



# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** William F. Sherry, A.A.E.

**SUBJECT:** AIRPORT CONCESSION  
DISADVANTAGED BUSINESS  
ENTERPRISE PROGRAM

**DATE:** August 30, 2006

Approved

Date 8/30/06

Council District: Citywide

## RECOMMENDATION

Adoption of a resolution:

- (a) Approving the City of San José Airport Concession Disadvantaged Business Enterprise Program in accordance with the regulations of the United States Department of Transportation;
- (b) Approving the annual Airport Concession Disadvantaged Business Enterprise Participation Targets for Airport car rental concessions and for all Airport concessions other than car rentals for federal fiscal years 2006 through 2008;
- (c) Authorizing the City Manager to submit the City of San José Airport Concession Disadvantaged Business Enterprise Program and Participation Targets to the Federal Aviation Administration and to make or submit revisions that are necessary to comply with applicable federal regulations and to achieve the objectives of the Program.

CEQA: Resolution Nos. 67380 and 71451, PP 06-132

## OUTCOME

Should Council approve the proposed Airport Concession Disadvantaged Business Enterprise (ACDBE) Program and Participation Targets, the City Manager will authorize the Director of Aviation to execute the new ACDBE plan and submit it to the FAA for final approval. When approved by the Federal Aviation Administration (FAA), the City will then be in compliance with the Federal requirements to establish the new ACDBE Program. The City, as a recipient of FAA financial assistance for Airport development, will continue to receive funding for various Airport projects.

August 30, 2006

Subject: Airport Concession Disadvantaged Business Enterprise Program

Page 2

## **EXECUTIVE SUMMARY**

In order for the City to continue to be eligible for FAA financial assistance for airport development, the Norman Y. Mineta San José International Airport (Airport) must have an FAA approved ACDBE Program in place. This Council memo summarizes the ACDBE targets for the Airport for the years 2006-2008 and provides a recap of the methodology used to determine the targets and comply with the new US Department of Transportation (USDOT), 49 CFR Part 23 regulation pertaining to ACDBE participation in concessions at federally funded airports.

## **BACKGROUND**

On March 22, 2005, the USDOT published revised ACDBE regulations. The new ACDBE regulations revise and update former USDOT regulations concerning participation by Disadvantaged Business Enterprises (DBEs) in the concessions activities of airports receiving Federal grants from the FAA Airport Improvement Program (AIP). The new ACDBE regulations are parallel in many important respects to the USDOT DBE regulations for federally assisted contracts.

The new ACDBE regulations became effective April 22, 2005. These regulations require recipients of FAA grants to develop new programs for ACDBE participation in airport concession contracts. The City, as a recipient of AIP funds for Airport development, is required to revise its ACDBE program to comply with the new regulations.

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.

August 30, 2006

Subject: Airport Concession Disadvantaged Business Enterprise Program

Page 3

A. “ACDBE” Defined

Under the ACDBE regulations, “disadvantaged business enterprise” 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 control the management and daily business operations of the company claiming ACDBE status.

B. “Small Business Concern” Defined

In order to qualify as an ACDBE, a firm must qualify as a small business concern. As a general rule, the ACDBE regulations treat a firm as a small business concern eligible to be certified as an ACDBE if its annual gross receipts, averaged over the firm’s previous three fiscal years, do not exceed \$30 million.<sup>1</sup>

C. “Socially and Economically Disadvantaged” Defined

Under the ACDBE regulations, “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:

- Any individual determined to be a socially and economically disadvantaged individual on a case-by-case basis;
- Any individual in the following groups, members of which are reputedly 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

---

<sup>1</sup> The following types of businesses have size standards that differ from the standard set forth above:

- Banks and financial institutions: \$275 million in assets
- Car rental companies: \$40 million average annual gross receipts over the firm’s three previous fiscal years
- Pay telephones: 1,500 employees.

August 30, 2006

Subject: Airport Concession Disadvantaged Business Enterprise Program

Page 4

(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;

- o "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
- o Women;
- o 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.

Any individual who has a personal net worth exceeding \$750,000 is not a socially and economically disadvantaged individual for purposes of ACDBE regulations, even if the individual is a member of a group otherwise presumed to be disadvantaged.

#### D. "Airport Concessions" Defined

The ACDBE regulations define "concessions" to include: (1) businesses located on the Airport that are engaged in the sale of consumer goods or services to the public under an agreement with the City, another concessionaire, or the owner or lessee of a terminal, if other than the City; and (2) businesses conducting one or more of the following covered activities, even if it does not maintain an office, store, or other business location on an airport, as long as the activities take place on the airport. Such activities include management contracts and subcontracts, a 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.

#### E. Utilization of 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.

F. Use of Race-Conscious Measures

The ACDBE program must also 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.

G. Quotas or Set-Asides Prohibited

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

**ANALYSIS**

The City contracted with a consultant team to assist staff with the preparation of an ACDBE Program to meet the FAA regulatory requirements and to determine ACDBE participation goals for the City's Airport concessions opportunities for federal fiscal years 2006 -2008. Consistent with the ACDBE regulations, the City's ACDBE Program includes a narrative description of the types of measures that the City intends to make to ensure nondiscriminatory participation of ACDBEs in Airport concessions and it provides for setting targets rather than specific goals in light of the requirements of the Western States case. The methodology used in establishing these targets is consistent with the requirements of the ACDBE regulations. The City's ACDBE program also provides for seeking ACDBE participation in all types of Airport concession activities, rather than concentrating participation in one category or a few categories to the exclusion of others.

A. Participation Targets

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 ready, willing and able to participate in the City's ACDBE Program, in accordance with applicable Federal regulations.

To meet the requirements of the USDOT regulations, the City established two separate ACDBE participation targets for the Airport, each covering a three-year period, that are based on demonstrable evidence of the availability of ready, willing and able ACDBEs relative to all businesses ready, willing and able to participate in the City's ACDBE program. The first is for all Airport concessions other than rental cars and the second is for rental cars. The objective in setting separate ACDBE participation targets is to estimate the percentage of: (a) total non-rental car concession revenues; and (b) total rental car concession revenues that would be performed by ACDBEs in the absence of discrimination and its effects. This percentage is the estimated ACDBE participation that would occur if there were a "level playing field" for firms to work as concessionaires at the Airport. However, the ACDBE regulations require an annual review to

August 30, 2006

Subject: Airport Concession Disadvantaged Business Enterprise Program

Page 6

make sure that these targets continue to fit the City's circumstances appropriately. The City is required to report to the FAA any significant interim adjustments to its targets as a result of any annual review.

In achieving this objective, the City is to determine the extent, if any, to which the firms in the City's market area have suffered discrimination or its effects in connection with concession opportunities or related business opportunities.

The City's plan is to meet the ACDBE targets through race neutral means. The City's overall target for concessions other than car rental during the period beginning July 1, 2005 and ending June 30, 2008, collectively the City's Fiscal Years 2006-2008, is 17.03% of the total gross receipts for concessions at the Airport. To determine our ACDBE target, the City calculated its overall ACDBE availability base figure of 14.84% for all non-rental car concession opportunities for FYs 2006-2008. This base figure was derived by dividing the estimated non-rental car gross receipts from ACDBEs by the estimated gross receipts from all non-rental car concessions. In order to determine whether a further adjustment to the base figure was needed, the Airport's Annual DBE Achievements Reports to the FAA for Fiscal Years 2001 – 2005 were reviewed to determine median past participation in all non-rental car concessions. Using the prescribed FAA formula, the median past participation percentage of 19.23% and the ACDBE availability of 14.84% were then divided by 2 to determine our target of 17.03%. Historically, the Airport has exceeded the 17.03% target, primarily through extensive outreach efforts. Currently, the car rental target has been submitted as undetermined, pending additional direction from the FAA on this segment of the ACDBE plan.

The City will not be penalized, or treated by the FAA as being in noncompliance with the ACDBE regulations, simply because its ACDBE participation falls short of the City's overall ACDBE targets. The City can be penalized or treated as being in noncompliance only if the City fails to administer its ACDBE program in good faith. If the City's ACDBE participation falls short of the City's overall ACDBE targets, the FAA may require the City to submit to the FAA a statement of the reasons why the City was unable to meet its overall ACDBE targets and the steps that the City is taking to meet its overall targets or to adjust them based on changed circumstances. In response to any such submission, the FAA may require the City to implement appropriate remedial measures.

#### B. ACDBE Certification

Certification decisions for ACDBEs to participate in the City's airport concessions will be made by the California Unified Certification Program (CUCP). The City is a member of the CUCP, which has established four regional DBE certification activities. The California Department of Transportation Office in Sacramento will process ACDBE certifications for the ACDBE Program.

C. Modification of Existing Concession Agreements Not Required

The ACDBE regulations do not require the City to modify or terminate any existing concession agreements. However, after receiving FAA approval of its ACDBE program, the City will be required to include its ACDBE targets in any new Airport concession RFP and when an extension or option to renew such an agreement is exercised, or when a material amendment is made, the City must assess the potential for ACDBE participation and may, if permitted by the agreement, modify the amount of ACDBE participation in the renewed or amended agreement.

D. Compliance and Enforcement Procedures

Staff will monitor compliance of its Airport concessionaires consistent with the requirements of the ACDBE regulations and the City's ACDBE Program. The City may impose such contract remedies as are available under the concession agreement and under applicable law. Failure to carry out the City's ACDBE Program and obligations as set forth in the ACDBE Program and in each concession agreement will constitute a breach of contract that may result in termination of the concession agreement.

E. Approval and Submission of ACDBE Program

Staff, with the aid of the consultant team, drafted the ACDBE Program, completed the study and submitted a draft ACDBE Program and targets to the FAA for comments. In early June of this year a revised draft ACDBE Program and targets were submitted to the FAA for review. The FAA has agreed to approve the ACDBE Program and targets once they have been approved by the City Council and submitted to the FAA by the City Manager. As part of the ACDBE program, an additional effort will be undertaken shortly with respect to the Airport management contracts. The Airport ACDBE targets may be revised based on the results of that study.

A copy of the draft Airport Concession Disadvantaged Business Enterprise Program is available for review in the Clerk's Office.

**POLICY ALTERNATIVES**

The City may elect to not submit an ACDBE Program. The City would thereby forgo the opportunity for federal grant funding.

August 30, 2006

Subject: Airport Concession Disadvantaged Business Enterprise Program

Page 8

### PUBLIC OUTREACH/INTEREST

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
  
- √ **Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
  
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

The ACDBE regulations require that the City consult with stakeholders before submitting its overall ACDBE goals to the FAA for approval. Stakeholders with whom the City must consult include, but are 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.

Both Airport staff and the consultant contacted many groups and individuals as part of the goal-setting process required by the ACDBE regulations. Airport staff and the City's ACDBE consultant fulfilled this requirement through outreach to minority and women's business groups, community organizations, trade associations representing concessionaires currently located at the Airport, as well as existing concessionaires themselves. Others contacted include officials and organizations that could be expected to have information concerning the availability of disadvantaged businesses. In addition, a presentation was made to the Small Business Commission at their meeting on August 9<sup>th</sup> 2006 to review the Airport goal setting process. The presidents of the local business associations were also invited to attend.

In addition to the above, staff conducted two workshops about DBE certification including information on what is a DBE, who qualifies and the process to obtain certification. Hayden Lee, the VTA DBE certifier who does certification for Santa Clara County, conducted the workshops at the City Council Chambers and Tully Library. Notification of the workshops was posted on the Airport website and sent via the Airport's business newsletter, business associations/Groups and City Council member offices.

HONORABLE MAYOR AND CITY COUNCIL

August 30, 2006

Subject: Airport Concession Disadvantaged Business Enterprise Program

Page 9

### COORDINATION

This memo has been coordinated with the City Attorney's Office and the Department of Public Works/Office of Equality Assurance. In addition, the plan has been presented to the Small Business Development Commission, in which the presidents of the local business associations were invited to attend. The ACDBE Program will be presented to the Airport Commission on September 11, 2006.

### BUDGET REFERENCE

N/A

### CEQA

Resolution Nos. 67380 and 71451, PP 06-132



WILLIAM F. SHERRY, A.A.E.  
Director of Aviation

Please direct questions to William Sherry, Director of Aviation, at (408) 501-7669.