

TRANSPORTATION RESEARCH BOARD

**Legally Defensible Disadvantaged Business
Enterprise Disparity Studies**

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

The Transportation Research Board has met the standards and requirements of the Registered Continuing Education Providers Program. Credit earned on completion of this program will be reported to RCEP. A certificate of completion will be issued to participants that have registered and attended the entire session. As such, it does not include content that may be deemed or construed to be an approval or endorsement by RCEP.



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
- 

TRB DBE Subcommittee

Parameters of A Legally Defensible DBE Program Disparity Study

Federal Highway Administration

Martha Kenley, National DBE Program Manager

Jim Esselman, Senior Attorney Advisor

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 (10th Cir. 2000)
 - *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transp.*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004)
 - *Northern Contracting, Inc. v. Illinois Dep't Transp.*, 473 F.3d 715 (7th 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 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006)
 - *Midwest Fence Corp. v. U.S. Dep't of Transp.*, 840 F.3d 942 (7th 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 (4th Cir. 2010) (state MWBE program)
 - *Associated Gen. Contractors of Am., San Diego Chapter v. California Dep't of Transp.*, 713 F.3d 1187 (7th Cir. 2013)
 - *Dunnet Bay Constr. Co. v. Illinois Dep't of Transp.*, 700 F.3d 676 (7th Cir. 2015), *cert. denied*, 137 S. Ct. 31 (2016)

Disparity Study Requirement?

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

9th 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
- 9th 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 9th 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 |
|--|---------------------|---------------|---------------------------------|
| Geographic Distribution of Participating Prime Contractors/ sub contractors | \$727,048,359 | \$779,140,546 | 93.31% |
| Geographic Distribution of Participating Consultants/ subconsultants | \$113,513,436 | \$151,557,115 | 74.90% |
| Total State Market % | \$840,561,795 | \$930,697,661 | 90.32% |

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

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*,
denesha.james@dot.gov
 - Martha Kenley, *United States Federal Highway Administration*,
Martha.Kenley@dot.gov
 - James Esselman, *United States Federal Highway Administration*,
James.Esselman@dot.gov
- 

Get Involved with TRB

- Getting involved is free!
- Join a Standing Committee (<http://bit.ly/2jYRrF6>)
- Become a Friend of a Committee (<http://bit.ly/TRBcommittees>)
 - Networking opportunities
 - May provide a path to become a Standing Committee member
 - ***Sponsoring Committee: AFH80***
- For more information: www.mytrb.org
 - Create your account
 - Update your profile

Receiving PDH credits

- Must register as an individual to receive credits (no group credits)
- Credits will be reported two to three business days after the webinar
- You will be able to retrieve your certificate from RCEP within one week of the webinar