U.S. Department
of Transportation
**Federal Aviation
Administration**

800 Independence Ave. S.W.
Suite 1030
Washington, DC 20591

November 25, 2024

Dear Airport Sponsors,

Title 49 Code of Federal Regulations (CFR) Part 23 requires primary airports that receive FAA financial assistance to establish aspirational goals for the participation of Airport Concession Disadvantaged Business Enterprises (ACDBEs). Consequently, airport sponsors frequently receive proposals from large concession companies to achieve ACDBE goals by forming joint ventures with ACDBEs. These arrangements are often intricate, making it challenging for airport sponsors to determine how much credit toward a goal should be counted for an ACDBE firm's participation.

The attached 2025 Airport Concession Disadvantaged Business Enterprise Joint Venture Guidance is a framework for counting ACDBE participation in a joint venture. The guidance follows the critical core principles of the ACDBE program where ACDBE certified firms combine their property, capital, efforts, skills, and knowledge, and in which the ACDBE firm is responsible for a distinct, clearly defined and measurable portion of the work, and must share in the capital contribution, control, management, risks, and profits of the joint venture commensurate with their ownership interest in order to be counted.

This guidance supersedes the 2008 "Airport Concessions Disadvantaged Business Enterprise Joint Venture Guidance." The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR Part 23.

The FAA remains committed to continue offering training, technical assistance, and guidance to ensure effective review and monitoring of joint ventures arrangements under 49 CFR Part 23. As part of its commitment, the FAA will provide additional training on the review of joint venture agreements, monitoring, verification of commercially useful function, as well as documenting written certification for counting of ACDBE participation in joint ventures.

We hope that the updated guidance will assist you in your review of joint venture arrangements and determining how much ACDBE participation to count.

If you have any questions, please contact your regional FAA DBE/ACDBE Compliance Specialist.

Sincerely,

John P. Benison Digitally signed by John P. Benison
Date: 2024.11.25 12:12:53 -05'00'

John P. Benison
Assistant Administrator for Civil Rights

Attachment

2025 Airport Concession Disadvantaged Business Enterprise Joint Venture Guidance

November 25, 2024

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PURPOSE

This guidance provides Airport Concession Disadvantaged Business Enterprise (ACDBE) program staff, ACDBEs, concessionaires, and various stakeholders with information and tools regarding the structure, review, implementation, monitoring, and counting of joint venture arrangements in the ACDBE Program. The Federal Aviation Administration (FAA) is responsible for overseeing airport compliance with the ACDBE program found in Title 49 Code of Federal Regulations (CFR) Part 23. We offer training, technical support, and provide guidance to airports, ACDBEs, concessionaires, and various stakeholders to effectively participate in or administer the ACDBE program.

We sought public input on the challenges of interpreting the recommendations of the 2008 FAA ACDBE Joint Venture Guidance from airports, concessionaires, trade associations, ACDBEs, and consultants. Whenever possible, FAA considered the representations made by stakeholders regarding industry practices on joint venture arrangements. However, it should be noted that accommodation for certain practices was not possible where the practice conflicted with requirements of the regulation and/or objectives of the program. Some business, accounting, and tax practices that may be completely legitimate in the business world between two or more firms may not be appropriate under the Department of Transportation's (Department) ACDBE regulation, 49 CFR Part 23

This guidance does not create new legal mandates independent of the Department's statutory and regulatory authorities but is intended to inform interested parties and the public of the way in which the Department understands and will implement those authorities. Regulated parties may consult FAA with respect to alternative means of compliance with ACDBE joint venture requirements. This guidance supersedes the 2008 "Airport Concessions Disadvantaged Business Enterprise Joint Venture Guidance".

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR Part 23.

WHY IS JOINT VENTURE GUIDANCE NECESSARY?

Airports are required to review joint venture agreements (49 CFR 23.29) and count ACDBE participation in the venture equal to the distinct, clearly defined portion of the work of the concession that the ACDBE performs with its own forces. This guidance is designed to assist in the effective structuring, monitoring, and counting of ACDBE joint ventures and joint venture participation by ACDBEs in the concessions activities of airports receiving Federal financial assistance from the Airport Improvement Program of the FAA.

TO WHOM DOES THIS GUIDANCE APPLY?

The Department's ACDBE program is mandated by 49 U.S.C. 47107(e) and implemented by airports that receive funds subject to 49 CFR Part 26. The ACDBE rule, 49 CFR Part 23, requires primary airports who must implement an ACDBE program to establish aspirational goals for the participation of ACDBEs. These airports are required to establish triennial ACDBE goals and review concession opportunities to establish concession-specific ACDBE goals. Airports should review this guidance to determine how to credit the participation of ACDBE joint venture participants toward an ACDBE goal.

SECTION 1: DEFINITIONS

1.1 What is a joint venture?

For purposes of the ACDBE program, a joint venture is defined as an "association of an ACDBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the ACDBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest." (§ 23.3)

In accordance with the objectives of ACDBE regulations, joint ventures are intended to have a business structure set forth in a signed written agreement that clearly and specifically defines the contribution of property, capital, efforts, skills and knowledge by each party and their participation in the overall operation of the concession. Any business structure that meets the part 23 definition of "joint venture" will be considered a joint venture for purposes of counting ACDBE participation, regardless of the name attributed to the business structure in the written agreement.

1.2 What does an "association" of an ACDBE and one or more other firms mean?

An association is an organization of an ACDBE firm and one or more other firms with a legal structure that meets federal and state legal requirements used to form a joint venture provided that, for purposes of counting ACDBE participation, the requirements of 49 CFR Part 23 are met. Note that the association may consist entirely of ACDBEs or of an ACDBE and a former ACDBE (e.g., those which have exceeded the personal net worth (PNW) and/or size standards).

1.3 What does "carry out a single, for-profit business enterprise" mean?

A joint venture carries out a single for-profit business when the single business entity is created to operate at a specific airport. It may not operate at multiple airports under the same joint venture entity created for the operations at that specific airport. The participants in the joint venture should be required to disclose any other business relationships currently in existence between or among the parties (e.g., joint ventures at other airports).

1.4 What does "the parties combine their property, capital, efforts, skills and knowledge" mean?

Each party in a joint venture should bring real and substantial value to the joint venture enterprise. Each party is also expected to contribute both tangible and intangible assets commensurate with their ownership interest. If property is contributed, the joint venture agreement should itemize the equipment and resources to be furnished by each party, its value, and how the property was valued. If this is not yet known, the agreement should describe generally the anticipated major equipment and other resources and their value to be furnished by each party to the joint venture. The skill set (a combination of knowledge, experience, core competencies, unique talent, etc.) provided by each party should add value to the joint venture relationship that is objectively apparent. In addition, each joint venture should be an active participant and contribute to the success of the joint venture. Each of these elements of property, capital, efforts, skills, and knowledge should be specifically addressed in the joint venture agreement and verified by the airport during the initial review and periodically thereafter.

1.5 What does "distinct, clearly defined portion of the work" mean?

For the purpose of this guidance, "distinct" means separate and distinguishable from the work, (e.g., source of labor, responsibilities, and performance) of the other participants. "Clearly defined" means that there is no guesswork involved in determining the nature of the work assigned to each ACDBE firm. To be considered a distinct, clearly defined portion of the work, it is necessary to fully understand exactly what the work will entail, including an estimate of the time and resource requirements for each major task. For example, if the ACDBE's portion of the work is only described as "advise about" or "participate in" a portion of the work, the work would likely not be considered distinct or clearly defined because it is not clear what work the ACDBE firm will accomplish. Much more detail is necessary to determine the portion of the work to be attributed to the ACDBE firm. Undoubtedly, the work of the contract also includes the role of the ACDBE in the overall management of the business (e.g., as a participant on a management committee or some other governing board) as well as participation in the day-to-day management of the business.

1.6 What does "shares in the capital contribution, control, management, risks, and profits" mean?

The ACDBE's participation in capital contribution, control, management, risks, and profits must be proportionate to the claimed ownership and role in the overall operation of the concession work performed. See section 3 of this guidance for further discussion on each area.

SECTION 2: REVIEW OF JOINT VENTURE AGREEMENT

2.1 When should the airport review the joint venture agreement?

As a recommended practice, a draft of the joint venture agreement should be submitted to and reviewed by the airport for approval prior to its execution and prior to contract award. The airport should review all joint venture agreements, including those where joint venture participants consist of only ACDBEs, and supporting documents submitted by a joint venture entity to determine whether, in fact, the agreement meets all the requirements of the regulation (49 CFR Parts 23 and 26) and what portion(s), is eligible to be counted towards ACDBE participation.

Based on the review, the airport will assign a value to the ACDBE participation which may be counted towards the ACDBE goal provided that the joint venture operates in accordance with the submitted agreement. (See Attachment 1 – Joint Venture Review Process (Flowchart) describing the recommended process for the review.) The airport should provide a written letter to the joint venture applicant outlining any areas of concern no later than fifteen (15) days from concessions contract offer/selection and allow a minimum of fifteen (15) days for a response and to make reasonable adjustments where applicable. In accordance with 49 CFR § 23.29, airports must implement appropriate mechanisms to ensure compliance with the requirements of this part by all participants in the program.

Pursuant to 49 CFR § 26.109, which is applicable to part 23 through 49 CFR § 23.11, all participants in the ACDBE program, including, but not limited to, ACDBE firms and applicants for ACDBE certification, are required to cooperate fully and promptly with airport's requests for information.

2.2 What is the overall review process for the joint venture agreement?

The review of joint venture agreements with ACDBE participation is comprised of: (1) confirming that the ACDBE participant is a certified ACDBE in the applicable NAICS code trade; (2) making a determination that the agreement meets the definition of a joint venture under the regulation; and (3) determining the appropriate credit based on the "distinct, clearly defined portion of the work performed by the ACDBE." Once the airport has reviewed the joint venture agreement to ensure that it meets the

regulatory definition of a joint venture (i.e., in terms of the various areas being commensurate with ownership interest) the airport should proceed to a review of the distinct, clearly defined portion of the work assigned to the ACDBE in order to determine how to count ACDBE participation towards the ACDBE goal. (See Attachment 1)

2.3 What specific information should the joint venture agreement include?

The agreement should include information specific to the structure and operation of the joint venture. Some of the important components to include in the written agreement are:

- **Identification of the participants in the joint venture.** The joint venture participants must be firms, including sole proprietorships, not individuals.
- **Identification of the single, for-profit business enterprise to be undertaken by the joint venture.** The agreement should identify the business enterprise and specific contract(s) under which the joint venture will operate and the locations that will be operated.
- **Term of the joint venture agreement and factors effecting the term.** The agreement should identify the term of the joint venture including concession contract extensions or termination, sale of interest, etc.
- **Capital to be contributed by each party.** The agreement should include information about the initial contributions and methods to contribute capital to meet future needs. The airport should review the loan agreement and related financial documents to ensure that the arrangement does not limit the ACDBE's participation in the venture (e.g., by limiting risk, control, etc.). The agreement should specify the amount of capital to be contributed by each non-ACDBE joint venture participant and the method and timing of any such capital contribution. Capital contributions may include, for example, capital investment in facilities, inventory, security deposit, assets, working capital, and first month's rent.
- **Accounting methods.** The accounting methods should be identified in the agreement.
- **Profits and Losses.** Each of the participants must share in the profits and losses in proportion to their ownership interest and identified in the agreement.
- **Risks.** Each participant in the joint venture must share in the risks of the business in proportion to their ownership interest. The agreement should include provisions for proportional share of business risks.
- **Access to financial information.** The agreement should include language that obligates

the joint venture firm to provide reasonable access to ACDBE participants to all financial information of the joint venture, including, but not limited to, financing documents, contract receipts and expenditures, databases, payroll records, human resources projections, hiring plans, payables, tax returns (including K-1s), financial performance documents, profit & loss statements, balance sheets, and other information deemed appropriate by the airport relevant to the review of the joint venture agreement and/or operations.

- **Management of the joint venture's business.** The agreement should address how the ACDBE will participate in the overall management (e.g., participation on a management committee or management board) and day-to-day management responsibilities through the distinct clearly defined portion of the work.
- **Administrative matters.** The agreement should include joint venture office locations, recordkeeping requirements, identification of an auditor, fiscal year, addresses for notices, transfer of interests, etc.
- **Replacements or substitutions of ACDBEs.** The joint venture agreement should include process for replacement and substitutions of ACDBEs, which should be subject to the requirements of 49 CFR § 26.53. These requirements are applicable to 49 CFR § 23.25 regarding concession-specific goals.
- **Breach and sanctions**. The joint venture agreement should provide for breach and sanctions for any party failing to operate in accordance with the agreement. The sanctions should be similar to those imposed for other defaults under the concessions contract.
- **Dissolution/Termination.** The joint venture agreement should include events/conditions upon which the joint venture may be dissolved and terminated, and how assets will be distributed, including any reserves.

2.4 Should the airport review the joint venture agreement to determine the ACDBE's participation in specific areas?

Yes. The parties involved in the joint venture seeking to count ACDBE participation towards the ACDBE goal for the contract must demonstrate to the airport that the ACDBE capital contribution, control, management, risks, and profits are commensurate with its ownership interest. The airport is responsible for reviewing joint venture agreements to ensure that capital contribution, control, management, risks, profits, ownership, and work to be performed by the ACDBE are clearly addressed. The airport may

follow up with questions and request written explanations and require the joint venture to submit information, including a summary of the agreement and supporting documentation, for review.

2.5 May a joint venture have more than one contract at an airport?

Yes. While a joint venture must be a single, for-profit business enterprise, it may have more than one contract with a given airport or more than one business location at the airport but may not operate at multiple airports. It is the joint venture as an entity, and not the individual participants in the joint venture, that have the contractual relationship(s) with the airport or as sub-concession with the Prime Concessionaire.

However, joint venture operations that frequently or always use the same ACDBE should be closely monitored as such arrangements have been previously identified as a Selected "Red Flag" Indicator of DBE Fraud by the Department of Transportation Office of Inspector General (OIG).

SECTION 3: ACDBE CERTIFICATION REQUIREMENTS

3.1 Can a joint venture be certified as an ACDBE?

No. By definition, a joint venture is an association of an ACDBE and another firm to carry out a single business enterprise (§ 23.3). Even if a joint venture is more than 51%owned by an ACDBE firm, it cannot be certified as an ACDBE because it is owned by other firms and not directly owned by disadvantaged individuals. In order to count towards ACDBE participation, one or more of the joint venture participants must be a certified ACDBE.

3.2 Must the ACDBE participant be certified in the specific type of work?

Yes. ACDBE firms must be certified (capable of performing) in the type of work to be undertaken by the joint venture (e.g., an ACDBE participant in a retail joint venture must be a certified as an ACDBE retail operator) and in the state where the joint venture will operate. Since an ACDBE firm is required to share in the management and control of the operation, the ACDBE must possess the requisite experience and expertise. In addition, the ACDBE should be involved in the broader areas of the operation which would enable them to gain operating experience for the purpose of competing independently for operations in the future. The implementation of joint ventures which promote participation in the provision of services not related to the overall management of the operation does not support the objectives of the ACDBE program. (See 49 CFR § 23.1(a), 49 CFR § 23.31(a), and 49 CFR § 26.73).

An overarching objective of the DBE and ACDBE programs is to ensure that only firms that fully meet the eligibility standards are permitted to participate in the program (see 49 CFR § 23.1 and 49 CFR §

26.1). Airports should be diligent when reviewing joint venture agreements to ensure that the ACDBE's participation in the joint venture does not result in the sacrifice of independence or loss of control of the ACDBE. If the ACDBE loses its independence or control over its business because of the joint venture arrangement, the ACDBE's certification eligibility is compromised. Any suspected loss of control or independence should be referred to the Uniform Certification Program (UCP) certifying agency immediately, which shall institute decertification proceedings, if appropriate, consistent with § 26.87.

3.3 Should the ACDBE be automatically terminated if the ACDBE is decertified?

No. The joint venture agreement should not include provisions that terminate or replace an ACDBE participant for losing its certification eligibility, provided that their participation still counts towards ACDBE goals. An ACDBE decertified solely because one or more of its disadvantaged owners exceed the personal net worth (PNW) cap or the firm exceeds the business size standards may continue to be counted toward ACDBE goals for the remainder of the term of the concession's agreement, excluding term extensions, renewals, or options, and should not be automatically terminated or replaced. (See 49 CFR § 23.55(j)) However, if the ACDBE is decertified for reasons such as change in control, sale of the majority interest in the company or fraud, and its participation is ineligible for continued counting, it is reasonable to allow a provision for transfer of interest or the buyout of the ACDBE participant. It is also reasonable to allow a provision for the transfer of interest or buyout of a decertified firm whose participation is eligible for continued ACDBE credit but later becomes ineligible for continued ACDBE credit due to changes in control or ownership. Any joint venture provision regarding termination or substitution, whether the ACDBE is certified or decertified, must not conflict with the good faith efforts procedures set forth in § 26.53(f).

3.4 Can the ACDBE participation continue to count after the ACDBE is decertified?

Consistent with 49 CFR § 23.55, when an ACDBE is decertified because one or more of its disadvantaged owners exceed the PNW cap or the firm exceeds the business size standards during the performance of an agreement, the participation of the ACDBE may continue to be counted toward ACDBE goals for the remainder of the term of the concession agreement. The airport must not count the participation toward ACDBE goals beyond the termination date for the concession agreement in effect at the time of the decertification (e.g., in a case where the agreement is renewed or extended, or an option for continued participation beyond the current term of the agreement is exercised). However, if the ACDBE is decertified for any other reason, the participation of the firm cannot be counted towards the ACDBE goal after the firm is decertified.

SECTION 4: REVIEW OF SPECIFIC ELEMENTS OF THE JOINT VENTURE AGREEMENT

4.1 Should the airport review "control"?

Yes. The ACDBE participant(s) in the joint venture should have control in proportion to their ownership interest and proportionate control of the governance of the joint venture. Each joint venture participant should assume full responsibility for executing each element of the work assigned to it. Usually, a joint venture will have a management committee (referred to by various names, including "Executive Committee" or "Board") that controls the overall business. The ACDBE participant(s) is usually a minority participant, owning less than 50% of the business. In this case, the ACDBE(s) can be out-voted on most of the business decisions made by the committee. Therefore, for the most part, the joint venture is controlled by the party owning 51% or more of the business, usually not the ACDBE. However, the agreement should provide for control by the ACDBE of the activities for which it is responsible. This can be accomplished through direct control of their assigned role or establishment of a separate management committee or subcommittee in which the ACDBE has majority vote for issues involving facilities or responsibilities which it controls. In addition, there should be some major decisions requiring a unanimous vote to substantiate some level of control attributable to the ACDBE (e.g., items related to expansion, borrowing, lending money, etc.).

4.2 Should the airport review the management of the joint venture?

Yes. The ACDBE participant must share in the management of the joint venture. The joint venture agreement should address the issue of the overall management, or governance, of the business of the joint venture and the day-to-day management of the joint venture's operation. The ACDBE participant should participate in the overall management, decision making, and day-to-day operations, including decisions on the hiring and firing of management personnel (and if appropriate non- management personnel) for the joint venture to be eligible for ACDBE credit. This can be accomplished through a "Management Committee," as described under "control," in section 4.1, though this is not the only acceptable mechanism. Under a management committee structure, the committee is responsible for managing and directing the business of the joint venture. Each participant is represented on the management committee and votes according to its ownership interest in the venture. Each participant on the management committee not only has a right, but an obligation to receive and consider the views of the ACDBE participant. The joint venture agreement should not contain quorum provisions that block the ACDBE participant from calling a management committee meeting to vote and from conducting business for the activities which they are responsible. The agreement should specify the frequency of the management

committee meetings, and formal agendas and meeting minutes should be prepared. In addition, the agreement should provide for the day-to-day management of the joint venture and specify the roles and responsibilities of each participant.

4.3 Should the airport review risks of the joint venture?

Yes. Each of the participants in the joint venture must share in the risks of the business in proportion to their ownership interest. These risks include financial, legal, operational, etc. The agreement should include provisions for proportional sharing of business risks. Airports should review the joint venture agreement and any accompanying documents to ensure that the ACDBE participant's risk of loss is unconditional and proportional to its share of ownership in the joint venture.

4.4 Should the airport review the profit and losses of the joint venture?

Yes. Each of the participants must also share in the profits and losses in proportion to the ownership interest and work performed. Accounting methods and the timing of distributions should be included in the agreement and reviewed for reasonableness by the airport. A monthly distribution of actual profits or monthly payment of a management fee, as defined in the agreement and consistent with industry standards, is permissible. However, there should be no provisions in the agreement which have the effect of creating separate profit centers to siphon off profits before each participant's share is calculated. For example, requirements to purchase goods and/or services from one of the participants that results in controlling profits remaining for distribution to the joint venture participants are not acceptable. Purchasing goods from one of the participants may be acceptable if the terms are clearly identified and the cost of the goods reflects the actual cost of the product plus any processing/handling costs and reasonable overhead expenses.

4.5 Should the airport review capital contributions?

Yes. The capital to be contributed by each party should be clearly specified in the joint venture agreement. The agreement should specify the initial capital contributions to be made by each party and how future capital contributions will be allocated. The ACDBE's portion of the initial and future capital contributions should be equal to its ownership percentage.

4.6 Can the non-ACDBE participant provide technical assistance to the ACDBE joint venture participant in securing financing?

Yes. To assist the ACDBE with independent third-party sourcing for capital, the non-ACDBE joint venture participant may provide and is encouraged to provide support to the ACDBE participant with

technical assistance in preparing financial reports and presentations to independent financial institutions for the purpose of obtaining financing.

4.7 Can a non-ACDBE joint venture participant loan capital to the ACDBE joint venture participant?

Yes. The non-ACDBE joint venture participant may provide financing to the ACDBE participant upon the following conditions:

- The terms and conditions of such a loan should be comparable to prevailing market conditions offered by commercial lenders for similar type projects (e.g., in terms of such factors as duration, rate, fees, etc.).
- The loan should be evidenced by a promissory note or loan agreement clearly stating the terms and conditions of the loan, including due date and payment method, interest rate, prepayment, defaults, and collateral.
- The loan should not have the effect of reducing or eliminating the business risk to the ACDBE participant. In general, loans should be consistent with debt-financed requirements in 26.70.
- The loan should be a full recourse loan. The loan should be secured with collateral outside of the ownership interest or be personally guaranteed by the ACDBE.
- The loan should not be for 100% of the capital requirement as further explained under subsection 3.8. The ACDBE should invest capital from its own resources or through a third-party arms-length loan at current market conditions. At least 15% of the capital required (including all capital contributions made to the joint venture, e.g., start-up capital, pre-opening expenses, facility construction, operating capital, reinvestment, etc.) should be provided by the ACDBE from its own resources or through a third-party as previously referenced. This is consistent with the percentage of debt-financed investment required in 26.70.
- The terms of the loan should not be longer than the term of the contract under which the joint venture operates (excluding options or extensions).
- There must not be provisions in the loan agreement which have the effect of limiting the ACDBE's ability to control its business or independently perform its designated role in the joint venture's business. This does not preclude a lender from including provisions in a loan agreement designed to preserve property that may have been pledged as collateral.

4.8 Can a non-ACDBE joint venture participant loan capital to the joint venture?

Yes. The non-ACDBE joint venture participant can loan capital to the joint venture. The loan(s) should be reviewed under the same requirements of section 4.7 and the ACDBE must be responsible for guaranteeing repayment of its portion of the loan.

4.9 How should profits and losses be calculated and divided?

The profit or loss of the joint venture should be distributed between the participants in proportion to their work performed in the joint venture. Any funds or other forms of payment (including draws) that are taken from the joint venture assets, profits, distributions, etc., should be documented and accounted for by the airport to determine the amount of benefit each participant has received from the joint venture entity during the year. The joint venture agreement should also specify the timing of distributions. Since distribution provisions directly impact the value and economics of a joint venture participant's interest, any distributions should be made no less frequent than quarterly, or in a manner consistent with industry practices.

The Department does not view as consistent with the regulatory definition of joint venture—which provides for commensurate sharing of risks and profits—any provision in an agreement that calls for a party: (1) to be entitled to a distribution of money regardless of the profitability of the joint venture, or (2) to have a debt that is a portion of a joint venture participant's risk in the joint venture forgiven by another party.

4.10 Are service, management, and/or fees of a similar nature acceptable?

Yes, subject to some restrictions. The joint venture agreement should identify, if applicable, "management fees," "royalty fees," or "service/administrative fees," or fees of similar nature, to be paid to the various participants, dependent upon a participant's contribution to the "indirect" management of the operation (i.e., corporate overhead or corporate support services) of that joint venture. The fees charged should be reasonable and not used as a method of draining profits of the joint venture to the benefit of a particular participant. Any fees that are used in place of a "draw" arrangement are not allowed. In addition, these fees should represent a recovery of costs and not profit to the provider of the service and should be cost specific to that joint venture operation. For example, royalty fees or fees other than franchise fees charged by a participant to the joint venture or other participant(s) in exchange for use of their intellectual property is presumed to be a draw arrangement or not represent a recovery of cost. The agreement should specifically address how the costs for such services are derived, the ability of the ACDBE to participate in the selection of the service provider, and a vehicle for monitoring and/or auditing such costs.

4.11 Can the ACDBE or joint venture purchase inventory, supplies, goods and services, etc., from the non-ACDBE joint venture participant?

Yes. However, the agreement should not mandate that the ACDBE participant or joint venture purchase inventory, supplies, or services from the non-ACDBE joint venture participant. Such a mandate limits the ACDBE participant's ultimate decision-making authority and otherwise, restricts their control over the distinct, clearly defined portion of the work for which they are responsible.

The ACDBE should always have the option of obtaining goods and services on an arms-length, market price basis from any source. The joint venture agreement may allow such purchases from a non-ACDBE participant. This may be advantageous when, for example, the non-ACDBE joint venture participant can obtain the goods or services at a lower rate/price than the ACDBE participant. In such case, the goods and services may not be marked up above the direct landed cost. The ACDBE participant or joint venture should have the option to purchase products and services from an unrelated third party on a market price/arms-length basis. In the case of a franchise, the joint venture or ACDBE participant should have the same option providing it does not conflict with the franchise agreement requirements.

4.12 Should the assets of a joint venture be liquidated, and any proceeds distributed, upon dissolution?

Yes. A joint venture, by definition, is a single for-profit enterprise so when the single purpose of the business is concluded, such serves as a triggering event causing the wind up of the joint venture. Assets contributed or accumulated by the joint venture become the property of the joint venture. When a joint venture winds up, the joint venture agreement or a separate agreement should provide for the disposition or liquidation of its assets and fair and equitable final distributions. The joint venture's assets are generally first used to pay off debts/obligations to third parties and then to pay debts/obligations to the joint venture participants. Regarding any remaining assets, the agreement should provide for distribution commensurate with the ownership of the joint venturer participants. The distribution should be finalized and completed within a reasonable period following the triggering event that caused the wind up of the business—generally, within six months, or consistent with industry practice. A reserve may be kept if any specific outstanding potential obligations are identified.

Upon agreement by all parties, joint venture assets may be distributed in kind, including inventory and furniture, fixtures, and equipment, provided the parties can agree on the value. Failure to agree on the value of assets or if distributions in kind are objectionable to any party should result in liquidation of the asset and distribution of proceeds.

4.13 Can a joint venture withhold reserves from cash available for distribution?

Yes. A joint venture may establish reserves necessary for working capital needs and to cover contingent or unforeseen liabilities or obligations of the joint venture arising out of or in connection with the joint venture operation or its liquidation. However, the need to hold reserves during the term of the contract of the joint venture must not be arbitrary and the dollar amount of reserves held should be based on an established formula consistent with industry practice (e.g., two to three months of working capital) and on specific identified requirements, not at the sole discretion of the controlling party. Additional reserves withheld for a specific purpose over and above working capital needs should be tracked and accounted for separately.

SECTION 5: DEFINING COUNTABLE ACDBE PARTICIPATION

5.1 How is ACDBE participation in a joint venture counted towards ACDBE goals?

Airports should only count participation that is a result of a commercially useful function as defined by 26.55(c). This provision is made applicable to the ACDBE program by reference in 23.55(a). Therefore, a commercially useful function is performed when the assigned role of the ACDBE is distinct and clearly defined and the ACDBE is carrying out its role by actually operating and managing its assigned concession operations. If the role of the ACDBE firm is limited to minor functions or vague, the ACDBE may be deemed not to be performing a commercially useful function.

The description of the work should be clear and distinguishable from the work of the non-ACDBE and sufficiently stated to easily assign a value for the purpose of counting and monitoring. Joint ventures should be structured so that the ACDBE has specific roles in the operation of the business. If an operating role is assigned, credit can be counted at the level of gross receipts earned by the operations managed by the ACDBE. In the event the role assigned involves activities that occur on an ongoing basis and relates to a core function, crediting participation is straightforward. For example, if an operating role is assigned, credit can be counted at the level of gross receipts earned by the operations managed by the ACDBE. This is not to say that managerial or “back office” functions cannot be credited. However, if the role of the ACDBE occurs on an “as-needed” basis and is a minor function, it is very difficult to anticipate the level of the ACDBE participation, and therefore may be difficult to count and monitor. In order to make a determination of the value of work, the airport should understand the tasks involved in managing and operating the business as well as the level of difficulty and relative importance of each task. If the role of the ACDBE participant can’t be quantified or qualified, it can’t be counted.

Count only ACDBE certified firms in the NAICS code applicable to the type of concession agreement performed by the joint venture. Before the airport considers the ACDBE credit to be given, the airport will have a good idea of the credit that is desired, since it should be commensurate with ownership percentage. For example, if the ACDBE ownership in a joint venture is stated as 25%, it is likely that the joint venture participants are seeking to count the ACDBE participation at 25%. The airport should look at the roles and responsibilities of the ACDBE and determine if the claimed ownership appears reasonably proportionate to the "distinct, clearly defined portion of the work performed by the ACDBE (see 49 CFR § 23.55(d)). Some slight variations may occur because the quantitative measurement of roles may be somewhat subjective. The key factor is the reasonableness of the claimed participation after reviewing all elements of the joint venture.

5.2 How can the value of the ACDBE role be determined?

The airport may examine the typical business practice of each of the firms participating in the joint venture to determine if their assigned roles match the joint venture agreement. One approach is to examine the skills and experience that each firm brings to the joint venture. Since each business operation is unique and often complex, the value of specific tasks may vary from operation to operation. The role of each participant should be evaluated in the light of the specific business opportunity being performed. Ultimately, it is the joint venture participants who should provide information demonstrating that the roles of each party justify the claimed ACDBE participation credit.

5.3 What does the ACDBE "performs with its own forces" mean?

For purposes of counting ACDBE joint venture participation, the Department views work performed by employees of the joint venture entity or a non-ACDBE participant in the joint venture as performed by the ACDBE's "own forces" only if the ACDBE has the power to control those employees with respect to the performance of the ACDBE's role. If persons employed directly by the ACDBE perform the tasks associated with its participation in the joint venture, then the ACDBE is clearly performing that work with its own forces. Ideally, the "distinct clearly defined" portion of the work performed by the ACDBE participant in a joint venture would be performed by the ACDBE's own employees. This provides a clearer view of the management and control over the element of work attributed to the ACDBE. However, in some circumstances it may be advantageous for the joint venture or the non-ACDBE to employ the staff to provide comparable compensation and benefits to all employees.

5.4 How does the airport determine if the ACDBE "performs with its own forces" when employees are hired by the joint venture?

When employees are employees of the joint venture or the non-ACDBE, the ACDBE portion of the work can be considered as being performed "with its own forces" if the ACDBE has the power to control staff regarding the performance of the work for which the ACDBE is responsible, analogous to the utilization of contract employees.

There should be a higher burden of proof that the ACDBE controls the employees performing its designated portion of the work in instances when the employees are employees of the joint venture and an even higher burden of proof when the employees are employees of the non-ACDBE. Conversely, simply having the employees on the payroll of the ACDBE firm does not remove the burden of proving that the ACDBE controls those employees. There should exist a reporting relationship between the staff responsible for the ACDBE portion of the work and the ACDBE. The ACDBE should have the power to hire and terminate staff responsible for performing its share of the work without the approval of the non-ACDBE participant.

One factor to be considered in evaluating the amount of participation to be counted is the evaluation of resources necessary to perform the ACDBE's assigned role. For example, if the joint venture employs five managers, two administrative/support staff members, and 100 hourly employees, and the ACDBE has no employees reporting to it in the performance of its assigned role, then it would be very difficult to show that the role is a substantial one. Therefore, little, if any, credit might be counted towards ACDBE participation.

5.5 What if the level of work performed by the ACDBE changes the participation?

If it is determined that the ACDBE has performed less work than its role as defined in the approved joint venture agreement each year, participation may be counted less than originally approved for that year. If the reduced level of participation is planned to continue, the airport should request that the joint venture participants amend their agreement to reflect the new level of participation.

If it is determined that the ACDBE participated more than expected, participation may only be counted at the originally approved level, not higher since participation must be counted commensurate with ownership interest. If the increased level of participation is planned to continue, the airport should request that the joint venture participants amend their agreement to reflect the new, ongoing level of participation,

although the counting of participation continues to be limited to the ownership percentage as expressed in the joint venture agreement until the agreement is amended.

SECTION 6: ACDBE MONITORING REQUIREMENTS

6.1 Should the airport monitor ACDBE joint venture?

Yes. Pursuant to 49 CFR § 23.29, airports must monitor the work performed by ACDBEs and must review the records of contracts, leases, joint venture agreements, and other concession-related agreements to ensure that the ACDBE participant is performing a commercially useful function. In the event that the ACDBE is found to have relinquished an element of control in its business as a result of the joint venture, the airport should immediately refer the matter to the UCP certifying agency for review in accordance with § 26.87.

The airport should develop a formal monitoring program that includes, at a minimum, the following elements:

- Periodic (not less than annual) verification of the status of the ACDBE's certification
- Periodic review of the managing entity's meeting minutes and reports
- Review of ACDBE participation on management committee and certain business decisions requiring unanimous consent
- Periodic on-site visits to the concession location(s)
- Periodic interviews with the joint venture participants, managers, and employees
- Review of any relevant documentation, including financial reports and agreements, necessary to ensure compliance with the joint venture agreement (e.g., profit and loss statements, distribution statements, balance sheets, tax returns, capital accounts, etc.)
- Review of share of profits/distributions to ensure that they are proportionate to ownership interest
- Review share of risk and capital accounts, including source of funds, to ensure that they are proportionate to ownership interest
- Review of management fees paid to ACDBEs and non-ACDBE participants, as compared to the cost of providing the service
- Review operations and any changes to assigned roles and responsibilities
- Written certification that the airport reviewed all related joint venture contract records and monitored the concession location(s)

The joint venture should operate in accordance with a written agreement approved by the airport, and monitoring is crucial to preventing ACDBE fraud (e.g., silent ACDBE participants) and ensuring the

integrity of the ACDBE program. Any evidence related to fraud in the ACDBE program should be referred to the Department of Transportation OIG. See https://www.oig.dot.gov/hotline.

6.2 Are annual updates required for joint venture agreements?

No. Annual updates are not required for joint venture agreements. However, any changes to the approved joint venture agreement should be submitted to the airport for review prior to implementation. In such cases, the airport should review and respond to the proposed changes within 30 days.

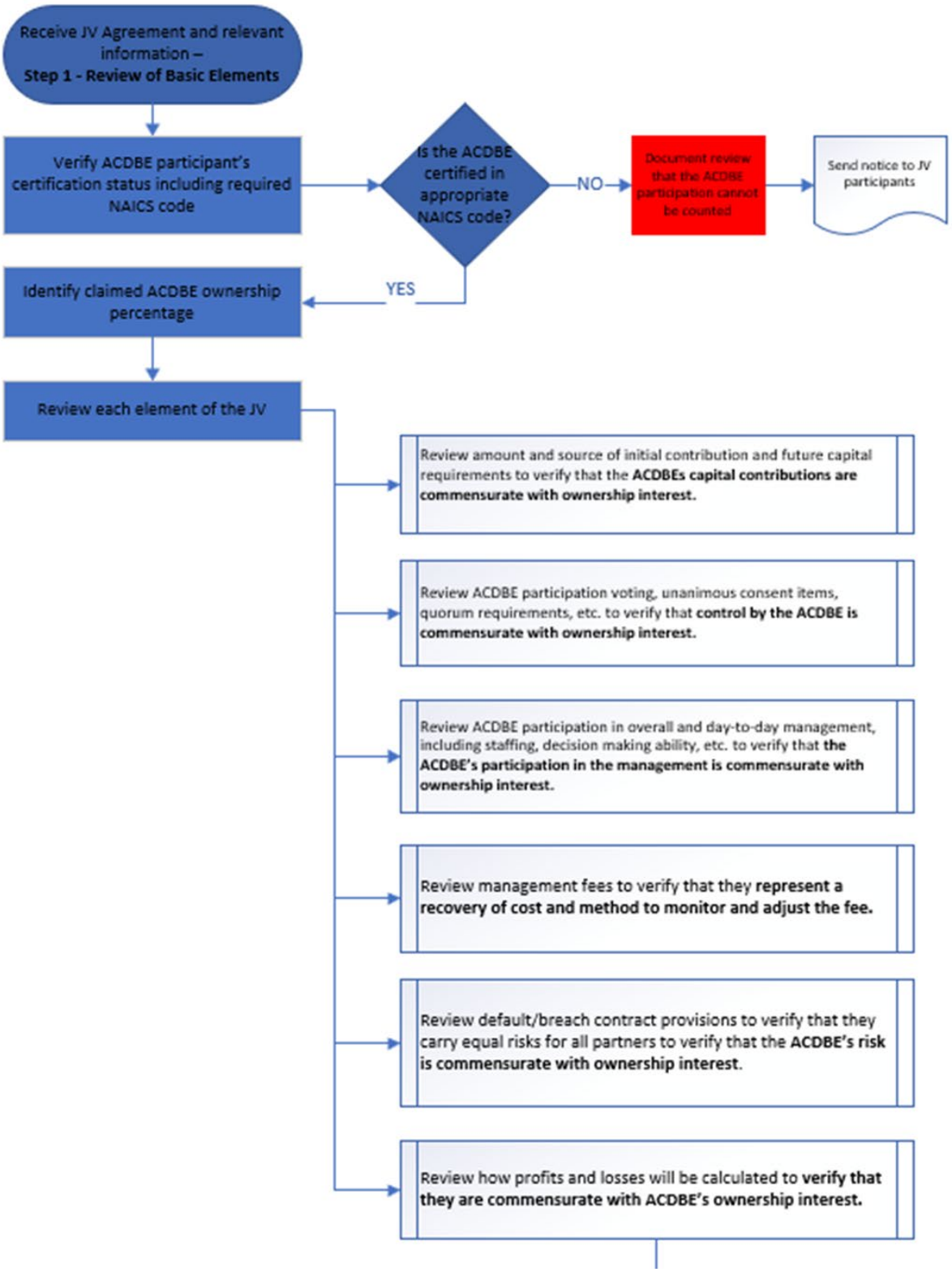
6.3 Is the airport required to monitor compliance requirements of joint ventures?

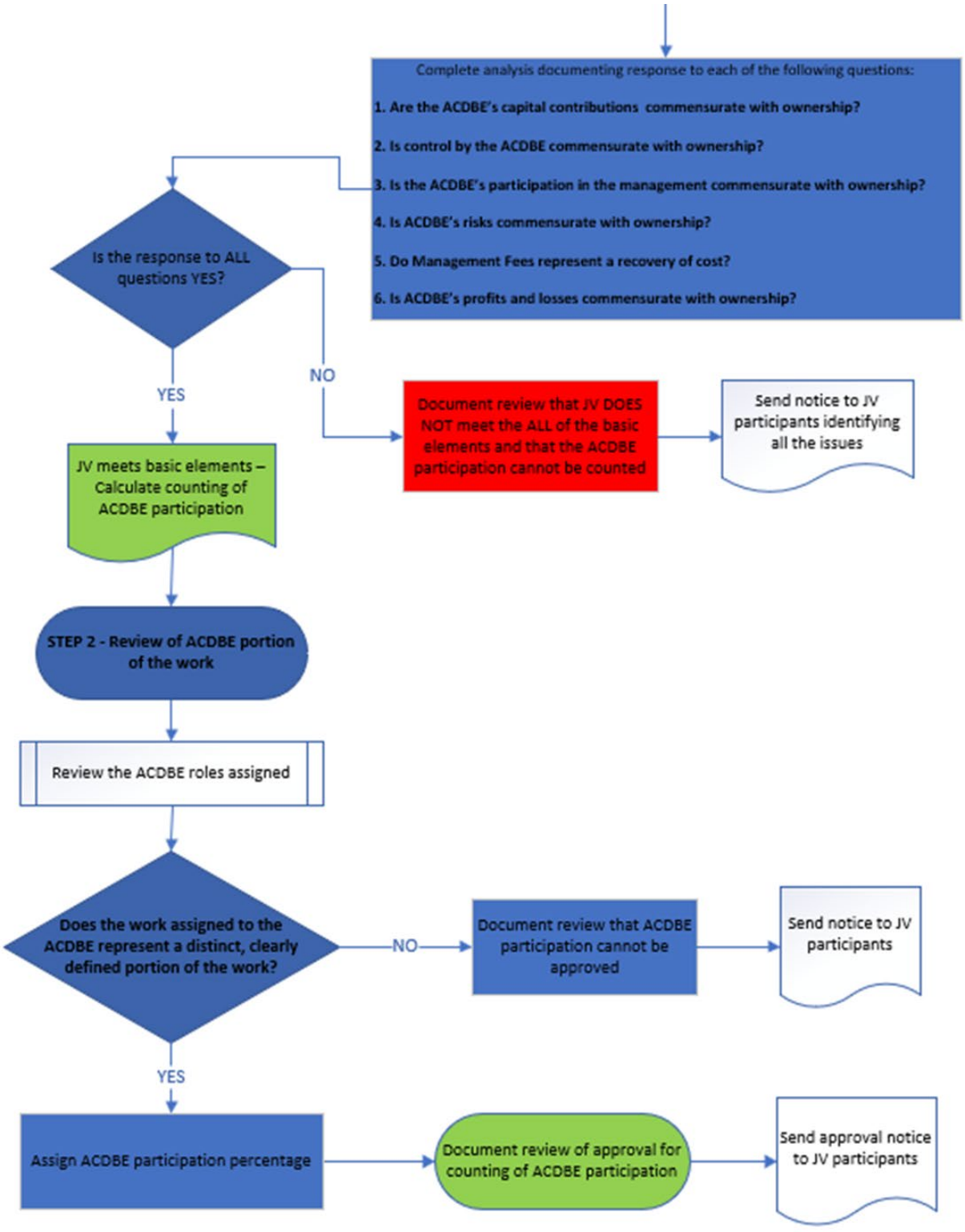
Yes. Airports must implement appropriate mechanisms to ensure compliance with the requirements of 49 CFR Part 23, including the monitoring of joint venture concessions (49 CFR § 23.29). Consistent with 49 CFR § 23.13, FAA written interpretations and guidance on the monitoring of joint ventures are valid as they express the official positions and view of the Department.

6.4 What enforcement mechanisms apply in the event of noncompliance or misconduct?

The same compliance and enforcement and compliance mechanisms apply under Part 23 as under Part 26 (49 CFR § 23.11). Under 49 CFR § 26.105, airports are subject to sanctions under FAA statutes and regulations if they fail to comply with DBE regulations. Under 49 CFR § 26.107, businesses working in the DBE or ACDBE program who engage in misconduct may be subject to suspension or debarment, enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, or criminal prosecution. The Department of Transportation OIG makes investigating and prosecuting DBE fraud a priority. The OIG, working with U.S. Attorneys' Offices, has helped to create successful criminal prosecutions for fraudulent conduct in the DBE and ACDBE programs. Anyone who becomes aware of fraud, waste, or abuse in these programs should inform OIG as well as FAA officials immediately, see https://www.oig.dot.gov/hotline.

ATTACHMENT 1 - Joint Venture Review Process (Flowchart)





NOTE: In the case where notice was sent to participants for not meeting specific requirements, the review process should revert to the appropriate stage of process if the participant provides clarification demonstrating issues have been resolved.