

December 31, 2013

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

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

### I. Executive Summary of Recommendations

The following is an executive summary of the memorandum prepared by Richard E. Mitchell, Special Assistant Attorney General to Washington State Department of Transportation (WSDOT), and submitted to WSDOT on December 31, 2013, concerning the Federal Highway Administration's (FHWA) findings of noncompliance with the DBE program relating to the above-mentioned DBE Complaint.

Counsel addresses three issues in the memorandum relating to WSDOT's Contract with Seattle Tunnel Partners (STP) on the Alaskan Way Viaduct Bored Tunnel Project (Project):

1. Whether noncompliance with DBE requirements constitutes material breach of the Contract?

Brief Answer: Yes

2. Whether WSDOT's course of dealings, its failure to avail itself of contractual remedies, or any other affirmative acts or omissions in administering the Contract constitutes a waiver of WSDOT's rights and remedies in the event of a default?

Brief Answer: No

3. What contractual remedies are available to WSDOT to correct noncompliance?

Brief Answer: When STP is noncompliant and otherwise fails to comply with the DBE requirements, and thus triggers a technical event of default, WSDOT may (in addition to termination or such other remedy it deems appropriate) incur recoverable administrative costs and expenses. WSDOT may withhold

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payment, suspend, or...subject Design-Builder to civil penalties of up to ten percent of the amount of the Contract for each violation. In addition, WSDOT may impose such sanctions as it or the Federal Highway Administration may determine necessary to gain compliance....”

In addition, counsel recommends the following:

Counsel strongly recommends that WSDOT declare an event of default under the Contract, request assurance of future performance, recover its damages, and assess appropriate financial penalties. WSDOT should also withhold future payments, as necessary, to gain STP's compliance with the Contract's DBE program requirements. To the extent WSDOT assesses penalties against STP, as allowed under the Contract, WSDOT should use those penalties to increase DBE participation by offering to return some portion of them to STP for each percentage point it achieves over the Contract's 8% DBE participation goal.

Counsel further strongly recommends that WSDOT rely on the Contract language that allows it to fashion “other remedies” when STP is noncompliant with the DBE requirements, such as creating a rigorous just-in-time oversight and monitoring mechanism that tracks and evaluates STP's interactions with and utilization of DBEs. Such a mechanism would provide WSDOT with real time information, and immediate opportunities to identify and remove hurdles and barriers to DBE participation on the Project. WSDOT's appointment of an independent DBE program monitor, tasked with active oversight and monitoring, is integral to the creating of an effective oversight and monitoring mechanism. STP should be required to advise all DBEs that it interacts with of the existence and purpose of WSDOT's independent DBE program monitor. In order to ensure that such a mechanism is not used by STP to submit claims, WSDOT should memorialize the oversight and monitoring mechanism (inclusive of the existence of the independent monitor) via a Project change order, one in which STP is required to waive any and all claims against WSDOT relating to its process for overseeing and monitoring STP's compliance with the DBE program.

Yours truly,

/s/ Richard E. Mitchell

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

RM/dd

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