example, available cash flow may be used in a specific order before applying to cash distributions. Cash flow may be used to pay outstanding loans or other obligations before being distributed to the members but must be documented and made in accordance with an amortizations schedule submitted with the loan for



approval unless the borrower decides to repay the loan on an accelerated schedule. Any such decision must be at the sole direction, in writing, of the ACDBE borrower.

- 6) **Bank Accounts.** The JV Agreement must specify how the decision to utilize a specific bank for the joint venture is made. The parties should agree on the bank(s) to be used. In the event that the company's funds are to be deposited or swept into in the account of one of the members, all members must agree, and a separate accounting of the funds must be maintained. Any investment of the funds must be transparent and approved by all parties. Any interest earned from the accounts must be accounted for and credited to the joint venture.
- 7) **Overall Management.** The Guidance provides for participation by the ACDBE(s) in the overall management or "governance" of the joint venture, as well as responsibility for a distinct, clearly defined portion of the work. This section deals with the overall management or "governance" of the joint venture. This participation is often accomplished through a management committee or managing board. Whatever the structure, the end result must be that the ACDBE participant(s) has the ability to participate in the overall management of the joint venture commensurate with their ownership interest. There must be some meaningful decisions that require a unanimous vote. In establishing how this participation occurs in your JV Agreement, the following points are important considerations:
 - a. The Management or Governance Committee should meet at least quarterly.
 - b. The number of participants on the committee from each company and the voting rules (i.e., how many votes needed to pass an action, how many votes each member of the committee executes, etc.) should be clearly spelled out. In the event that more than one committee governs the joint venture, the authority and responsibility, as well as the rules for each committee must be detailed in the JV Agreement.
 - c. Requirements for a quorum should include the participation of the ACDBE member(s). If not, it must be demonstrated that the ACDBE will participate in the overall management in another way.
 - d. There must be a sufficient number of significant decisions that require a unanimous vote so that a determination can be made regarding the ACDBE's participation in the overall management. For example, unanimous decisions might include the establishment of reserves, approval of significant expenditures, taking loans or lending money, changes in operating structure, etc.
 - e. Documentation in the form of minutes and schedules for meetings must be kept.
 - f. If the JV Agreement provides that decisions can be made without a meeting, such decisions must be limited in scope and there must be a mechanism for notifying members and providing an opportunity for input.
- 8) **Overall Management, Designation of a Joint Venture Manager.** In the event that a joint venture agreement provides for the designation of a Joint Venture Manager, the powers/duties assigned to the Manager must be reasonable and limited. The Joint Venture Manager cannot be responsible for management of the work assigned to the ACDBE unless the managing member is the ACDBE. The Manager's powers should be limited and they should not have unilateral authority to take actions or make decisions that would have a major impact on the other partner, such as making capital calls not



previously anticipated, deciding when distributions will be made, expending large sums, establishing reserves, etc.

- 9) **Distinct, clearly defined portion of the work** – This area is critical as under the FAA ACDBE regulation, this is what may be counted towards an ACDBE goal. In accordance with the ACDBE Regulation, Section 23.55(d), participation in a joint venture is counted as follows:

23.55(d) When an ACDBE performs as a participant in a joint venture, count a portion of the gross receipts equal to the distinct, clearly defined portion of the work of the concession that the ACDBE performs with its own forces toward ACDBE goals.

In addition, the principle of “commercially useful function” also applies as stated in 23.55(a) and 26.55(c)(1) and (2):

23.55(a) You count only ACDBE participation that results from a commercially useful function. For purposes of this part, the term commercially useful function has the same meaning as in part 26, §26.55(c), except that the requirements of §26.55(c)(3) do not apply to concessions.

26.55(c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

“A[n] [AC]DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved....”

“A[n] [AC]DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation....”

The following points should be considered in developing the roles/responsibilities of each participant:

a. Meaning of distinct, clearly defined

The roles/responsibilities assigned to the ACDBE participant(s) must be separate from the roles/responsibilities assigned to the non-ACDBE participant(s) and must be clearly laid out in the JV Agreement in sufficient detail so as to provide no ambiguity about who will be responsible for what tasks. Roles that are described as “assisting,” “evaluating,” “participating in,” etc. are not clearly defined. Shared roles cannot be credited unless the specific portion of the work assigned to the ACDBE is clear and meets all other criteria.

b. Burden of proof

The burden of proving that the joint venture meets the requirements of the ACDBE Regulation and the Guidance by a preponderance of the evidence is on the applicant.

c. Employees



The ACDBE is not required to employ the employees but is required to control the employees performing their assigned roles/responsibilities. The ACDBE must have the authority to independently hire/fire employees performing their role. The employees must report directly to the ACDBE firm. If employees report daily to the Joint Venture Manager or an employee of the non-ACDBE, and periodically to the ACDBE, that would not be considered reporting to the ACDBE. The burden of proving that the ACDBE controls the employees is elevated when the employees are employed by the joint venture as opposed to the ACDBE and is elevated even further when the employees are employed by the non-ACDBE.

d. Independence

The preamble to the 2005 ACDBE regulation, 49 CFR part 23, states as follows: “If the ACDBE participant is not required to perform independently a distinct portion of the joint venture’s work, it becomes very easy for a prime concessionaire seeking to circumvent ACDBE requirements by having an ACDBE “silent partner” on its payroll.” The ACDBE must have the authority to perform their role independently. This does not mean that the ACDBE can perform in any way it wishes as it is understood that the firm is a single company and has responsibilities under the lease and under the overall governance of the company. However, the ACDBE should have substantial control over the roles assigned to it. If staff performing the ACDBE role does not perform the portion of the work assigned to the ACDBE and that work is not directed by the ACDBE, the work would not be considered as being performed independently and ACDBE credit would not be assigned.

e. Nature of the Relationship

The ACDBE participant is a firm, not an individual. The ACDBE owner should not be treated as an employee (i.e., have a schedule, set hours, etc.), but as a partner. Roles and responsibilities are assigned to the firm, not the owner.

f. Roles/Responsibilities

Roles/responsibilities assigned to the ACDBE must be commensurate with ownership interest. The assigned roles must be clear, quantifiable, and must represent a commercially useful function. These roles must be meaningful and bring significant value to the partnership. Frequently, the ACDBE is assigned a series of small roles, such as finding minority/women owned vendors, maintaining a relationship with the airport, attending tenant meetings, etc. These types of roles are difficult to quantify and, absent evidence quantifying the value of these roles, will not be given significant, if any, credit.

The description of the roles/responsibilities should be clear. For example, if the role of an ACDBE is described as “hiring and training an assistant manager,” it must be clear that the assistant manager actually reports to the ACDBE on an ongoing basis, and the duties of the assistant manager which are controlled by the ACDBE must be specified. Roles that are described by percentage values, for example “30% of the purchasing,” are insufficient to determine credit unless the actual duties involved in that activity are described. Note that not all purchasing is considered equal, especially if the purchasing involves purchasing from the Prime rather than



meeting with vendors, selecting specific product, negotiating price, etc. In addition, the full list of duties associated with a specific task will be evaluated in order to determine credit. For example, if an ACDBE is assigned 30% of the purchasing activity, that will not equate to 30% credit for the joint venture as there are other duties associated with the operation such as operational duties and administrative duties. A 30% role in the purchasing activities may actually equate to less than 10% credit for the joint venture once all duties pertaining to the complete operation are considered.

- 10) **Organization Charts.** An organization chart **must** be provided along with the JV Agreement for DEN review and must accurately reflect the reporting structure for all positions employed by the joint venture or employed by one of the partners and assigned to the joint venture. The organization chart should include a notation regarding who will employ each party and must accurately reflect day-to-day reporting structure, including all levels and positions. Any dotted-line reporting structures should be explained. The Guidance provides that the ACDBE should be able to hire/fire employees performing its portion of the work without the approval of the non-ACDBE.
- 11) **Management/Administrative Fees.** The Guidance provides that any fees charged for services must represent a reimbursement of actual costs. The Guidance further provides that:
 - a. Management fees must be specific to the clearly defined services provided
 - b. Method of charging must be detailed (i.e., dollar amount or percentage, reimbursement vs. percentage paid and reconciled annually)
 - c. Method and timing (annually at a minimum) for reconciliation to cost must be provided
 - d. Royalty, Franchise, or License Fees may be charged to the joint venture based on one of two conditions as follows:
 - i. The fee is being paid to an unrelated third party for a valid franchise or license arrangement.
 - ii. The fee is paid to one of the participants or an affiliate of one of the participants as a reimbursement of demonstrable costs only. This charge must meet the same standards required for Management/Administrative fees.
- 12) **Requirements to Purchase from One of the Members.** Purchases may be made by one of the members through its corporate affiliation. However, in such a case, the cost of products must be charged to the venture at landed cost without mark-up.
- 13) **Events of Default.** Any events of default will be carefully reviewed. It should be noted that an ACDBE participant may only be terminated/substituted with the advance written approval of the airport in accordance with Section 23.25 of the ACDBE Regulation. Clauses that permit the termination of an ACDBE member without the advance written approval of DEN cannot be approved as those clauses do not comply with the ACDBE Regulation (Section 23.25(e)(1)(iv)).
 - a. **ACDBE Loss of Certification.** ACDBE certification loss should not be an event of default if the ACDBE loses its certification due to exceeding the size standard or exceeding the personal net



worth cap during the original term of the JV Agreement without extensions or options as ACDBE participation may continue to be counted in this case.

- 14) **Limitations on ACDBE.** There can be no clauses included in the JV Agreement that have the effect of limiting the ACDBE's ability to control its own business. Clauses that limit the ACDBE's ability to have a Change in Control or management of its own business are not acceptable. In accordance with the DBE and ACDBE regulations (49 CFR parts 23 and 26), an ACDBE may not be terminated without the prior written consent of DEN which may only be granted with good cause. A change in control of the ACDBE firm that does not impact the firm's certification, on its own, may not be considered good cause.
- 15) **Non-Compete Clauses.** In general, non-compete clauses cannot be used to prevent the ACDBE from teaming with other non-ACDBEs. In some cases, such as in franchise or licensed operations, the franchise or license agreement may require certain non-compete clauses, however the non-compete clauses should apply equally to all parties. Non-complete clauses must not be overly-broad. For example, a non-compete may apply to a similar business in a specific terminal but should not apply to non-comparable businesses or those located in other terminals.
- 16) **Transfer of Interest.** The conditions under which a party may transfer its interest to another party should be included in the JV Agreement. A requirement that transfers from the ACDBE must be to another ACDBE are acceptable. Other than that, requirements should not be more stringent on the ACDBE than on the non-ACDBE.
- 17) **Dissolution.** Procedures for winding up and dissolving the business should be provided, including provisions for disposing of assets and making final distributions.
- 18) **Other.** The JV Agreement may not contain other provisions that have the effect of creating an imbalance in control or risk. The entire JV Agreement will be reviewed to ensure that such an imbalance is not created to the extent that the entire JV Agreement becomes ineligible for counting towards ACDBE participation or towards an ACDBE goal.