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The following section entitled “Legal Overview for Authority DBE Program” was prepared by the Authority’s General Counsel and the law firm of Godwin Ronquillo PC.



SAN DIEGO
INTERNATIONAL
AIRPORT

Legal Overview for Authority DBE Program

The California legislature created the San Diego County Regional Airport Authority (“Authority”) as a local governmental entity of regional government. The Authority is a recipient of federal funds from the United States Department of Transportation (“USDOT”). The Authority, therefore, is subject to various laws and regulations relating to its public contracting, including the following: (1) California Proposition 209; (2) Code of Federal Regulations found at 49 CFR Parts 23 and 26; and (3) legal precedent defining the permissible scope of remedial measures for the non-discriminatory spending of public contracting dollars. These laws and regulations are briefly summarized below.

California Proposition 209

The Authority’s non-federally funded contracts are subject to California’s Proposition 209, which prohibits affirmative action by public entities. Specifically, Proposition 209 added Section 31 to Article I of the California Constitution as follows:

ARTICLE 1 DECLARATION OF RIGHTS. Section 31.

(a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(b) This section shall apply only to action taken after the section's effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.

(f) For the purposes of this section, "State" shall include, but not necessarily be limited to, the State itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the State.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

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(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Courts have upheld the application of Proposition 209 since its adoption in 1996. *See Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (1997) (rejecting requests for a preliminary injunction to prevent California's application of Proposition 209, finding it does not violate the equal protection clause of the United States Constitution and is not preempted by federal civil rights legislation); *Hi-Voltage Wire Works v. City of San Jose*, 24 Cal.4th 537 (2000) (invalidating a city program requiring contractors bidding on a city project to notify and use minority and women subcontractors or to document their efforts in attempting to hire these subcontractors); *C&C Constr., Inc. v. Sacramento Muni. Util. Dist.*, 122 Cal. App. 4th 284, 298 (Cal. Ct. App. 2004) (finding that to discriminate on the basis of subsection (e) – the loss of federal funds, a government agency “must have substantial evidence that it will lose federal funding if it does not use race-based measures and must narrowly tailor those measures to minimize discrimination”).

Federal Regulations

The Authority must comply with federal regulations (49 CFR Parts 26 and 23) and implement the USDOT's Disadvantaged Business Enterprise (DBE) Program because it is a recipient of federal funds from the USDOT and awards and administers opportunities for airport concessions and construction contracts.

The Authority is required to develop and submit for approval to the USDOT its DBE Program, including an overall goal for DBE participation on federally-funded contracts. Depending on the evidence available to it, the Authority may meet its DBE goals through use of race- and gender-neutral means, race- and gender-conscious means, or a combination of both. The USDOT advises that recipients should take affirmative steps to use as many of the race-neutral means of achieving DBE participation as possible and are required to “meet the maximum feasible portion of [its] overall goal by using race neutral means.” The USDOT has also recommended the use of disparity studies to examine whether or not there is evidence of discrimination or its effects, and how remedies might be narrowly tailored for a specific DBE program.

As a governmental entity in California (within the 9th Federal Judicial Circuit), the Authority must operate its DBE Program within the parameters of significant legal precedent, including the following:

- *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)

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In *Western States Paving Company*, the Ninth Circuit Court of Appeals considered an award of federally-funded road construction contracts by the Washington State Department of Transportation. The court found that the Transportation Equity Act for the 21st Century (“TEA-21”) and its implementing regulations are constitutional. It held “TEA-21’s DBE Program is a narrowly tailored means of remedying the effects of race and sex-based discrimination within the transportation contracting industry.” The court explained that “TEA-21 and its implementing regulations possess all of the features of a narrowly tailored remedial program: race-conscious remedies are used only when race-neutral means prove ineffective, these race-conscious measures are employed in a flexible manner and for a limited duration, and the program is tied to the labor market in each State and is designed to minimize the burden on minorities.” *Id.*

The court then examined the specific DBE program that the Washington State Department of Transportation (“Washington State”) put in place. In its analysis, the court pointed out that Washington State did not need to establish a compelling need for its DBE program independent of the determinations Congress made in enacting TEA-21. The court stated that “Washington need not demonstrate an independent compelling interest for its DBE Program. When Congress enacted TEA-21, it identified a compelling nationwide interest in remedying discrimination in the transportation contracting industry.” *Id.* at 997.

The court’s analysis, therefore, focused on whether the race conscious element of Washington State’s DBE program was narrowly tailored to address the presence or absence of discrimination and identify any specific groups that have actually suffered discrimination. (Washington State imposed a 14% minority utilization requirement on all who bid on a construction project involving a highway.) The court concluded that Washington State’s DBE program was *not* narrowly tailored because the evidence of discrimination supporting its application was inadequate. *Id.* at 1003. The court’s finding was based upon the following: (1) Washington State had not conducted statistical studies to establish the existence of discrimination in the highway contracting industry; (2) its calculation of the capacity of DBEs to do work was flawed because it failed to take into account the effects of race-conscious programs; (3) the disparity between DBE participation on contracts with and without affirmative action components did not provide any evidence of discrimination; and (4) the small disparity between the proportion of DBE firms in the state and the percentage of funds awarded to DBEs in race-neutral contracts was entitled to little weight as evidence of discrimination because it did not account for other factors that may affect the relative capacity of DBEs to undertake contracting work. *Id.*

In response to *Western States Paving*, the General Counsel of the Department of Transportation published a document setting forth guidelines for recipients of federal funds located in the 9th Circuit conducting a disparity study. In that document, recipients of federal funds were advised that the following points should be considered when designing disparity studies:

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- The study should ascertain the evidence of discrimination and its effects separately for each of the groups presumed by Part 26 to be disadvantaged;
- The study should include an assessment of any anecdotal and complaint evidence of discrimination;
- Recipients may consider the kinds of evidence that are used in “Step 2” of the Part 26 goal-setting process, such as evidence of barriers in obtaining bonding and financing, disparities in business formation and earnings;
- With respect to statistical evidence, the study should rigorously determine the effects of factors other than discrimination that may account for statistical disparities between DBE availability and participation;
- The study should quantify the magnitude of any differences between DBE availability and participation in race-neutral and race-conscious contracts. Recipients should exercise caution in drawing conclusions about the presence of discrimination and its effects based on small differences;
- In calculating availability of DBEs, the study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored; and
- Recipients should consider, as they plan their studies, evidence-gathering efforts that Federal Courts have approved in the past.

- *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)

Adarand submitted the lowest bid as a subcontractor for part of a project that the USDOT funded. Under the terms of the federal contract, the prime contractor would receive additional compensation if it hired small businesses controlled by socially and economically disadvantaged individuals. Pursuant to the contract, it was presumed that socially and economically disadvantaged individuals included “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities. . . .”

Despite Adarand’s low bid, another subcontractor was awarded the work. The successful bidder was certified as a minority business; Adarand was not. The prime contractor would have accepted Adarand's bid had it not been for the additional payment for hiring the minority business.

The U. S. Supreme Court considered whether the presumption of disadvantage based on race alone, and consequent allocation of favored treatment, is a discriminatory practice that violates the equal protection clause of the Fifth Amendment.

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The Court held that all racial classifications, whether imposed by federal, state, or local authorities, must pass strict scrutiny review. In other words, they must serve a compelling government interest, and must be narrowly tailored to further that interest. In addition, the Court found that proof of past injury does not in itself establish the suffering of present or future injury.

- *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989)

In 1983, the City Council of Richmond, Virginia adopted regulations that required companies awarded city construction contracts to subcontract 30 percent of their business to minority business enterprises. The J.A. Croson Company, which lost its contract because of the 30 percent set-aside, brought suit against the city.

The U. S. Supreme Court considered whether the Richmond law violated the Equal Protection Clause of the Fourteenth Amendment. The Court held that "generalized assertions" of past racial discrimination could not justify "rigid" racial quotas for the awarding of public contracts. The Court noted that the 30 percent quota could not be tied to "any injury suffered by anyone," and was an impermissible employment of a suspect classification.

The Authority is engaged in a disparity study to comply with federal regulations and the Federal DBE Program based upon the statutory and case law set forth above.