

**UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC**

<b>J&amp;B ENTERPRISES, INC.,</b>	)	
<b>dba RHYTHM SHINE,</b>	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. 16-08-07</b>
	)	
<b>METROPOLITAN NASHVILLE</b>	)	
<b>AIRPORT AUTHORITY,</b>	)	
<b>Respondent.</b>	)	
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**DIRECTOR'S DETERMINATION**

**I. INTRODUCTION**

This matter is before the Federal Aviation Administration (FAA) based on the formal complaint filed in accordance with FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings (FAA Rules of Practice), 14 Code of Federal Regulations (CFR) Part 16.

J&B Enterprises, Inc., dba Rhythm Shine, (Complainant) has filed a complaint pursuant to 14 CFR Part 16 against the Metropolitan Nashville Airport Authority (MNAA) (Respondent), alleging Respondent is in violation of 49 CFR Part 26, *Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs*, and 49 CFR Part 23, *Participation of Disadvantaged Business Enterprise in Airport Concessions*.<sup>1</sup> The Complainant filed its complaint with the FAA on July 30, 2008, and it was docketed by the FAA on August 11, 2008.

The Complainant is a certified Airport Concession Disadvantaged Business Enterprise (ACDBE) owned and operated by James and Betty Druett. The Complainant has operated at the Nashville International Airport since 1992 under a direct lease with the Airport. In 2006, the Respondent implemented a new concessions plan which required the shoeshine operations to be subleases under a master concessionaire. In November 2006, the Respondent awarded both master retail concession contracts to Airport Management Services, LLC (the Hudson Group), which included the award of two shoe-shine operations to the Complainant. As of October 31, 2008, the Complainant has been

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<sup>1</sup> FAA Exhibit 1, Item 1.

operating in two locations as a month to month tenant (one at B-5 inside the CNN store, and one in the C Concourse) at the Nashville International Airport.<sup>2</sup>

The Complainant alleges that Respondent discriminated against it on the basis of its race in violation of 49 CFR § 26.7, both directly against Complainant, and through its administration of its ACDBE program. Specifically, Complainant alleges that Respondent awarded both the News, Gifts and Specialty Retail master concession contracts to a prime contractor who failed to meet the ACDBE contract goal of 15.7 percent.<sup>3</sup> Complainant also alleges that Respondent breached its Concessions Agreement with Complainant when it sought to alter the layout and store location, without notifying Complainant, and ordered the closure of the J& B store in Concourse B-1 in July 2007 after Respondent awarded the contract to the Hudson Group.<sup>4</sup> As a consequence of this breach of the Concession Agreement, Complainant alleges it was placed in the CNN store (and not in the Hudson News store), where it was placed at a distinct business disadvantage. According to Complainant, the sum of the above acts of discrimination violated 49 CFR § 26.7(b) and 49 CFR § 23.1(e).<sup>5</sup> Additionally, Complainant alleges that Respondent violated 49 CFR § 23.1(b) because Respondent did not provide Complainant with a level playing field, when Respondent chose not to intervene when Complainant refused to sign a sublease with the Hudson Group.<sup>6</sup>

The Complainant also claimed that Hudson discriminated against it on the basis of its race “by resorting to tactics of intimidation... [Complainant] was ordered to pay for a booth that neither served the needs of its customers nor its own operational requirements. When [Complainant] balked, it was threatened with removal from the premises by [Respondent] and Hudson all in furtherance of an illegal conspiracy to force [Complainant] into a sublease agreement.”<sup>7</sup> Complainant alleges “that Respondent violated 49 CFR Part 26 § 26.7 because [Respondent] administered the ACDBE program, in such a way that both directly and through contractual and other arrangements, it used criteria or methods of administration that have had the effect of defeating or substantially impairing accomplishment of the objectives of the ACDBE program with respect to [Complainant] on the basis of race.”<sup>8</sup>

Complainant also alleges that Respondent violated 49 CFR § 23.1 by erecting barriers in Complainant’s path when it decided not to remove Complainant from the Hudson contracts, and move it from its CNN location to one of the two identified store locations of the Complainant’s choosing.<sup>9</sup> The Complainant claims it has been placed at an economic disadvantage and has suffered monetary damages by virtue of the violations of law by Respondent.<sup>10</sup>

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<sup>2</sup> FAA, Exhibit 1, Item 6 at 2 and 4.

<sup>3</sup> FAA Exhibit 1 Item 1, at 2-3.

<sup>4</sup> Id.

<sup>5</sup> Id. at 2-3.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id. at 4.

Respondent denies it has discriminated against Respondent because of its race.<sup>11</sup> According to Respondent, Complainant has not establish a prima facie case of discrimination under 49 CFR Part 26 and 49 CFR Part 23.<sup>12</sup> Additionally, Respondent argues that Complainant “alleges violations of sections of Part 26 that do not apply to the ACDBE programs, and alleges violations of the general objectives of Part 23 (at § 23.1) which are not independently actionable.”<sup>13</sup> Further, Respondent counters that the Complainant’s allegation relating to a breach of contract and an illegal conspiracy, and request for relief are not cognizable or available in a Part 16 proceeding.<sup>14</sup> Respondent recommends that the Director dismiss the complaint with prejudice.<sup>15</sup>

## **II. THE AIRPORT**

Nashville International Airport is a public-use, medium-hub commercial-service airport in Nashville, Tennessee. The Metropolitan Nashville Airport Authority (MNA) owns and operates Nashville International Airport, and one other airport, and is the airport sponsor for the purposes of compliance with federal statutes, regulations, and grant assurances. In each of the fiscal years from 2006 through 2008, MNA received federal financial assistance under FAA’s Airport Improvement Program (AIP) to finance in whole or in part the planning and development of Nashville International Airport.<sup>16</sup> The AIP program is a grant program authorized by the Airport and Airway Improvement Act, 49 USC § 47101, *et seq.* As a recipient of Federal AIP funds, the Respondent is subject to all grant assurances, including the assurance to comply with the requirements of Title 49 CFR Parts 26 and 23, the DBE and ACDBE regulations of the U.S. Department of Transportation.

## **III. (A) BACKGROUND**

From 1992 to 2006, the Complainant successfully operated a shoeshine concession under a direct lease with Respondent at Nashville International Airport. The term of the Complainant’s lease ran initially from 1992 through 1997, when the parties renewed it for two more years. In December 1999, the Respondent and the Complainant agreed to renew the lease on a year-by-year basis, with each year to run from September 1 through August 31.<sup>17</sup>

In 2005, Respondent began a \$35 million renovation program for the Terminal at Nashville International Airport that would involve relocating concessions to areas beyond the security checkpoints within the concourses, and expanding the number of concessions to generate substantially greater revenues for the Airport. In preparation for the Terminal upgrade project, the Authority’s Board of Commissioners adopted a new Concessions

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<sup>11</sup> FAA Exhibit 1, Item 10 at 1.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at 2-3.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> FAA Exhibit 1, Item 11, FAA AIP Grant History for MNA.

<sup>17</sup> FAA Exhibit 1, Item 10 at 8.

Master Plan in October 2004 that among other things, called for one master concessionaire for news, gift, and specialty retail concessions. The Master Plan in its description of the news, gift, and specialty retail concepts specified that a “shoeshine stand would be incorporated into two of the news and convenience shops, ‘either within or immediately adjacent to these stores.’” In addition, the Master Plan required the operator to subcontract the shoeshine stand to a “local operator”.<sup>18</sup> In February 2006, Respondent issued a Request for Proposals (RFP) that reflected these Master Concession Plan requirements for the shoeshine services.<sup>19</sup> The RFP included a 15.7 percent ACDBE contract goal.<sup>20</sup>

According to Respondent, MNAA staff explained the upcoming changes in the lease arrangement for the shoeshine operation and the new solicitation requirements to the Complainant (Mr. James Druett) prior to the development of MNAA’s 2004 Concessions Master Plan and the February 6, 2006, issuance of the RFP. MNAA’s Manager of Properties stated that “James Druett and I had numerous conversations about locating the shoe shine concession in the newsstands as part of MNAA’s new NG&S program. During these conversations, James indicated to me that he understood that the shoe shine services at the Airport would be provided as a subtenant of whoever was selected as the prime tenant as a result of the RFP process.”<sup>21</sup> Additionally, Respondent reported that James Druett attended a mandatory pre-proposal meeting on February 24, 2006, where discussion of the requirements and objectives of the RFP, including the shoe shine component, took place.<sup>22</sup>

The Complainant was included in two of the three proposals that were submitted to Respondent in response to the News, Gifts, and Specialty Retail RFP.<sup>23</sup> The RFP was to result in two awards, each reflecting a package of concession locations within the Airport. Each package contained a shoeshine location. The concession package labeled NGS-1 included the news store and shoeshine concession at area B-5, while the package labeled NGS-2 included a similar news store/shoeshine concession at C-2.<sup>24</sup> On September 20, 2006, Respondent awarded both packages of the News, Gifts, and Specialty Retail concessions to the Hudson Group. The Complainant was included in both awards. On November 30, 2006, the Hudson Group entered into a Master Lease and Concession Agreement with Respondent.<sup>25</sup> The renovation of B Concourse began in 2006, and design and construction of the newsstand at B-5 began in the spring of 2007.<sup>26</sup>

According to MNAA’s Airport Concessions Disadvantaged Business Enterprise Liaison Officer (ACDBELO), the Complainant (Ms. Betty Druett) dropped by her office in May 2007, a month after she became ACDBELO, “to express her concern about the alleged

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<sup>18</sup> Id. at 6.

<sup>19</sup> Id. at 9.

<sup>20</sup> Id. at 10.

<sup>21</sup> FAA Exhibit 1, Item 6 at 2.

<sup>22</sup> Id.

<sup>23</sup> Id. at 3.

<sup>24</sup> FAA Exhibit 1, Item 10 at 9.

<sup>25</sup> FAA Exhibit 1, Item 10 at 11, and Item 6 at 3.

<sup>26</sup> FAA Exhibit 1, Item 10 at 12.

lack of follow up and involvement from Hudson with regard to finalizing a sublease, build-out of the shoe shine stand in Space B5, and other issues.”<sup>27</sup> The ACDBELO stated that she “then spoke with Rebecca Ramsey, MNAA Properties Manager, about the issues raised, [and] from there began a series of internal meetings as to how to accomplish a mutually acceptable agreement between complainant J&B and Hudson.”<sup>28</sup>

On July 27, 2007, the “B” Concourse Space B-5 CNN newsstand opened for business. According to Rebecca Ramsey, Manager of Properties, around this time, the Complainant “expressed his displeasure with the “B” Concourse location, the stand itself, the environment of being inside the newsstand rather than being in a stand alone operation, as it had been previously.”<sup>29</sup> The Complainant also raised an issue with the amount of rent they were being charged at the B-location. Previously, they had been required to pay 4 percent of gross sales under their direct lease with Respondent. Under the new Master Lease between the Airport and the Hudson Group, the Complainant was required to pay 13 percent of gross receipts. In response to Complainant’s concern, “MNAA, in spite of being under no legal obligation to do so, gave the Hudson Group approval to collect only 4 percent rent from J&B consistent with what they had been remitting to the Authority.”<sup>30</sup>

On August 20, 2007, the Complainant wrote to MNAA’s Chief Executive Officer (CEO), informing him of numerous grievances with the Hudson Group, and “the demeaning level that J&B Enterprises has been reduced to in the outcome of this awarded contract.”<sup>31</sup> Among other things, the Complainant alleged a deteriorating gap in communication between both the Hudson Group and MNAA, a lack of responsiveness on the part of the Hudson Group to their request for documents to assist them in making business decisions, and their exclusion from design discussions of the shoe shine stand until that product for Concourse B was completed and found to be unacceptable in appearance, uncomfortable for customers, and uncomfortable for the workers to perform their duties.”<sup>32</sup> The Complainant requested the CEO’s assistance in providing the Complainant with a number of documents and information, including the contract award documents, the Rhythm Shine drawings, and the Respondent’s DBE policies. The Complainant asked “that a written response including requested documents be forwarded to J& B Enterprises, Inc. within 10 days to begin to openly and appropriately discuss our concerns with only those that have the authority to take corrective action.”<sup>33</sup> According to the Complainant, “MNAA failed to respond to the August 20, 2007 missive.”<sup>34</sup>

According to Respondent, MNAA staff took various actions to resolve the Complainant’s concerns in response to Complainant’s August 20, 2007, letter to MNAA’s CEO. On or about August 21, 2007, Rebecca Ramsey, Manager of Properties, advised the Hudson

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<sup>27</sup> FAA Exhibit 1, Item 8 at 2-3.

<sup>28</sup> Id. at 3.

<sup>29</sup> FAA Exhibit 1, Item 6 at 4.

<sup>30</sup> Id.

<sup>31</sup> FAA Exhibit 1, Item 1, attachment: Letter, dated August 20, 2007, from J&B to Raul Regalado, President & CEO, MNAA.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> FAA Exhibit 1, Item 1 at 4.

Group of the Complainant's concerns and need to improve the business relationship.<sup>35</sup> She also responded to the Complainant's request for specific information, and attempted to arrange a meeting with the Complainant and the Hudson Group to resolve outstanding issues, which the Complainant declined to attend. Additionally, Amber Gooding, Director of Business Diversity Development, responded to the Complainant's request for information on the ACDBE program.<sup>36</sup>

John Howard, Assistant Vice President of Properties and Business Development Departments and MNAA Properties Corporation, also made several attempts to reach the Complainant to schedule a meeting, but received no response.<sup>37</sup> The Complainant, and their representative, Mary Collier, ultimately agreed to meet with Mr. Howard privately on September 18, 2007, to discuss their concerns. The Complainant informed Mr. Howard "that Hudson had informed them that Hudson 'did not negotiate' subleases and that the [Complainant] had to accept Hudson's sublease if they wanted to continue working at the Airport."<sup>38</sup> According to Mr. Howard, the Complainant also acknowledged to him that the Hudson Group did make a lot of effort to seek the Complainant's opinions in the beginning on the design of the new shoeshine stand inside Concourse B's CNN News Store, but the Hudson Group ultimately did not incorporate any of the Complainant's requested design elements.<sup>39</sup>

According to Complainant, when Respondent failed to respond to their August 20, 2007, letter to MNAA's CEO, Complainant then wrote to Mr. James H. Cheek, III (Chairman) and Ms. Rosalyn Carpenter of the MNAA Board of Commissioners on September 21, 2007, in an effort to resolve their complaint.<sup>40</sup> In this letter, which included three attachments, the Complainant described their experience in attempting to finalize a sublease with the Hudson Group, and provided their comments and issues with the draft sublease. The Complainant's letter to the Board stated, "Our position at this moment is that we are sure that there are serious legal ramifications of the actions and follow-up taken by both the MNAA and the Hudson Group that damage the intent of fair and equitable treatment, and an equal playing field in opportunities available to ACDBEs."<sup>41</sup> The Complainant requested the MNAA Board to review their letter, and have staff ready to assist in resolving their concerns. The Complainant requested to hear from the Board.<sup>42</sup>

On October 13, 2007, Mr. Howard of the MNAA staff attempted to reach the Complainant to schedule a meeting between the Hudson Group, Olympic Supply, MNAA and the Complainant to address the issues the Complainant had raised in their letter to the Chairman of MNAA's Board of Commissioners. This meeting, ultimately scheduled for November 2, 2007, took place between the Complainant and MNAA staff, with two

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<sup>35</sup> FAA Exhibit 1, Item 6 at 4-5 and Item 10, exhibit 17.

<sup>36</sup> FAA Exhibit 1, Item 8 and Item 10, exhibits 20 & 21.

<sup>37</sup> FAA Exhibit 1, Item 7 and Item 10 at 14.

<sup>38</sup> Id.

<sup>39</sup> FAA Exhibit 1, Item 7 at 3.

<sup>40</sup> FAA Exhibit 1, Item 1 at 4.

<sup>41</sup> Id. See attachment, Letter, dated September 21, 2007, from J&B to MNAA Board of Commissioners

<sup>42</sup> Id.

Hudson Group representatives attending the meeting by teleconference. At the request of the Complainant, Olympic Supply, the joint venture partner with Hudson, did not attend. According to Respondent, the November 2, 2007, meeting, was “an effort to resolve any issues so that all parties could move forward with a sublease between AMS-Olympic Joint Venture (Hudson Group) and J&B Enterprises. The meeting concluded with, among other things, the Hudson Group agreeing to work with the Complainant on the redesign of the shoe shine stand inside the CNN News Store on Concourse B, and MNAA, agreed to pay 50 percent of the cost of the redesign, although it had no legal obligation to do so.”<sup>43</sup>

Immediately following the November 2 meeting, Mr. Howard received a telephone call from the Complainant (Mr. Druett), informing him that “J&B had no desire at all to move forward with that relationship” because they did not feel they could trust Hudson.<sup>44</sup> The Respondent stated that based on the Complainant’s reaction to the November 2, 2007, meeting, it decided to move Complainant out of the CNN News Store at B-5, and into a new location. The Respondent also decided to take Complainant out of the Hudson Master Concession Agreement altogether and allow Complainant to operate as a stand-alone entity under a new concession agreement directly with MNAA.<sup>45</sup> According to Respondent, “MNAA made this exception to its Concessions Master Plan and Hudson’s Master Lease and Concession Agreement because MNAA saw it as the most promising approach to keep [Complainant] operating at the Airport.”<sup>46</sup>

Respondent stated that its Property Manager then worked with Complainant to find stand alone locations. The Airport identified four locations of which two were found to be satisfactory to Complainant.<sup>47</sup> The Respondent subsequently found that they could not effect a move immediately because the shoeshine stand in location B-5 was constructed in such a way that it could not be relocated, and that a new stand had to be constructed or brought in from another airport.<sup>48</sup> The Complainant also had declined moving to a temporary location, stating it wanted only to move once to a permanent location.<sup>49</sup> At the time of the proposed move, Respondent had communicated to the Complainant that it planned to procure new design services for a new shoe shine stand, and to complete a new concession agreement<sup>50</sup>

In the meantime, the Hudson Group also continued its efforts to reach out to the Complainant. In February 2008, the Hudson Group wrote Complainant to acknowledge Complainant’s desire to relocate its business to stand-alone locations proposed by the Airport, and to reaffirm its desire to retain Complainant as its subtenant and improve communications. Hudson requested Complainant to execute a sublease, and offered its

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<sup>43</sup> FAA Exhibit 1, Item 7 at 3-4.

<sup>44</sup> Id. at 4.

<sup>45</sup> Id.

<sup>46</sup> FAA Exhibit 1, Item 10 at 15.

<sup>47</sup> FAA Exhibit 1, Item 7 at 4.

<sup>48</sup> FAA Exhibit 1, Item 10 at 16 and Item 6 at 6.

<sup>49</sup> FAA Exhibit 1, Item 10, exhibit 36 and Item 6 at 6.

<sup>50</sup> FAA Exhibit 1, Item 10, exhibit 26.

assistance to develop its merchandising line.<sup>51</sup> According to Respondent, Complainant continued to refuse to sign a sublease with Hudson.<sup>52</sup>

In April 2008, Respondent had nearly completed drafting a new concession agreement, and was awaiting written confirmation on Complainant's preferred locations and intent to enter into a direct lease agreement with Respondent. At this time, the Respondent's CEO received a letter from the Complainant's lawyer Anthony Robinson, Minority Business Enterprise Legal Defense and Education Fund (MBELDEF), alleging that MNAA and the Hudson Group were in violation of FAA's DBE regulations, and requested a meeting between Respondent, the Hudson Group, and Complainant to informally resolve the legal compliance matters.<sup>53</sup>

According to Respondent, between April and June 2008, MNAA attempted, without success, to coordinate a meeting with Complainant's attorney.<sup>54</sup> On June 6, 2008, the Respondent informed the Complainant's legal counsel, Anthony Robinson, that it would not be renewing the Complainant's lease and that the lease would terminate upon its expiration on August 31, 2008. Respondent further advised that MNAA would be issuing a Request for Proposals (RFP) for a shoe shine concessions operator, and it encouraged the Complainant to participate in the RFP process. Respondent also conveyed its expectation that Complainant would continue to operate the shoe shine concession on a month-to-month basis until a new operator was selected.<sup>55</sup> On July 30, 2008, Respondent received the Complainant's Part 16 complaint.

As of November 3, 2008, the date of the Respondent's last pleading, the Complainant continues to operate at the Airport as a month-to-month tenant at its original stand-alone C-Concourse location and at the B-5 location. The Hudson Group has permitted the Complainant to continue operating inside its store at B5 without a sublease.<sup>56</sup>

### **III. (B) PROCEDURAL HISTORY**

On July 30, 2008, Complainant filed its Part 16 Complaint with 12 exhibits. [FAA Exhibit 1, Item 1]

On August 11, 2008, the FAA issued its Notice of Docketing. [FAA Exhibit 1, Item 3]

On August 18, 2008, Respondent filed a Motion for Extension of time to answer. [FAA Exhibit 1, Item 4]

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<sup>51</sup> FAA Exhibit 1, Item 10, exhibit 27.

<sup>52</sup> FAA Exhibit 1, Item 10 at 16.

<sup>53</sup> *Id.* at 17.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* The Director notes that the Shoe Shine Service Concession Request for Proposal was posted on the Respondent's website on March 4, 2009. The notice stated that proposals would be accepted until April 17, 2009.

<sup>56</sup> *Id.*

On September 3, 2008, FAA granted the Respondent's request for an extension of time. [FAA Exhibit 1, Item 5]

On September 4, 2008, the Complainant filed via email its objection to the extension request. [FAA Exhibit 1, Item 5A]

On November 3, 2008, Respondent filed its Answer and Motion to Dismiss with Affidavits in Support. [FAA Exhibit 1, Items 6-10]

On December 11, 2008, Complainant filed a request for an extension of time to reply. [FAA Exhibit 1, Item 13]<sup>57</sup>

On December 23, 2008, Respondent filed its objection to the extension request. [FAA Exhibit 1, Item 14]

On January 8, 2009, FAA denied the Complainant's request for an extension of time. [FAA Exhibit 1, Item 15]

On January 9, 2009, Raymond G. Price, Esq., notified the parties that he does not represent the Complainant and will not be representing the Complainant in this proceeding.<sup>58</sup> [FAA Exhibit 1, Item 16]

On March 10, 2009, the Director issued a Notice of Extension of Time for issuance of Director's Determination to on or before May 5, 2009. [FAA Exhibit 1, Item 17]

#### **IV. ISSUES**

Upon review of the allegations and the relevant airport-specific circumstances, summarized above in the Background Section, the FAA Director of the Office of Airport Compliance and Field Operations, has determined that the following issues require analysis in order to provide for a complete review of the Respondent's compliance with applicable Federal law and policy.

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<sup>57</sup> On January 6, 2009 which was after the time to reply, Complainant submitted a letter to the FAA Part 16 Airport Proceedings Docket regarding their former attorney's request for an extension of time. The letter was not served properly and was without a certificate of service. Accordingly, the improperly filed letter was not considered by the Director in this determination, and is not included in the Index of the Administrative Record.

<sup>58</sup> On February 9, 2009, Complainant submitted a letter to the FAA Part 16 Airport Proceedings Docket, regarding their contractual relationship with the Hudson Group and Respondent. On February 17, 2009, Complainants submitted a letter to the FAA Part 16 Airport Proceedings Docket, which included a chronology of the events that the Complainants thought had a significant role in the review of the facts in this proceeding. Neither of these letters were served properly and both were without a certificate of service. Accordingly, these two improperly filed letters were not considered by the Director in this determination and are not included in the Index of the Administrative Record.

Issue 1: Whether the Hudson Group met the Respondent's ACDBE contract goal of 15.7 percent, and whether Respondent complied with 49 CFR Part 23 in good faith in awarding the Hudson Group the two News, Gift, and Specialty Retail concession contracts (NGSP-1 and NGSP-2) at Nashville International Airport;

Issue 2: Whether Respondent's administration of its new shoeshine concession leasing policy and procedure discriminated against Complainant and shoe shine operators of Complainant's race (African American), in violation of 49 CFR §§ 23.9 and 26.7(b);

Issue 3: Whether Complainant was discriminated against because of its race (African American) when Complainant allegedly was relocated to an unsuitable location, provided a shoe shine stand that did not work, and required to sign a sublease with the Hudson Group, in violation of 49 CFR §§ 23.9 and 26.7(a); and

Issue 4: Whether Respondent's alleged actions, or lack of actions, individually or cumulatively, were contrary to the administrative, general and compliance requirements of 49 CFR Parts 23 and 26, and Federal Grant Assurances Nos. 30 and 37.

## **V. APPLICABLE FEDERAL LAW AND POLICY**

The Federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing federal funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by grant agreement or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the airport.

The following is a discussion pertaining to the Airport Improvement Program, Airport Sponsor Assurances, and the FAA Airport Compliance Program.

### **A. Airport Improvement Program**

Title 49 USC § 47101, *et seq.*, provides for federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, as amended. Title 49 USC § 47107, *et seq.*, sets forth assurances to which an airport sponsor agrees as a condition of receiving federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding obligation between the airport sponsor and the federal government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

Part 16 of Title 14 of the Code of Federal Regulations (14 CFR Part 16) contains the rules of practice for filing complaints involving federally assisted airports. [See *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings*, 61 Fed. Reg. 53998 (October 16, 1996)]. Complaints may be filed under Part 16 alleging violations of the federal grant assurances required under 49 USC § 47107 or § 47113 for airports receiving federal airport improvement program funds.

The standard federal grant assurances contain a civil rights assurance [No. 30], and a Disadvantaged Business Enterprise (DBE) Assurance [No. 37], as well as the express requirement to comply with 49 CFR Parts 26 and 23.

Title 49 USC § 47113 provides authority for 49 CFR Part 26 and requires that “The Secretary of Transportation shall take affirmative action to ensure that an individual is not excluded because of race, creed, color, national origin, or sex from participating in an activity carried out with money received under a grant under this subchapter. The Secretary shall prescribe regulations necessary to carry out this section.”

Part 26 of 49 CFR contains the Department of Transportation regulations for its DBE program with respect to Department of Transportation-assisted contracts. [See *Participation by Disadvantaged Business Enterprises in the Department of Transportation Financial Assistance Programs*, 64 Fed. Reg. 5096 (February 2, 1999).] Part 26 applies to recipients of Federal Airport Funds authorized by 49 USC § 47101, *et seq.* [See 49 CFR § 26.3(a) (3).] Part 26 does not apply to contracts in which the Department of Transportation does not participate in financial assistance. [See 49 CFR § 26.3(d)]. Part 26 replaced 49 CFR Part 23 for DBEs in Department of Transportation-assisted contracts; DBE airport concessions provisions of 49 CFR Part 23 were revised and updated in the Department’s regulation entitled *Part 23-Participation of Disadvantaged Business Enterprise in Airport Concessions*. [See 70 Fed. Reg. 14496 (March 22, 2005)].

The sections of 49 CFR Parts 23 and 26 applicable to this Part 16 proceeding include §§ 23.1, 23.3, 23.9, 23.11, 23.57, 23.59, 23.61, 23.79, 26.7, 26.101, and 26.105.

49 CFR § 23.1 sets forth the objectives of 49 CFR Part 23:

This part seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of opportunities for concessions by airports receiving DOT financial assistance;
- (b) To create a level playing field on which ACDBEs can compete fairly for opportunities for concessions;
- (c) To ensure that the Department’s ACDBE program is narrowly tailored in accordance with applicable law;
- (d) To ensure that only firms that fully meet this part’s eligibility standards are permitted to participate as ACDBEs;
- (e) To help remove barriers to the participation of ACDBEs in opportunities for concessions at airports receiving DOT financial assistance; and

- (f) To provide appropriate flexibility to airports receiving DOT financial assistance in establishing and in providing opportunities for ACDBEs.

49 CFR § 23.3 defines the terms used in Part 23:

*Airport Concession Disadvantaged Business Enterprise (ACDBE)* is defined as a concession that is a for-profit small business concern (1) 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; and (2) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

*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. Joint venture entities are not certified as ACDBEs.<sup>59</sup>

49 CFR § 23.9 provides the nondiscrimination requirements for recipients with airport concessions programs.

- (a) As a recipient, you must meet the non-discrimination requirements provided in part 26, § 26.7 with respect to the award and performance of any concession agreement, management contract or subcontract, purchase or lease agreement, or other agreement covered by this subpart.
- (b) You must also take all necessary and reasonable steps to ensure nondiscrimination in the award and administration of contracts and agreements covered by this part.

49 CFR § 26.7 states:

- (a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

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<sup>59</sup> See also DOT/FAA ACDBE Joint Venture Guidance, distributed July 17, 2008. Joint venture entities, themselves, are not certified as ACDBEs. In order to count towards ACDBE participation, one or more of the joint venture participants must be a certified ACDBE. Even if the joint venture is more than 51% owned by an ACDBE firm, it is not certified as an ACDBE because, by definition, a joint venture is an association of firms, not individuals. The regulation states as follows: § 26.73(e) *An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm - even a DBE firm - cannot be an eligible DBE.* Therefore, a joint venture cannot be certified as an ACDBE.

- (b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex or national origin.

The regulation in 49 CFR § 26.7 prohibits not only intentional discrimination but also actions that have the effect of discriminating against individuals on one of the prohibited grounds (e.g., that have a disparate adverse impact on members of a particular group). The language of paragraph (b) is similar to that in the Department's longstanding Title VI regulation (49 CFR § 21.5(b)(2) and is consistent with court interpretations of nondiscrimination statutes in other contexts. [See Supplemental Notice of Rulemaking 62 FR 29548, 29551 (May 30, 1997) citing *Alexander v. Choate*, 469 U.S. 287 (1985); *Elston v. Talladega Board of Education*, 997 F.2d 1394 (11<sup>th</sup> Cir., 1993)]. Therefore, to analyze the allegations in this case, we will consider two primary theories of discrimination under Title VI: intentional discrimination or disparate treatment, and disparate impact or adverse effects.

The regulations in 49 CFR §§ 23.59 and 23.57 provide guidance to recipients on the role of the statutory 10 percent goal in the ACDBE program, and on the situation where a recipient falls short of meeting its overall goals. The regulation in 49 CFR § 23.59 states:

- (a) The statute authorizing the ACDBE program provides that, except to the extent the Secretary determines otherwise, not less than 10 percent of concession businesses are to be ACDBEs.
- (b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in airport concessions.
- (c) The national 10 percent aspirational goal does not authorize or require recipients to set overall or concession-specific goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

The regulation in § 23.57(a) states:

- (a) You cannot be penalized, or treated by the Department as being in noncompliance with this part, simply because your ACDBE participation falls short of your overall goals. You can be penalized or treated as being in non-compliance only if you have failed to administer your ACDBE program in good faith.

Title 49 CFR § 23.61 prohibits the use of quotas or set-asides for ACDBE participation.

Title 49 CFR § 23.79 does not permit recipients to use local geographic preferences. The section states:

As a recipient you must not use a local geographic preference. For purposes of this section, a local geographic preference is any requirement that gives an ACDBE located in one place (e.g. your local area) an advantage over ACDBEs from other places in obtaining business as, or with a concession at your airport.

Finally, the regulations in 49 CFR §§ 23.11, and 26.101 and 26.105 cover FAA's enforcement authorities in the event FAA finds the recipient in non-compliance. The regulation in 49 CFR § 23.11 states:

The compliance and enforcement provisions of part 26 (§§ 26.101 and 26.105 through 26.107) apply to this part in the same way that they apply to FAA recipients and programs under part 26.

The regulation in § 26.101(a) states:

(a) If you fail to comply with any requirement of this part, you may be subject to formal enforcement actions under § 26.103 or § 26.105 or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants, or contracts until deficiencies are remedied. Program sanctions may include...in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122...

The regulatory provision in § 26.105 specifically provides for enforcement actions in FAA programs, as follows:

(a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

(b) The provisions of § 26.103(b) and this section apply to enforcement actions in FAA programs.

(c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

## **B. Airport Sponsor Assurances**

As a condition precedent to providing airport development assistance under the Airport Improvement Program, 49 USC § 47107, *et seq.*, the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Title 49 USC § 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. FAA Order 5190.6A, *Airport Compliance Requirements* (Order), issued on October 2, 1989, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances. The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.

Federal Grant Assurances No. 30 and No. 37 apply to the circumstances set forth in this complaint. Grant Assurance No. 30 states:

It [the airport recipient] will comply with such rules as are promulgated to assure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or handicap be excluded from participating in any activity conducted with or benefiting from funds received from this grant. This assurance obligates the sponsor for the period during which Federal financial assistance is extended to the program, except where Federal financial assistance is to provide, or is in the form of personal property or real property or interest therein or structures or improvements thereon in which case the assurance obligates the sponsor or any transferee for the longer of the following periods: (a) the period during which the property is used for a purpose for which Federal financial assistance is extended, or for another purpose involving the provision of similar services or benefits, or (b) the period during which the sponsor retains ownership or possession of the property.

Grant Assurance No. 37 states:

The recipient shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure non-discrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR Part 26, and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 USC 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 USC 3801).

### **C. The FAA Airport Compliance Program**

The FAA discharges its responsibilities for ensuring airport owners' compliance with their Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the obligations an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are

incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation.

The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served. FAA Order 5190.6A, *Airport Compliance Requirements* (Order) sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct. Rather, it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition of receiving a grant of Federal funds or the conveyance of Federal property for airport purposes. The Order analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance Program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. [See e.g. *Wilson Air Center v. Memphis and Shelby County Airport Authority*, FAA Docket No. 16-99-10, (8/30/01); upheld in *Wilson Air Center, LLC v. FAA*, 372 F.3d 807 (C.A. 6, June 23, 2004)]

The Order covers all aspects of the airport compliance program except enforcement procedures, which as referenced above are at *FAA Rules of Practice for Federally-Assisted Airport Enforcement Proceedings* (14 CFR Part 16). Under 49 CFR § 26.105(b), any person who knows of a violation of Part 26 by a recipient of FAA funds may file a complaint under 14 CFR Part 16 with the Federal Aviation Administration Office of Chief Counsel.

On February 22, 2002, the Associate Administrator for Airports delegated to the Assistant Administrator for Civil Rights the authority to prepare and issue final decisions pursuant to 14 CFR Part 16. On February 22, 2002, the Director of the Office of Airport Safety and Standards (now the Director of Airport Compliance and Field Operations) delegated to the Deputy Assistant Administrator for Civil Rights the authority to prepare and issue director's determinations pursuant to 14 CFR Part 16. [See *Albuquerque Valet Parking Service, Norma G. Morris and David Powdrell, v. City of Albuquerque, Albuquerque, NM*, FAA Docket No. 16-01-01; upheld in *Albuquerque Valet Parking Service v. FAA*, Civ. No. 03-575 (D.C. New Mexico, March 31, 2004)] The Deputy Assistant Administrator for Civil Rights position is

vacant without an acting official and the Director of Airport Compliance and Field Operations is acting as the decision maker.

## VI. ANALYSIS AND DISCUSSION

In this complaint, the role of the FAA is to determine whether the Complainant was discriminated against because of its race (African American), both directly, and through Respondent's policies and practices, in violation of 49 CFR § 23.9 and 49 CFR § 26.7 (a) (b). FAA's role also is to determine whether Respondent is in compliance with its Federal obligations, specifically those required by 49 CFR Parts 23 and 26, and Federal Grant Assurances No. 30 *Nondiscrimination* and No. 37 *DBE (ACDBE)*.

In accepting Federal airport development funds, an airport owner assumes certain obligations, memorialized in the grant assurances which include the responsibility to comply with 49 CFR Parts 23 and 26 and Grant Assurances No. 30 and No. 37. The Respondent has signed grant agreements containing the applicable assurances and are therefore subject to review of matters pertaining to the Respondent's compliance with its grant assurance obligations. The FAA has authority under 14 CFR Part 16 and 49 CFR Parts 23 and 26 to obtain relief for violations of the DBE Program. However, clarification as to the types of relief that may be granted by the FAA at the outset of this Analysis is warranted since the Complainant has requested the FAA to prohibit the Respondent from terminating the concession agreement and to award it money damages.<sup>60</sup>

Issues solely involving contractual disputes between the parties, namely landlord/tenant disputes, are outside the scope of review of 14 CFR Part 16, and are specifically outside the scope of the DBE requirements under review here. Contractual disputes are more appropriately addressed in state court and will not be addressed herein. This is consistent with the position the FAA has taken in prior cases raising similar state contract claims. See *Consolidated Services v. City of Palm Springs*, FAA Docket No. 16-03-05 (June 10, 2004); *Boca Airport, Inc. v. Boca Raton Airport Authority*, FAA Docket No. 16-00-10 (April 26, 2001); and *Morris Waller and M & M Transportation v. Wichita Airport Authority*, FAA Docket No. 16-98-13 (March 12, 1999).

In the event of findings of noncompliance by FAA, compliance orders may be issued which may include terminating eligibility for grants pursuant to 49 USC §§ 47106(e) and 47111(d), suspending the payment of grant funds, withholding approval of any new application to impose a passenger facility charge, a cease and desist order, directing the refund of fees unlawfully collected, or any other compliance order to carry out the provisions of the Act as defined in 14 CFR § 16.3.

The Respondent is correct in noting that the FAA is without authority to award money damages. The FAA has enforcement authority over an airport sponsor, but it has no authority to award damages to persons subjected to an airport sponsor's non-compliance

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<sup>60</sup> FAA Exhibit 1, Item 1 at 4 and 15.

with its grant assurances. While the Complainant has requested an award of money damages, the sum of damages alleged to be suffered by the Complainant is not under review in this Part 16 proceeding.

The Director will now proceed with the review of the four stated issues.

*Issue 1: Whether the Hudson Group met the Respondent's ACDBE contract goal of 15.7 percent, and whether Respondent complied with 49 CFR Part 23 in good faith in awarding the Hudson Group the two News, Gift, and Specialty Retail concession contracts (NGSP-1 and NGSP-2) at Nashville International Airport.*

The Complainant alleges that AMS-Olympic Nashville, a Joint Venture (the Hudson Group), the successful contractor for both Nashville International Airport's Gift, News, and Specialty Retail master concessions contract awards, failed to meet the 15.7 percent contract goal that was set in the solicitation. The Complainant asserts that Olympic Supply and the other designated ACDBE firm were not certified as ACDBEs in the state of Tennessee, and that the only firm that was legitimately certified as an ACDBE in Tennessee was the Complainant. The Complainant also claims that Olympic Supply did not meet the 51 percent control criterion required for ACDBE certification, and as a result, the Hudson Group's actual participation was somewhere between 0.7 percent and 2.0 percent. The Complainant alleges that Respondent knew about the deficiencies with respect to the amount of ACDBE participation, but in concert with the Hudson Group, chose to ignore them, and awarded the contracts anyway, in violation of 49 CFR § 26.41. It recommended that Respondent be sanctioned under 49 CFR § 26.47(b).<sup>61</sup>

The Respondent disputes these allegations, arguing that Complainant's allegations contain numerous errors of fact regarding the Joint Venture between Airport Management Services and Olympic Supply.<sup>62</sup> The Respondent provided documentation of Olympic Supply's ACDBE certification in the State of Tennessee, and asserts that Olympic Supply's owners, Sandi and Terri Roberts, both African-Americans, own 100 percent of Olympic Supply.<sup>63</sup> Respondent also asserts that Complainant incorrectly claims that in a Joint Venture, the ACDBE partner must have 51 percent ownership. The Respondent states that according to FAA's Joint Venture Guidance, only DBE participants in a joint venture, not the joint venture itself, must be at least 51 percent owned and controlled by socially and economically disadvantaged individuals.

The Respondent explains that Olympic Supply's 17 percent ownership is of the Joint Venture of which 17 percent of the Joint Venture's revenues were attributable to ACDBEs, not counting CBR or J&B Enterprises.<sup>64</sup>

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<sup>61</sup> FAA Exhibit 1, Item 1 at 2-3.

<sup>62</sup> FAA Exhibit 1, Item 10 at 30-32. The Complainant alleges that Respondent violated 49 CFR § 26.49 and § 29.47 when it allegedly chose to ignore deficiencies in Hudson's proposed amount of ACDBE participation for the retail master concessions RFP. The Respondent argued that Complainant cited the wrong regulatory provision that would apply to goal-setting in airport concessions, and misinterpreted the application of the overall goal in concession agreements. This was a harmless error and the review will be under the correct citations for the Part 23 ACDBE Program, 49 CFR §§ 23.59 and 23.57.

<sup>63</sup> FAA Exhibit 1, Item 10 at 31.

<sup>64</sup> Id. at 31-32.

Secondly, the Respondent counters that it carefully considered the ACDBE participation in all of the News, Gift, and Specialty Retail proposals, and awarded the contracts only after a review was made by MNAA's ACDBELO. The ACDBELO determined that the Hudson Group was responsive to the requirements of Part 23, and recommended award of the contracts with respect to ACDBE compliance. Respondent concludes that the record does not support a finding that MNAA was not operating its ACDBE program in good faith.<sup>65</sup>

The Respondent is correct that only DBE participants in a joint venture, not the joint venture itself, must be at least 51 percent owned and controlled by socially and economically disadvantaged individuals. This is consistent with the regulation at 49 CFR Part 23 and the definition of Joint Venture at 49 CFR § 23.3. This is further explained in the DOT/FAA Joint Venture Guidance which states that in order to count towards ACDBE participation, one or more of the joint venture participants must be a certified ACDBE. Even if the joint venture is more than 51% owned by an ACDBE firm, it is not certified as an ACDBE. Joint venture entities are not certified as ACDBEs.

The record evidence shows that Olympic Supply was certified as an ACDBE by the State of Tennessee, and held a 17% ownership interest in a Joint Venture with Hudson, the concessionaire chosen for the news and gift retail concession at the airport.<sup>66</sup>

In the instant case, the Director finds the Respondent counted the Hudson Group's proposed amount of ACDBE participation (17 percent) correctly as specified in their response to the RFP, and that the Hudson Group met the ACDBE contract goal of 15.7 percent required for award. The record evidence indicates the ACDBE participation of 17 percent was attributed to the joint venture participation of Olympic Supply, and that the participation of the two subcontractors, CBR and the Complainant, were considered by Hudson and the Respondent to be additional ACDBE participation in the Hudson Group proposal.<sup>67</sup>

The regulation at 49 CFR § 23.25(e)(1)(iii) provides the following in establishing concession-specific goals for particular concession opportunities: "To be eligible to be awarded the concession, competitors must make good faith efforts to meet this goal. A competitor may do so either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so."

Additionally, 49 CFR § 23.35(e)(1)(iv) provides that "The administrative procedures applicable to contract goals in part 26, § 26.51-53, apply with respect to concession-specific goals."

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<sup>65</sup> Id. at 32.

<sup>66</sup> FAA Exhibit 1, Item 10, exhibits 14, 32 and 37.

<sup>67</sup> See Press Release Regarding Award of Concessions dated September 20, 2006. FAA Exhibit 1, Item 10, exhibit 14.

Title 49 CFR Part 26, Appendix A, *Guidance Concerning Good Faith Efforts*, provides assistance to airport sponsors on good faith efforts on federally-assisted contracts which is also helpful for airport concession contracts. In instances, when an airport sponsor established a contract goal, “a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn’t meet the goal, the bidder can document adequate good faith efforts.”

As stated above, the Director concluded that the Joint Venture submitted a proposal documenting 17% ACDBE participation exceeding the contract goal of 15.7% and thus the proposer met its good faith obligation.

Accordingly, the Director also finds Respondent exercised due diligence in evaluating the participation proposed. Moreover and contrary to Complainant’s assertion, the Director finds that Respondent carried out its responsibility in evaluating each competitors’ proposed ACDBE participation, including the Hudson Group, in good faith. Therefore, Complainant’s demand to sanction Respondent for ignoring deficiencies in the Hudson Group’s proposed amount of ACDBE participation is dismissed.

*Issue 2: Whether Respondent’s administration of its new shoeshine concession leasing policy and procedure discriminated against Complainant and shoe shine operators of Complainant’s race (African American), in violation of 49 CFR §§ 23.9 and 26.7(b).*

The Complainant asserts that “After the contract was awarded to Hudson, in violation of the concession agreement, it sought to alter the layout and store location, without either written notice to, or discussion with J&B. In fact MNAA avoided the legal process and ordered the closure of the J&B store located at Concourse B-1 in July of 2007. As a consequence of this breach of the Concession Agreement, J&B was placed in the CNN store and not in the Hudson News store.”<sup>68</sup>

The Complainant continues, “These illegal acts placed J&B at a distinct business disadvantage; it was without appropriate storage space for customers’ bags, coats, hats, and other belongings, and the booth space made it difficult for customers’ shoes to be shined. Moreover, elderly and or handicapped customers had tremendous difficulty being seated. The sum of the aforesaid alleged acts of discrimination violate 49 CFR Part 26 § 26.7(b) and 49 CFR Part 23 § 23.1(e).”<sup>69</sup>

Additionally, Complainant claims that Respondent tried to force Complainant into a sublease with Hudson. The Complainant contends that when it “balked,” Respondent threatened it with removal from the premises.<sup>70</sup> The Complainant argued that “MNAA violated 49 CFR Part 26 § 26.7 because MNAA administered the ACDBE program, in such a way that both directly and through contractual and other arrangements, it used

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<sup>68</sup> FAA Exhibit 1, Item 1 at 2-3.

<sup>69</sup> FAA Exhibit 1, Item 1 at 2-3.

<sup>70</sup> Id. at 3.

criteria or methods of administration that have had the effect of defeating or substantially impairing accomplishment of the objectives of the ACDBE program with respect to J&B on the basis of race.”<sup>71</sup>

Respondent argued that Complainant’s allegations “do not identify a policy or practice at issue, nor do they identify a disparate adverse impact suffered by African-American DBE concessionaires at the Airport.”<sup>72</sup> It contends Complainant has not supplied evidence to demonstrate adverse impact or any impact of Respondent’s actions on any entity other than J&B’s individual business.<sup>73</sup> The Respondent’s ACDBELO asserts that “Two other ACDBEs, one owned by African-American owners, participated in the Hudson News, Gift and Specialty Retail concessions proposal. Neither of them has expressed any discontent with Hudson, MNAA, or the ACDBE program.”<sup>74</sup>

The Director notes that because the complaint specifically raises allegations under 49 CFR § 26.7(b), a review of disparate impact theory of discrimination is appropriate here. The regulation under 49 CFR § 26.7(b) uses the disparate impact theory of discrimination under Title VI case law. This theory will be applied to determine whether the Respondent used criteria or methods of administration that have the effect of defeating or substantially impairing the accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin. Under the disparate impact theory, a recipient, in violation of agency regulations, uses a neutral procedure or practice that has a disparate impact on protected individuals, and such practice lacks a substantial legitimate justification. The elements of a Title VI disparate impact claim derive from the analysis of cases decided under Title VII disparate impact law. [See *U.S. Department of Justice Title VI Legal Manual*, at 48 (January 11, 2001), citing: *New York Urban League v. New York*, 71 F.3d, 1031, 1036 (2d Cir. 1995)].

In a disparate impact case, the focus concerns the consequences of the recipient’s practices, rather than the recipient’s intent. *Lau v. Nichols*, 414 U.S. 563 at 568 (1974). To establish liability under the disparate impact theory, the Complainant must first demonstrate by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI. [See *U.S. Department of Justice Title VI Legal Manual*, at 49 (January 11, 2001), citing: *Larry P. v. Riles*, 793 F.2d 969, 982 (9<sup>th</sup> Cir. 1984); *Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1407 (11<sup>th</sup> Cir.), reh’g denied, 7 F.3d 242 (11<sup>th</sup> Cir. 1993) (citing *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11<sup>th</sup> Cir. 1985)] If a prima facie showing is made, the Respondent then must prove a substantial legitimate justification for the challenged practice exists in order to avoid liability. [*DOJ Manual*, p. 49.] If the Respondent does prove such justification, the Complainant may still prevail if it is able to show that a comparably effective alternative practice which results in less disproportionate impact exists, or that the justification provided by the Respondent is pretext for discrimination. [*DOJ Manual*, p. 49.]

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<sup>71</sup> Id.

<sup>72</sup> FAA Exhibit 1, Item 10 at 27.

<sup>73</sup> Id. at 29.

<sup>74</sup> FAA Exhibit 1, Item 8 at 4.

In this case, the policy and program in question appears to be the Respondent's new Concessions Program Plan that it adopted in October 2004, and specifically, its decision to place the shoe shine concession under the news, gift, and specialty retail master concessionaire as a local subcontractor, and to not continue with a direct lease to Respondent. The Respondent also required that the shoe shine service be offered as part of the News and Conveniences Concessions Locations at B-5 and C-2.<sup>75</sup>

While the Complainant alleged it was discriminated because of its race, it failed to name the protected group of which it was a member. The record indicates that Respondent acknowledges the Complainant to be a firm that is owned by two African American owners, James Druett and Betty Druett.<sup>76</sup> The Director finds there is sufficient evidence to establish that the protected group in question is African Americans.

In order to make a prima facie showing that a given action by the Respondent violated 49 CFR § 26.7(b), the Complainant must show that the Respondent's actions had a disproportionate and an adverse impact on this group. To do this, the Complainant must show a causal connection between the facially neutral policy and the disproportionate and adverse impact on African American shoe shine operators as a group.

In order to establish causation, the Complainant is required to employ facts and statistics that will adequately capture the impact of the practice on similarly situated African Americans, and members of non-protected groups. The Complainant must show, using an appropriate measure, that specific actions of the Respondent caused a disparate effect on similarly situated concessionaires to the detriment of African American shoe shine operators. *New York City Environmental Justice Alliance (NYCEJA) v. Giuliani*, 214 F.3d 65, 70 (2d Cir. 2000).

The Complainant has provided only evidence of how it was adversely impacted by Respondent's decisions; it has provided no facts or statistical data to show whether there is a disproportional and adverse impact on African American shoe shine operators. The Complainant also does not provide any evidence of the impact of Respondent's decisions on shoe shine operators not of Complainant's race. Without facts, or statistical data, Complainant is unable to establish a causal link between the neutral policy and the alleged disparate impact. The Director finds the Complainant has not met its initial burden of establishing a prima facie case of discrimination based on disparate impact.

To provide for a complete review, however, the Director will assume for the sake of argument that the Complainant met its burden of establishing a prima facie case of disparate impact. The burden would shift to the Respondent to demonstrate a substantial justification for the policies and procedures it used for assigning the shoe shine services as a subcontract, and integrating this service with two news and convenience concession locations under the new Concessions Master Plan.

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<sup>75</sup> FAA Exhibit 1, Item 10, exhibit 12 at 33.

<sup>76</sup> FAA Exhibit 1, Item 10 at 8. See also FAA Exhibit 1, Item 12.

In its Answer, the Respondent explained that it was embarking on a \$35 million renovation program for the Terminal, which included consolidation of the security checkpoint in the core of the Terminal, construction of another food and retail court, and modifications to the concourse, as well as construction of more spaces for concession development.<sup>77</sup> The Respondent stated that in preparation for the Terminal upgrade project, it adopted a new Concessions Master Plan to achieve the long-term strategic business plan of the Airport.

This Master Plan called for Nashville International Airport's news, gifts, and specialty retail concessions to be managed by one master retail concessionaire. In addition, there would be separate direct leases for service providers (such as a nail salon, massage bar, advertising, travel and business Center, bank and ATM's, video games rooms, medical clinic, storage lockers and luggage carts services). According to Respondent's consultants, this management approach would address "the goals of the [concessions] program without placing an unrealistic burden on BNA [Nashville International Airport] from an administrative standpoint. By utilizing master concessionaires, it is anticipated that there will be improved competition, higher sales and revenues, greater customer satisfaction and service, lower risk to the airport, and a greater variety of national brand names and local concepts."<sup>78</sup>

Additionally, the Master Concession Plan called for the master retail concessionaire to implement the merchandising concept of "news and convenience." According to the Plan, the shoe shine stand service was required to be incorporated into two of the eight "news & convenience" shops (located at B-5 and C-2), either within or immediately adjacent to these stores. The news, gifts and specialty operator was required to subcontract the shoe shine stand to a local operator.<sup>79</sup> The Respondent noted that "this marked a change from the previous arrangement with the shoeshine concession; prior to adoption of the new Master Plan, J&B Enterprises, the Airport's shoeshine concessionaire, operated its booths in stand alone areas in the Concourses, and had a lease agreement directly with MNAA."<sup>80</sup>

The Director finds that Respondent's reason for changing the arrangement for the shoe shine concession appears to be in the interest of increasing customer service. Further, an airport has discretion in fashioning its concessions program. The FAA under its Airport Compliance Program does not seek to control or direct the operations of airports. The Director finds that Respondent exercised this discretion in developing a concessions program that met its long term business objectives. There is nothing in the ACDBE or DBE regulations that would require an airport sponsor to select one merchandising concept, or concession management method over another, unless an airport sponsor's action was motivated, or resulted in discrimination prohibited under 49 CFR § 26.7.<sup>81</sup>

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<sup>77</sup>FAA Exhibit 1, Item 10 at 5.

<sup>78</sup>FAA Exhibit 1, Item 10, exhibit 2 at viii.

<sup>79</sup>Id. at exhibit 2 at VII-11 and VII-12.

<sup>80</sup>FAA Exhibit 1, Item 10 at 6.

<sup>81</sup> Additionally, Federal Grant Assurance #24, *Fee and Rental Structure*, requires the airport to maintain a fee and rental structure that will make the airport as self-sustaining as possible under the circumstances

The Director concludes Respondent has sufficiently met its burden of providing a substantial justification for its policies.

To prevail under the disparate impact theory, the Complainant must show that there was a comparably effective practice that would have met the Airport's objectives efficiently and would have less discriminatory effect on African American shoe shine concessionaires. The Complainant believed that a direct lease with the Airport would have been the more effective approach. However, without the necessary evidence to establish a disparate impact on African American shoe shine operators, the Complainant cannot prevail on a finding of discrimination based on disparate impact. Therefore, the Director finds no violation by the Respondent of 49 CFR § 23.9 and § 26.7(b) and this issue is dismissed.

The Director would like to address a related side issue regarding the RFP at issue requiring the news, gifts and specialty operator to subcontract the shoe shine stand to a local operator. Title 49 CFR § 23.79 does not permit airport sponsors to use local geographic preferences.<sup>82</sup> A local geographic preference is any requirement that gives an ACDBE located in one place (e.g. your local area) an advantage over ACDBEs from other places in obtaining business as, or with a concession at your airport. Additionally, Title 49 CFR § 23.61 prohibits the use of quotas or set-asides for ACDBE participation.

It appears that the Respondent has now moved in a different direction for the shoe shine service at the airport by seeking a direct solicitation rather than requiring an impermissible local preference. The Director is aware that a *Shoe Shine Service Concession Request for Proposal* was posted on the Respondent's website on March 4, 2009. The Director does not generally find sponsors in non-compliance for past compliance violations that it subsequently cured or is in the process of curing. [See *Wilson Air Center v. Memphis and Shelby County Airport Authority*, FAA Docket No. 16-99-10, (8/30/01)] The FAA's Compliance Program is designed to achieve voluntary compliance with a sponsor's federal obligations. The Director recognizes an airport sponsor's voluntary corrective action as a means to cure compliance violations. While the language in the prior RFP is of concern, the Director believes that appropriate corrective action has taken place and the compliance concern has been addressed.

*Issue 3: Whether Complainant was discriminated against because of its race (African American) when Complainant allegedly was relocated to an unsuitable location, provided a shoe shine stand that did not work and required to sign a sublease with the Hudson Group, in violation of 49 CFR §§ 23.9 and 26.7(a).*

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existing at the particular airport. [See *Albuquerque Valet Parking Service, et al., v. City of Albuquerque, Albuquerque, NM*, FAA Docket No. 16-01-01, FAD, at 8.]

<sup>82</sup>See also Title 49 CFR § 18.36(c)(2) requires federal grantees and subgrantees to conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographic preferences in the evaluations of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference.

The Complainant asserts that “Hudson has discriminated against J&B based on race by resorting to tactics of intimidation in an effort to force J&B to collaborate in an artifice that would permit Hudson to continue the fraudulent performance of its concession management contract with the MNAA. Specifically, J&B alleged that it was ordered to pay for a booth that served neither the needs of its customers nor its own operational requirements. When J&B balked it was allegedly threatened with removal from the premises by MNAA and Hudson all in furtherance of an illegal conspiracy to force J&B into a sublease agreement.”<sup>83</sup> The Complainant also alleges that Respondent chose not to intervene when Complainant refused to sign the subleases because no compromise was negotiable between the two companies.<sup>84</sup> In a letter to Respondent’s Board of Commissioners, the Complainant complained about the poor communication between it and the Hudson Group. For example, it claimed that only after it contacted Hudson’s Chief Executive Officer in June 2007, did it receive a draft sublease from Hudson, and it had to write Hudson twice to obtain information that it deemed important for its business decision-making.<sup>85</sup>

In its letter to Respondent’s Board of Commissioners, the Complainant also complained that it was not afforded the same rights that were held by other concession operators at the Airport.<sup>86</sup> The Complainant provided several examples of these violations of rights. Complainant claimed the following: (1) not permitted to design its interiors and obtain approval from the Airport, as was the case for all other operators; (2) respondent never held any discussion with J&B regarding its location change to “B-5”; (3) denied adequate seating for its customers, or their belongings, thus drastically affecting its gross receipts; (4) denied comparison information of the other operators within the Airport and was told it was not relevant to Complainant, when Respondent’s staff had informed Complainant that what it could charge for a shine was based on a comparison study of other Airport shoe shine services; and (5) no one from Respondent’s staff and the Hudson Group’s staff understood what Complainant was requesting in terms of its information requests.<sup>87</sup>

The Complainant concludes that “we are very aware at the present time, that the information provided to us declaring the necessity of J&B Enterprises, Inc. to agree to be included in the packages of the Prime Contractors in order to remain an Airport operator, was false information. For at this present time, we are aware that there are still independent Concessionaire Agreements with operators established at the Airport.”<sup>88</sup>

In the Respondent’s Answer, it states that, “[a]lthough J&B does not specifically allege anywhere in its complaint that MNAA violated § 26.7(a), the complaint implies such a claim when it alleges that Hudson ‘discriminated against J&B based on race’ by intimidating and threatening J&B, and by forcing it to use unsuitable space to conduct its

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<sup>83</sup> FAA Exhibit 1, Item 1 at 3.

<sup>84</sup> Id.

<sup>85</sup> Id. at Attachment: Complainant’s September 21, 2007, letter to MNAA’s Board of Commissioners, attachment: Memorandum addressed to MNAA Board, dated September 21, 2007 at 3 and 6.

<sup>86</sup> Id. at 7.

<sup>87</sup> Id. at 7-8.

<sup>88</sup> Id. at 22.

business.”<sup>89</sup> The Respondent denies the allegation, arguing that “[n]either the complaint nor the accompanying documents provide evidence to state a prima facie case or support a claim that any of Hudson’s or MNAA’s actions were ’motivated by an intent to discriminate’ against J&B on the basis of race.”<sup>90</sup>

The Respondent argues that “[t]he complaint does not attempt to raise an inference of intentional discrimination by contrasting J&B’s treatment with any other concessionaire. It simply provides no basis, direct or inferential, for its claim that MNAA’s and Hudson’s acts were motivated by an intent to discriminate.” The Respondent further argues that its record of correspondence and meetings with the Complainant, and other efforts to assist the Complainant contradicts Complainant’s “characterization of MNAA’s behavior as intimidating, threatening, or coercing J&B”.<sup>91</sup> It concludes “J&B’s longstanding presence at the Airport belies any allegation of intentional discrimination, as do MNAA’s sustained efforts to accommodate J&B when problems arose with Hudson at the B Concourse store. Consequently, any claim of intentional discrimination should be dismissed with prejudice because the complaint has failed to state a prima facie case or to provide a record of facts that could support such a case.”<sup>92</sup>

To analyze whether racial discrimination occurred under 49 CFR § 26.7(a), the FAA will use the intentional discrimination or disparate treatment theory of discrimination under Title VI of the Civil Rights Act, as amended. The Director will review these matters to determine whether Respondent intentionally discriminated against Complainant on the basis of its race, when after the contract was awarded to Hudson, in violation of the Complainant’s concession agreement, Respondent allegedly took the following actions: (1) altered the layout and store location, without either written notice to, or discussion with Complainant; (2) ordered the closure of the J&B store located at Concourse B-1 in July 2007; (3) placed J&B in the CNN store and not in the Hudson News store; and (4) threatened to remove Complainant from the premises when it refused to sign a sublease with Hudson.

The analysis of intentional discrimination is equivalent to the analysis of disparate treatment under the Equal Protection Clause of the Fourteenth Amendment. (See *U.S. Department of Justice Title VI Legal Manual*, at 42 (January 11, 2001), citing: *Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1405 n. 11 (11th Cir.), reh’g denied, 7 F.3d 242 (11th Cir. 1993); *Guardians Association v. Civil Service Commission*, 463 U.S. 582, 582 (1983); *Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417, (11th Cir. 1985). To prove intentional discrimination, one must show that “a challenged action was motivated by an intent to discriminate.” *Elston*, 997 F.2d at 1406. It does not require evidence of “bad faith, ill will or any evil motive on the part of the [recipient].” *Elston*, 997 F.2d at 1406 (quoting *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11<sup>th</sup> Cir. 1984)). Intentional discrimination claims may be analyzed using the Title VII burden

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<sup>89</sup> FAA Exhibit 1, Item 10 at 24.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 25.

<sup>92</sup> *Id.* at 26.

shifting analytic framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 at 802 (1973).

In applying the framework established in *McDonnell Douglas*, the complainant must first raise an inference of discrimination by establishing a prima facie case of discrimination. The elements of a prima facie case often include, (1) the aggrieved person was a member of a protected class, (2) the person applied for, and was eligible for a federally-assisted program that was accepting applications, (3) despite the person's eligibility he or she was rejected, and (4) recipient selected applicants of the person's qualifications, or the recipient continued to accept applications from applicants of person's qualifications.

As noted earlier, the Complainant alleges discrimination on the basis of race, but failed to articulate its protected class. However, the Director has determined there is sufficient evidence in the record to support Complainant's race as African American.<sup>93</sup> The Complainant is also a qualified firm that is eligible to participate in Respondent's concession program.

Although the Complainant has described how it was treated by Hudson and the Respondent, it has provided no comparative data to show how Hudson treated other subcontractors not of Complainant's race. The Complainant did not demonstrate that the Respondent selected a concessionaire matching the Complainant's qualifications to operate the shoe shine concession. On the contrary, the Director notes the Respondent documented that the Complainant was the only shoe shine concessionaire operating at the Airport.

The Director also finds that most of the examples that Complainant has cited to support its claim that it was not afforded the same rights as other concession operators at the Airport are misdirected because the group that the Complainant appears to be comparing itself to are operators with direct leases with the Airport. Since the Complainant is a subtenant to Hudson for the new shoeshine locations, it has not provided valid comparison data for the purpose of proving discrimination. Therefore, the Director concludes that the Complainant has not provided the necessary information to meet its initial burden of establishing a prima facie case of disparate treatment under Title VI.

Although the Complainant has not established a prima facie case, in the interest of obtaining a complete review, the Director will assume for the sake of argument that the Complainant had met its burden of establishing a prima facie case of discrimination based on disparate treatment. The burden would shift to the Respondent to articulate a legitimate, nondiscriminatory reason(s) for its alleged actions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 at 802 (1973).

The record indicates that Respondent made Complainant fully aware of its plans to seek a subtenant to provide shoe shine services to the Airport and to relocate the shoe shine concession in the newsstands as part of Respondent's new NGSP [News, Gift, and

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<sup>93</sup> See Footnote 76.

Specialty Retail] program. Complainant then agreed to participate in the solicitation process, and was made aware of the Request for Proposal requirements, including concession locations, phase-in plan, etc., through a mandatory pre-solicitation meeting. It later agreed to become a subtenant participant in two of the proposals to the Airport, and was awarded two shoe shine locations by the successful proponent, the Hudson Group.

The record substantiates that Respondent took immediate action when it learned of Complainant's deteriorating relationship with Hudson in May 2007.<sup>94</sup> The Respondent disputes the allegation that it ever threatened to remove Complainant from the premises when it refused to sign a sublease with Hudson. Contrary to Complainant's allegation that Respondent chose not to intervene in Complainant's dispute over the sublease, Respondent countered that it intervened and made extensive efforts to resolve the disputes between Complainant and Hudson, especially over the design of the shoe shine stand. The Respondent argued that it and Hudson "were entitled to require that J&B sign a sublease in order to operate a shoeshine concession from inside the CNN News store."<sup>95</sup> It also argued that, "MNAA did just the opposite of forcing or coercing J&B into signing a sublease with Hudson; when a sublease agreement could not be reached, MNAA took the initiative to remove J&B's shoeshine concession from the master concessionaire structure and unsuccessfully attempted to negotiate a direct lease with the Druetts."<sup>96</sup>

The Director finds that Respondent has met its burden of articulating legitimate, nondiscriminatory reasons for its alleged actions. The Director then must determine whether the record contains sufficient evidence to establish that the Respondent's stated reason was a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 at 804 (1973) The Director will consider whether the evidence in the record supports a finding that the reason articulated by the Respondent was not the true reason for the challenged action, but that the real reason was discrimination based on race.

Evidence may be found in various sources, including statements by decision makers, the historical background of the events in issue, the legislative or administrative history (e.g., minutes of meetings), the sequence of events leading to the decision in issue, a departure from standard procedure (e.g., failure to consider factors normally considered), a past history of discriminatory or segregated conduct, and evidence of a substantial disparate impact on a protected group. See *U.S. Department of Justice Title VI Legal Manual*, at 43 (January 11, 2001), citing *Arlington Heights v. Metropolitan Hous. Redevelopment Corp.*, 429 U.S. 252, 266-268(1977); *Elston*, 997 F.2d at 1406.

The record indicates that after award of the master retail concessions to Hudson, Respondent took the customary steps to phase in the new retail concession operator, and to phase out the existing operations in a manner that would maintain shoeshine concession service during the transition. Respondent contends that its lease agreement with Complainant explicitly provided the Airport the right to move J&B's shoe shine

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<sup>94</sup> FAA Exhibit 1, Item 8 at 2-3.

<sup>95</sup> FAA Exhibit 1, Item 10 at 34.

<sup>96</sup> *Id.* at 34-35.

booths to a different location in the airport as necessary and that Respondent's staff had notified Complainant during the formation of the Master Plan, the preparation of the RFPs, and at the pre-proposal meeting, that it would be moving the shoe shine booths.<sup>97</sup>

The Director reviewed whether there was any factual basis for Complainant's allegation that Respondent breached its contract with Complainant when it did not provide written notification, or held discussion with Complainant over the closing of the B-7 concession location. The Director notes there was no evidence in the Record of any written notification to the Complainant of the Airport's planned closing of B-7 that was required under section 24.18 of the Complainant's lease.<sup>98</sup> However, there is ample evidence in the Record, for the Director to find that the Respondent did provide sufficient general notice to the Complainant about its concession program plans to put Complainant on notice of the Respondent's intentions to move the shoe shine booths. This evidence includes the representation from the MNAA Manager of Properties of the numerous conversations about the RFP and subtenancy that took place between the Manager and Mr. Druett, and Mr. Druett's attendance at the mandatory pre-proposal meeting on February 24, 2006.<sup>99</sup>

While the record indicates the Respondent did not meet its contractual obligation to provide Complainant a 60-day written notification, there is no evidence to indicate that this omission was racially motivated. The Complainant did not provide comparative evidence that Respondent treated other concessionaires differently because of their race.

Airport sponsors are required to ensure non-discrimination by their contractors and subcontractors.<sup>100</sup> The Respondent did not provide any evidence to dispute Complainant's allegations of Hudson's treatment of Complainant concerning the dissemination of vital contract information, including the design of the shoeshine stand in location B-5, and the finalization of an executed sublease. However, once the Respondent became aware of Complainant's grievances over Hudson's alleged treatment of Complainant, it took immediate action to communicate that it was entirely unacceptable for the Complainant to have the impression that they were being treated in a "demeaning" manner.<sup>101</sup> The Director finds the Respondent acted appropriately and timely in responding to Complainant's concerns.

There is also no evidence that Respondent has a past history of discrimination. Its ACDBE program includes an overall ACDBE goal of 15.7 percent for federal fiscal years 2006 through 2008. For fiscal years 2006, 2007, and 2008, Respondent achieved 16.5 percent, 9.6 percent, and 18.9 percent respectively in non-car rental ACDBE participation.<sup>102</sup> Moreover, of the seven ACDBEs operating at Nashville International Airport in FY 2007, five were African American firms.<sup>103</sup> Thus, the Complainant has not

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<sup>97</sup> FAA Exhibit 1, Item 10 at 34.

<sup>98</sup> Id. at exhibit 8 at 40.

<sup>99</sup> FAA Exhibit 1, Item 6.

<sup>100</sup> See 49 CFR §§ 23.9(a) and 23.9 (c)(1).

<sup>101</sup> FAA Exhibit 1, Item 6 at 5.

<sup>102</sup> FAA Exhibit 1, Item 12.

<sup>103</sup> Id.

provided evidence to indicate that Respondent's non-discriminatory reasons for its acts were a pretext for discrimination. Therefore, the Director finds that Complainant has not proven that Respondent had treated the Druetts differently because of their race.

*Issue 4: Whether Respondent's alleged actions, or lack of actions, individually or cumulatively, were contrary to the administrative, general and compliance requirements of 49 CFR Parts 23 and 26, and FAA Grant Assurances No. 30 and No. 37.*

The Complainant alleges that Respondent failed to implement its ACDBE program in good faith, citing its failure to meet the ACDBE program objectives under 49 CFR § 23.1. Specifically, the Complainant contends that Respondent did not provide for a level playing field, and thwarted Complainant's full participation in the ACDBE program when Respondent was unable to relocate Complainant outside of B-5 as planned. The Complainant believes the Respondent did not follow through on its decision to remove Complainant from the Hudson master concession contract and move it into a direct lease arrangement with the Airport.

The Director considered the totality of the record to determine whether any of Respondent's alleged actions, or lack of actions, individually or cumulatively, were contrary to the administrative, general and compliance requirements of 49 CFR Parts 23 and 26, and Federal Grant Assurances No. 30 and No. 37. Under its new Concession program, the Respondent had decided to change its shoe shine concession arrangement from a direct lease to a sublease tenant arrangement and to integrate the shoe shine service with the news and convenience concession in two such locations to increase customer service and revenues.

The regulation in 49 CFR § 23.25 requires airport recipients to implement race-neutral measures to obtain as much ACDBE participation needed to meet overall goals through such measures. The issue here is not the Respondent's failure to meet its ACDBE goal, but rather goes to the Respondent's efforts to facilitate and encourage ACDBE participation. The Record is clear that the Respondent had originally set a requirement that the shoe shine operations were to be subcontracted to a local operator. The Record also indicates the Respondent's desire to encourage ACDBE participation in the shoe shine concession. The regulation in 49 CFR § 23.25(d)(5) cites the following example of a race-neutral measure that could be implemented: "when practical, structuring concession activities so as to encourage and facilitate the participation of ACDBEs."

The record indicates that Respondent structured the shoe shine opportunity in such a manner that it gave the prime contractor full responsibility for determining the layout and amount of square footage for the news and sundries merchandise store and the shoeshine stand. While there is nothing necessarily improper with that approach, if silent as to a local geographic preferences, Respondent failed to consider the impact of the prime contractor's incentive to maximize profit in its space.<sup>104</sup> In this case, the prime contractor had to balance its requirement to support a significantly lower revenue

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<sup>104</sup> The Director did discuss in Issue 2 above the potential improper local geographic preference contained within the Respondent's original Request For Proposal (RFP).

producing shoeshine service against its objective to develop highly profitable news and convenience stores which traditionally hold higher profit margins. In its Request For Proposal for a master retail concessionaire, Respondent failed to provide detailed standards, specifications, or square footage allotments for the shoe shine concession as it did for its other retail concepts. By failing to set service or operational standards, or a minimum square footage allotment, the Director finds the Respondent created the conditions for issues such as those experienced by the Complainant on the unsuitability of the space and design of the shoeshine stand.

The Director also finds Respondent did not appear to consider the impact of its policy on ACDBEs and other small businesses, when it decided to charge a 13 percent rent for both the news and convenience store operator, and the shoeshine operator, which were to be co-located in two of the news and convenience stores. As noted above, the news and convenience and the shoeshine concessions are not comparable. The two concessions vary widely in their industry type and traditional profit margins.

On the other hand, the Respondent made decisions to promote Complainant's success. Respondent rejected Hudson's request to modify the floor plan of B-5 by flipping the locations of the shoe shine and the refrigerator areas. The Airport's Property Manager rejected this request to ensure that "the shoeshine stand ...remain visible to passengers walking down the concourse towards the B-5 location. This will allow maximum exposure for the shoeshine operator which was agreed to by Hudson."<sup>105</sup> Respondent also decided to relocate the Complainant's C-2 location to the C-1 location after it determined that C-1 was by far the superior location for the shoe shine concession, giving it better exposure and more space to accommodate the stand. According to the Respondent, Complainant was pleased with this decision, and the greater exposure it would offer.<sup>106</sup>

When the Complainant complained of having to pay a rent of 13 percent of gross sales to the Hudson Group for the B-5 location that was consistent with the Master Lease agreement, both the Respondent and Hudson responded by agreeing to allow the Complainant to pay a rent of 4 percent of its gross sales, which was the same percentage that Complainant had previously paid Respondent under Complainant's direct lease with the Airport.<sup>107</sup>

The Director finds that Respondent made extraordinary efforts to resolve the disputes between the Complainant and Hudson, and to otherwise accommodate the Complainant's concerns. It offered to pay half the cost for the redesign of the shoe shine stand. When the effort to facilitate the disputes between the Complainant and Hudson failed, the Respondent decided to remove Complainant from Hudson's master lease as a subcontractor, and took steps to draft a new concession agreement directly with Complainant.<sup>108</sup> The new concession agreement was nearly completed, and the

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<sup>105</sup> FAA Exhibit 1, Item 10, exhibit 16.

<sup>106</sup> FAA Exhibit 1, Item 6 at 3.

<sup>107</sup> Id. at 6.

<sup>108</sup> FAA Exhibit 1, Item 7 at 4-5.

Respondent was awaiting written confirmation on Complainant's preferred locations for the direct lease agreement when the Complainant's lawyer brought forth alleged violation of the DBE regulations, and requested a meeting to resolve compliance matters.<sup>109</sup>

The parties' efforts to resolve the matters were not successful, and resulted in the filing of this Complaint. Ultimately, the Respondent elected to change its leasing arrangement for the shoe shine concession by choosing to issue a direct contract opportunity with the airport for the shoe shine concession through an RFP.

An airport's compliance status is determined by its most current actions, including any actions it has taken to correct past errors or omissions. The Director finds the Respondent to be fully responsive in resolving all issues raised by the Complainant, and that contrary to Complainant's allegation, it attempted to do everything it believed it could to facilitate Complainant's full participation in the ACDBE program. The Director believes it is important to emphasize that the ACDBE program is designed to create a level playing field on which ACDBEs can compete fairly for opportunities for concessions. As Respondent states in its Answer, it does not give the Complainant a perpetual right to operate the shoeshine concession without competing for such a right.<sup>110</sup>

The Director is aware that a *Shoe Shine Service Concession Request for Proposal (RFP)* was posted on the Respondent's website on March 4, 2009. The Director is also aware that the Complainant did attend the Respondent's shoe shine concession pre-bid proposal. The Respondent has made it clear that ACDBEs, including J&B, will be encouraged to apply and that ACDBE certification would be a positive factor in proposals submitted in response to the RFP.<sup>111</sup>

In conclusion, the Director finds the Respondent is in compliance with the requirements in 49 CFR Parts 23 and 26, and FAA Grant Assurances No. 30 and No. 37.

### **Findings and Conclusions**

Upon consideration of the submissions and responses by the parties, and the entire record, herein, and the applicable law and policy and for the reason stated above, the Director finds and concludes as follows:

Issue 1: The Hudson Group exceeded Respondent's ACDBE contract goal of 15.7 percent. Respondent Metropolitan Nashville Airport Authority complied with 49 CFR Part 23 in good faith in awarding the Hudson Group the two News, Gifts, and Specialty Retail concession contracts (NGSP-1 and NGSP-2) at Nashville International Airport.

Issue 2: The Respondent's administration of its new shoeshine concession leasing policy and procedure did not have a disparate impact on Complainant;

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<sup>109</sup> Id. at 17.

<sup>110</sup> FAA Exhibit 1, Item 10 at 33.

<sup>111</sup> FAA Exhibit 1, Item 10 at 18 and Item 8 at 4.

Respondent was compliant with 49 CFR § 23.9 and 49 CFR § 26.7(b) as to the allegations raised herein.

Issue 3: The Respondent did not discriminate against the Complainant on the basis of its race (African American); Respondent was compliant with 49 CFR § 23.9 and 49 CFR § 26.7(a) as to the allegations raised herein.

Issue 4: The Respondent complied with the administrative, general and compliance requirements of 49 CFR Parts 23 and 26 and Grant Assurances No. 30 and No. 37.

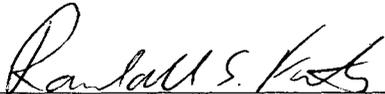
## **ORDER**

Accordingly, it is ordered that:

- 1) The Respondent's Motion to Dismiss is granted for the reasons stated above;
- 2) The complaint is dismissed; and
- 3) All motions not expressly granted herein are denied.

## **Right of Appeal**

The Director's Determination is an initial agency determination and does not constitute final agency action and order subject to judicial review (14 CFR § 16.247(b)(2)). A party to this proceeding adversely affected by the Director's Determination may appeal the initial determination to the attention of the FAA Assistant Administrator for Civil Rights pursuant to 14 CFR § 16.33(b) within thirty (30) days after service of the Director's Determination. Any appeal should be forwarded to the FAA Office of the Chief Counsel, Attn: FAA Part 16 Airport Proceedings Docket, AGC-610, Room 925, Federal Aviation Administration, 800 Independence Avenues, SW, Washington, DC 20591.

  
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Randall S. Fiertz  
Director, Office of Airport Compliance  
and Field Operations

*May 5, 2009*  
\_\_\_\_\_  
Date

## FAA Exhibit 1

### **J&B Enterprises Inc., d/b/a Rhythm Shine v. Metropolitan Nashville Airport Authority Director's Determination – Docket No. 16-08-07**

#### **INDEX OF ADMINISTRATIVE RECORD**

Item 1 July 30, 2008, complaint filed by J&B Enterprises Inc., d/b/a Rhythm Shine (Complainant), against the Metropolitan Nashville Airport Authority (MNAА) (Respondent), alleging numerous violations of 49 CFR Parts 23 and 26 in reference to a Request for Proposal (RFP) for the management of the News Gifts and Specialty Retail concessions at MNAА. July 30, 2008, letter accompanying complaint, from Anthony W. Robinson, Esquire, Minority Business Enterprise Legal Defense and Education Fund, Inc. (MBELDEF) to the Federal Aviation Administration (FAA) Office of the Chief Counsel, certifying service of complaint upon the MNAА by electronic mail to Robert Watson, Esq., Senior Vice President and Chief Legal Officer and to Raul Regalado, President & CEO, MNAА.

Complainant included the following attached exhibits with its complaint. The following attachments were not paginated and were not referenced numerically or alphabetically. They are presented below in the order found in the complaint document.

- September 20, 2006, Press Release issued by Hudson Group and MNAА, "Metropolitan Nashville Airport Selects Hudson Group and Partners to Revamp BNA's News/Gift and Retail Concessions."

- Concession Agreement, Exhibits A& B, map, dated May 14, 1992, showing tenant locations in North Concourse "B" and South Concourse "C", and Complainant's "Assigned Area" in Concourse "B" Alcove, and "Assigned Area: in Course "C" Alcove.

- December 7, 2007, E-mail from MNAА, John Howard, to James Druett and Betty Druett, Subject: "Rhythm Shine". Correspondence concerns relocation of shoeshine stand.

- December 12, 2007, E-mail from MNAА, John Howard, to Betty Druett, Subject: "Moving of shoe shine booth from Hudson News store to temporary location."

- November 29, 2007, E-mail from MNAА, Rebecca Ramsey to S. Farris, Hudson Group, Subject: "Shoe shine stand @ CNN". Correspondence concerns request for certain information for the move of the shoe shine stand from CNN to temporary location in front of old "B" Concourse smoking lounge.

- November 20, 2007, E-mail from MNAA, Rebecca Ramsey to James and Betty Druett, Subject: "New Shoeshine locations". Correspondence concerns attendance of Betty and James Druett at casual luncheon to meet Tommy Bibb, new Properties Director.

- November 19, 2007, E-mail from MNAA, Rebecca Ramsey, to James and Betty Druett, Subject: "New Shoeshine locations." Correspondence concerns request to schedule search for potential locations for shoe shine stands.

- August 20, 2007, Letter from James Druett, President, and Betty Druett, Secretary/Treasurer, J&B Enterprises, Inc. to Mr. Raul Regalado, President and CEO, MNAA, concerning grievances with the Hudson Group, experience with the solicitation process for the master retail concession contract, and request for information.

- September 21, 2007, Letter from James Druett, President, and Betty Druett, Secretary and Treasurer, J&B Enterprises, Inc. to Mr. James H. Cheek, III, Chairman, and Ms. Roslyn Carpenter, Board of Commissioners, MNAA, concerning numerous grievances with regard to the retail concession contract. Includes a history of Complainant's experience with MNAA, and with MNAA's News, Gifts, and Specialty Retail RFP, and a September 21, 2007, letter from J&B to MNAA Commissioners detailing lease concerns.

- November 2, 2007, meeting attended by J&B, MNAA and Hudson Group representatives, meeting minutes.

- April 15, 2008, Letter from Anthony W. Robinson, Esquire, MBELDEF, to Raul Regalada [Regalado], President and CEO, MNAA, advising the Airport of their status as J&B Enterprises, Inc.'s legal representative, and requesting a meeting to voluntarily resolve legal compliance issues.

- June 06, 2008, Letter from Robert C. Watson, Senior Vice President and Chief Legal Officer, MNAA, to Anthony W. Robinson, MBELDEF, informing Mr. Robinson of their lack of success in obtaining a satisfactory date to meet, and the Airport's intent to not renew J&B Enterprises' contract, and plan to publicly compete the Shoe Shine Concession at BNA.

Item 2            August 7, 2008, Letter from Anthony W. Robinson, Esq., MBELDEF, to FAA Office of the Chief Counsel, regarding "Complaint of J&B Enterprises, Inc. d/b/a. Rhythm Shine v. Metropolitan Nashville Airport Authority; Supplemental Certificate of Service."

Item 3            August, 11, 2008, FAA Notice, advising the parties that Complaint filed by J&B Enterprises Inc., d/b/a Rhythm Shine under the rules of 14 CFR Part 16, has been docketed by the FAA's Office of the Chief Counsel as Docket No. 16-08-07.

- Item 4 August 18, 2008, Designation of Persons to Receive Service for the Metropolitan Nashville Airport Authority, and Respondent Metropolitan Nashville Airport Authority’s Motion for Extension of Time to File Answer.
- Item 5 September 3, 2008, Letter from FAA, Airports Law Branch, to Thomas R. Devine, Esq., KAPLAN, KIRSCH, & ROCKWELL, LLP, and to Blaine A’mmon White, Esq. and Anthony W. Robinson, Esq., MBELDEF, granting Respondent’s request for an extension of time to file Answer. Respondent’s Answer due November 3, 2008.
- Item 5A September 4, 2008, Complainant’s Objection to Respondent’s Request for An Extension of Time.
- Item 6 October 31, 2008, Affidavit in Support of Respondent Metropolitan Nashville Airport Authority’s Answer and Motion to Dismiss: Rebecca Ramsey, Manager of Properties, MNAA.
- Item 7 October 30, 2008, Affidavit in Support of Respondent Metropolitan Nashville Airport Authority’s Answer and Motion to Dismiss: John Howard Jr., Assistant Vice President of Properties and Business Development, MNAA.
- Item 8 October 30, 2008, Affidavit in Support of Respondent Metropolitan Nashville Airport Authority’s Answer and Motion to Dismiss: Amber Dancy Gooding, Director of Business Diversity Development, MNAA.
- Item 9 November 3, 2008, Respondent Metropolitan Nashville Airport Authority’s Motion to Dismiss.
- Item 10 November 3, 2008, Respondent Metropolitan Nashville Airport Authority’s Answer and Memorandum of Points and Authorities in Support Thereof and in Support of its Motion to Dismiss.

Exhibit List To: Respondent Metropolitan Nashville Airport Authority’s Answer and Memorandum of Points and Authorities in Support Thereof and in Support of Its Motion to Dismiss

Volume 1 of 2 (Exhibits 1 through 12)

Exhibit 1: Layout of Concourses (BNA—All Concession Locations).

Exhibit 2: Metropolitan Nashville Airport Authority, Nashville International Airport, Master Concession Plan, dated December 2004 (Excerpts).

Exhibit 3: FY 2009-2011 Airport Concessionaires DBE Program, Goal Methodology (Non-Car Rental Concessions) for Nashville Airport.

Exhibit 4: FFY 2006 – 2008 Airport Concessionaires DBE Goal Methodology (Non-Car Rental concessions) for Nashville International Airport, dated December 2005, and Metropolitan Nashville Airport Authority, Airport Concessions Disadvantaged Business Program for Nashville International Airport, December 2005, revised August 2006.

Exhibit 5: Letter to Raul Regalado from M. Howell, Regional Civil Rights Officer for FAA, dated September 29, 2006, regarding overall DBE goal methodology for 15.7 percent for non-car rental concessions for federal fiscal years 2006-2008.

Exhibit 6: MNAA's Uniform Reports of ACDBE Participation, 2007 and 2008. The MNAA's Uniform Report of ACDBE Participation for FY 2007 report was not submitted although it was stated to be included.

Exhibit 7: Second Amendment to Concession Agreement between J&B Enterprises, Inc. and Metropolitan Nashville Airport Authority, dated December 17, 2003

Exhibit 8: Concession Agreement between J&B Enterprises, Inc. and Metropolitan Nashville Airport Authority for Shoeshine Concession, dated July 6, 1992, and First Amendment to Concession Agreement, dated July 25, 1997. The First Amendment to Concession Agreement was not submitted, although it was stated to be included.

Exhibit 9: Letter to J. Druett from R. Ramsey dated December 23, 1999, extending J&B's Concession Agreement on year-to-year basis until Authority implements its Long Range Commercial Strategic Plan.

Exhibit 10: Letter to R. Regalado from J. Druett and B. Druett, dated August 20, 2007, concerning grievances with the Hudson Group.

Exhibit 11: Letter to M. Tatom from J. Druett and B. Druett, dated October 3, 2006, thanking her for her professionalism in handling their concerns.

Exhibit 12: Request for Proposals for News, Gifts and Specialty Retail Concession at Nashville International Airport, dated February 6, 2006 (Excerpts). Excerpts provided: Table of Contents; Section 1, Introduction; Section II, Solicitation Schedule; Section VII, News, Gifts and Specialty Retail Concepts; and Section IX, Rights and Duties of Proposers.

Volume 2 of 2 (Exhibits 13 through 37):

Exhibit 13: Sign-In Sheet for Pre-Proposal Meeting, dated February 24, 2006. (Attendance List for the News, Gift, and Specialty Retail RFP Pre-proposal Meeting.)

Exhibit 14: Press Release regarding Award of Concessions, dated September 20, 2006.

Exhibit 15: Master Lease and Concession Agreement between Airport Management Services, LLC (Hudson Group) and Metropolitan Nashville Airport Authority, dated November 30, 2006.

Exhibit 16: E-mail to H. Bassett, Transystem Inc. from R. Ramsey, dated May 11, 2007, declining the Hudson Group's request to flip the shoe shine area and the refrigerator areas in the B-5, CNN store.

Exhibit 17: E-mail to J. DiDomizio and others from R. Ramsey, dated August 21, 2007, concerning the relationship between J&B Enterprises and the Hudson Group.

Exhibit 18: E-mail to J. Druett and B. Druett from J. Howard, dated September 6, 2007, requesting a face to face meeting with J&B Enterprises to resolve any issue between J&B Enterprises and the Hudson Group.

Exhibit 19: E-mail to J. Howard from J. Wilson, the Hudson Group, dated September 17, 2007, responding to Mr. Howard's request for a list of items needed from J&B Enterprises.

Exhibit 20: (1) Letter to J&B from R. Ramsey, dated August 29, 2007, enclosing information that J&B requested in their letter to Raul Regalado dated August 20, 2007; (2) Letter to R. Ramsey from J&B, dated August 31, 2007, informing Ms. Ramsey that the information that was sent was identical to the information that J&B already had in its possession; Letter to A. Gooding from J&B, dated September 1, 2007, requesting several items of information, including some relating to the Concession Agreement for the Hudson Group; (3) e-mail to James and Betty Druett from R. Ramsey, dated September 6, 2007, responding to Complainant's request for information, and agreeing to share a copy of Hudson's proposal that was submitted in response to the News, Gifts, and Specialty Retail RFP; and (4) e-mail to R. Ramsey from J. Howard, dated October 9, 2007, informing Ms. Ramsey that Mr. Howard met with the Druetts, and they picked up Hudson's response to the RFP.

Exhibit 21: E-mail to R. Ramsey from B. Druett, dated September 5, 2007, regarding James and Betty Druett's decision not to attend a September 14, 2007, meeting with Airport and Hudson Group personnel.

Exhibit 22: E-mail to J. Howard from B. Druett, dated September 19, 2007, regarding concerns to be addressed.

Exhibit 23: Letter (with attachments) to MNAA Board of Commissioners from J. Druett and B. Druett, dated September 21, 2007, regarding grievances with the Hudson Group.

Exhibit 24: November 2, 2007, meeting attended by J&B, MNAA, and Hudson Group representatives, meeting minutes.

Exhibit 25: E-mail to J. Druett and B. Druett from R. Ramsey, dated November 19, 2007, regarding the scheduling of a meeting to look at potential shoe shine locations.

Exhibit 26: E-mail to J. Druett and B. Druett from J. Howard, dated December 7, 2007, regarding plans relating to the relocation of the shoe shine stand currently inside the CNN Newsstand.

Exhibit 27: Letter to Mr. and Mrs. J. Druett from D. Benton, the Hudson Group, dated February 11, 2008, regarding desire to execute a sublease with J&B Enterprises, and to offer assistance in developing its merchandising line.

Exhibit 28: E-mail to J. Howard from R. Ramsey, dated April 8, 2008, regarding plan to move forward with a temporary location for Rhythm Shine.

Exhibit 29: Letter to R. Regalado from A. Robinson, MBELDEF, dated April 15, 2008, regarding legal representation of J&B Enterprises, and request to informally resolve J&B Enterprises' issues.

Exhibit 30: Letter to A. Robinson, MBELDEF, from R. Watson, MNAA Senior Vice President and Chief Legal Officer, dated June 6, 2008, regarding the lack of success in scheduling an informal resolution meeting, and intent to compete the shoe shine concession, and not renew J&B Enterprises' contract with MNAA.

Exhibit 31: Photos of J&B's shoe shine stands--2 photos of B Concourse inside CNN Newsstand, and 2 photos of Complainant's C-Concourse location.

Exhibit 32: DBE Certificate Documents for Olympic Supply, April 2006.

Exhibit 33: ACDBE Joint Venture Guidance from FAA issued July 17, 2008.

Exhibit 34: Memorandum to Rebecca Ramsey from Michelle Tatom (former DBELO at MNAA), dated June 8, 2006, regarding the assessment of each proposer's response to the ACDBE participation goal and requirements in the News, Gift, and Specialty Retail concession RFP.

Exhibit 35: Letter to J&B Enterprises from J. Howard, dated September 11, 2007, regarding J&B Enterprises' lack of response to Mr. Howard's request for a meeting.

Exhibit 36: E-mail to R. Ramsey from B. Druett, dated November 29, 2007, regarding J&B Enterprises' response to MNAA's proposal to move it to another location.

Exhibit 37: Hudson/Olympic DBE Participation Report FY 2008.

Item 10A      November 6, 2008, Notice of Change of Address for Attorney for Respondent Metropolitan Nashville Airport Authority, Arthur P. Berg, KAPLAN KIRSCH & ROCKWELL LLP.

Item 11      FAA AIP Grant History for MNAA, 2006 through 2008.

- Item 12 MNAAs Uniform Report of ACDBE Participation for FY 2006 (October 1, 2005 to September 30, 2006); FY 2007 (October 1, 2006 to September 30, 2007); and FY 2008 (October 1, 2007 to September 30, 2008); List of ACDBEs by name, concession type, concession receipts, and race/ethnicity in FY 2007 for the MNAAs, from FAA's DOORS database.
- Item 13 December 11, 2008, Complainant's Request for An Extension of Time to retain substitute counsel.
- Item 14 December 23, 2008, Respondent Metropolitan Nashville Airport Authority's Opposition to Complainant's Motion for An Extension of Time.
- Item 15 January 8, 2009, FAA Order, denying Complainant's request for extension of time.
- Item 16 January 9, 2009, Notice from Raymond G. Prince, attorney at law, PRINCE & HELLINGER, PC, Nashville, Tennessee, notifying parties that he has not been retained by Complainant, and does not represent, and will not be presenting Complainant in this matter.
- Item 17 March 10, 2009, FAA Notice of Extension of Time, notifying parties that Director's Determination will be issued on or before May 5, 2009.