

## Questions?



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## Concessions Joint Venture Agreements



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## Who are The Airports with Joint Venture Agreements?



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## ACDBE's Role in Reviewing Their Joint Venture



- It is a legal document, forming a new company
- ACDBEs should reviewed joint venture agreements (JVAs) for:
  - Compliance with DBE/ACDBE regulations
  - Minimization of legal exposure
  - Calculation of when/if profit will be made
- Airport JVA reviews historically have benefited the ACDBE
  - They should not and cannot determine 'good' business decisions for ACDBEs
- Agreements are made for when parties do not agree
  - ACDBEs should read each term as if doomsday is happening
  - ACDBEs should beware of "this never happens" or "we've never implemented that" statements



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## New FAA Joint venture guidance

- Issued November 2024
- Highlights
  - 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
  - Decreased amount of capital contribution that non-ACDBE can loan ACDBE
  - Information on service and royalty fees
  - Information on purchase of inventory from non-ACDBE



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 -0500

John P. Benison  
Assistant Administrator for Civil Rights

Attachment

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## FAA Joint Venture Guidance

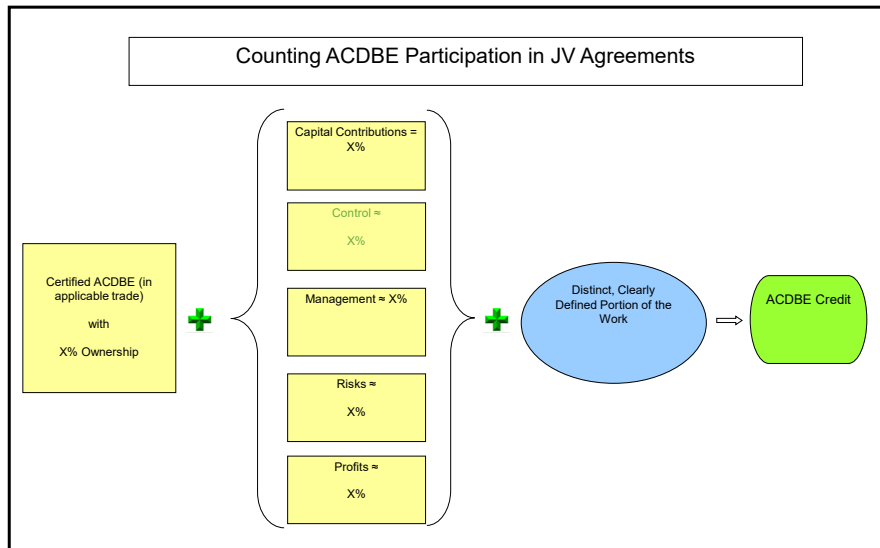
- Important components of JV Agreement:
  - Identification of the participants in the JV
  - Identification of the single, for-profit business enterprise to be undertaken
  - Term of the agreement and factors effecting the term
  - Capital to be contributed by each
  - Accounting methods
  - Distribution of profits/losses
  - Risks
  - Access to financial information
  - Management of the joint venture's business
  - Administrative matters
  - Replacements or substitutions
  - Breaches and sanctions
  - Dissolution



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## JV Value of ACDBE Role



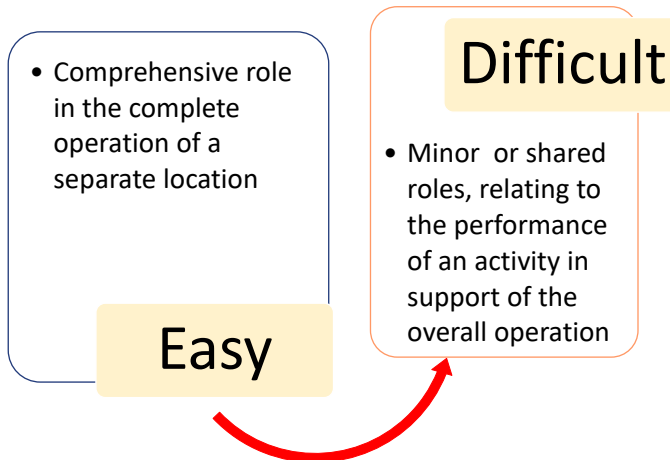
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## JV Value of ACDBE Role

- Each business operation is unique and often complex,
  - Value of specific tasks may vary from operation to operation
  - Roles should be evaluated in the light of the specific business opportunity
- Determine if roles for each of the participants appear logical.
  - Factors to consider:
    - capital,
    - expertise,
    - capacity,
    - purchasing power,
    - for ACDBE, areas of work they are certified for.
- How does the non-ACDBE participant performs and values the role(s) assigned to the ACDBE at its other operations?
- A chart of tasks for each participant can provide a framework for assigning credit.

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## Determining JV Value of ACDBE Role



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## JV Capital Contribution

- Each party in a JV should bring real and substantial value to the joint venture enterprise.
- The parties should each contribute both tangible and intangible assets.
- 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.

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## Capital Contributions

- Initial capital contributions vary in JVs
  - Initial 'open the bank account' amount
  - Full projected amount for construction and initial expenses
  - Graduated amount for all initial projected expenses
- Future capital contributions can include
  - Unanticipated capital calls
    - Underestimation of initial fit-out costs
    - Repairs/required upgrades
  - Anticipated mid-term refurbishment



## Capital Contributions

- Important considerations for future capital contributions
  - Who decides when and how much (see JV management decisions)?
  - May require additional loans
  - Should be anticipated and factored into cash flow projections



## JV Capital Contribution

- The parties should contribute capital commensurate with their ownership interest, knowledge and skills relative to the portion of the JV's business for which they are responsible, and efforts to the success of the venture.
- The skill set (a combination of experience, core competencies, unique talent, etc.) provided by each party should add value to the JV relationship that is objectively apparent. *This skill set should be specifically addressed in the JV agreement, and verified by the airport during its initial review and periodically thereafter.*

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## JV Ownership Interest

- The ACDBE's ownership interest is defined in the JV agreement as a percentage.
- Sections of the JV Guidance discuss how certain other aspects of JV management and operations are conducted *in proportion to* that ownership interest.
- These areas include management, control, risks, and profits – all areas that the Airport is not truly able to monitor until after the JV agreement is executed and operations begin.

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## JV Control

- The ACDBE in the JV should have control in proportion to their ownership interest and proportionate control of the governance of the JV.
- Each JV partner should assume full responsibility for executing each element of the work assigned to it.
- There is 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.

*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.*



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## JV Control

- Usually, JVs will have a management committee or Board that controls the overall business.
- The JV agreement should provide for control by the ACDBE of the activities for which it is responsible.
- Some major decisions should require a unanimous vote to substantiate some level of control attributable to the ACDBE (e.g., items related to expansion, borrowing, lending money, etc.).
  - Many JVs accessed COVID-19 resources such as PPP and EIDL—did they following their voting requirements?
- *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*



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## JV Management

- The 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.
- 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.
- The agreement should specify the frequency of the management committee meetings, and formal agendas and meeting minutes should be prepared.

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## JV Management

- The agreement should describe the day-to-day management of the joint venture and specify the roles and responsibilities of each participant.
- Management of the JV entity is one aspect of management, the ACDBE should consistently demonstrate that it is also managing its assigned roles within the JV as well.

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## Management and Control

- Structures to look for in the JVA
  - Committees
    - ACDBE Committee
    - Member Committee
    - Management Committee
    - Executive Management Committee
    - Operations Committee
  - What day-to-day and long-term actions do the committees control/vote on?
  - How are committee issues voted on/decided?
    - By shares or by people



## Management and Control

- “Day-to-Day” personnel/personnel actions to look for in the JVA and JV Information Form
  - Manager/General Manager/Operations Manager/Location Manager – Who employs them and what do they control?
  - Hiring/firing of employees
  - More subjective employee terms:
    - Selecting
    - Recruiting
    - Developing/Training
  - What company name is on employee payroll checks?
  - How are employees being ‘badged’?



## Management and Control

### ■ Terms to search for in the JVA

- |                            |                       |
|----------------------------|-----------------------|
| ○ "Decision/Decide"        | ○ "Responsibility"    |
| ○ "Determine"              | ○ "Specify/specified" |
| ○ "Under the direction of" | ○ "Acting through"    |
| ○ "Directed"               | ○ "Answerable to"     |
| ○ "Manager"                | ○ "Through"           |
| ○ "Manage"                 | ○ "Vote"              |
| ○ "Report"                 | ○ "Acting Alone"      |
| ○ "Control"                | ○ "Exclusive"         |
| ○ "Authority"              | ○ "Discretion"        |
| ○ "Select"                 | ○ "Right"             |
| ○ "Approve"                | ○ "Power"             |



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## JV Risks

- 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 in profits ***as well as losses.***
- The joint venture agreement should provide details on how profits and losses will be calculated and divided between the participants.
- It is not consistent with the regulation if the JV agreement calls for a party to have a debt that is a portion of a joint venture participant's risk in the joint venture forgiven by another party.

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## JV Profits



- Each JV partner must share in the profits in proportion to their ownership interest.
- Accounting methods and the timing of distribution should be included in the agreement and reviewed for reasonableness by the airport.
- There should be no provisions in the agreement which have the effect of creating separate profit centers to siphon profits before each participant's share is calculated.
- Airports are to carefully examine all accounting mechanisms to ensure that the distribution process is reasonable.



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## JV Profits



- 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 in order for the airport to determine the amount of benefit each participant has received from the business during the year.
- The joint venture agreement should specify the timing of the distributions.
- It is not consistent with the regulation if an agreement calls for a party to be entitled to a distribution of money regardless of the profitability of the joint venture.



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## Profits – Amount of Distributions

- Definitions such as ‘net profit’ or ‘distributable income’ come into play – read the definition sections of agreements
- Potential ‘siphons’
  - Administrative/management/service fees
  - Franchise fees/royalties/license fees/branding fees
  - Administrative employees of non-ACDBE directly charged to JV
  - Consultants to JV
  - Reserves
  - Loan paybacks
  - Etc., etc., etc.
- Who determines if there is ‘enough’ cash to make disbursement?



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## Fees

- JVA should identify:
  - Any “management fees,” “royalty fees,” or “service/administrative fees,”
  - Fees be paid to participants for “indirect” management of the operation (i.e., corporate overhead or corporate support services) of that joint venture
- Fees should be reasonable and not used as a method of draining profits of the joint venture to the benefit of a particular participant
- 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
- Royalty fees or fees (other than franchise fees) charged by a participant 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.

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## Purchase of Inventory

- JVA should not mandate that the ACDBE participant or joint venture purchase inventory, supplies, or services from the non-ACDBE joint venture participant.
  - This 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.
- ACDBE should always have the option of obtaining goods and services on an arms-length, market price basis from any source.
- JVA may allow such purchases from a non-ACDBE participant.
  - 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.



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## Loans – Between JV Partners

From FAA's JV Guidance

- If ACDBE cannot obtain independent financing, the non-ACDBE may provide financing with the following conditions:
  - Terms and conditions comparable to prevailing market conditions in terms of such factors as duration, rate, fees, etc.
  - Must have promissory note or loan agreement clearly stating due date and payment method, interest rate, prepayment, defaults, and collateral.
  - Full recourse note personally guaranteed by the ACDBE and/or secured by assets outside of the ownership interest or future profits of the joint venture.



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## Loans – Between JV Partners

### From FAA's JV Guidance

- Should not be for 100% of the capital requirement (**max. 85%**)
- Should not be longer than the term of the contract under which the joint venture operates (excluding options or extensions).
- No provisions in the loan agreement which have the effect of limiting the ACDBEs ability to control its business or independently perform its designated role in the joint venture's business.



## Loans – What to Focus On

- In JVA, loans from non-ACDBE can be offered but cannot be required
- Calculate the monthly and annual payment for anticipated loans
- Know what the rate is and when it can change
  - Often described as an index + a factor, such as
    - Secured Overnight Financing Rate (SOFR) (early June = 4.29%) + XX% – *this replaced the LIBOR rate*
    - Wall St. Journal prime rate (early June = 7.5%) + XX% (usually 2-4%)
- Understand how the interest compounds – monthly, quarterly, annually?—it adds up
- Who is the non-ACDBE loaning the money to?
  - The ACDBE, or
  - The JV
    - Could be paying interest from the JV to itself
- Look for disconnects between loan terms in JVA, promissory notes, and guarantees/securities



## Other Loans and Dilution of Interest

- Does the non-ACDBE have authority to:
  - Loan money to the JV in lieu of making an additional capital call
  - Automatically convert an ACDBE capital call liability as a loan to the JV
    - Typically at a much higher rate than an anticipated loan to the ACDBE
  - Automatically allow the non-defaulting member to pay a defaulting member's capital and assess a loan
- Can non-repayment of loan or non-contribution of capital dilute ACDBE's interest in the JV?
  - This triggers an immediate ACDBE counting issue for the JV, along with a reduction in distribution



## Termination and Defaults

- Termination – Blanket clauses that indicate that ACDBE will be terminated or in default if it loses its ACDBE certification must be modified
- ACDBE participation continues to count (except for extensions or renewals) if ACDBE was decertified because
  - disadvantaged owner exceeded personal net worth criterion, or
  - firm exceeds business size standards during the performance agreement





## Terminations and Defaults

- Carefully read any term that discusses
  - Change in control event
  - Redemption event
  - Default
- Carefully review the sliding scale of how the ACDBE shares will be bought back in the event of any termination or default



## Restrictive Conditions

- Exclusivity and non-competes
  - Not only an impact on growth, but can also impact the 'independence' of an ACDBE
- Actions for which sanctions only apply to the ACDBE:
  - Unlawful acts
  - Tax issues
  - Financial issues outside of the JV
  - Transfer of ownership



# Joint Venture Review and Monitoring Tool

XYZ JV, LLC  
Joint-Venture-ACDBE-Review-and-Monitoring-Guide

JV- Guidance- Section	Criteria	What-is-in-the-JV- Agreement?	Comments	Monitor
2.2	Components-of-written-JV-agreement-include:			
	<ul style="list-style-type: none"> <li>• Identification-of-participants</li> </ul>	<ul style="list-style-type: none"> <li>• Various-sections-- Each-member-of-the-agreement-is-referred-to-by-at-least-two-names,-including-'dba'-names.</li> </ul>	<ul style="list-style-type: none"> <li>• Clarify-official-business-names-of-members-(along-with-the-dba-names),-use-one-name-for-each-member-consistently-throughout-agreement</li> </ul>	<ul style="list-style-type: none"> <li>• Ensure-consistency-of-names-of-member-firms-when-reviewing-meeting-minutes,-etc.-during-monitoring.</li> </ul>
	<ul style="list-style-type: none"> <li>• Identification-of-single-for-profit-business-of-JV</li> </ul>	Section 3.a.-"food-concessions-in-Terminal-5-of-XYZ-Airport"		<ul style="list-style-type: none"> <li>• Confirm-continued-nature-of-business-once-operational.</li> </ul>
	<ul style="list-style-type: none"> <li>• Term-of-JV-agreement-and-factors-affecting-the-term</li> </ul>	Section 7.c--"Dissolution-when-first-of-the-following-occurs:" <ul style="list-style-type: none"> <li>• Unanimous-consent-of-JV-Management-Committee</li> <li>• Termination-of-concessions-lease-by-airport</li> </ul>		

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## Questions on this Section or from the Day?

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