



**Washington State
Department of Transportation**

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January 13, 2014

Seattle Tunnel Partners
999 Third Avenue, Suite 2424
Seattle, WA 98104
ATTN: Chris Dixon

Subject: SR 99 Bored Tunnel Alternative Design-Build Project
Contract No. 007999 / Federal-Aid No. BR-NH-STP-STPF-0099(111)
Requirements for Nondiscrimination, DBE

Dear Mr. Dixon:

On November 1, 2013, WSDOT received a letter summarizing the findings of a Report of Investigation (DBE Complaint DOT# 2012-0257) from FHWA Regional Administrator Dan Mathis. FHWA determined that there was "reasonable cause to find WSDOT in noncompliance with its obligations under the DBE program requirements" for two reasons:

- STP failed to follow the DBE procedures set forth in the regulations (49 CFR § 26); it placed artificial barriers in its RFP, and created hardships for DBEs that were not required of Grady Excavating, Inc.; and
- WSDOT failed to provide the requisite oversight to ensure STP is meeting its contractual commitments to meet the DBE goal or provide documentation of meaningful good faith efforts to do so.

As a result of these findings, FHWA requires WSDOT to (1) "take all appropriate actions against STP available under its contractual agreement" and (2) work with STP to identify actions that will be taken to achieve the 8% DBE participation goal by the Project's completion date in 2015.

I recognize that both WSDOT Program and Project staff as well as STP project staff have been working diligently over the last several months to rectify both project and program level coordination to meet or exceed the goal. The list of work to-date by both parties is significant. Nevertheless, FHWA's finding of STP's discriminatory behavior seriously jeopardizes the ability of the State to provide equal opportunity to all communities in the Region and State with this project and community investment.

Immediately following the receipt of the FHWA letter, WSDOT required a third-party analysis of the FHWA findings and to make additional recommendations to rectify the situation. A Special Assistant Attorney General was engaged to provide that third-party analysis. Mr. Richard Mitchell, an attorney with experience in civil rights laws and DBE contracting issues, began work his immediately.

After interviewing numerous individuals involved, including STP's DBE staff, and reviewing the evidence, Mr. Mitchell provided his analysis to myself and the Office of the Attorney General on December 31, 2014. Mr. Mitchell summarizes his findings and recommendations in the attached letter. The following is WSDOT findings and proposed next steps, taking into consideration, Mr. Mitchell's recommendations.

WSDOT Finding Number One:

Seattle Tunnel Partnership is in breach of the Contract pursuant to Contract Section 16.1.1(g) by erecting barriers and creating hardships to DBE participation.

The Contract language in Appendix 6 contains two important elements to remedy the finding of breach of DBE requirements: (1) Sections 8.3, 8.4 and 13 allow WSDOT to impose sanctions that include the recovery damages, assessment of penalties, withholding of progress payments, and suspension or termination of the Contract; and (2) under Section 8.4 and 13, WSDOT may impose "such other remedy" as WSDOT or FHWA deems appropriate.

Rather than initiate one or all of the various monetary remedies provided in the Contract at this time, WSDOT would prefer to assist STP in developing procedures that will ensure the future performance of STP in meeting the DBE requirements of the Contract. We recognize that with this finding of default, STP has the right, pursuant to Section 8.4 of the Contract, to request an adjudicative proceeding. I would ask that STP not consider that type of action, at this time, because the two parties (WSDOT and STP) would spend time and resources in litigation, and not on the removal of barriers to DBE participation nor on meeting the intent of the program.

WSDOT Finding Number Two:

WSDOT will pursue an in-lieu of sanctions methodology with STP to resolve this problem if and only if STP makes significant progress toward quarterly project DBE targets to meet or exceed the project DBE goal and allows WSDOT to monitor all activity related to sub-contracting to ensure no barriers or hardships are erected in future work conducted by STP.

Next Steps

- **Beginning today, January 13, 2014, WSDOT will require monthly progress reports from STP that demonstrate steady progress toward DBE goal attainment.** WSDOT, in consultation with STP, will set monthly and quarterly goals that must be achieved to reach or exceed the 8% DBE participation goal. WSDOT will consider that STP is making progress as long as these goals are met. If the quarterly goals are not met, unless there is an extenuating circumstance with substantial proof, WSDOT reserves the right to proceed with sanctions.
- **Beginning today, January 13, 2014, STP must allow WSDOT to monitor all activity related to subcontracting policies and procedures.** WSDOT's oversight and monitoring will be done to ensure that STP is not creating hardships or barriers to DBE participation. If there are not honest and open transactions with the DBE contracting community and WSDOT, WSDOT reserves the right to proceed with sanctions.
- WSDOT strongly encourages, to ensure compliance and progress toward these quarterly goals, that STP hire a DBE program monitor to independently oversee and monitor STP's DBE program and otherwise assist WSDOT in WSDOT's implementation of its Conciliation Agreement with FHWA. WSDOT will specifically request that William Miller of Dragados, USA be assigned full time to the Project in this capacity. Mr. Miller has been less than part-time in a consultation role.
- Based on Mr. Mitchell's findings and our WSDOT program/project staff experience, WSDOT strongly recommends that STP propose, develop and implement specific DBE procedures and practices. The proposed items include but are not limited to the following. This list should not be considered a minimum to meeting good faith requirements but actions that are focused on meeting or exceeding the goal.
 - Implement procedures to allow for oversight and monitoring of any and all DBE efforts and subcontracting by the STP program monitors.
 - Establish an oversight and monitoring mechanism that allows for independent DBE program monitoring with the ability to hear, investigate, and make recommendations to WSDOT's project team on issues raised by DBEs concerning STP's DBE program compliance.
 - STP's Project Manager (C. Dixon) and Commercial Manager (R. Steadbeck) will participate in all of WSDOT's DBE meetings and monthly project meetings.
 - Implement practices that advise DBEs of the existence and purpose of WSDOT's and/or other DBE program monitors.

- Require STP's DBE program monitor to provide information requested by WSDOT within a reasonable period of time, so that WSDOT can timely evaluate and assist in resolving any concerns.
- Implement a practice of STP giving WSDOT and/or any 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.
- Consider, prior to award of any non-DBE work, whether such work can be unbundled in order to create distinct DBE opportunities.
- Implement a practice of STP establishing competitive bidding range guidelines for DBEs who bid on RFPs and are not the lowest responsive bidders, such that DBEs will have a reasonable opportunity to negotiate with STP for some or all of the work.
- Agree 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.
- Agree to provide to WSDOT, for inclusion in the Conciliation Agreement, a clear and concise set of policies and procedures for all future DBE RFPs.
- Implement a practice of STP building in sufficient time for WSDOT to review all upcoming Contract work, not just DBE specific RFPs, and to fully evaluate that work for compliance with the DBE program.
- Implement, after consultation with WSDOT project staff, the STP DBE Action Plan. Review of this submittal is underway and should be completed in the next two weeks. WSDOT will be contacting STP should there be questions and concerns with your submittal.

I believe this path offers both parties the quickest path to a resolution to the removal of barriers and achieving or exceeding the 8% DBE participation goal.

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There is one item that is not resolved by this path and that is the potential damage done to DBE contractors based on STP's business practices that were identified in the FHWA report. WSDOT believes that STP should find a way to remedy potential damage caused by such actions. We have ideas to share with STP on how that could be accomplished.

It is in our shared interest that the DBE community has every opportunity to participate in the completion of this vital project. We look forward to assisting STP in your company's development and implementation of practices and procedures to provide such opportunities.

Finally, WSDOT reserve all rights under the Contract. Nothing in this letter shall be considered as a waiver of any Contract requirement or remedy. Any failure to adhere to the Contract DBE requirements, including a lack of progress toward the goal, shall result in the implementation of any and all remedies available under the Contract.

Sincerely,

Lynn Peterson
Secretary of Transportation

LP:jaa

cc: Victor Mendez, FHWA
Dan Mathis, FHWA
Joby Shimomura, Governor's Office
Todd Trepanier, WSDOT
File, Alaskan Way Viaduct Replacement Program