



## *Airports Conducting Disparity Studies To Assess Marketplace*

*A disparity study is being conducted in relation to Phoenix Sky Harbor International's concession program.*

BY CAROL WARD

Around the country and particularly in Western states, several airports have completed or are in the process of conducting disparity studies in their markets. These wide-ranging studies should help airports provide a statistical backdrop for their disadvantaged business enterprise programs, and in some cases for non-federally funded programs, as well.

Disparity studies are a statistical assessment of the local vendor marketplace designed to determine the presence of discrimination or its effects. While some airports have been conducting disparity studies intermittently for decades, for most it is their first drilled-down analysis of their local markets. And these efforts aren't without reason. Recent court decisions have indicated that entities that administer race-based programs – like airport DBE or local inclusion programs – must have the statistics to back them up.

"We're really doing [a disparity study] in reaction to the 9th Circuit Court ruling in the **Western States Paving** case," says Scott Kichline, manager of commercial business development for **McCarran International** (LAS), which was completing a disparity study for both its construction and concession programs at press time.

"We decided early on after that decision

to get ahead of the curve and have the disparity studies in place," he says. "We've got a huge capital improvement program here through 2012 with Terminal 3 and we're going to spend close to \$3B. The last thing we want to do is tie things up should we be challenged on the issue."

### THE WESTERN STATES' IMPACT

Nevada is one of nine states under the jurisdiction of the 9th Circuit Court in Washington and is therefore impacted by the court's ruling in the Western States Paving case. In that case, Western States Paving challenged the Washington State Department of Transportation DBE program governed by 49 CFR Part 26 regulation of the U.S. Department of Transportation. Part 26 deals with construction and capital improvement programs

In that case, the court found that the Washington State DOT DBE program was unconstitutional. According to a summary from the U.S. DOT, the court affirmed that Congress had determined there was a compelling need for the DBE program and the Part 26 was narrowly tailored. However, the court concluded that Washington State DOT's DBE program was not narrowly tailored because the

evidence of discrimination supporting its application was inadequate.

While the Western States Paving case itself had nothing to do with airports, airports administer Part 26 in their federally funded construction projects. The U.S. DOT, in a question-and-answer explanation of the case's implications on its Web site, recommended that recipients "should immediately begin to conduct a rigorous and valid study to determine whether there is evidence of discrimination or its effects." The DOT added that it expects recipients who submit an all-race neutral goal because they lack sufficient evidence of discrimination to ensure that the evidence-gathering effort is completed expeditiously.

The 9th Circuit Court ruling also applies in California, Oregon, Washington, Alaska, Arizona, Idaho, Montana and Hawaii, and only applies to DBE programs administered under Part 26. But the language in Part 23 (DBE rules for concessions) is so similar to Part 26 that some airports are conducting disparity studies for their concessions programs as well as their construction programs.

"The Western States Paving case applies to the Part 26 side, but some airports believe that if it applies to Part 26 it's going to apply to Part 23 at some point," explains

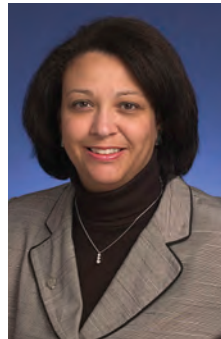


ABOVE: Jack Thomas, STL's assistant airport director for MWDBE certification and compliance, presents the WBE of the Year award to Ollie Dowell of Ollie Dowell Communications.

BELOW LEFT TO RIGHT: Nancy West, managing member of Exstare Federal Services Group LLC, says airports can use a variety of information when doing availability assessments for concessions.

Tamie Fisher, deputy aviation director at PHX, says a disparity study will give the airport an in-depth analysis of the ready, willing and able firms in the area.

Amber Gooding, director of business diversity development for the Metropolitan Nashville Airport Authority, says sometimes those identified as bidders in a disparity study may lack qualifications to bid on some projects.



Nancy West, managing member of consulting firm **Exstare Federal Services Group LLC**, which conducts disparity studies in relation to airport concessions. "Some airports are prudent and they want to make sure they don't have any problems with any of their programs."

West also notes that there is guidance in the Part 23 rule that requires airports conduct an availability assessment to determine the "ready, willing and able" firms in the market, for which a disparity study is appropriate.

"When airports do their availability assessment for concessions, they can use bidders lists, disparity studies, past participation ... for their goal-setting purposes," says West.

At **Phoenix Sky Harbor International** (PHX), a disparity study for the concessions program was under way at press time, with expected completion in the summer. Tamie Fisher, deputy aviation director at PHX, says the disparity study will give the airport an in-depth analysis of the ready, willing and able firms in the area.

"The federal regulations require a basis for the program," she says. "Our goals can't be arbitrary."

Although Missouri is not one of the states covered under the 9th Circuit, **Lambert-St. Louis International** (STL) plans to undertake a disparity study covering both federal programs (Parts 26 and 23) as well as a locally administered program. An RFQ for companies to conduct

the study was slated to go out in May.

"We want to make sure that we satisfy the constitutional concerns" surrounding the programs, says Jack Thomas, assistant airport director for MWDBE certification and compliance. "In order to have race- and gender-conscious programs, you must first establish that the government has a compelling interest in doing so, and the method that is generally employed to establish that compelling interest is disparity studies."

Thomas says the disparity study as it applies to the airports DBE programs will serve to fulfill federal requirements of assessing the ready, willing and able firms in the region, and also will guard against future challenges.

"A disparity study helps airports and communities to buttress their program against a legal challenge from someone who feels that the implementation of goals are inherently unfair," he says, noting that disparity studies help airports "get their programs up to constitutional muster."

An added benefit, of course, is the valuable information that will be gained from a disparity study. Thomas notes that the availability analysis – the in-depth assessment of firms that are ready, willing and able to respond to RFPs from the airport – will help the airport reach out to firms that it might not otherwise have been aware of.

"We'll get a true barometer of firms in our marketplace and then we can set goals that are realistic for us," he says.

STL's disparity study will also apply to its local diversity program, covering non-federally funded areas like procurement and professional services. Some other airports that have administered local race- and gender-based programs are also undertaking disparity studies to reinforce their goals.

**Nashville International** (BNA), for example, has had a disparity study in place since September.

"The airport since 2002 had been running a local small minority- and women-owned business enterprise program. It had carved out some goals for participation on our procurement opportunities at the local level," explains Amber Gooding, director of business diversity development for the Metropolitan Nashville Airport Authority.

Such programs had been challenged elsewhere, so the airport authority suspended the goal-setting aspect of its program until a disparity study could be completed.

"The airport ... needed a narrowly tailored view of its contracting history to make a determination – was there a past discrimination or disparity in the usage of small, minority- and women-owned firms in its contracting?" notes Gooding.

Similar disparity studies were at press time under way for **Detroit Metropolitan Wayne County** (DTW) and **Dallas/Fort Worth International** (DFW).

"The goal is to determine whether or not there is a sufficient basis upon which to establish a minority or women business program," says Genelle Allen, senior vice president of procurement and strategy management for the Wayne County Airport Authority. The program would be applicable to non-federally funded procurements such as snow removal, janitorial services, legal services and myriad others.

Both DTW and DFW contracted with **Mason Tillman Associates** for their studies. In DFW's case, the study will cover not only the airport but the cities of Arlington and Fort Worth as well as other local public entities, each of which will receive results specific to their programs.

Don O'Bannon, vice president of small and emerging business at DFW, says the airport's latest disparity and availability study – begun in February and due to be completed in March 2009 – will build on a previous study conducted in the 1990s. The airport is at the end of the "sunset

provision" on that previous study and needs an updated document in order to continue using race-conscious measures when bidding non-federally funded jobs.

In many cases, airports initially see in their reports a huge disparity in the number of minority- or women-owned firms able to perform a job and the utilization rate of those firms. DFW had a previous study in place so the difference may not be as dramatic.

"The unknown variable is how much the availability has grown," O'Bannon says, speaking of the growth in local women- and minority-owned businesses.

DTW doesn't have a local race- and gender-based program, and even if the disparity study points to a need, it remains up in the air whether the airport will be allowed to move forward with race-conscious contract awards. A measure passed in Michigan last year prohibits such actions on non-federally funded programs, saying, "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting."

Allen notes: "Even if we have a disparity

study where the results show there is a 'disparity' that would warrant establishing a minority or women's business program, there is a question as to whether or not in our state we could do so. We are evaluating that."

BNA's disparity study was conducted over eight months, with final approval in September.

"There were about six key recommendations, the biggest being that there was enough evidence to suggest that the airport authority could develop, on a project-by-project basis, race and gender participation levels," says Gooding.

The airport used the study to assess gaps in contracting with minority firms as compared to firms in the general marketplace. In BNA's case, the disparity study found that the gap was "overwhelming," with minority- and women-owned businesses underutilized. From those statistics, the airport was able to develop "aspirational levels" of participation that are factors in considering bids on contracts. For BNA, the disparity study focuses on non-federally funded construction projects, procurement of goods and services, and professional services. The airport has not conducted a disparity study relating to concessions or construction.

Airport executives say the most valuable information coming out of a disparity study is the comprehensive list of ready, willing and able companies who can bid on airport jobs. But Gooding warns the number of firms that are ready, willing and able often decreases, particularly on larger jobs.

"These studies are done statistically," she notes. "They don't look into all the little nuances, like how much bonding capacity one firm has over the other."

In some cases, those identified in a disparity study as prime bidders may lack qualifications to bid on certain projects.

Gooding also says that identifying possible bidders is only half the battle. Pro-active measures are needed to entice some companies to get involved.

"You aren't going to get participation if people aren't showing up at the pre-bid and informational meetings, because you can't just drag them over the finish line and give them contracts," she says. "They've got to get engaged and get involved."

*We'd like to hear your opinion about this article. Please direct all correspondence to Carol Ward at [carol@airportrevenue.com](mailto:carol@airportrevenue.com).*

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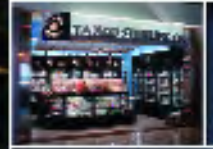


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