



U.S. Department
of Transportation
Federal Highway
Administration

Office of the Administrator

March 20, 2014

1200 New Jersey Ave., SE
Washington, D.C. 20590

In Reply Refer To:
HCC-1

Ms. Lynn Peterson
Secretary
Washington State Department of Transportation
P.O. Box 47300
Olympia, WA 98504-6388

Dear Ms. Peterson:

Please find enclosed an executed copy of the Conciliation Agreement between the Federal Highway Administration and the Washington State Department of Transportation. Thank you for your and your staff's efforts to reach this Agreement and for your commitment to the Disadvantaged Business Enterprise program. We look forward to continued cooperative efforts to carry out a successful Federal-aid highway program in Washington.

Sincerely,

A handwritten signature in black ink, appearing to read "Gregory G. Nadeau".

Gregory G. Nadeau
Deputy Administrator

**Conciliation Agreement between the Federal Highway Administration
(FHWA) and the Washington State Department of Transportation (WSDOT)**

This Conciliation Agreement (Agreement) is entered into by the Federal Highway Administration (FHWA) and the Washington State Department of Transportation (WSDOT) (collectively, the Parties) on the date set forth below.

WHEREAS, all recipients of Federal-aid highway funds are required to comply with the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) regulations found in Part 26 of Title 49 of the U.S. Code of Federal Regulations (CFR);

WHEREAS, WSDOT annually receives Federal-aid highway funds from the FHWA;

WHEREAS, the DBE regulations require State recipients of Federal-aid highway funds to set overall goals for participation by DBE firms as a percentage of all Federal-aid highway funds expended in FHWA-assisted projects over a three-year period;

WHEREAS, the DBE regulations require a State to set DBE contract goals when goals are necessary to achieve its overall DBE participation goal;

WHEREAS, the Alaskan Way Viaduct (AWV) Bored Tunnel Project (the Project) is a design-build, Federally-assisted contract in the City of Seattle in which WSDOT is the contract owner and Seattle Tunnel Partners (STP), a joint venture between Dragados USA and Tutor Perini Corporation, is the prime contractor;

WHEREAS, WSDOT established an 8% DBE contract goal for the Project, which STP committed to as a condition of the contract;

WHEREAS, STP agreed through the Project contract to be bound by the DBE requirements of 49 CFR Part 26;

WHEREAS, when a recipient has established a DBE contract goal, the DBE regulations require that the contractor make good faith efforts to meet the goal by either obtaining enough DBE participation to reach the goal or demonstrating that it "took all necessary and reasonable steps to achieve [the] DBE goal . . . which, by their scope, intensity and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful";

WHEREAS, the DBE regulations require that when a DBE subcontractor is terminated, the prime contractor must make good faith efforts to find another DBE subcontractor to substitute for the original DBE;

WHEREAS, the DBE regulations require a recipient of Federal-aid highway funds to monitor its contractors' compliance with the DBE regulations, including the good faith efforts requirements;

WHEREAS, the FHWA, as a result of an investigation following the filing of a civil rights complaint, has determined that it has reasonable cause to find WSDOT in noncompliance with its oversight obligations under the federal DBE regulations by failing to intervene when there is clear evidence to support that STP was violating the DBE regulations by not making adequate good faith efforts to achieve the Project goal when it created barriers to fair DBE participation in the replacement Request for Proposal for the Grady work;

WHEREAS, the FHWA identified in its investigation report additional complaints it received from DBE firms concerning questionable practices by STP in dealing with DBE firms:

WHEREAS, pursuant to 49 CFR §26.103(2), on November 1, 2013, FHWA notified WSDOT that it is in noncompliance with its obligations under the DBE Program requirements:

WHEREAS, in a letter dated November 27, 2013, WSDOT requested the commencement of conciliation proceedings with FHWA;

WHEREAS, the Parties intend, by the terms of this Agreement, to set forth the actions required to ensure WSDOT's compliance with 49 CFR Part 26 and continued eligibility for FHWA financial assistance.

NOW, THEREFORE, the Parties agree and commit as follows:

AWV Project-Specific Efforts

1. WSDOT agrees to make a commitment of resources and time necessary to accomplish the activities set forth in this Agreement.
2. WSDOT will formally define the process by which it will verify past and future DBE participation and deliver that participation information to FHWA.
3. WSDOT will produce to FHWA on a quarterly basis, or as mutually agreed by the Parties, written certification, as required under 49 CFR §26.37, that WSDOT has reviewed the contracting records and monitored work sites (e.g., determined commercially useful function (CUF); compared DBE quote to commitment and commitments to actual payments to DBEs) to ensure work committed to each DBE at contract award or subsequently is/has been actually performed by these DBEs. Along with the written certification, WSDOT will produce to FHWA documentation, including: name of DBE; what the DBE is certified to perform; type of work or service performed; dollar amount STP committed to DBE; dates DBE performed work or services; hours worked; actual payments made to DBE.
4. WSDOT will monitor STP's activities related to subcontracting and investigate complaints regarding DBE participation. WSDOT will coordinate with STP to identify and resolve impediments to successful DBE participation, which may include, but not limited to, issues such as bonding, response timeframes, and low bid policy.

5. WSDOT will monitor post-subcontract utilization, prompt payment and retainage to ensure STP's compliance with 49 CFR §26.29 and chapter 60.28 RCW. WSDOT understands that it is responsible for ensuring STP complies with prompt payment and retainage requirements.
6. WSDOT will hire a Project position called the DBE Program Administrator, who shall report to DBELO and receive daily direction from the AWV Program Administrator, whose duties shall include, but not be limited to: (1) acting as a single point of contact for all DBE's; (2) conducting community outreach; and (3) making recommendations to the DBELO and AWV Program Administrator regarding the removal of impediments and barriers to DBE participation.
7. WSDOT will pursue with STP the hiring of an independent DBE Program Coordinator who shall be responsible for providing ongoing independent review and assessment of STP's DBE program and progress on this Project through Substantial Completion, including, but not limited to, working with WSDOT's DBE Program Administrator. In the event that there are new DBE complaints against STP, the DBE Program Coordinator will be made available to assist in the resolution of such complaints. The reports prepared by the DBE Program Coordinator will be provided directly to WSDOT and will be simultaneously shared with STP. WSDOT shall share the reports with FHWA. STP will submit the firm/individual chosen as the DBE Program Coordinator to WSDOT for review and acceptance prior to entering into any agreement with the firm/entity.
8. WSDOT will actively monitor STP's efforts to achieve the 8% DBE contract goal, which will include at a minimum such actions as:
 - a. Identification of DBE opportunities that may be found through the purchase of materials, technical and professional consulting, and assistance through the procurement of services, personnel, or equipment necessary for the project;
 - b. Consideration of unbundling large pay items to facilitate DBE participation ;
 - c. Evaluation of bonding requirements for small, low-risk prime contracts;
 - d. Identification of additional opportunities that may be subcontracted to DBEs, including anticipated amounts;
 - e. Identification of targeted DBE outreach and communication strategies;
 - f. Identification of any supportive services that will be provided to DBEs during the project; and
 - g. Direct communication with DBEs concerning upcoming opportunities and bidding processes.

9. The FHWA recognizes that, in response to its October 31, 2013, investigation report, which directed WSDOT to take all appropriate actions against STP available under its contract, and as supported by the review performed by the independent Special Assistant Attorney General (SAAG) hired by the state of Washington, WSDOT issued a letter to STP dated January 13, 2014, setting forth WSDOT's finding of breach on the part of STP and proposed next steps for both WSDOT and STP to resolve the DBE compliance issues identified by FHWA. FHWA supports WSDOT's decision to find STP in breach of contract, and in the event that STP fails to resolve the DBE compliance issues identified by the FHWA through discussions with WSDOT, WSDOT must take all appropriate actions against STP available under its contract.

WSDOT DBE Program Level Efforts

1. WSDOT will maintain a clear line of authority on its organizational chart whereby the DBE Liaison Officer (DBELO) will have direct, independent access to WSDOT's Secretary concerning DBE program matters and shall be responsible for implementing all aspects of WSDOT's DBE program, in accordance with 49 CFR §26.25.
2. WSDOT will develop an automated DBE monitoring process and procedure for inclusion in its DBE Program Plan, including, at a minimum, identifying how WSDOT will comply with the terms of 49 CFR § 26.37, including (1) enforcement of legal and contract remedies for violation of regulation; (2) the provision to FHWA of written certification that WSDOT has reviewed contracting records and monitored work sites to ensure work committed to DBEs, at contract award or subsequently, is actually performed by these DBEs; (3) development of a running tally that shows each month by project, the commitments made to DBEs and subsequent payments pertaining to those commitments.
3. WSDOT will establish monitoring processes and procedures for determining the value of DBE participation consistent with the terms of 49 CFR § 26.55, specifically as applies to brokers and trucking operations.
4. WSDOT, in coordination with FHWA, agrees to develop and conduct annual agency-wide training to reinforce the importance of the DBE program and clarify roles and responsibilities of all personnel.
5. WSDOT will include DBE and other core civil rights programmatic responsibilities as part of staff performance expectations upon which they will be evaluated.
6. WSDOT will coordinate with FHWA to provide training for the Office of Minority and Women Business Enterprises (OMWBE) on DBE certification and the assigning of appropriate NAICS Codes.

7. WSDOT, including the DBELO, will review its current Design Build specifications, incorporate national best practices, collaborate with FHWA, and then revise as appropriate to ensure consistency with DBE Program requirements. The revised specifications may include, but not be limited to:
 - a. Identification of a DBE Liaison staff member;
 - b. Identification, at the proposal submission, to the extent possible, of specific DBEs, with specific types of work, for specific dollar amounts, including construction-related and professional services-related DBEs;
 - c. Identification of all work types that will be self-performed by the design-builder or prime consultant, or that are estimated to be awarded (including estimated cost and timeline of award) to subcontractors, including DBEs, during the design and construction of the project;
 - d. Identification of other opportunities that may be found through the purchase of materials, technical and professional consulting, and assistance through the procurement of services, personnel, or equipment necessary for the project;
 - e. Identification of additional opportunities that may be subcontracted to DBEs, including anticipated amounts and anticipated timeframes;
 - f. Identification of the DBE commitment and anticipated work areas for work to be performed by year for the duration of the project;
 - g. Identification of a schedule of submission of updated participation lists and DBE program plan, e.g., monthly;
 - h. Identification of DBE outreach and communication strategies; and
 - j. Identification of any supportive services that will be provided to DBEs during the project.
8. WSDOT will review its current DBE project goal setting methodology and revise as appropriate to ensure that contracts goals will cumulatively result in meeting any portion of its overall goal that it does not anticipate meeting through race-neutral means, specifically taking into account design build projects.
9. WSDOT shall establish a process for reviewing DBE participation plans submitted by prime contractors in response to proposals for design-build. The DBELO shall participate in the creation and implementation of the review of the DBE participation plans.

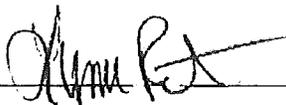
In the first 30 days following execution of this Agreement, WSDOT and FHWA shall develop a DBE report template for both the AWV Project and WSDOT's DBE Program. WSDOT will provide reports of its compliance with the above requirements beginning 30 days after the template is complete and, thereafter, monthly until the Parties agree that the terms of this Agreement have been satisfied. FHWA reserves the right to ask for additional documentation if it deems documentation WSDOT provides is insufficient.

Upon the signing of this Agreement by both Parties, the FHWA's November 1, 2013, notice of noncompliance will be considered closed, and WSDOT will be considered in compliance with its DBE obligations and eligible to receive FHWA financial assistance.

The FHWA's Washington Division Office and Headquarters Office of Civil Rights will jointly monitor WSDOT's implementation of this Agreement to ensure that WSDOT complies with its terms. Should FHWA find that WSDOT has failed to carry out the terms of the Agreement, FHWA will notify WSDOT in writing that WSDOT is in noncompliance with the DBE regulations.

This Agreement may not be modified unless in writing and executed by both Parties.

In acknowledgement of the foregoing, this Agreement is hereby signed:



Lynn Peterson
WSDOT Secretary

Date: March 19, 2014



Greg Nadeau
FHWA Deputy Administrator

Date: 3/20/14