

November 17, 2022

VIA EMAIL

Billy Nolen, FAA Administrator (Acting)
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

Re: Request for Investigation Into JCDecaux's Failure To Comply With Its ACDBE Obligations and Massport's Failure To Properly Oversee The ACDBE Program

Dear Acting FAA Administrator Nolen,

The Airport Concessions Disadvantaged Business Enterprise (ACDBE) program is a critical way by which the FAA ensures equal opportunity for disadvantaged businesses and avoids funneling taxpayer dollars into an exclusionary contracting system. In order to operate as Congress intended, the ACDBE program requires majority-owned firms to work in good faith to meet its goals, and requires vigorous oversight by the agency receiving FAA funding.

Unfortunately, as set forth in detail below, JCDecaux has persistently failed to meet its obligations under the ACDBE program, and the Massachusetts Port Authority (Massport) has failed to exercise appropriate oversight. Accordingly, we call upon the FAA to investigate: a) JCDecaux's failure to comply with its ACDBE obligations; and b) Massport's failure to adequately oversee the ACDBE program.

The Requirements of Federal Law

As a recipient of federal funds, Massport must adhere to strict nondiscrimination policies aimed at creating a level playing field on which disadvantaged business entities can compete fairly for opportunities for concessions. See 49 CFR § 23 and 49 CFR § 26. Federal law requires Massport to create strict monitoring and compliance procedures and establish goals for ACDBE participation for concessions. Specifically, federal law requires recipients of federal grant money to "take necessary action to ensure, to the maximum extent practicable, that at least 10 percent of all businesses at the airport selling consumer products or providing consumer services to the public are small business concerns...owned and controlled by a socially and economically disadvantaged individual."¹ Grant recipients must also "implement appropriate mechanisms to ensure compliance" with a comprehensive regulatory scheme "by all participants in the program."² Each recipient must establish overall ACDBE goals. While a recipient cannot be penalized for merely failing to meet ACDBE goals they "can be penalized or treated as being in noncompliance... if [they] have failed to administer [their] ACDBE program in good faith."³

¹ 49 U.S.C. § 47107(e)(1)

² 49 C.F.R. § 23.29

³ 49 CFR § 23.57

JCDecaux's Bad Faith and Toxic Practices

In 2013, Massport awarded JCDecaux a 9-year concession contract (starting January 1, 2014) to provide interior and exterior advertising and sponsorship services at Boston Logan International Airport. To carry out the concession agreement, JCDecaux created a joint venture, JCDecaux Airport Boston LLC, which subcontracted with Colette Phillips Communication, (CPC) a Black woman-owned public relations and marketing communications boutique firm and certified ACDBE.⁴ The contract between JCDecaux and Massport created a requirement that JCDecaux, through CPC sales, would generate eleven and one half (11.5%) percent of total annual gross revenue as ACDBE revenue to satisfy their federal obligations. This contractual goal is similar to Massport's overall ACDBE participation goal, which has fluctuated in the relevant years between 10.9% from 2015-2017 to 12.5% from 2018-2020.

Yet despite JCDecaux's representations to Massport, it has persistently failed to engage CPC as required. CPC has worked diligently to try and secure advertising revenue at Logan Airport but have continually been thwarted in its efforts by JCDecaux's discriminatory business practices. JCDecaux has never treated CPC as an equal partner, but rather as an obstacle to be overcome to obtain the Massport contract. Examples of this include:

- JCDecaux solicited business from Harvard University which violated an agreement between JCDecaux's Joint Venture and CPC. CPC was given exclusive categories to solicit advertising sales from, which included all local (New England) businesses in the area of health services, education and hospitality. This was clearly articulated at several board meetings between JCDecaux and CPC, but was ignored. Once JCDecaux signed the agreement with Harvard they handed off the matter to CPC for clerical follow up.
- JCDecaux made several "introductions" for CPC at organizations that JCDecaux had prior working relationships with, which were in CPC's exclusive categories. Rather than allow CPC to foster and grow their own relations, however, JCDecaux would negotiate the contracts themselves and send the agreed upon contract for CPC to get signed. One such instance was with Massachusetts General Hospital, where again, CPC was allowed only to complete clerical follow-up. These types of administrative tasks do not comply with either the spirit or letter of the ACDBE program.
- JCDecaux staff berated CPC and its CEO in public settings. Massport was in attendance on February 2018 where the Co-Managing Director of JCDecaux made various disrespectful comments toward CPC. No one from JCDecaux's management structure made any attempt to rectify the situation with CPC after the fact, nor discipline the employees in question. Massport did nothing to follow up about the situation.
- In the joint venture agreement signed by CPC and JCDecaux, CPC is allowed access to the records and books pertaining to the joint venture's business. However, even after repeated requests, the books were not made available to CPC, leaving them in the dark on crucial business decisions, including compliance with federal ACDBE obligations.

⁴ The Joint Venture itself is a venture between JCDecaux (98%) and CPC (2%). However, the Sales Service Subcontract was the sole way in which JCDecaux represented that it would meet its ACDBE goal.

The overall working experience with JCDecaux was one of disrespect, dismissal, and impediment. At every turn, CPC faced an uphill battle to participate in the ACDBE program.

Moreover, JCDecaux's pattern and practice of non-compliance with the ACDBE program extends beyond Massport. Other ACDBEs who have been used by JCDecaux to meet goals in other parts of the country have been treated similarly. JCDecaux sets up its ACDBE partners to fail. JCDecaux pressures their partners into working predominantly with local businesses as clients, which generally are small contracts that don't interfere with JCDecaux's stranglehold on outdoor advertising. They offer ACDBE partners commissions that don't adequately reflect the work required to make the sales, and when JCDecaux inevitably fails to meet their ACDBE participation goals they scapegoat their partners who are not provided the tools or incentives to succeed.

JCDecaux has made considerable sums of money through their contracts with Massport and other airports across the country. This money has been earned with the express intent of Congress and FAA to help close the opportunity gap in concessions by having large concessionaires mentor, aid, and support small minority owned businesses to increase their opportunities. As the largest outdoor advertising company in the world, JCDecaux has the resources, skills, and tools available to assist in these efforts, and yet they have only shown contempt for the program. JCDecaux has acted as a barrier to levelling the playing field. Their continued participation in the ACDBE program must be investigated.

Massport's Failure to Enforce and Oversee FAA Policies

Although JCDecaux is responsible for repeatedly failing to meet its ACDBE goals, Massport also bears responsibility for allowing this pattern of non-compliance to continue. Massport has allowed JCDecaux to circumvent the ACDBE program's intent by constantly failing to achieve the contractual goal of 11.5% ACDBE participation and failing to show the good faith efforts required.

Massport has long been on notice that JCDecaux was not complying with the ACDBE program, yet Massport took only superficial steps that failed to remedy the problem.

In the nine years of the contract between JCDecaux and Massport, JCDecaux has managed to reach their ACDBE contractual goal only once, in 2014, the first year of the agreement. Every other year JCDecaux was not close to achieving their participation goal. In 2017, after three consecutive years of JCDecaux failing to meet their ACDBE participation goal, Massport required them to update their ACDBE action plan and include details on how they planned to meet the requirements of the program going forward. This was submitted to Massport on May 18, 2018. Rather than follow up on the action plan, however, Massport instead approved JCDecaux's 2019 projected ACDBE participation rates at 4.5% and failed to take meaningful action.

A year later, in July 2019, CPC raised serious concerns directly with Massport. It took another six months for Massport to start an official good faith review of JCDecaux. Nevertheless, Massport approved JCDecaux's projected 2020 ACDBE revenue at 5%. This pattern of blatant disregard for the goals of the ACDBE program combined with a rubber stamp process and perfunctory review allowed for JCDecaux's bad faith practices to continue until such time as CPC could no longer be involved with JCDecaux, Massport, and the ACDBE program. CPC ended up terminating the relationship in 2021.

Massport's lack of oversight and disregard for the bad faith actions of JCDecaux are magnified in light of JCDecaux's failure to correctly calculate the ACDBE participation requirements for advertising concessions. Massport has allowed JCDecaux to use a deceptive calculation that massively inflated JCDecaux's ACDBE participation numbers. Specifically, JCDecaux used a formula of ACDBE Gross Sales over Total Gross Sales to calculate ACDBE participation. Massport has signed off on this calculation, most recently in 2018.

However, under 49 CFR 23 and the official FAQs on DBE Program Regulations⁵ created by the DOT, this calculation is erroneous for concessions that involve the sale of advertising displays or messages to the public. Massport and JCDecaux should have been using the calculation in §23.55(e) which counts "the entire amount of fees or commissions charged by an ACDBE firm for a *bona fide* service" rather than gross sales.⁶

The FAQ provides examples to highlight how to correctly calculate ACDBE participation.⁷ In example five of the FAQ, it states that when Firm C, not a certified ACDBE, "enters into a contract with Firm A, the ACDBE. Firm A's sole function is to sell ads, for which it is compensated based on commission and fees earned. *Count only the fees or commissions paid by Firm C for the service it received*" (emphasis supplied). This makes sense as a method to report ACDBE participation because for advertising only the commission fees are paid to the ACDBE.

Applying the correct methodology, JCDecaux's ACDBE participation is even worse than the single-digit numbers they reported. For example, in 2016 JCDecaux's calculated their ACDBE achievement at 5%, with Gross Sales to CPC at \$616,464 and total JCDecaux sales at \$11,719,374. However, CPC only earned anywhere between \$49,331-\$73,997 based on their commission rate (8% on returning clients and 12% on new clients). This results in a ACDBE participation around 0.6%, a shockingly small number. Using the correct calculation in §23.55(e) means JCDecaux has never accomplished more than 2% ACDBE participation in any of the years of the contract.⁸

⁵ [Official FAQs on DBE Program Regulations \(49 CFR 23\)](https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/official-faqs-dbe-program-49-cfr-23), <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/official-faqs-dbe-program-49-cfr-23>.

⁶ 49 CFR § 23.55(e)

⁷ [Official FAQs on DBE Program Regulations \(49 CFR 23\)](https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/official-faqs-dbe-program-49-cfr-23), <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/official-faqs-dbe-program-49-cfr-23>.

⁸ Massport was even put on notice about the Official FAQs on DBE Regulation (released in 2015) when in 2018, JCDecaux asked for a change to the goal methodology to make it even more favorable to JCDecaux. Massport refused but failed to correct their reporting methods.

Logan Airport is not the only place JCDecaux has used this incorrect method of calculation. The problem is national in scope. In November 2021, the Greater Orlando Aviation Authority Internal Audit identified this same issue with JCDecaux's calculation methods. When Orlando's Aviation Authority brought up this error, JCDecaux stated that they would "continue with the same reporting until there is additional clarification from the FAA."⁹ This massive failure to accurately reflect JCDecaux's ACDBE participation is alarming and highlights both Massport's inability to oversee the program and JCDecaux's lack of commitment to diversity.¹⁰

Requested Action

No ACDBE should have to deal with harassment, discrimination, and belittlement. No ACDBE should be forced to leave a toxic partnership that causes mental anguish. No ACDBE participant should need to seek enforcement and oversight of bad faith actions on multiple occasions. The federal program was designed to lift disadvantaged businesses and create a thriving ecosystem for diversifying public contracts. Massport needs to be a place where ACDBEs are valued and heard. Unfortunately, Massport failed in their duties and ultimately failed CPC, ACDBEs, and the ACDBE program.

Therefore, LCR calls upon the FAA to:

- 1) Require Massport to conduct an audit of JCDecaux's ACDBE participation and its reasons for approving their remediation plans while they continually failed to meet their goals. This should include engaging a third party that will investigate JCDecaux's discriminatory practices and provide a comprehensive report addressing each of the claims of discrimination.¹¹
- 2) Investigate JCDecaux's participation in the ACDBE program in the nine major airports across the country that contract with JCDecaux to determine the extent of their deceptive practices.
- 3) Investigate Massport's compliance with the ACDBE program.

We request a meeting to discuss these matters of great public interest with broad implication for minority- and women-owned businesses. We look forward to the FAA taking immediate steps to

⁹ [Greater Orlando Aviation Authority Internal Audit](https://orlandoairports.net/site/uploads/Finance-Agenda-20211110.pdf), <https://orlandoairports.net/site/uploads/Finance-Agenda-20211110.pdf> at 85.

¹⁰ Massport's lax treatment of its responsibility to enforce the ACDBE program is further shown in the difficulty to assess Massport's current ACDBE participation levels. A cursory review of accessible information shows very little transparency in the way Massport collects and makes public its ACDBE data. While information on the separate DBE program is readily accessible on Massport's website, the same cannot be said of the ACDBE participation goals. The public has no way of knowing how Massport is doing in meeting its ACDBE goals.

¹¹ See. Cordial Endeavor Concessions of Atlanta, LLC v. City of Atlanta, Georgia where the FAA mandated a similar request. 2019 WL 8365512 (F.A.A.) [Cordial Endeavor Concessions of Atlanta, LLC, Complainant](#), No. 16-17-01, 2019 WL 8365512 (Aug. 2, 2019)



ensure compliance with federal law. Please contact Russell Paul at rpaul@lawyersforcivilrights.org or call 617-971-8082 to discuss this matter in greater detail.

Sincerely,
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