

TRANSPORTATION RESEARCH BOARD

**Legally Defensible Disadvantaged Business  
Enterprise Disparity Studies**

**Wednesday, June 13, 2018  
2:00-3:30 PM ET**

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**REGISTERED CONTINUING EDUCATION PROGRAM**




## Purpose

Discuss how to commission Disadvantaged Business Enterprise (DBE) program disparity studies to satisfy legal and constitutional imperatives.

## Learning Objectives

At the end of this webinar, you will be able to:

- Identify what needs to be included in a DBE program disparity study that passes constitutional muster
  - Describe how to use DBE program data
  - Discuss how to improve current data and recordkeeping
  - Identify how a study can be used to improve DBE triennial goal-setting, DBE supportive services, and race-neutral means or measures
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# TRB DBE Subcommittee

## Parameters of A Legally Defensible DBE Program Disparity Study

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*June 13, 2018*

# Webinar Overview

- DBE Disparity Study/Availability Study Definitions
- Legal Framework
- Considerations for Choosing a Consultant
- Content of a Disparity Study
  - Legal Background/Context
  - Relevant Market Area
  - Availability Analysis
  - Capacity Analysis (?)
  - Disparity Indices (Availability vs. Utilization)
  - Social and Business Environmental Factors
  - Anecdotal Evidence

# Definitions

- Disparity Study
  - An analysis to determine “but for” discrimination, what would be the percentage of participation by minority and women-owned businesses on transportation-related projects in a specific market area
- Availability Study
  - An analysis to determine the number of transportation-related minority and women-owned firms in the relevant market area and their relative availability compared to all transportation-related firms

# Legal Framework

- Race/gender-based classifications
- Early race-based programs and set-asides
- *City of Richmond v J.A. Croson Co.*, 488 U.S. 469 (1989): Strict scrutiny standard in city contracting; onset of disparity studies
- Strict scrutiny standard of review
  - Compelling governmental interest
  - Narrow tailoring
- *Adarand v. Peña*, 515 U.S. 200 (1995): Strict scrutiny required for federal contracting

# Legal Framework

- Department responds to *Adarand* in 1999 by revising regulations, 49 CFR Part 26
- State-specific goal setting based on relative availability of DBE firms to all firms
- Maximum feasible portion of goal achieved through race-neutral efforts
- No quotas
- Good Faith Efforts
- Groups listed rebuttably presumed to be socially and economically disadvantaged, but business size and PNW cap.
- Individual showing of disadvantage allowed



# Legal Framework

- Courts of Appeals have consistently upheld DOT DBE regulations in face of constitutional challenge
  - DBE program compelling need
    - Congress determines – strong basis in evidence. Reviews every few years through surface transportation reauthorization statutes.
  - Courts have found regulations to be narrowly tailored to achieve remedial purpose

# Key Cases

- Key Cases
  - *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000)
  - *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transp.*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004)
  - *Northern Contracting, Inc. v. Illinois Dep't Transp.*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007), *reh'g and reh'g en banc denied* (2007)
  - *Western States Paving Co., Inv. V. Washington State Dep't of Transp.*, 407 F.3d 989 (9<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006)
  - *Midwest Fence Corp. v. U.S. Dep't of Transp.*, 840 F.3d 942 (7<sup>th</sup> Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017)

# Legal Framework (cont.)

- Additional case law
  - *H.B. Rowe Co. v. North Carolina Dep't of Transp.*, 615 F.3d 233 (4<sup>th</sup> Cir. 2010) (state MWBE program)
  - *Associated Gen. Contractors of Am., San Diego Chapter v. California Dep't of Transp.*, 713 F.3d 1187 (7<sup>th</sup> Cir. 2013)
  - *Dunnet Bay Constr. Co. v. Illinois Dep't of Transp.*, 700 F.3d 676 (7<sup>th</sup> Cir. 2015), *cert. denied*, 137 S. Ct. 31 (2016)

# Disparity Study Requirement?

- 9<sup>th</sup> Circuit States under *Western States Paving* case: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington
- No federal requirement for States outside 9<sup>th</sup> Circuit to base its annual goal on a disparity study.

# 9<sup>th</sup> Circuit States – Effect of *Western States*

- Disparity study to show sufficient evidence of discrimination by group for narrow tailoring
- If study supports that some, but not all groups, face discrimination, those shown not to face discrimination cannot be used to meet contract goals.
- Note that does not mean they are no longer in the DBE program!

# Waiver Process

- U.S. DOT regulations provide that all disadvantaged groups are eligible to meet DBE contract goals
- 9<sup>th</sup> Circuit States, if some groups shown not to face discrimination, States must ask the Secretary for a program waiver to administer their programs in a manner that differs from the regulations, e.g., to allow only those groups suffering discrimination to meet contract goals

# Selecting a Disparity Study Consultant

- Purpose: The study must be reasonably supported to withstand legal challenge
- Cost: Expect to pay \$1.5 - \$2 M for disparity study (may be less for smaller states)
- Federal apportionment funds may be used, but not DBE Supportive Services funds
- Typically funded by State DOT
- Quality studies typically take at least 12 months to complete

# Selecting a Disparity Study Consultant

- Independent and objective—no predetermined outcomes
- Use generally accepted research practices
- Have expertise in legal principles and case law, econometrics, and social science research methodology
- Are they qualified to serve as an expert witness should litigation ensue?
- How will they determine geographic market area?
- How will they determine availability?



# Selecting a Disparity Study Consultant (cont.)

- Will they factor in capacity in determining disparity indices?
  - What are the consultant's views on eliminating firms based upon size, experience, bonding capacity, etc.
- Will they research other economic factors in the economy that could influence current disparities?
- Will the studies control for other factors that may account for statistical disparities, e.g., use regression analysis?
- How will the consultant collect anecdotal data and from what parties?

# Selecting a Disparity Study Consultant (cont.)

- Will the consultant evaluate contracting disparities in markets that do not contain DBE subcontract goals (unremediated markets)?
- In the 9<sup>th</sup> Circuit, will the consultant analyze disparity by each disadvantaged group?

# Establishing Geographic Market Area

Purpose: To determine area in which the consultant will count transportation – related contractors, subcontractors and DBEs.

- Determine location of prime and subcontractors that work on State DOT contracts both Federal-aid and 100% State-funded
- Consider construction and consultant contracts separately
- May not be geographic boundaries of the State
  - If 75% are within State, may consider that substantial majority and limit to State.
- Look at adjoining counties in surrounding States
- Determine dollar amount in each location

# Establishing Market Area (Example)

	Dollars to In-State	Total Dollars	Representative State Percentage
<b>Geographic Distribution of Participating Prime Contractors/ sub contractors</b>	\$727,048,359	\$779,140,546	93.31%
<b>Geographic Distribution of Participating Consultants/ subconsultants</b>	\$113,513,436	\$151,557,115	74.90%
<b>Total State Market %</b>	\$840,561,795	\$930,697,661	<b>90.32%</b>

# Establish Work Types

- Identify what work types the State DOT uses to deliver its projects (70% + in contract spending)
- Look at former construction and consultant contracts from previous years (most use 5 years)– representative of typical spending
- Label work types by NAICS codes or other work codes that are recognized in online resources

# Calculate Weights by NAICS Codes

- To get more accurate count, determine the percentage of dollars awarded by the State and assign to each NAICS Code
- For example, a larger weight is assigned to those codes that make up a larger share of the State's spending

# Determining Availability

- Availability should not be limited to prequalified firms or firms that have previously done business with the State. This ignores the intent of the program, i.e., perpetuates past discrimination
- Cast a broader net to identify firms in the market area with potential to work on State DOT transportation-related projects

# Establish Availability

- Most studies create custom census
- Identify all businesses in market area within the identified NAICS Codes
- Use State DOT bidders list of prime and subcontractors/consultants
- If State lacks subcontracting data (both DBE and non-DBE), consultant can re-create through various means



# Establish Availability

- Supplement data with online resources, e.g., Dun & Bradstreet *MarketPlace* (database of U.S. businesses, purchase a list of all businesses within the geographic market area that have identified NAICS codes)
- *MarketPlace* does not always list businesses owned by minority and women

# Supplementing DBE data through Other Sources (Examples)

- Surrounding States' UCP Directories within Geographic Market Area
- Associated General Contractors Regional List
- Black Chamber of Commerce Regional List
- Minority and women-owned lists from cities
- Minority and women owned firms from company supplier diversity lists

# Establish Availability

- Cross-check sources to avoid duplicating firms
- Verify that firms are DBEs, and/or minority or women-owned, phone surveys, Google, etc.
- Merge list with *MarketPlace* list (apples to apples)

# Consider Capacity? Two Schools of Thought

**Capacity should be considered to include only minority and women-owned firms that are ready, willing, and able.**

- Survey firms to determine if they are qualified
  - Are they for-profit?
  - Have they submitted bids or quotes to work on State DOT jobs as prime or subcontractors?
  - Are they interested in working on State DOT transportation-related jobs?
  - What was the largest contract they have been awarded?
  - Are they a newly-formed business?
  - Business size/number of employees

# Consider Capacity? Two Schools of Thought

- Based upon answers to these surveys, some minority and women-owned firms are eliminated from availability list as they are not considered ready, willing, and able to work on federally-assisted State DOT transportation-related contracts.

# Consider Capacity? Two Schools of Thought

## **Do not consider capacity in determining availability.**

- Do not eliminate minority and women owned firms based upon factors related to their capacity to do business on State DOT contracts
- Doing so does not account for the remedial purpose of the program
- The program is intended to provide opportunities for minority and women owned firms to overcome past obstacles that limited their access to financing required to start their own businesses

# Consider Capacity? Two Schools of Thought

- Capacity limitations perpetuate past discrimination by only counting those firms that are currently involved in the State DOT contracting market
- Typically, capacity adjustments lead to lower goals eliminating firms that have been affected by economic factors that have impeded their participation
- Certain capacity considerations may not correspond to ability to work on State DOT contracts
- Small businesses can “become ready” quickly by renting equipment, hiring employees, etc. in response to an opportunity

# Relative Availability Calculations

Number of minority and women owned  
firms from generated list

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Number of all firms from generated list

= Relative  
availability



# Analyze disparities

- The larger the disparities (“gross disparities”) the stronger the argument for the presence of current discrimination and effects of past discrimination in the market
- Compare disparities in contracting market with DBE goals and market without DBE goals

# Substantively Significant Disparity Measure

- Generally accepted that disparity ratios below 80% are substantively significant (100% represents parity between capacity and utilization).

# Additional Factors to be Considered

- Quantitative disparity index under 80% creates inference of discrimination
- Inference may be supported by other considerations:
  - Regression Analysis
  - Econometric Analysis
  - Anecdotal Evidence

# Disaggregation of Disparity Data

- Show causal connection between discrimination and disparity
- Control for other factors that could cause the disparity

# Analysis of Other Economic Disparities in the Private Sector

- Econometric studies of minority and female business formation rates
- Econometric studies of barriers to access to capital, financing, and bonding by minority and women-owned firms
- Disparity in business owner earnings

# Anecdotal Evidence

- All disparity studies include interviews with business owners: minorities, women, non-minorities
- Interviews with prime contractor groups and minority contractor groups
- Focus groups, surveys, public hearings
- Anecdotes buttress an inference that identified disparities are a result of discrimination

# Anecdotal Evidence

- Courts do not require verification of anonymous anecdotal evidence
- If written surveys used, response rate typically is 15% at best.
- To ensure representative sample, compare respondents and nonrespondents –testing for nonresponse bias

# Findings and Recommendations in Disparity Studies

- Study will include opinion to support whether race-conscious measures are necessary for the State DOT to meet the objectives of the DBE program
- Includes recommendations
- Ultimate decisions on DBE program administration, goal-setting, etc., should be made by the State DOT



# Responsibilities of State DOT

- Hire outside consultant (in-house studies may be perceived as biased)
- Use a team to write RFP and evaluate respondents, including interviews
- Include senior management in consultant selection process
- Appoint employee to manage process

# Responsibilities of State DOT

- Collect all contractor data (State DOT and subrecipients)
- State DOTs often lack subcontractor data. It is essential to collect:
  - Successful and unsuccessful subcontractors
  - DBE and non-DBE subcontractors
- Consultant can re-create subcontractor data, but costly

# Today's Participants

- Denesha James, *United States Department of Transportation*,  
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- For more information: [www.mytrb.org](http://www.mytrb.org)
  - Create your account
  - Update your profile

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