

**AIRPORT CONCESSIONS
DISADVANTAGED
BUSINESS ENTERPRISE**

**JOINT VENTURE
TEMPLATE GUIDANCE**

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Business Diversity and Development Department
&
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Dallas Fort Worth International Airport
ACDBE & JV Template Guidance

I. Purpose – To develop a template for certain recommended standard clauses for Joint Venture Agreements and to provide sample language for both acceptable conditions and unacceptable conditions to be included

II. Topics

A. Organization

- 1) Name of JV
- 2) Ownership interests
- 3) Term of JV
- 4) Purpose (must be a single purpose)

The agreement should specify the name of the joint venture, the parties involved and their ownership interest and the term and purpose of the joint venture. The joint venture should be formed for a single purpose.

SAMPLE:

Name. The business of the Company shall be conducted under the name of _____.

Purpose. The purpose of the Company is to _____.

Ownership. Each member's interest in the Company shall be as follows:

	<i>Percentage Interest</i>
<i>Company A:</i>	<i>75%</i>
<i>Company B:</i>	<i>25%</i>

Term. The Company shall commence on the date on which its Certificate of Formation is filed with the Secretary of State. The Company shall continue for the term of the _____ lease agreement.

B. Capital contributions

1) Initial amount to be contributed by each party

The dollar amount of initial contributions should be included in the agreement. The total capital needs may not be known at the time that the

joint venture is executed, however a reasonable estimate should be included with provisions for additional capital if required to meet needs.

SAMPLE:

Each member's interest in the company and estimated initial capital contribution shall be as follows:

	<u>Initial Capital Contribution</u>	<u>Percentage Interest</u>
Company A:	\$750,000	75%
Company B:	\$250,000	25%

2) Additional capital contributions

- a. Purpose
- b. Conditions
- c. Limits

The conditions upon which additional capital will be required and the purpose of additional capital contributions should be specified. In addition, there should be some limit on the part of any one partner from unilaterally calling for additional capital without a legitimate purpose.

Do not Include: Clauses that allow one member to arbitrarily make capital calls in any amount for any purpose.

SAMPLE:

*In the event that additional Capital Contributions are **required to fund construction or operations** of the Company, the Managing Member will notify each Member of the amounts required. Each Member will contribute additional capital in the same proportion as its Percentage Interest. Each Member acknowledges and agrees that the Master Lease requires additional investments in the Facilities.*

3) Source of funds

- a. Potential for loans
- b. Loan requirements

The conditions upon which a loan may be made from one party to another or from one party to the joint venture must be specified. In the event that a loan will be made between any of the parties (i.e. from one partner to another or from one partner to the joint venture), such loan must meet the requirements of the regulation and FAA Joint Venture Guidance.

SAMPLE:

A Member's failure to contribute required capital within thirty (30) days of notice shall be considered an Event of Default; provided, however, that any other

Member may, in that Member's sole discretion, cure such default by contributing on behalf of the noncontributing Member up to 90% of the noncontributing Member Capital Contribution. Such capital contribution shall be considered a loan to the noncontributing Member amortized over the remaining Term. Any such loan shall comply with the FAA ACDBE Regulation and FAA Joint Venture Guidance.

Member Loans to Company. Any loan made by a Member to the Company shall be considered a loan to each of the Member's in proportion to each Member's ownership and shall comply with the FAA ACDBE Regulation and FAA Joint Venture Guidance.

C. Accounting Procedures

1) Method of Accounting

The method of accounting to be used for the joint venture should be specified in the agreement and should be a standard method acceptable to all parties, such as GAAP. The accounting method should not be left up to one party and be based on whatever standard or method that party chooses.

Sample:

Accounting Methods. In all accounting matters pertaining to this agreement, generally accepted accounting principles ("GAAP") set forth in the opinions and pronouncements of the Accounting Principles Board and the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or in such other statements by such other entity as may be approved by a significant segment of the accounting profession shall be used.

2) Distributions

- a. Timing
- b. Amount
- c. Reserves

The agreement must specify the timing of distributions and how distributions will be determined. Distributions should be made at least quarterly and should be determined based on the ventures profitability and cash flow. In the event that reserves are to be withheld from distributions, the amount and purpose for any such reserves should be specified and should be reasonable in light of upcoming expenses.

Sample:

Distributions of Net Cash Flow. The Company shall distribute available net cash flow to the members in proportion to their ownership interest not less than quarterly. Payment shall be made within 15 days of final determination of net cash flow for the period. Available net cash flow shall

be defined as net cash flow that is not required to meet contingencies. Net Cash Flow is defined as:

- (a) the Gross Revenue of the Company for the period for which the calculation of Net Cash Flow is being made less
- (b) all operating costs and expenses incurred or attributed to Company operations for the period, consistent with GAAP less
- (c) any Member payments on any Company debts.

3) Bank accounts

The agreement should specify the bank account to be used for the joint venture's business. The parties should agree on the bank(s) to be used for the company's business. In the event that the company's funds are to be deposited in the account of one of the members, a spate accounting of the funds must be maintained.

Sample:

Bank Accounts. The Managing Member will open and maintain on behalf of the Company bank accounts in which all monies received by or on behalf of the Company will be deposited. All withdrawals from such accounts will be made upon the signature of such person as the members may from time to time designate.

4) Other language regarding distributions

The agreement should specify any other items applicable to distributions. For example, available cash flow may be used in a specific order before applying to distributions. Cash flow may be used to pay outstanding loans or other obligations before being distributed to the members.

5) Company records

- a. Access to financial information/reports/tax returns

All parties should have access to financial information and reports on a timely basis as well as tax returns and K1s.

Sample:

Financial Statements. The Managing Member shall provide to the other Member(s) as soon as practicable after the close of each month a Profit & Loss Statement. In addition, the Managing Member shall, within 15 days of the close of each quarter, provide to the other Member(s) a Balance Sheet, a Statement of Operations and a Statement of Changes in Partners' Capital for the current fiscal quarter and year-to-date information.

Tax Returns. The Managing Member will prepare a United States Partnership Return of Income, and appropriate state tax returns and will file such Returns within the time prescribed by law for such filing. The

Managing Member will send copies of the Returns and of tax form Schedule K-1 to each Member within ninety (90) days after each fiscal year, or as soon thereafter as is practicable.

b. Location of records

Records should be located in a place that is accessible and agreeable to the parties. In the event that records are located in a remote location, such as a different state, reasonable access to records should be made available electronically.

D. Management

1) Overall Management

- a. Management or Governance Committees
- b. Voting
- c. Quorum
- d. Unanimous Decisions
- e. Timing/frequency of meetings
- f. Documentation

Each party should participate in the overall management or governance of the joint venture in proportion to their ownership interest. There should be some items that are voted upon and the method of voting should be included in the agreement (e.g. majority in number or majority in interest). All parties should be represented in order to have a quorum. Since the majority partner will be able to outvote the minority partner, there should be some items that require unanimous consent. Meetings of the management or governance committee should be held regularly, at least quarterly.

SAMPLE:

2) JV Manager

- a. Powers and duties
- b. Limits on powers

The joint venture may appoint or vote upon a member to act as the managing member. The managing member should be assigned reasonable powers and duties and should not be responsible for management of the work assigned to the ACDBE unless the managing member is the ACDBE. The managing member's powers should be limited and they should not have unilateral authority to take actions or make decisions that would have a major impact on the other partner, such as making capital calls not previously anticipated, deciding when distributions will be made, establishing reserves, etc.

SAMPLE: Designation of the Managing Member. *The Managing Member shall be designated by a vote of all of the Members and shall serve until removed by a vote of all members. Upon removal of the Managing Member, its interest converts to that of a non-Managing Member and it shall continue to be entitled to its share of the distributions and profits as provided hereunder.*

Managing Member Powers and Responsibilities. Subject to the terms and conditions of this Agreement, the Managing Member shall have authority over, and be responsible for, the day-to-day management, conduct, operation and control of the business, properties and affairs of the Company except for those duties assigned to the ACDBE member.

3) Day-To-Day Management

a. Distinct, clearly-defined portion of the work

i. Meaning of distinct, clearly defined

The roles/responsibilities assigned to the ACDBE participant(s) shall be separate from the roles/responsibilities of the non-ACDBE participant(s) and shall be clearly laid out in the agreement in sufficient detail so as to provide no ambiguity about who will be responsible for what tasks. Roles that are “assisting,” “evaluating,” “participating in,” etc. are not clearly defined. Shared roles cannot be credited unless it the specific portion of the work assigned to the ACDBE is clear and meets all other criteria.

ii. Burden of proof

The burden of proving that the joint venture meets the requirements of the regulation and the JV Guidance by a preponderance of the evidence is on the applicant.

iii. Employees

The ACDBE is not required to employ the employees, but is required to control the employees performing their assigned roles/responsibilities. The employees must report directly to the ACDBE firm. If employees report daily to the Joint Venture Manager or an employee of the non-ACDBE, and periodically to the ACDBE, that would not be considered reporting to the ACDBE. The burden of proving that the ACDBE controls the employees is elevated when the employees are employed by the Joint Venture as opposed to the ACDBE and is elevated even further when the employees are employed by the non-ACDBE.

iv. Independence

The preamble to the 2005 ACDBE regulation, 49 CFR part 23, states as follows: “If the ADCBE participant is not required to perform independently a distinct portion of the joint venture’s work, it becomes very easy for a prime concessionaire seeking to circumvent ACDBE requirements by having an ACDBE “silent partner” on its payroll.” The role performed by the ACDBE should be performed independently.

v. Nature of the relationship

The ACDBE participant is a firm, not an individual. The ACDBE should not be treated as an employee, but as a partner.

vi. Roles/Responsibilities

Determining the value of the roles/responsibilities assigned to the ACDBE in a Joint Venture can be a difficult task. The JV guidance provides a sample chart to assist in determining that value of various roles. The chart is helpful, but the value of each category will change depending upon the operation. Also, additional detail or “tips” would enhance its value. For example:

Operations (1/3 of the business effort)	Product (1/3 of the business effort)	Administration/ Corp Support (1/3 of the business effort)
<p>Human Resources (Supervise on-site operations staff, hire/fire staff, scheduling, training, etc.)</p> <p>Tip: Supervision of on-site staff is the greatest portion of this category. An organization chart listing the number of staff at each level and how the reporting structure works should be provided. Dotted line relationships should be clearly explained. Do not confuse what independence and direct reporting relationship mean. Dotted line relationships on paper that look like solid line relationships in practice will be revealed through compliance reviews and could cause approval to be withdrawn.</p>	<p>Purchasing</p> <p>Tip: Purchasing of product is one of the most important task in this category for a non-franchised retail location. In this sense, purchasing means from a vendor as opposed to from the non-ACDBE. If the ACDBE has the autonomy to perform this role independently, it could be a significant role. If the ACDBE has the ability to select items from the non-ACDBE’s warehouse, that is not purchasing and should not be described as such.</p>	<p>Accounting/Payroll/ Taxes</p> <p>Tip: This is the most significant task in this category and is rarely assigned to the ACDBE.</p>
<p>Loss Prevention</p> <p>Tip: Depending on the type of operation, responsibility for loss prevention could be a somewhat significant role or a relatively meaningless role. Loss prevention is much more critical in a retail operation and you will rarely see it in a food operation. It is not typically a full-time job and, unless there is a significant issue with loss or it is a very large operation, it is often handled by corporate or regional staff rather than local staff.</p>	<p>Inventory Management</p> <p>Tip: Inventory Management should be defined in the agreement if it is assigned to one of the parties. Inventory Management may include managing the open-to-buy, making decisions about when and how to move stock through transfers or mark-downs, assortment decisions, determining stock levels on the shelves, etc. Many agreements assign inventory management as a role without defining what it means in the context of the</p>	<p>Legal Services</p> <p>Tip: Also rarely assigned to the ACDBE. Be aware of clauses that indicate that the Joint Venture will pay for legal services on behalf of only one of the parties.</p>

	agreement. Make sure you know what it involves before assigning credit.	
Safety/Security	<p>Pricing</p> <p>Tip: Pricing is a critical element in the merchandise/product area if there is not a market basket or street pricing approach. Do not confuse pricing in an unrestricted setting with pricing in a restricted setting. One takes much more effort. If pricing means simply conducting the market basket survey once or twice a year, it is not a significant role. If pricing means determining the selling price of every item, it is a much more significant role.</p>	<p>Business Development/ Landlord Relations</p> <p>Tip: This may be assigned to either party and is not a significant portion of the work. Be aware that business development work should be business development for the joint venture and not on behalf of only one of the involved parties.</p>
Cash Management (check- out, banking)	<p>Décor/Display</p> <p>Tip: Display is a significant role in both merchandise and some food operations. If display is defined as displaying product according to a plan-o-gram that is developed by someone at a corporate office, it is not a very large role. If display includes developing the plan-o-gram and continually monitoring and revising the plan to accommodate merchandise changes and promotions, it is a larger role.</p>	<p>Human Resources/ Training Programs</p> <p>Tip: This is also a significant role. Be aware that sometimes this role may be assigned but only performed in part by the assigned party. For example, training may be assigned to an ACDBE for their staff, however the training may entail primarily video or interactive computer training utilizing the training program developed by the noon-ACDBE. This task should be broken down into numerous elements, including recruiting, interviewing, hiring, discipline, firing, training program development, hands-on training, etc.</p>

<p>Day-to-Day Landlord Relations</p> <p>Tip: This is usually the responsibility of all management but may be assigned to one individual company. It is not a major task unless there are lots of problems with the operation. Ask questions regarding specific tasks under this category.</p>	<p>Product Assortment (retail)/Menu Development (food)</p> <p>Tip: This is an important role in both food and merchandise. Basically, it is making the determination of what you are going to sell. As with purchasing, it is not as significant of a role if you are selecting a product assortment for your store based on a planogram developed by the</p>	<p>Policies/Procedures</p> <p>Tip: Frequently the policies and procedures used in a joint venture are the standard policies and procedures of the non-ACDBE firm. If this role is assigned to an ACDBE, they should be developing the policies and procedures and not merely implementing someone else's policies/procedures.</p>
<p>Maintenance/Cleaning</p> <p>Tip: This may be assigned as a separate task, usually in food operations. Sometimes it involves only weekly or monthly inspections. It is important to understand what is being cleaned, who is doing the actual cleaning, and how often it is done.</p>	<p>Negotiation of Special Programs, Rebates, Display Allowances, etc.</p> <p>Tip: This is usually handled at the corporate level by larger firms. Be aware of clauses that allow one of the partners to keep incentives, rebates, display allowances, etc.</p>	<p>Other Corporate Support</p> <p>Tip: Do not accept a vague definition. Require any corporate support to be detailed and specific, including related tasks and time requirements.</p>
<p>Budgeting/Monitoring Performance</p> <p>All participants in the joint venture should be participating in this activity. It is really more of an "overall management" role than a distinct, clearly-defined portion of the work.</p>	<p>Budgeting/Monitoring Performance</p> <p>All participants in the joint venture should be participating in this activity. It is really more of an "overall management" role than a distinct, clearly-defined portion of the work.</p>	<p>Budgeting/Monitoring Performance</p> <p>All participants in the joint venture should be participating in this activity. It is really more of an "overall management" role than a distinct, clearly-defined portion of the work.</p>

- vii. Note that performing a percentage of one of these areas does not equate to credit for that percentage. For example, if an ACDBE is assigned the role of purchasing 30% of the merchandise sold in the operation, that will not equate to a 30% role on its own as there are still operations and administrative roles to be considered. Depending on the value assigned to purchasing, the role might be counted at 30% of 33% (assuming that purchasing is determined to be 1/3 of the work) which would equate to credit of 10%.

- viii. Roles assigned to the ACDBE must represent a commercially useful function, be meaningful and bring significant value to the partnership. Frequently, the ACDBE is assigned a series of small roles, such as finding minority/women owned vendors, maintaining a relationship with the airport, attending tenant meetings, etc. These types of roles are difficult to quantify and, absent evidence quantifying the value of these roles, should not be given significant, if any, credit.

4) Management/Administrative Fees

- a. Management fees must represent a reimbursement of actual costs
- b. Management fees should be related to the clearly defined services provided
- c. Method of charging should be detailed (i.e dollar amount or percentage)
- d. Method for reconciliation the cost to the charge must be provided at least annually

SAMPLE:

The Managing Member shall provide the following administrative services ("Administrative Services"):

1. *Accounting, payroll and record keeping*
2. *Legal counseling*
3. *Tax administration*
4. *Internal audit*
5. *Monitoring of food and labor costs*
6. *Conduct pricing surveys*
7. *Purchasing supervision*
8. *Loss Prevention/Safety & Security*
9. *Cash Management*
10. *Human Resources*
11. *Maintenance of equipment and facility*

In consideration of Managing Member's Administrative Services, the Company shall pay Managing Member a Management Fee equal to 2.5% of the Company's gross sales.

At the end of each annual period, the dollar amount of fees charged for the above services will be compared to the actual cost of providing the service. Any payments in excess of the cost will be refunded to the Company. The Company shall reimburse the Managing Member for any costs in excess of the amount charged. In no event will the Management Fee exceed 2.8% of the Company's gross sales.

5) Royalty or License Fees

Royalty or License Fees may be charged to the Joint Venture, provided that the fee is a reimbursement of demonstrable costs and meets the same standards required for Management/Administrative fees.

E. Events of default

- 1) ACDBE Loss of Certification - ACDBE certification loss should not be an event of default if the ACDBE loses its certification due to exceeding the size standard or exceeding the personal net worth cap during the original term of the agreement without extensions or options.

SAMPLE:

ACDBE Certification. ACDBE X shall be certified as an airport concessions disadvantaged business enterprise (“ACDBE”) with the XUCP and the applicable NAICS code during the term of this Agreement and shall provide proof to Company that its annual renewal application has been submitted to the appropriate certifying entity. ACDBE X’s failure to maintain ACDBE certification solely due to exceeding the personal net worth or NAICS size standards as defined by 49 CFR part 23, shall not be a default under this Agreement. ACDBE X’s failure to maintain its ACDBE certification for any other reason shall be deemed a default under this Agreement.

- 2) Limitations on ACDBE Change of Control

There can be no clauses included in the Agreement that have the effect of limiting the ACDBE’s ability to control its own business. Clauses that limit the ACDBE’s ability to have a Change in Control or management of its own business are not acceptable. In accordance with the regulations (49 CFR parts 23 and 26), an ACDBE may not be terminated without the prior written consent of the Airport which may only be granted with good cause. A change in control of the ACDBE firm that does not impact the firm’s certification, on its own, would not be considered good cause.

F. Non-compete clauses

- 1) In general, non-compete clauses should not be used to keep the ACDBE from teaming with other non-ACDBEs. In some cases, such as in franchise or licensed operations, the franchise or license agreement may require certain non-compete clauses, however the non-compete clauses should apply equally to the parties and should not be overly broad.

G. Transfer of Interest

- 1) The conditions under which a party may transfer its interest to another party should be included in the Agreement. A requirement that transfers from the ACDBE must be to another ACDBE are acceptable. Other than that, requirements should not be more stringent on the ACDBE than on the non-ACDBE.

H. Dissolution

1) Procedures for winding up and dissolving the business should be provided, including provisions for disposing of assets and making final distributions.

I. Organization Charts

1) Organization charts should be provided along with the Agreement for Airport review and should accurately reflect the reporting structure for all positions employed by the joint venture or employed by one of the partners and assigned to the joint venture. The Organization Chart should include a notation regarding who will employ each party and should accurately reflect day-to-day reporting structure. Any dotted-line reporting structures should be explained. If any employees are shared, detailed information regarding who controls that employee for each task should be included. It should be noted that the Joint Venture guidance provides that the ACDBE should be able to hire/fire employees performing its portion of the work without the approval of the non-ACDBE. The reporting structure as presented should be confirmed during any monitoring of the joint venture.