

Enforcement of Equal Employment and Economic Opportunity Laws and Programs Relating to Federally Assisted Transportation Projects

A Report of the U.S. Commission on Civil Rights

January 1993

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and Congress.

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Opportunity Laws and Programs
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Federally Assisted
Transportation Projects**

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Letter of Transmittal

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The United States Commission on Civil Rights transmits this report, *Enforcement of Equal Employment and Economic Opportunity Laws and Programs Relating to Federally Assisted Transportation Projects*, to you pursuant to Public Law 98-183, as amended.

This report presents the Commission's evaluation of selected aspects of civil rights enforcement by the Departments of Transportation and Labor. The information on which this report is based was collected primarily from a review of agency guidelines, procedures, and activity reports, and staff interviews with key enforcement staff at the Department of Transportation, the Federal Aviation Administration, and the Department of Labor's Office of Federal Contract Compliance Programs.

The Departments of Transportation and Labor, jointly, are responsible for ensuring that Federal funds spent on various transportation public works projects, such as airports and highways, are distributed equitably without regard to a person's race, color, national origin, or sex. Without effective civil rights enforcement, minorities and women will not have equal opportunities to benefit from the jobs and economic growth stimulated by these Federal programs, as guaranteed by our Constitution.

We find the civil rights enforcement efforts by the Departments of Transportation and Labor to be deficient. We conclude that many of the critical failings identified in this report stem from a lack of comprehensive executive oversight and direction and a lack of commitment to implementing effective civil rights policies. To correct these deficiencies, each agency head must give civil rights and equal opportunity goals the highest priority and must ensure that these goals are integrated fully into all primary functions and operations throughout the agency. Furthermore, each agency head must ensure that resources devoted to civil rights activities are commensurate with the agency's renewed dedication to vigorous civil rights enforcement.

We urge the members of Congress and the President to consider the facts presented in this report and the Commission's recommendations for corrective action.

Respectfully,



For the Commissioners,
Arthur A. Fletcher, *Chairperson*

Acknowledgments

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Table of Contents

Introduction

Department of Transportation.....	1
Title VI	1
Disadvantaged Business Enterprise Program	3
Department of Labor, Office of Federal Contract Compliance Programs	4

Commission Monitoring and Evaluation

Department of Transportation.....	6
DOT—Office of Civil Rights	6
FAA—Office of Civil Rights	7
FAA—Northwest Mountain Region.....	7
FAA—Southern Region	8
Department of Labor, Office of Federal Contract Compliance Programs	9
OFCCP Denver	9
OFCCP Atlanta	11

Summary of Findings.....	13
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Recommendations

Department of Transportation.....	14
Department of Labor	14
Joint Enforcement	15



Introduction

In June 1991 the U.S. Commission on Civil Rights held a forum to examine charges that minorities and women were being denied opportunities to participate in the construction of the New Denver International Airport (NDIA).¹ Particularly troubling were indications that the Federal Government had failed to ensure that all persons seeking jobs and business contracts at the Denver airport have equal opportunities to succeed. The possibility of such a failure in Denver and elsewhere prompted the Commission to undertake further examination of Federal civil rights enforcement activities relating to transportation and other public works projects, specifically the Denver airport project. Preliminary results from this inquiry support the charge that Federal enforcement at the Denver airport project is not fully effective. Problems stem not only from deficiencies in local Federal enforcement, but also reflect a lack of leadership and management at the national level.

This report focuses on the two principal Federal agencies charged with civil rights enforcement at the

Denver airport project: the Department of Transportation (DOT) and the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). Within DOT, the Secretary's Office of Civil Rights (OCR) has overall enforcement responsibility for the department. The Federal Aviation Administration (FAA) has primary responsibility for Federal interests in building and improving airports, including enforcing applicable civil rights laws and programs. We examined both the Secretary's OCR and FAA. At FAA and OFCCP, we examined both headquarters and selected field office enforcement activities.

Department of Transportation

Title VI

The Department of Transportation (DOT) funds public works projects,² such as airports, and therefore is legally obligated to enforce Title VI³ of the Civil Rights Act of 1964. Title VI prohibits companies and organizations that receive Federal assis-

1 U.S. Commission on Civil Rights, *Constructing Denver's New Airport: Are Minorities and Women Benefiting?*, July 1992.

2 An important example of a DOT law providing Federal financial assistance is the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) Pub. L. No. 102-240, 105 Stat. 1914, a 6-year, approximately \$155 billion authorization for highway construction, safety, and urban mass transportation development.

3 42 U.S.C. § 2000d(d)(4)(a)(1988). Compilation of Civil Rights Law by Committee on the Judiciary of the House of Representatives. The act states in part:

Sec. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to, discrimination under any program or activity receiving Federal financial assistance.

Sec. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

tance,⁴ such as grants, loans, or contracts (other than contracts of insurance or guaranty), from discriminating on the basis of race, color, or national origin in hiring, contracting, and other areas.⁵

The Secretary is ultimately responsible for enforcing Title VI at DOT, and has established, through DOT Order 1000.12, basic, departmentwide standards for implementing and enforcing the law.⁶ Primary responsibility, however, rests with DOT's eight modal administrations: the FAA, Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration (formerly Urban Mass Transit Authority), Maritime Administration, National Highway Traffic Safety Administration, U.S. Coast Guard, and Research and Special Programs Administration.

Each administration investigates complaints of discrimination by recipients of DOT funds and reviews DOT assisted programs and activities for compliance with the provisions of the administration's Title VI enforcement program.⁷

DOT's decentralized approach gives the administrations, including FAA, considerable discretion in carrying out their responsibilities under Title VI.

Compliance reviews are DOT's most potent enforcement tool and absorb most of the available enforcement resources. Reviews are conducted both prior to awarding and during execution of DOT as-

sisted contracts, grants, and loans, and while compliance standards may vary among administrations, all must include core criteria as specified in DOT Order 1000.12. Among other things, these core criteria specify that:

- (1) the benefits and services of the program or activity will be made available and are fairly and adequately distributed among beneficiaries without regard to race, color, or national origin;
- (2) the location of existing or proposed facilities and the provision of services involved in the program or activity will not deny access to any person on the basis of prohibited discrimination; and
- (3) the program or activity does not differentially or adversely affect persons in the applicable community on the basis of race, color, or national origin.

Federal funds made available through FAA to improve and build airports should trigger routine reviews of the recipients' compliance with Title VI.⁸

As is the case for other (Title VI) agencies, DOT directly imposes requirements to comply with Title VI only on the primary recipients of Federal assistance.⁹ Subcontractors, such as concessionaires, ten-

4 49 C.F.R. § 21.23 (1992). Federal assistance includes:

(1) grants and loans of Federal funds; (2) the grant or donation of Federal property and interests in property; (3) the detail of Federal personnel; (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient; and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

5 Section 520 of the Airport and Airway Improvement Act of 1982, as amended, added sex and creed as prohibited bases of discrimination in FAA's grant program.

6 DOT Order 1000.12, *Implementation of the Department of Transportation Title VI Program*, The Office of Civil Rights (OCR) Jan. 19, 1977 (hereafter DOT Order 1000.12). This internal order implementing the Title VI program establishes uniform minimum responsibilities for each operating component within DOT in implementing and enforcing the Title VI program.

7 DOT's departmentwide Title VI regulations are found at 49 C.F.R. § 21. In addition to DOT Order 1000.12, some DOT agencies have promulgated their own regulations for enforcing Title VI. As an example, Federal Highway Administration's Title VI program and procedures are found at 23 C.F.R. § 200.

8 Federal Aviation Administration letter to the U.S. Commission on Civil Rights, Oct. 16, 1991, attachment 8, Airport Improvement Program (hereafter cited as Commission's FAA Request). For example, the city of Atlanta and the city of Denver received approximately \$330 million during fiscal years 1987-1991 in Federal grants from FAA's Airport Improvement Program, and thus are subject to FAA's enforcement activities.

9 49 C.F.R. § 21.5 (1991).

ants, or lessees, are required to comply with Title VI as a condition for doing business with the primary recipient. In principle, therefore, Title VI applies to all agents who directly or indirectly receive Federal funds. For example, an airport owner who uses a Federal grant to expand facilities must include specific requirements for nondiscrimination in *all* new contracts, agreements, or leases with subcontractors.

Disadvantaged Business Enterprise Program

In addition to Title VI, DOT's administrations have a special emphasis program dealing with minority business opportunities called the Disadvantaged Business Enterprise Program (DBEP).¹⁰ DBE refers to a small business concern: (a) that is at least 51 percent owned by one or more socially and economically disadvantaged individuals,¹¹ and (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.¹²

DOT establishes the policies and guidelines under DBEP for entities that administer programs receiv-

ing Federal funds. The policies must further affirmative action goals for concerns controlled by "socially and economically disadvantaged individuals," specifically minorities and women. "Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available . . . in a fiscal year . . . shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals."¹³

In order to ensure compliance with DBEP goals, OCR requires its modal administrations to review periodically the practices and performance of applicants and recipients of Federal assistance. These reviews determine whether applicants or recipients of Federal financial assistance: 1) discriminate against any business organization in the award of any contract because of the race, color, or national origin of its managers, employees, or owners; and 2) have taken affirmative action to ensure that minority businesses are afforded a fair and representative opportunity to do business.¹⁴ To date, FAA has never finalized its guidelines for conducting DBEP compliance reviews.¹⁵

10 49 C.F.R. § 23.41 Subpart C (1991). The DBE program originated with Exec. Order No. 11625, 1971, U.S. Code Cong. & Admin. News (92 Stat.) 2586 which requires agencies to develop plans and programs to encourage minority business enterprises. The DOT regulation implementing this mandate is 49 C.F.R. § 23 Subpart D (1991). DOT's regulations governing the operation of the DBE program are separate and apart from Title VI regulations. The term minority business enterprise includes businesses owned by women.

11 In the case of a publicly owned business, this criterion applies to stock ownership.

12 49 C.F.R. § 23.41 Subpart C (1991). Part of the DBEP is the Minority Business Enterprise Program (MBEP) Minority business enterprise means a small business concern, as defined pursuant to section 3 of the Small Business Act and implementing regulations, which is owned and controlled by one or more minorities or women (49 C.F.R. § 23.5 (i)(1)(1991)). This definition applies only to financial assistance programs.

The MBEP is intended to eliminate discrimination and its effects, to ensure nondiscriminatory results and practices in the future, and to involve minority business enterprises fully in contracts and programs funded by DOT. Covered entities include associations of two or more businesses carrying out a single business enterprise for profit, or a business or person that leases or is negotiating to lease property from a recipient or DOT on DOT's facility for the purpose of operating a transportation-related activity or for the provision of goods or services to the facility or to the public on the facility.

13 49 U.S.C. app. § 2204(d)(1)(1988).

14 DOT Order 1000.12, ch. II, pp. II-1 to II-3

15 In 1990 the FAA's Office of Civil Rights circulated draft order 5100, "Compliance Manual-DBE Program," which would assign responsibilities and prescribe policy for conducting desk audits and on-site reviews under 49 C.F.R. § 23 (FAA Jan. 30, 1992 memorandum to the Commission). The FAA has failed to indicate why the draft manual has never been finalized.

Department of Labor, Office of Federal Contract Compliance Programs

Under Executive Order 11246,¹⁶ the Office of Federal Contract Compliance Programs (OFCCP) has overall responsibility for coordinating and enforcing civil rights compliance by Federal contractors. The order requires Federal contractors: (1) to refrain from discrimination based on race, color, national origin, creed, or sex; and (2) to take affirmative action in promoting equal employment opportunities for protected minority groups and women. The office has jurisdiction over all contractors and subcontractors with Federal contracts of \$50,000 or more and who have 50 or more employees,¹⁷ and all Federal and federally assisted construction contracts (grants, contracts, subcontracts, loans, insurance, or guarantees) over \$10,000.¹⁸

DOT and DOL use similar enforcement methods in their respective jurisdictions. Violations of Title VI, Executive Order 11246, or the DBE program may be brought to the attention of the responsible agency through an individual complaint, or may be uncovered during compliance reviews, which are conducted in a similar fashion for all three programs. When violations are found, the responsible agency negotiates an agreement (a Letter of Commitment or a Conciliation Agreement) to correct them¹⁹ or initiates enforcement proceedings if nego-

tiations fail. Enforcement may involve litigation to obtain court-ordered remedies or administrative proceedings to terminate Federal contracts.²⁰ In addition, both agencies provide technical assistance to employers and the public to promote voluntary compliance with equal opportunity requirements and thereby reduce the need for enforcement action.

While the civil rights laws DOT and DOL implement cover different areas of employment and types of businesses and contractors, their jurisdictions overlap and their enforcement methods are very similar. The table on page 5 provides a general comparison of the provisions and coverage under Title VI, DOT's DBE Program, and Executive Order 11246.

There have been attempts in the past to improve coordination of equal enforcement activities between DOL and DOT. In October 1979, in an effort to minimize inconsistency and duplication of effort, DOL/OFCCP and the Federal Highway Administration (FHA) entered into an interim memorandum of understanding (MOU).²¹ Under this agreement the two agencies were to exchange information but limit use of such information to performing their respective statutory or administrative functions. They also agreed not to act as the agent of, or on behalf of, the other agency.

Within 120 days of ratifying the MOU, DOT and DOL were to develop a similar agreement applicable to all operating components of DOT. This never happened.

¹⁶ Exec. Order No. 11246, 1965 U.S. Code Cong. & Admin. News (89 Stat.) 4416.

¹⁷ 41 C.F.R. § 60-1.40 (1991).

¹⁸ *Id.* § 60-4.1.

¹⁹ The agency monitors such agreements to ensure compliance with its terms.

²⁰ 49 C.F.R. §§ 21.11, 21.13, 21.15, and 21.17 are used to enforce DOT's Title VI program. 14 C.F.R. § 13 is used to enforce the DBE provisions of Section 505(d) of the Airport and Airway Improvement Act. 41 C.F.R. § 60-1, § 60-1.26 to 60-1.34 are used to enforce OFCCP's Executive Order 11246.

²¹ Department of Labor and the Department of Transportation, *Interim Memorandum of Understanding* executed by Neil Goldschmidt, Secretary of Transportation, (Oct. 26, 1979) and Ray Marshall, Secretary of Labor (Dec. 7, 1979). The memorandum of understanding was intended to further the objectives of Section 140 of Title 23 of the U.S. Code and Section 205 of Executive Order 11246.

**Comparison of Civil Rights
Laws, Regulations and Executives Orders
Related to Airport Construction**

	Civil Rights Act of 1964, Title VI—DOT	Executive Orders 11246, 11375, 12084, & Sec. 503 of the Rehabilitation Act—OFCCP	Disadvantaged Business Enterprise Program—DOT
Covered entities	Recipients of Federal financial assistance and their subcontractors	Recipients of Federal contracts of \$50,000 or more and recipients of federally assisted contracts of \$10,000 or more	Grantees receiving \$75,000 or more in Federal assistance*
Basic requirements	Nondiscrimination in benefits, services, participation, facilities, and employment when program is designed to provide employment or discriminatory practices in employment would impact the provision of services or benefits; consideration of adverse impact on community	Nondiscrimination and affirmative action in employment and nonsegregated facilities; assurance of nondiscrimination by subcontractors	Nondiscrimination in award of leases and contracts, affirmative action goals for business opportunities
Protected classes	Race, color, and national origin	Race, creed, color, national origin, sex, religion, and disability	Businesses owned 51% by one or more socially and economically disadvantaged individuals, including women and minorities**

* All FAA grantees, regardless of the amount of the Federal funding, must adhere to a number of basic requirements, including nondiscrimination.

** Minorities include: Black, Hispanic, Asian American, Pacific Islander, American Indian, Alaskan Native.

Commission Monitoring and Evaluation

In gathering information for this report, the Commission interviewed key enforcement staff at DOT,²² FAA,²³ and OFCCP to verify statements made by agency officials at the Denver forum and to evaluate the overall leadership and direction of headquarters staff at DOT and OFCCP over regional civil rights compliance staff. Pertinent regulations, policy and operations guidelines, procedures, and routine enforcement activity reports were also evaluated. The results of this research are summarized below.

Department of Transportation

DOT—Office of Civil Rights

The Secretary of Transportation's Office of Civil Rights (OCR) does not have in place nor has it considered developing a formal plan of action to monitor the activities and programs of the department's modal administrations relating to Title VI. OCR does not routinely review the performance reports of any of the eight modal administrations, and the administrations appear to be operating independently of the OCR.

With only one Title VI compliance officer in OCR, the office is inadequately staffed to provide

direction and to oversee the civil rights enforcement activities of the eight administrations. Compliance reviews and audits are not routinely sent to OCR for review. Furthermore, while in the past OCR was able to audit a random sample of compliance reviews conducted by the administrations, lack of staff has caused OCR to terminate this essential oversight function.²⁴

Four years ago, OCR attempted to revise its regulations to place all the modal administrations under a single, uniform set of Title VI guidelines, but the revised regulations were rejected by DOT's Internal Review Committee.²⁵ Together with very limited departmental oversight, failure to establish uniform guidelines raises serious concerns that Title VI is not being enforced effectively across all modal administrations.

Very few Title VI complaints are being handled at the present time because staff are allegedly "swamped"²⁶ with complaints based on Title II of the Americans with Disabilities Act (ADA),²⁷ and section 504 of the Rehabilitation Act of 1973.²⁸ Disability-related complaints are being filed against cities regarding issues of accessibility, such as construction of bridges, walkways, and overhead bypasses with steps instead of ramps. OCR staff expressed concern

22 Interview with Roosevelt Greer, Deputy Director, DOT/OCR, in Washington, D.C. (Apr. 9, 1992) (hereafter cited as Greer/Austin interview).

23 Interview with Roosevelt Greer, Deputy Director, DOT/OCR, George F. Gordon, Deputy Assistant Administrator, FAA/OCR, and Dave Micklin, compliance officer, FAA/OCR, in Washington, D.C. (Apr. 10, 1992) (hereafter cited as Gordon/Micklin interview).

24 Greer/Austin interview.

25 Ibid.

26 Ibid.

27 42 U.S.C. § 12101 et seq. (1988), sec. 12141 to 12150 first came into effect on Aug. 26, 1990 and, among other things, requires public transit to purchase accessible vehicles. Paratransit system for persons with disabilities was effective on July 26, 1992.

28 29 U.S.C.A. 794 (1988); 28 C.F.R. § 41 (1988).

that they would be inadequately prepared to handle the complaint workload when the ADA takes effect.²⁹

OCR acknowledged that compliance reviews have not been given appropriate priority. OCR indicated that it has limited resources with which to conduct DOT's civil rights program.³⁰

FAA—Office of Civil Rights

In examining FAA's civil rights enforcement program, it became apparent that FAA devotes most of its civil rights enforcement resources to conducting DBE compliance reviews and does not vigorously enforce Title VI or DOT Order 1000.12. Specifically, there is no evidence that FAA's Northwest Mountain or Southern regions conducted any *on-site* Title VI compliance reviews between 1987 and 1991. Moreover, the administration receives very few complaints of discrimination under Title VI, and then, its involvement is limited to attempting conciliation, leaving investigation of charges to OCR when conciliation fails.³¹

The virtual absence of a Title VI program represents an inappropriate balance in FAA's civil rights enforcement activities. Title VI applies to all recipients of Federal assistance, whether through contracts, grants, or loans, whereas the DBE program applies just to contracts. Furthermore, as noted earlier, compliance with Title VI requires that federally assisted programs and activities satisfy a broad range of criteria, which includes an assessment of the beneficial and harmful effects of Federal assistance on the "affected community." The DBE program, on the other hand, is limited to contractual arrangements between minority and nonminority businesses and requires that minority businesses be given the "maximum opportunity to participate"³² in such ar-

rangements. Thus, the DBE program and associated compliance reviews, alone, are inadequate to ensure nondiscrimination in contract participation, economic opportunities (benefits and services) and employment derived from federally assisted programs.

FAA—Northwest Mountain Region

In order to examine some of the concerns raised at the Denver forum about construction opportunities in the Denver area, the Commission reviewed DBE compliance reviews by FAA's Northwest Mountain Regional Office³³ of the Denver-Stapleton Airport.

Five compliance reviews of the Denver-Stapleton Airport were conducted between 1987 and 1989. These revealed the following discrepancies: allegations of contract favoritism, need to establish practical goals, lack of preparation on the part of affirmative action officers in helping to set goals, apparent lack of inquiries from the public about the DBE program, and allegations that certain minority firms were receiving more than one subcontract. The City and County of Denver were given 45 days to respond or to correct these discrepancies. Denver responded that its investigation did not find contract favoritism and that very few minority firms had received more than one subcontract. However, Denver did provide training for affirmative action officers and instituted an outreach program for all contractors. Based on these responses and additional information, FAA determined that Denver was in compliance with the DBE program. All concerns raised during the course of the compliance reviews have been resolved and, according to FAA officials, Denver-Stapleton Airport has been implementing the DBE program in good faith.

More recently, the Northwest Mountain Regional Office conducted a DBE compliance review on

²⁹ Provisions of Title III of ADA concerning privately owned transportation systems also come under the jurisdiction of DOT. Some provisions of Title III became effective Jan. 26, 1992.

³⁰ DOT's Oct. 22, 1992, comments on the Commission's report.

³¹ FAA received only one Title VI complaint in 1991, per Gordon/Micklin interview.

³² 49 C.F.R. § 23 Subpart D (1991).

³³ FAA transmitted compliance review information from its Northwest Mountain Regional Office on Apr. 8, 1992, referenced by FAA/OCR as "FAA Northwest Mountain Region Response to U.S. Commission on Civil Rights," attachments 9A & 9B and "FAA Southern Region Response to U.S. Commission on Civil Rights."

November 4, 1991, to examine concession opportunities³⁴ at Denver-Stapleton Airport and the new Denver International Airport. It focused on three areas: (1) whether recipients excluded minority business enterprises from participation in business opportunities by entering into long-term, exclusive leases with nonminority business enterprises; (2) whether recipients' or lessees' contract clauses included (DBE) affirmative action obligations; and (3) whether recipients or contractors ensure that minority business enterprises have the maximum opportunity to compete for and perform DOT federally assisted contracts.

FAA concluded:

Our greatest concern with the implementation of County and City of Denver's DBE program, with respect to concessions, is the historical pattern of low DBE participation. Although DBE participation from 1988 through 1990 slowly increased from 3.82 to 7.82 percent, it fell during 1991 to approximately 5.2 percent, representing about \$9 million out of \$172 million total airport revenues from concessions. The actual participation is potentially even lower, because the figures do not include the ground transportation leases which were inadvertently omitted by Denver from the FY 91 goal calculation.

This level of participation is well below what is expected from a major airport such as Stapleton and the regional airport it will become with the opening of the New Denver International Airport. Although the existing regulation at 49 C.F.R. Part 23 does not require a minimum percentage of participation, the FAA's proposed regulations for DBE

participation in concessions requires a minimum of 10 percent; comparable airports in other areas of the United States achieve 15-25 percent DBE participation. In short, the current level of DBE participation at Stapleton is about one-half the proposed minimum.³⁵

While the November 1991 report identifies weaknesses in the concession opportunities for disadvantaged businesses, it does not deal with construction contracting opportunities for disadvantaged businesses. Nevertheless, these results raise concern about opportunities for DBE participants during construction of the new Denver airport.

FAA—Southern Region

The Commission also examined 18 DBE compliance review letters³⁶ issued by FAA's Southern Regional Office concerning the Hartsfield Atlanta International Airport.³⁷ The letters only dealt with minor deficiencies, such as corrections that needed to be made to the forms, more information requested from addressees, and approval of DBE affirmative action plans. As such, they reflect what is typically called a desk audit, or an office review of forms and applications submitted for approval. Although a necessary part of full compliance review, a desk audit is insufficient for determining whether a recipient or applicant of Federal funds is in compliance with applicable civil rights laws. An on-site review by a team of civil rights specialists, similar to the reviews conducted by the North Western Mountain Regional Office, is necessary to determine whether deficiencies exist.

34 Concessions are defined as the right or a lease granted by FAA to individuals to engage in a certain activity for profit on the airport premises (i.e., a refreshment or parking concession). [For a complete definition of concession see 57 Fed. Reg. 18410 (1992) (to be codified at 49 C.F.R. § 23.89)].

35 FAA Northwest Mountain Region Review, Denver, CO, Nov. 4, 1991.

36 The letters were sent during the period 1987-1991 to Rodney Strong, Director of the Office of Contract Compliance, city of Atlanta, and Calvin Carter, Commissioner of Aviation, city of Atlanta.

37 FAA transmitted compliance review information from its Southern Regional Office on Apr. 8, 1992, referenced by FAA/OCR as, "FAA Southern Region Response to U.S. Commission on Civil Rights," Tab 18.

Department of Labor, Office of Federal Contract Compliance Programs

Monitoring of OFCCP focused on implementation of Executive Order 11246 at the New Denver International Airport and Hartsfield Atlanta International Airport. Clarification also was sought regarding some of the statements made by OFCCP's Denver staff at the Commission's Denver airport forum.³⁸

OFCCP Denver

At the forum, OFCCP's Denver District Office Director indicated that, as of June 22, 1991, compliance reviews had been conducted of four major contractors at the new airport, and that most subcontractors had either been reviewed or were on a review "forecast list."³⁹ According to the office director, as each new contract is awarded, individual

contractors are added to this list. However, Annie Blackwell, Director of OFCCP's Division of Policy, Planning, and Program Development, stated in an interview that the term "forecast list" has not been defined by OFCCP, nor does OFCCP use such a list to determine which contractors to review.⁴⁰

OFCCP headquarters staff indicated that construction contractors are selected for compliance review based primarily on an analysis of the Monthly Employment Utilization Report (CC-257)⁴¹ and not a "forecast list."⁴² However, since the Denver Metropolitan Area has a Hometown Plan,⁴³ contractors submit only one utilization report encompassing all sites in a geographic area, not a report for each site,⁴⁴ such as the new Denver International Airport. Consequently, OFCCP's data restricts evaluation to aggregate hours worked by minorities and women in the Denver Standard Metropolitan Statistical Area (SMSA).⁴⁵ This makes it difficult for OFCCP investi-

38 Denver Airport Forum: forum before the U.S. Commission on Civil Rights, Denver, CO, Jun. 21-22, 1992 (statement of June Radtke, Acting District Director, OFCCP's Denver District Office).

39 Ibid.

40 Interview with Annie A. Blackwell, Director, Division of Policy, Planning, and Program Development, DOL/OFCCP, and David Rutherford, Special Assistant, DOL/OFCCP (Apr. 21, 1992) (hereafter cited as Blackwell Interview).

41 Ibid. The CC-257 is used for minority and female goal reporting purposes. Contractors are required to record the total hours worked by all construction employees and the number of hours worked by minority and female employees by construction trade, on construction projects in a specific geographic area. Computer-generated CC-257 reports are acceptable if approved by the OFCCP National Office in advance of submission. The CC-257 is required only for construction work performed in geographic areas where a contractor holds a Federal or federally assisted construction contract and where minority goals had been established prior to Oct. 3, 1980.

42 Telephone interview with David Rutherford, Special Assistant, OFCCP (May 12, 1992). On May 12, 1992, OFCCP informed the Commission that the OFCCP Denver District Office compliance review report showed that only one construction contractor had been reviewed at NDIA.

43 41 C.F.R. § 60-4.4. "To implement the affirmative action requirements of Executive Order 11246 in the construction industry, the Office of Federal Contract Compliance Programs previously has approved affirmative action programs commonly referred to as Hometown Plans. . . ."

41 C.F.R. § 60-4.5. "A contractor participating, either individually or through an association, in an approved Hometown Plan (including heavy highway affirmative action plans) shall comply with its affirmative action obligations under Executive Order 11246 by complying with its obligations under the plan: *Provided*, That each contractor or subcontractor participating in an approved plan is individually required to comply with the equal opportunity clause . . . ; to make a good faith effort to achieve the goals for each trade participating in the plan in which it has employees; and that the overall good performance by other contractors or subcontractors toward a goal in an approved plan does not excuse any covered contractor's or subcontractor's failure to take good faith efforts to achieve the plan's goals and timetables. . . ."

44 41 C.F.R. § 60-4.3-4. OFCCP determines whether the contractor is meeting his affirmative action goals by examining the contractor's aggregate trade work force in the "covered" area, which potentially encompasses many work sites. The covered area is defined in the solicitation from which the contract resulted.

45 The Denver SMSA includes the counties of Denver, Arapahoe, Boulder, Adams, Douglas, Gilpin, and Jefferson.

gators to isolate the hours devoted exclusively to specific projects such as airport construction.

The Office of Contract Compliance of the City and County of Denver, on the other hand, monitors only the hours worked on the airport project. Thus, a contractor may appear to be in noncompliance with the goals established by the City and County of Denver, while OFCCP may find the same contractor in compliance by its criteria. Underrepresentation may exist for minorities and women in construction trades at a particular site while OFCCP finds the contractor in compliance with the Executive order. Although a contractor may be meeting goals when all sites are considered together, it is difficult to know whether minority and women workers are being treated differently among sites. For example, minority workers may be disproportionately placed in selected sites where terms and conditions of work are not equal to those at sites where nonminority workers are concentrated. Other factors may also differ from one site to another, including the expected length of job, stability of work, risk of injury, distance from residence, and work schedules.

In principle, OFCCP could use the site-specific information collected by the City and County of Denver to target on-site compliance reviews. However, OFCCP's present practice precludes compliance officers from obtaining such information.

One of the concerns expressed during the Commission's Denver forum was that OFCCP's contact with community groups during compliance reviews has been inadequate. Such contacts are essential to gauging whether contractors are making good faith efforts to recruit women and minorities and to identify contractors that are "alleged discriminators." OFCCP staff is required to contact community organizations, appropriate district offices of

the Equal Employment Opportunity Commission, and State and local fair employment agencies to notify them of a scheduled review and to request any information they might have regarding complaints against the contractor. If allegations of discrimination are uncovered through community contacts, they are forwarded to EEOC for processing. OFCCP conducted a number of compliance reviews in the months following the Commission's forum. Although the office contacted groups representing women, contact with minority groups and other government agencies appeared to be lacking.⁴⁶

The Commission has reviewed summaries of compliance reviews done by OFCCP in the Denver area for all of fiscal year 1991 and the first quarter of fiscal year 1992. During this period, "at least 26 reviews of airport contractors and subcontractors" were conducted. The following summarizes OFCCP's findings: "No major problems were found during the reviews conducted. In those cases where lack of good faith to meet goals was found, commitments to remedy this were obtained in the closing documents."⁴⁷ The fiscal year 1992 first quarter report stated that "no goals were met for women; however, they were represented in carpenters, operating engineers and laborers."⁴⁸

While OFCCP indicates that considerable placements have been made into the various craft programs, it also acknowledges that contractors frequently reported a need for journey-level rather than apprentice workers on various phases of work, which limited opportunities for minority workers. Minority workers were approximately 22 percent of all construction workers, but only 10 percent of journeyman workers. Most women are just entering many of the construction trades,⁴⁹ and OFCCP notes that "There

46 Response from Annie A. Blackwell, Director, Division of Policy, Planning, and Program Development, U.S. Department of Labor, Office of Federal Contract Compliance Programs, June 9, 1992 (hereafter cited as OFCCP Denver Airport Project Response).

47 Ibid.

48 Ibid.

49 U.S. Department of Labor, *Employment and Training Administration, Report 5: Equal Employment Indicators, U.S. Census of Population 1980*. Prepared by: Physics, Computer Science, Mathematics Division, Lawrence Berkeley Laboratory, University of California, Berkeley, California; and U.S. Department of Commerce, National Technical Information Service, Washington, D.C. (April 1982). (All construction trades: Total Minority 22%, Females 2%; Examples of Journeyman level construction trades: Electricians-Total Minority 10%, Female, 2%; Plumbers and Pipe fitter-Total Minority 13%, Female 1%; Sheet Metal - Total Minority 9%, Females 1%; Driller, Earth-Total Minority 10%, Females 2%, and Structural Metal Workers- Total

continues to be an insufficient number of qualified women in all crafts for referral to the contractors.”⁵⁰

The letters of commitment (7) and conciliation agreements (19) stemming from OFCCP’s compliance reviews in the Denver area, however, seem to contradict OFCCP’s assertion that “no major problems” exist. Among the violations, OFCCP indicated that construction contractors were not submitting monthly employment utilization reports and not listing recruitment sources for both women and minorities. The conciliation agreements revealed 17 violations of the requirement to make good faith efforts to correct the underutilization of women; 15 violations of the monthly employment utilization reporting requirements; 7 violations of the requirement to list recruitment sources for both women and minorities; 6 violations regarding good faith efforts to correct underutilization of minorities; 4 violations of the requirement to direct recruitment efforts to women’s community and training organizations; and 2 violations of the same requirement with respect to minorities. These violations suggest that serious problems do exist, contrary to OFCCP’s conclusion.⁵¹

To supplement compliance reviews and desk audits, other activities are undertaken by OFCCP, such as joint community meetings sponsored by OFCCP and DOL’s Women’s Bureau, including such groups as Mi Casa, Northeast Women’s Center, and Colorado Sex Equity and Empowerment Center.⁵² Still another activity, called “linkage” by OFCCP, is designed to enhance affirmative recruitment action.⁵³ Employers and applicants are brought together into

partnerships and, in the case of the airport, use the airport employment office as the liaison. The “linkage” activity is designed to inform potential employees about vacancies and to inform Federal contractors of the availability of qualified applicants. However, the identified list of community contacts or recruitment sources participating was extremely limited. There is no indication that the minority and women’s organizations such as the Urban League of Metropolitan Denver, the Colorado Black Chamber of Commerce, the Coalition for Non-Traditional Employment for Women, the Colorado Black Contractors Alliance, or the Hispanic Public Affairs Committee were involved in OFCCP’s linkage activity. Also, it is not clear whether the information regarding “linkage” activity reported in the fourth quarter of 1991 covers the entire fiscal year or only one quarter.

In 1989 representatives from OFCCP’s Denver Regional Office and its Denver District Office, the City and County of Denver, FAA, and a minority-owned consulting firm together developed a proposal covering contract compliance on the Denver airport project. The proposal would have established guidelines for coordinating the efforts and activities of all parties during compliance reviews, and at bidders’ and post-award conferences. However, this proposal was never adopted.⁵⁴

OFCCP Atlanta

The Commission also requested information regarding OFCCP compliance reviews completed at

Minority 12%, Females 1%.

50 OFCCP Denver Airport Project Response, First Quarter 1992, Success of MPI, items 5 & 6.

51 Review of 7 Letters of Commitment and 19 Conciliation Agreements received from OFCCP, July 1, 1992.

52 OFCCP Denver Airport Project Response.

53 Dept. of Labor, OFCCP, Federal Contract Compliance Manual, ch. 3, sec. 3J, “. . . working relationships, or linkages, between contractors and specific community recruitment and training resources to help fill work force deficiencies.” These agreements may be a part of a letter of commitment or conciliation agreement if the contractor is found in noncompliance. Linkages are monitored to evaluate contractors’ good faith efforts to meet affirmative action obligations.

54 OFCCP Denver Airport Project Response.

the Hartsfield Atlanta International Airport. In response, OFCCP submitted a list of contractors reviewed by their Atlanta office without indicating which, if any, were airport-related compliance reviews. Follow-up with OFCCP revealed that no compliance reviews had been done of the Atlanta airport from 1987 through 1991 because, according

to OFCCP staff, no "mega contracts"⁵⁵ have been awarded for the Atlanta Airport. Although some construction has occurred, it has been "piecemeal" over an extended period. None of the airport-related contracts were of the magnitude of the New Denver International Airport.⁵⁶

⁵⁵ The term "mega" applies to multimillion dollar Federal contracts. See memorandum from Cari M. Dominquez, Director, OFCCP (Feb. 23, 1991).

⁵⁶ Telephone interview with Dave Rutherford, special assistant, Program Planning and Development Division, OFCCP (Aug. 4, 5, 1992).

Summary of Findings

Based on its monitoring and evaluation, the Commission reaches the following conclusions.

1. Title VI enforcement at the Department of Transportation lacks leadership and direction. Civil rights enforcement is neither a top priority nor an integral part of the Department of Transportation's primary mission planning. The Secretary of Transportation has delegated authority to the eight modal administrations to enforce certain civil rights laws and programs, but has failed to monitor and assess aspects of enforcement such as budget, staff resources, compliance reviews, and complaint investigation. As a direct consequence, civil rights enforcement at the departmental level and within at least one modal administration, the Federal Aviation Administration, is grossly underfunded.
2. The Secretary's Office of Civil Rights is not in compliance with DOT Internal Order 1000.12 (Title VI), which states that the departmental Director of Civil Rights must:
 - Recommend, develop, disseminate, monitor, and vigorously pursue Department policies on the implementation of Title VI and assist the operating elements in the establishment of Title VI programs; and
 - Review, evaluate, and vigorously monitor operating elements' activities and programs relating to Title VI and effectuate changes to assure consistency and program effectiveness.
3. OCR has not established procedures to ensure that the modal administrations are implementing effective DBE programs.
4. FAA has not met fully its legal obligation to enforce Title VI, specifically those requirements that apply to federally assisted contractors, applicants, loan recipients, and grantees not covered by Executive Order 11246.
5. The Denver District Office of OFCCP has not contacted minority community organizations, appropriate district offices of the Equal Employment Opportunity Commission, and State and local fair employment agencies to notify them of any scheduled reviews and to request any information they might have regarding complaints against the contractor.
6. OFCCP's regulations at 41 C.F.R. § 60-4 require OFCCP to evaluate individual Federal contractors' and subcontractors' affirmative action commitments for work performed in a particular geographic area. This requirement limits OFCCP's ability to effectively evaluate specific projects or work sites such as the New Denver International Airport. For example, the Denver metropolitan area has a Hometown Plan requiring contractors to submit only one report encompassing all sites in a geographic area. It is conceivable that a contractor could comply with nondiscrimination laws at one site and not at another—a significant problem when large contracts such as airport construction are involved. The inability of OFCCP to target a specific site of a given contractor is therefore, on its face, a barrier to OFCCP enforcement. The failure of DOL, DOT, and the City and County of Denver to formulate a memorandum of understanding to coordinate and share information when conducting compliance reviews has further hampered enforcement efforts. The failure of negotiations between OFCCP, FAA, and the City and County of Denver is disturbing, particularly since no explanation was offered as to why this draft coordinated enforcement agreement was not approved.
7. An analysis of compliance activity in the Denver area seems to contradict OFCCP's conclusion that "no major problems" exist. A review of the 19 conciliation agreements and 7 letters of commitment indicated that a number of serious violations did exist.

Recommendations

Department of Transportation

1. The Secretary of Transportation must begin immediately to enforce Title VI and other civil rights programs vigorously at the departmental level and to assist the modal administrations in establishing effective civil rights enforcement programs. The Secretary personally must demonstrate, through policy pronouncements and day-to-day involvement in decisionmaking actions, that aggressive civil rights enforcement is part of DOT's primary mission and will be fully integrated into all program planning efforts. Furthermore, the Secretary must ensure that sufficient funds and staff resources are provided to fulfill DOT's civil rights enforcement responsibilities.

Specifically, the Secretary of Transportation must:

- a) Develop a management plan to ensure that Title VI and DBE on-site compliance reviews are one of the major priorities of the various modal administrations.
 - b) Hire additional compliance officers to oversee the civil rights enforcement activities pertaining to Title VI, the DBE Program, and Title II of the Americans with Disabilities Act;
 - c) Immediately ensure that all modal administrations are conducting Title VI and DBE on-site compliance reviews and investigations;
 - d) Establish a system for reviewing desk audits and on-site compliance reviews conducted by the modal administrations; and,
 - e) Establish a single, uniform set of Title VI guidelines and operating procedure for conducting compliance reviews and investigations.
2. The civil rights offices of DOT's various modal administrations must not reassign staff and other resources from its other civil rights programs (i.e., Title VII EEO programs), thus decreasing the effectiveness of those programs.

3. The Secretary's Office of Civil Rights must undertake a comprehensive review of contracting at the new Denver airport using its DBE and Title VI enforcement authority.
4. DOT should take immediate action to assess the impact the Intermodal Surface Transportation Act will have on the various modal administrations' civil rights enforcement programs.

Department of Labor

5. Lack of training for unskilled workers was widely cited by Commission forum participants as a major hurdle facing minorities and women seeking to participate in federally assisted projects. The Secretary of Labor must:
 - a) Investigate existing training and apprenticeship programs to determine whether they conform to Federal affirmative action guidelines for Federal and federally assisted programs.
 - b) Ensure that training and apprenticeship programs are mandatory for Federal and federally assisted construction contractors in all geographical areas where minorities and women are underrepresented in the journeyman-level trades.
 - c) Direct a national effort to develop and implement training and apprenticeship programs in the construction trades that promote the full participation of minorities and women.
6. OFCCP must audit compliance reviews conducted of New Denver International Airport contractors by its Denver District Office to ensure that the district office is selecting contractors appropriately for compliance reviews and is vigorously enforcing Executive Order 11246.
7. OFCCP must seek greater community involvement in selecting companies for review. In addition, OFCCP must contact community organizations, appropriate district offices of the Equal Employment Opportunity Commission, and State and local fair employment agencies to no-

tify them of any scheduled reviews and to request any information they might have regarding complaints against the contractor.

8. OFCCP should reassess its approach to determining compliance under Hometown Plans, since different job sites may offer higher salaries, better working conditions, or greater job security. OFCCP should judge its current approach by whether it can detect discriminatory variations in employment and the terms and conditions of employment across a contractor's various sites.

Joint Enforcement

9. DOT and DOL must update their December 1979 Memorandum of Understanding. Specifically, DOT and DOL must develop operating procedures that will create coordinated civil rights enforcement activities and thus avoid confusion over responsibilities and duplicated efforts, especially with regard to the enforcement of Title VI. Coordinated compliance review activities must be instituted and vigorously monitored and maintained for both efficiency and effectiveness in achieving federally mandated civil rights goals.

10. DOT and DOL must establish contact with the community groups and organizations represented at the Commission's forum to assess whether they continue to have difficulty obtaining contracts or employment related to the construction of the New Denver International Airport.

11. DOT and DOL must establish a joint review and information-sharing agreement between OFCCP's Regional Office, the city and county of Denver, and FAA. DOT and DOL must also take appropriate action elsewhere to encourage this kind of coordinated compliance effort.

12. The FAA, OFCCP, and Denver City and County Contract Compliance Office must undertake a joint study to address the following questions raised by the Commission's Denver forum speakers:

- Are prime contract bidders making sufficient and timely efforts to solicit bids from minority and female subcontractors?

- Are federally mandated outreach programs for both contracting and employment used appropriately and consistently?
- Are existing and potential barriers to minority and female participation in contracts and employment under investigation, and when identified, are these barriers being eliminated?
- Are reasonable and appropriate training and apprenticeship programs in place and are they serving all members of the Denver metropolitan area?
- Are all Federal employment and contracting guidelines regarding opportunities for women and minorities being met?

This joint undertaking should actively involve the community-based organizations represented at the Commission's June 1991 Denver forum.

13. Congress and the administration must ensure that the Departments of Transportation and Labor establish aggressive, fully integrated, and fully funded civil rights programs. Toward this end, Congress should require DOT and DOL to submit annual reports on their respective civil rights enforcement efforts relating to Federal contracts and financial assistance programs. At a minimum, these reports should identify (separately) the total dollar amount received by each recipient of a contract, subcontract, grant, or loan; a summary analysis of the relative benefits, services, and adverse effects of Federal contracts and federally assisted projects on persons and businesses; recipients' work force profile; recipients' work force employed, directly and indirectly, in preparing applications for Federal contracts or financial assistance; recipients' work force employed in connection with expending Federal funds. Each of the above analyses should be prepared separately by race, color, national origin, and sex. In addition, each report should include an analysis of the department's civil rights enforcement activities, such as the number and outcomes (i.e., major deficiencies found and corrective actions taken) of compliance reviews, and a summary of inter-agency enforcement efforts.