Defensible Disparity Studies:
Preparing for, completing and implementing results
Event #203 Fostering Small Business Participation

91st Annual Meeting
Transportation Research Board
Washington, D.C.
January 23, 2012

David Keen
Principal
Keen Independent Research LLC
100 Fillmore St. 5th Floor
Denver CO 80206
303-385-8515
dkeen@keenindependent.com
www.keenindependent.com
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)