



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

Office of Inspector General

Memorandum

Subject: ACTION: Results of Investigation into Allegations
Concerning MWAA Duty-Free Concession Contract

Date:

From: Kenneth M. Mead
Inspector General

Reply to
Attn of:

To: The Secretary
Federal Aviation Administrator

Please find attached a copy of a report we transmitted to Representatives Joseph Pitts and Peter Deutsch concerning issues and allegations stemming from the award of a concession contract by the Metropolitan Washington Airports Authority (MWAA) to Duty Free Americas (DFA) in April 2003. Rep. Pitts asked us to address whether MWAA complied with its contracting and competition procedures.

In addition to Rep. Pitts' request, the Nuance Group, which had unsuccessfully competed for the concession contract, contacted us directly with allegations about MWAA's actions in this matter. Among other issues, Nuance raised concerns about MWAA's certification of DFA's partnering Disadvantaged Business Enterprise (DBE), Concourse Gift and News, Inc., questioning the personal wealth of its owner. Subsequently, we received a letter from Rep. Deutsch on behalf of DFA.

We found no evidence that MWAA failed to comply with its contract competition procedures in selecting DFA, nor did we substantiate the specific allegations raised by Nuance. However, we identified several aspects of the current program for which we are making recommendations.

- In particular, we found it problematic that there are no personal net worth limits established for the airport DBE concessionaire program.
- Concessionaire DBEs can have revenues totaling as much as \$30 million annually and continue to qualify as "economically disadvantaged".

- Finally, while current regulations provide that an individual's claim of social and economic disadvantage is a rebuttable presumption, the regulations do not provide criteria upon which the presumption of economic disadvantage may be rebutted. Such lack of definitive standards for rebuttal, namely a personal net worth limit for airport concession DBE owners, highlights the ambiguous and highly confusing nature of the current regulations, rendering the process of rebuttal largely subjective.

Accordingly, our report includes recommendations for the Department's consideration in its ongoing rulemaking to revise the DBE regulations applicable to airport concessions. We note, however, that while Nuance asserted that the owner of Concourse Gift and News is not economically disadvantaged, it is not our role to determine the personal net worth of this individual (or the owner of Nuance's proposed DBE firm), nor do we know the personal net worth of the individuals involved.

However, if Nuance elects to appeal MWAA's certification of Concourse Gift and News as a DBE to the Department, this issue would presumably fall to the Department to address, to the extent that personal wealth is relevant to determining whether or not an individual is economically disadvantaged.

Attachment

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cc: Acting General Counsel
FAA Chief Counsel



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

The Inspector General

Office of Inspector General
Washington, D.C. 20590

The Honorable Joseph R. Pitts
U.S. House of Representatives
Washington, DC 20515-3816

Dear Representative Pitts:

This responds to your letter of May 13, 2003, concerning the award of a duty-free concession contract by the Metropolitan Washington Airports Authority (MWAA) to Duty Free Americas (DFA) in April 2003. You asked us to address whether in making its selection for the duty-free concession contract, MWAA complied with its contracting and competition procedures.

In addition to your request, the Nuance Group contacted us directly with allegations about MWAA's actions in this matter. Among other issues, Nuance raised concerns about MWAA's certification of DFA's partnering Disadvantaged Business Enterprise (DBE), Concourse Gift and News, Inc., relative to the reported social status and personal wealth of its owner.

In completing our investigation, we conducted interviews of Nuance, DFA, and MWAA officers and employees, as well as industry personnel. In addition, we reviewed the Department of Transportation's (DOT) Disadvantaged Business Enterprise (DBE) statutes and regulations, contract proposals submitted by Nuance and DFA, MWAA responses to Nuance's protests, and financial and legal documents supplied to MWAA by DFA.

By letter dated July 2, 2003, Representative Peter Deutsch requested that we provide him with the results of our investigation. Accordingly, we are transmitting to him correspondence containing an identical report of our findings as that which is presented below. In addition, we are forwarding a copy of this letter to the Secretary of Transportation, as well as MWAA.

Background

The MWAA duty-free concession contract involves four duty-free stores at Washington Dulles International Airport and a kiosk at Ronald Reagan Washington National Airport¹. These retail operations stock and sell duty-free merchandise to international travelers.

Nuance operated the duty-free stores at Washington Dulles International Airport from 1997 through July 2003, after acquiring the holdings of Allders International, which had competed for and won the prior concession contract². While that contract was scheduled to expire in May 2002, MWAA extended it to May 31, 2003, due to the events of September 11, 2001.

In September 2002, MWAA issued a Request for Proposals (RFP), which initiated the competitive process³ for awarding a new five-year contract for the duty-free concessions at Dulles International and Ronald Reagan National Airports. Initially, five firms submitted proposals in response to the RFP. Three of the five offerors—Nuance, DFA, and Alpha Stellar Dulles—competed in the best and final stage.

As required by the RFP, each of the three final offerors identified in its proposal a DBE with which it would “partner” in the operation of the duty-free concessions. DFA’s proposal identified Concourse Gift and News, Inc., as its DBE partner, while Nuance identified Pen & Prose⁴.

By letter to the offerors dated April 7, 2003, MWAA announced that DFA had been awarded the duty-free concession contract. Nuance immediately lodged a protest with MWAA, and subsequently reported to us its allegations concerning MWAA’s contracting process and the certification of Concourse Gift and News as a DBE.

¹ The duty-free kiosk at Reagan National Airport has not been in operation since September 11, 2001. It is presently unknown when the kiosk will reopen.

² Nuance had not been competitively awarded a contract by MWAA. Nuance assumed control of the MWAA duty-free concessions as a result of its acquisition of Allders International (USA), Inc. Delstar Group of Phoenix, AZ, was Allders International’s DBE and continued under Nuance for the duration of the contract.

³ The 1986 Metropolitan Washington Airports Act requires complete and open competition at the airports. A 2002 General Accounting Office report on MWAA’s contracting practices (GAO-02-36) found that while MWAA is not required to follow Federal procurement statutes and regulations, the Act does require MWAA to comply with fundamental principles underlying full and open competition.

⁴ Nuance did not partner with the incumbent DBE, Delstar Group. Nuance asserted that its proposal identified Pen & Prose as its DBE partner based on feedback from MWAA that the proposal would receive more favorable consideration if it partnered with a local DBE. MWAA denied having made any such representation. Nuance had no prior business relationship with Pen & Prose.

MWAA carried out its internal process for addressing Nuance's protest, reviewing each of the points Nuance raised in its protest. By letter dated July 16, 2003, MWAA informed Nuance of its determination that the protest was without merit. Additionally, by separate correspondence to Nuance, dated July 16, 2003, MWAA reaffirmed its certification of Concourse Gift and News as a valid DBE. On August 1, 2003, DFA commenced performance under the contract.

We note that Nuance has until October 14, 2003, to appeal MWAA's certification of Concourse Gift and News as a DBE to the Office of the Secretary of Transportation. Nuance advised us that it is considering an appeal. While Nuance has asserted that the owner of Concourse Gift and News is not economically disadvantaged, it is not our role to determine the personal net worth of this individual (or the owner of Pen & Prose), nor do we know the personal net worth of the individuals involved.

If Nuance elects to appeal, this issue would presumably fall to the Department to address, to the extent that personal wealth is relevant to determining whether or not an individual is economically disadvantaged. Should Nuance appeal and not be satisfied with the Department's determination, it may seek redress in U.S. District Court.

Summary of Findings and Observations

In brief, we did not find evidence that MWAA failed to comply with its contract competition procedures in selecting DFA for the duty-free concession contract, and our investigation did not substantiate the specific allegations raised by Nuance. However, we concluded that the DOT regulations governing airport concession DBEs require strengthening, in several key areas, to promote fairness of opportunity for those persons who, per statute, are considered both "socially and economically disadvantaged."

First, the regulations covering airport concession DBEs do not prescribe a personal net worth limit for the owner of a DBE. Accordingly, irrespective of personal wealth, it appears that virtually anyone within statutorily designated groups (based on race, ethnicity, or gender) may attain DBE certification. Conversely, separate DOT regulations, covering Federal-aid highway/transit and airport construction project DBEs, prescribe a \$750,000 personal net worth cap for the owner of a DBE⁵. In addition, under the current regulations, an airport concession DBE

⁵ Excluding equity in one's primary residence and ownership in the DBE firm.

firm can operate so long as its average annual gross revenue does not exceed \$30 million, when averaged over the preceding three years⁶.

Secondly, while the regulations provide that an individual's claim of social and economic disadvantage is a rebuttable presumption, the regulations do not provide clear, objective, and tangible criteria upon which the presumption of economic disadvantage may be rebutted. Such lack of definitive standards for rebuttal, namely a personal net worth limit for airport concession DBE owners, highlights the ambiguous and highly confusing nature of the current regulations, rendering the process of rebuttal largely subjective.

Lastly, the absence in the regulations of any specified limit on personal net worth for airport concession DBE owners, compounded by the provision allowing DBE firms up to \$30 million per year in gross revenues—averaged over the preceding three years, raises a question as to when, if ever, and how the owner of a DBE firm could lose DBE eligibility. It appears, under the existing regulations, that a socially disadvantaged individual (i.e., within the statutorily designated groups) could have unlimited personal wealth, yet be able to benefit from this preference and participate in the concession program indefinitely.

In addition, the present regulations allow an airport concession DBE firm that exceeds the \$30 million average annual gross revenue ceiling, after entering a concession agreement, to operate through the expiration of the contract, including the exercise of any options. For example, in the case of MWAA concession contracts, such a DBE firm could operate for at least five years. The regulations are unclear as to the firm's eligibility to participate in future concession contracts with the same, or other, airports.

In 2000, the Department of Transportation initiated the rulemaking process to revise the Departmental DBE regulations applicable to airport concessions. The rulemaking remains ongoing at present. Based upon our results in this investigation, as well as our preliminary findings in an investigation of DOT-related DBE programs in New Orleans, which we are conducting at the direction of the House Appropriations Committee, we are recommending to the Department the following:

- The DBE regulations covering airport concessions need to prescribe a personal net worth limit for the owner of a DBE. While we are not proposing any

⁶ In contrast, the regulations covering Federal-aid highway/transit and airport construction DBEs cap the annual gross revenue of DBEs at \$17.4 million (averaged over the preceding three years.)

specific cap, it would serve as an appropriate threshold determinant in establishing whether an individual is economically disadvantaged.

- The regulations should set forth clear, objective, and tangible criteria for rebutting the presumption of economic disadvantage.
- Consideration should be given to establishing terms for DBE firms, and their owners, to graduate from DBE eligibility.

We recognize that the DBE program is intended to promote laudable social and economic policy objectives, such as enhanced business opportunities. These recommendations are not intended to imply that there are inherent problems with the overall DBE policy goals, but rather identify some issues that Congress and the Department may wish to consider with respect to the oversight and administration of the airport concessionaire program.

Regarding Nuance's assertion that the owner of Concourse Gift and News is not economically disadvantaged, it is not our role to determine the personal net worth of this individual (or the owner of Pen & Prose), nor do we know the personal net worth of the individuals involved. However, should Nuance appeal, this issue would presumably fall to the Department to address, to the extent that personal wealth is relevant to determining whether or not an individual is economically disadvantaged or to establish the elements of a rebuttable presumption.

Our investigative results are presented in greater detail in the below sections of this report.

Review of MWAA Contracting and Competition Procedures

We did not find evidence that MWAA failed to comply with its contract competition procedures in selecting DFA for the duty-free concession contract. We determined that the process MWAA followed for the competition was in accordance with its contracting policy and procedures.

Specifically, we found that MWAA selected DFA based on the results of a standardized rating process, using rating criteria that were identified in the RFP⁷. While details of the scoring are proprietary in nature, the MWAA selection panel ranked Nuance third out of the three final offerors, with DFA receiving ratings

⁷ There were five evaluation criteria specified in the RFP, each worth 20 points of an overall 100 points: (1) Operating/Merchandising Plan; (2) Staffing/Personnel; (3) Qualifications and Experience of the Firm; (4) DBE participation; and (5) Financial Offer.

numerically higher than Nuance in four of the five criteria categories of evaluation, and tying with Nuance in the fifth category. With respect to the “Financial Offer” evaluation criteria, while not a substantial difference, DFA’s proposal pledged a monetary return to MWAA greater than that proposed by Nuance.

Nuance asserted to us that DFA was “pre-selected” for the MWAA duty-free concession contract. Nuance provided us with the names of two of its employees whom it advised could furnish us with information concerning “rumors” circulating at a March 2003 trade show in Orlando, FL, that MWAA had already decided to award DFA the duty-free concession contract, more than a week prior to MWAA’s selection announcement.

We interviewed these Nuance employees, who told us, under oath, that they did not hear from anyone at the conference that DFA had been awarded the MWAA duty-free concession contract. One of the Nuance employees we interviewed told us that an individual not employed by Nuance was a witness to such rumors at the Orlando trade show. We then interviewed this individual, who denied having heard anything at the trade show, or elsewhere, that MWAA had decided to award the contract to DFA.

DBE Participation in MWAA Contract Competition

The greatest rating difference between DFA and Nuance was in the area of quality of DBE participation. In this area, the MWAA selection panel rated DFA’s proposal notably higher than Nuance’s because DFA pledged to utilize its partnering DBE, Concourse Gift and News, to fully operate two of the four duty-free stores at Dulles Airport. Nuance’s proposal, in contrast, did not reflect this level of participation (i.e., day-to-day store operation at Dulles) by its DBE, Pen & Prose; rather, Nuance proposed utilizing Pen & Prose in a lesser role, primarily involving management, training, and merchandising⁸.

While our review did not disclose violation of the DBE regulations, we believe the current regulatory scheme governing airport concessions merits attention by Congress and the Department, particularly concerning the criteria for qualification as a DBE and, specifically, the area of personal net worth of DBE owners.

⁸ Recently, MWAA awarded a Dulles Airport newsstand concession contract to a partnership consisting of Host Marriott Services and Pen & Prose (serving as a DBE). MWAA informed us that the Host Marriott-Pen & Prose partnering proposal reflects substantial participation by Pen & Prose in the day-to-day operation of newsstands. Also, currently and over the last seven years, Pen & Prose has independently operated a retail newsstand concession at Reagan National Airport under a lease agreement (non-DBE) with MWAA.

FAA authorizing legislation, Title 49 U.S. Code, Section 47101 et seq., requires that airports receiving Airport Improvement Program funding, to the maximum extent practicable, must have at least ten percent of all airport businesses selling consumer products/services (i.e., concessions) owned by socially and economically disadvantaged individuals. The FAA authorizing statute does not define the term “socially and economically disadvantaged” but refers to the Small Business Act, which identifies the qualifying groups for which disadvantage is to be presumed⁹. The Small Business Act leaves to the Department promulgation of regulations further defining the terms and conditions for DBE eligibility.

The DOT regulations applicable to airport concession DBEs are at Title 49 Code of Federal Regulations, Part 23. Significantly, Part 23 imposes no personal net worth limit for the owner of a DBE. Accordingly, anyone otherwise qualified—irrespective of personal wealth—can be certified as a DBE for an airport concession contract based on their inclusion in a designated group. In addition, Part 23 allows airport concession DBE firms up to \$30 million in gross revenues per year (averaged over the preceding three years).

In contrast to the Part 23 regulations for airport concession DBEs, the regulations covering Federal-aid highway/transit and airport construction projects (49 CFR Part 26) prescribe a \$750,000 personal net worth cap for the owner of a DBE (excluding equity in the primary residence and ownership in the DBE). Also, Part 26 caps the annual gross revenue of a DBE at \$17.4 million per year (averaged over three years).

In its protest, Nuance disputed MWAA’s certification of Concourse Gift and News as a DBE, asserting that the firm’s owner is not socially and economically disadvantaged. Specifically, Nuance questioned how the owner of Concourse Gift and News could be considered economically disadvantaged based on her reported ownership interest in multiple national commercial enterprises.

⁹ The Small Business Act defines socially disadvantaged as “...those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.” Economically disadvantaged is defined as “...those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.” Further, the Small Business Act requires contractors to presume that socially and economically disadvantaged individuals include U.S. citizens (or persons having permanent resident status) who are African American, Hispanic American, Native American, Subcontinent Asian American, Asian-Pacific American, and women.

Though the current DBE regulations stipulate that an individual's claim of social and economic disadvantage is a rebuttable presumption¹⁰, we found the Department's existing regulations with respect to the term "socially and economically disadvantaged" to be inconsistent and confusing. For example:

- While the regulations provide for rebuttal of an individual's presumed social and economic disadvantage, they do not specify clear, objective, and tangible criteria for rebutting the presumption of economic disadvantage, e.g., a personal net worth limit for the owner of an airport concession DBE. In fact, the Department noted in commentary in the Federal Register, dated June 28, 1999, that "Pending completion of the final rule on airport concessions, the Department believes it best to resolve the current uncertainty by making the \$750,000 [personal net worth] cap amount of [49 CFR] Sec. 26.67 inapplicable to airport concessionaires."¹¹

In our view, this not only injects a level of ambiguity and confusion into the issue of what constitutes a DBE, but also presents a fundamental problem with the regulations. In particular, the regulations provide for a rebuttable presumption of social and economic disadvantage for airport concession DBEs but, other than the \$30 million average annual gross revenue cap, lack clear and definitive standards for rebuttal of economic disadvantage. Without a personal net worth cap for airport concession DBEs, an individual with a multi-million dollar personal net worth could claim economic disadvantage and rebuttal of such a claim would be largely subjective. Accordingly, it seems inconsistent that the regulations provide for a rebuttable presumption, but at the same time do not provide clear and definitive standards for rebutting the presumption.

- With respect to the evaluation criteria used by MWAA on this concession contract, more weight was assigned for higher levels of DBE participation in the overall operations of the concession. It seems to us that absent a limitation on personal net worth and clear, objective, and tangible criteria for rebutting the presumption of economic disadvantage, it is not surprising that a wealthier, more established DBE would naturally have a greater capacity for substantial

¹⁰ A rebuttable presumption means that an individual, based on inclusion in one or more of the above listed groups, is presumed to be socially and economically disadvantaged unless the presumption is protested and specific evidence is presented to rebut the presumption.

¹¹ To date, the Department's rulemaking to revise DOT's DBE regulations applicable to airport concessions remains pending. In September 2000, the Department published a Supplemental Notice of Proposed Rulemaking that proposed a personal net worth cap of \$2 million for airport concession DBEs.

participation in concession operations over, say, a new entrant DBE with more limited financial resources.

DOT's Office of General Counsel advised us that it was unaware of any prior challenge to an individual's claim of disadvantage in the area of airport concessions. Should Nuance appeal to the Department, contesting the claim of presumed social and economic disadvantage of the owner of Concourse Gift and News, the case could be precedent-setting for the Department. This issue would presumably fall to the Department to address, to the extent that personal wealth is relevant to determining whether or not an individual is economically disadvantaged or to establish the elements of a rebuttable presumption.

While an appeal would provide an opportunity for the Department to clarify the process and criteria for rebutting the presumption of disadvantage, only a rulemaking can resolve the underlying issues of what does, and does not, constitute a DBE for this program. As the Department proceeds with its rulemaking, the results of this investigation—as well as the preliminary findings of an investigation concerning the administration of DOT-related DBE programs in New Orleans we are conducting at the direction of the House Appropriations Committee—highlight areas of inconsistency in the regulations.

Accordingly, we are transmitting our results in this case to the Office of the Secretary, so the Department can consider our results in its rulemaking¹², including our recommendations. In brief, we are recommending that the Department (a) prescribe a personal net worth limit for the owner of an airport concession DBE; (b) establish clear, objective, and tangible criteria by which the presumption of economic disadvantage can be rebutted; and (c) consider instituting terms for DBE firms, and their owners, to graduate from DBE eligibility.

Specific Concerns with MWAA Contract

In your May 13, 2003, correspondence to us, you asked us to address three specific issues, raised by Nuance, concerning MWAA's award of the duty-free concession contract. Below are our detailed findings concerning each of these issues:

DFA's financial and management challenges

In its protest, Nuance contended that DFA had significant financial and management challenges for which DFA would not have scored well on the 20

¹² We have discussed our results in this case with the Department, and have previously briefed senior officials on our review of administration of DOT-related DBE programs in New Orleans.

percent-weighted criterion of “Qualifications/Experience of Firm” had MWAA examined and taken DFA’s problems into consideration. Specifically, Nuance asserted that DFA failed to pay rent at Detroit’s Metropolitan Airport; DFA was indebted to Fossil, Inc.; and was the subject of a lawsuit filed by bondholders.

We reviewed financial documents provided to MWAA by DFA, court records, and DFA’s responses to questions posed by MWAA. We also interviewed, and reviewed the analysis of MWAA’s contracting officer, who examined the issue of DFA’s financial suitability in connection with DFA’s proposal and Nuance’s subsequent appeal. The MWAA contracting officer found that (a) DFA did not fail to pay its rent at Detroit; (b) DFA paid, and received a release from, a nominal debt to Fossil, Inc., that was incurred when it acquired certain holdings of BAA, Inc., a U.K. firm; and (c) while DFA has been sued by the holders of bonds that BAA assumed through its earlier acquisition of a firm¹³, DFA is restructuring its debt to resolve the upcoming scheduled balloon payment on the bonds. We spoke with DFA’s Chief Financial Officer, who advised that DFA is in the process of refinancing the balloon payment and has a refinancing plan in place.

A nationally recognized major accounting firm recently completed an annual financial audit of DFA. After a review of the audit report, dated July 30, 2003, as well as DFA’s unaudited financial statements, an expert financial consultant from our office concluded that DFA should be able to refinance the balloon payment.

Additionally, in accordance with the RFP, DFA was required to deliver a performance guaranty¹⁴ to MWAA in the amount of approximately \$959,000, 50 percent of its first-year minimum guaranteed monetary return to MWAA of \$1.918 million, as specified in the contract. The amount of the performance guaranty would be forfeited to MWAA in the event the firm defaults.

Based on these findings, and DFA’s assurance that it would be able to meet its financial obligations, MWAA concluded that DFA would be able to successfully fulfill the terms of its duty-free concession contract. In reviewing the foregoing issues, our office did not identify anything to contradict MWAA’s conclusion about DFA’s financial fitness to perform under the terms of its contract.

¹³ DFA acquired a subsidiary of BAA and thus became responsible for bonds the BAA subsidiary had assumed when it acquired another firm, DFI.

¹⁴ A performance guaranty to MWAA is required to be in the form of an irrevocable letter of credit issued by a bank, a certified check, bank guaranty, or money order, or a performance bond issued by an insurance company.

MWAA compliance with contracting and DBE procedures

Second, you asked whether in making its selection for the duty-free concession contract, MWAA complied with its own contracting competition procedures and guidelines, including the application of DBE certification criteria and the necessary Board of Directors approval of an award with less than full and open competition. Specifically, Nuance alleged that MWAA violated its internal procedures because the MWAA Board of Directors had not approved the final selection. Nuance believed that there was a lack of full and open competition in the contract award, thus requiring MWAA Board of Directors approval, as required per MWAA's 2003 Contracting Manual.

We did not find evidence that MWAA failed to comply with its contracting competition procedures and guidelines in effect at the time the RFP was issued. We concluded that the RFP was widely disseminated and MWAA's requirement for full and open competition had been satisfied.

As discussed above, 49 CFR Part 23 prescribes the criteria for certification of DBEs exclusive to airport concessions. Under Part 23, there is no personal net worth limit for the owner of a concession DBE. Additionally, Part 23 provides that an airport concession DBE may have annual gross receipts up to \$30 million per year, averaged over the preceding three years.

In its protest to MWAA, Nuance asserted that Concourse Gift and News, Inc., was improperly certified as a DBE, asserting that the firm's owner did not appear to be socially and economically disadvantaged. Specifically, Nuance questioned how this individual could be considered economically disadvantaged based on her reported ownership interest in a number of commercial enterprises nationally. Nuance cited her reported business involvement with other individuals and ventures, namely Lanta Concessions, Inc., and expressed concern that the gross revenue of her business enterprises exceeds \$30 million per year.

The owner of Concourse Gift and News, based on race and gender, has the presumption of social and economic disadvantage. While we are not the deciding authority in this matter, we reviewed financial documents provided to MWAA by this person. Our review indicates that her involvement in other business ventures, including Lanta Concessions, Inc., did not cause her DBE firm's gross revenue to exceed \$30 million per year, averaged over the preceding three years.

As previously addressed, unlike the regulations applicable to DBEs on Federal-aid highway/transit and airport construction projects, which specify a personal net worth limit for the DBE owner, the regulations covering airport concession DBEs

impose no personal net worth cap. Moreover, though the current DBE regulations stipulate that an individual's claim of social and economic disadvantage is a rebuttable presumption, the regulations do not provide clear, objective, and tangible standards by which the presumption of economic disadvantage may be challenged and adjudicated.

In a July 16, 2003, letter to Nuance, MWAA reaffirmed its certification of Concourse Gift and News as a valid DBE and on August 1, 2003, DFA commenced performance under the contract. Nuance advised us that it is considering an appeal to the Secretary of Transportation. Should Nuance appeal and not be satisfied with the Department's determination, it may seek redress in U.S. District Court.

Full and open competition

Third, you asked whether MWAA complied with the statutory and lease requirements of full and open competition. We did not find evidence to support allegations that MWAA failed to comply with requirements for full and open competition.

We found that MWAA provided ample notice of the RFP. Specifically, MWAA posted the RFP on its website, available to anyone wishing to see MWAA's current activities and projects, sent notification of the RFP through a subscription email service, and advertised the RFP in the Washington Post.

In accordance with MWAA procedures, its evaluation committee is charged with evaluating the proposals in accordance with the evaluation criteria stated in the RFP to determine which offeror best meets these criteria. Each offeror's proposal is scored against the RFP, not against the proposals of the other offerors. The recommendation of the evaluation panel is then forwarded to the Contracting Officer, who is independent of the evaluation committee. The Contracting Officer decides whether to accept the evaluation committee's recommendation. If the Contracting Officer accepts the recommendation, the recommended firm becomes the apparent successful offeror and the Contracting Officer commences a review of the responsibility of this offeror before executing a contract with that firm.

For this contract, there were five evaluation criteria specified in the published RFP. Also stated in the RFP was that each of the five criteria was worth 20 points of an overall 100 points. The five evaluation criteria were: (1) Operating/Merchandising Plan; (2) Staffing/Personnel; (3) Qualifications and Experience of the Firm; (4) DBE Participation; and (5) Financial Offer. Prospective offerors were required to present any concerns about the terms and criteria in the RFP prior to the deadline

for submission of proposals. We found that Nuance had not raised any concerns beforehand.

The actual scores of the three offerors invited by MWAA to make oral presentations and submit best and final offers are considered proprietary information and thus may not be disclosed. However, our review of notes and scoring sheets from the selection panel revealed that DFA was the unanimous choice of the selection panel, with Alpha Stellar ranked second and Nuance ranked third.

Unfair advantage to DFA

In addition to the specific issues you asked us to examine, Nuance asserted to us that in the scoring of the proposals, MWAA gave DFA's proposal more points than Nuance's because the extent of participation by DFA's DBE partner, Concourse Gift and News, exceeded the RFP-specified minimum 20 percent partnering participation level. DFA's proposal received a higher point value for the 25 percent participation level of its DBE. Nuance maintained it was unaware that greater evaluation credit would be given to offerors pledging DBE participation levels exceeding 20 percent.

The RFP specified that participation by the DBE partner would be at a minimum level of 20 percent, and stated that the offeror must demonstrate that "the DBE will participate substantially and meaningfully in the day-to-day management and operation of the Duty Free concession." Further, the RFP stated, "The Authority (MWAA) will evaluate the quality, type, and quantity of DBE participation." In our view, a reasonable reading of the RFP is that a proposed participation level exceeding the 20 percent required minimum would receive relatively greater weight in terms of scoring.

According to MWAA officials, DFA's proposal was given a higher score than Nuance's because of Concourse Gift and News, Inc.'s greater extent of proposed participation, over that of Nuance's DBE partner, Pen & Prose. We reviewed the proposals submitted by DFA and Nuance and found that, under DFA's proposal, Concourse Gift and News had substantially higher, hands-on participation than Nuance proposed for Pen & Prose¹⁵.

The greatest rating difference between DFA and Nuance was in the area of quality of DBE participation. In this area, the MWAA selection panel rated DFA's proposal notably higher than Nuance's because DFA pledged to utilize Concourse Gift and News to fully run two of the four duty-free stores at Dulles Airport.

¹⁵ MWAA advised us that specific details of the proposal submitted by Nuance are of a proprietary nature.

Nuance's proposal, in contrast, did not reflect such substantial participation (i.e., day-to-day store operation at Dulles) by Pen & Prose; rather, Nuance proposed utilizing Pen & Prose in a lesser role, primarily involving management, training, and merchandising.

We did not find evidence to support contentions that DFA was given an unfair advantage based upon the participation level of its DBE. However, as previously addressed, it appears to us that absent a limitation on personal net worth and clear, objective, and tangible criteria for rebutting the presumption of social and economic disadvantage, it is not surprising that a wealthier, more established DBE would naturally have a greater capacity for substantial participation in concession operations, over a DBE with fewer financial resources.

Pre-selection/pre-announcement

Nuance also asserted to us that DFA was "pre-selected" for the MWAA duty-free concession contract. According to Nuance, its employees heard information during a trade show in Orlando, FL, around March 28, 2003, that DFA had been awarded the duty-free concession contract. This was more than a week before MWAA's selection announcement on April 7, 2003. Nuance further alleged that DFA began purchasing merchandise around the middle of March 2003 for the Dulles International Airport duty-free stores. In addition, Nuance maintained that during oral presentations before the selection panel, they were only asked three questions. Nuance officials said that because MWAA posed just three questions, they believed that the oral presentations were merely perfunctory, because MWAA had already decided who was going to receive the duty-free concession award.

We did not find evidence to support Nuance's contentions that DFA was "pre-selected" for the duty-free concession contract. Specifically, we found that DFA was selected by a panel guided by a specific set of grading factors that had been identified and explained in the RFP. Based on our review, we concluded that each of the panel members independently graded each of the submissions in accordance with those grading factors, and that it was a process not allowing for interpretation or deviation from the grading standards by panel members.

The three competing offerors were invited to make oral presentations to the selection panel. MWAA's Vice President for Marketing told our office that each of the companies was given leeway to present anything that they wanted during the oral presentations, and that questions asked during the oral presentations arose out of the presentations themselves without any pre-determined questions to be posed by the panel. The panel completed its deliberations on March 19, 2003, made the final selection, and presented the selection to the MWAA contracting officer on

March 31, 2003. However, the official written announcement was not made to the successful and unsuccessful companies until April 7, 2003. DFA and Alpha Stellar were notified by telephone on April 4. MWAA advised that its attempts to contact Nuance officials on April 4 were unsuccessful.

Regarding Nuance's allegation that MWAA had "pre-selected" DFA, Nuance provided us with the names of two of its employees whom it advised could furnish us with information concerning "rumors" circulating at the March 2003 Orlando trade show that MWAA had already decided to award DFA the duty-free concession contract. We interviewed these Nuance employees, who told us, under oath, that they did not hear from anyone at the conference that DFA had been awarded the MWAA duty-free concession contract. These employees said they had been telling vendors at the trade show that they (Nuance) were confident they would win the contract, but had been challenged on that assertion by the vendors. According to these Nuance employees, none of the vendors with whom they spoke represented as having any information concerning the award of the contract.

One of the Nuance employees we interviewed told us that the editor/publisher of Travel Markets Insider, a travel trade publication, attended the Orlando trade show and was a witness to the "pre-selection" rumors. We then interviewed this individual, who advised that she did not hear any rumors at the Orlando trade show, or anywhere else, that MWAA had decided to award the contract to DFA.

We do not anticipate further investigative activity in this matter. If I can answer any questions or be of further assistance in this or any other matter, please feel free to contact me at 202-366-1959, or my Deputy, Todd J. Zinser, at 202-366-6767.

Sincerely,



Kenneth M. Mead
Inspector General

Enclosure
Member's Correspondence