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**2015 Hawai'i DOT  
Civil Rights Symposium**

***Disparity Studies***

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# Legal Standards

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- Strict scrutiny standards
  - Race-conscious government decision-making must meet two prongs
    - There must be a “strong basis in evidence” of the agency’s “compelling interest” in remedying discrimination
    - Remedies must be “narrowly tailored” to that evidence
  - Purpose of strict scrutiny
    - Expose “illegitimate notions of racial inferiority or simple racial politics”
    - Provide a “framework for carefully examining the importance and the sincerity of the reasons” for using race

## Legal Standards, cont.

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- “Societal” discrimination is not sufficient
- All racial & ethnic groups must suffer in local marketplace
- Disparities between population & agency utilization of M/WBEs is insufficient
- Race-neutral measures must be seriously considered
- Evidentiary standard can be met through defensible disparity studies
- Gender is subject to “intermediate scrutiny”
- Location, size, veteran status, etc. subject to “rational basis” scrutiny

# *AGC of San Diego v. CalTrans*

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- CalTrans Disparity Study
  - Found insufficient disparities for Hispanics & Subcontinent Asians
  - Recommended a DBE goal of 13.5%, 6.75% to be met through contract goals
- USDOT approved dropping Hispanic & Subcontinent Asian males from goal credit
- DBE group & San Diego NAACP intervened
- Caltrans conducted a study “update” that found dropping Hispanic & Subcontinent Asian males lead to disparities in their utilization

## *AGC of San Diego v. CalTrans, cont.*

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- Summary judgment in CalTrans favor
  - AGC did not have associational standing because it did not identify individual members harmed by the program
  - Statistical & anecdotal evidence of discrimination in the California transportation industry was sufficient
  - No need to show specific acts of deliberate discrimination
  - No need to show underutilization in every industry category; the test is a pervasive, discriminatory system
  - No requirement to verify anecdotes
  - No requirement for separate goals by industry category
  - CalTrans applies many race-neutral measures

# Pending Cases

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## *Midwest Fence v. Illinois DOT & Illinois Tollway*

- Controlling case law upheld IDOT's DBE Program in 2007
- Use of federal record for the Tollway's state-funded program?
- Inadequate disparity study for the Tollway so counsel is relying on a 2006 availability study
- Summary judgment motions pending
- New study completed

# Disparity Study Objectives

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- Provide a litigation defense
  - Studies aren't challenged; programs are challenged
- Meet regulatory requirements of 49 CFR Parts 26 & 23
- Set overall, annual goals
- Develop D/M/WBE contract goals
- Make administrative improvements
  - Create focus on data collection & monitoring
  - What works? What doesn't?

# Transportation Research Board's Recommended Disparity Study Elements

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- Determine utilization of D/M/WBEs
  - Empirically establish geographic & product marketplaces
  - Use highest level of detail (6 digit NAICS vs. “construction”) to establish compelling interest & narrowly tailor program elements
  - Fill in missing non-D/M/WBE subcontractor data
  - Do not limit the size of contracts studied (e.g., >\$500K)
  - Analyze the large majority of contracts & contract dollars (e.g., 85%)

## Transportation Research Board's Recommended Disparity Study Elements, cont.

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- Use the true broad-based “Custom Census” availability methodology
  - Create a database of relevant agency projects
  - Count all businesses in the relevant markets
  - Identify firms’ industries & locations
  - Assign race & sex to unclassified firms
  - Estimate D/M/WBE availability for each racial & ethnic group & white women at the highest level of industry detail

## Transportation Research Board's Recommended Disparity Study Elements, cont.

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- Use the “Custom Census” because it:
  - Provides dollar-weighted availability estimates to set overall, annual D/M/WBE goals
  - Provides detailed availability estimates to set D/M/WBE contract goals
  - Casts a “broad net” as held by courts & suggested by USDOT to meet contracting affirmative action programs’ remedial purpose
  - Counts all businesses in relevant markets, not just those known to the agency or willing to respond to surveys

# Transportation Research Board's Recommended Disparity Study Elements, cont.

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- Do not use only bidders or vendors lists for availability
  - Discrimination or poor program administration may lead to under-representation
  - Popularity of the existing D/M/WBE program may lead to over-representation
  - Remedial aspect is lost by looking only at current program results without regard to discrimination
- Do not determine availability by surveys
- Do not calculate separate prime & sub availability because firms work as both

## Transportation Research Board's Recommended Disparity Study Elements, cont.

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- Do not conduct a separate “capacity” analysis to adjust availability
  - Ignores the elasticity of supply
  - “Capacity” variables (revenues, years in business, bonding limits, etc.) are impacted by discrimination & lock in the results of past discrimination
  - Disparities persist even when “capacity” variables are controlled for in Census data
  - “Capacity” limitations have been rejected by courts when explained by expert testimony

# Transportation Research Board's Recommended Disparity Study Elements, cont.

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- Conduct an agency contracts disparity analysis
  - Necessary but not sufficient for an existing local M/WBE program & DBE programs in the 9th Circuit
  - A finding of no disparity isn't the end of the analysis
  - What is the effect of the current program's remedial market intervention?
  - What is the continuing impact of discrimination?
  - What is the import of a lack of statistical significance?
    - Small sample sizes
    - "Overconcentration" in subindustries with low entry barriers and low profit margins

# Transportation Research Board's Recommended Disparity Study Elements, cont.

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- Conduct a program review
  - Interview D/M/WBEs, primes, non-D/M/WBE subs & staff
  - Evaluate the effectiveness of contract goals
  - Evaluate the effectiveness of race-neutral measures
    - Utilization on no-goals contracts
    - Small business elements
      - Size standards & personal net worth criteria
      - Setasides
      - Contract goals
    - Supportive services efforts
    - Business Development Program

## Transportation Research Board's Recommended Disparity Study Elements, cont.

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- Conduct an economy-wide disparity analysis
  - Look outside agency's own contracting activities
  - D/M/WBEs' vs. non-D/M/W/BEs' business formation rates & earnings from Census data sources
  - Review of literature on commercial credit discrimination & Federal Reserve/SBA survey
  - Critical element of legal defense for existing programs, including the USDOT DBE cases

# Transportation Research Board's Recommended Disparity Study Elements, cont.

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- Include anecdotal evidence
  - Necessary but not sufficient
  - Explore current effects of past biases & exclusion
  - Examine denials of full & fair access to government contracts & subcontracts
  - Evaluate existing programs for effectiveness in remedying discrimination & providing opportunities
  - Conduct interviews; be cautious about surveys

# Recommended Disparity Study RFP Design & Process

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- Allow at least one year for study completion
- Analyze 3-5 years of data
- Evaluate cost factors
  - Number of years of data
  - Size of marketplace
  - Accounting for missing subcontractor records
  - Number of in-person meetings
- Avoid deliverables-based payments

# Recommended Disparity Study RFP Design & Process, cont.

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- Include legal counsel at all steps
- Use a general rather than a detailed scope of work
  - Do not “phase” the study
  - Don’t mandate a study method other than demonstrated legal defensibility
  - Clearly & in detail describe the state of the agency’s prime & subcontract data

# Recommended Disparity Study RFP Design & Process, cont.

- Require a sample study & review it against the proposal
- Check references & contact clients not listed as references
  - Does the consultant have a litigation track record?
  - Does the consultant understand the program?
  - Does the consultant have credibility with all stakeholders?
- Conduct interviews with finalists to:
  - Clarify proposals, methods & costs

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~~Evaluate potential expert witnesses~~

# Recommended Disparity Study RFP Design & Process, cont.

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- Critically evaluate results of prior studies
  - Estimates should comport with reality
  - Do not fall in love with the model; has any agency “fixed” discrimination?
  - Remember M/W/DBE programs are remedial
- Review standard contract terms to avoid FOIA fishing expeditions & data misuse
- Designate a project manager with broad agency knowledge & “clout”

# Recommended Disparity Study RFP Design & Process, cont.

- Multi-Jurisdiction Studies
  - Great in theory; very difficult in practice
  - Issues
    - Disparate product markets (e.g., aviation versus education) & geographic markets (e.g., nationwide versus local)
    - Differing governing structures (e.g., elected versus appointed officials; cities versus authorities)
    - Differing political climates (e.g., urban transit versus state DOT)
    - Differing types of programs (e.g., DBE versus M/WBE versus SBE)
    - Turf wars/study oversight
    - Structuring costs & invoicing (proportional versus equal shares)
  - Proceed with caution

# Recent Errors

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- Minor
  - Excessive in person meetings
  - Inflexible interview dates
- Major
  - Relying on price
  - Including small businesses, veterans, corporate boards, other unrelated availability & disparity analyses
  - Requiring free expert witness support
  - Hiring anti-affirmative action consultants as experts

# Conclusion: Study Methodology Matters

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- Does the approach meet legal & social science standards?
- Does the agency want a strong remedial program?
- Focus on program enhancements, not just program justification
- Document, document, document
- Collect complete contract data NOW; get a good electronic compliance system
- Know when to hold 'em, know when to fold 'em

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