

Defensible Disparity Studies: Preparing for, completing and implementing results

Event #203 Fostering Small Business Participation

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Session topics

- How is small business participation incorporated into the Federal DBE Program?
- What are disparity studies?
- What does Caltrans legal decision tell us about disparity studies?
- What do Final Rule and other USDOT guidance tell us about disparity studies?
- Tips when preparing for disparity studies
- Tips when conducting a study
- Tips when using the study

Keen background and experience

- Began first disparity study immediately after *Croson* decision in 1989
- Directed disparity studies for more than 70 agencies including 8 state DOTs
- Developed race-conscious and race-neutral programs, including small business programs
- As expert witness, helped in successful defense of MBE/WBE/DBE programs for Columbus, Denver, Phoenix and Caltrans
- Consulted with agencies to help prepare for, implement and defend disparity studies and programs
- Collaborated with other disparity study experts
- Formerly Managing Director of BBC Research & Consulting
- Started Keen Independent Research in spring 2011

How is small business participation incorporated into the Federal DBE Program?

- Section 26.39 requires agencies implementing the Federal DBE Program to facilitate small business participation
 - Agencies must submit plans by February 28, 2012
 - Federal DBE Program provides guidance on possible program elements
- DBEs are small businesses
- Narrow-tailoring of race- and gender-conscious programs requires consideration of neutral remedies such as small business programs

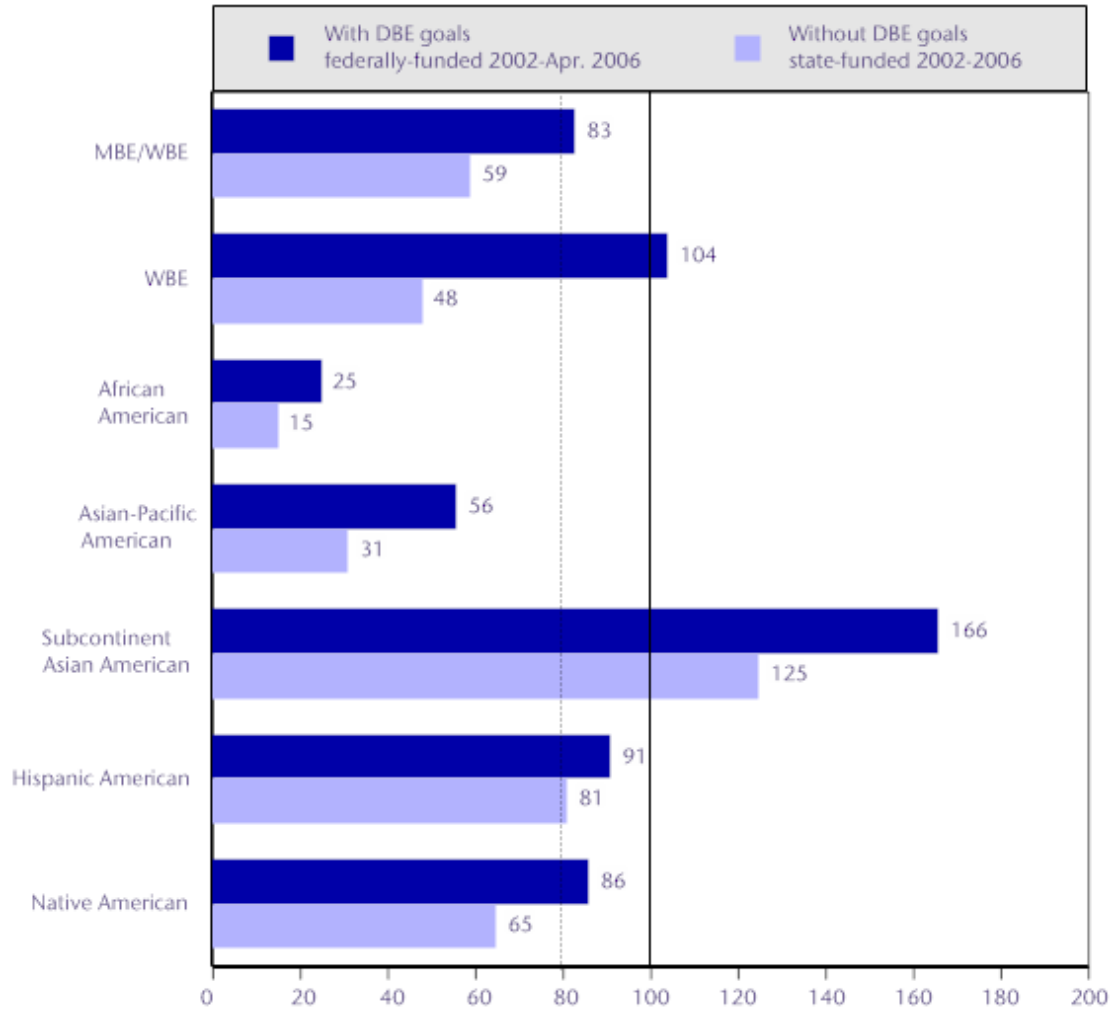
What are disparity studies?

- Research that can help identify whether there is a level playing field for minority- and women-owned firms
- Examines agency contracting and marketplace conditions
- Includes quantitative and qualitative information
- Reviews neutral remedies such as small business programs
- Results help agencies implement:
 - Federal DBE Program
 - Small business programs
 - State and local MBE/WBE programs

What does 2011 Caltrans legal decision tell us about disparity studies?

- U.S. District Court upheld California Department of Transportation implementation of the Federal DBE Program
Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation
- What can be learned?
 - Implement the Federal DBE Program based on a study
 - Collect and analyze both statistical and qualitative evidence
 - Examine MBE/WBE utilization on contracts without goals
 - Perform a sophisticated availability analysis that considers firm capacity
 - Seriously consider neutral remedies
 - Only extend eligibility for race-conscious programs to groups for which have evidence of discrimination

One key result of Caltrans study – Disparity indices with and without DBE contract goals



What do Final Rule and other new USDOT guidance tell us about disparity studies?

- Consider certain non-certified MBE/WBEs in base figure (USDOT Tips for Goal Setting)
- Develop small business program (Section 26.39)
- Examine reasons why and develop corrective actions if fall short of overall DBE goal (Section 26.47(3)(i))

Tips when preparing for a disparity study

- Implement procedures to consistently collect contract data
 - HQ, districts, local agencies
 - Prime contracts and subcontracts
 - USDOT-funded and state-funded contracts
- Implement procedures to consistently collect firm characteristics for primes/subs
- Build support for disparity study within organization and with outside groups
- Determine scope of study
 - Tasks to be performed
 - Length of study period
- Obtain funding (\$400,000-\$1,000,000+)
- Determine procurement process
- Allow sufficient time for procurement process

Scope of disparity study

- Legal analysis
- Analysis of relevant geographic market area and types of work to be studied
- Utilization analysis for MBE/WBEs
- Availability analysis for MBE/WBEs
- Disparity analysis (by racial/ethnic/gender group)
- Quantitative information about local marketplace
- Qualitative information about local marketplace
- Review of contracting processes and any barriers to MBE/WBE participation
- Analysis of base figure and possible step 2 adjustment
- Analysis of whether overall goal can be met through neutral measures
- Report and presentations
- Public comment — after release draft report can incorporate comments into final report

Tips when conducting a study

- Mutual understanding of scope and schedule
- Commitment from leadership
- Internal communication within agency
- Outreach to interested groups
- Collaboration with consultant on contract data collection
- Data review by agency before disparity analysis
- Process for internal draft report review
- Frequent meetings with consultant team
- External review and comment before report is final — recommended
- Understand the final report and how to act on it

Tips when using the study

- Commitment from leadership to act on results
- Internal communication of results
- Outreach to interested groups
- Use of results in implementation of the Program
 - Base figure
 - Step 2 adjustment
 - Program design
- Refinement of internal data collection
- Preparation for study update (recommend to help set 3-year goals)