

City of San José

Norman Y. Mineta San José International Airport

Airport Concession Disadvantaged Business Enterprise Program

September 16, 2014

(Updated April 10, 2017)

POLICY STATEMENT

Section 23.1, 23.23 Objectives/Policy Statement

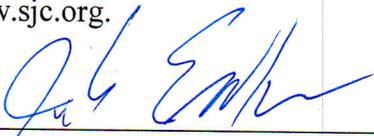
The City of San José (City) has established an Airport Concession Disadvantaged Business Enterprise (ACDBE) Program for Norman Y. Mineta San José International Airport (Airport) in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 23. Norman Y. Mineta San José International Airport (Airport) 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 City has signed airport grant assurances that it will comply with Part 23.

It is the policy of the City 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 49 CFR Part 23 eligibility standards are permitted to participate as ACDBEs at our airport;
5. To help remove barriers to the participation of ACDBEs in opportunities for concessions at our airport; and
6. To provide appropriate flexibility to our airport in establishing and providing opportunities for ACDBEs.

Christopher Hickey, Director of the Office of Equality Assurance, has been designated as the ACDBE Liaison Officer (ACDBELO). In that capacity, Mr. Hickey 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 the City in its financial assistance agreements with the Department of Transportation.

The City has disseminated this policy statement to the San José City Council and all departments of the City. We have distributed this statement to ACDBE and non-ACDBE concessionaire communities in our area. This distribution is accomplished by posting our policy statement on the Airport's website at www.sjc.org.



Julie Edmonds-Mares
Deputy City Manager



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 Definitions

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

Section 23.5 Applicability

Norman Y. Mineta San José International Airport is a primary airport. The City is the sponsor of federal airport funds authorized for airport development at the Airport after January 1988 that were authorized under Title 49 of the United States Code.

Section 23.9 Non-discrimination Requirements

As a recipient of DOT financial assistance, the City will meet the non-discrimination requirements provided in Part 26, §26.7 with respect to the award and performance of any concession agreement, management contract or subcontract, purchase or lease agreement, or other agreement covered by Part 23.

The City 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 other agreement covered by 49 CFR Part 23 on the basis of race, color, sex or national origin.

In administering its ACDBE Program, the City 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 City acknowledges these representations are also in accordance with obligations contained in its Civil Rights, DBE and ACDBE Airport grant assurances.

The City will include the following assurances in all concession agreements and management contracts it executes with any firm:

- (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 City will comply with and is subject to the provisions of 49 CFR Part 26 (§§ 26.101, 26.105, 26.107 and 2 CFR parts 180 and 1200.

The City 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.

2 CFR Part 180, Government-wide Debarment and Suspension (Non-procurement), effective November 15, 2006, adopted and supplemented by DOT at 2 CFR Part 1200, effective June 2, 2008, provides Office of Management and Budget (OMB) guidance for Federal agencies on the government-wide debarment and suspension system for non-procurement transactions, programs and activities. 2 CFR Part 1200 adopts the OMB guidance in subparts A through I of 2 CFR part 180, as supplemented by part 1200, as the Department of Transportation policies and procedures for non-procurement suspension and debarment.

The City's 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.

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

(a) For a firm that does not meet the eligibility criteria of subpart D 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 the firm under 2 CFR parts 180 and 1200.

(b) For a firm that, in order to meet ACDBE goals or other AC/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 D of this part, DOT or FAA may initiate suspension or debarment proceedings against the firm under 2 CFR parts 180 and 1200..

(c) 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.

(d) 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 City's ACDBE program or otherwise violates applicable Federal statutes.

Compliance reviews: The FAA may review the City's compliance with this part at any time, including but not limited to, reviews of paperwork, on-site reviews, and review of the City'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 City may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

SUBPART B – ACDBE PROGRAMS

Section 23.21 ACDBE Program Updates

The Airport is a medium hub primary airport required to have an ACDBE program.

As a condition of eligibility for FAA financial assistance, the City will submit its ACDBE program for the Airport and overall goals to FAA according to Section 23.45(a).

Until the City's new ACDBE program is submitted and approved, we will continue to implement our ACDBE program that was in effect previously, except with respect to any provision that is contrary to 49 CFR Part 23.

This ACDBE program will be implemented at Norman Y. Mineta San José International Airport.

When the City makes significant changes to its ACDBE program, we will provide the amended program to the FAA for approval prior to implementing the changes.

Section 23.23 Administrative Provisions

Policy Statement: The City is committed to operating its ACDBE Program in a non-discriminatory manner.

The City'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:

Christopher Hickey
Director
Office of Equality Assurance
City of San Jose
200 East Santa Clara Street - Fifth Floor
San Jose, CA 95113
Telephone: (408) 535-8481
Email: Christopher.Hickey@sanjoseca.gov

In that capacity, the ACDBELO is responsible for implementing all aspects of the ACDBE Program and ensuring that the City complies with all provisions of 49 CFR Part 23. The ACDBELO has direct, independent access to the Director of Aviation concerning ACDBE program matters. An organizational 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 one 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 the City'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. 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).
10. Plans and participates in ACDBE training seminars.
11. Acts as liaison to the Uniform Certification Process in the State of California.
12. Provides outreach to ACDBEs and community organizations to advise them of opportunities.
13. Reviews and responds to requests for ACDBE termination or substitution.

Other personnel assigned ACDBE Program responsibilities include the:

A. Airport Managers who will:

1. review concession and management contract and subcontract proposals, advising the DBELO regarding ACDBE participation levels offered;
2. provide recommendations on award of concession and management contracts; and
3. review and report on ACDBE participation during the progress of concession and management contracts and subcontracts.

B. The Chief Financial Officer, who is responsible for consulting with the Director of Aviation and ACDBELO on financial requirements, including bonding, licenses, insurance, financial information and other requirements; and

C. The Procurement Specialist, who is responsible for:

1. providing advice, guidance, and information to the DBELO regarding the City's procurement policies and procedures and requirements, and for reviewing recommendations by the ACDBELO regarding incorporating ACDBE participation language in City request for proposal and concession contract documents;
2. ensuring that ACDBE goals and procedures adopted by the City are properly contained in City concession and management contract advertisements; and
3. advising the ACDBELO of the results of concession and management advertisements for recommendation to the City regarding contract awards.

Directory: The City through the California Uniform Certification Program (CUCP), maintains a directory identifying all firms eligible to participate as DBEs and ACDBEs. The Directory lists 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 CUCP revises the Directory at least annually. We make the Directory available at <http://californiaucp.org/cucpDirectory.htm> or by contacting the California Department of Transportation/Unified Certification Program at 1-916-324-1700. The website link to the Directory may be found in Attachment 2 to this program document. (26.31)

Section 23.25 Ensuring Nondiscriminatory Participation of ACDBEs

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

The City will never exclude any person from participation in, deny any person the benefit of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 23 on the basis of race, color, sex or national origin.

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

If the City projects that race-neutral measures alone, are not sufficient to meet an overall goal, it will use race-conscious measures as described in Section 23.25 (e) (1-2) and Attachments 4 and 5 of this plan. (23.25(e)).

The City 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. (23.25(f)).

The City will not use set-asides or quotas as a means of obtaining ACDBE participation. (23.25(g)).

Section 23.27 Reporting

The City will retain sufficient basic information about its 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 three (3) years following the end of the concession agreement or other covered contract.

It is the contractor's responsibility to maintain records and documents for three (3) years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of the City or DOT. This reporting requirement is also extended to any certified ACDBE.

Beginning March 1, 2006 we will submit to the FAA Regional Civil Rights Office, an annual ACDBE participation report on the form in Appendix A of Part 23. We will submit the report to the FAA Regional Civil Rights Office via hard copy of the form or electronically via dbE-Connect.

Section 23.29 Compliance and Enforcement Procedures

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

At San José Mineta International Airport, the ACDBE sales are tracked as a percentage of overall concession revenue. The Airport maintains these statistics and graphs the results on a quarterly basis to ensure that work committed to ACDBEs at contract award is actually performed by the ACDBEs.

Monitoring of the work on-site may be conducted in conjunction with monitoring of concession performance for other purposes. On a daily basis airport staff monitors the ongoing operation of the concession areas including but not limited to: standards of service, pricing, cleanliness and opening and closing times. These standards are specifically listed in each agreement and together with customer service surveys and direct observations we are able to gauge compliance.

The City will monitor compliance of its contractors on concession related contracts, including review of records of all contracts, leases, joint venture agreements, or other concession-related agreements, consistent with the requirements of Part 23 and this Program. The City may impose such contract remedies as are available under the contract and under federal, state and local law and regulations for non-compliance. Failure to carry out the City's ACDBE Policy and goals and obligations set forth above shall constitute a breach of contract that may result in termination of the Agreement, or such other remedy as deemed appropriate by the City.

The following monitoring and enforcement provisions are included in the City's concession agreements and management contracts:

Compliance. Failure to carry out the City's ACDBE Program Policy and obligations in accordance with the requirements of Part 23 shall constitute a breach of contract that may result in termination of the Agreement, or such other remedy as deemed appropriate by the City.

Monitoring and Enforcement. The City will monitor and enforce compliance of its contractors on concession related contracts consistent with the requirements of Part 23. This monitoring includes the City's review of records of all contracts, leases, joint venture agreements, or other concession-related agreements. The City will also monitor the work on-site, which may be conducted in conjunction with monitoring of concession performance for other purposes.

Audits. The City may also perform interim audits of contract payments to ACDBE management firms or subcontractors. The audit will review payments to ACDBE subcontractors and gross receipts earned by or payments for goods and services and management agreements to ACDBEs to ensure that the actual amount equals or exceeds the dollar amounts stated in the report of proposed ACDBE participation.

Replacement/Substitutions of ACDBEs. For concession contracts that include concession-specific ACDBE goals, Concessionaire will be required to have a valid arrangement with the ACDBE(s) designated by Concessionaire to fulfill the contract goal. For any such concession contracts that include concession-specific ACDBE goals, Concessionaire will be allowed to substitute the originally designated ACDBE(s) only if it is demonstrated to the City that the ACDBE(s) is unwilling or unable to perform. For any such concession contracts that include concession-specific ACDBE goals, Concessionaire's ability to negotiate a more advantageous contract with another ACDBE firm will not be considered a valid basis for substitution. For any such concession contracts that include concession-specific ACDBE goals, if an ACDBE is unwilling or unable to perform, Concessionaire shall inform the City in writing and include documentation to justify the substitution, including a statement from the ACDBE to be replaced acknowledging the substitution. In any such instance, Concessionaire will identify a replacement ACDBE or document good faith efforts to replace the ACDBE with another ACDBE. For any such concession contracts that include concession-specific ACDBE goals, if Concessionaire or a non-ACDBE firm performs the work originally committed to an ACDBE, the Concessionaire shall submit a revised ACDBE plan to the City detailing how the ACDBE goal will be met or will supply documentation detailing good faith efforts which have been made to meet the goal.

ACDBE Reports. Non-car rental concessionaires shall submit, in the format required by the City, a monthly report of ACDBE utilization. Car rental concessionaires shall submit, in the format required by the City, a quarterly report of ACDBE utilization. The City reviews the reports that are required to be submitted by concessionaires to ensure that the ACDBE participation levels remain in compliance with any contract requirements and to verify that the work committed to ACDBEs is actually performed by ACDBEs. This information will

also be used to provide the statistical data for the achievement reports to the FAA. If the City determines that any concessionaire is not complying with any contract requirements regarding this Program, the City will implement the contract remedies specified above.

Notices to DOT. The City will also notify the Department of Transportation of any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take 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 Section 26.107.

We will consider similar action under our own legal authorities, including responsibility determinations in future contracts. Attachment 3 lists the regulation, provisions, and contract remedies available to us in the events of non-compliance with the ACDBE regulation by a participant in our procurement activities. (26.37).

SUBPART C – CERTIFICATION AND ELIGIBILITY

Section 23.31 The City will use the procedures and standards of Part 26, except as provided in Section 23.31, for certification of ACDBEs to participate in our concessions program and such standards are incorporated herein.

The City is a member of the Unified Certification Program (UCP) administered by the State of California, which will make ACDBE certification decisions on behalf of the City.

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

Prior to entering into a new contract, extension, or option with a currently certified ACDBE, the City will review ACDBE eligibility. The City's schedule for this review process will occur during the solicitation evaluation process for a new contract and prior to executing any extension option of an existing contract. The City will rely on the CUCP's certification decisions to confirm an ACDBE's continued eligibility.

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 \$56.42 million for non-car rental ACDBEs and \$75.23 million for car rental ACDBEs. The size standard for banks and other financial institutions is \$1 billion in assets, for pay telephone companies is 1500 employees and for ACDBE automobile dealers is 350 employees.

Section 23.35 The personal net worth standard used in determining eligibility for purposes of part 23 is \$1.32 million. *We recognize that Personal net worth* means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth (PNW) does not include the following:

- (1) The individual's ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification; and
- (2) The individual's equity in his or her primary place of residence.

An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

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 otherwise presumed to be disadvantaged. (See 23.3 - *Personal Net Worth* definition and 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. (23.39(e)).

We will use the Uniform Application Form found in appendix F to part 26 with additional instruction as stated in Section 23.39(g).

SUBPART D – GOALS, GOOD FAITH EFFORTS, AND COUNTING

Section 23.41 Basic Overall Goal Requirement

The City 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 City will review the targets annually to make sure they continue to fit the City's circumstances. The City will report any significant overall 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 City's overall targets provide for participation by all certified ACDBEs and are not subdivided into group-specific goals.

Section 23.43 Consultation in Goal Setting

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

When submitting our overall goals, we will identify the stakeholders that we consulted with and provide a summary of the information obtained from the stakeholders.

Section 23.45 Overall Goals

Norman Y. Mineta San José International Airport is a medium hub primary airport. As a condition of eligibility for FAA financial assistance, the City will submit its overall goals for the Airport according to the following schedule:

Due Date: October 1, 2017 for Federal Fiscal Years 2018, 2019, and 2020

Next Goal Due: October 1, 2020 for Federal Fiscal Years 2021, 2022, and 2023

Subsequent Goals Due: 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 City will submit an appropriate adjustment to its overall goal to the FAA for approval no later than 90 days before issuing the solicitation for the new concession opportunity. (23.45(i)).

The City 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 to examine all relevant evidence reasonably available in the sponsor’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 City 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).

The sponsor will arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by ACDBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under § 26.39 of this part.

A description of the methodology 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))

The breakout of estimated race-neutral and race-conscious participation can be found with the goal methodology in Attachments 4 and 5 to this program. This section of the program will be reviewed annually when the goal calculation is reviewed under Section 23.41(c).

Concession Specific Goals (23.25(c)(e)(1)(iv))

The City will use concession specific goals to meet any portion of the overall goals the City 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. We 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 DBEs (23.25 (f)). Car rental firms are not required to change their corporate structure to provide for direct ownership arrangements. In the case of a car rental goal, where it appears that all or most of the goal is likely to be met through 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 City 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 City will calculate the goal by dividing the estimated dollar value of such purchases and/or leases from ACDBEs by the total estimated dollar value of all purchases to be made by the concessionaire. (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. Examples of good faith efforts are found in Appendix A to 49 CFR Part 26. The procedures applicable to 49 CFR Sections 26.51 and 26.53, regarding contract goals and good faith efforts apply to the City's concession specific goals. (23.25(e)(1)(iv)). Specifically,

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

The Airport Managers 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.

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 City treats bidder/offeror's compliance with good faith effort 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 an 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 three (3) days of being informed by the City 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: Norberto Dueñas, City Manager, 200 East Santa Clara Street, San Jose, California 95113, (408) 535-8100, Norberto.Duenas@sanjoseca.gov. 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. 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 DOT.

Any business that fails to demonstrate that it achieved the concession-specific ACDBE participation goal and fails to demonstrate that it made sufficient good faith efforts to do so shall be deemed “non-responsive” and, therefore, shall be ineligible for award of the concession contract.

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

The City 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 or amended subcontracts, or documentation of good faith efforts.

If the concessionaire fails or refuses to comply in the time specified, our contracting office will give notice and opportunity to cure until satisfactory action has been taken. If the concessionaire still fails to comply, the contracting officer may issue a termination for default proceeding.

When a concession specific goal is established pursuant to the City’s ACDBE Program, the following specification will be used to notify concession firms of the requirements to make good faith efforts:

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 City of San José to

practice nondiscrimination based on race, color, sex, or national origin 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 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.

Section 23.53 Counting ACDBE Participation for Car Rental Concessions

We will count ACDBE participation toward overall goals other than car rental as provided in 49 CFR Section 23.53.

Section 23.55 Counting ACDBE Participation for Concessions Other Than Car Rentals

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

Section 23.57 Falling Short of Meeting Overall Goals

If the awards and commitments shown on the Airport's Uniform Report of ACDBE Participation (found in Appendix A to this Part) at the end of any fiscal year are less than the overall goal applicable to that fiscal year, the City will:

- (1) Analyze in detail the reasons for the difference between the overall goal and our awards and commitments in that fiscal year; and
- (2) Establish specific steps and milestones to correct the problems identified in our analysis in order to enable the City to meet fully its goal for the new fiscal year. The City will retain analysis and corrective actions in its records for three years and make it available to the FAA, on request, for their review.

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 23.75 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 business entity. If special, local circumstances exist that make it important to enter into a long-term and exclusive agreement, the City will submit detailed information to the FAA Regional Civil Rights Office for review and approval.

Section 23.77 Preemption of Local Requirements

In the event that a State or local law, regulation, or policy differs from the requirements Part 23, the City must, as a condition of remaining eligible to receive Federal financial assistance from the DOT, take such steps as may be necessary to comply with the requirements of Part 23.

The City will clearly identify any State or local law, regulation, or policy pertaining to minority, women's, or disadvantaged business enterprise concerning airport concessions that adds to, goes beyond, or imposes more stringent requirements than the provisions of Part 23. FAA will determine whether such a law, regulation, or policy conflicts with this part, in which case the requirements of this Part will govern. FAA will not approve the City's ACDBE program if there are such provisions that conflict with the provisions Part 23.

If not deemed in conflict by the FAA, the City must write and administer such a State or local law, policy, or regulation separately from the ACDBE program. Copies of any such provisions and the legal authority supporting them will be provided to the FAA with the City's ACDBE program submission.

However, nothing in Part 23 preempts any State or local law, regulation, or policy enacted by the governing body of the City, or the authority of any State or local government or recipient to adopt or enforce any law, regulation, or policy relating to ACDBEs, as long as the law, regulation, or policy does not conflict with Part 23.

Section 23.79 Geographic Preferences

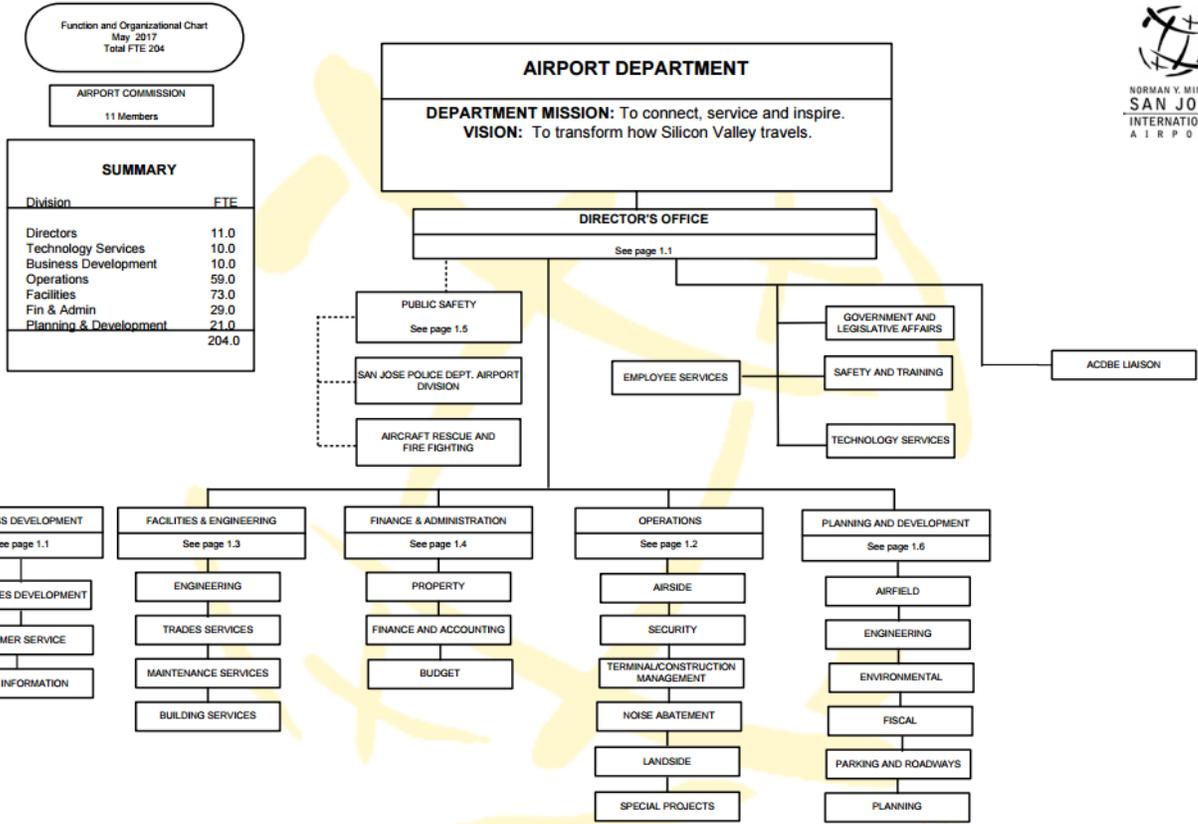
We will not use a: “local geographic preference”, i.e., any requirement that gives an ACDBE located in one place (e.g., *our local area*) an advantage over ACDBEs from other places in obtaining business as, or with, a concession at our airport.

ATTACHMENTS

Attachment 1	Organizational Chart
Attachment 2	Website link to DBE/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	Overall Goal for Car Rentals Calculation, Consultation, Breakout of Estimated Race-Neutral & Race- Conscious Participation
Attachment 6	Form 1 & 2 for Demonstration of Good Faith Efforts
Attachment 7a	DBE/ACDBE Certification of Required FAA Assurances and Contract Elements
Attachment 7b	Certification of DBE/ACDBE Workplace Inspection
Attachment 8	Website link to Certification Application Forms
Attachment 9	Procedures for Removal of ACDBEs Eligibility
Attachment 10	State’s UCP Agreement
Attachment 11	Website Link to Regulations: 49 CFR Part 23

Attachment 1

Organization Chart



Attachment 2

Website Link to California DBE Directory:

<http://californiaucp.org/cucpDirectory.htm>

Attachment 3

Monitoring and Enforcement Mechanisms

The City 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; and
2. Breach of contract action, pursuant to the San Jose Municipal Code Chapter 4.10, Debarment of Contractors from City Contracts.

In addition, the federal government has available several enforcement mechanisms that it may apply to firms participating in the ACDBE program, 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.

The City will implement various mechanisms to monitor program participants to ensure they comply with Part 23, including, but not limited to, the insertion of the following provisions into concessions agreements and management contracts:

Compliance. Failure to carry out the ACDBE Policy and obligations set forth above shall constitute a breach of contract that may result in termination of the Agreement, or such other remedy as deemed appropriate by the City.

Audits. The City may also perform interim audits of contract payments to ACDBE management firms or subcontractors. The audit will review payments to ACDBE subcontractors and gross receipts earned by or payments for goods and services and management agreements to ACDBEs to ensure that the actual amount equals or exceeds the dollar amounts stated in the report of proposed ACDBE participation.

Replacement/Substitutions of ACDBEs. For concession contracts that include concession-specific ACDBE goals, Concessionaire will be required to have a valid arrangement with the ACDBE(s) designated by Concessionaire to fulfill the contract goal. For any such concession contracts that include concession-specific ACDBE goals, Concessionaire will be allowed to substitute the originally designated ACDBE(s) only if it is demonstrated to the City that the ACDBE(s) is unwilling or unable to perform. For any such concession contracts that include concession-specific ACDBE goals, Concessionaire's ability to negotiate a more advantageous contract with another ACDBE firm will not be considered a valid basis for substitution. For any such concession contracts that include concession-specific ACDBE goals, if an ACDBE is unwilling or unable to perform, Concessionaire shall inform the City in writing and include documentation to justify the substitution, including a statement from the ACDBE to be replaced acknowledging the substitution. In any such instance, Concessionaire will identify a replacement ACDBE or document good faith

efforts to replace the ACDBE with another ACDBE. For any such concession contracts that include concession-specific ACDBE goals, if Concessionaire or a non-ACDBE firm performs the work originally committed to an ACDBE, the Concessionaire shall submit a revised ACDBE plan to the City detailing how the ACDBE goal will be met or will supply documentation detailing good faith efforts which have been made to meet the goal.

ACDBE Reports. Non-car rental concessionaires shall submit, in the format required by the City, a monthly report of ACDBE utilization. Car rental concessionaires shall submit, in the format required by the City, a quarterly report of ACDBE utilization. The City reviews the reports that are required to be submitted to the City by concessionaires to ensure that the ACDBE participation levels remain in compliance with any contract requirements and to verify that the work committed to ACDBEs is actually performed by ACDBEs. This information will also be used to provide the statistical data for the achievement reports to the FAA. If the City determines that any concessionaire is not complying with any contract requirements regarding this Program, the City will implement the contract remedies specified above.

Notices to DOT. The City will also notify the U.S. Department of Transportation of any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take 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 Section 26.107.

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 will be accomplished by the Airport Property Section's monitoring of ACDBE sales, which are tracked as a percentage of overall concession revenue. The Airport maintains these statistics and graphs the results on a monthly basis. In addition, on a daily basis, airport staff monitors the ongoing operation of the concession areas including but not limited to: standards of service, pricing, cleanliness and opening and closing times. These standards are specifically listed in each agreement and together with customer service surveys and direct observations we are able to gauge compliance.

In our reports of ACDBE participation to FAA, we will show both commitments and attainments, as required by the DOT reporting form.

Attachment 4

Section 23.45: Overall Goal Calculation for Concessions Other Than Rental Cars

Amount of Goal: 10.64%

Name of Recipient: City of San Jose, California
Norman Y. Mineta San Jose International Airport (SJC)

Goal Period: FFY 2018-2020 – October 1, 2017 through September 30, 2020

Overall Three-Year Goal: 10.64%, to be accomplished 100% through race-neutral measures

Market Area

The market area is the geographical area in which the substantial majority of firms which seek to take part in concessions business with the Airport are located and the geographical area in which the firms receiving the substantial majority of concessions related revenues are located. The City has determined the following market areas for new concession opportunities (excluding rental car concessions) anticipated at SJC during this goal-setting period:

Table 1 - Market Area for New Non- Rental Car Concessions

Type of Concession	Market Area
Advertising	National
Food & Beverage	National
Airport Lounge	Undetermined
Parking Facilities Management	State of California

Base of Goal

To calculate the base of the goal the City considered the previous three years of gross concession receipts and the projected potential concession revenue (gross receipts) three years into the future including upcoming new opportunities.

Table 2 – Base of Goal

Federal Fiscal Year	Concessions Revenue (Excluding Rental Cars)
2014	\$ 46,780,566
2015	\$ 49,286,222
2016	\$ 58,499,858
Total	\$154,566,646
Average	\$ 51,522,215

Source: SJC Uniform Reports of ACDBE Participation, 2014-2016

The City estimates that revenues to existing concessions will grow by approximately 3% over the next three years rates based on market conditions and concessionaire’s performance. The base of the goal was calculated as follows: $\$51,522,215 \times 3\% = 1,545,666$ + $\$51,522,215 = \$53,067,881$ base of goal.

The concession opportunities anticipated during this goal period are: Advertising, Airport Lounge, Food & Beverage, and Parking Facilities Management with estimated gross receipts of \$53,067,881.

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.

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 City will submit to the FAA an appropriate adjustment to the overall goal. A proposed adjustment will be submitted to FAA for approval no later than 90 days before issuing the solicitation for the new concession opportunity. (23.45(i)).

Methodology used to Calculate Overall Goal

Goods and Services

The City can meet the percentage goal by including the purchase from ACDBEs of goods and services used in businesses conducted at the airport. We, and the businesses at the airport, shall 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.

Management Contract or Subcontract

The City 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.*

ACDBE Availability Base Figure (Step 1: Section 23.51(c).)

The City first calculated the relative availability of ACDBEs for anticipated FFYs 2018-2020 concession opportunities shown in Table 3 as follows:

Ready, willing, and able non-car rental ACDBEs in the Market Area
 Base figure % = _____

All ready, willing and able non-car rental concession firms in the Market Area

Table 3 –Availability of ACDBEs for FFYs 2018-2020 Concession opportunities

NAICS	Type of Concession	Total ACDBEs	Total All Firms	ACDBE Availability
541810	Advertising	428	13,279	3.22%
561110	Airport Lounge	0	2	0%
722310	Food and Beverage	293	26,592	1.10%
812930	Parking Facilities Management	8	2,783	0.28%
561612	- Parking security services	55	1,691	3.25%
561720	- Janitorial services	<u>100</u>	<u>5,072</u>	<u>1.97%</u>
	Total	163	9,546	1.71%
Total		884	49,417	1.79%

Compiled by Exstare Federal Services Group, LLC
 Note: ACDBE availability percentages are rounded.

The data sources used to derive the numerator were:

1. California Unified Certification Program DBE/ACDBE database
2. FAA dbE-Connect online DBE/ACDBE database
3. SJC's FFYs 2014, 2015 and 2016 Uniform Report of ACDBE Participation
4. SJC's tenant list, December 2016
5. SJC's interested parties lists
6. Trade association¹ membership lists
7. Concessions information from other airports²

The data sources used to derive the denominator were:

1. California Unified Certification Program DBE/ACDBE database
2. FAA dbE-Connect online DBE/ACDBE database
3. SJC's FFYs 2014, 2015 and 2016 Uniform Report of ACDBE Participation
4. SJC's tenant list, December 2016
5. SJC's interested parties lists
6. Trade association³ membership lists
7. Concessions information from other airports⁴
8. U.S. Census Bureau, 2014 County Business Patterns data

Based on the data sources, the City then calculated its overall ACDBE availability base figure for all non-rental car concessions (existing and anticipated) of 7.45% as shown in Table 4:

¹ Airport Minority Advisory Council; Airports Council International-North America

² LAWA,OAK, SAN, SFO, DFW, RNO, DIA, SMF, RNO, MSP

³Airport Minority Advisory Council; Airports Council International-North America

⁴ LAWA,OAK, SAN, SFO, DFW, RNO, DIA, SMF, RNO, MSP

Table 4 – ACDBE Availability Base Figure

NAICS Code	All Non-Rental Car Concessions	Estimated Gross Receipts FFYs 2018-2020	Potential ACDBE Gross Receipts	ACDBE Race- Neutral Goal
541810	Advertising *	\$ 8,087,329	\$ 260,412	3.22%
561110	Airport Lounge Management*	5,130,181	-	0.00%
522110	Automated Teller Machines	990,800	-	0.00%
541870	Brochure Display/Distribution	220,844	-	0.00%
722310	Food and Beverage*	112,229,869	1,234,529	1.10%
523130	Currency Exchange	771,006	77,101	10.00%
812990	Luggage Carts	873,339	-	0.00%
45121; 45322	News, Gifts & Specialty Retail	57,526,939	12,558,131	21.83%
561431	Security Checkpoint Mailing Services	19,957	-	0.00%
488190	Passenger Screening Services	10,170,406	-	0.00%
515120	Television Services	135,000	-	0.00%
454210	Vending	474,136	-	0.00%
812990	Self-service Massage Chairs	417,001	-	0.00%
447190	CNG Fueling Station Management	-	-	0.00%
812930	Parking Facilities Management*	226,545	226,545	1.71%
485113	Shuttle Bus Management Services	264,234	264,234	2.00%
	TOTALS	\$197,537,586	\$14,620,952	7.40%
	FFYs 2018-2020 BASE FIGURE			7.40%

Source: SJC, FFYs 2018-2020 revenue projections

*Concession opportunities anticipated during FFYs 2018-2020

Note: ACDBE revenue amount and percentages are rounded

Step 2 Adjustments to the Base Figure (Section 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 Step 1 base figure in order to arrive at the overall goal.

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

Past ACDBE Participation

As shown in Table 5 below, median past ACDBE participation in concessions other than rental car concessions has been 12.73%.

Table 5– Past ACDBE Participation

Federal Fiscal Year	Total Gross Revenue (excludes rental cars)	ACDBE Gross Revenue (excludes rental cars)	ACDBE Participation Achievement	ACDBE Race-Neutral Goal	ACDBE Participation Achievement Over/Under Goal
2012	\$49,829,076	\$5,973,947	11.99%	9.67%	+2.32%
2013	\$55,906,729	\$6,332,524	11.33%	9.67%	+1.66%
2014	\$63,090,538	\$9,782,858	15.51%	9.67%	+5.84%
2015	\$68,156,935	\$9,599,821	14.08%	10.57%	+3.51%
2016	\$86,092,403	\$10,957,184	12.73%	10.57%	+2.16%
Median Past Participation			12.73%		

SJC Uniform Report of ACDBE Participation, FFYs 2012-2016

The Airport's historical volume of ACDBE participation in non-rental car concessions provides relevant evidence for adjusting the Step 1 base availability figure of 7.40%. The average of the sum of the median past ACDBE participation of 12.73% and the current step one ACDBE availability of 7.40% equals 10.07% $((12.73\% + 7.40\%)/2 = 10.07\%)$.

Brochure Display/Distribution Past Participation. The race-neutral goal established in the 2015-2017 ACDBE plan for this concession was 40 percent. In August 2016, the Airport sought providers of these services by conducting research in the established market area (State of California) and in other states to try to identify companies in addition to the incumbent. In early February 2017, one of our consultants (Exstare) also conducted research on a sampling of ACDBE certified firms listed in the CUCP directory. Although a number of firms were identified by the Airport and the consultant, none were providers of the specific services utilized at SJC. We also learned that firms providing these services are very specific to certain areas. The incumbent provider, Certified Folder, a non-ACDBE, is the only company that serves the greater San Jose region and does not have any competitors in the region. In addition, ACDBE firms have not pursued or participated in the brochure/display distribution concession at SJC in the past. As the only ready, willing and able company that could provide the services, the City extended Certified Folder's contract as a sole source provider.

Food and Beverage Past Participation. Since SJC has consistently met and exceeded its ACDBE participation goals in the food and beverage concessions, the City compared the food and beverage availability percentage of 1.10% to past ACDBE participation in SJC's food and beverage concessions. As shown in Table 6, median past participation achieved over the last three years has been 28.45%. The average of the sum of the median past ACDBE participation of 28.45% and the current step one ACDBE availability of 1.10% for food and beverage concessions equals 14.78% $(1.10\% + 28.45\%)/2 = 14.78\%$. We believe 14.78% more accurately reflects ACDBE participation that can be achieved in the food and beverage concessions during this three-year period. We also considered the availability and capacity of ACDBE firms participating in airport food and beverage concessions.

Table 6 - Past ACDBE Participation in Food and Beverage Concessions

Federal Fiscal Year	Food and Beverage Concessions Gross Receipts	ACDBE Gross Receipts	ACDBE Race-Neutral Goal	ACDBE Participation Achievement	ACDBE Participation Achievement Over/Under Goal
2014	\$27,277,493	\$6,925,117	13.32%	25.39%	+12.07%
2015	\$30,262,278	\$8,605,346	13.32%	28.45%	+15.13%
2016	\$34,225,441	\$9,918,191	13.32%	28.99%	+15.67%

Sources: SJC 2012-2016 revenue data

News, Gifts and Specialty Retail Past Participation. A 21.83% goal was established in the Airport’s 2006-2008 ACDBE plan for the News, Gifts and Specialty Retail concessions agreements that do not expire during this goal setting period. While SJC does have some ACDBE participation in this concession segment and its concessionaires continue to attempt in good faith to achieve the goal, participation has not reached the 21.83% level. The Airport therefore reviewed the goal to assess whether it continues to be appropriate and whether a change in the ACDBE participation goal is warranted.

Some of the factors that have affected achievement of the goal are: the original joint venture did not move forward, changes in prime concessionaire ownership have occurred two times, and even through documented good faith efforts, the current prime concessionaire has not been able to secure ACDBE participation at the 21.83% level.

As shown in Table 7 below, median past participation achieved over the last three years has averaged 6.27%. We expect that level of participation to continue during this goal period with the continued participation of the existing ACDBE. Based on the factors above and the current level of ACDBE participation, the City believes a decrease in ACDBE participation is warranted, and proposes to adjust the 21.83% level to the median participation level of 6.27% during this goal period. The Airport continues to work with all vendors to stress the importance of providing ample opportunities for small businesses to participate in our market. The Airport will continue to explore additional vehicles in order to provide opportunities for ACDBE firms both inside and outside the current prime contracts.

Table 7 - Past ACDBE Participation in News, Gifts and Specialty Retail Concessions

Federal Fiscal Year	News, Gifts and Specialty Retail Concessions Gross Receipts	ACDBE Gross Receipts	ACDBE Race-Neutral Goal	ACDBE Participation Achievement	ACDBE Participation Achievement Over/Under Goal
2014	\$12,971,874	\$813,263	21.83%	6.27%	-15.56%
2015	\$13,848,400	\$955,061	21.83%	6.90%	-14.93%
2016	\$16,256,696	\$1,003,576	21.83%	6.17%	-15.66%

Sources: SJC 2012-2016 revenue data

Based on these further analyses, we determined to adjust the step 1 base figure from 7.40% to 10.64% as shown in Table 8 below. The City believes this adjusted goal figure more accurately reflects ACDBE participation that can be achieved during this three-year period.

Table 8 – ACDBE Availability Base Figure

NAICS Code	All Non-Rental Car Concessions	Estimated Gross Receipts FFYs 2018-2020	Potential ACDBE Gross Receipts	ACDBE Race- Neutral Goal
541810	Advertising*	\$ 8,087,329	\$ 260,412	3.22%
561110	Airport Lounge*	5,130,181	-	0.00%
522110	Automated Teller Machines	990,800	-	0.00%
541870	Brochure Display/Distribution	220,844	-	0.00%
722310	Food and Beverage*	112,229,869	16,587,575	14.78%
523130	Currency Exchange	771,006	77,101	10.00%
812990	Luggage Carts	873,339	-	0.00%
45121; 45322	News, Gifts & Specialty Retail	57,526,939	3,606,939	6.27%
561431	Security Checkpoint Mailing Services	19,957	-	0.00%
488190	Passenger Screening Services	10,170,406	-	0.00%
515120	Television Services	135,000	-	0.00%
454210	Vending	474,136	-	0.00%
812990	Self-service Massage Chairs	417,001	-	0.00%
447190	CNG Fueling Station Management	-	-	0.00%
812930	Parking Facilities Management*	226,545	226,545	1.71%
485113	Shuttle Bus Management Services	264,234	264,234	2.00%
	TOTALS	\$197,537,586	\$21,022,806	10.64%
FFYs 2018-2020 BASE FIGURE				10.64%

Sources: SJC, FFYs 2018-2020 revenue projections; ACDBE receipts and percentages compiled by Exstare Federal Services Group, LLC

*Concession opportunities anticipated during FFYs 2018-2020

Note: ACDBE gross receipts and percentages are rounded.

Other Factors. The City did not identify any disparity studies within our jurisdiction that examine ACDBE participation in airport non-rental car concessions. Thus, we did not use a disparity study in determining an adjustment to the base figure.

We also did not identify any data on employment or training programs relevant to SJC's rental car concessions that may be a factor in adjusting the base ACDBE availability figure.

The Airport will review its non-rental car goal annually to determine whether the 10.64% goal is appropriate or can be adjusted. We will inform the FAA of any significant adjustments to the goal before our next scheduled plan submission.

Overall Goal Methodology

Advertising (NAICS Code 541810)

The existing Advertising concession agreement at SJC will expire June 30, 2020. A new agreement is anticipated to begin in FFY 2020, on July 1, 2020.

Market Area

The majority of seekers of this opportunity are national operators with locations throughout the country. The firm generating all of the gross revenue from the Advertising concession is among those national operators. SJC's Market Area for the Advertising concessions business is National.

Step One

Of the 13,279 firms in the Market Area, 428 are ACDBEs. As a result, the availability of ACDBE firms for this opportunity accounts for 3.22% of all the firms identified.

Step Two

The City did not make an adjustment to its 3.22% availability figure. The City believes ACDBE participation can be achieved by including the purchase from ACDBEs of goods and services used in the Advertising concession at the Airport. ACDBE participation may also be in the form of other legal arrangements that meet the eligibility standards in 49 CFR Part 23, Subpart F.

Airport Lounge (NAICS Code 561110)

The existing Airport Lounge concession agreement at SJC will expire January 31, 2019. An agreement is anticipated to be in place for FFY 2019, on February 1, 2019.

Market Area

Airport lounge concessions appear to be a niche market with very few operators. The firm currently generating all of SJC's Airport Lounge Management revenue is located in Plano, TX. We therefore concluded that a market area for SJC's Airport Lounge Management business could not be determined.

Step One

None of the firms identified in the data sources operate airport lounge concessions. As a result, the availability of ACDBE firms for this opportunity accounts for 0% of all the firms identified.

Step Two

We did not make an adjustment to our 0% availability figure because:

- None of the firms identified in the data sources operate airport lounge concessions.
- ACDBE firms have not pursued this opportunity in the past.
- There has not been past ACDBE participation in this concession.
- The Airport does not have data to rely on from a disparity study, as we could not identify any disparity studies conducted in the State of California or elsewhere that are specific to airport lounge management concessions.

Food and Beverage (NAICS Code 722310)

The existing food and beverage concession agreements at SJC will expire June 30, 2020. A new agreement is anticipated to begin in FFY 2020, on July 1, 2020.

Market Area

The majority of seekers of this opportunity are national operators with locations throughout the country. The firm generating the majority of gross revenue from the Food and Beverage concession is among those national operators and located in South San Francisco, CA. We determined a National Market Area for the Food and Beverage concessions business.

Step One

Of the 26,592 firms in the Market Area, 293 are ACDBEs. As a result, the availability of ACDBE firms for this opportunity accounts for 1.10%% of all the firms identified.

Step Two

The City adjusted the 1.10% availability figure to 14.78 % after comparing the food and beverage availability percentage of 1.10% to past ACDBE participation in SJC's food and beverage concessions. As shown in Table 5, median past participation over the last three years has been 28.45%. The average of the sum of the median past ACDBE participation of 28.45% and the current step one ACDBE availability of 1.10% equals 14.78% $(1.10 + 28.45\%)/2 = 14.78\%$ We believe 14.78% more accurately reflects ACDBE participation that can be achieved in the food and beverage concessions during this three-year period. We also considered the availability and capacity of ACDBE firms participating in airport food and beverage concessions.

Parking Facilities Management

The existing Parking Facilities Management agreement at SJC will expire March 31, 2020. A new agreement is anticipated to begin in FFY 2020, on April 1, 2020.

Market Area

The substantial majority of firms seeking to conduct parking facility management business are located throughout the state of California. The firm currently receiving all of SJC's parking

facilities management revenue is located in San Jose, California. We therefore determined that the state of California is the Market Area for SJC's parking facilities management contract opportunity.

Step One

From the CUCP DBE/ACDBE database, 163 ACDBE and potential ACDBE firms were identified in the Market Area. Of these firms, 8 are parking operators, 100 are janitorial services firms and 55 are parking security services firms.

From the U.S. Census Bureau, 2014 County Business Patterns data, 9,546 firms were identified in the Market Area. Of these firms, 2,783 are parking operators, 5,072 are janitorial services firms, and 1,691 are parking security services firms. As a result, the availability of ACDBE firms accounts for 1.71% of all firms identified.

Step Two

Several factors were considered in determining whether to adjust the base figure. We estimated that of the management fees paid to the concessionaire, 95% will be for management services, 2.50% will be for janitorial services, and 2.50% will be for security services. The estimated cost of the services that could be provided by subcontractors in this management contract can vary based on the decision of the contractor and the requirements of the contract. Based on the scope of work, the availability of ACDBE firms in the Market Area, and our cost estimates for the services associated with this opportunity, we determined that an adjustment to the availability figure is not warranted.

PUBLIC PARTICIPATION

Consultation with Stakeholders (Section 23.43)

Before establishing the final overall goal and submitting it to the FAA, invitations were sent to individuals and organizations to seek their participation in SJC's stakeholder consultation meeting that was held March 8, 2017 at the San José City Hall. These individuals and organizations represent concessionaires currently located at the airport, potential concessionaires, 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 City's efforts to increase participation of ACDBEs.

Notice of the stakeholder consultation meeting was also posted on the SJC's website at: <http://flysanjose.com/acdbe>.

The following stakeholders expressed interest and/or participated in the consultation meeting:

Dennis King, Hispanic Chamber of Commerce/SBDC
ShahRukh Rahman, Kerstin Peitz –Lufthansa
Greta Randev, Fox Rent-a-Car
Sean Ahmed, Green Signz & Company
Walter Wilson, Minority Business Consortium
Deborah Quintana, Worldwide Money Exchange
Maritza Job, Worldwide Money Exchange
Juan Job, Worldwide Money Exchange
Hong Chu, Anthonng Calicur, CLEAR
Pedro Alvarez, Andale Operations
Stephano Medina, UNITE HERE
Njambi Mungai, JR Lester & Associates, Ltd.
Rod Tafoya, Mission Yogurt, Inc.
Councilmember Charles “Chappie” Jones
Kim Becker, SJC
Drake Beaton, SJC
Matthew Kazmierczak, SJC
Nina Grayson, City of San Jose
Chris Hickey, City of San Jose
Mara Rosales, Rosales Business Partners LLC
Nancy West, Exstare Federal Services Group, LLC

Stakeholder comments. The March 8, 2017 Stakeholder Consultation Meeting agenda addressed (1) the proposed triennial goal presentation; and (2) an overview of FFYs 2018-2020 concession opportunities. SJC and its consultants explained that the goals were intended to represent “the floor and not the ceiling” in terms of desired ACDBE participation. No concerns or comments were made about the proposed ACDBE goals.

Participants in the stakeholder meeting raised a variety of other issues. One topic which generated much comment was presented by the question: “What can SJC do to increase capacity of ACDBEs?” A trade organization noted that SJC did not participate in the organization’s small business conference and recommended that SJC strengthen its relationships with ethnic chambers of commerce. SJC staff agreed that strong business relationships are important to achieving its goals and described its past and current efforts in achieving that objective. An out of state ACDBE participant commended SJC’s outreach efforts, stating that she became aware of a SJC concession opportunity because SJC staff had made a strong effort to reach her and invite her participation in the solicitation process.

A concessionaire asked a question about the potential impact to SJC’s ACDBE Program should the federal government decide to abolish the Federal DBE requirements embodied in federal law. SJC’s response was that the City of San Jose and SJC were committed to seeking and engaging with small business enterprises, including disadvantaged businesses, as business partners irrespective of any changes to the Federal DBE Program.

A labor organization raised questions about the solicitation and contract award determination processes. Its representative also sought information about worker retention, labor harmony,

and wage policies and requirements in concession solicitations and contracts. Additionally a participant asked how SJC evaluated ACDBE provisions in requests for proposals e.g. on a pass/fail or other basis. Another stakeholder asked if the food and beverage master concessionaire contract would be unbundled. SJC staff addressed the questions in detail.

Following the consultation and consideration of the adjustment factors above, SJC and its consultants engaged in an additional outreach effort to eighteen (18) trade organizations, including AMAC, ACI-NA and AAAE, in an extra effort to solicit more comments from stakeholders. No substantive comments were received.

Breakout of Estimated Race-Neutral & Race Conscious Participation
Section 23.51

The City will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating ACDBE participation. The City uses the following race-neutral measures to increase ACDBE participation:

- Locating and identifying ACDBEs and other small businesses who may be interested in participating as concessionaires;
- Notifying ACDBEs of concession opportunities and encouraging them to compete, when appropriate;
- When practical, structuring concession activities so as to encourage and facilitate the participation of ACDBEs;
- Providing advice to ACDBEs in overcoming limitations such as the inability to obtain bonding, financing, or technical assistance;
- Ensuring that competitors for concession opportunities are informed during pre-solicitation meetings about how the City's ACDBE program will affect the procurement process;
- Providing information concerning the availability of ACDBE firms to competitors to assist them in obtaining ACDBE participation;
- Providing information to ACDBE firms about the City, its function and full range of contractual needs;
- Offering instructions and clarifications on solicitation requirements, the City's procurement policies, procedures, and general proposal requirements;
- Conducting debriefing sessions to explain why certain proposals were unsuccessful;
- Providing information to ACDBE firms on future concession opportunities, contracting schedules, subcontracting opportunities and bonding requirements;
- Providing instructions about job performance requirements;

- Placing solicitation notices in periodicals of interest to the disadvantaged business community; and
- Taking other race-neutral steps to foster ACDBE participation in the City's concession opportunities.

We estimate that in meeting our overall goal of 10.64%, we will obtain 100% from race-neutral participation and 0% through race-conscious measures.

If we project that race-neutral measures, standing alone, are not sufficient to meet our ACDBE participation goals, the following race-conscious measures will be implemented in the City's program, but only to the extent the City is able to demonstrate the need for race-conscious action to meet the overall goal:

1. Establishing concession-specific goals for particular concession opportunities. (Section 23.25(e)(1).), as follows:

a. If the objective of the contract-specific goal is to obtain ACDBE participation through a direct ownership arrangement with an ACDBE, the goal will be calculated as a percentage of the total estimated annual gross receipts from the concession.

b. If the goal applies to purchases and/or leases of goods and services, the goal will be calculated by dividing the estimated dollar value of such purchases and/or leases from ACDBEs by the total estimated dollar value of all purchases to be made by the concessionaire.

c. To be eligible to be awarded the concession, 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.

d. The administrative procedures applicable to contract goals in Sections 26.51–53, apply with respect to the City's concession-specific goals.

2. Negotiating with a potential concessionaire to include ACDBE participation, through direct ownership arrangements or measures, in the operation of the concession. (Section 23.25(e)(2).)

3. With FAA's prior approval, other methods that take a competitor's ability to provide ACDBE participation into account in awarding a concession. (Section 22.35(e)(3).)

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 status in making the award.

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

Attachment 5

Section 23.45: Overall Goal Calculation for Rental Car Concessions

Name of Recipient: City of San José, California
Norman Y. Mineta San José International Airport (SJC)

Goal Period: FFYs 2018-2020 (October 1, 2017 through September 30, 2020)

Overall Three-Year Goal: 3.46%, to be accomplished 100% through race-neutral measures.

Market Area: The substantial majority of rental car firms with which the City does business have locations in California, and California is the area in which the City spends the substantial majority of its rental car contracting dollars. The City therefore determined that its market area for rental car concession opportunities is California.

Base of Rental Car Goal

The existing rental car concession agreements at SJC will expire June 30, 2020. New agreements are not anticipated to begin until FFY 2020, on July 1, 2020. Estimated rental car gross receipts including goods and services purchases (such as insurance, automobiles, automobile repairs, automobile towing) during those remaining three months of this goal period are \$42,790,092.

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 to the FAA an appropriate adjustment to the overall goal. This adjustment will be submitted to the FAA for approval no later than 90 days before issuing the solicitation for the new concession opportunity.

Overall Goal Methodology

When the new rental car concession agreements begin on July 1, 2020, only three months will remain in the FFYs 2018-2020 goal-setting period. The City is proposing to continue to implement its current ACDBE participation goal of 3.46% during those three months (July 1, 2020 – September 30, 2020). The City will then conduct the required goal-setting analysis to determine ACDBE participation goals for the next three-year period, FFYs 2021 through 2023 (October 1, 2020-September 30, 2023).

Consultation with Stakeholders. Before establishing the final overall goal and submitting it to the FAA, invitations were sent to individuals and organizations to seek their participation in SJC's stakeholder consultation meeting that was held March 8, 2017 at the San José City Hall. These individuals and organizations represent concessionaires currently located at the airport, potential concessionaires, 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 City's efforts to increase participation of ACDBEs.

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Greta Randev, Fox Rent-a-Car
Sean Ahmed, Green Signz & Company
Walter Wilson, Minority Business Consortium
Deborah Quintana, Worldwide Money Exchange
Maritza Job, Worldwide Money Exchange
Juan Job, Worldwide Money Exchange
Hong Chu, Anthonng Calicur, CLEAR
Pedro Alvarez, Andale Operations
Stephano Medina, UNITE HERE
Njambi Mungai, JR Lester & Associates, Ltd.
Rod Tafoya, Mission Yogurt, Inc.
Councilmember Charles “Chappie” Jones
Kim Becker, SJC
Drake Beaton, SJC
Matthew Kazmierczak, SJC
Nina Grayson, City of San Jose
Chris Hickey, City of San Jose
Mara Rosales, Rosales Business Partners LLC
Nancy West, Exstare Federal Services Group, LLC

Stakeholder comments. The March 8, 2017 Stakeholder Consultation Meeting agenda addressed (1) the proposed triennial goal presentation; and (2) an overview of FFYs 2018-2020 concession opportunities. SJC and its consultants explained that the goals were intended to represent “the floor and not the ceiling” in terms of desired ACDBE participation. No concerns or comments were made about the proposed ACDBE goals.

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A concessionaire asked the question of what impact might there be on SJC's ACDBE Program should the federal government decide to abolish the Federal DBE requirements embodied in

federal law. SJC's response was that the City of San Jose and SJC were committed to seeking and engaging with small business enterprises, including disadvantaged businesses, as business partners irrespective of any changes to the Federal DBE Program.

A labor organization raised questions about the solicitation and contract award determination processes. Its representative also sought information about worker retention, labor harmony and wage policies and requirements in concession solicitations and contracts. Additionally a participant asked how SJC evaluated ACDBE provisions in requests for proposals e.g. on a pass/fail or other basis. Another stakeholder asked if the food and beverage master concessionaire contract would be unbundled. SJC staff addressed the questions in detail.

Following the consultation, SJC and its consultants engaged in an additional outreach effort to eighteen (18) trade organizations, including AMAC, ACI-NA and AAAE, in an extra effort to solicit more comments from stakeholders. No substantive comments were received.

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 target of _____%) is committed to a minimum of _____% ACDBE utilization on this contract submits documentation demonstrating good faith efforts.

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 8

ACDBE Certification Application Form

The website where the ACDBE Certification Application Form can be found for the State of California is: http://www.dot.ca.gov/hq/bep/business_forms.htm.

Attachment 9

Procedures for Removal of ACDBEs Eligibility

The procedures for removal of ACDBEs eligibility, as stated in Part 26.87, are as follows:

[a] *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in §26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive to initiate proceeding.* (1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its

eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under §26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decision maker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a UCP is operational in its state, a small airport or small transit authority (i.e., an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. You may base such a decision only on one or more of the following:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;

(4) A change in the certification standards or requirements of the Department since you certified the firm; or

(5) A documented finding that your determination to certify the firm was factually erroneous.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under §26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding.

(h) When you decertify a DBE firm certified by the SBA, you must notify the SBA in writing. The notification must include the reason for denial.

(i) *Status of firm during proceeding.* (1) A firm remains an eligible DBE during the pendency of your proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.

(j) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where you have let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

(3) *Exception:* If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.

(k) *Availability of appeal.* When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under §26.89.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003]

Attachment 10

State of California UCP Agreement

Below is the City of Jose Resolution 70373 authorizing the City's participation in a Unified Certification Program for DBEs and authorizing the City Manager to executive an agreement to participate in the California Unified Certification Program.

RD:NS
5-29-01

RESOLUTION NO. 70373

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSÉ APPROVING CITY OF SAN JOSE PARTICIPATION IN A UNIFIED STATEWIDE DISADVANTAGED BUSINESS ENTERPRISE (DBE) CERTIFICATION PROGRAM AS REQUIRED BY FEDERAL REGULATIONS

WHEREAS, the United States Department of Transportation issued Regulations (49 CFR Part 26 on February 2, 1999 regarding participation by Disadvantaged Business Enterprises (DBE) in U.S. Department of Transportation (DOT) Programs; and

WHEREAS, the U.S. Department of Transportation Regulations require that all recipients of federal financial assistance to participate in a statewide unified DBE certification program by March 4, 2002.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSÉ THAT:

SECTION 1.

The City Council of the City of San Jose hereby approves the City's participation in a Unified Certification Program for Disadvantaged Business Enterprise as required by the federal Regulations of the Department of Transportation.

SECTION 2.

The City Manager is hereby authorized to execute an agreement and declaration in order that the City of San Jose can participate as a certified member in the Unified Certification Program.

RD:NS
5-29-01

ADOPTED this 29th day of May, 2001, by the following vote:

AYES: CAMPOS, CHAVEZ, CORTESE, DANDO, LeZOTTE,
REED, SHIRAKAWA, WILLIAMS, YEAGER: GONZALES

NOES: NONE

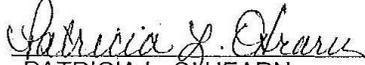
ABSENT: DIQUISTO

DISQUALIFIED: NONE



RON GONZALES
Mayor

ATTEST:



PATRICIA L. O'HEARN
City Clerk

Attachment 11

Regulations: 49 CFR Part 23

The always current 49 CFR Part 23 Regulations can be accessed at:

http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr23_main_02.tpl