



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: John Aitken

SUBJECT: SEE BELOW

DATE: September 1, 2020

Approved

Date

9/3/2020

SUBJECT: AIRPORT CONCESSION DISADVANTAGED BUSINESS ENTERPRISE PROGRAM FOR FEDERAL FISCAL YEARS 2021-2023

RECOMMENDATION

Adopt a resolution:

- 1) Approving the proposed Airport Concession Disadvantaged Business Enterprise (ACDBE) program update in accordance with the regulations of the Federal Aviation Administration (FAA) for the Norman Y. Mineta San José International Airport;
- 2) Approve the three-year ACDBE race-neutral goal of 10.10% for all Airport Concessions, other than car rentals, for Federal Fiscal Years 2021-2023;
- 3) Approve the three-year ACDBE race-neutral goal of 0.40% for rental cars for Federal Fiscal Years 2021-2023;
- 4) Authorizing the City Manager to submit the three-year ACDBE program to the FAA;
- 5) Authorizing the City Manager to make revisions to the three-year ACDBE plan as requested by the FAA.

OUTCOME

Approval of the updated ACDBE program and submission to the FAA will result in the City being compliant with ACDBE Program requirements, allowing the City to remain eligible to receive an estimated \$36.3 million in FAA financial assistance for Airport development projects between 2021 and 2023.

BACKGROUND

The ACDBE program was created to minimize concerns related to minority discrimination in the award and administration of concession opportunities at airports. Adherence to ACDBE program regulations is required to remain eligible to receive federal grants for airport development from the FAA's Airport Improvement Program.

Under the FAA regulations, the City is required to submit an updated ACDBE participation plan every three (3) years that identifies new concession opportunities, potential ACDBE participants, and new percentage targets for ACDBE participation. The last ACDBE participation plan submitted to the FAA was for Federal Fiscal Years 2018 through 2020. The Federal Fiscal Year begins on October 1 and ends on September 30 of the following year.

The purpose of the ACDBE program is:

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

Definitions

ACDBE

Under the ACDBE regulations, an airport concession disadvantaged business enterprise (ACDBE) means a for-profit small business concern that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals. The ACDBE regulations further require that one or more of the socially and economically disadvantaged individuals who own it must control the management and daily business operations of the company claiming ACDBE status and be independent.

Airport Concessions

ACDBE regulations define concessions to include businesses located on an airport that are engaged in the sale of consumer goods or services to the public under an agreement with the owner of the airport, the non-airport owner or lessee of a terminal on the airport, or another

concessionaire. Covered concessions also include management contracts and subcontracts, web-based or other electronic business in a terminal or which passengers can access at the terminal, an advertising business that provides advertising displays or messages to the public on the airport, or a business that provides goods and services to concessionaires.

Market Area

The ACDBE program regulations define Market Area as the geographical area in which the substantial majority of firms which seek to do concessions business with the Airport are located and where they receive the substantial majority of concessions related revenues.

Quotas or Set-Asides Prohibited

The ACDBE regulations expressly prohibit the use of quotas or set-asides in the ACDBE program.

Race-Conscious Measures

The ACDBE program must provide for the use of race-conscious measures when race-neutral measures, standing alone, are not projected to be sufficient to meet the City's overall ACDBE goal. The City of San José is subject to the rulings of the Ninth Circuit Court of Appeals, which established/identified specific rules and situations before a jurisdiction can utilize race-conscious measures. When a race-conscious measure is adopted, the following are examples of race-conscious measures that are acceptable under the ACDBE regulations:

- Establishing concession-specific goals for particular concession opportunities; or
- Negotiation with a potential concessionaire to include ACDBE participation, through direct ownership arrangements or measures, in the operation of the concession.

Race-Neutral Measures

In implementing its ACDBE program, the City is first required to use race-neutral measures to the maximum extent possible to achieve its ACDBE goals. Examples of race-neutral measures include:

- Locating and identifying ACDBEs and other small businesses that may be interested in participating as Airport concessionaires;
- Structuring concessions so as to encourage and facilitate the participation of ACDBEs;
- Providing technical assistance to ACDBEs in overcoming limitations, such as inability to obtain bonding or financing; and
- Establishing a business development program, technical assistance program; or taking other steps to foster ACDBE participation in concessions.

Small Business Concern

In order to qualify as an ACDBE, a firm must also qualify as a small business concern. As a general rule, the ACDBE regulations 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. The following types of businesses have different ACDBE size standards:

- Banks and financial institutions: \$1 billion in assets;
- Car rental companies: \$75.23 million average annual gross receipts over the firm's three previous fiscal years;
- Automobile dealers: 350 employees

Socially and Economically Disadvantaged

Socially and economically disadvantaged individual means any individual who is a citizen, or lawfully admitted permanent resident, of the United States and who meets one or more of the following conditions and does not have a personal net worth exceeding \$1.32 million:

- Any individual to be a socially and economically disadvantaged individual on a case-by-case basis;
- Any individual in the following groups whose members are presumed to be socially and economically disadvantaged:
 - "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
 - "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
 - "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
 - Women; and
 - Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration (SBA), at such time as the SBA designation becomes effective.

Geographic Preferences

ACDBE regulations prohibit the use of geographic preferences as a factor in obtaining business or doing business as, or with, an Airport concession.

ANALYSIS

The City is required to prepare an ACDBE participation program update for the Airport every three years (Please see Attachment A for the complete program goal updates). Targets are prepared to estimate the percentage of concession revenues that will be performed by ACDBEs in the absence of discrimination. The first target is for all concessions other than rental cars and the second target is for rental cars. The reason for setting separate ACDBE participation targets is that the FAA has determined that there are differences between car rental concessions and other types of concessions. Each target must cover a three-year period, with annual reviews and reporting to the FAA to ensure that the Airport is tracking the ACDBE participation.

Pursuant to FAA regulatory requirements, the proposed ACDBE participation targets were determined based on the marketplace and on demonstrable evidence of the availability of ready, willing, and able ACDBE firms relative to all businesses that were also ready, willing, and able to participate in the Airport's concession opportunities.

The Airport contracted with consultant company, GCAP Services Group LLC to determine ACDBE participation goals for the Airport for Federal Fiscal Years 2021-2023. In determining these overall ACDBE participation goals, the consultants closely followed the U.S. Department of Transportation DBE Program regulations set forth for goal setting in 49 Code of Federal Regulations Part 23 (49 CFR 23) including a two-step goal-setting methodology identified in 49 CFR Section 23.51.

To determine the overall ACDBE participation goal, the Consultants are required to:

- Examine the types of concession opportunities that the Airport anticipates for the plan period;
- Base requirements on the Federal laws, regulations, and guidance set forth by the U.S. DOT;
- Base goals on evidence of ACDBE firms that are “ready, willing, and able”;
- Narrowly tailor the goals to the evidence.

The ACDBE participation targets are based on demonstrable evidence and using formulas approved by the FAA. The Airport's ACDBE concession participation targets for Federal Fiscal Years 2021 through 2023 are 10.10% for concessions other than rental cars and 0.40% for rental cars. Given the lack of ACDBE rental car companies, rental car ACDBE goals rely on the purchases of goods and services from ACDBE businesses, which are often limited given the national and/or regional supply chain of car rental companies.

The City proposes to meet the overall goal by using the race-neutral methods for ACDBE and small business participation in accordance with 49 CFR 23.

The Airport will use the following methods to encourage ACDBE participation:

- Encourage ACDBE participation in all new Airport concession request for proposals (RFPs);
- Prior to granting an extension or option to renew an agreement, assess the potential for new ACDBE participation;
- Require monthly ACDBE participation reporting by concessionaires;
- In the event that opportunities for new entrants arise, identify ACDBEs and other small businesses that may be interested in participating as Airport concessionaires and conduct outreach;
- Encourage ACDBE certification of concessionaires currently operating at the Airport that are ACDBE eligible;
- Encourage prime concessionaires with new opportunities to include ACDBE participation; and
- Request that concessionaires identify ACDBE goods and services providers and report the amount of those transactions.

The City can be penalized or treated as being in noncompliance by the FAA only if the City fails to administer its ACDBE program at the Airport in good faith. If ACDBE participation falls short of the targets, the FAA may require the City to provide a statement explaining why the overall targets were not met and what is being done to improve ACDBE participation in Airport concessions.

The City held a stakeholders meeting on August 13, 2020 to present these proposed goals to the community and to seek input about the availability of disadvantaged and non-disadvantaged opportunities, the effects of discrimination on opportunities for ACDBEs, and the City efforts to establish a level playing field for the participation of ACDBEs.

Following the consultation with stakeholders, notice of the proposed 10.10% goal for concessions other than rental cars and 0.40% goal for rental cars was published by the Airport Minority Advisory Council and on the Airport's websites. Furthermore, the Airport and its consultants conducted additional outreach to eighteen trade organizations, including Airport Minority Advisory Council, Airports Council International - North America, and American Association of Airport Executives.

CONCLUSION

In following the FAA established guidelines as set forth in 49 Code of Federal Regulations Part 23 (49 CFR 23), the Airport proposes adopting a three-year race-neutral ACDBE goal of 10.10% for all Airport Concessions other than car rentals and a three-year race-neutral ACDBE goal of 0.40% for rental cars for the Federal fiscal years of 2021-2023.

EVALUATION AND FOLLOW-UP

This memorandum will not require any follow-up from staff.

CLIMATE SMART SAN JOSE

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

POLICY ALTERNATIVE

Alternative: Forgo federal financial assistance from the FAA.

Pros: None.

Cons: Not conforming to the FAA's requirements for a three-year ACDBE plan by the October 1, 2020 deadline would jeopardize the City's eligibility to receive millions in federal Airport Improvement Program grants.

Reason for not recommending: Staff is confident that the Consultants followed the proper methodology set forth in the DBE regulations of 49 CFR 23. The required two step process takes into account the concession opportunities, availability of ACDBE firms, history of achievement, and other factors.

PUBLIC OUTREACH

The Airport and Public Works held a stakeholder meeting on August 13, 2020 to present the ACDBE goal setting process and subsequent goals and to seek community input. A notice of the proposed goal and methodology was published on July 13, 2020 on the Airport's website, Federal Airport Administration's Airport goal page of the FAA website, and the Airport Minority Advisory Council's Events Page. Additionally, this notice was forwarded out to ACDBE's in our market area, all vendors and parties on our interested party list, that includes primes, small and local businesses and the local Chambers of Commerce.

The notice informed the public of the upcoming ACDBE Federal Fiscal Years 2021-2023 proposed goal for the Norman Y. Mineta Airport. The notice to the public included information on:

- Who to contact about the goal
- How to inspect the details about the goal and methodology
- The Deadline for providing comments
- Notice of the August 13, 2020 Stakeholder meeting

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The Stakeholder meeting that took place on August 13, 2020 was presented by Sarah Mee, our ACDBE consultant from GCAP Services. Sarah presented on the proposed goal and methodology. Below is the list of participants from the Stakeholder Meeting Webinar.

Presenter: Sarah Mee – Main Presenter (GCAP)

City Staff Participants:

Magdalena Nodal – Meeting Host (Airport)

Council Member Chappie Jones

Kevin Hom, Airport

Megan Kennedy, Airport

Participants:

Heather Barry

Ashley Autrey

Sam Sadeddin

No comments have been received as of the writing of this memo.

Once approved by the City, the ACDBE program will be posted to the San José Airport website and submitted to the FAA.

COORDINATION

This memorandum has been coordinated with the City Attorney's Office.

COMMISSION RECOMMENDATION/INPUT

The Airport Commission was briefed at a public meeting on August 10, 2020 on the ACDBE goal setting process and invited to the stakeholder meeting.

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CEQA

Not a Project, File No. PP17-003, Agreements/Contracts (New or Amended) resulting in no physical changes to the environment.

/s/

JOHN AITKEN, A.A.E.

Director of Aviation

For questions, please contact Magdalena Nodal, Senior Analyst at 408-392-3673.