

SECTION I.

Introduction

The Disparity Study provides information to assist the San Diego County Regional Airport Authority (SDCRAA or “the Authority”) as it determines how to implement the United States Department of Transportation’s Disadvantaged Business Enterprise (DBE) Program under 49 CFR Part 26 and Federal Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program under 49 CFR Part 23.

The Authority must develop and submit to the U.S. Department of Transportation (USDOT) an annual aspirational DBE goal and three-year ACDBE goal which, depending on the evidence available, may be achieved using race- and gender-neutral means, race- and gender-conscious means, or a combination of these measures.¹

Until January 2006, the Authority’s implementation of the Federal DBE Program included race- and gender-based measures such as DBE contract goals. The Authority changed its implementation of the Federal DBE Program and ACDBE Program in response to a May 2005 Ninth Circuit Court of Appeals decision which ruled that the Washington State Department of Transportation’s implementation of the Federal DBE Program was unconstitutional.² This court decision affected state and local agencies implementing the Federal DBE Program in California and other western states.

The Disparity Study provides information to assist the Authority as it:

1. Establishes an overall annual aspirational goal for DBE participation in its FAA-funded contracts;
2. Estimates the portion of its overall annual aspirational DBE goal to be met through race- and gender-neutral means and any portion to be met through race- and gender-conscious means;
3. Chooses the specific measures it will apply when implementing the Program;
4. Identifies specific race/ethnic/gender groups of DBEs eligible for any necessary race- and gender-based remedies such as DBE contract goals; and
5. Anticipates development of a future three-year ACDBE goal and implementation of the Federal ACDBE Program for concessions at the Airport.

The information is also useful to SDCRAA as it seeks to ensure fairness in its non-FAA-funded contracting. As further background, Section I discusses: (a) the scope of the disparity study; (b) the Federal DBE Program; and (c) organization of the balance of the report.

¹ 49 CFR Sections 26.45, 26.51.

² *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005)

A. Background and Study Scope

The analysis is referred to as a “disparity study” because it examines whether there is a disparity between the Authority’s actual utilization of minority- and women-owned firms and what would be expected for Airport contracts based on availability of minority- and women-owned firms to perform this work. The study also incorporates other quantitative and qualitative information beyond the disparity analysis.

Study team. BBC Research & Consulting, assisted by Winstead & Co., GCAP Services and CRI International (each a minority-owned firm), conducted this analysis. The study began in July 2008 and was completed in 2009.

Coordination with recent and concurrent disparity studies. Some of the quantitative and qualitative information examined in this study was collected as part of previous or concurrent disparity studies for the California Department of Transportation (Caltrans) and a consortium of local transportation agencies in Southern California that included the San Diego Association of Governments (SANDAG) and the San Diego Metropolitan Transit System (MTS).

This draft report for SDCRAA may be augmented with any additional information that will be collected as part of public forums held in Los Angeles and San Diego in fall 2009 as part of the studies for SANDAG, MTS and other local transportation agencies.

Time period for utilization analysis. The Authority was created as an independent agency to operate the San Diego International Airport on January 1, 2003. Prior to that date, the Airport was operated by the Unified Port of San Diego.

January 1, 2003 begins the time frame for historical analysis of Airport contracts in the Disparity Study. The study examines contract awards through December 31, 2007.

Race/ethnic/gender groups examined in the study. Disadvantaged business enterprises (DBEs) are defined in the Federal DBE Program.³ A DBE is a small business owned and controlled by one or more individuals who are socially and economically disadvantaged. The Federal DBE Program specifies the race, ethnic and gender groups that can be presumed to be disadvantaged as long as they do not exceed firm revenue and personal net worth limits:

- Black Americans (or “African Americans” in this study);
- Hispanic Americans;
- Native Americans;
- Asian-Pacific Americans;
- Subcontinent Asian Americans; and
- Women of any race or ethnicity.

³ 49 CFR Section 26.5.

There is a gross revenue limit (not more than \$22,410,000 and lower limits for certain lines of business) and a personal net worth limit (\$750,000, not including equity in the business and in personal residence) that firms and firm owners must fall below to be able to be certified as a DBE.⁴ White male-owned firms can also meet the federal certification requirements and be certified as DBEs. (Few DBEs are white male-owned firms.)

In this study:

- The term “DBEs” refers to disadvantaged business enterprises according to the federal definitions in 49 CFR Part 26 that have been certified as such.
- “MBEs” and “WBEs” are firms owned and controlled by minorities or women, according to the race/ethnicity definitions listed above, regardless of whether they are certified or meet the revenue and net worth requirements for certification.
- BBC’s term “potentially certified DBEs” refers to minority- and women-owned firms that are or could be certified as DBEs given BBC’s information about firm size and race/ethnicity/gender ownership.

B. Federal DBE Program

Because the San Diego County Regional Airport Authority is a primary airport and has received FAA funds authorized for airport development after January 1988, it must comply with federal regulations (49 CFR Parts 23 and 26) and implement the Federal DBE and ACDBE Programs.

The Federal DBE Program that the federal government promulgated in 1999 responded to the 1995 U.S. Supreme Court decision in *Adarand Constructors, Inc. v. Peña*.⁵ The Court held that federal government programs utilizing racial or ethnic classifications are only constitutional if they pass the “strict scrutiny” standard of legal review, which means that the programs serve a “compelling interest” and are “narrowly tailored” to achieve that objective.

Difference between implementing a federal program and a state or local program. In *Adarand*, the U.S. Supreme Court applied the same strict scrutiny standard for review to federal programs that the Court had applied in 1989 to state and local governments in *City of Richmond v. J.A. Croson*.⁶ After the *Croson* decision, many state and local minority- and women-owned business enterprise programs (non-federal programs) were held to be unconstitutional by the courts. The state and local programs found to be unconstitutional included a State of California construction subcontracting program for minority- and women-owned businesses on state-funded contracts.

⁴ 49 CFR Subpart D.

⁵ 515 U.S. 200 (1995).

⁶ 488 U.S. 469 (1989).

Proposition 209. Proposition 209 was passed by California voters in 1996 and became effective on August 28, 1997.⁷ Proposition 209 precludes government agencies in the state from implementing race and gender preferences related to non-federally-funded contracts. Proposition 209 does not prohibit action that must be taken to establish or maintain eligibility for a federal program, and thus permits continued implementation of federally-required programs.⁸ Therefore, Proposition 209 does not preclude the Authority’s implementation of the Federal DBE Program.

Requirements for implementing the Federal DBE Program. The Authority is required to implement the Federal DBE Program and to narrowly tailor its implementation according to regulations set forth in 49 CFR Part 26. Several of these requirements are discussed below. The Authority must:

- Set an overall annual aspirational goal for DBE participation in the Airport’s FAA-funded contracts;⁹
- Examine whether or not the annual DBE goal can be attained solely through neutral measures or whether race- or gender-based measures are needed (and estimate the percentage of the overall annual aspirational DBE goal that will be met through neutral and any race-conscious measures);
- Choose the measures it will apply in an attempt to meet the overall annual DBE goal; and
- Identify the specific race, ethnic and gender groups eligible for any race- or gender-conscious measures such as contract goals.

Western States Paving. The 2005 Ninth Circuit decision in *Western States Paving Co.* further addresses the steps state and local governments must follow for their implementation of the Federal DBE Program to be constitutional.

- The court found that sufficient evidence of discrimination exists nationwide to hold that the Federal DBE Program was constitutional.
- However, the court held that state and local governments are responsible for determining whether or not there is discrimination in the government’s transportation contracting industry, and for developing narrowly tailored measures if a need exists, in order to comply with the Federal DBE Program. Narrow tailoring of the program depends on each state or local government evaluating conditions within its own contracting markets and implementing the Federal DBE Program in a way that pertains to those local conditions.

⁷ California Constitution, Article 1, Section 31.

⁸ Proposition 209 expressly provides that: “[N]othing 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.”

⁹ Even though the Federal DBE Program outlined in 49 CFR Part 26 includes an overall 10 percent aspirational goal for DBE participation across the nation, state and local governments receiving USDOT funds must set an overall annual DBE goal specific to conditions in their relevant marketplace. The Federal DBE Program requires an agency such as SDCRAA to set an overall annual aspirational DBE goal whether or not its program utilizes DBE contract goals.

Subsequent guidance from USDOT. After *Western States Paving*, the USDOT advised state and local agencies that any use of race- or gender-conscious remedies as part of its DBE program must be based on evidence the recipient has concerning discrimination affecting the government's transportation contracting industry:¹⁰

- The state or local agency determines whether or not there is evidence of discrimination in its transportation contracting industry.
- The USDOT recommends the use of disparity studies to examine whether or not there is evidence of discrimination and how remedies might be narrowly tailored.
- The USDOT suggests consideration of both statistical and anecdotal evidence. "Disparity analysis," or comparisons of DBE utilization with the relative availability of DBEs to perform the work, is an important part of the statistical information.
- Evidence must be considered for individual race, ethnic and gender groups.

State and local governments in the Ninth Circuit discontinued implementing race- and gender-conscious elements of the Federal DBE Program after the *Western States Paving* decision and subsequent guidance from USDOT, and many have initiated disparity studies.

BBC's disparity study for the Authority reflects provisions in 49 CFR Parts 26 and 23, *Western States Paving* and other court decisions, and guidance from USDOT, and also considers recommendations for disparity studies by the U.S. Commission on Civil Rights and suggestions that critics of disparity studies have made.

C. Organization of the Report

The balance of this report is organized as follows:

- **Section II – Collection and Analysis of Airport Contracting and Procurement Data.** BBC begins its analysis by defining the relevant geographic market area for the study (determined to be Southern California) and the relevant "product markets," which are the types of construction, engineering and material and equipment related to Airport construction and operations.
- **Section III – Analysis of MBE/WBE Availability for Airport Contracting and Procurement.** USDOT requires federal aid recipients to formulate overall annual aspirational goals for DBE participation in federally-funded contracts. Section III of this report presents data pertinent to establishing a "base figure" for the Airport's overall annual aspirational DBE goal and information on MBE/WBE availability used in subsequent disparity analyses. The base figure is formulated from BBC's consideration of Airport FAA-funded contracts from 2003 through 2007 and the availability of minority-, women- and majority-owned firms to perform specific types and sizes of these contracts and subcontracts.

¹⁰ Questions and Answers Concerning Response to *Western States Paving Company v. Washington State Department of Transportation*, available at http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm. (January 2006).

- **Section IV – Utilization and Disparity Analysis for Airport Contracting and Procurement.** The Authority must decide how much of its overall annual DBE goal can be met through neutral means and how much, if any, through race-conscious measures. If any race- or gender-conscious measures are needed, SDCRAA must determine the specific race/ethnic/gender groups eligible for these remedies.

Disparity analysis assists SDCRAA in making these decisions. Section IV compares past utilization of minority- and women-owned firms on Airport contracts with what would be expected given the relative availability of MBEs and WBEs for this work. This analysis is conducted for each race/ethnic/gender group.

- **Section V – Exploration of Possible Causes of Any Disparities in Airport Contracting and Procurement.** In Section V, BBC further explores factors behind any overall disparities in Airport utilization of firms owned by specific race/ethnic/gender groups. For example, utilization as prime contractors is separated from utilization as subcontractors. BBC examines large versus small contracts and subcontracts, and disaggregates the overall data for construction, engineering, and material and equipment. In addition, BBC presents results of case studies of bidding on Airport procurements.
- **Section VI – Summary of Results for Airport Contracting and Procurement.** Section VI of the report summarizes information pertinent to each decision the Authority must make in its future implementation of the Federal DBE Program. Study information includes a review of potential program elements.
- **Section VII – Airport Concessions and Implementation of the Airport ACDBE Program.** Section VII of the report reviews MBE/WBE participation as concessionaires at the Airport and other aspects of the Authority’s future implementation of the Federal ACDBE Program.

A number of appendices provide supporting information. Appendices contain detailed discussion of utilization and availability data collection, additional disparity analyses of Airport contract data and quantitative and qualitative information on the Airport’s transportation contracting marketplace.