UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Sun's, Inc., Complainant
v.
Port of Seattle, Respondent.

Docket No. 16-06-13

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on the formal complaint filed in accordance with FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings (FAA Rules of Practice), 14 Code of Federal Regulations (CFR) Part 16.

Sun's, Inc., (Sun's/Complainant) has filed a complaint pursuant to 14 CFR Part 16 against the Port of Seattle (sponsor of the Seattle-Tacoma International Airport) (Port/Respondent), alleging the Port is in violation of 49 CFR Part 23, *Participation of Disadvantaged Business Enterprise in Airport Concessions*, and 49 CFR Part 26, *Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs*. On September 14, 2006, the Complainant filed its original complaint with the FAA.[1] On January 17, 2007, the FAA granted the Complainant's request to amend the complaint with the submission of additional information,[2] and on September 12, 2007, the FAA granted the Complainant's motion to submit a second amended complaint to correct the name of the petitioner from Lo-Yu Sun, an individual, to Sun's, a certified ACDBE.[3] The Complainant is an airport food and beverage concessionaire operating at Seattle-Tacoma International Airport (Sea-Tac International Airport).

The Complainant alleges that it has been economically harmed by the Port's failure to adhere to the requirements of 49 CFR Part 23 (ACDBE regulations), to carry out the objectives of the ACDBE program under 49 CFR § 23.1, and to adhere to the prohibition against engaging in acts of discrimination under 49 CFR § 26.7. The Complainant alleges that the Port's practice of entering into direct leasing agreements with the vendors in the Central Terminal and its method of selecting vendors for the new Central Terminal have had a discriminatory effect on existing ACDBE vendors in the outer concourses. The Complainant alleges that the discriminatory practices of the Port with respect to securing vendors for the new Central Terminal have resulted

[1] FAA Exhibit 1, Item 1.
[2] FAA Exhibit 1, Item 9.
[3] FAA Exhibit 1, Item 16.

in the Complainant's businesses, as well as other ACDBES, being relegated to the outer concourse where traffic of customers is fewer and secondary in comparison to the Central Terminal. As a result of the opening of the new Central Terminal, the Complainant alleges that both of its concession locations have suffered financially.[4]

The Respondent denies that its actions with respect to its leasing practice and solicitation of vendors for the Central Terminal were discriminatory in violation of 49 CFR § 23.9, which requires airport recipients in their concessions program to comply with the nondiscrimination requirements under 49 CFR § 26.7.[5] In response to Complainant's second amended complaint of February 15, 2007, the Respondent argued that Complainant did not state a claim because ACDBE vendors as a group were not a protected class under 49 CFR § 26.7, and that Complainant failed to establish a prima facie case of discrimination under 49 CFR Part 23 and Part 26.[6] In the Complainant's reply to Respondent's answer and motion to dismiss, it clarified that its claim was based on Sun's owner and Sun's key manager's race (Asian American), and that Complainant was disparately impacted by Respondent's policies with regard to the selection of ACDBE vendors for the Central Terminal.[7] In its Rebuttal, Respondent maintains that Complainant has not met its burden of proof for establishing a prima facie case of discrimination based on disparate impact.[8]

II. THE AIRPORT

Sea-Tac International Airport is a public-use, commercial-service airport in Seattle, Washington. The Port of Seattle, a Washington municipal corporation, owns and operates Sea-Tac International Airport. In each of the fiscal years from 2003 through 2006, the Port of Seattle, the airport sponsor, received federal financial assistance under FAA's Airport Improvement Program (AIP) to finance in whole or in part the planning and development of Sea-Tac International Airport.[9] AIP is a grant program authorized by the Airport and Airway Improvement Act, 49 USC § 47101, *et seq*. As a recipient of Federal AIP funds, the Respondent is subject to all grant assurances, including the assurance to comply with the requirements of Title 49 CFR Parts 26 and 23, the DBE and ACDBE regulations of the U.S. Department of Transportation.

III. BACKGROUND

From September 1995 to April 2006, Sun's operated China First Express, a Chinese restaurant, at the Sea-Tac International Airport under a sublease with Host International (Host) in Concourse B at Sea-Tac International Airport.[10] In 2004, Sun's acquired another location under a second sublease with Host, and began operating Manchu Wok in Concourse A in May 2004. Sun's continues to operate Manchu Wok to date.[11]

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[4] FAA Exhibit 1, Item 11, Amended Complaint at 5.
[5] FAA Exhibit 1, Item 20, Answer and Memorandum of Points and Authorities at 5.
[6] FAA Exhibit 1, Item 20, Respondent's Motion to Dismiss and Memorandum of Points and Authorities.
[7] FAA Exhibit 1, Item 23.
[8] FAA Exhibit 1, Item 24.
[9] FAA Exhibit 1, Item 29, Grant History for Port of Seattle.
[10] FAA Exhibit 1, Item 11, Amended Declaration of Lo-Yu Sun at 2.
[11] Id. at 10.

During the period prior to January 2006, Sun's was owned jointly by Mr. Gin-Chung Yu and Mr. Lo-Yu Sun, under a 60/40 ownership arrangement. In January 2006, Mr. Sun transferred his 40 percent interest to Gin-Chung Yu, making Mr. Yu the sole owner and director of the company. Mr. Yu subsequently appointed Mr. Sun Vice President and General Manager of the company. This change in ownership was disclosed by Complainant in its second motion to amend its complaint.[12]

The Complainant alleges that its revenues for both locations began to decline significantly after the opening of the new Central Terminal at Sea-Tac International Airport in the summer of 2005. He alleged that prior to the opening of the new Central Terminal, the annual net sales for China First Express in 2003 and 2004 were healthy, but in 2005, they decreased sharply by nearly 50 percent. Complainant alleges that due to the significantly decreased revenues as a result of the opening of the new Central Terminal, it terminated its sublease for China First Express with Host in April 2006. The Complainant alleges that a similar pattern occurred for Manchu Wok. From 2004 to 2005, the average monthly net revenue decreased by over 37 percent.[13]

The Complainant also noted that prior to the 2005 opening of the new Central Terminal, it had experienced other negative impacts on its businesses from Host and the Port. It alleged that in 2003, China First Express had to close for a period of eight (8) months to undergo significant reconstruction and reconfiguration of the lease space due to the additions of security checkpoints by the Port. Its 2003 losses included reduced square footage, loss of visual appeal for customers, and the Complainant's inability to afford employee wage increases, and major revenue shortfalls. It alleged that it suffered again in 2005, when the Port constructed a firewall that cut across a portion of China First Express's leased space, and it had to undergo reconstruction and reconfiguration again. It further alleged the Port reneged on its verbal promises to pay China First Express' remodeling expenses and employees' wages that were lost because the reconstruction period took longer than expected. The Complainant alleged it could not reopen until October 2003, although it was promised that it could reopen in June 2003.[14]

The Complainant alleged it sought to informally resolve the impact of the construction of the new Central Terminal matter on China First Express with the Port. In January 2004, Host offered the Complainant a second lease space, which the Complainant stated was a space that no other tenant wanted, but where it eventually opened Manchu Wok in May 2004.[15]

The Complainant also alleged that prior to the 2005 opening of the new Central Terminal, the Manchu Wok location also suffered economically because of the high build-out costs of Terminal A. In December 2005, Manchu Wok was one of four certified ACDBE concessionaires in Concourse A who sought and received rent relief and lease extensions from the Port Commission to resolve their economic hardships.[16]

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[12] FAA Exhibit 1, Item 11, Complainant's Second Motion to Amend Complaint at 2, and Declaration of Lo-Yu Sun in Support of Complainant's Second Motion to Amend Complaint at 2.
[13] Id., Amended Declaration of Lo-Yu Sun at 3.
[14] Id. at 5-6.
[15] Id. at 6.
[16] Id. at 7-8.

The Complainant further noted that its revenues for Manchu Wok were further eroded by the Port's street pricing policy, and marketing costs, which benefited the new Central Terminal, and by the fact there was no steady flow of flights departing from Concourse A from approximately 1:30 p.m. to about 8:00 p.m. The Complainant alleged that ACDBEs were underrepresented in the Central Terminal, with only one ACDBE food and beverage operator.[17]

The Complainant alleged that during the summer and fall of 2005, it requested the assistance of Host and the Port to acquire a different location for China First Express because of its financial difficulties. Host and the Port allegedly suggested alternative leasing spaces that were either poorly located or subject to Host's restrictive demands.[18] According to Respondent, Host and the Complainant found a mutually acceptable space for China First Express in Concourse C, but Host withdrew the offer when Complainant insisted that it be compensated for certain losses that it had incurred for China First Express.[19]

The Complainant alleged it inquired about lease space in the Central Terminal through Ms. Pat Davis, a Port Commissioner at the time, but this request was never followed through by Ms. Davis.[20] The Complainant alleged that despite his attempts to communicate and negotiate with the Port about the major shortfalls in revenue at both of its businesses, it received no satisfactory response or resolution from the Port. The Complainant alleged it tried one more time to resolve the matter through his attorney. When the Port replied it found its allegations had no merit, it filed a Part 16 complaint with the FAA.[21]

The Respondent states it has an FAA- approved ACDBE program which provides for a goal of 19.54 percent for the period of October 1, 2006, through September 30, 2008. Its program for October 1, 2005 through September 30, 2006, provided for a goal of 19 percent, with an achievement rate of 19.07 percent.[22] The Respondent states it also ensures ACDBE participation, and compliance with its ACDBE program, by formally and informally targeting 25 percent ACDBE participation within Tier I, Tier II, and Tier III contracts.[23]

The Respondent restructured its concessions program after its 40-year contract with Host International expired on December 31, 2004. The Respondent's current program is comprised of three tiers: Tier I, a contract with Host for 30 food and beverage and duty free venues, and with Concessions International for 9 food and beverage venues; Tier II, a retail prime concessionaire with 22 venues and a food and beverage concessionaire with 11 venues (both awarded through competitive solicitations) and; Tier III, 12 independent concession contracts, with 11 direct leases (six retail and five food and beverage operators) selected by a third party developer through a competitive process, and one sit-down restaurant operator selected through a Request for Qualifications (RFQ) process by the Port. Tier III is comprised of the concessions in the Central Terminal.[24]

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[17] Id. at 8-9.
[18] Id. at 5.
[19] FAA Exhibit 1, Item 20, Memorandum of Points and Authorities at 10.
[20] FAA Exhibit 1, Item 11, Amended Declaration of Lo-Yu Sun at 5.
[21] Id. at 9-10.
[22] FAA Exhibit 1, Item 20, Memorandum of Points and Authorities at 5-6.
[23] Id. at 6.
[24] Id., and Exhibit 6.C.

In January 2003, the Respondent hired a consultant to conduct the leasing for the new Central Terminal.[25] According to Respondent, the consultant was tasked to identify and present to the Port a single package of concessions that would meet the Port's overall objectives. These objectives included finding concessions that offered a variety of food types, that sold goods and services at desired price points, that reflected a mix of national and local businesses, and that satisfied the Port's goals for ACDBE participation.[26] No ACDBE contract goal appeared to have been set for the Central Terminal concession opportunities.

Linda LaCombe, a former Port employee who served as the Port's Manager of Commercial Development in 2003, and staff contact for the leasing agent, stated that although she had made efforts to ensure that there would not be an Asian food and beverage tenant in the Central Terminal who would compete with Complainant in Concourse B, the leasing agent nonetheless insisted on a second Asian food and beverage operation in the Central Terminal. [27] According to Ms. LaCombe, the leasing agent then promised that if he were to select an Asian food and beverage operation, it would be an ACDBE operator.[28] The leasing agent had also promised her that he would select a minimum of three or four ACDBE food and beverage tenants in the Central Terminal.[29] According to Complainant, neither of these promises ever materialized.[30]

On February 27, 2003, the consultant held an outreach meeting to seek expressions of interest from firms for the concession opportunities in the Central Terminal. A total of 114 firms expressed interest in these opportunities. A total of 33 firms were "short listed" by the consultant, of which 11 were selected for Port Commissioner approval. The slate of 11 firms included one ACDBE food and beverage operator (Wendy's), and one ACDBE retail operator (Fireworks Gallery).[31] The slate also included a non-ACDBE Asian cuisine food and beverage operator (Maki of Japan).[32] On October 9, 2003, the Port Commission approved the 11 concession agreements.[33] The Port reported that after the Central Terminal opening in May 2005, the two ACDBE operators accounted for nearly 25 percent of the revenues generated in the Central Terminal.[34]

In Respondent's Memorandum of Points and Authorities to support Respondent's answer and motion to dismiss, it countered that Ms. LaCombe's desire for the Port to select three or four ACDBE food and beverage vendors for the Central Terminal was both irrelevant and illegal. It argued it was irrelevant because three or four vendors were not needed to meet the Port's ACDBE goals, and it was illegal because set-asides were illegal under 49 CFR Part 23.[35]

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[25] FAA Exhibit 1, Item 20, Memorandum of Points and Authorities at 7, and Item 11, Resubmission of Declaration of Linda LaCombe & Exhibit A.
[26] FAA Exhibit 1, Item 20, Memorandum of Points and Authorities at 7.
[27] FAA Exhibit 1, Item 11, Declaration of Linda LaCombe at 3.
[28] Id.
[29] Id.
[30] FAA Exhibit I, Item 23, Motion and Reply at 7.
[31] FAA Exhibit 1, Item 20, Memorandum of Points and Authorities at 7.
[32] FAA Exhibit 1, Item 20, Exhibit 6.C., and Item 23, Item 11, Declaration of Linda LaCombe at 3.
[33] FAA Exhibit 1, Item 20, Memorandum of Points and Authorities at 7.
[34] Id.
[35] Id.

In its reply to Respondent's answer and motion to dismiss, Complainant alleged it was adversely impacted by Respondent's policies or lack of policies for selecting ACDBE vendors for the Central Terminal. Complainant alleged that despite repeated requests, Respondent has failed to produce any documents that would clearly describe the procedures and criteria for selecting tenants for the Central Terminal. Complainant also alleged that it met the threshold of qualifications for tenancy in the Central Terminal, but was not selected, or given any substantive explanation for that rejection despite repeated inquiries and requests for that information.[36]

The Complainant also requested that FAA dismiss its complaint without prejudice under 14 CFR § 16.27 because it realized that its complaints may be premature in its prima facie case as previously filed, and to conduct an investigation. Even if not granted, the Complainant argued that its current complaint would still demonstrate a prima facie case.[37] On December 7, 2007, the Port submitted its rebuttal urging the FAA to dismiss the complaint with prejudice because the Complainant had admitted it had not satisfied its burden of proof to establish a prima facie case, and Complainant should be bound by its own admissions that it had material defects in the amended complaint. The Respondent maintained that the Complainant had not supplied evidence of disparate impact, or evidence that the Port's facially neutral actions in selecting concessions operators for the Central Terminal were the cause of a disparate impact.[38]

Procedural History

The procedural history for this complaint has been long, protracted, and contentious. A chronological listing of the filings is provided in the "Administrative Record Index" that is attached as FAA Exhibit 1 of the Director's Determination. This history includes the following highlights: The complaint was filed on September 14, 2006, and was docketed by the FAA on October 6, 2006.[39] FAA granted the Complainant's motion to amend its complaint twice. The FAA granted Complainant's motion on January 17, 2007, to submit an amended complaint that would include additional information for substantiating its allegations, and granted Respondent an additional 30 days to submit its answer. On February 14, 2007, the Respondent submitted its answer and motion to dismiss. On February 15, 2007, Complainant submitted another motion to amend its complaint. On September 17, 2007, FAA granted Complainant's motion to submit a second amended complaint that would change the petitioner from Mr. Lo-Yu Sun, an individual, to Sun's, a certified ACDBE. On October 10, 2007, FAA issued an order granting Respondent's request for a 30-day extension to file its answer to Complainant's second amended complaint, and ordered that no further filings would be accepted. On November 13, 2007, the Respondent submitted its answer to Complainant's second amended complaint and a motion to dismiss. On November 26, 2007, the Complainant submitted a motion for voluntary dismissal, its reply, and opposition to Respondent's motion to dismiss, and alternatively, for an extension of time. On December 7, 2007, the Respondent submitted its rebuttal. On January 21, 2008, the Complainant

[36] FAA Exhibit 1, Item 23, Motion and Reply.
[37] Id.
[38] FAA Exhibit 1, Item 24.
[39] The original complaint also listed Host International Inc., as a party and a footnote in the Docket Noticing advised the parties that Host was not a proper party. Accordingly, Host International Inc., was dismissed as a party. See FAA Exhibit 1, Item 2.

submitted a Supplemental Declaration with an attached Exhibit. On January 30, 2008, the Port filed papers opposing the inclusion of the Supplemental Declaration. On April 14, 2008, the FAA issued an Order closing the docket, and prohibited the parties from submitting any further filings unless requested by the FAA. On July 14, 2008, and on October 21, 2008, the Director extended the time for the issuance of the Director's Determination.

IV. ISSUES

Upon review of the allegations and the relevant airport-specific circumstances, summarized above in the Background Section, the Director of the Office of Airport Compliance and Field Operations, has determined that the following issues require analysis in order to provide for a complete review of the Respondent's compliance with applicable Federal law and policy.

> Issue 1: Whether Respondent's selection procedures for vendors in the Central Terminal had a discriminatory impact on Complainant and other similarly situated Asian American food and beverage vendors in the outer concourses, in violation of 49 CFR § 23.9 and 49 CFR §26.7(b);
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> Issue 2: Whether Complainant was discriminated against because of its race (Asian American) when it was not selected as a concessionaire for the Central Terminal, in violation of 49 CFR § 23.9 and 49 CFR § 26.7(a); and
>
> Issue 3: Whether Respondent's alleged actions, or lack of actions, individually or cumulatively, were contrary to the administrative, general and compliance requirements of 49 CFR Parts 23 and 26, and Federal Grant Assurance No. 37.

V. APPLICABLE FEDERAL LAW AND POLICY

The Federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing federal funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by grant agreement or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the airport.

The following is a discussion pertaining to the Airport Improvement Program, Airport Sponsor assurances, and the FAA Airport Compliance Program.

A. Airport Improvement Program

Title 49 USC § 47101, *et seq.*, provides for federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by the Airport and Airway Improvement Act of 1982, as amended. Title 49 USC § 47107, *et seq.*, sets forth assurances

to which an airport sponsor agrees as a condition of receiving federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding obligation between the airport sponsor and the federal government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

Part 16 of Title 14 of the Code of Federal Regulations (14 CFR Part 16) contains the rules of practice for filing complaints involving federally assisted airports. [See *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings*, 61 Fed. Reg. 53998 (October 16, 1996)]. Complaints may be filed under Part 16 alleging violations of the federal grant assurances required under 49 USC § 47107 or § 47113 for airports receiving federal airport improvement program funds.

The standard federal grant assurances contain a civil rights assurance [No. 30], and a Disadvantaged Business Enterprise (DBE) Assurance [No. 37], as well as the express requirement to comply with 49 CFR Parts 26 and 23.

Title 49 USC § 47113 provides authority for 49 CFR Part 26 and requires that "The Secretary of Transportation shall take affirmative action to ensure that an individual is not excluded because of race, creed, color, national origin, or sex from participating in an activity carried out with money received under a grant under this subchapter. The Secretary shall prescribe regulations necessary to carry out this section."

Part 26 of 49 CFR contains the Department of Transportation regulations for its DBE program with respect to Department of Transportation-assisted contracts. [See *Participation by Disadvantaged Business Enterprises in the Department of Transportation Financial Assistance Programs*, 64 Fed. Reg. 5096 (February 2, 1999).] Part 26 applies to recipients of Federal Airport Funds authorized by 49 USC § 47101, *et seq*. [See 49 CFR § 26.3(a) (3).] Part 26 does not apply to contracts in which the Department of Transportation does not participate in financial assistance. [See 49 CFR § 26.3(d)]. Part 26 replaced 49 CFR Part 23 for DBEs in Department of Transportation-assisted contracts; DBE airport concessions provisions of 49 CFR Part 23 were revised and updated in the Department's regulation entitled Part 23-*Participation of Disadvantaged Business Enterprise in Airport Concessions*. [See 70 Fed. Reg. 14496 (March 22, 2005)].

The sections of 49 CFR Parts 23 and 26 applicable to this Part 16 proceeding include §§ 23.1, 23.9, 23.11, 26.7, 26.101, and 26.105.

49 CFR § 23.1 sets forth the objectives of 49 CFR Part 23:

This part seeks to achieve several objectives:

(a) To ensure nondiscrimination in the award and administration of opportunities for concessions by airports receiving DOT financial assistance;
(b) To create a level playing field on which ACDBES can compete fairly for opportunities for concessions;
(c) To ensure that the Department's ACDBE program is narrowly tailored in accordance with applicable law;

(d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as ACDBES;
(e) To help remove barriers to the participation of ACDBES in opportunities for concessions at airports receiving DOT financial assistance; and
(f) To provide appropriate flexibility to airports receiving DOT financial assistance in establishing and in providing opportunities for ACDBEs.

49 CFR § 23.9 provides the nondiscrimination requirements for recipients with airport concessions programs.

(a) As a recipient, you must meet the non-discrimination requirements provided in part 26, § 26.7 with respect to the award and performance of any concession agreement, management contract or subcontract, purchase or lease agreement, or other agreement covered by this subpart.

(b) You must also take all necessary and reasonable steps to ensure nondiscrimination in the award and administration of contracts and agreements covered by this part.

49 CFR § 26.7 states:

(a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

(b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex or national origin.

The regulation in 49 CFR § 26.7 prohibits not only intentional discrimination but also actions that have the effect of discriminating against individuals on one of the prohibited grounds (e.g., that have a disparate adverse impact on members of a particular group). The language of paragraph (b) is similar to that in the Department's longstanding Title VI regulation (49 CFR § 21.5(b)(2) and is consistent with court interpretations of nondiscrimination statutes in other contexts. [See Supplemental Notice of Rulemaking 62 FR 29548, 29551 (May 30, 1997) citing *Alexander v. Choate*, 469 U.S. 287 (1985); *Elston v. Talladega Board of Education*, 997 F.2d 1394 (11th Cir., 1993)]. Therefore, to analyze the allegations in this case, we will consider two primary theories of discrimination under Title VI: intentional discrimination or disparate treatment, and disparate impact or adverse effects.

B. Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the Airport Improvement Program, 49 USC § 47107, *et seq.*, the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Title 49 USC § 47107(a) sets forth the statutory

sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances. FAA Order 5190.6A, *Airport Compliance Requirements* (Order), issued on October 2, 1989, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances. The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.

Federal Grant Assurance No. 37 applies to the circumstances set forth in this complaint and states:

> The recipient shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure non-discrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR Part 26, and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 USC 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 USC 3801).

C. The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners' compliance with their Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the obligations an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation.

The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served. FAA Order 5190.6A, *Airport Compliance Requirements* (Order) sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct. Rather, it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering

the various continuing commitments made to the United States by airport owners as a condition of receiving a grant of Federal funds or the conveyance of Federal property for airport purposes. The Order analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance program is designed to achieve voluntary compliance with federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable federal obligation to be grounds for dismissal of such allegations. [See e.g. *Wilson Air Center v. Memphis and Shelby County Airport Authority*, FAA Docket No. 16-99-10, (8/30/01); upheld in *Wilson Air Center, LLC v. FAA*, 372 F.3d 807 (C.A. 6, June 23, 2004).]

The Order covers all aspects of the airport compliance program except enforcement procedures, which as referenced above are at *FAA Rules of Practice for Federally-Assisted Airport Enforcement Proceedings* (14 CFR Part 16). Under 49 CFR § 26.105(b), any person who knows of a violation of Part 26 by a recipient of FAA funds may file a complaint under 14 CFR Part 16 with the Federal Aviation Administration Office of Chief Counsel.

On February 22, 2002, the Associate Administrator for Airports delegated to the Assistant Administrator for Civil Rights the authority to prepare and issue final decisions pursuant to 14 CFR Part 16. On February 22, 2002, the Director of the Office of Airport Safety and Standards (now the Director of Airport Compliance and Field Operations) delegated to the Deputy Assistant Administrator for Civil Rights the authority to prepare and issue director's determinations pursuant to 14 CFR Part 16. [See *Albuquerque Valet Parking Service, Norma G. Morris and David Powdrell, v. City of Albuquerque, Albuquerque, NM*, FAA Docket No. 16-01-01; upheld in *Albuquerque Valet Parking Service v. FAA*, Civ. No. 03-575 (D.C. New Mexico, March 31, 2004]. The Deputy Assistant Administrator for Civil Rights position is vacant without an acting official. Therefore, the Director of Airport Compliance and Field Operations is acting as the decision maker.

VI. ANALYSIS AND DISCUSSION

In this complaint, the role of the FAA is to determine whether as a result of Respondent's leasing policies and practices in the Central Terminal, the Complainant was adversely impacted because of its race (Asian American), in violation of 49 CFR § 26.7(b), and whether the Complainant was discriminated against because of its race when it was not selected as a concessionaire for the Central Terminal, in violation of 49 CFR § 26.7(a). FAA's role also is to determine whether Respondent is in compliance with its Federal obligations, specifically those required by 49 CFR Parts 23 and 26 and Federal Grant Assurance No. 37, the DBE and ACDBE grant assurance.

The issues identified in Section IV above are addressed in this Section, and in addition the Director is addressing at the outset of this Analysis and Discussion two preliminary issues regarding the 14 CFR Part 16 process and requirements, and whether Complainant has a cause of action to invoke

49 CFR § 26.7.

A. The Complainant filed a motion on November 26, 2007, requesting the FAA to dismiss its complaint without prejudice, pursuant to 14 CFR § 16.27.

In its motion for voluntary dismissal without prejudice, the Complainant "acknowledges some prematurity in the prima facie case it had previously filed." The Complainant asserts "that the issue of dismissal has only now ripened upon receipt of the Respondent's answer, and that the FAA may grant dismissal without prejudice under the subject rule provision."[40] It argued that 14 CFR §16.27 allowed FAA to grant voluntary dismissals without prejudice to enable complainants to correct technical and procedural deficiencies. The Complainant noted that its complaint was at a preliminary point in the proceedings because the FAA had not yet initiated a formal investigation, and the only activity in this case had been solely procedural, limited to filings on the procedural propriety of Complainant's amendment of its complaint.[41]

The regulation in 14 CFR § 16.27 states, "if a complaint is not dismissed pursuant to § 16.25 of this part, but is deficient as to one or more of the requirements set forth in § 16.21 or § 16.23(b), the Director will dismiss the complaint within 20 days after receiving it. Dismissal will be without prejudice to the refiling of the complaint after amendment to correct the deficiency." The regulation in 14 CFR §16.23(b) requires the Complainant to provide a concise but complete statement of the facts relied upon to substantiate each allegation. The intention of 14 CFR §16.27 is to provide an opportunity for complainants to correct procedural and technical issues in their complaint, so that upon refiling of the complaint, there will be a reasonable basis for the FAA to docket the complaint for further investigation. Contrary to the Complainant's assertion, this complaint is not in its preliminary stages. The FAA docketed the complaint on October 6, 2006. Additionally, the FAA granted the Complainant's motion to amend its complaint two times since it docketed the complaint on October 6, 2006. On January 17, 2007, the FAA granted Complainant's first motion to amend its complaint, and on September 12, 2007, the FAA granted Complainant's second motion to amend its complaint again. The FAA has provided more than ample opportunity for the Complainant to provide all information necessary to substantiate its allegations.

Further, the assertion that FAA has not begun a formal investigation is erroneous. As part of its investigation, FAA has reviewed all written pleadings that have been submitted by the Complainant and the Respondent. The regulation in 14 CFR § 16.29(b) specifies that investigations may include one or more of the following, at the sole discretion of the FAA: a review of the written submissions or pleadings of the parties as supplemented by any informal investigation the FAA considers necessary and by additional information furnished by the parties at FAA request.

Additionally, an examination of the record, including the Director's September 12, 2007 Order, reveals the checkered history of this case and the extensive opportunities the Complainant had to substantiate its case. This was much more than the standard practice in most Part 16 cases and approached the point of prejudicing the Respondent. Each time the Respondent was to file, or just upon filing, a responsive pleading, the Complainant would make another filing and on occasion not in accordance with the Part 16 procedural process. This troubled the Director, but the Director believed

[40] FAA Exhibit Item 23, Motion and Reply at 2.
[41] Id. at 4.

he exercised appropriate controls to facilitate a process that was fair to the Respondent in granting reasonable extensions of time for the Respondent's filings. It too troubled the Director that having gone through the full pleading stage, the Complainant filed a motion to voluntarily dismiss the case without prejudice. The only way such a motion would be granted at this juncture would for it to be *with* prejudice.

It is plainly stated in the 14 CFR Part 16 rules, that "in rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided under this subpart. Each party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance." [See 14 CFR § 16.29] Accordingly, the Director denies Complainant's motion for voluntary dismissal without prejudice under 14 CFR § 16.27.

B. The Respondent asserts in its affirmative defense that Complainant has failed to identify any individual entitled to protection under 49 CFR § 26.7 who claims he or she has been subject to discrimination by the Respondent. The Respondent recommended that the complaint be dismissed with prejudice.

The Respondent contends that while the amended complaint refers to injuries allegedly suffered by the Complainant, Sun's, there is no allegation of discrimination [in the complaint]that alleges that Respondent discriminated against Mr. Sun, or the actual owner of Sun's, Mr. Gin-Chung Yu. Nowhere in the amended complaint has the Complainant alleged that Mr. Sun or Mr. Yu are members of a class protected under § 26.7, based on race, color, sex, or national origin, or that they were the subject of discrimination because of their membership in such class.[42] According to Respondent, only paragraph 3.9 in the amended complaint purports to state a claim of discrimination in violation of 49 CFR § 26.7. Paragraph 3.9 alleges that "The Port's contracting and business practices in securing vendors have had a discriminatory effect on existing ACDBE vendors located in the outer concourses."[43] The Respondent argues that "such allegation is fatally defective. Sun's Inc. cannot present a claim on behalf of other ACDBEs. Moreover, Section 26.7 does not prohibit discrimination against ACDBEs as a group, but instead prohibits discrimination against an individual based on sex, race, color, or national origin."[44]

In its Reply, the Complainant clarifies that the basis of discrimination against the Respondent is race, and that both Mr. Sun, and Mr. Yu, who is the owner, are Asian Americans.[45] In its Rebuttal, Respondent counters that while the Complainant has asserted that its claim was for discrimination based on the race of Sun's Inc's management: Mr. Yu and Mr. Sun, "there is no mention of Mr. Yu or his race in the amended complaint or any of the affidavits or exhibits supplied by either Complainant or the Port. Indeed, it does not appear that Mr. Yu had any involvement in the events which Complainant directly and indirectly asserts amount to discrimination." [46] Title VI applies to "persons." Specifically, Title VI states, no "person" shall be discriminated against on the basis of race, color, or national origin. The Complainant has named the aggrieved persons and the basis of

[42] FAA Exhibit 1, Item 20, Memorandum of Points and Authorities at 3-4, and 15.
[43] Id. at 1.
[44] Id.
[45] FAA Exhibit 1, Item 23, Motion and Reply.
[46] FAA Exhibit 1, Item 24 at 8.

the alleged discrimination. While it is true that Mr. Yu was not named or appeared to be actively involved in the alleged incidents of discrimination, by mere fact that he was the majority owner, and later, the sole owner of Sun's during the time of the alleged discrimination, is sufficient to conclude that he was impacted by the events that impacted Sun's. The Director finds that Complainant's Reply has satisfactorily articulated a basis of discrimination by Respondent under Title VI., and has satisfactorily stated a claim under 49 CFR § 26.7. Therefore, the Respondent's motion to dismiss with prejudice for this ground is denied.

It should also be noted that Mr. Sun was a 40 percent co-owner and General Manager of Sun's at the time the alleged discrimination occurred, which began approximately in 2003.[47] The fact that he sold his ownership interest to Mr. Yu in January 2006, and is no longer an owner as of Sun's, but remains a key management official (Vice President and General Manager) of Sun's after the filing of the complaint, does not diminish his ability to file his discrimination claim under this Part 16 proceeding. Additionally, the complaint was amended to substitute Sun's for Mr. Sun.

Issue 1: *Whether Respondent's selection procedures for vendors in the Central Terminal had a discriminatory impact on Complainant and other similarly situated Asian American food and beverage vendors in the outer concourses, in violation of 49 CFR § 23.9 and 49 CFR § 26.7 (b).*

The Complainant asserts that "the Port's contracting and business practices in securing vendors have had discriminatory effect on existing ACDBE vendors located in the outer concourses."[48] The Complainant claims that the Respondent "suggested alternative leasing spaces that were either poorly located or subject to Host's restrictive demands."[49] The Complainant states that "decreased revenues at China First Express were so significant that the Company had to close down China First Express in April 2006 because it was no longer economically feasible to continue to do business...Manchu Wok is currently still open for business, but it continues to suffer ever decreasing revenues."[50]

The Respondent contends that its 2005 Leigh Fisher report "found that the development cost per square foot for Manchu Wok was higher than any other concession in Concourse A seeking relief," and Manchu Wok's sharp decline in sales in 2005 "suggests that Manchu Wok has significant operating problems that are different and unrelated to the challenges facing the other Concessionaires."[51] The Respondent does admit that the Complainant was "offered by Host an acceptable new concession location on Concourse C6 in exchange for closing the China First Express location on Concourse B" but that Mr. Sun "conditioned his acceptance on the unacceptable demand of receiving damages."[52]

The Complainant counters that its allegations make clear that the Complainant was discriminated against through the Respondent's contracting and business practices that disparately impacted it.

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[47] FAA Exhibit 1, Item 11, Petitioner's Second Motion to Amend Complaint at 2; Declaration of Lo-Yu Sun in Support of Petitioner's Second Motion to Amend complaint at 2; and Amended Declaration of Lo-Yu Sun.
[48] FAA Exhibit 1, Item 11, Amended Complaint at 5.
[49] FAA Exhibit 1, Item 11, Amended Declaration of Lo-Yu Sun at 4.
[50] Id. at 9-10.
[51] FAA Exhibit 1, Item 20, Affidavit at 5-6.
[52] FAA Exhibit 1, Item 20, Affidavit at 6.

The Complainant asserts that "while it clearly met the threshold qualifications necessary to be considered for a tenancy in the Central Terminal, Sun's was not selected" and was "never been given any substantive explanation for that rejection". The Complainant declares that the "exact method by which the two current ACDBE's in the Central Terminal were selected has still not been voluntarily disclosed."[53] The Complainant closes by stating "[t]he fact remains that the selection of non-ACDBE concessionaires over ACDBE-certified Sun's Inc., a 10 year plus business tenant in the airport, has had a substantial adverse economic impact which continues today."[54]

The Respondent in its Rebuttal contends that "although Complainant alleges a disparate impact, it does not, and cannot, establish the two essential elements of a disparate impact claim: proof that Complainant suffered a disparate impact and that there is a causal connection between such disparate impact and specific, non-discriminatory action by Respondent."[55] The Respondent also contends that "aside from the Complainant's failure to substantiate its allegation that the Port failed to supply the requested documents, the documents allegedly sought would not have assisted Complainant in setting forth a claim of discrimination based on disparate impact."[56]

A review of disparate impact is appropriate here; the regulation under 49 CFR § 26.7(b) uses the disparate impact theory of discrimination under Title VI case law. This theory will be applied to determine whether the Respondent used criteria or methods of administration that have the effect of defeating or substantially impairing the accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin. Under the disparate impact theory, a recipient, in violation of agency regulations, uses a neutral procedure or practice that has a disparate impact on protected individuals, and such practice lacks a substantial legitimate justification. The elements of a Title VI disparate impact claim derive from the analysis of cases decided under Title VII disparate impact law. [See *U.S. Department of Justice Title VI Legal Manual,* at 48 (January 11, 2001), citing: *New York Urban League v. New York,* 71 F.3d, 1031, 1036 (2d Cir. 1995)].

In a disparate impact case, the focus concerns the consequences of the recipient's practices, rather than the recipient's intent. *Lau v. Nichols*, 414 U.S. 563 at 568 (1974). To establish liability under the disparate impact theory, the Complainant must first demonstrate by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI. [See *U.S. Department of Justice Title VI Legal Manual,* at 49 (January 11, 2001), citing: *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984); *Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1407 (11th Cir.), reh'g denied, 7 F.3d 242 (11th Cir. 1993) (citing *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985).] If a prima facie showing is made, the Respondent then must prove a substantial legitimate justification for the challenged practice exists in order to avoid liability. [*DOJ Manual*, p. 49.] If the Respondent does prove such justification, the Complainant may still prevail if it is able to show that a comparably effective alternative practice which results in less

[53] FAA Exhibit 1, Item 23, Motion and Reply at 6-7.
[54] Id. at 8.
[55] FAA Exhibit 1, Item 24, Rebuttal at 2.
[56] Id. at 9.

disproportionate impact exists, or that the justification provided by the Respondent is pretext for discrimination. [*DOJ Manual*, p. 49.]

In this case, the facially neutral policy in question is the Respondent's leasing policies with respect to the Central Terminal and the protected group at issue is Asian American food and beverage concessionaires. Therefore, in order to make a prima facie showing that a given action by the Respondent violated the ACDBE regulations, the Complainant must show the action had a disparate impact on this group. To do this, the Complainant must show a causal connection between the facially neutral policy and the disproportionate and adverse impact on Asian American food and beverage concessionaires as a group.

In order to establish causation, the Complainant is required to employ facts and statistics that adequately capture the impact of the practice on similarly situated Asian Americans, and members of non-protected groups. The Complainant must show, using an appropriate measure, that specific actions of the Respondent caused a disparate effect on similarly situated concessionaires to the detriment of the Asian American food and beverage concessionaires. *New York City Environmental Justice Alliance (NYCEJA) v. Giuliani*, 214 F.3d 65, 70 (2d Cir. 2000).

The Complainant has only provided its own racial data; the Complainant has provided no racial data for all vendors in the Central Terminal and in the other concourses to enable the FAA to make a determination of disparate impact or effect. Complainant supplied comparison data on its financial status and the financial status of other vendors for a point of time before and after the opening of the Central Terminal, indicating that most vendors in Concourses A and B suffered losses, and that Complainant was one of several firms that suffered significantly more losses.[57] However, without the racial information, the information submitted is insufficient to establish whether Asian American food and beverage concessionaires were adversely and disproportionately impacted. As previously stated, the Director may rely entirely on the complaint and the responsive pleading and each party is responsible to file all documents it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance with its Federal obligations.

Without racial data, Complainant has failed to establish a causal link between Respondent's leasing policies for the Central Terminal and the alleged disparate impact on Asian American food and beverage vendors. The Respondent has argued that both ACDBE and non-ACDBE vendors in the concourses near the Central Terminal were initially negatively impacted by the increased competition from the new Central Terminal operations. The Respondent further argued that Complainant's larger financial losses compared to other similarly situated vendors may be due to factors within the Complainant's business that did not appear to exist for the other vendors who were also exposed to the increased competition from the Central Terminal operations.[58] The Director finds therefore that Complainant is unable to meet its initial burden of establishing a prima facie showing of disparate impact.

Nevertheless, the Director will assume for purposes of a complete review that the Complainant met its burden of establishing a prima facie case of disparate impact, thus shifting the burden to

[57] FAA Exhibit 1, Item 11, Amended Declaration of Lo-Yu Sun, Exhibit G.
[58] FAA Exhibit 1, Item 20, Memorandum of Points and Authorities at 26.

the Respondent to demonstrate a substantial legitimate justification for the policies and procedures it used in the selection of vendors for the Central Terminal.

The Respondent articulated in its answer that it restructured its concessions program in anticipation of the expiration of its lease agreement with Host (a 40-year term lease) at the end of 2004. The third tier (which pertained to the Central Terminal) was to consist of 12 concession contracts, each of which was to have its own concession contract with the Port.[59] According to Respondent's consultant, Leigh Fisher Associates, the Port restructured its concessions program to enable it to exercise more effective control over its program, and to bring it up to the standards of other major airports.[60]

As part of its leasing policies for the Central Terminal concession contract opportunities, the Respondent also hired a professional consultant to conduct the leasing process and to select the 11 independent leases through a competitive process for staff and Port of Commissioner approval (the 12th lease [a sit down restaurant] was chosen through a Request for Qualifications (RFQ) process conducted by the Port).[61] The Director understands the Respondent hired the consultant to assist Respondent in achieving its overall financial and Central Terminal project objectives. There is nothing in the Airport Improvement Program (AIP) grant assurances, the 49 CFR Parts 23 and 26 regulations or the governing authorities that compels or directs the Respondent to use a specific approach or method for selecting concessionaires.[62]

Therefore, the Respondent exercised its discretion in electing to use an independent consultant who developed a slate of vendors for the Port's review and approval. The Respondent is responsible for its independent consultant's action and the Respondent is required to comply with the nondiscrimination provisions of 49 CFR Parts 23 and 26 in the application of its discretion.

In this case the Port required the consultant to meet certain program objectives and to use a competitive procedure for selecting the slate of 11 vendors. It appears that the Port gave the consultant wide latitude for balancing the different program objectives, and for choosing the group of food and beverage and retail concepts that would best achieve the Port's program goals, not unlike what a proponent would do in response to an airport's RFP. The Director finds the Respondent has provided a substantial legitimate justification for its leasing policies. To prevail, the Complainant must show that there was a comparably effective practice that would have met the Port's objectives efficiently and would have less discriminatory effect on Asian American food and beverage concessionaires. There is no evidence in the record that indicates

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[59] Id. at 6.

[60] FAA Exhibit 1, Item 20, Exhibit 11 at 12.

[61] FAA Exhibit 1, Item 20, Memorandum of Points and Authorities at 7, and Exhibits 6.C at 3, and 6.D at 1.

[62] The FAA interprets Grant Assurance 24, the self-sustaining grant assurance, to require that an airport receive fair market value for the provision of nonaeronautical facilities and services, to the extent practicable considering the circumstances at the airport. [See *Policy and Procedures Concerning the Use of Airport Revenue*, 64 Fed. Reg. 7696, 7721 (Feb. 16, 1999)] Additionally, the FAA has found the common industry practice of issuing Requests for Proposals for aeronautical interest in airport facilities is an appropriate method of ensuring the highest and best use for limited airport property. [See *Kihlstrom v. Port of Orcas, WA*, Docket No. 16-020-07 (September 1, 2004), *Cedarhurst Air Charter v. County of Waukesha, WI*, Docket No. 16-99-14 (April 6, 2000), affd., Final Agency Decision (August 7, 2000)].

Complainant has met this burden. Therefore, the Complainant's disparate effect claim under 49 CFR § 26.7 has not been met, and the claim cannot be proven. The Director finds no violation by the Respondent of 49 CFR § 23.9 or § 26.7 (b) and this issue is dismissed.

Issue 2: *Whether Complainant was discriminated against because of its race (Asian American) when it was not selected as a concessionaire for the Central Terminal, in violation of 49 CFR § 23.9 and 49 CFR § 26.7(a).*

The Complainant claims that "[b]oth Sun's owner, Gin-Chung Yu, and vice president/general manager, Lo-Yu Sun, are Asian...Sun's status as an ACDBE as well as the discussion of race and citation to the appropriate race-related regulations in its Complaint were therefore sufficient to put Respondent on notice that the protected class claimed by Sun's in this action is race."[63]

The Respondent counters that the "mere fact that the word 'race' appears in the Amended Complaint as part of a reference to the applicable regulations does not impliedly set forth a claim for discrimination based on race."[64] In its answering papers, Respondent contends that "the Amended Complaint does not allege that Sun's sought any particular concession contract, that its application was denied by the Port, and that the sought-after concession contract was awarded to someone from a non-protected class."[65]

A Title VI analysis also requires the FAA to review whether there may be a case of disparate treatment under 49 CFR § 26.7(a). In this case, the Complainant has also alleged it was discriminated against because of its race (Asian American), when it expressed an interest in a vendor location in the Central Terminal, and was rejected in favor of a non-ACDBE vendor.[66] The analysis of intentional discrimination is equivalent to the analysis of disparate treatment under the Equal Protection Clause of the Fourteenth Amendment. (See *U.S. Department of Justice Title VI Legal Manual*, at 42 (January 11, 2001), citing: *Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1405 n. 11 (11th Cir.), reh'g denied, 7 F.3d 242 (11th Cir. 1993); *Guardians Association v. Civil Service Commission*, 463 U.S. 582, 582 (1983); *Alexander v. Choate*, 469 U.S.287, 293 (1985); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417, (11th Cir. 1985). To prove intentional discrimination, one must show that "a challenged action was motivated by an intent to discriminate." *Elston*, 997 F.2d at 1406. It does not require evidence of "bad faith, ill will or any evil motive on the part of the [recipient]." *Elston*, 997 F.2d at 1406 (quoting *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984). Intentional discrimination claims may be analyzed using the Title VII burden shifting analytic framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 at 802 (1973).

In applying the framework established in *McDonnell Douglas,* the complainant must first raise an inference of discrimination by establishing a prima facie case of discrimination. The elements of a prima facie case often include, (1) the aggrieved person was a member of a protected class,

[63] FAA Exhibit 1, Item 23, Motion and Reply at. 5.
[64] FAA Exhibit 1, Item 24 at 8.
[65] FAA Exhibit 1, Item 20, Memorandum of Points and Authorities at 22.
[66] FAA Exhibit 1, Item 23, Motion and Reply at 8.

(2) the person applied for, and was eligible for a federally-assisted program that was accepting applications, (3) despite the person's eligibility he or she was rejected, and (4) recipient selected applicants of the complainant's qualifications, or the recipient continued to accept applications from applicants of complainant's qualifications.

In this case, the Complainant has shown that both Mr. Yu and Mr. Sun are members of a protected class (Asian American). Although this claim was not stated in the amended complaint, the Complainant later clarified this point in its Reply. The Complainant also presumably applied for,[67] and was eligible for the Central Terminal concession opportunities that Respondent's consultant had solicited interest for in February 2003. In its reply, Complainant argued that it was adversely impacted by the selection procedures. It claimed that "while it clearly met the threshold qualifications necessary to be considered for a tenancy in the Central Terminal, Sun's was not selected, and yet has never been given any substantive explanation for that rejection despite repeated inquiries and requests for that information."[68] The Complainant further asserted, that "instead, Respondent, through its agent, negotiated a Central Terminal lease with a non-ACDBE certified Asian food and beverage tenant, Maki of Japan."[69] Maki of Japan is a firm generally sharing the same food service qualifications as the Complainant.

Although the record is unclear on whether the Central Terminal selection procedures required a formal application, and whether the Complainant submitted one in response to the consultant's solicitation efforts, the Director concludes that the Complainant has established a prima facie case based on disparate treatment under Title VI.

Since the Complainant has established a prima facie case, the burden then shifts to the Respondent to articulate a legitimate, nondiscriminatory reason for the Complainant's rejection. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 at 802 (1973).

The Respondent indicated that the third party consultant had selected a slate of 11 vendors that it assessed to be the best mix of businesses to meet the Respondent's requirements for having a variety of food types, goods and services at different price points, a blend of national and local businesses that would promote the Pacific Northwest region, and inclusion of ACDBE participation. According to the Respondent, the Complainant was not among the best qualified given the overall criteria, and was not included in the slate of vendors that was submitted to the Port Commissioners for approval.

The Respondent has articulated a nondiscriminatory explanation for the alleged discriminatory action, and nothing in the regulation or the governing authorities compels the selection of a vendor not deemed one of the best qualified. The Director then must determine whether the record contains sufficient evidence to establish that the Respondent's stated reason was a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 at 804 (1973). The Director will consider whether the evidence in the record supports a finding that the reason articulated by the Respondent was not the true reason for challenged action, and that the real

[67] Complainant indicted an interest in relocating to the Central Terminal during the competitive process. FAA Exhibit 1, Item 11, Amended Declaration of Lo-Yu Sun at 5.
[68] FAA Exhibit 1, Item 23, Motion and Reply at 7.
[69] Id.

reason was discrimination based on race.

Evidence may be found in various sources, including statements by decision makers, the historical background of the events in issue, the legislative or administrative history (e.g., minutes of meetings), the sequence of events leading to the decision in issue, a departure from standard procedure (e.g., failure to consider factors normally considered), a past history of discriminatory or segregated conduct, and evidence of a substantial disparate impact on a protected group. See *U.S. Department of Justice Title VI Legal Manual*, at 43 (January 11, 2001), citing: See *Arlington Heights v. Metropolitan Hous. Redevelopment Corp.*, 429 U.S. 252, 266-268(1977); *Elston*, 997 F.2d at 1406.

While each side has submitted voluminous documents, there is no evidence to indicate that the Port has a past history of discrimination or that the actual selection process and the evaluation done by the third party consultant was discriminatory.[70] The evidence in the record reflects a thoughtful process designed to achieve a mix of businesses providing goods and services at different price points mirroring a blend of national and local businesses promoting the Pacific Northwest.[71]

The Director considered the representations made by Linda LaCombe, the former Port employee who served as the Port's Manager of Commercial Development and understood her concerns relative to competition in the Asian food arena.[72] However, the Director concluded that although it was Ms. LaCombe's belief that the Respondent's third party consultant promised Ms. LaCombe that the selected Asian food and beverage operation would be ACDBE operator, there was no actual requirement for this to occur, and its non-occurrence does not rise to an act of discrimination.

Thus, the Complainant has not provided evidence to indicate that Respondent's non-discriminatory reason for the selections was a pretext for discrimination. Therefore, the Director finds that Respondent did not discriminate against Complainant because of its race when it chose not to select the Complainant to be a vendor in the Central Terminal.

Issue 3: *Whether the Respondent's alleged actions, or lack of actions, individually or cumulatively, were contrary to the administrative, general and compliance requirements of 49 CFR Parts 23 and 26 and Federal Grant Assurance No. 37.*

The Complainant alleged that Respondent did not comply with the ACDBE program regulations under 49 CFR Part 23. In addition to its allegations that Respondent violated the non-discrimination provisions under 49 CFR § 23.9(a), and 49 CFR § 26.7, Complainant also alleged Respondent failed to comply with 49 CFR § 23.9(b), which requires Respondent to take all necessary and reasonable steps to ensure nondiscrimination in the award and administration of

[70] FAA Exhibit 1, Item 30. The Port, for example, achieved 22.01% in DBE participation in its concessions program in fiscal year 2004, and 19.54 % in fiscal year 2005.
[71] FAA Exhibit 1, Item 20, Exhibit 6.A.
[72] FAA Exhibit 1, Item 11, Declaration of Linda LaCombe at 3.

contracts and agreements covered by this part. Additionally, the Complainant also alleged the Respondent failed to carry out the objectives of the ACDBE program under 49 CFR § 23.1.

The Complainant cited in its complaint the requirements under 49 CFR §§ 23.25 (a-d), which require Respondent to include and maximize race neutral measures to obtain as much as possible of the ACDBE participation needed to meet overall goals through such measures. It also cited the requirement under 49 CFR § 23.25(e), which requires Respondent to implement race-conscious measures when race neutral measures, standing alone, are not projected to be sufficient to meet an overall goal.[73]

The Complainant asserted, for example, that the Respondent's high build-out costs in Concourse A, its street pricing policy, and its marketing costs, which it alleged benefited only the Central Terminal, all negatively impacted the financial status of Manchu Wok in Concourse A.[74]

The Director finds that Respondent submitted evidence to substantiate it had used race neutral measures to advertise opportunities for the Central Terminal, which enabled Respondent to fully meet its overall ACDBE goal of 19.54 percent for fiscal years 2006- 2008, the years following the opening of the Central Terminal in 2005.[75] For example, the Respondent conducted a public meeting and public outreach.

The Director also finds that Respondent has demonstrated it was responsive to the concerns of the Complainant and other ACDBEs in Terminal A that complained about the negative financial impact of the high build out costs in Terminal A, and to the concerns of Complainant and others with regard to the signage and marketing of their concessions by the Port. In the former case, the Respondent provided rent relief after it reviewed the matter, and in the latter case, the Respondent amended its signage program to ensure that tenants in the outer concourses were advertised more effectively.[76]

The Director believes it is important to emphasize that the ACDBE Program is designed to create a level playing field on which ACDBEs can compete fairly for opportunities for concessions. The ACDBE Program was never intended to guarantee success to participants who avail themselves of opportunities, just as no business, large or small, ACDBE or non-ACDBE, is guaranteed to make a profit and to be a successful venture in airport concession programs.

In conclusion, there is no evidence to support the allegation that the Respondent failed to comply with the administrative, general and compliance requirements of 49 CFR Parts 23 and 26, and Federal Grant Assurance No. 37.

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[73] FAA Exhibit 1, Item 11, Amended Complaint at 3-4.
[74] Id., Amended Declaration of Lo-Yu Sun at 7 and 8.
[75] FAA Exhibit 1, Item 20, Exhibit 6.A, and Memorandum of Points and Authorities at 5-6.
[76] Id., Affidavit and Exhibits at 4-5.

Findings and Conclusions

Upon consideration of the submissions and responses by the parties, and the entire record, herein, and the applicable law and policy and for the reason stated above, the Director finds and concludes as follows:

Issue 1: The Respondent, Port of Seattle's leasing policies and selection procedures for the Central Terminal vendors did not have a disparate impact on Complainant and similarly-situated Asian American food and beverage vendors in the outer concourses, and was compliant with 49 CFR § 26.7(b).

Issue 2: The Respondent did not discriminate against the Complainant when the Respondent did not select Complainant as a vendor for the Central Terminal, and was compliant with 49 CFR § 26.7(a).

Issue 3: The Respondent's actions, or lack of actions, individually or cumulatively, were not contrary to the administrative, general and compliance requirements of 49 CFR Parts 23 and 26 and Grant Assurance No. 37.

ORDER

Accordingly, it is ordered that:

The Respondent's Motion to Dismiss is granted for the reasons stated above;

2) The complaint is dismissed; and

3) All motions not expressly granted herein are denied.[77]

Right of Appeal

The Director's Determination is an initial agency determination and does not constitute a final agency action and order subject to judicial review (14 CFR § 16.247(b)(2)). A party to this proceeding adversely affected by the Director's Determination may appeal the initial determination to the FAA Assistant Administrator for Civil Rights pursuant to 14 CFR § 16.33(b) within thirty (30) days after service of the Director's Determination.

Randall S. Fiertz
Director, Office of Airport Compliance
and Field Operations

Nov. 14, 2008
Date

[77] This includes striking FAA Exhibit 1, Item 25, Complainant's Supplemental Declaration and Exhibit A 2007 Performance Audit Report from the Record. This item is irrelevant to the matters under review in this proceeding and was submitted notwithstanding the Director's Order, dated September 12, 2007.