SECTION I.
Introduction

The Disparity Study Report provides information to assist the San Diego Association of Governments (SANDAG) in its future implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. This information will aid SANDAG as it:

1. Establishes an overall annual aspirational goal for DBE participation in its FTA-funded contracts;
2. Estimates the portion of its overall annual aspirational DBE goal to be met through race- and gender-neutral means and any portion to be met through race- and gender-conscious means;
3. Chooses the specific measures it will apply when implementing the Program; and
4. Identifies specific race/ethnic/gender groups of DBEs eligible for any needed race- and gender-based remedies such as DBE contract goals.

The information is also useful to SANDAG as it seeks to ensure fairness in its non-federally-funded contracting.

Study Scope

This Disparity Study examines the transportation contracting industry in Southern California and related SANDAG contracts and subcontracts. The study focuses on the types of SANDAG work funded through the Federal Transit Administration (FTA) as well as similar SANDAG contracts not involving federal funds. It was performed as part of a larger regional disparity study that included:

- Los Angeles County Metropolitan Transportation Authority (LACMTA or “Metro”);
- Orange County Transportation Authority (OCTA);
- San Diego Metropolitan Transit System (MTS); and
- Southern California Regional Rail Authority (SCRRA or “Metrolink”).

BBC collectively refers to agencies participating in the Southern California Regional Disparity Study Consortium as “Consortium agencies” or simply “agencies.”

Federal DBE Program

After enactment of the Transportation Equity Act for the 21st Century (TEA-21) in 1998, the U.S. Department of Transportation (USDOT) established a new Federal DBE Program to be implemented by federal aid recipients. SANDAG was implementing the Federal DBE Program at the beginning of the study period in 2003.
Program elements. Requirements of the Federal DBE Program are set forth in 49 CFR Part 26. Until May 1, 2006, SANDAG included DBE contract goals in its implementation of the Federal DBE Program and considered whether or not a bidder met the DBE contract goal or showed good faith efforts to do so when considering award of federally-funded contracts.

In response to a Ninth Circuit Court of Appeals decision involving the State of Washington’s implementation of the Federal DBE Program (explained below) and subsequent guidance to federal aid recipients from USDOT, SANDAG changed its use of DBE contract goals effective May 1, 2006. Any projects without an executed contract by May 1, 2006 were re-advertised. After May 1, 2006, SANDAG set advisory goals for DBE participation on FTA-funded contracts, but did not require bidders to meet those goals or show good faith efforts. In early 2007, SANDAG discontinued setting advisory goals for contracts. SANDAG does not include its overall annual aspirational DBE goal in its bid documents, but posts this information on its website.

SANDAG does not set contract goals for locally-funded contracts.

Race/ethnic/gender groups. Disadvantaged business enterprises (DBEs) are defined in the Federal DBE Program (49 CFR Section 26.5). A DBE is a small business owned and controlled by one or more individuals who are socially and economically disadvantaged. The Federal DBE Program specifies the race, ethnic and gender groups that can be presumed to be disadvantaged as long as they do not exceed firm revenue and personal net worth limits. These groups are:

- Black Americans (or “African Americans” in this study);
- Hispanic Americans;
- Native Americans;
- Asian-Pacific Americans;
- Subcontinent Asian Americans; and
- Women of any race or ethnicity.

There is a gross revenue limit (not more than $22,410,000 and lower limits for certain lines of business) and a personal net worth limit ($750,000, not including equity in the business and in personal residence) that firms and firm owners must fall below to be able to be certified as a DBE (49 CFR Subpart D).

In this study:

- The term “DBEs” refers to disadvantaged business enterprises according to the federal definitions in 49 CFR Part 26 that have been certified as such. White male-owned firms that meet the certification requirements in 49 CFR Section 26.5 and are currently certified are included in the definition of DBEs. (Few DBEs are white male-owned firms.)
- “MBEs” and “WBEs” are firms owned and controlled by minorities or women, according to the race/ethnicity definitions listed above, whether or not they are certified or meet the revenue and net worth requirements for certification.
- BBC’s term “potentially certified DBEs” refers to minority- and women-owned firms that are or could be certified as DBEs given BBC’s information about the size of these firms and their race/ethnicity/gender ownership.
Legal Requirements for SANDAG Implementation of the Federal DBE Program

The Federal DBE Program that the federal government promulgated in 1999 responded to the 1995 U.S. Supreme Court decision in *Adarand Constructors, Inc. v. Pena.* The Court held that federal government programs utilizing racial or ethnic classifications are only constitutional if they pass the “strict scrutiny” standard of legal review, which means that the programs serve a “compelling interest” and are “narrowly tailored” to achieve that objective. “Compelling interest” and “narrow tailoring” have a number of components, which are discussed in detail in Appendix A.

Difference between implementing a federal program and a state or local program. In *Adarand,* the U.S. Supreme Court applied the same strict scrutiny standard for review to federal programs that the Court had applied in 1989 to state and local governments in *City of Richmond v. J.A. Croson.* After the *Croson* decision, many state and local minority- and women-owned business enterprise programs (non-federal programs) were held to be unconstitutional by the courts. The state and local programs found to be unconstitutional included a State of California construction subcontracting program for minority- and women-owned businesses on state-funded contracts.

**Proposition 209.** Proposition 209, passed by California voters in 1996, precludes government agencies in the state from implementing race and gender preferences related to non-federally-funded contracts. Proposition 209 does not prohibit action that must be taken to establish or maintain eligibility for a federal program, and thus permits continued implementation of federally-required programs.

Appendix A discusses Proposition 209 and summarizes certain key federal court decisions affecting race- and gender-conscious programs implemented by public agencies.

Requirements for implementing the Federal DBE Program. As a direct recipient of FTA funds, SANDAG is required to implement the Federal DBE Program and to narrowly tailor its implementation according to regulations set forth in 49 CFR Part 26. Several of these requirements are discussed below. SANDAG must:

- Set an overall annual aspirational goal for DBE participation in SANDAG’s federally-funded contracts;
- Examine whether or not the annual DBE goal can be attained solely through neutral measures or whether race- or gender-based measures are needed (and estimate the percentage of the overall annual aspirational DBE goal that will be met through neutral and any race-conscious measures);
- Choose the measures it will apply in an attempt to meet the overall annual DBE goal; and
- Identify the specific race, ethnic and gender groups eligible for any race- or gender-conscious measures such as contract goals.

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Overall annual DBE goal. Even though the Federal DBE Program outlined in 49 CFR Part 26 includes an overall 10 percent aspirational goal for DBE participation across the nation, state and local governments receiving USDOT funds must set an overall annual DBE goal specific to conditions in their relevant marketplace. The Federal DBE Program requires an agency such as SANDAG to set an overall annual aspirational DBE goal whether or not its program utilizes DBE contract goals.

Measures required to attempt to meet the overall annual DBE goal. The Federal DBE Program requires state and local governments to assess how much of the annual DBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts such as DBE contract goals. The state or local government must then select specific measures it will use in implementing the Program.

The 2005 Ninth Circuit decision in Western States Paving Co. v. Washington State DOT further addresses the steps state and local governments must follow for their implementation of the Federal DBE Program to be constitutional. The ruling applies to any agency implementing the Federal DBE Program in the Ninth Circuit, which includes California. 3

- The court found that sufficient evidence of discrimination exists nationwide to hold that the Federal DBE Program was constitutional.

- However, the court held that state and local governments are responsible for determining whether or not there is discrimination in the government’s transportation contracting industry, and for developing narrowly tailored measures if a need exists, in order to comply with the Federal DBE Program. Narrow tailoring of the program depends on each state or local government evaluating conditions within its own contracting markets and implementing the Federal DBE Program in a way that pertains to those local conditions.

Accordingly, the USDOT has advised state and local agencies that any use of race- or gender-conscious remedies as part of its DBE program must be based on evidence the recipient has concerning discrimination affecting the government’s transportation contracting industry: 4

- The state or local agency determines whether or not there is evidence of discrimination in its transportation contracting industry.

- The USDOT recommends the use of disparity studies to examine whether or not there is evidence of discrimination, and how remedies might be narrowly tailored.

- The USDOT suggests consideration of both statistical and anecdotal evidence. “Disparity analysis,” or comparisons of DBE utilization with the relative availability of DBEs to perform the work, is an important part of the statistical information.

- Evidence must be considered for individual race, ethnic and gender groups.

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3 Western States Paving Co. v. Washington State DOT, 407 F.3d 983 (9th Cir. 2005)
State and local governments in the Ninth Circuit discontinued implementing race- and gender-conscious elements of the Federal DBE Program after the Western States Paving decision and subsequent guidance from USDOT, and many have initiated disparity studies.

BBC’s disparity studies for Consortium agencies reflect provisions in 49 CFR Part 26, Western States Paving and other court decisions, and guidance from USDOT and also consider recommendations for disparity studies by the U.S. Commission on Civil Rights and suggestions made by critics of disparity studies.

**Implementation of the Federal DBE Program for FHWA-funded contracts.** Some Consortium agency contracts utilize Federal Highway Administration (FHWA) funds. FHWA funds are typically administered through the California Department of Transportation (Caltrans), which is responsible for determining how the Federal DBE Program for FHWA-funded contracts will be administered in California. Therefore, BBC examined FTA- and locally-funded contracts in the Consortium agency disparity studies. Caltrans’ DBE Program requirements for local agencies receiving FHWA funds apply to Consortium agencies.

**Study Team**

The study team for the SANDAG disparity study is:

- BBC Research & Consulting, a Denver-based economic and policy research firm (prime consultant);
- Holland + Knight, LLP, a law firm with offices throughout the United States, including Los Angeles;
- GCAP Services, a research firm with offices in Costa Mesa and Sacramento;
- The Law Offices of John W. Harris & Associates, with offices in Los Angeles, New York, and Sacramento; and
- Customer Research International (CRI), a telephone survey research firm in San Marcos, Texas.

BBC Research & Consulting has overall responsibility for this study and performed most of the required quantitative analyses. Holland + Knight conducted the legal analysis that provides the legal framework for this study. In-depth personal interviews of business owners were performed by the Law Offices of John W. Harris & Associates, Holland + Knight, and GCAP Services. GCAP Services also conducted a detailed review of SANDAG contracting practices, collected contracting data from SANDAG offices and helped analyze SANDAG utilization of minority- and women-owned firms. BBC worked with Customer Research International to conduct telephone surveys with business managers and owners in the transportation contracting industry.
Organization of the Report

The balance of this report is organized as follows:

- **Section II — Relevant Geographic Market Area and Product Markets.** BBC begins its analysis by defining the relevant geographic market area for the study (determined to be Southern California) and the relevant “product markets,” which are the types of construction, engineering and other professional services, and other types of goods and services related to SANDAG’s transit system construction and operations.

- **Section III — Analysis of MBE/WBE Availability and Overall Annual Aspirational DBE Goal.** USDOT requires federal aid recipients to formulate overall annual aspirational goals for DBE participation in federally-funded contracts. Section III of this report presents data pertinent to establishing a “base figure” for SANDAG’s overall annual aspirational DBE goal, and information to assist SANDAG in considering whether to make a “step 2” adjustment to the overall DBE goal. The base figure is formulated from BBC’s consideration of SANDAG’s FTA-funded contracts from 2003 through 2007 and the availability of minority-, women- and majority-owned firms to perform specific types and sizes of these contracts and subcontracts. Analysis related to a possible step 2 adjustment includes quantitative and qualitative information on local marketplace conditions and past participation of DBEs in SANDAG’s FTA-funded contracts.

- **Section IV — Utilization and Disparity Analysis for SANDAG Contracts.** SANDAG must decide how much of its overall annual DBE goal can be met through neutral means and how much, if any, through race-conscious measures. Disparity analysis assists SANDAG in making these decisions. Section IV compares past utilization of minority- and women-owned firms on SANDAG contracts with DBE contract goals and utilization without DBE goals. BBC also compares utilization of minority- and women-owned firms on these contracts with what would be expected given the relative availability of MBEs and WBEs for this work. This analysis is conducted for each race/ethnic/gender group.

- **Section V — Exploration of Possible Causes of Any Disparities.** In Section V, BBC further explores factors behind any overall disparities in SANDAG’s utilization of firms owned by specific race/ethnic/gender groups. For example, utilization as prime contractors is separated from utilization as subcontractors. BBC examines large versus small contracts and subcontracts, and disaggregates the overall data for construction, engineering, and other goods and services. In addition, BBC presents results of case studies of a random sample of SANDAG procurements as well as qualitative and quantitative information concerning local marketplace conditions that could explain any overall disparities in SANDAG contracting.

- **Section VI — Summary of Results.** Section VI of the report outlines certain decisions SANDAG must make in its future implementation of the Federal DBE Program and summarizes study results relevant to each decision. Study information includes a review of potential program elements.

A number of appendices provide supporting information. Appendices contain detailed discussion of legal background, utilization and availability data collection, additional disparity analyses of SANDAG contract data, and quantitative and qualitative information on SANDAG’s transportation contracting marketplace.