

December 31, 2013

Ms. Lynn Peterson, P.E.
Secretary of Transportation
Washington State Department of Transportation
310 Maple Park Avenue S.E.
P.O. Box 47300
Olympia, WA 98504-7300

Re: Recommendations in Response to The Federal Highway Administration's
(FHWA) Investigation Concerning the Disadvantaged Business Enterprise (DBE)
- Complaint: DOT #2012-0257 (Complaint)

I. Summary of Recommendations

The recommendations contained in this memorandum can be grouped into two categories.

First, counsel strongly recommends that the Washington State Department of Transportation (WSDOT) fully avail itself of the remedies allowed under the Alaskan Way Viaduct Bored Tunnel Project (Project) Contract given that Seattle Tunnel Partners (STP) has committed an event of default. Specifically, in light of the Federal Highway Administration's (FHWA) findings of noncompliance with the DBE program relating to STP's substitution of Grady Excavating, Inc. (Grady) with another DBE on the Project, WSDOT should declare an event of default under the Contract, recover its damages, and assess appropriate financial penalties. Anything short of this course of action would be inconsistent with the plain language of the Contract and WSDOT's stated desire to reform its DBE program. To the extent WSDOT assesses penalties against STP, WSDOT should use those penalties to increase DBE participation by offering to return some portion of the assessed amount to STP for each percentage point it achieves over the Contract's 8% DBE participation goal.

Second, WSDOT should rely on the Contract language that allows it to fashion "other remedies" when STP is noncompliant with the DBE requirements, such as creating a rigorous just-in-time oversight and monitoring mechanism that tracks and evaluates STP's interactions with and utilization of DBEs. Reliance on incidental reporting from DBEs via various WSDOT personnel, STP's self-reporting, or bi-weekly and monthly meetings with STP has proven to be insufficient to quickly identify, investigate and remove potential barriers to DBE participation. Furthermore, WSDOT's current oversight and monitoring mechanisms do not provide DBEs, who are either bidding on or performing work on the Project, with an understanding of who WSDOT's authorized

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point of contact is to investigate and resolve issues. It may well be necessary to memorialize the above recommended “just-in-time” oversight and monitoring mechanism via a Project change order, one in which STP is required to waive any and all claims against WSDOT relating to its process for overseeing and monitoring STP’s compliance with the DBE program.

II. Background

In the fall of 2012, the FHWA received and commenced an investigation into a Complaint filed by Elton Mason, a Washington DBE, against WSDOT and STP, the prime contractor for the Project. On November 1, 2013, FHWA’s Washington Division transmitted to WSDOT the FHWA findings and conclusions following the investigation. A four-page cover letter signed by the FHWA Division Administrator, Daniel M. Mathis,¹ accompanied the FHWA 20-page Report of Investigation (Report).² In the letter, Mr. Mathis wrote: “The investigation found that the facts supported Mr. Mason’s allegations as well as those of an additional eight DBEs.”

In the Report itself, the FHWA concluded:

The evidence supports a noncompliance finding in that WSDOT has failed to provide sufficient or effective oversight of STP’s efforts to meet the 8% DBE goal on the Project, and has provided insufficient oversight of STP’s procurement practices to ensure STP does not create barriers for DBE participation [under 49 CFR §26]. While STP ultimately replaced Grady with another DBE, it failed to follow the procedures set forth in the regulations [49 CFR §26]; it placed artificial barriers in its RFP, and created hardships for DBE respondents that were not required of Grady.

WSDOT has failed to intervene when there is clear evidence to support that STP is not making adequate good faith efforts to achieve the Project goal which was a condition of contract award. It is clear that STP is not actively and aggressively using all measures that one would reasonably undertake if intending to meet the Project’s DBE goal; it continues to engage in pro forma efforts that do not yield DBE participation while submitting inflated DBE participation reports based upon unsubstantiated commitments.

As a result, the FHWA required WSDOT to take certain actions including:

- Identifying “specific actions that will be taken to achieve the 8% DBE goal by the Project’s completion date in 2015.”
- Taking “all appropriate actions against STP available under its contractual agreement.”

¹ D. Mathis, FHWA Division Administrator, Letter Dated November 1, 2012 to WSDOT Secretary, L. Peterson.

² FHWA, Report of Investigation, Disadvantaged Business Enterprise (DBE) Complaint (DOT# 2012-0257).

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- Replying to the Report within 30 days, and indicating whether WSDOT wished to commence conciliation proceedings.

III. WSDOT Engages Special Assistant Attorney General

On November 6, 2013, WSDOT engaged Richard E. Mitchell with Graham & Dunn, PC, to review FHWA's factual allegations and findings and, in part, address the second of the three above bullets by providing recommendations to WSDOT on appropriate actions to take under WSDOT's contract with STP. This memorandum, which examines various Contract clauses, includes those recommendations.

IV. WSDOT's Response to the FHWA Report

On November 27, 2013, WSDOT Secretary, Lynn Peterson, replied to the Report. In her response, Secretary Peterson requested the commencement of conciliation proceedings under 49 CFR §26.103(d), and outlined a series of actions that WSDOT had already committed to undertake to improve its monitoring and oversight of all WSDOT contracts with DBE participation goals. The WSDOT proposed actions focused on four primary areas:

- Identifying and implementing specific monitoring and oversight mechanisms;
- Clarifying roles and responsibilities for DBE goal setting, and establishing accountability to achieve those goals;
- Establishing consistent contract language pertaining to DBE participation goals; and
- Increasing engagement with and further supporting the DBE community.

The process of drafting and negotiating the FHWA/WSDOT Conciliation Agreement is currently under way, and as allowed by the federal regulations will continue "for at least 30 days, but not more than 120 days, from the date of [WSDOT's] request" of November 27, 2013. 49 CFR §26.103(d).

V. Factual Summary

Summary of the Facts Presented by the FHWA

The WSDOT's project staff advocated for a 3% DBE participation goal before the Contract was awarded, after the participation goal was officially established as a condition of award, and after the contract was awarded. WSDOT's Project Administrator stated on more than one occasion that she believed the 8% DBE participation goal was too high, and that a 3% goal was more reasonable. In turn, WSDOT's project staff shared this perspective with STP's project team members.

WSDOT's Contract Administrator stated that WSDOT did not get involved in STP's procurement policies and procedures. In turn, STP stated that it did not like to unbundle

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contracts as it preferred to deal with one subcontractor, and that its subcontractor selection criteria was based on the lowest responsive bid.

The FHWA paid close attention to a Request for Proposal (RFP) that STP issued in early 2012 to substitute Grady on the Project, once the Governor's Office of Women and Minority Business Enterprises (OMWBE) decertified Grady as a DBE. STP's new RFP required that bidders own a minimum of twenty trucks; submit detailed personal and business financial information; obtain a performance bond, when such a bond is not normally required for the work in question; and respond to the RFP through web-based construction management software system, called Aconex, that many DBEs found onerous – even though STP's contract with WSDOT did not require use of the system. In the original RFP, the one to which Grady responded and was awarded the trucking contract, none of these barriers to DBP participation were present.

The FHWA noted that on August 12, 2012, STP's Project Administrator convened a meeting of DBEs that had submitted a bid on the new RFP, but did not disclose in advance to them the purpose of the meeting. Many of the DBEs thought the bid awardee would be announced at the meeting. However, instead, STP's Project Administrator advised the DBEs for the first time that: their bids were compared to Grady's; none of them had submitted a low enough bid; they were all non-responsive for failing to submit their bids via the Aconex system; STP intended to continue working using Grady on the Project; and that STP would not meet the 8% DBE participation goal.

Notwithstanding the above, and irrespective of STP's 1% attainment of the DBE participation goal with the Project completion at 33% as of the date of the Report, STP believed that its DBE recruitment events, and meet and greet and open house activities were sufficient to demonstrate evidence of good faith efforts to meet the Contract's 8% DBE participation goal. Similarly, WSDOT's Project and Contract Administrators felt that STP was making outstanding efforts to reach out to DBEs.

Summary of Investigation by WSDOT's SAAG

During initial discussions with WSDOT project staff, WSDOT staff communicated the need to further evaluate the FHWA findings in context. Therefore, counsel determined that supplemental interviews would be necessary. Those interviews were conducted with WSDOT and STP personnel, as well as the other DBEs referred to in the FHWA Report.³ The documents reviewed included those referred to by the FHWA in addition to the FHWA's interview notes (both as provided by the Office of the Attorney General). In addition, documents provided by interviewees were reviewed. Finally, counsel participated in a variety of WSDOT/STP/FHWA meetings where, in some instances, STP project officials discussed the status of DBE participation on the Project.

³ While counsel's supplemental evaluation of the FHWA findings included interviews with other DBEs referred to in the Report, the final conclusions drawn in this memorandum are not based on the statements made by those other DBEs.

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Additional Facts

- After WSDOT's HQ Construction arrived at the 8% DBE participation project goal, WSDOT's project staff advocated for a 3% DBE participation goal. In particular, WSDOT's Project Administrator spoke directly with WSDOT's Office of Equal Opportunity (OEO) about the need to change from an 8% to 3% goal, due to the amount of specialty work on the project.
- OEO was present during a meeting convened by STP where DBEs specifically asked STP's Project Manager whether the work in trucking RFPs could be unbundled into smaller contracts to provide more opportunities. STP's Project Manager responded that he would get back to the DBEs, but did not.
- OEO and STP do not directly interact, independent of WSDOT's project office. To the extent OEO has offered to assist STP with DBE engagement, STP has not yet responded to that invitation.
- WSDOT's Contract Administrator and newly appointed DBE Program Manager believe that WSDOT cannot advise STP on how to manage its subcontracts as "the subcontracting process is STP's own business decision." WSDOT perceives involving itself in STP's subcontracting processes as taking on risk.
- WSDOT's project office has never availed itself of any of the Contract's breach remedies on the Project.
- OEO perceives WSDOT's project office as not wanting OEO to communicate directly with DBEs on DBE subcontract issues. So OEO reports any DBE complaints it receives to the project office. DBEs report that the project office then tells them to work it out their concerns directly with STP, as the DBEs do not have a contract with WSDOT.
- WSDOT's former Project Manager stated that it's not the project office's role to investigate DBE complaints/concerns; that's OEO's role.
- WSDOT's current Project Administrator noted that the Project Contract Administrator was not engaged in any oversight and monitoring of the DBE program. His role was to manage the "administrative end" of the Project.
- WSDOT's Contract Administrator does not recall receiving DBE program training.
- There is nothing in the FHWA Report that is categorically false. (Dragados - Miller/D'Angelo).
- The impediments referred to in the new trucking RFP (e.g. bonding, truck ownership, financial records, etc.) existed. The imposition of impediments was inconsistent with Dragados' policy. (Dragados - Miller/D'Angelo).
- OEO was not aware of STP's Aconex system, or any other impediments raised by STP relating to the new trucking RFP referred to in the Complaint until after it had been filed and the FHWA investigation had already begun.

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- Aconex was intended to make things more transparent, track RFIs, and create appropriate access controls. However, requiring use of Aconex on bids is inconsistent with Dragados' policy. (Dragados - Miller/D'Angelo).

Facts Uncovered in Interviews with Other DBEs Referred to in the FHWA Report

- Barry O'Young did not learn about the Grady decertification issue and new trucking RFP until after the news was publicly televised. It is unclear how STP develops its DBE lists, and when and who STP is communicating with concerning DBE opportunities. STP's trucking work consistently requires bidders to bid on barging material to a specific location, which increases the bid estimate. Mr. O'Young requested that STP break up the new RFP to exclude the barging component. STP declined to do this.
- Ardith Lanstra was engaged as an independent consultant to HTNB, but not allowed to control her working conditions and work period. She was directed to work at HTNB during certain times of the day, at certain work stations, to use the email addresses of a specific HTNB employee, and to use only certain office supplies. Ms. Lanstra communicated her concerns to WSDOT, but no one at WSDOT responded. After Ms. Lanstra openly expressed these concerns, STP terminated her contract, giving her less notice than was required under her contract terms. Ms. Lanstra has not worked on the Project since that time.
- Duane May attended a DBE meeting in Spokane convened by STP, to learn about rebar supply opportunities. At the meeting, Reggie Smith, an STP employee, stated that Harris Rebar would likely get the work, but that STP would look at any bids. Since most DBE rebar bidders knew that Harris Rebar would only subcontract work out to Rebar International that meant that the other DBE rebar suppliers in attendance would have to be third or fourth tier subcontractors to get any work. STP was asked to unbundle the rebar work, so that labor could be bid separately. STP declined to do so. Consequently, the other DBE rebar suppliers could not submit competitive bids.
- James Hasty signed a fuel supply contract with STP. STP then changed Hasty's scope of work from fueling an on-site and metered tank to fueling on-site equipment. Since the scope change materially affected Mr. Hasty's pricing, he refused to agree to the change without a contract price change, asked for a copy of the signed contract, and said the work should be rebid. STP responded that if Hasty did not agree to the change, he would not get the work. STP further stated that it had not countersigned the contract. Hasty did not get the work.
- Susan Belcher stated that STP repeatedly called her to bid, and openly stated that it wanted to establish a record of getting DBE bids. Because she kept bidding without getting work, Ms. Belcher called WSDOT to find out whether STP was simply calling for bids to satisfy some requirement without really intending to hire DBEs. STP invited bids through one union (Bricklayers), without telling the bidders they would accept bids through another union (Painters). The labor costs between the two are materially different. If Ms. Belcher had known that

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STP was inviting bids from the Painters union, she would not have submitted bids, as her labor costs through the Bricklayers union are higher.

- Catherine Bassetti has a signed contract with STP to photograph the Project while under construction. For six months Ms. Bassetti waited for STP to give her a start date to commence work. She eventually received a call from Reggie Smith, who told her to look for other work as STP did not have start date for her. No further explanation was given. Ms. Bassetti has never performed any work on the Project.

VI. Statement of the Issues

1. Whether noncompliance with DBE requirements constitutes material breach of the Contract?
2. Whether WSDOT's course of dealings, its failure to avail itself of contractual remedies, or any other affirmative acts or omissions in administering the Contract constitutes a waiver of WSDOT's rights and remedies in the event of a default?
3. What contractual remedies are available to WSDOT to correct noncompliance?

VII. Analysis

Discussion on Issue 1

Appendix 6 of the Contract contains the applicable DBE participation requirements and procedures under 49 CFR §26 for the Project. Section 8.2.1 of the Contract expressly states that STP “*shall* comply with the requirements set forth in Appendix 6.” (Emphasis added). The compulsory language in Section 8.2.1 is explained in Appendix 6, Section 8.4, which states:

“Design-Builder *shall* carry out applicable requirements of 49 CFR Part 26 in the *award and administration* of contracts, which contain funding assistance from the United States Department of Transportation. *Failure by Design-Builder to carry out these requirements is a material breach of this contract*, which may result in the termination of this contract or such other remedy as WSDOT deems appropriate.” (Emphasis added).

This language – “[f]ailure by Design-Builder to carry out these requirements is a material breach of this contract” – is reinforced in Section 16.1.1 of the Contract, which specifically itemizes what constitutes a pre-defined event of default. It states:

“Design-Builder *shall* be in breach under the Contract upon the occurrence of any one or more of the following events or conditions:...(g)...Design-Builder fails to perform any other obligation under the Contract Terms, including EEO and *DBE requirements*...” (Emphasis added).

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Similarly, FHWA Form 1273, which is incorporated into the Contract by reference, states in Section II (10)(b) the following: "...The contractor *shall* carry out applicable requirements of 49 CFR Part 26... *Failure by the contractor to carry out these requirements is a material breach of this contract*, which may result in the termination of this contract or such other remedy as the contracting agency deems appropriate." (Emphasis added). The FHWA Form 1273 language mirrors the same language contained in 49 CFR §26.13(b).

In its Report, the FHWA stated that "[w]hile STP ultimately hired another DBE to replace Grady, the procedures it followed created barriers and hardships for DBEs which do not conform to good faith efforts requirements."⁴ The phrase "good faith efforts" means that STP:

"must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to objective, could reasonably be expected to obtain sufficient DBE participation even if they were not fully successful."

49 CFR §26, Appendix A. When evaluating STP's good faith efforts, and in affect whether it is compliant with DBE requirements,

"...It is important for [the recipient/WSDOT] to consider the quality, quantity, and intensity of the different kinds of effort that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements."

49 CFR §26, Appendix A. Consequently, when one of the STP joint venture partners (Dragados) stated that nothing in the FHWA Report was categorically false, and that STP's noncompliant behavior was inconsistent with Dragados' own procedures, they confirmed not only the underlying facts concerning STP's conduct in 2012, but also FHWA's conclusions based on those facts.

Specifically, when STP issued an RFP that required bidders to: own a minimum of twenty trucks; submit detailed personal and business financial information; obtain a performance bond where such a bond is not normally required for the work in question; and respond to the RFP through a newly acquired web-based construction management software system called Aconex, which most DBEs found too onerous to use, that conduct created barriers and hardships for DBEs inconsistent with the requirements of 49 CFR §26.

In short, the totality of STP's behavior with the RFP was wholly inconsistent with that of a prime contractor "actively and aggressively trying to obtain DBE participation." If anything, it was suggestive of both willful intent to do otherwise and absolute disregard

⁴ FHWA Report, Page 12.

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of the Project's DBE participation requirements by engaging in conduct that was neither necessary nor reasonable to achieving the goal of 8% DBE participation. Section 8.2.1 and Appendix 6, Section 8.4.

Likewise, when STP misled DBEs into attending a meeting during which they believed Grady's replacement would be announced and instead told those DBEs that their bids were being compared to Grady's, STP had already anticipated not meeting the 8% DBE participation goal in 2012, and only bids lower than Grady's would be considered. This too was wholly inconsistent with the Contract requirements. Many of the DBEs would not have submitted bids, if they had known their bids would be compared to Grady's, as due to their size they could not compete with a much larger trucking company such as Grady. Moreover, STP's statements in 2012 that it would not meet the DBE participation goal, when the Project was not scheduled for completion until 2015, further highlighted its lack of intent to take necessary and reasonable steps to meet the goal that was a condition of award.

The FHWA further referred to additional STP conduct that was not of the quality, quantity and intensity expected if STP were actively and aggressively trying to obtain DBE participation. In particular, while the FHWA commended STP on its outreach efforts, it simultaneously noted that such efforts were "pro forma window dressing rather than authentic good faith efforts" if they did not yield meaningful contracts for DBEs.⁵ As stated by the FHWA, "[m]eaningful good faith efforts require not only absorbing some higher costs if necessary, they also mean removing barriers such as those found in STP's RFP to replace Grady."⁶

Those barriers to participation include: requiring in the new trucking RFP that debris be trucked from the site and then barged to another disposal area rendered DBE bids non-competitive; refusing to unbundle labor and rebar in a rebar RFP when STP knows that DBEs cannot compete on material price with major rebar suppliers; awarding a fuel contract and requiring a scope change without a corresponding price change; and finally calling a DBE and openly stating that it (STP) wants to establish a record of getting DBEs to bid.

In isolation, and notwithstanding the fact that STP ultimately hired another DBE to replace Grady, STP's conduct specific to the new trucking RFP is sufficient to conclude that STP was not taking all necessary and reasonable steps to achieve the DBE project goal of 8% participation in 2012. Therefore, it had failed at that time to perform its obligations under the Contract – specifically the DBE requirements. Moreover, when considered in context with the other DBEs referred to in the Report, the totality of circumstances surrounding STP's conduct in 2012 as reported solely by the other DBEs, and Elton Mason, raises additional concerns with the existence of enduring systemic conduct that warrants aggressive oversight and monitoring, in addition to possible corrective action on the part of WSDOT.

⁵ FHWA Report, Page 18.

⁶ FHWA Report, Page 18.

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Consequently, as compliance with DBE requirements is compulsory, when STP is noncompliant at any time with exercising good faith efforts, the Contract terms are unambiguous in that a material breach, an event of default, has in fact occurred. There is absolutely no reference in the Contract to WSDOT considering noncompliance with DBE requirements as anything other than a material breach. Therefore, as a threshold matter, STP's noncompliance with DBE requirements under the Contract, as initially established by the FHWA Report, and corroborated by STP officials, unequivocally constitutes a material breach of the Contract.

Discussion on Issue 2

Section 26.2 of WSDOT's contract with STP states in part that:

"No act, delay or omission done, suffered or permitted by one Party or its agents shall be deemed to waive, exhaust or impair any right, remedy or power of such Party under any Contract Document, or to relieve the other Party from the full performance of its obligations under the Contract Documents. No custom or practice between the Parties in the administration of the terms of the Contract Documents shall be construed to waive or lessen the right of a Party to insist upon performance by the other Party in strict compliance with the terms of the Contract Documents."

This language is of particular importance in light of the several statements contained in the FHWA Report concerning WSDOT's failure to fully exercise its obligations under 49 CFR §26. Specifically, the FHWA concluded that:

"WSDOT failed in its oversight responsibilities to ensure STP used good faith efforts to find other DBEs once the decision was made to replace Grady."⁷

"WSDOT failed to oversee and adequately monitor STP's efforts to achieve the DBE goal. WSDOT failed to intervene when it recognized STP's efforts to meet the DBE goals were not of the nature of the efforts contemplated and required under the DBE regulations."⁸

Some concern has been expressed by WSDOT with the need to consider WSDOT's own "unclean hands," its failures, omissions or inaction, when deciding on a course of action in response to STP's noncompliance. However, WSDOT's failures, omissions or inaction should not be relied upon by WSDOT to fail to enforce the plain language of the Contract. In fact, the Contract states that "No act, delay or omission permitted by one Party...shall be deemed to waive, exhaust or impair any right, remedy or power...under the Contract, or to relieve the other Party from the full performance of its obligations under the Contract Documents."

⁷ FHWA Report, Page 12.

⁸ FHWA Report, Page 19.

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Where an event of default has occurred, WSDOT's own failures, omissions or inaction related to that event of default do not provide STP with an argument that the Contract terms concerning events of default and the corresponding remedies have somehow been waived. Conversely, WSDOT should not rely on its own failures, omissions or inaction to not declare a defined event of default when one has in fact occurred, and to not exercise its right to other remedies under the Contract.

Discussion on Issue 3

There are several provisions within the Contract that address WSDOT's rights and remedies in the event STP breaches or otherwise fails to perform in accordance with the Contract. The provisions are not mutually exclusive, and reliance on one does not preclude simultaneous reliance on another.

Section 16.2.1, which states in part:

“If an Event of Default occurs, then, in addition to all other rights and remedies provided by Law or equity or available under the Contract or otherwise...WSDOT shall have the following rights and remedies, without further notice, and without prejudice to any of its other rights or remedies and without waiving or releasing Design-Builder from any obligations.... (a) WSDOT may order Design-Builder to suspend or discontinue the Work or any portion of the Work; (b) WSDOT may terminate the Contract or a portion thereof...;...(f) WSDOT may deduct from any amounts payable by WSDOT to Design-Builder such amounts payable by Design-Builder to WSDOT, including Liquidated Damages or other damages payable to WSDOT under the Contract Documents...” (Emphasis added).

Section 16.2.2.5 states in part:

“If WSDOT suffers damages as a result of Design-Builder's breach or failure to perform an obligation under the Contract Documents, then WSDOT shall be entitled to recovery of such damages from Design-Builder regardless of whether the breach or failure that gives rise to the damages ripens into an Event of Default.”

Contract Appendix 6, Section 8.3 states:

“WSDOT may incur damages if Design-Builder violates the DBE provisions under the Contract. These damages consist of additional administrative costs including, but not limited to, the inspection, supervision, engineering, compliance, and legal staff time and expenses necessary for investigating, reporting, and correcting violations as well as loss of federal funding. Pursuant to Section 10.3 of the Contract, damages attributable to Design-Builder's violations of the DBE provision may be deducted from progress payments due to the Design-Builder or from retainage withheld by WSDOT as allowed by RCW 60.28.021. Before any money is withheld, Design-Builder will be provided with notice of the basis of the violations and an opportunity to respond...In appropriate circumstances, WSDOT

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may also refer Design-Builder to state or federal authorities for additional sanctions.”

Contract Appendix 6, Section 8.4 states:

“Failure by the Design-Builder to carry out these requirements is a material breach of this Contract, which may result in the termination of this Contract or such other remedy as WSDOT deems appropriate...”

“If Design-Builder does not comply with any part of this Contract as required under 49 CFR Part 26, and/or any other applicable law or regulation regarding DBE, WSDOT may withhold payment, suspend, or terminate the contract, and subject Design-Builder to civil penalties of up to ten percent of the amount of the Contract for each violation....Design-Builder is entitled to request adjudicative proceeding with respect to WSDOT’s determination of contract violation and assessed penalties by filing a written application within thirty days of receipt of notification...”

Contract Appendix 6, Section 13 states:

“In the event that Design-Builder is found in noncompliance with the provisions of Contract Section 8.1 [Equal Opportunity] or 8.2 [Disadvantaged Business Enterprises], or the non-discrimination provisions of Appendix 5-C, WSDOT may impose such sanctions as it or the Federal Highway Administration may determine necessary to gain compliance including, but not limited to:... (c)...WSDOT may refer the matter to the Federal Highway Administration (FHWA) for possible federal sanctions; and/or (d) The Contract may be terminated.”

FHWA Form 1273, which is incorporated into the Contract, states in Section I (3):

“A breach of any of the stipulations contained in these Required Contract Provisions may be sufficient grounds for withholding of progress payments, withholding of final payment, termination of the contract, suspension / debarment or any other action determined to be appropriate by the contracting agency and FHWA.”

And in Section II (10)(b), FHWA Form 1273 states in part:

“Failure by the contractor to carry out these requirements [49 CFR § 26] is a material breach of this contract, which may result in the termination of this contract or such other remedy as the contracting agency deems appropriate.”

Again, in plain language, Section 16.2.1 establishes that when an event of default occurs, WSDOT may rely on remedies specific to events of default concurrently other remedies available under the Contract. But, if STP’s nonperformance is determined to be a failure to comply with the DBE requirements, and by definition an event of default, then WSDOT’s remedies include either termination of the Contract or such other

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remedy as it deems appropriate. Termination is not compulsory. See FHWA Form 1273, Sections I (3) and II (10)(b).

Therefore, when STP is noncompliant and otherwise fails to comply with the DBE requirements, and thus triggers a technical event of default, WSDOT may (in addition to termination or such other remedy it deems appropriate) incur recoverable administrative costs including, but not limited to, the inspection, supervision, engineering, compliance, and legal staff time and expenses necessary for investigating, reporting, and correcting violations. Contract Appendix 6, Section 8.3; see also Contract, Section 16.2.2.5. WSDOT may withhold payment, suspend, or...subject Design-Builder to civil penalties of up to ten percent of the amount of the Contract for each violation. Contract Appendix 6, Section 8.4. In addition, WSDOT may impose such sanctions as it or the Federal Highway Administration may determine necessary to gain compliance....” Contract Appendix 6, Section 13.

While the Contract specifically affords STP notice of and the right to cure a breach before WSDOT formally declares such breach, those rights are inapplicable when the breach in question cannot be cured. Section 16.1.2. Here, STP cannot cure impediments raised in 2012 during the Grady new trucking RFP process, as the impact to the DBEs who either responded or endeavored to respond to the RFP cannot now be mitigated. Those who, for example, were unable to obtain bonding, could not navigate the Aconex system, submitted personal and/or business financial data unnecessarily, and had their bids compared to Grady’s without their prior knowledge, have irrevocably experienced incurable impediments and hardships inconsistent with the good faith effort requirements of 49 CFR §26 of the Contract. They may well have not been able to submit competitive bids due to the very impediments raised by STP.

In short, under the Contract, WSDOT should give STP notice that a defined event of default has occurred (Section 16.1.1(g)), where notice and the right to cure is inapplicable (Section 16.1.2), and request adequate assurance of future performance under the Contract (Section 16.2.2.2). In addition, with respect to remedies related to technical events of default, WSDOT should take action to recover its damages (Sections 16.2.2.1 and 16.2.2.5, and App. 6, Section 8). Further, as it has been determined that STP was noncompliant with the DBE provisions of the Contract, WSDOT should consider withholding payments each time STP is noncompliant going forward (App. 6, Sec. 8.4), and should subject STP to civil penalties up to 10% of the Contract for the 2012 violation and each subsequent violation (App. 6, Sec. 8.4). Finally, consistent with FHWA Form 1273, WSDOT should fashion “such other remedy as WSDOT deems appropriate” (App. 6, Sec. 8.4, App. 6, Sec. 13), to include an aggressive just-in-time DBE oversight and monitoring mechanism, as well as an incentive program to increase DBE participation beyond the Contract goal (e.g. refunding a portion of amounts assessed for noncompliance).

VIII. Conclusion & Recommendations

While neither the Contract nor the federal regulations require WSDOT to evaluate the relative severity of STP's noncompliance with DBE regulations before determining whether to declare an event of default, it is counsel's assessment nevertheless that the facts surrounding STP's noncompliance in 2012 are egregious. What occurred with the new trucking RFP to replace Grady is irrefutable and, without regard to other allegations involving other DBEs, warrants clear and decisive action on the part of WSDOT. When considered in context, STP's conduct in 2012 raises serious concerns with the need for systemic change within STP, change which may well have commenced in 2013, but nonetheless must be addressed now by WSDOT with more robust monitoring and oversight of STP's DBE program compliance.

Therefore, counsel recommends that WSDOT should:

- Advise STP in writing that a defined event of default occurred, which cannot be cured and for which no notice is required relating to STP's material breach of the Contract DBE requirements when STP substituted Grady in 2012.
- Advise STP that WSDOT reserves the right to terminate the Contract, but that in light of STP's ongoing and collaborative efforts in 2013 to address the issues raised in the Complaint, WSDOT intends to rely on other discretionary Contract remedies to address the noncompliance.
- Specifically note that WSDOT is entitled to recover all of its damages relating to the event of default, and that it is assessing the scope of those damages, and further reserves the right to recover those damages under the Contract.
- Request assurance of future performance of DBE requirements under the Contract.
- Assess penalties for the noncompliance in an amount not to exceed 50% of the value of the new Grady trucking RFP contract award;
- Fashion other remedies, as allow under the Contract, to include the following:
 - Engage an independent DBE program monitor to oversee and monitor the Project DBE program, and otherwise implement the anticipated Conciliation Agreement.
 - Establish a just-in-time oversight and monitoring mechanism that allows the independent DBE program monitor to hear, investigate, and make recommendations to WSDOT's project team on issues raised by DBEs concerning STP's DBE program compliance.
 - Require STP's Project Manager (C. Dixon) and Commercial Manager (R. Steadbeck) to participate in all of WSDOT's bi-weekly DBE meetings and monthly project meetings.
 - Negotiate changes to the Contract that: require STP to advise DBEs of the existence and purpose of WSDOT's independent DBE program monitor; ensure that WSDOT's and/or the independent DBE program monitor's requests for information, investigations and other actions concerning

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STP's DBE program compliance cannot be relied on by STP as evidence of contractual interference or otherwise constitute damages for delays; require STP's DBE program manager to provide the information requested within a reasonable period of time, so that WSDOT can timely evaluate and resolve concerns raised; and define any non-responsiveness by STP to such requests as a material breach of the contract.

- Require STP to give WSDOT and the independent DBE program monitor reasonable advance notice of all STP outreach, pre-bid and other site meetings with DBEs, so that WSDOT and/or the DBE program monitor can attend.
- Require STP to certify that, prior to awarding of any non-DBE work, STP has reasonably unbundled the work to create distinct DBE opportunities and/or determined that no DBE opportunities reasonably exist.
- Require STP to establish competitive bidding range guidelines for DBEs who bid on RFPs and are not the lowest responsive bidders, such that they will have a reasonable opportunity to negotiate with STP for the some or all of the work.
- Require STP to provide to WSDOT, for inclusion in the Conciliation Agreement, a clear and concise written summary of all remaining Contract work potentially available for DBEs on the Project that will result in meeting or exceeding the 8% DBE participation goal.
- Require STP to provide to WSDOT, for inclusion in the Conciliation Agreement, a clear and concise set of policies and procedures for all future DBE RFPs.
- Require STP to build in sufficient time for WSDOT's to review all upcoming Contract work, not just DBE specific RFPs, and to fully evaluate that work for compliance with the DBE program.
- Withhold payments to STP each time it fails to provide information requested by the date requested (e.g. GFE Package, Action Plan, and information for the Project Contract Review Committee, etc.).
- To the extent WSDOT assesses penalties for the noncompliance with the DBE program requires, offer to refund a portion of those monies for each percentage point of DBE participation STP achieves over the 8% Contract goal.

Yours truly,

/s/ Richard E. Mitchell

Richard E. Mitchell
WSDOT – Special Assistant Attorney General
Shareholder, Graham & Dunn PC

RM/dd

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cc: Cam Gilmour, WSDOT, Deputy Secretary (via email)
Bryce Brown, Assistant Attorney General (via email)
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