

## 2ESHB 1299 Section 217 Proviso Report

### Proviso Report Overview:

2ESHB 1299 Section 217 requires the Washington State Department of Transportation report on efforts for increasing the utilization for socially and economically disadvantaged business enterprises (DBEs) on our heavy highway construction and design projects. This proviso also requires the agency to discuss efforts in increasing the effectiveness of pre-apprenticeship program and outreach to socially and economically disadvantaged individuals. This report summarizes activities from July 1, 2015 through December 31, 2015.

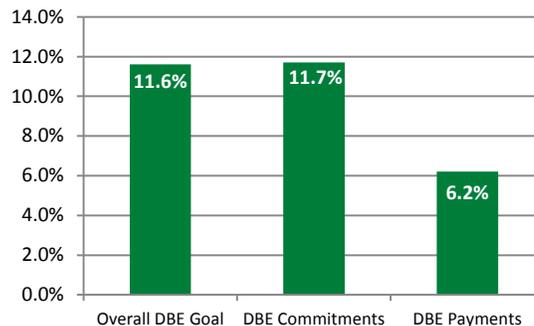
### Disadvantaged Business Enterprise Program

The Disadvantaged Business Enterprise (DBE) program ensures a level playing field and fosters equal opportunity for firms owned and operated by disadvantaged individuals on USDOT-assisted contracts and procurements. Projects with federal aid are required to be evaluated for Condition of Award DBE goals. Prime contractors and consultants are required to meet the condition of award DBE goals or demonstrate Good Faith Efforts in achieving these goals. WSDOT has an agency-wide overall DBE goal of 11.6% for Federal Highway Administration.

### Agency Progress:

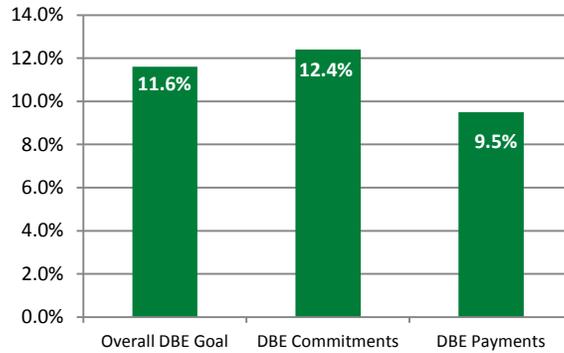
For FFY 2015 (October 1, 2014 through September 30, 2015), WSDOT (Local Programs, Consultant Services and HQ Construction) attained 11.7 percent in DBE commitments (condition of award goals 9.55 percent; voluntary participation 2.19 percent) and 6.2 percent in payments on closed contracts. WSDOT's payments were 6.2 percent due to old mega-projects contracted prior to the Conciliation Agreement, including a \$400 million dollar project from over ten years ago with nominal DBE participation.

Agency-wide processes and procedures have been implemented to ensure current and future DBE participation goals are in alignment with expectations as established in the conciliation agreement, regulations, and internal processes and procedures.



Thus far, for FFY 2016 (October 1, 2015 through November 30, 2015), WSDOT (Local Programs, Consultant Services and HQ Construction) has attained 12.4 percent in DBE commitments (condition of award goals are 12.35 percent and voluntary participation is at 0.08 percent) and 9.5 percent in payments on closed contracts. Improvements correlate to the new, more aggressive, project goal setting process used by WSDOT (implemented on May 1, 2015 which is reflected in the commitments).

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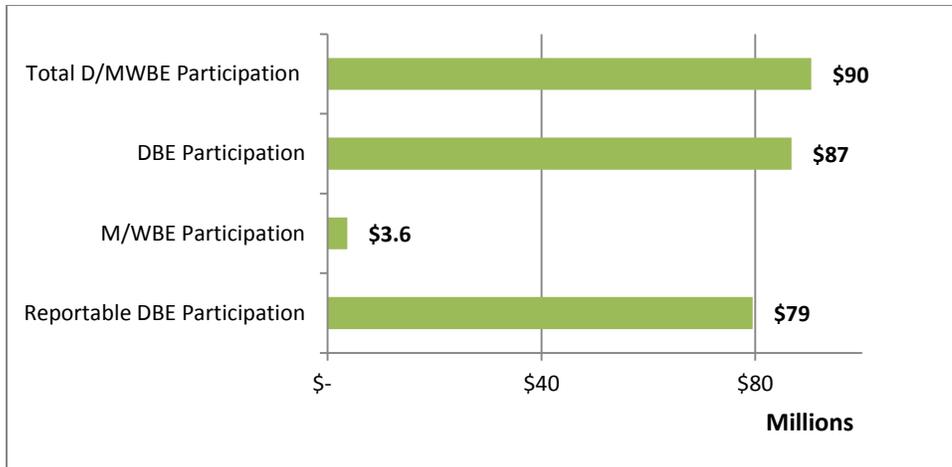
### **Accomplishments:**

- During August, WSDOT implemented the new DBE General Special Provision (GSP). This provides WSDOT Project Engineers with more control and responsibility for managing DBE Participation. The new DBE GSP is included as Exhibit A.
- On May 1, 2015, WSDOT implemented a new, more aggressive, project goal setting methodology. This has allowed WSDOT to meet the overall DBE goal in commitments. Below, and attached as Exhibit B) is an comparison of the two project goal setting methodologies:

<b>Methodology</b>	Previous Methodology	New Methodology
<b>Timeframe</b>	October 1, 2014 - April 30, 2015	May 1, 2015 - September 30, 2015
<b>Average Goal Set</b>	9.93%	12.89%

- On June 29, 2015, the Chief Engineer issued a project delivery memo regarding DBE utilization requiring all federally-assisted and potentially federally-assisted professional service agreements (e.g. Architectural and Engineering Agreements), supplements, task orders and task order amendments over \$250,000 evaluated for DBE goals. Previously, WSDOT evaluated new agreements for DBE goals. This memo is attached as Exhibit C. Professional service agreements will see this same level of emphasis.
- WSDOT is part of the Governor's Subcabinet on increasing agency spending with Small, Minority, Women and Veteran owned businesses. In support of this, WSDOT analyzed spending with DBEs as well as Minority and Women's Business Enterprises (M/WBE) to determine: how much money was going to the minority and women contracting community versus what was reported to the Federal Highway Administration pursuant to DBE program rules. WSDOT analyzed the last state fiscal year (July 1, 2014 through June 30, 2015) and the results are illustrated below:

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WSDOT is working with the Governor's Subcabinet on Business Diversity, specifically, the Department of Enterprise Services and Assistant Attorney General, to increase the effectiveness of the state Minority and Women's Business Enterprise program. Due to their similarities, best practices adopted under the Connecting Washington program should transfer to the DBE Program.

- WSDOT is finalizing a system for tracking and resolving DBE Program complaints (e.g. prompt payment, disputes, etc.). This log will assist the agency in providing more timely investigation and monitoring of prompt payment. WSDOT took this opportunity to be more transparent on payments made to prime contractors by posting the monthly payment details on the WSDOT website and requiring contractors to submit monthly subcontractor payment information. These changes along with an update to the specifications will reduce future prompt payment issues for all subcontractors. WSDOT will continue to closely monitor this issue.
- On November 16, 2015, FHWA Acting Associate Administrator for Civil Rights, Irene Rico, FHWA DBE Program Administrator, Martha Kennly, and FHWA Washington Division staff met with OEO DBE Program staff, HQ Construction staff, AWW staff, and members of executive leadership to discuss:
  - DBE Programmatic Update
  - Status of the Conciliation Agreement
  - Alaskan Way Viaduct Bored Tunnel Progress
  - Prompt Payment Update
  - Caucasian Women Owned Business Waiver Status
  - DBE Support Services Program Overview
- On October 20, 2015, WSDOT received a request from Dan Mathis, FHWA Washington Division Administrator, to submit an updated Caucasian women owned business (WBE) waiver. This waiver was originally submitted in March of 2014 and requested to remove WBEs from the race-conscious portion on the DBE Program. The revised waiver was submitted on November 9, 2015 and is attached as Exhibit D.

### **DBE Support Services:**

- WSDOT has developed a new DBE Support Services and Long Term Business Development Program Delivery Model. This model consists of a Business Development Advisor (BDA) serving as a case

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manager for DBEs. The BDA will assist firms with accessing readily available, free resources, such as the Small Business Development Centers, for Business Plan assistance.

Also, DBEs enrolled in the Long Term Business Development Program, or upon request, will be able to receive free targeted technical assistance from consultants providing the following technical assistance (presently three agreements have been executed, three more are nearly executed):

- Information Technology
- Contract Administration (change orders, prompt payment, invoicing, etc.)
- Bidding and Scheduling
- Proposal Preparation
- Bonding Assistance
- Accounting (FAR and Safe Harbor)
- Management
- Marketing

Service delivery is managed by the BDA to ensure adequate technical assistance is provided to highway-related DBEs.

Additionally, WSDOT has recently executed a contract with the Washington Procurement Technical Assistance Center (PTAC) to ensure the needs identified by the Alaskan Way Viaduct program DBEs are adequately addressed. This contract was written to ensure AWV and DBEs statewide can receive technical assistance as necessary. WSDOT has also partnered with Native-PTAC, the USDOT Small Business Transportation Resource Center, and the Washington Center for Women in Business to deliver additional services.

- The Disparity Study Request for Qualification (RFQ) was posted on September 22, 2015 and responses were due on November 10, 2015. The scoring team was comprised of Chris Liu, Department of Enterprise Services; Kyle McKeon, Local Programs; Chris Christopher, HQ Construction; and Greg Bell, OEO. Five firms responded to the RFQ: 1) BLDS, LTD; 2) Browne, Bortz & Coddington, Inc.; 3) Colette Holt & Associates; 4) Mason Tillman Associates, Ltd.; and 5) MGT of America, Inc. Consulting Services requested the panel complete the scoring process by November 30, 2015. The next step will be to conduct interviews with the top scoring firms..
- On November 19, 2015, WSDOT hosted a DBE Advisory Group Meeting. During this meeting the following topics were discussed with group members:
  - Director of OEO Recruitment Status
  - Design-Build Contract Language Status
  - DBE Program Participation Plan
  - Disparity Study Update
  - Disparity Study Research and Incorporation of Community Specific Concerns
  - Disparity Study Community Engagement:
    - Getting Information Out
    - Shaping the Conversation
    - Collecting and Cataloging Public Information
    - Reporting Community Engagement Findings

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### **Outreach:**

- On July 23, 2015, WSDOT OEO and HQ Construction staff provided DBE Program Training to approximately 40 PCL Construction Services staff. This training included WSDOT's DBE Program policies and procedures, including but not limited to commercially useful functions, bidding requirements, and change orders.
- From July through December the interim Director of OEO and DBE Community Engagement Manager shared attendance duties with community and trade based organization meetings (e.g. Tabor 100 and NAMC).
- On August 27, 2015, OEO staff attended the USDOT Northwest Small Business Transportation Resource Center's Small Business Loan Workshop "Are You Ready?" During this event small business owners, agency representatives, prime contractors and financial industry experts discussed the importance of working capital and how to obtain it. There were approximately 20 people in attendance.
- On September 9, 2015, OEO staff attended Manson Construction's "ABCs of RFPs". This class consisted of presentations from Manson Construction, Procurement Technical Assistance Center (PTAC), Native PTAC, Nisqually Indian Tribe, and WSDOT. The presentations were developed with the intent of teaching small business owners the basic tools for preparing responsive, responsible bids, finding prime contractors, submitting quotes, and entering into subcontracts.
- On September 17, 2015, OEO staff attended the 2<sup>nd</sup> Annual Minority Business Policy Workshop. At this event minority business owners engaged with state agencies in a roundtable discussion to develop a legislative policy agenda intended to change systematic issues and create sustainable change in Washington.
- WSDOT developed and distributed a new DBE Program Newsletter, attached as Exhibit E.
- On November 16, 2015, WSDOT launched a survey to develop a current DBE Support Services Needs Assessment. This survey will close at the end of December, 2015, and will position WSDOT to deliver a more effective DBE Support Services program.
- On October 15, 2015, OEO staff attended the Tabor 100 sponsored Northwest Small Business Workshop in Seattle. This event was co-sponsored by Wells Fargo presenting on business plan preparation and general lending advice.
- On October 21, 2015, OEO staff attended the USDOT's Northwest Small Business Transportation Resource Center Small Business Blueprint event on strategic planning and doing business with primes.
- On October 27 and 28, 2015, OEO and HQ Construction hosted Subcontracting on Construction projects with WSDOT classes in Seattle and Spokane. Between both classes, approximately 40 people attended. This class is taught to ensure subcontractors are provided with adequate information regarding the administrative requirements of working with WSDOT.

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- On November 4, 2015, OEO and HQ Construction staff attended the Department of Enterprises Annual Trade Show & Training Conference. Approximately five hundred individuals representing small and large businesses (including minority and women owned firms) as well as government officials were in attendance.
- On November 6, 2015, OEO staff attended the North Puget Sound Small Business Summit. A reverse trade show with approximately 100 government entities present. This was a well-attended event with hundreds of small business (including minority and women owned firms) representatives present.
- On November 12, 2015, WSDOT, Sound Transit, and the Port of Seattle hosted Business After Hours. This annual event is for small, veteran, minority and women owned consulting and construction firms to network with prime contractors, consultants and agency staff in a casual environment. This event included an awards ceremony in which Kiewit Infrastructure was named as WSDOT's 2015 Champion of Inclusion. Following are photos from the event:



To ensure DBEs are notified in a timely fashion of WSDOT business opportunities and events. WSDOT OEO provided the following “Notice to Contractors” to highway-related DBEs and partner organizations:

Date	Information Contained within the Notice to Contractors				
	Construction Opportunities	Consulting Opportunities	Purchasing Opportunities	Administrative & IT Contracts	DBE/SS & Outreach
July 6, 2015	X	X	X	X	X
July 13, 2015	X	X	X	X	X
July 20, 2015	X	X	X	X	X
July 27, 2015	X	X	X	X	X
August 3, 2015	X	X	X	X	X
August 10, 2015	X	X	X	X	X
August 17, 2015	X	X	X	X	X
August 31, 2015	X	X	X	X	X

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September 8, 2015	X	X	X	X	X
September 14, 2015	X	X	X	X	X
September 22, 2015	X	X	X	X	X
September 22, 2015	X	X	X	X	X
September 28, 2015	X	X	X	X	X
October 5, 2015	X	X	X	X	X
October 7, 2015	X	X	X	X	X
October 19, 2015	X	X	X	X	X
October 27, 2015	X	X	X	X	X
November 2, 2015	X	X	X	X	X
November 10, 2015	X	X	X	X	X
November 16, 2015	X	X	X	X	X
November 23, 2015	X	X	X	X	X
November 30, 2015	X	X	X	X	X
December 8, 2015	X	X	X	X	X
December 15, 2015	X	X	X	X	X
December 22, 2015	X	X	X	X	X
December 29, 2015	X	X	X	X	X

### **On-the-Job Training Support Services Program**

The primary task of the On the Job Training Support Services (OJT/SS) Program is to assist minorities, females and socially and economically disadvantaged individuals who desire to a career in the construction trades by providing pathways to employment in the highway construction trades. WSDOT and L&I collaborate to effectively utilize all available resources to deliver the most comprehensive services available to prepare individuals interested in entering the construction workforce. These services include pre-apprenticeship programs, pre-employment counseling, orientation to the programs, basic skills improvement classes, career counseling, remedial training, entry requirements, transportation assistance, child care, jobsite mentoring, retention services, and safety equipment and tools.

For Federal Fiscal Year (FFY) 2015, WSDOT received funds from FHWA for the OJT/SS program through an allocation formula in the amount of \$150,241. WSDOT also received a bi-annual allocation of \$750,000 through the state legislature this was FY 2016 received state funds.

WSDOT's Statement of Work (SOW) submitted to FHWA utilizes a pre-established foundation of successful relationships with pre-apprenticeship providers (e.g., Job Corps, SVI, ANEW, etc.) and assists WSDOT with its goal of establishing a pipeline of female and minority workers ready to enter the highway construction trades.

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Outreach into the community through WSDOT hosted roundtable discussions, attending related meetings and trade shows and regular discussions with those involved with apprenticeship and the trades has identified some of the following barriers to highway construction related trades for minorities and females:

- Education about opportunities in the trades
- Childcare issues/loss or reduction of daycare subsidy (when income increases)
- Assistance with safety gear and basic tools
- Transportation to training programs and jobs
- Jobsite retention and mentoring

In response to the needs of pre-apprenticeship and apprenticeship programs and those minorities and females desiring training in highway construction related trades, WSDOT's OJT/SS program established the following goals to improve access to on-the-job training and supportive services enabling careers in the highway construction related trades.

### **Accomplishments:**

**Goal One:** The continued development and implementation of recruitment/referral services, pre-program intake assessments, assistance with job placements and related services to increase and support continued participation and maintain job retention for minorities and women on federal-aid highway construction projects.

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Having newly filled the role of OJT/SS Coordinator, emphasis has been placed on understanding the previous program and its accomplishments, meeting key individuals and identifying resources to provide necessary services. Contact has been made with community colleges (Clover Park Tech, Spokane Community College) and service organizations (Goodwill) to determine how their resources and funding sources can be utilized to increase the number of pre-apprenticeship programs available to which WSDOT can lend support. The goal of this support is to create sustainable programs for the long term. Established programs such as ANEW, Tulalip Construction Training Center and SVI are continuing to be supported by WSDOT as each organization requests assistance.

The WSDOT OJT/SS program continues to build a network of training partners and community resources to assist females and minorities with overcoming barriers to entry into the trades. Instead of working to directly recruit and assist individuals, WSDOT is developing partnerships with organizations that are already recruiting, training and providing case management job seeking assistance. This collaborative approach will allow WSDOT to create a larger network of resources for individuals in need of assistance and increase awareness of career opportunities in the highway trades.

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### **Results:**

- Spokane Community College founded the Skills Trade Preparation Program that began training the first class of students in September 2015.
- Discussion with Clover Park Tech is ongoing regarding how WSDOT can support their efforts to expand current construction trade programs to include highway construction.
- Funding has been provided to students enrolled in the pre-apprenticeship programs at the SVI PACT Program and the Tulalip Construction Training Center. Provided program guidance and general information to two individuals seeking information about entering the heavy highway construction field (Robert Schwartz and Marcell Montgomery). Attempts to follow up have not been responded to by either Schwartz or Montgomery.

**Goal Two:** Through the utilization of consultants and other partner organizations, the provision of: referral to driver's license reinstatement, basic math skills training, LEP classes, safety vests and related safety equipment, high school diploma/GED preparatory classes, and assistance with public transportation.

- In August 2015, a contract was signed between Akana and WSDOT to provide services for females, minorities and socially and economically disadvantaged individuals in the Southwest area of the state. Akana is experienced in workforce development, and over the last 15 years has worked together with many apprenticeship training and pre-apprenticeship training programs, as well as several other types of support programs throughout the Northwest. Akana has partnered with Constructing Hope and the Pacific Northwest Carpenters Training Institute to provide pre-apprenticeship training for minorities, women and socially and economically disadvantaged individuals living in the Vancouver area. Other services being provided are outreach/recruitment, screening and case management, including hands on training with construction tools and materials. Following the pre-apprenticeship training, individuals receive job development assistance and support services.

**Goal Three:** Provide tuition assistance for highway-related construction pre-apprenticeship training programs designed to increase the overall participation of minorities and women in federal-aid highway construction projects. Partner with other community based organizations, community and technical colleges and tribal entities to establish new pre-apprenticeship programs in eastern Washington and other identified areas of need.

### **Results:**

- On June 15, 2015, the Tulalip TERO Vocational Training Center had 13 students complete the program in the Vocational Training Program. In addition to graduating the program, five students also received their Construction Industry trades diploma. Six of these students are currently employed, with only one of the six being employed outside of construction. This one individual is actively seeking work in the construction field. Employment data on the other seven graduates is not available at this time.

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- During August 2015, WSDOT provided tuition assistance in the amount of \$5,728 for three minority male students attending the SVI PACT program in Seattle.
- During September 2015, WSDOT provided assistance to Spokane Community College’s Skills Trade Preparation Pre-Apprenticeship Program through purchasing three different books to create permanent classroom sets for use during training. The book purchase is as follows:

Title	Number purchased	Cost each	Total cost
Practical MS Office 2013	25	\$115.20	\$2,880.00
Professionalism Skills for Workplace Success	25	\$73.98	\$1,849.50
Basic Blueprint Reading & Sketching	25	\$116.10	\$2,902.50
		Tax	\$663.98
<b>Total</b>			<b>\$8,295.98</b>

- During September 2015, WSDOT provided tuition assistance, \$19,000, to the Tulalip Tribe’s Construction Training Center’s Program to provide tuition assistance to pay for Flagger, CPR/First Aid, Forklift and OSHA 10 certifications. Graduation for this class will be held mid-December.

**Goal Four:** Consistent with the approval and direction from Federal Highway Administration (FHWA), the OJT program will continue to coordinate statewide outreach activities with various partners to establish an adult construction pre-apprenticeship program in Washington.

**Results:**

- On July 14, 2015, WSDOT attended the Washington State Apprenticeship Training Council (WSATC) Meetings in Tumwater. These meetings provide updates on various state apprenticeship programs and an opportunity to connect with those providing pre-apprenticeship training in the state to create opportunities for partnerships.
- On July 28, 2015, WSDOT met with the State Board of Community and Technical Colleges and various representatives from technical and community colleges in the state to discuss improved coordination of existing state resources to more effectively deliver pre-apprenticeship training and discuss barriers that are typically faced by new apprentices and those who want to attend training.
- On August 26, 2015, WSDOT attended a meeting with the Bureau of Labor and Industries in Oregon to discuss how ODOT’s programs are implemented with BOLI in order to gain insight on how Oregon implements their FHWA programs. WSDOT also met with Steve Sims, Larry Williams (BOLI) and Tim Wilson (Washington L&I) and learned of ways to improve WSDOT’s supportive services program.

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- On September 1, 3, and 22, 2015, WSDOT hosted Statewide Roundtable meetings in Seattle, Spokane and Pasco (respectively for the listed dates). These meetings were held in order to gather information from pre-apprenticeship stakeholders in light of recent state funding for ESSB 5863 through the Transportation Package. Discussion revealed needs in the program that are applicable to federally funded OJT/SS efforts. Supportive services and continued barrier removal are a critical need to newly trained apprentices as they enter the workforce if they are to remain employed as apprentices.
- On September 14, 2015, WSDOT met with Cristeen Crouchet of Clover Park Technical College (CPTC) to discuss a partnership to expand pre-apprenticeship training and supportive services in the Lakewood area. CPTC's construction program can be expanded to include highway construction related trades. Further discussion is ongoing with CPTC staff to discuss program design and partners (trades, union and non-union groups, etc). Follow up indicated they are expanding their program to include highway construction.
- On September 16, 2015, WSDOT met with Frances Rohr of the Nisqually TERO to hear ideas on expanding a construction program held through the Northwest Indian College to include Highway construction workforce training for tribal members. WSDOT provided Rohr with basic information and contacts for expanding their current housing construction programs to include highway construction.

**Goal Five:** Marketing and promotion of the program by utilizing consultants, multiple media sources, and different types of events/venues.

### **Results:**

- During August 2015, the OJT/SS newsletter was published and distributed mid-August 2015. The newsletter contained information about programs supported by WSDOT, upcoming events and related information.
- From July through September, 2015, WSDOT assisted in Construction Career Day events planning for events in Seattle, Spokane, the Tri-Cities, and Pierce County.
- WSDOT provided support to four Construction Career Days (CCD) offered in King County, Spokane, Tri-Cities area, and Pierce County providing a total of \$11,581 to support all four events. The CCD Program is a workforce development tool that introduces high school students to the transportation construction industry and non-traditional career pathways. Through these programs, WSDOT is able to reach thousands of youths who may not consider the construction industry as a career pathway.
  - Tri-Cities CCD on October 6, 2015
  - King County CCD on October 9, 2015
  - Spokane CCD on October 21 and 22, 2015
  - Pierce County Career Day on November 9, 2015
- WSDOT continues to update current OJT marketing materials. Website revisions have been started, adding a form process to more accurately track requests for OJT funding and the ability to gather

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information to determine results of the program. Updates include revision of existing brochure, creating an updated OJT poster, and creating an OJT newsletter.

**Program Goal Six:** Contract out the OJT/SS program in order to deliver all services available through the program to all interested and available participants in Washington State. Establish a method for collecting more detailed metrics on any program supported by WSDOT funding to compile accurate data on program effectiveness, barriers to program completion and employment, and employment statistics for program completers.

- In August 2015, a contract was signed between Akana and WSDOT for \$100,000 for one year to provide services for females, minorities and socially and economically disadvantaged individuals in the Southwest area of the state. Akana is experienced in workforce development, and over the last 15 years has worked together with many apprenticeship training and pre-apprenticeship training programs, as well as several other types of support programs throughout the Northwest. Akana has partnered with Constructing Hope and the Pacific Northwest Carpenters Training Institute to provide pre-apprenticeship training for minorities, women and socially and economically disadvantaged individuals living in the Vancouver area. Other services include: outreach/recruitment, screening and case management, and hands on training with construction tools and materials. Following the pre-apprenticeship training, individuals receive job development assistance and support services.

Currently, two minority males are enrolled in the program that began on September 8, 2015. The students received First Aid/CPR, Flaggers, Confined Space and OSHA 10 certifications. On October 5, 2015, the students began trade specific training with the Pacific NW Carpenters. This training emphasizes Bridge Anatomy training for Carpenters. This training grants students "Direct Entry" and are placed as second term on the "Out of Work" Lists instead of the "Eligible List" for work opportunities. This will give them higher priority for available jobs. They will also start work as an apprentice at a higher than average starting apprentice pay. Since the start of this class, two additional recruiting sessions have been held (September 14 and 28) and additional sessions are planned for October, November and December

# Exhibit A

1 **(August 3, 2015)**

2 **Disadvantaged Business Enterprise Condition of Award Participation**

3 The Disadvantaged Business Enterprise (DBE) requirements of 49 CFR Part 26 and  
4 USDOT's official interpretations (i.e., Questions & Answers) apply to this Contract.  
5 Demonstrating compliance with these Specifications is a Condition of Award (COA) of  
6 this Contract. Failure to comply with the requirements of this Specification may result in  
7 your Bid being found to be nonresponsive resulting in rejection or other sanctions as  
8 provided by Contract.  
9

10 **DBE Abbreviations and Definitions**

11 **Broker** – A business firm that provides a bona fide service, such as  
12 professional, technical, consultant or managerial services and assistance in  
13 the procurement of essential personnel, facilities, equipment, materials, or  
14 supplies required for the performance of the Contract; or, persons/companies  
15 who arrange or expedite transactions.  
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17 **Disadvantaged Business Enterprise (DBE)** – A business firm certified by the  
18 Washington State Office of Minority and Women's Business Enterprises, as  
19 meeting the criteria outlined in 49 CFR 26 regarding DBE certification.  
20

21 **Commercially Useful Function (CUF)**

22 49 CFR 26.55(c)(1) defines commercially useful function as: *"A DBE performs*  
23 *a commercially useful function when it is responsible for execution of the work*  
24 *of the contract and is carrying out its responsibilities by actually performing,*  
25 *managing, and supervising the work involved. To perform a commercially*  
26 *useful function, the DBE must also be responsible, with respect to materials*  
27 *and supplies used on the contract, for negotiating price, determining quality*  
28 *and quantity, ordering the material, and installing (where applicable) and*  
29 *paying for the material itself. To determine whether a DBE is performing a*  
30 *commercially useful function, you must evaluate the amount of work*  
31 *subcontracted, industry practices, whether the amount the firm is to be paid*  
32 *under the contract is commensurate with the work it is actually performing and*  
33 *the DBE credit claimed for its performance of the work, and other relevant*  
34 *factors."*  
35

36 **DBE Commitment** – The dollar amount the Contractor indicates they will be  
37 subcontracting to be applied towards the DBE Condition of Award Goal as  
38 shown on the DBE Utilization Certification Form, and in the Bid Item break  
39 down for each DBE Subcontractor. This DBE Commitment amount will be  
40 incorporated into the Contract and shall be considered a Contract requirement.  
41 Any changes to the DBE Commitment shall require Engineer's approval.  
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43 **DBE Condition of Award (COA) Goal** – An assigned numerical percentage of  
44 the Bid amount of the Contract. This is the minimum amount that the Bidder  
45 must commit to by submission of the Utilization Certification Form and/or by  
46 Good Faith Effort (GFE). The DBE COA Goal will also be applied to change  
47 orders associated with this Contract.  
48

49 **DBE Directory of Certified Firms** – A publication listing all Minority, Women,  
50 and Disadvantaged Business Enterprises currently certified by the  
51 Washington State Office of Minority and Women's Business Enterprises  
52 (OMWBE). The on-line Directory is available to contractors for their use in

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identifying and soliciting interest from DBE firms whose participation on a contract may be counted toward achievement of the assigned DBE COA Goal.

**Description of Work** – Specific descriptions of work that the DBE is certified to perform, as identified in the OMWBE Directory of Certified Firms, under the DBE’s profile page.

**Good Faith Efforts** – Efforts to achieve the DBE COA Goal or other requirements of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

**Manufacturer (DBE)** – A DBE firm that operates or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment required under the Contract. A DBE Manufacturer shall produce finished goods or products from raw or unfinished material or purchase and substantially alters goods and materials to make them suitable for construction use before reselling them.

**Regular Dealer (DBE)** – A DBE firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of a Contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a Regular Dealer, the DBE firm shall engage in, as its principal business and in its own name, the purchase and sale of the products in question. A Regular Dealer in such items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as Regular Dealers within the meaning of this definition.

**DBE COA Goal**  
The Contracting Agency has established a COA Contract Goal in the amount of: \*\*\*  
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**DBE Eligibility/Selection of DBEs**  
A Directory of Certified Firms is available at the OMWBE web site. A description of specific items of work that a DBE is certified to perform is shown in the directory on the DBE’s profile page.

**Crediting DBE Participation**  
Subcontractors proposed as COA must be certified prior to the due date for bids on the Contract. All non-COA DBE Subcontractors shall be certified before the subcontract on which it is participating is executed.

DBE participation cannot be counted toward the Contractor’s contract goal until the amount being counted has actually been paid to the DBE.  
The following are some examples of what may be counted as DBE participation. In all cases the DBE must be certified for the work being considered and must be capable of performing a CUF during the execution of the Work.

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**DBE Prime Contractor**

A DBE Contractor may only take credit for that portion of the total dollar value of the Contract equal to the distinct, clearly defined portion of the Work that the DBE performs with its own forces.

**DBE Subcontractor**

Only that portion of the total dollar value of the subcontract equal to the distinct, clearly defined portion of the Work that the DBE performs with its own forces. Include the cost of supplies and materials obtained by the DBE for its work on the contract, and equipment leased by the DBE.

The supplies, materials, and equipment purchased or leased from the Contractor or its affiliate shall not be credited. Including any Contractor's resources available to DBE subcontractors at no cost.

If a DBE subcontracts a portion of the Work of its contract to another firm, the value of the subcontracted Work may be counted toward the DBE COA Goal only if the DBE's Lower-Tier Subcontractor is also a DBE. Work subcontracted to a non-DBE does not count towards the DBE COA Goal.

Count expenditures toward DBE COA Goal only if the DBE is performing a commercially useful function (CUF) on that contract.

**DBE Subcontract and Lower Tier Subcontract Documents**

There must be a subcontract agreement that complies with 49 CFR Part 26 and fully describes the distinct elements of Work committed to be performed by the DBE. The subcontract agreement shall incorporate requirements of the primary Contract. Subcontract agreements of all tiers, including lease agreements shall be readily available at the project site for the Engineer review.

**DBE Broker/Packager**

The value of fees or commissions charged by a DBE Broker or a DBE behaving in a manner of a Broker for providing a bona fide service, such as professional, technical, consultant, managerial services, or for providing bonds or insurance will only be credited towards meeting the DBE COA Goal if the firm is determined to be performing a CUF.

**Force Account Work**

When the Contractor elects to utilize force account Work to meet the DBE COA Goal, as demonstrated by listing this force account Work on the DBE Utilization Certification Form, for the purposes of meeting DBE COA Goal, only 50% of the Proposal amount shall be credited toward the Contractors Commitment to meet the DBE COA Goal.

One hundred percent of the actual amounts paid to the DBE for the force account Work shall be credited towards DBE COA Goal.

**Trucking**

The DBE trucking firm receives credit for the value of the transportation services it provides on the Contract using trucks it owns or leases, licenses, insures, and operates with drivers it employs.

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The Work that a DBE trucking firm performs with trucks it leases from other certified DBE trucking firms qualify for 100% DBE credit.

Only the fees/commissions the DBE receives for arranging the transportation services provided is credited when trucks are leased from non-DBE trucking firm. The trucking Work subcontracted to any non-DBE trucking firm will not receive credit for Work done on the project.

Truck registration and lease agreements shall be readily available at the project site for the Engineer review.

**DBE Manufacturer and DBE Regular Dealer**

If materials or supplies are obtained from a DBE Manufacturer, 100 percent of the cost of materials or supplies can count toward the DBE COA Goal. The DBE Manufacturer shall be certified as such by OMWBE.

Sixty percent (60%) of the cost of materials or supplies purchased from a DBE Regular Dealer may be credited toward meeting the DBE COA Goal. If the role of the DBE Regular Dealer is determined to be that of a Broker, then the DBE credit shall be limited to the fee or commission it receives for its services. Regular Dealer status is granted on a Contract-by-Contract basis.

A firm wishing to be approved as a Regular Dealer must submit a request in writing to WSDOT for approval, no later than ten working days prior to Bid opening. The Approved Regular Dealers List is published on WSDOT's Office of Equal Opportunity (OEO) web site.

Purchase of materials or supplies from a DBE which is neither a manufacturer nor a regular dealer, (i.e. Broker) only the fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation changes for the delivery of materials or supplies required on a job site, can count toward DBE COA Goal, provided the fees are not excessive as compared with fees customarily allowed for similar services. The cost of the materials and supplies themselves cannot be counted toward DBE COA Goal.

Note: Requests to be listed as a Regular Dealer will only be processed if the requesting firm is certified by the Office of Minority and Women's Business Enterprises in a NAICS code that fall within the 42XXXX NAICS Wholesale code section.

**Disadvantaged Business Enterprise Utilization Certification FORM # 272-056 EF**

To be eligible for award of the Contract, the Bidder shall properly complete and submit a Disadvantaged Business Enterprise Utilization Certification with the Bidder's sealed Bid Proposal, as specified in Section 1-02.9 Delivery of Proposal. The Bidder's Disadvantaged Business Enterprise Utilization Certification must clearly demonstrate how the Bidder intends to meet the DBE COA Goal. A Disadvantaged Business Enterprise Utilization Certification (WSDOT Form 272-056

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EF) is included in your Proposal package for this purpose as well as instructions on how to properly fill out the form.

The Bidder is advised that the items listed below when listed in the Utilization Certification must have their amounts reduced to the percentages shown and those reduced amounts will be the amount applied towards meeting the DBE COA Goal.

- Force account at 50%
- Regular dealer at 60%

In the event of arithmetic errors in completing the Disadvantaged Business Enterprise Utilization Certification the amount listed to be applied towards the DBE COA Goal for each DBE shall govern and the DBE total amount shall be adjusted accordingly.

Note: The Contracting Agency shall consider as non-responsive and shall reject any Bid Proposal submitted that does not contain a Disadvantaged Business Enterprise Utilization Certification Form that accurately demonstrates how the Bidder intends to meet the DBE COA Goal.

**Disadvantaged Business Enterprise Written Confirmation Document(s) FORM # 422-031 EF**

The Bidder shall submit a Disadvantaged Business Enterprise Written Confirmation Document (completed and signed by the DBE) for each DBE firm listed in the Bidder's completed Disadvantaged Business Enterprise Utilization Certification submitted with the Bid. Failure to do so will result in the associated participation being disallowed, which may cause the Bid to be determined to be nonresponsive resulting in Bid rejection.

The Confirmation Documents provide confirmation from the DBEs that they are participating in the Contract as provided in the Contractor's Commitment. The Confirmation Documents must be consistent with the Utilization Certification.

A Disadvantaged Business Enterprise Written Confirmation Document (form No. 422-031 EF) is included in your Proposal package for this purpose.

The form(s) shall be received as specified in the special provisions for Section 1-02.9 Delivery of Proposal.

It is prohibited for the Bidder to require a DBE to submit a Written Confirmation Document with any part of the form left blank. Should the Contracting Agency determine that a Written Confirmation Document was signed by a DBE that was not complete; the validity of the document comes into question and the associated DBE participation may not receive credit.

**Selection of Successful Bidder/Good Faith Efforts (GFE)**

The successful Bidder shall be selected on the basis of having submitted the lowest responsive Bid, which demonstrates a good faith effort to achieve the DBE COA Goal. Achieving the DBE COA Goal may be accomplished in one of two ways, as follows:

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1. By meeting the DBE COA Goal  
The best indication of GFE is to document, through submission of the Disadvantaged Business Enterprise Utilization Certification and supporting Disadvantaged Business Enterprise Written Confirmation Document(s) that the Bidder has obtained enough DBE participation to meet or exceed the assigned DBE COA Goal. That being the case, no additional GFE documentation is required. Or;
  
2. By documentation that the Bidder made adequate GFE to meet the DBE COA Goal  
The Bidder may demonstrate a GFE in whole or part through GFE documentation ONLY IN THE EVENT a Bidder's efforts to solicit sufficient DBE participation have been unsuccessful. In this case, the Bidder must supply GFE documentation in addition to the Disadvantaged Business Enterprise Utilization Certification, and supporting Disadvantaged Business Enterprise (DBE) Written Confirmation Document(s).

Note: In the case where the Bidder was awarded the contract based on demonstrating adequate GFE the advertised DBE COA Goal will not be reduced to the Bidder's partial commitment. Further, the Bidder shall demonstrate a GFE during the life of the Contract to attain the DBE COA Goal as assigned to the project.

GFE documentation shall be received, as specified in the special provisions for Section 1-02.9 Delivery of Proposal.

Based upon all the relevant documentation submitted in Bid or as a supplement to Bid, the Contracting Agency shall determine whether the Bidder has demonstrated sufficient GFE to achieve DBE participation. The Contracting Agency will make a fair and reasonable judgment of whether a Bidder that did not meet the DBE COA Goal through participation, made adequate good faith efforts as demonstrated by the GFE documentation.

**Good Faith Effort (GFE) Documentation**

The following is a list of types of actions, which would be considered as part of the Bidder's GFE to achieve DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

1. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the Work of the Contract. The Bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The Bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
  
2. Selecting portions of the Work to be performed by DBEs in order to increase the likelihood that the DBE COA Goal will be achieved. This includes, where appropriate, breaking out contract Work items into economically feasible units to facilitate DBE participation, even when the

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Contractor might otherwise prefer to perform these Work items with its own forces.

3. Providing interested DBEs with adequate information about the Plans, Specifications, and requirements of the Contract in a timely manner to assist them in responding to a solicitation.
  - a. Negotiating in good faith with interested DBEs. It is the Bidder's responsibility to make a portion of the Work available to DBE subcontractors and suppliers and to select those portions of the Work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the Plans and Specifications for the Work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the Work.
  - b. A Bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as the DBE COA Goal into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a Bidder's failure to meet the DBE COA Goal, as long as such costs are reasonable. Also, the ability or desire of a Contractor to perform the Work of a Contract with its own organization does not relieve the Bidder of the responsibility to make Good Faith Efforts. Contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
4. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The Contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the Contractor's efforts to meet the DBE COA Goal.
5. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or Contractor.
6. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
7. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.
8. Documentation of GFE must include copies of each DBE and non-DBE subcontractor quotes submitted to the Bidder when a non-DBE

1 subcontractor is selected over a DBE for Work on the Contract. (ref.  
2 updated DBE regulations – 26.53(b)(2)(vi) & App. A)  
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#### 4 **Administrative Reconsideration of GFE Documentation**

5 Any Bidder has the right to reconsideration but only for the purpose of reassessing  
6 the GFE documentation that was originally submitted with their Bid, and determined  
7 to be inadequate.  
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- 9 • The Bidder must request within 48 hours of GFE determination and  
10 schedule a reconsideration hearing within seven calendar days of  
11 notification of being nonresponsive or forfeit the right to reconsideration.  
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- 13 • The reconsideration decision on the adequacy of the Bidder's GFE  
14 documentation shall be made by an official who did not take part in the  
15 original determination.  
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- 17 • Only the GFE documentation submitted and evaluated to meeting the  
18 required DBE COA Goal shall be considered. Bidder shall not introduce  
19 new documentation at the reconsideration hearing.  
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- 21 • The Bidder shall have the opportunity to meet in person with the official for  
22 the purpose of setting forth the Bidder's position as to why the GFE  
23 documentation demonstrates a sufficient effort.  
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- 25 • The reconsideration official shall provide the Bidder with a written decision  
26 on reconsideration within five working days of the hearing explaining the  
27 basis for their finding.  
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#### 29 **Procedures between Award and Execution**

30 After Award and prior to Execution, the Contractor shall provide the additional  
31 information described below. Failure to comply shall result in the forfeiture of the  
32 Bidder's Proposal bond or deposit.  
33

- 34 1. Additional information for all successful DBEs as shown on the  
35 Disadvantaged Business Enterprise Utilization Certification:  
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  - 37 a. Correct business name, federal employee identification number (if  
38 available), and mailing address.  
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  - 40 b. List of all Bid items (with a clear description of the Work to be  
41 performed) assigned to each successful DBE, including the dollar  
42 value.  
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  - 44 c. Description of partial items (if any) to be sublet to each successful  
45 DBE specifying the Work committed under each item to be performed  
46 and including the dollar value of the DBE portion.  
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  - 48 d. Total amounts shown for each DBE shall match the amount shown  
49 on the Disadvantaged Business Enterprise Utilization Certification. A  
50 breakdown that does not conform to the Disadvantaged Business  
51 Enterprise Utilization Certification or that demonstrates a different  
52 amount of DBE participation than that included in the Disadvantaged

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Business Enterprise Utilization Certification will be returned for correction.

2. A list of all firms who submitted a bid or quote in attempt to participate in this project whether they were successful or not. Include the business name and mailing address.

Note: The firms identified by the Contractor may be contacted by the Contracting Agency to solicit general information as follows: age of the firm and average of its gross annual receipts over the past three-years.

**Procedures after Execution**

**Commercially Useful Function (CUF)**

The Contractor may only take credit for the payments made for Work performed by a DBE that is determined to be performing a CUF. This applies to all DBEs performing Work on a project, whether or not the DBEs are COA, if the Contractor wants to receive credit for their participation. The Engineer will conduct CUF reviews to ascertain whether DBEs are performing a CUF. A DBE performs a CUF when it is carrying out its responsibilities of its contract by actually performing, managing, and supervising the Work involved. The DBE must be responsible for negotiating price; determining quality and quantity; ordering the material and installing (where applicable); and paying for the material itself. If a DBE does not perform "all" of these functions on a furnish-and-install contract, it has not performed a CUF and the cost of materials cannot be counted toward DBE COA Goal. Leasing of equipment from a leasing company is allowed. However, leasing/purchasing equipment from the Contractor is not allowed. Lease agreements shall be readily available for review by the Engineer.

In order for a DBE traffic control company to be considered to be performing a CUF, the DBE must be in control of its work inclusive of supervision. The DBE shall employ a Traffic Control Supervisor who is directly involved in the management and supervision of the traffic control employees and services.

The DBE does not perform a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which the funds are passed in order to obtain the appearance of DBE participation.

The Engineer will use the following factors in determining whether a DBE trucking company is performing a CUF:

- The DBE shall be responsible for the management and supervision of the entire trucking operation. The owner demonstrates business related knowledge, shows up on site and is active in running the business.
- The DBE finances are independently controlled by the DBE.
- The DBE shall with its own workforce, operate at least one fully licensed, insured, and operational truck used on the Contract. Employees are shown exclusively on the DBE payroll.

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- The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.
- Lease agreements for trucks shall indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others provided it is with the consent of the DBE and the lease provides the DBE absolute priority for use of the leased truck.
- Leased trucks shall display the name and identification number of the DBE.
- Leased trucks shall be driven by DBE employees included in the DBE's payroll.

The DBE may lease trucks from another DBE including a DBE owner-operator. The DBE who leases trucks from another DBE shall claim participation for the total value of the transportation services the lessee DBE provides on the Contract.

#### **Joint Checking**

A joint check is issued by a Contractor to a Subcontractor and to a material supplier for items or services to be incorporated into a project.

A joint check agreement must be approved by the Engineer and requested by the DBE involved using the DBE Joint Check Request Form (form # 272-053) prior to its use. The form must accompany the DBE Joint Check Agreement between the parties involved, including the conditions of the arrangement and expected use of the joint checks.

The approval to use joint checks and the use will be closely monitored by the Engineer. To receive DBE credit for performing a CUF with respect to obtaining materials and supplies, a DBE must "be responsible for negotiating price, determining quality and quantity, ordering the material and installing (where applicable) and paying for the material itself." The Contractor shall submit DBE Joint Check Request Form for the Engineer approval prior to using a joint check.

Material costs paid by the Contractor directly to the material supplier are not allowed. If proper procedures are not followed or the Engineer determines that the arrangement results in lack of independence for the DBE involved, no DBE credit will be given for the DBE's participation as it relates to the material cost.

#### **Prompt Payment**

Refer to Section 1-08.1 for Prompt Payment requirements associated with this contract.

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**Reporting**

All certified DBE Work whether COA or race neutral participation is reported. The Contractor shall submit a Monthly Report of Amounts Credited as DBE Participation to the Project Engineer each month, regardless of whether payments were made or Work occurred, between Execution of the Contract and the final amounts paid to DBE contractor or Completion of the Contract using the application available at: <https://remoteapps.wsdot.wa.gov/mapsdata/tools/dbeparticipation/>. The monthly report is due 20 calendar days following the end of the month. After Execution of the Contract, the Contractor shall send an e-mail to DBEPAdmin@wsdot.wa.gov containing the following information: the first and last name, e-mail address, title and phone number of the person that will be submitting the above documents for the Contractor. The e-mail shall include the WSDOT contract number they will be reporting on. After receipt of this information by WSDOT, the Contractor will receive an e-mail containing their username and password for the application and a link to the application. Reporting instructions are available in the application.

In the event that the payments to a DBE contractor have been made by an entity other than the Contractor, as in the case of a lower-tier Subcontractor or supplier, then the Contractor shall obtain evidence of payments from the paying entity and report these payments to the Engineer.

**Changes in COA Work Committed to DBE**

The Contractor shall utilize the COA DBEs to perform the work and supply the materials for which each is committed unless approved by the Engineer. The Contractor shall not be entitled to any payment for work or material completed by the Contractor or subcontractors that was committed to be completed by the COA DBEs.

**Owner Initiated Changes**

The Engineer will consider the impact on DBE participation in instances where the Engineer changes Work that was committed to a DBE at the time of Contract Award. In such instances, the Contractor shall not be required to substitute for the Work but is encouraged to do so. The Engineer may direct DBE participation or solicitation of DBEs as part of a change order.

**Contractor-Initiated Changes**

The Contractor cannot reduce the amount of work of a COA DBE without good cause, even if the Contractor continues to meet the DBE COA Commitment through other means. Reducing a COA DBE's Commitment is viewed as a partial DBE termination, subject to the procedures below.

**Original Quantity Under runs**

In the event that Work committed to a DBE firm as part of the COA underruns the original planned quantities the Contractor is encouraged to substitute the remaining applicable Work to another DBE but is not required to do so.

**Contractor Proposed DBE Substitutions**

Requests to substitute a COA DBE must be for good cause (see DBE termination process below), and requires the written approval of the Engineer. After receiving a termination with good cause approval, the Contractor may

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only replace a DBE with another certified DBE. When any changes encountered between Contract Award and Execution that result in a substitution of COA DBE, the substitute DBE shall be certified prior to the due date for bids on the Contract.

**DBE Termination**

Termination of a COA DBE (or an approved substitute DBE) is only allowed in whole or in part with prior written approval of the Engineer. The Contractor must have good cause to terminate a COA DBE.

Good cause typically includes situations where the DBE Subcontractor is unable or unwilling to perform the work of its subcontract. Good cause may exist if:

- The DBE fails or refuses to execute a written contract.
- The DBE fails or refuses to perform the Work of its subcontract in a way consistent with normal industry standards.
- The DBE fails or refuses to meet the Contractor’s reasonable nondiscriminatory bond requirements.
- The DBE becomes bankrupt, insolvent, or exhibits credit unworthiness.
- The DBE is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to federal law or applicable State law.
- The DBE voluntarily withdraws from the project, and provides written notice of its withdrawal.
- The DBE’s work is deemed unsatisfactory by the Engineer and not in compliance with the contract.
- The DBE’s owner dies or becomes disabled with the result that the DBE is unable to complete its Work on the contract.

Good cause does not exist if:

- The Contractor seeks to terminate a COA DBE so that the Contractor can self-perform the Work.
- The Contractor seeks to terminate a COA DBE so the Contractor can substitute another DBE contractor or non-DBE contractor after Contract Award.
- The failure or refusal of the COA DBE to perform its Work on the subcontract results from the bad faith or discriminatory action of the Contractor (e.g., the failure of the Contractor to make timely payments or the unnecessary placing of obstacles in the path of the DBE’s Work).

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Prior to requesting termination, the Contractor shall give notice in writing to the DBE with a copy to the Engineer of its intent to request to terminate DBE Work and the reasons for doing so. The DBE shall have five (5) working days to respond to the Contractor's notice. The DBE's response shall either support the termination or advise the Engineer and the Contractor of the reasons it objects to the termination of its subcontract.

When a COA DBE is terminated, or fails to complete its work on the contract for any reason, the Contractor shall substitute with another DBE, substitute other DBE participation or provide documentation of GFE. A plan to achieve the COA DBE Commitment shall be submitted to the Engineer within 2 working days of the approval of termination or the Contract shall be suspended until such time the substitution plan is submitted.

**Decertification/Graduation**

When a DBE is "decertified" or "graduates" from the DBE program during the course of the Contract, the participation of that DBE shall continue to count towards the DBE COA Goal as long as the subcontract with the DBE was executed prior to the decertification notice. The Contractor is obligated to substitute when a DBE does not have an executed subcontract agreement at the time of decertification/graduation.

**Consequences of Non-Compliance**

**Breach of Contract**

Each contract with a Contractor (and each subcontract the Contractor signs with a Subcontractor) must include the following assurance clause:

The Contractor, subrecipient, or Subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. 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 recipient deems appropriate, which may include, but is not limited to:

- (1) Withholding monthly progress payments;
- (2) Assessing sanctions;
- (3) Liquidated damages; and/or
- (4) Disqualifying the Contractor from future bidding as non-responsible.

**Notice**

If the Contractor or any Subcontractor, Consultant, Regular Dealer, or service provider is deemed to be in non-compliance, the Contractor will be informed in writing, by certified mail by the Engineer that sanctions will be imposed for failure to meet the DBE COA Commitment and/or submit documentation of good faith efforts. The notice will state the specific sanctions to be imposed which may include impacting a Contractor or other entity's ability to participate in future contracts.

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**Sanctions**

If it is determined that the Contractor's failure to meet all or part of the DBE COA Commitment is due to the Contractor's inadequate good faith efforts throughout the life of the Contract, including failure to submit timely, required Good Faith Efforts information and documentation, the Contractor may be required to pay DBE penalty equal to the amount of the unmet Commitment, in addition to the sanctions outlined in Section 1-07.11(5).

**Payment**

Compensation for all costs involved with complying with the conditions of this Specification and any other associated DBE requirements is included in payment for the associated Contract items of Work, except otherwise provided in the Specifications.

# Exhibit B

# FFY2015 WSDOT FHWA Federally-assisted Construction Contracts Goal Sets

from October 1, 2014 to April 30, 2015

**Race-Conscious Goal: 8.7%**

**Race-Neutral Goal: 2.9%**

## Construction

	Total	Projects with Race Conscious Goals	Projects with Zero Goals
<b>Number of Projects</b>	<b>68</b>	53	15
Percent of total	100%	78%	22%
<b>Contract Dollars</b>	<b>\$130,571,518</b>	\$117,696,717	\$12,874,802
Percent of total	100%	90%	10%
<b>Goal Dollars</b>	<b>\$11,311,131</b>	\$11,311,131	
RC Participation Estimates	<b>8.66%</b>	9.61%	

## Ferries

	Total	Projects with Race Conscious Goals	Projects with Zero Goals
<b>Number of Projects</b>	<b>5</b>	2	3
Percent of total	100%	40%	60%
<b>Contract Dollars</b>	<b>\$14,425,323</b>	\$9,065,237	\$5,360,086
Percent of total	100%	63%	37%
<b>Goal Dollars</b>	<b>\$806,011</b>	\$806,011	
RC Participation Estimates	<b>5.59%</b>	8.89%	

## Local Programs

	Total	Projects with Race Conscious Goals	Projects with Zero Goals
<b>Number of Projects</b>	<b>105</b>	73	32
Percent of total	100%	70%	30%
<b>Contract Dollars</b>	<b>\$151,069,811</b>	\$138,714,532	\$12,355,279
Percent of total	100%	92%	8%
<b>Goal Dollars</b>	<b>\$17,563,306</b>	\$17,563,306	
RC Participation Estimates	<b>11.63%</b>	12.66%	

## Consultant Services

	Total	Projects with Race Conscious Goals	Projects with Zero Goals
<b>Number of Projects</b>	<b>31</b>	2	29
Percent of total	100%	6%	94%
<b>Contract Dollars</b>	<b>\$4,689,200</b>	\$1,756,658	\$2,932,542
Percent of total	100%	37%	63%
<b>Goal Dollars</b>	<b>\$176,097</b>	\$176,097	
RC Participation Estimates	<b>3.76%</b>	10.02%	

## Total

	Total	Projects with Race Conscious Goals	Projects with Zero Goals
<b>Number of Projects</b>	<b>209</b>	130	79
Percent of total	100%	62%	38%
<b>Contract Dollars</b>	<b>\$300,755,853</b>	\$267,233,144	\$33,522,709
Percent of total	100%	89%	11%
<b>Goal Dollars</b>	<b>\$29,856,546</b>	\$29,856,546	
RC Participation Estimates	<b>9.93%</b>	11.17%	

# FFY2015 WSDOT FHWA Federally-assisted Construction Contracts Goal Sets

from May 1, 2015 to September 30, 2015

**Race-Conscious Goal: 8.7%**

**Race-Neutral Goal: 2.9%**

## Construction

	Total	Projects with Race Conscious Goals	Projects with Zero Goals
<b>Number of Projects</b>	<b>20</b>	17	3
Percent of total	100%	85%	15%
<b>Contract Dollars</b>	<b>\$41,899,114</b>	\$41,435,897	\$463,217
Percent of total	100%	99%	1%
<b>Goal Dollars</b>	<b>\$5,906,014</b>	\$5,906,014	
RC Participation Estimates	<b>14.10%</b>	14.25%	

## Ferries

	Total	Projects with Race Conscious Goals	Projects with Zero Goals
<b>Number of Projects</b>	<b>0</b>	0	0
Percent of total	#DIV/0!	#DIV/0!	#DIV/0!
<b>Contract Dollars</b>	<b>\$0</b>	\$0	\$0
Percent of total	#DIV/0!	#DIV/0!	#DIV/0!
<b>Goal Dollars</b>	<b>\$0</b>	\$0	
RC Participation Estimates	#DIV/0!	#DIV/0!	

## Local Programs

	Total	Projects with Race Conscious Goals	Projects with Zero Goals
<b>Number of Projects</b>	<b>64</b>	48	16
Percent of total	100%	75%	25%
<b>Contract Dollars</b>	<b>\$83,896,688</b>	\$80,582,047	\$3,314,641
Percent of total	100%	96%	4%
<b>Goal Dollars</b>	<b>\$10,710,856</b>	\$10,710,856	
RC Participation Estimates	<b>12.77%</b>	13.29%	

## Consultant Services

	Total	Projects with Race Conscious Goals	Projects with Zero Goals
<b>Number of Projects</b>	<b>17</b>	0	17
Percent of total	100%	0%	100%
<b>Contract Dollars</b>	<b>\$3,153,273</b>	\$0	\$3,153,273
Percent of total	100%	0%	100%
<b>Goal Dollars</b>	<b>\$0</b>	\$0	
RC Participation Estimates	<b>0.00%</b>	#DIV/0!	

## Total

	Total	Projects with Race Conscious Goals	Projects with Zero Goals
<b>Number of Projects</b>	<b>101</b>	65	36
Percent of total	100%	64%	36%
<b>Contract Dollars</b>	<b>\$128,949,074</b>	\$122,017,944	\$6,931,131
Percent of total	100%	95%	5%
<b>Goal Dollars</b>	<b>\$16,616,871</b>	\$16,616,871	
RC Participation Estimates	<b>12.89%</b>	13.62%	

# Exhibit C



June 29, 2015

TO: Tom Baker, Bridge & Structures  
Kevin Dayton, Olympic Region  
Lorena Eng, Northwest Region  
Nicole McIntosh, Ferries Division  
Julie Meredith, SR 520 Program Administrator  
Keith Metcalf, Deputy Chief Engineer  
Ron Pate, Rail Division  
Dan Sarles, North Central Region  
Kris Strickler, Southwest Region  
Craig Stone, Toll Division  
Todd Trepanier, AWW Program Administrator  
Megan White, Environmental Services  
Don Whitehouse, South Central Region

FROM: Linea Laird, Chief Engineer   
Assistant Secretary of Engineering & Regional Operations  
(360) 705-7032

SUBJECT: **Project Delivery Memo #15-02 – DBE Utilization on Consultant Contracts**

## PURPOSE

At the direction of the Secretary of Transportation in Executive Order E 1009.02, WSDOT is affirming our commitment to the Disadvantaged Business Enterprise (DBE) program. The DBE program is a federal assistance requirement (Title 49, Part 26) that has existed for more than 25 years.

WSDOT is implementing a more comprehensive DBE program that includes increased emphasis on federally-funded professional services agreements, including but not limited to architectural and engineering (A&E) contracts administered through the Consultant Services Office.

## Background

The total number of consultant contracts that include DBE contract goals has been modest historically. Various factors have affected this including litigation.

In the recent past, WSDOT has been implementing many DBE Program Reforms and renewing our commitment to the DBE Program. A determination has been made that an increased focus on DBE utilization within the consultant program is appropriate and necessary.

**Agreements Affected**

All federally-assisted and potentially federally-assisted A&E consultant agreements, supplements, task orders or task order amendments over \$250,000 shall be evaluated for a DBE goal as described below.

**DIRECTION**

**General**

Effective immediately, for any proposed Agreement, Supplement, Task Order or Task Order Amendment in excess of \$250,000 that utilizes federal funds, the State's Scope of Work and Estimate (along with the Work Order Authorization) shall be sent to the HQ Consultant Services Office (CSO) for evaluation of DBE goals. For existing agreements, communication with CSO should commence no later than during development of the State's Scope of Work and Estimate and prior to final negotiations. CSO will coordinate with WSDOT's Office of Equal Opportunity (OEO) as they will be responsible for setting the DBE goal for the project. Goals are set based on potentially subcontractible items within the Scope of Work.

Potential for future federal funding should be identified and communicated prior to contract procurement. Using federal dollars to fund a consultant agreement after it is executed without a goal reduces WSDOT's ability to meet our established DBE goals.

On-site reviews shall be performed by WSDOT staff for all DBE sub-consultants whether there is a DBE goal on the contract or not. These reviews will be documented on Form 272-051. Completed forms shall be sent electronically to CSO.

All payments to DBE consultants on existing agreements shall be captured using DOT Form 271-056 EF and sent to CSO as requested. The same form will also be required at the end of the project as final documentation of amounts paid to DBE. All new agreements will use the electronic DBE payment system for monthly and final reporting as set for in the contract terms and conditions.

All communication with the Office of Equal Opportunity (OEO) regarding the DBE program and consultant contracts shall begin with CSO.

**ACTIONS REQUIRED**

**All Divisions**

Work in close cooperation with the CSO in fulfilling expectations described in this memorandum.

**Consultant Services Office, Development Division**

Update the Consulting Services Manual to properly reflect the expanded focus on DBE goal setting, and procedure thereto, for consultant contracts. Facilitate communication and coordination with the OEO.

**Regions**

Contact CSO regarding all task orders, amendments or supplements over \$250,000.

LL/JC/mbn

cc: Region Project Development Engineers  
Region Construction Engineers  
Region Program Managers  
Region Traffic Engineers  
Chris Christopher  
Jeff Carpenter  
John Nisbet  
John Milton  
Jay Alexander  
Kara Larsen  
Kathleen Davis  
Don Peterson, FHWA

# Exhibit D



**Washington State  
Department of Transportation**

Lynn Peterson  
Secretary of Transportation

Transportation Building  
310 Maple Park Avenue S.E.  
P.O. Box 47300  
Olympia, WA 98504-7300  
360-705-7000  
TTY: 1-800-833-6388  
www.wsdot.wa.gov

November 9, 2015

Mr. Dan Mathis  
Division Administrator  
Federal Highway Administration  
771 South Capitol Way  
Olympia, Washington 98504

RE: WSDOT Request for Program Waiver Pursuant to 49 CFR § 26.15

Dear Mr. Mathis:

As required in 49 Code of Federal Regulations (CFR) §26.15, a recipient requesting an exemption to any part of Subpart B or C must apply for a waiver. The purpose of this letter is to request your consideration and approval of a waiver that is consistent with federal law.

WSDOT is requesting a waiver under the criteria of 49 CFR § 26.15(b) that will allow the agency to limit its use of race- and gender- conscious measures (i.e., DBE contract goals) to those DBE groups for which compelling statistical evidence of discrimination exists in the relevant geographic market area. The waiver request is based on results of WSDOT's 2012 DBE Disparity Study (Final Report by BBC Research & Consulting published May 17, 2013 based on data from federal fiscal years 2009-2011).

**I. REASONS FOR THE WAIVER REQUEST PURSUANT TO 49 CFR 26.15(B)**

**A. Summary of Reasons for Waiver**

The WSDOT 2012 DBE Disparity Study (hereinafter referred to as the "2012 Disparity Study"), conducted by BBC Research & Consulting, concluded that substantial disparities exist between utilization and availability for Black American-, Asian Pacific American-, Subcontinent Asian American-, Hispanic American-, and Native American-owned businesses. In addition, the 2012 Disparity Study described statistical analysis of non-Hispanic WBE's that would suggest a lack of substantial disparity in certain types of contracts. This analysis by BBC Research & Consulting indicates:

- Considering all Federal Highway Administration (FHWA) and state-funded contracts together, non-Hispanic white women-owned businesses did not exhibit substantial disparities on transportation contracts that WSDOT awarded during any year of the study period (federal fiscal years 2009, 2010, and 2011; for details, see Figure ES-2 of the Executive Summary of the disparity study report).

- Non-Hispanic white women-owned businesses did not exhibit substantial disparities on state-funded transportation contracts that WSDOT awarded during any year of the study period, to which race- and gender-conscious measures did not apply (for details, see Figure -ES3 of the-Executive Summary of the disparity study report.)
- Non-Hispanic white women-owned businesses did not exhibit substantial disparities on transportation-related engineering contracts that WSDOT awarded during any year of the study period, to which race- and gender-conscious measures did not apply (for details, see Figure ES-4 of the Executive Summary of the disparity study report).
- Non-Hispanic white women-owned businesses did not exhibit substantial disparities on FHWA funded construction contracts that WSDOT awarded between May 9, 2005 and September 30, 2006, to which race- and gender-conscious measures did not apply (for details/see Figure ES-5 of the Executive Summary of the disparity study report).

In the United States Court of Appeals for the Ninth Circuit, opinions have indicated that in order to implement the Federal Disadvantaged Business Enterprise (DBE) Program in a narrowly tailored manner, agencies should limit the use of race- and gender-conscious program measures to those groups "that have actually suffered discrimination" within its transportation contracting industry.<sup>1</sup>

Based on the statistical analysis of the 2012 Disparity Study, and considering the opinions of the United States Court of Appeals for the Ninth Circuit, WSDOT is requesting a waiver for the 2015-2017 federal fiscal years to consider WBEs as not being presumed to be disadvantaged at this time; therefore such firms would not be allowed to participate in any race- and gender-conscious goals that WSDOT implements under the presumption of social and economic disadvantage on federally funded contracts. DBEs that are owned by minority women will still be eligible to participate in WSDOT's race-conscious measures if they are DBE-certified for their corresponding minority group(s) that are subject to the presumption of being disadvantaged.<sup>2</sup>

Non-Hispanic white women-owned businesses will still have the option to apply for DBE certification based on individual evidence of disadvantaged status (as opposed to having a presumption of disadvantage because of statistical disparity associated with a particular group) due to individualized evidence of social and economic disadvantage pursuant to 49 CFR §§ 26.61(d), 26.67(d) and Appendix E; such firms will also be eligible to participate in the race- and gender-neutral measures that are part of WSDOT's implementation of the Federal DBE Program, including the small business participation plan.

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<sup>1</sup> *AGC v San Diego Chapter v. California DOT*, 713 F.3d 1187, 1191, 1199, 2013 WL 1607239 (9th Cir. April 16, 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 997-98 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006)

<sup>2</sup> For example, Black American women-owned businesses would be eligible for WSDOT's race- and gender-conscious measures if they are certified as Black American-owned DBEs.

WSDOT will monitor availability and utilization of non-Hispanic white women-owned businesses and reassess the statistical evidence during the goal-setting process for period covered by the upcoming Disparity Study, which is currently out to bid, and will continue to review the appropriateness of the requested waiver as required by federal law. See Disadvantaged Business Enterprise (DBE) Program Proposed Amended Three-Year Overall Goal & Methodology for Federal Fiscal Years 2014 and 2015 through 2017 available at: [www.wsdot.wa.gov/EqualOpportunity/DisparityStudy/default.htm](http://www.wsdot.wa.gov/EqualOpportunity/DisparityStudy/default.htm).

## **B. Brief History of WSDOT's Implementation of the Federal DBE Program**

WSDOT has been implementing variations of the Federal DBE Program and the regulations that preceded it since the 1980s. After enactment of the Transportation Equity Act for the 21st Century (TEA-21) in 1998, USDOT established a new Federal DBE Program to be implemented by state and local agencies receiving USDOT funds.

**Western States Paving decision in 2005.** In May 2005, the Ninth Circuit Court of Appeals in *Western States Paving v. Washington State DOT* held that the Federal DBE Program enacted by Congress was facially constitutional, but ruled that WSDOT's implementation of the program was unconstitutional.<sup>3</sup> The court held that in order to satisfy legal requirements, a public entity implementing race- and gender-conscious measures must have evidence of discrimination in its transportation contracting industry.

In response to the *Western States Paving* decision, WSDOT and other state and local agencies that were affected by the decision discontinued their use of race- and gender-conscious elements of the Federal DBE Program. USDOT recommended that agencies implementing the Federal DBE Program should consider conducting availability and disparity studies to satisfy the requirements of strict scrutiny.

**2005 Availability Study.** WSDOT completed its first availability study in October 2005. The study measured the availability of MBE/WBEs for WSDOT transportation contracts. The study did not examine WSDOT's utilization of MBE/WBEs nor did it examine any disparities between MBE/WBE utilization and availability. At the time that the 2005 availability study was released (October 2005), WSDOT had suspended using contract-specific DBE goals as part of its implementation of the federal DBE program, per the *Western States Paving* holding.

**Implementation of contract-specific DBE goals.** Beginning in October 2006, WSDOT resumed setting contract-specific DBE goals on certain FHWA-funded construction contracts. All groups identified in 49 CFR Part 26 were deemed eligible for participation in the goals program. WSDOT's implementation of the goals program was based in part on information from its 2005 availability study.

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<sup>3</sup> *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

WSDOT did not set any contract-specific DBE goals on FHWA-funded engineering/professional consulting contracts until 2012. Prior to that time, the agency only used race- and gender-neutral measures to encourage MBE/WBE participation on engineering/professional consulting contracts.

**Implementation of voluntary MBE/WBE goals:** The State of Washington no longer has a Women or Minority Business Enterprise program that can establish race conscious goals for state funded projects. The BBC found that this was part of the Washington state contracting environment that had a detrimental impact with minority contracting.

### **C. Executive Summary of Analyses in the 2012 Disparity Study (BBC Research & Consulting)**

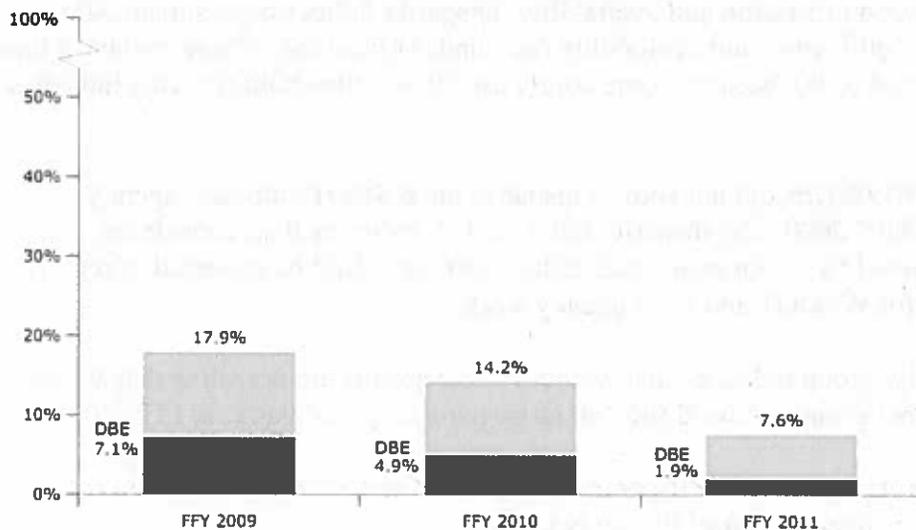
Along with measuring potential disparities between MBE/WBE utilization and availability on WSDOT transportation contracts, the disparity study also examined other quantitative and qualitative information related to the legal framework surrounding an agency's implementation of the Federal DBE Program; local marketplace conditions for MBE/WBEs and for other small businesses; and contracting practices and business assistance programs that the agency currently has in place.

- i. The study team conducted an analysis of federal regulations, case law, and other information to guide the methodology for the disparity study. The analysis included a review of federal requirements related to the Federal DBE Program and an assessment of any state requirements concerning the implementation of the Federal DBE program.
- ii. BBC conducted quantitative analyses of the success of minorities, women, and MBE/WBEs throughout Washington's transportation contracting industry. In addition, the study team collected qualitative information about potential barriers that small businesses and MBE/WBEs face in the Washington transportation contracting industry through in-depth anecdotal interviews, public hearings, and public meetings.
- iii. BBC analyzed the percentage of MBE/WBEs that are "ready, willing, and able" to perform on WSDOT transportation prime contracts and subcontracts. That analysis was based on telephone interviews that the study team completed with more than 3,000 Washington businesses that work in industries related to the types of transportation contracts that WSDOT and local agencies award. (The study team attempted telephone interviews with every business establishment that it identified as doing work that is relevant to WSDOT transportation contracting.)
- iv. BBC analyzed the dollars that WSDOT and local agencies awarded to MBE/WBEs on more than 11,000 transportation prime contracts and subcontracts executed between October 1, 2008 and September 30, 2011 (i.e., FFYs 2009, 2010, and 2011). BBC analyzed contracts that were USDOT-funded and contracts that were solely state-funded.

- v. BBC examined whether there were any disparities between the utilization of MBE/WBEs on transportation contracts that WSDOT and local agencies awarded during the study period. The study team also assessed whether any observed disparities were statistically significant.
- vi. BBC reviewed WSDOT's current contracting practices and Federal DBE Program measures and provided guidance related to additional program options and refinements to those practices and measures.

**Utilization results.** The study team measured MBE/WBE participation in terms of “utilization”—the percentage of prime contract and subcontract dollars that WSDOT and local agencies awarded to MBE/WBEs during the study period. Figure ES-1 presents overall MBE/WBE utilization for each study period year (i.e., FFYs 2009, 2010, and 2011). The darker portion of each bar presents WSDOT's utilization of MBE/WBEs that were DBE-certified during the study period. As shown in Figure ES-1, MBE/WBE utilization on WSDOT transportation contracts declined dramatically between FFY 2009 (17.9%) and FFY 2011 (7.6%). Certified DBE utilization also fell sharply, declining from 7.1% in FFY 2009 to only 1.9% in FFY 2011.

**Figure ES-1.**  
**MBE/WBE utilization on WSDOT and local agency transportation contracts**  
**(FHWA- and state-funded) by study period year**



**Note:** Includes FHWA- and state-funded WSDOT and local agency contracts. Darker portion of bar presents certified DBE utilization. Number of prime contracts/subcontracts analyzed was 4,244 for FFY 2009, 3,883 for FFY 2010, and 3,258 for FFY 2011. For more detail and results by group, see Figures K-5, K-6, and K-7 in Appendix K.

**Source:** BBC Research & Consulting from WSDOT contracting data.

**Disparity analysis results.** Although information about MBE/WBE utilization is instructive on its own, it is even more instructive when it is compared with the utilization that might be expected based on the availability of MBE/WBEs for WSDOT work. As part of the disparity study, BBC compared the utilization of MBE/WBEs on WSDOT transportation prime contracts and subcontracts with the percentage of contract dollars that MBE/WBEs might be expected to receive based on their availability for that work.

BBC expressed both utilization and availability as percentages of the total dollars that a particular group received for a particular set of contracts (e.g., 5% utilization compared with 4% availability). BBC then calculated a “disparity index” by dividing utilization by availability and multiplying by 100.<sup>4</sup> A disparity index of 100 indicates an exact match between utilization and availability for a particular group for a specific set of contracts (often referred to as “parity”). A disparity index of less than 100 may indicate a disparity between utilization and availability, and disparities of less than 80 are described in this report as “substantial.”<sup>5</sup>

Disparity analysis results for key contract sets are described below.

**All transportation contracts.** Figure ES-2 presents disparity analysis results for all WSDOT and local agency transportation contracts by study period year. Note that contract-specific DBE goals applied to many of the FHWA-funded contracts that WSDOT and local agencies awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between utilization and availability. Disparity indices of less than 100 indicate disparities between utilization and availability (i.e., underutilization). For reference, a line is also drawn at an index level of 80, because some courts use 80 as a threshold for what indicates a substantial disparity.

As an example, overall, MBE/WBEs did not show a disparity on WSDOT and local agency transportation contracts in FFY 2009. The disparity index of 136 indicates that, considered together, MBE/WBEs received \$1.36 for every one dollar that they would be expected to receive based on their availability for WSDOT and local agency work.

An examination of results by group indicates that whereas some groups did not show disparities during the study period, other groups showed substantial disparities, particularly, in FFY 2011:

- i. Subcontinent Asian American- and Hispanic American-owned businesses showed substantial disparities in each year of the study period.

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<sup>4</sup> For example, if actual utilization of WBEs on a set of contracts was 2 percent and the availability of WBEs for those contracts was 10 percent, then the disparity index would be 2 percent divided by 10 percent, which would then be multiplied by 100 to equal 20.

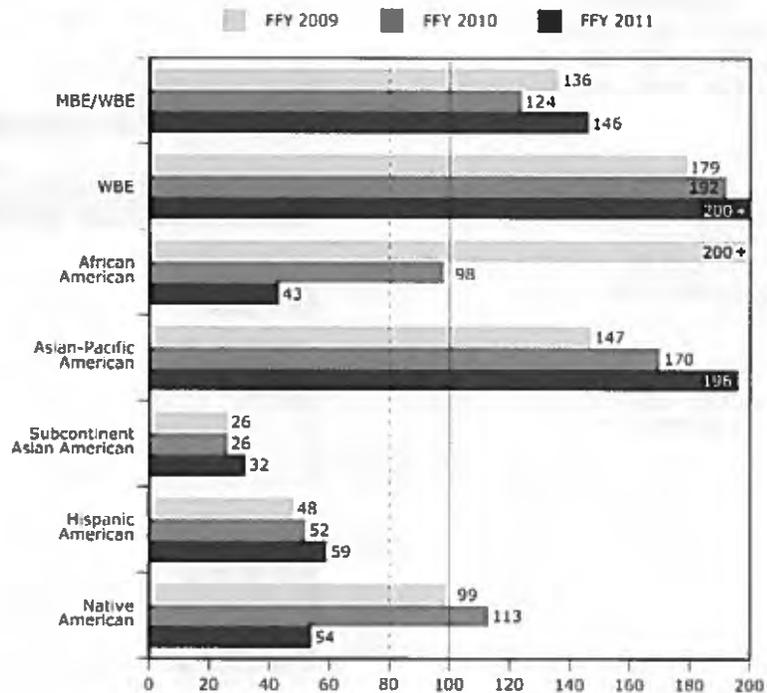
<sup>5</sup> Some courts deem a disparity index below 80 as being “substantial” and have accepted it as evidence of adverse conditions for MBE/WBEs. For example, see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). See Appendix B for additional discussion of those and other cases.

- ii. African American-owned businesses and Native American-owned businesses only showed substantial disparities in FFY 2011.<sup>6</sup>
- iii. Neither WBEs nor Asian-Pacific American-owned businesses showed disparities in FFYs 2009, 2010, or 2011.

**Figure ES-2. Disparity indices for WSDOT and local agency transportation contracts (FHWA- and state-funded) by study period year**

**Note**  
 Number of prime contracts/subcontracts analyzed was 4,244 for FFY 2009, 3,883 for FFY 2010, and 3,258 for FFY 2011.  
 For more detail and results by group, see Figures K-5, K-6, and K-7 in Appendix K.

**Source**  
 BBC Research & Consulting availability and utilization analyses.



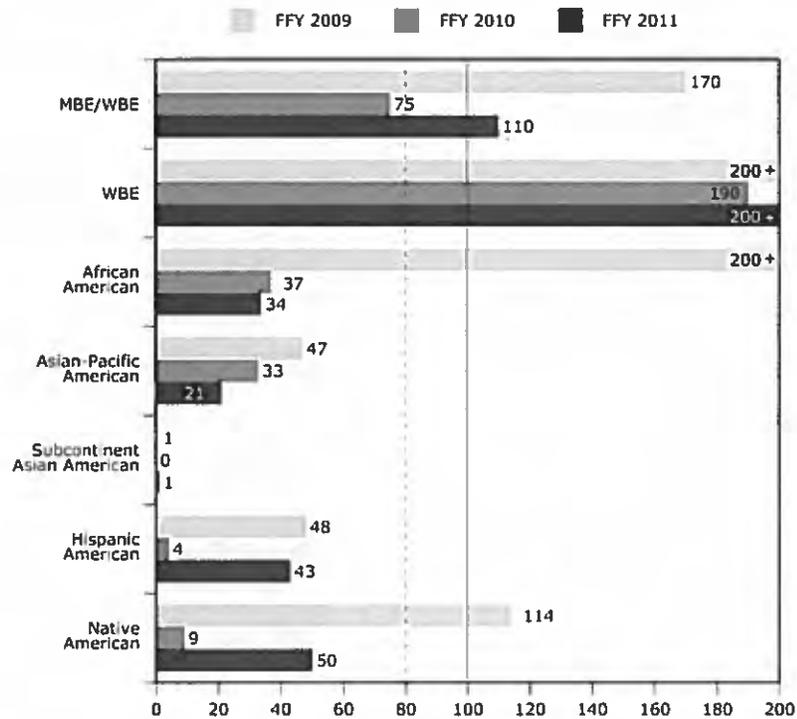
**Contracts without DBE goals.** One way to assess whether a lack of race- and gender-conscious programs affected the participation of MBE/WBEs on WSDOT transportation contracts is to examine any disparities on contracts to which contract-specific DBE goals did not apply. BBC presents disparity analysis results for three types of contracts to which DBE goals did not apply:

- i. State-funded transportation contracts that WSDOT awarded in FFYs 2009, 2010, and 2011;
- ii. Transportation-related engineering contracts that WSDOT and local agencies awarded in FFYs 2009, 2010, and 2011; and
- iii. FHWA-funded construction contracts that WSDOT awarded between May 9, 2005 and September 30, 2006.

<sup>6</sup> Although African American-owned businesses did not show substantial disparities in FFYs 2009 or 2010, most of the dollars that went to African American-owned businesses in FFYs 2009 (approximately \$53 million of \$57 million) and 2010 (approximately \$15 million of \$18 million) went to a single African American-owned electrical contracting firm that was not DBE certified. In some cases, other individual MBE/WBEs also accounted for relatively large proportions of their respective groups' utilization but not nearly to the same extent.

**State-funded transportation contracts.** In FFYs 2009, 2010, and 2011, WSDOT did not apply contract-specific DBE goals to any state-funded contracts.<sup>7</sup> Instead, WSDOT applied voluntary MBE/WBE goals to many of those contracts but did not require contractors to meet those goals or show good faith efforts to do so. Figure ES-3 presents disparity analysis results for state-funded WSDOT transportation contracts by study period year.

**Figure ES-3. Disparity indices for WSDOT state-funded transportation contracts by study period year**



**Note:**  
 Number of prime contracts/subcontracts analyzed was 759 for FFY 2009, 798 for FFY 2010, and 507 for FFY 2011  
 See Figures K-17, K-18, and K-19 for corresponding disparity results tables.

**Source:**  
 BBC Research & Consulting  
 availability and utilization analyses

All MBE groups showed substantial disparities on state-funded contracts after FFY 2009.

African American-owned businesses and Native American-owned businesses were the only two MBE groups that did not show substantial disparities on state-funded contracts in FFY 2009.<sup>8</sup>

WBEs did not show substantial disparities in any year of the study period on state-funded contracts.

<sup>7</sup> WSDOT used to apply race- and gender-conscious contract goals to certain state-funded contracts. However, Initiative 200, passed by Washington voters in 1998, prohibited state agencies from applying race- and gender-conscious measures to those contracts.

<sup>8</sup> Virtually all of the dollars that went to African American-owned businesses on state-funded contracts in FFY 2009 (\$19.3 million of \$19.6 million) went to a single African American-owned electrical contracting firm that was not DBE certified.

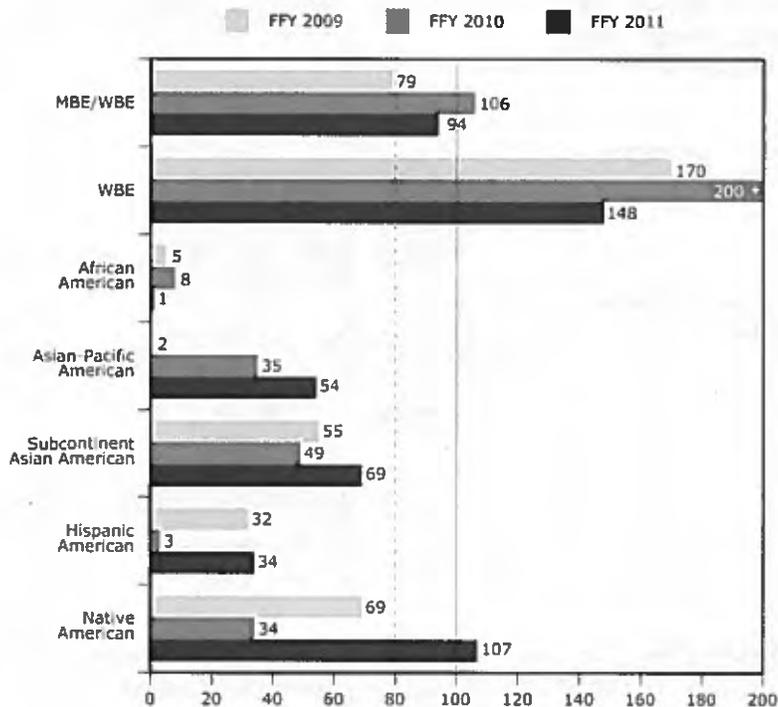
**Transportation-related engineering contracts.** During the study period, WSDOT and local agencies only used race- and gender-neutral measures to encourage MBE/WBE/ DBE participation on engineering contracts. They did not apply contract-specific DBE goals or voluntary MBE/WBE goals to and engineering contracts, regardless of funding source.

WBEs did not show substantial disparities on transportation-related engineering contracts in any year of the study period.

**Figure ES-4. Disparity indices for WSDOT and local agency transportation-related engineering contracts (FHWA- and state-funded) by study period year**

**Note:**  
 Number of prime contracts/subcontracts analyzed was 690 for FFY 2009, 948 for FFY 2010, and 659 for FFY 2011.  
 See Figures K-34, K-35, and K-36 for corresponding disparity results tables.

**Source:**  
 BBC Research & Consulting availability and utilization analyses



**FHWA-funded construction contracts from 2005-2006.** BBC also analyzed FHWA-funded construction contracts that WSDOT and local agencies awarded between May 9, 2005 and September 30, 2006. WSDOT did not set DBE contract goals on its FHWA-funded contracts during that time period in response to the May 2005 *Western States Paving Company vs. Washington State DOT* court decision.

Figure ES-5 presents overall disparity analysis results for FHWA-funded construction contracts that WSDOT and local agencies awarded between May 9, 2005 and September 30, 2006. Overall, MBE/WBEs did not exhibit a substantial disparity on those contracts (disparity index of 96). However, results varied for individual MBE/WBE groups:

Three MBE groups exhibited substantial disparities on FHWA-funded construction contracts in 2005-2006 — African American-owned businesses (disparity index of 40), Subcontinent

American-owned businesses (disparity index of 0), and Hispanic American-owned businesses (disparity index of 41).

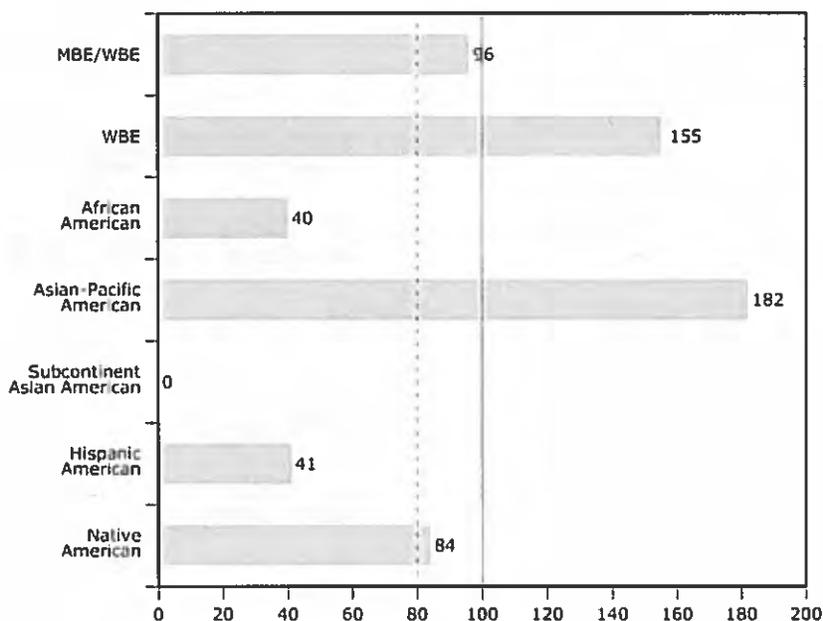
Native American-owned businesses exhibited a disparity index of 84 on those contracts, somewhat higher than the threshold of 80 that some courts use as an indicator of a substantial disparity.

Neither WBEs (disparity index of 155) nor Asian-Pacific American-owned businesses (disparity index of 182) exhibited disparities on those contracts.

**Figure ES-5. Disparity indices for WSDOT FHWA-funded construction contracts, May 2005 – September 2006**

Note:  
Number of prime contracts/subcontracts analyzed was 1,005.

Source:  
BBC Research & Consulting availability and utilization analyses.



**Other information.** The study team also examined information concerning the local marketplace, including results by MBE/WBE group, as part of the disparity study. WSDOT should review the full disparity study report, as well as other information it may have, in determining whether it needs to use any race- or gender-conscious measures, and if so, in determining which racial/ethnic and gender groups should be considered eligible for those measures.

In addition to the statistical evidence discussed above, the Study also gathered and analyzed anecdotal evidence of discriminatory barriers to the full and fair participation of M/W/DBEs in WSDOT's contracts and subcontracts. It looked at quantitative evidence through the use of a large-scale survey of DBEs and non-DBEs about their experiences and challenges in obtaining contracts. The survey quantified and compared anecdotal evidence on the experiences of DBEs and non-DBEs as a method to examine whether any differences might be due to discrimination.

The Study found that DBEs that have been hired in the past by non-DBE prime contractors to work on public sector contracts with DBE goals are rarely hired-or even solicited-by these prime contractors to work on projects without DBE goals. The relative lack of DBE hiring and, moreover, the relative lack of solicitation of DBEs in the absence of affirmative efforts by

WSDOT and other public entities in the Washington state market area shows that business discrimination continues to fetter DBE business opportunities in Washington's relevant markets.

Moreover, DBEs in WSDOT's market area report suffering business-related discrimination in large numbers and with statistically significantly greater frequency than non-DBEs. These differences frequently remain statistically significant when firm size and other "capacity-related" owner characteristics are held constant. DBEs are often more likely than similarly situated non-DBEs to report that specific aspects of the regular business environment make it harder for them to conduct their businesses and often less likely than similarly situated non-DBEs to report that specific aspects of the regular business environment make it easier for them to conduct their businesses.

The Study also presents the results from a series of in-depth personal interviews conducted with DBE and non-DBE business owners in the WSDOT market area. The interviews suggest that Black American-, Asian Pacific American-, Subcontinent Asian American-, Hispanic American-, and Native American-owned DBE businesses continue to suffer discriminatory barriers to full and fair access to WSDOT, other public sector, and private sector contracts. Participants reported experiences with discriminatory barriers, attitudes and performance standards, exclusion from industry networks; difficulties obtaining public sector contracts; and obtaining work on private sector or WSDOT "non-goals" contracts.

In summary, the Study concluded that there is strong anecdotal evidence of large, adverse, and frequently statistically significant disparities with Black American-, Asian Pacific American-, Subcontinent Asian American-, Hispanic American-, and Native American-owned DBE businesses' participation in business enterprise activity in WSDOT's relevant market area and the actual current availability of those businesses. It further concluded that these disparities cannot be explained solely, or even mostly, by differences between DBE and non-DBE business populations in factors untainted by discrimination, and that these differences therefore give rise to a strong inference of the presence of discrimination.

Based on these findings, the Study recommended that WSDOT augment its race-neutral initiatives, including reviewing surety bonding and insurance requirements; increasing outreach to DBEs and other small firms; create a WSDOT business development program; adopt a small business target market program; improve data collection and retention procedures; and increase DBE Program administration resources and commitment.

**D. Public Notice of Disparity Study Report, Public Notice of Reasons for Requesting Waiver, and Initial Request for Waiver Submitted in 2014**

In June 2013 WSDOT held public meetings throughout the state to discuss the Disparity Study Results, including the waiver request. These occurred at the following locations:

- June 18, 2013 – North Seattle
- June 19, 2013 – Yakima
- June 20, 2013 – Spokane
- June 24, 2013 – Webinar
- June 25, 2013 – Vancouver
- June 26, 2013 – South Seattle
- June 27, 2013 – Tacoma
- January 7, 2014 – Spokane
- January 9, 2014 – North Seattle
- January 13, 2014 – Tacoma

During and after the study process WSDOT met on numerous occasions with groups such as Tabor 100, the National Association of Minority Contractors, Women's Transportation Seminar and other members of the DBE Advisory Group. On January 23, 2014 WSDOT met with stakeholder organizations such as the Women in Highway Construction to discuss the proposed waiver. See Disadvantaged Business Enterprise (DBE) Program Proposed Amended Three-Year Overall Goal & Methodology for Federal Fiscal Years 2014 and 2015 through 2017 available at: [www.wsdot.wa.gov/EqualOpportunity/DisparityStudy/default.htm](http://www.wsdot.wa.gov/EqualOpportunity/DisparityStudy/default.htm).

WSDOT requested a waiver by letter dated March 28, 2014, available at: [www.wsdot.wa.gov/EqualOpportunity/DisparityStudy/default.htm](http://www.wsdot.wa.gov/EqualOpportunity/DisparityStudy/default.htm). attached. On October 20, 2015, FHWA requested that WSDOT amend and re-submit its request for a waiver; this document is WSDOT's submission of the amended request.

## **II. CONCLUSION: WSDOT'S REQUEST FOR A WAIVER IS CONSISTENT WITH THE PURPOSE AND CRITERIA OF 42 CFR § 26.15.**

Therefore, WSDOT hereby requests pursuant to 49 CFR §26.15(b) a waiver of the prohibition on sub-dividing goals into a group-by-group set of percentages. See 49 CFR § 26.51(e)(4) ("Your contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.")

Based on the 2012 Disparity Study analyses and recommendations, WSDOT requests to limit its use of DBE contract goals to the following groups: Black American-, Asian Pacific American-, Subcontinent Asian American-, Hispanic American-, and Native American-owned DBE businesses, including women-owned businesses that also fall within one of the above categories.

As a result of the waiver, WSDOT would not consider non-Hispanic white WBE businesses as being eligible on a statistical basis for the presumption of disadvantaged status concerning DBE contract goals at this time. If a specific non-Hispanic white woman-owned firm has evidence on an individualized basis that it has been socially and economically disadvantaged for purposes of attempting to conduct business in industries and markets in which WSDOT participates with

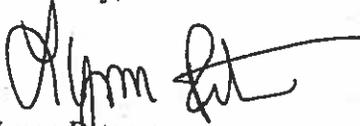
Mr. Dan Mathis  
November 9, 2015  
Page 13

respect to public contracting, then such a firm would still have the option of applying for certification under 49 CFR § 26.61(d), 26.67(d) and Appendix E. WSDOT's waiver request complies with all applicable laws and program requirements. Approval of the waiver will also be consistent with WSDOT's implementation of the Federal DBE Program in a narrowly tailored manner.

WSDOT asserts that this approach will achieve the objectives of 49 CFR Part 26. In addition, this request for a waiver conforms to the guidance from the USDOT's General Counsel on responding to the opinion of the United States Court of Appeals for the Ninth Circuit in *Western States Paving*.

If you have any questions regarding this submission, please contact Mike North at 360.705.7095 or [NorthM@wsdot.wa.gov](mailto:NorthM@wsdot.wa.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Lynn Peterson", with a long horizontal flourish extending to the right.

Lynn Peterson  
Secretary of Transportation

LP:jd

cc: Roger Millar, WSDOT  
Mike North, WSDOT

# Exhibit E

# WSDOT DBE NEWS

SEPTEMBER  
QUARTERLY EDITION

## TRAINING & OTHER SERVICES

### *Small Business Administration – Learning Center*

Take a class anywhere, anytime with the Small Business Administration's (SBA) – Learning Center. The SBA's Learning Center is a virtual campus offering online sources, publications, and other forms of technical assistance. Courses are typically self-paced, free and take about 30 minutes to complete. Some of the classes include:

- Business Opportunities: A Guide to Winning Federal Contracts
- Customer Services
- Strategic Planning
- How to Write a Business Plan
- Introduction to Accounting

Access the all the training at: [www.sba.gov/tools/sba-learning-center/search/training](http://www.sba.gov/tools/sba-learning-center/search/training).

## FREE PLANS, SPECIFICATIONS AND MANUALS

WSDOT offers free plans, specifications and manuals to DBEs. Also, WSDOT sends out weekly email Notice to Contractor and Consultants, containing upcoming opportunities, events and free training. If you are interested in either of these, please email [DBESS@wsdot.wa.gov](mailto:DBESS@wsdot.wa.gov) or call toll free (888) 259-9143.

## Mike North OEO's new Interim Director



On August 1st, Mike North joined WSDOT as Interim Director of our Office of Equal Opportunity (OEO). OEO is responsible for a number of important programs and activities that directly impact the DBE community and Mike is excited to step in to help bridge the gap in OEO leadership, while WSDOT conducts a nationwide search for a permanent OEO Director. As an agency, WSDOT has strengthened our DBE program and continues to work hard to ensure that all businesses have an equal opportunity to participate on our transportation projects.

Mike is committed to ensuring a fair and equitable environment for DBEs, if you have any questions, comments or concerns please contact [NorthM@wsdot.wa.gov](mailto:NorthM@wsdot.wa.gov) or 360.705.7095.

## Dennis Worrell is OEO's new Business Development Advisor



On August 17th, Dennis Worrell joined WSDOT OEO as the Business Development Advisor. Dennis has over twenty years' private sector experience in marketing, management, construction, and sales. His extensive business experience will make him a valuable asset to the DBE community and to our team! Dennis will be working in the DBE Support Services Program assisting small disadvantaged business owners in the Long Term Business Development Program. Dennis will be working with other agency and professional partners on delivering services and technical assistance to help you succeed.

If you are interested in becoming more strategic in your business planning or want to know how to position your company to do business with WSDOT contact Dennis via telephone at 360.705.7088 or [WorrelD@wsdot.wa.gov](mailto:WorrelD@wsdot.wa.gov).

# SAVE THE DATE

2015 BUSINESS AFTER HOURS  
NOVEMBER 12<sup>TH</sup>  
FROM 5:00 TO 8:00 PM  
PIER 66 IN SEATTLE

Sound Transit, the Port of Seattle, and Washington State Department of Transportation (WSDOT) are sponsoring the sixth annual Business After Hours Event! This event is for small, veteran, minority and women owned consulting and construction firms to network and establish meaningful relationships with prime contractors, consultants and agency staff, all in a casual and engaging atmosphere. This event includes an awards ceremony, networking opportunities with prime contractors and consultants, and refreshments. More information, including registration, will be coming later this fall.

## Because You Asked...

*What is a Commercially Useful Function?*

A Commercially Useful Function or CUF is an important task that you as a DBE must do if you are performing work on WSDOT projects to count towards the project goals or the overall DBE goal. Repetitive findings of not performing a CUF can jeopardize your DBE certification status and in rare circumstance could result in legal trouble. To make sure you are performing a CUF when working on a federal-aid project, here are the basic requirements (written in plain English, for the legal requirements see 49 Code of Federal Regulation Part 26.55):

- Perform, manage and supervise the work using your own staff;
- Perform the work with your own equipment;
- Purchase, manage and negotiate your materials; and
- The regulations are very specific about trucking so if you have questions or concerns about how your firm is operating as a DBE, please contact the Office of Equal Opportunity or read the contract language (DBE General Special Provision).

Most commonly, DBE firms are found not to be performing a CUF if they are:

- Sharing equipment and/or personnel with the Prime Contractor;
- Subcontracting portions of their work to non-DBEs and trying to count that work; or
- Working as a pass through or letting other companies borrow or buy your DBE certification.

WSDOT wants to see your company succeed but bending rules or being unaware of the requirements of performing work as a DBE can be detrimental to your company. If you have questions or concerns about this issue, please contact OEO toll free at 1.888.259.9143 and ask to speak to Greg Bell, DBE Program Manager or John Huff, DBE Program Supervisor.