

Change The Passenger Facility Charge Statute To Mitigate Adverse Impacts on Disadvantaged Business Enterprises

Background. Prior to 1990 Federal Aviation Administration (FAA) Airport Improvement Program (AIP) grants were the primary source for airports capital projects. Airport grant recipients must establish fact-based contract participation goals for small firms certified as “disadvantaged business enterprises” (DBEs) or “airport concessions disadvantaged business enterprises” (ACDBEs) and make good faith efforts to achieve the goals with respect to the airport’s capital development projects and concessions contracting. DBE/ACDBE participation goal requirements were enacted by Congress to address discrimination and barriers to small business participation in airport contracting based on race and gender.

At the urging of the airport community, in 1990 “passenger facility charges” (PFCs) were established by Congress (in the Aviation Safety and Capacity Expansion Act) to help pay for capital development projects at commercial service airports.¹ Airports must apply to the Federal Aviation Administration (FAA) for authority to collect a PFC for use in financing approved projects. For FAA-approved projects, airlines collect the PFCs and remit the funds to the respective airport recipient(s). However, unlike the AIP program, the PFC statute does not include DBE/ACDBE participation goals setting for approved projects nor the requirement to exercise good faith efforts to meet them.

The Issue. PFCs are eclipsing AIP grants as the primary funding source for airport capital projects². However, DBE/ACDBE participation goal provisions were not incorporated in the original PFC statute when it was first enacted in 1990. While the Airport Minority Advisory Council (AMAC) supported the enactment of PFCs, as further explained below, at that time as a practical matter it was not thought that including participation goal setting would be needed. However, with the increasing use of PFCs and PFC-only funded projects, Congressional intent to prevent barriers to the participation of small businesses in airport contracting because of race or gender bias of the business owners will not be fulfilled unless the PFC statute is amended to incorporate such participation goals setting.

As noted previously, the AMAC supported establishment of the PFC program in 1990, because of the organization’s strong support for airport development to meet pressing national airport infrastructure needs. However, AMAC like others in the airport community reasonably believed that funding for airport capital projects would be a blend of AIP grant funds and PFC revenue and as a consequence, DBE/ ACDBE participation goals would be part of these projects. Again, as noted above, this is increasingly not the case.³ Moreover, this is a serious concern whether or not Congress authorizes a PFC increase as is being advocated by airport trade organizations.⁴ In fact, a PFC increase without addressing the

¹ See 49 U.S.C. Sec. 40117.

² Either directly or as the “revenue stream” to support bonds issued for a project(s).

³ For example, the Seattle-Tacoma International airport recently completed a \$1 billion PFC-only financed runway project.

⁴ The Administration has also included a PFC increase proposal in its FY’16 budget proposals.

adverse effects on DBE and ACDBE participation would be very harmful and would further undermine the Congressional concern for equity and inclusion.

For example, according to a General Accounting Office (GAO) report from 1990 through August 2014, the FAA approved airports' request to collect a total of approximately \$89 billion in PFCs with about a third of collecting airports approved to collect PFCs to at least 2024 or later. GAO estimates that nearly three fourths of all approved uses involve construction (e.g., terminals, runways and taxiways) as well as airport access such as roads and rail connecting to airports.

Data from a recent study commissioned by AMAC and the City of Atlanta's Hartfield-Jackson Airport resents compelling evidence that DBEs and ACDBEs are currently being adversely impacted because of the lack of participation goals.⁵ The study shows that the rate of DBE participation in PFC-only financed projects is substantially lower than the rate for AIP financed projects.⁶ The adverse effect and lost opportunity cost is exacerbated when state law prohibitions on race-conscious contracting goals are factored in. In six states (Washington, California, Arizona, Nevada, Michigan and New Mexico) race-conscious contract goals are not permitted by State mandate unless federal dollars are part of the project and/or a specific federal requirement preempts state law.⁷

To address this problem and the exclusion of small women and minority-owned firms from airport capital development contracting opportunities currently and in the future, Congress must enact an amendment to the PFC statute that applies DBE/ACDBE participation goal setting and good faith efforts to all airport projects and activities financed by PFC revenue. There is precedent for such an amendment. In the 111th Congress, H.R. 915, the FAA Reauthorization Act of 2009 (that was approved in committee and passed by the House of Representatives on a bi-partisan basis) included such a provision.⁸

⁵ The study is entitled "DBE Analysis of AIP vs. PFC Funded Projects", March 20, 2015. Prepared by Martin Associates (Lancaster, PA).

⁶ Moreover, the data shows that when the notable achievement of one or two key airports is not included in the analysis (e.g., Atlanta Hartsfield-Jackson International) the extent of DBE lost opportunities is even greater and more troubling.

⁷ Regrettably, there are threats that similar prohibitions may be pursued in other states and jurisdictions.

⁸ The legislation died in the U.S. Senate for unrelated reasons.