

By Jim Burnley, IV and Kenneth M. Mead

## Examining The Revised Airport DBE Rules

Small and disadvantaged businesses have long been provided opportunities to participate in airport concessions, but the rules governing these opportunities have changed. The courts have weighed in on the constitutionality of programs designed for disadvantaged business enterprises (DBEs). These court decisions have prompted DOT to revise the rules. Compliance is important not only because violations carry serious consequences, but also because abuses undercut the important purpose of this program upon which legitimate DBEs depend. Here are the five most important things airport directors, prime and subcontractors, and DBE firms need to know.

### 1. Why did DOT revise the airport DBE regulations and what are the major changes?

DOT revised its DBE regulations to follow the Supreme Court's 1995 decision in *Adarand Constructors, Inc. v. Peña*,<sup>1</sup> which held that DOT's program was constitutional only if it furthered a compelling government interest, such as not perpetuating discrimination, and if it was narrowly tailored. The Airport DBE regulations now conform with the "narrowly tailored" requirement by including alternative race-neutral methods for reaching DBE goals, and basing DBE participation goals on conditions in the contracting and concessions markets. DOT implemented a personal net worth limit of \$750,000. Furthermore, a DBE firm seeking airport concessions cannot have annual gross receipts of more than \$30 million.<sup>2</sup>

### 2. What are the consequences for violating the regulations?

There are serious consequences, both civil and criminal, for violating DOT's DBE regulations; the number of DBE fraud cases investigated by the DOT Inspector General's office has been on the rise. Failure to comply with the regulations could result in the suspension or termination of an airport's federal funding. DBE firms and contractors

also face severe penalties for fraudulent conduct, including suspension, debarment, and even jail time.<sup>3</sup> DOT has pledged to enforce a zero-tolerance debarment policy for firms indicted or convicted of fraud, with civil penalties and fines for false claims or fraudulent statements.<sup>4</sup>

Additionally, the 2004 *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*<sup>5</sup> federal district court decision serves as a warning to DBE program administrators that they could be held liable if their programs violate the rules. In *Hershell-Gill*, officials ignored a prior court ruling<sup>6</sup> declaring the county's DBE program unconstitutional. Consequently, the county officials were stripped of their administrative immunity and were potentially liable for the contracts they awarded.

### 3. How should airports calculate their DBE goals to meet DOT requirements?

The Department requires airports to use credible data to set goals, and to estimate DBE participation as if there were a discrimination-free "level playing field." Airports are required to adhere to an annual two-step goal-setting process. First, recipients must base their DBE goals on the number of "ready, willing and able" DBEs in the local industry. Second, recipients must adjust their goals to reflect factors affecting DBE participation, such as the capacity to perform the work, disparity studies, the availability of DBE financing, bonding, and insurance. The DBE concessions program requires two separate concession goals: one for car rentals and another for other concessions, such as restaurants and newsstands. Participants are forbidden from using racial quotas, and race-conscious measures can only be used to meet the portion of their goal that cannot be achieved via race-neutral measures.<sup>7</sup>

In *Western States Paving Co., Inc. v. Washington State Dep't of Transportation*,<sup>8</sup> the federal 9th Circuit declared Washington State's DBE program unconstitutional, holding that only those minority groups with a demonstrated histo-

ry of suffering discrimination in the industry were program-eligible. The constitutionality of the Minnesota and Nebraska DBE programs was upheld in *Sherbrooke Turf, Inc. v. Minnesota Dep't. of Transportation*, because those states were deemed to have conducted adequate DBE availability and capability studies.<sup>9</sup>


#### **4. What are the challenges of DBE participation through joint ventures?**

DOT allows DBEs to participate through the use of a joint venture, with a non-DBE firm. However, DOT is wary of DBE joint ventures because they have been used to evade or defraud the program. The DOT Inspector General has pointed out that it is often difficult to determine whether the DBE is performing an independent and distinct portion of the work. Airport directors and prime concessionaires must be extremely vigilant to ensure that the division of labor, management, operations, and financing is clearly articulated and followed. Recognizing the confusion surrounding joint ventures, DOT is currently drafting additional guidance to help concessionaires comply with the rule.

#### **5. Best Practices: What steps should airports, contractors, and concessionaires take to ensure compliance with the revised rules?**

The good news is that there are steps airport officials, contractors, and concessionaires can take to ensure they follow the rules. Compliance with the rules' due diligence requirements begins with cooperation between FAA and airport officials to create program goals that accurately reflect the local DBE market. Next, airports are responsible for the certification of DBE firms, and must formulate a strategy to monitor DBE programs and implement compliance measures, such as the annual review of DBE records, onsite visits to contractors and concessionaires, and the verification of actual performance and management by

DBE firms. Airports are also obligated to report information about their DBE programs, such as a bidders' list supplying accurate DBE information. Finally, DBE firms are also required to verify in writing that they have not exceeded the personal net worth limit.

Airports can establish successful DBE programs by taking proactive steps to encourage and mentor DBE participation. They can establish outreach programs designed to disseminate information and increase awareness about DBE opportunities, provide supplemental training and management programs, and assist firms in obtaining necessary loans and bonds. 

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1 515 U.S. 200 (1995).

2 49 C.F.R. 26 (2005); 49 C.F.R. 23 (2005).

3 49 C.F.R. 29 (2005).

4 49 C.F.R. 31 (2005).

5 333 F.Supp.2d 1305 (S.D.Fla. 2004).

6 *Engineering Contractors Ass'n v. Metropolitan Dade County*, 943 F.Supp. 1546 (S.D.Fla. 1996).

7 407 F.3d 983 (9th Cir. 2005).

8 407 F.3d 983 (9th Cir. 2005).

9 345 F.3d 964 (8th Cir. 2003).