

DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM PROPOSED AMENDED THREE-YEAR OVERALL GOAL & METHODOLOGY FOR FEDERAL FISCAL YEARS 2014 AND 2015 THROUGH 2017

The Washington State Department of Transportation (WSDOT) submitted its three-year overall Disadvantaged Business Enterprise (DBE) goal for federal fiscal years (FFYs) 2012 through 2014 to the Federal Highway Administration (FHWA) on August 1, 2011. FHWA subsequently approved WSDOT's goal of 15.17% on December 16, 2011. In accordance with 49 CFR Part 26, USDOT's Tips for Goal-Setting, and other USDOT official guidance, WSDOT based its goal and goal methodology on an availability study that the agency completed in October 2005 and on other relevant information. Recently, WSDOT commissioned BBC Research & Consulting (BBC) to conduct a disparity study related to the agency's implementation of the Federal DBE Program. BBC completed the study in December 2012 (referred to herein as the 2012 Disparity Study). Based substantially on study results and on guidance from the Ninth Circuit Court of Appeals rulings in *Associated General Contractors of America, San Diego Chapter vs. California Department of Transportation, et al.* and *Western States Paving Company vs. Washington State DOT*, WSDOT proposes to amend its overall DBE goal for FFY 2014 and proposes to continue using the amended overall DBE goal for FFYs 2015 through 2017.^{1,2} To determine its amended overall DBE goal, WSDOT closely followed federal regulations, including the two-step goal-setting methodology set forth in 49 Code of Federal Regulations (CFR) Section 26.45.

Step 1. Determining a Base Figure – 49 CFR Section 26.45(c)

WSDOT began the process of determining its amended overall DBE goal by establishing a base figure. Consistent with United States Department of Transportation (USDOT) guidance, WSDOT established a base figure based on data from a "custom census" availability analysis that BBC conducted as part of the 2012 Disparity Study (for details, see Chapter 5 and Appendix D of the 2012 Disparity Study report, which are attached to the end of this document). For the purposes of establishing a base figure, the availability analysis was limited to the availability of *potential DBEs*—minority- and women-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in federal regulations including 49 CFR Section 26.65—for FHWA-funded prime contracts and subcontracts that WSDOT and subrecipient local agencies awarded in FFYs 2009 through 2011 (i.e, referred to herein as the study period).^{3, 4} WSDOT has determined that the mix of the types and sizes of transportation contracts that it anticipates awarding in FFY 2014 and in FFYs 2015 through 2017 will be similar

¹ *AGC, San Diego Chapter v. California DOT*, 713 F.3d 1187, 2013 WL 1607239 (9th Cir. April 16, 2013)

² *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 997-98 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006)

³ Consistent with USDOT guidance, WSDOT considers any contract with at least \$1 of FHWA funding as an "FHWA-funded contract" and includes the total value of the contract in its pool of total FHWA-funded contracting dollars.

⁴ BBC defined women-owned businesses specifically as *non-Hispanic white women-owned businesses*. BBC grouped minority women-owned businesses with their corresponding minority groups (e.g., grouping Black American women-owned businesses with all other Black American-owned businesses). For details about BBC's definition of women-owned businesses, see Chapter 5 of the 2012 Disparity Study report. The Ninth Circuit Court of Appeals has accepted this definition of women-owned businesses. See *AGC, San Diego Chapter v. California DOT*, 713 F.3d 1187, 1198, 2013 WL 1607239 (9th Cir. April 16, 2013).

to the mix of types and sizes of transportation contracts that it awarded in FFYs 2009 through 2011.

Methodology for the availability analysis. BBC's availability analysis focused on specific areas of work (i.e., subindustries) related to the types of transportation-related construction and engineering contracts that WSDOT and subrecipient local agencies awarded during the study period. BBC identified specific subindustries—based on 8-digit Standard Industry Classification (SIC) codes—for inclusion in the availability analysis and identified the geographic market areas in which WSDOT and subrecipient local agencies awarded most of the corresponding contract dollars (i.e., the relevant geographic market area). BBC considered the state of Washington as the relevant geographic market area for the study. The study team then developed a database of potentially available businesses through surveys with local business establishments within relevant subindustries.

Overview of availability surveys. The study team conducted telephone surveys with business owners and managers to identify businesses that are potentially available for WSDOT transportation prime contracts and subcontracts.⁵ BBC began the interview process by collecting information about business establishments from Dun & Bradstreet (D&B) Marketplace listings. BBC collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most related to the transportation contracts that WSDOT and subrecipient local agencies awarded during the study period. D&B provided 15,860 business listings related to those work specialization codes.

Information collected in availability surveys. The study team conducted telephone surveys with the owners or managers of the identified business establishments. Survey questions covered many topics about each organization, including:

- Status as a private business (as opposed to a public agency or not-for-profit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work in terms of 8-digit SIC codes;
- Qualifications and interest in performing transportation-related work for WSDOT and other state and local government agencies;
- Qualifications and interest in performing transportation-related work as a prime contractor or as a subcontractor;
- Ability to work in specific geographic regions of Washington;
- Largest prime contract or subcontract bid on or performed in the previous five years;
- Year of establishment; and
- Race/ethnicity and gender of ownership.

⁵ The study team offered business representatives the option of completing surveys via fax or e-mail if they preferred not to complete surveys via telephone.

Considering businesses as potentially available. BBC considered businesses to be potentially available for WSDOT transportation prime contracts or subcontracts if they reported possessing *all* of the following characteristics:

- a. Being a private business (as opposed to a nonprofit organization);
- b. Having performed work relevant to WSDOT transportation contracting;
- c. Having bid on or performed transportation-related public or private sector prime contracts or subcontracts in Washington in the past five years; and
- d. Being qualified for and interested in work for WSDOT and other state or local governments.⁶

BBC also considered the following information to determine if businesses were potentially available for specific contracts that WSDOT awarded during the study period:

- e. The ability to work in specific regions of Washington;
- f. The largest contract bid on or performed in the past (i.e., relative capacity); and
- g. The year the business was established.

Steps to calculating availability. As part of the availability analysis, BBC collected and analyzed relevant information to develop dollar-weighted availability estimates to help WSDOT set its overall DBE goal. Dollar-weighted availability estimates represent the percentage of transportation contracting dollars that potential DBEs would be expected to receive based on their availability for specific types and sizes of WSDOT's FHWA-funded prime contracts and subcontracts. BBC's approach to calculating availability was a bottom up, contract-by-contract "matching" approach.

Only a proportion of the businesses in the availability database were considered potentially available for any given WSDOT construction or engineering prime contract or subcontract (referred to collectively as "contract elements"). BBC first examined the characteristics of each specific FHWA-funded contract element, including type of work, location of work, contract size, and contract date. BBC then identified businesses in the availability database that perform work of that type, in that location, of that size, in that role (i.e., prime contractor or subcontractor), and that were in business in the year that the contract element was awarded.

BBC identified the specific characteristics of each FHWA-funded prime contract and subcontract that the study team examined as part of the disparity study and then, for the purposes of helping WSDOT establish a base figure, took the following steps to calculate the availability of potential DBEs for each FHWA-funded contract element:

1. For each contract element, the study team identified businesses in the availability database that reported that they:

⁶ That information was gathered separately for prime contract and subcontract work.

- Are qualified and interested in performing transportation-related work in that particular role for that specific type of work (based on 8-digit SIC codes) for WSDOT and other local agencies;
 - Are able to serve customers in that geographic location;
 - Have bid on or performed work of that size; and
 - Were in business in the year that WSDOT awarded the contract.
2. The study team then counted the number of potential DBEs (by race/ethnicity and gender) relative to all businesses in the availability database that met the criteria specified in Step 1.
 3. The study team translated the numeric availability of potential DBEs for the contract element into percentage availability.

BBC repeated those steps for each FHWA-funded contract element that the study team examined as part of the disparity study. BBC multiplied the percentage availability for each contract element by the dollars associated with the contract element, added results across all contract elements, and divided by the total dollars for all contract elements. The result was a dollar-weighted estimate of the overall availability of potential DBEs and estimates of availability by each relevant racial/ethnic and gender group.

BBC expressed availability as the percentage of the associated contracting dollars that one might expect potential DBEs to receive based on various factors including the type of work involved, the location of the work, and the size of the contract. Figure 1 presents detailed information about the base figure for WSDOT's overall DBE goal:

- Column (a) presents the groups of potential DBEs that BBC considered as part of the base figure analysis;
- Column (b) presents the availability percentage for each group for FHWA-funded *construction* contract elements;
- Column (c) presents the availability percentage for each group for FHWA-funded *engineering* contract elements; and
- Column (d) presents the availability percentage for each group for *all* FHWA-funded contract elements (i.e., construction and engineering contract elements considered together).

As presented at the bottom of column (d), the availability analysis shows that potential DBEs could be considered available for 8.4% of WSDOT's FHWA-funded prime contracts and subcontracts. Thus, WSDOT considers 8.4% as its base figure. That value reflects a weight of 0.94 for construction contracts and 0.06 for engineering contracts. BBC based those weights on the volume of FHWA-funded construction and engineering contracting dollars that WSDOT awarded during the study period.

Figure 1.
Availability components of the base figure

a. Potential DBEs	Availability percentage		
	b. Construction	c. Engineering	d. Total
African American-owned	0.8 %	1.3 %	0.8 %
Asian-Pacific American-owned	0.5	0.8	0.5
Subcontinent Asian American-owned	0.3	3.3	0.5
Hispanic American-owned	1.9	0.6	1.8
Native American-owned	1.8	2.1	1.8
Non-Hispanic White women-owned	<u>2.7</u>	<u>4.9</u>	<u>2.9</u>
Total potential DBEs	8.1 %	12.9 %	8.4 %
Industry weight	0.94	0.06	

Note: Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals due to rounding.

Source: BBC Research & Consulting availability analysis from 2012 Disparity Study

Step 2. Determining if an Adjustment is Needed – 49 CFR Section 26.45(d)

After establishing the base figure, WSDOT considered available information to determine whether any adjustment was needed to the base figure to determine the overall DBE goal and to make it as precise as possible. In considering an adjustment to the base figure, WSDOT evaluated information about:

- Current capacity of DBEs to perform work on DOT-assisted contracting;
- Any disparities in the ability of DBEs to get financing, bonding, and insurance;
- Employment, self-employment, education, training, and unions; and
- Other relevant data.

WSDOT considered all of the above information in considering whether to make an adjustment to the base figure. All of the above evidence suggested that an upward adjustment to the base figure would be appropriate.

Current capacity of DBEs to perform work on DOT-assisted contracting. USDOT’s “Tips for Goal-Setting” suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years. USDOT further suggests that agencies should choose the median level of annual DBE participation for those years as the measure of past participation. According to WSDOT *Uniform Reports of DBE Awards or Commitments and Payments*, median DBE participation on WSDOT’s FHWA-funded contracts from FFYs 2009 through 2011 was 9.4 percent (see Chapter 9 of the 2012 Disparity Study report).

Any disparities in the ability of DBEs to get financing, bonding, and insurance. BBC’s analysis of access to financing, bonding, and insurance revealed quantitative and qualitative evidence that minorities, women, and minority- and women-owned businesses (MBE/WBEs) do not have the same access to those business inputs as non-Hispanic white males and non-

Hispanic white male-owned businesses in Washington.⁷ Any barriers to obtaining financing, bonding, and insurance might affect opportunities for minorities and women to successfully form and operate construction and engineering businesses in the Washington marketplace. Any barriers that MBE/WBEs face in obtaining financing, bonding, and insurance would also place those businesses at a disadvantage in obtaining WSDOT and subrecipient local agency transportation prime contracts and subcontracts (see Chapter of 4 of the 2012 Disparity Study report).

Employment, self-employment, education, training, and unions. BBC used regression analyses to investigate whether race/ethnicity or gender affects rates of self-employment among workers in the Washington construction and engineering industries. The regression analyses allowed BBC to examine those effects while statistically controlling for various race- and gender-neutral personal characteristics including education and age (for details, see Chapter 4 and Appendix F of the 2012 Disparity Study report). The analyses revealed that Hispanic Americans and women were significantly less likely than non-Hispanic whites and males to own construction businesses after accounting for various race- and gender-neutral personal characteristics. In contrast, there were no statistically significant differences in self-employment rates for minorities and women working in the local engineering industry after accounting for race- and gender-neutral factors.

BBC analyzed the impact that barriers to self-employment would have on the base figure. BBC estimated the availability of potential DBEs if minorities and women owned businesses at the same rate as non-Hispanic white males who share similar race- and gender-neutral personal characteristics (for details, see Chapter 9 of the 2012 Disparity Study report). The analysis included the same set of contracting dollars that BBC used to determine the base figure (i.e., FHWA-funded construction and engineering contracting dollars that WSDOT awarded during the study period). BBC took the following steps to complete the analysis:

1. BBC made adjustments to availability percentages for construction contracts based on observed disparities in self-employment rates for minorities and women. BBC only made adjustments for those groups that exhibited statistically significant disparities in self-employment rates compared to non-Hispanic whites and males.
2. BBC then combined adjusted availability percentages for construction contracts with availability percentages for engineering contracts in a dollar-weighted fashion. BBC did not make any adjustments to the availability percentages for engineering contracts due to the lack of statistically significant disparities in self-employment rates for minorities and women in engineering.

Figure 2 presents the results of the analysis, which is sometimes referred to as a “but for” analysis, because it estimates the availability of potential DBEs *but for* the continuing effects of

⁷ For the 2012 Disparity Study, BBC considered WSDOT’s relevant geographic market area to be Washington state. During the contracting years that the study examined (FFYs 2009, 2010, and 2011), WSDOT awarded approximately 96% of its transportation construction and engineering contracting dollars that the study team analyzed as part of the study to prime contractors and subcontractors with locations in Washington state.

past race- and gender-based discrimination. The rows and columns of Figure 2 present the following information from the “but for” analysis:

- a. **Current availability.** Column (a) presents the current availability of potential DBEs by group and by industry, as also presented in Figure 1. Each row presents the percentage availability for each group. Before any adjustment, the availability of potential DBEs for WSDOT’s FHWA-funded construction and engineering contracts is 8.4%, as shown in row (19) of column (a).
- b. **Disparity indices for self-employment.** For each group that is significantly less likely than similarly-situated non-Hispanic white males to own construction or engineering businesses, BBC estimated business ownership rates if those groups owned businesses at the same rate as non-Hispanic white males who share the same race- and gender-neutral personal characteristics. The study team then calculated a self-employment disparity index for each group by dividing the observed self-employment rate by the estimated self-employment rate and then multiplying the result by 100. Values of less than 100 indicate that, in reality, the group is less likely to own businesses than what would be expected for non-Hispanic white males who share the same personal characteristics.

Column (b) presents disparity indices related to self-employment for the different racial/ethnic and gender groups. For example, as shown in row (4) of column (b), Hispanic Americans own construction businesses at 41% of the rate that one might expect based on the estimated self-employment rates of non-Hispanic white males who share similar personal characteristics.

- c. **Availability after initial adjustment.** Column (c) presents availability estimates by group and by industry after initially adjusting for statistically significant disparities in self-employment rates. BBC calculated those estimates by dividing the current availability in column (a) by the disparity index for self-employment in column (b) and then multiplying by 100. Note that BBC only made adjustments for those groups that are significantly less likely than similarly-situated non-Hispanic white males to own businesses. (For that reason, BBC did not make any adjustments to availability percentages for engineering businesses.)
- d. **Availability after scaling to 100%.** Column (d) shows adjusted availability estimates that the study team rescaled so that the sum of the availability estimates equaled 100% for each industry. BBC rescaled the adjusted availability estimates by taking each group’s adjusted availability estimate in column (c) and dividing it by the sum of availability estimates shown under “Total firms” in column (c)—in row (9) for construction and in row (18) for engineering—and multiplying by 100. For example, the rescaled adjusted availability estimate for Hispanic American-owned construction businesses shown in row (4) of column (d) was calculated in the following way: $(4.6\% \div 103.9\%) \times 100 = 4.5\%$.

Figure 2.
Adjustment to base figure to account for disparities in self-employment rates

Industry and group	a. Current availability	b. Disparity index for self- employment	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of base figure**
Construction					
(1) African American	0.8 %	no adjustment	0.8 %	0.8 %	
(2) Asian-Pacific American	0.5	no adjustment	0.5	0.5	
(3) Subcontinent Asian American	0.3	no adjustment	0.3	0.3	
(4) Hispanic American	1.9	41	4.6	4.5	
(5) Native American	1.8	no adjustment	1.8	1.7	
(6) WBE	<u>2.7</u>	<u>68</u>	<u>4.0</u>	<u>3.8</u>	
(7) Potential DBEs	8.1 %	no adjustment	12.0 %	11.6 %	10.8 %
(8) All other businesses ***	<u>91.9</u>	<u>no adjustment</u>	<u>91.9</u>	<u>88.4</u>	
(9) Total firms	100.0 %	no adjustment	103.9 %	100.0 %	
Engineering					
(10) African American	1.3 %	no adjustment	1.3 %	1.3 %	
(11) Asian-Pacific American	0.8	no adjustment	0.8	0.8	
(12) Subcontinent Asian American	3.3	no adjustment	3.3	3.3	
(13) Hispanic American	0.6	no adjustment	0.6	0.6	
(14) Native American	2.1	no adjustment	2.1	2.1	
(15) White women	<u>4.9</u>	<u>no adjustment</u>	<u>4.9</u>	<u>4.9</u>	
(16) Potential DBEs	12.9 %	no adjustment	12.9 %	12.9 %	0.8 %
(17) All other businesses	<u>87.1</u>	<u>no adjustment</u>	<u>87.1</u>	<u>87.1</u>	
(18) Total firms	100.0 %	no adjustment	100.0 %	100.0 %	
(19) Total	8.4 %	no adjustment	n/a		11.6 %

Note: Numbers rounded to nearest tenth of 1%. Numbers may not add to totals due to rounding.

* Initial adjustment is calculated as current availability divided by the disparity index.

** Components of the base figure were calculated as the value after adjustment and scaling to 100%, multiplied by the percentage of total FHWA-funded contract dollars in each industry (construction = 94%, engineering = 6%).

*** All other businesses included non-Hispanic white male-owned businesses and MBE/WBEs that were not potential DBEs.

Source: BBC Research & Consulting

e. Components of goal. Column (e) shows the component of the total base figure attributed to the adjusted potential DBE availability for each industry. BBC calculated each component by taking the total availability estimate shown under “Potential DBEs” in column (d)—in row (7) for construction and in row (16) for engineering—and multiplying it by the proportion of total FHWA-funded contract dollars for which each industry accounts (i.e., 0.94 for construction and 0.06 for engineering). For example, BBC used the 11.6% shown in row (7) of column (d) for construction and multiplied it by 0.94 for a result of 10.8% (see row (7) of column (e)). The values in column (e) were then summed to equal the base figure adjusted for barriers in business ownership—11.6 %, as shown in the bottom row of column (e).

Other relevant data. The Federal DBE Program suggests that federal aid recipients also examine “other factors” when determining whether to make any step-2 adjustments to their base figures.⁸

Success of businesses. There is quantitative evidence that certain groups of MBE/WBEs are less successful than non-Hispanic white male-owned businesses and face greater barriers in the marketplace, even after considering race- and gender-neutral factors. Chapter 4 and Appendix H of the 2012 Disparity Study report summarize that evidence. There is also qualitative evidence of barriers to the success of MBE/WBEs, as explored in Appendix J of the report. Some of that information suggests that discrimination on the basis of race/ethnicity and gender affects MBE/WBEs in the Washington transportation contracting industry.

Initiative 200. Initiative 200 amended state law to prohibit the use of race- and gender-based preferences in public contracting, public employment, and public education, unless such requirements are required “to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.”⁹ Thus, Initiative 200 prohibited government agencies in Washington from applying race- and gender-conscious programs (e.g., DBE contract goals) to state-funded contracts but not necessarily to USDOT-funded contracts.

Many business owners and others knowledgeable about the Washington transportation contracting industry report that many MBEs and WBEs closed as a result of Initiative 200 and the prohibition of race- and gender-conscious programs on state-funded contracts (see Appendix J of the 2012 Disparity Study report). Consistent with those claims, some academic research that has examined business ownership before and after the passing of Initiative 200 has suggested adverse effects for minorities, women, and MBE/WBEs as a result of the measure.¹⁰

Step 2 adjustment. WSDOT has considered available information relevant to a potential step 2 adjustment and proposes to make an upward adjustment to the base figure. WSDOT proposes to make an upward adjustment that specifically accounts for barriers that minorities and women face related to self-employment in the local transportation contracting industry. WSDOT proposes to base its adjustment specifically on barriers to self-employment because there are clear, direct, and quantifiable effects of barriers to self-employment on the availability of potential DBEs. Furthermore, accounting for barriers to self-employment in the overall DBE goal indirectly accounts for other barriers that minorities and women face in the local transportation contracting industry (e.g., barriers related to education, unions, financing, bonding, and insurance).

⁸ 49 CFR Section 26.45

⁹ RCW 49.60.400(1)

¹⁰ Fairlie, R. & Marion, J. 2007. “Affirmative Action Programs and Business Ownership among Minorities and Women.” Ford Foundation and National Economic Development and Law Center.

Based on information about disparities in self-employment rates, WSDOT proposes to adjust its base figure upward and amend its overall DBE goal to 11.6%.

Goal Decision. The disparity study presented information on the availability of potential DBEs for FHWA-funded construction projects that WSDOT awarded between May 9, 2005 and September 30, 2006. The disparity study showed that potential DBEs might have been considered available for 14.9% of the dollars associated with those construction projects. However, WSDOT decided not to adjust its base figure upward to the 14.9% figure, because WSDOT has determined that the characteristics of the FHWA-funded construction projects that the agency awarded between May 9, 2005 and September 30, 2006 are dissimilar to the characteristics of the contracts that the agency anticipates awarding in FFYs 2015 through 2017, both in terms of size and work industries (for details, see the attached BBC memorandum in Appendix D). WSDOT has determined that the mix of the types and sizes of transportation contracts that it anticipates awarding in FFYs 2015 through 2017 will be similar to the mix of types and sizes of transportation contracts that it awarded in FFYs 2009 through 2011. Accordingly, a 14.9% goal is not supported by WSDOT's current situation.

Race-/Gender-Neutral and Race/Gender-Conscious Split – 49 CFR Section 26.51 (c)

In accordance with federal regulations and USDOT guidance, WSDOT will attempt to meet the maximum feasible portion of its proposed 11.6% overall DBE goal by using race- and gender-neutral measures. As part of the 2012 Disparity Study, BBC provided information about the degree to which WSDOT utilized certified DBEs on contracts that the agency awarded in a race- and gender-neutral environment (i.e., contracts to which WSDOT did not apply DBE contract goals). BBC examined the utilization of certified DBEs on four such contract sets:

- **State-funded contracts (FFYs 2009, 2010, and 2011)**, to which WSDOT applied voluntary minority- and women-owned business enterprise (MBE/WBE) goals but did not require contractors to meet those goals or show good faith efforts to do so;
- **Engineering contracts (FFYs 2009, 2010, and 2011)**, to which WSDOT applied neither DBE contract goals or voluntary MBE/WBE goals, regardless of funding source;
- **Public Transportation Division contracts (FFYs 2009, 2010, and 2011)**, to which WSDOT applied neither DBE contract goals or voluntary MBE/WBE goals; and
- **FHWA-funded construction contracts (May 9, 2005 - September 30, 2006)**, to which WSDOT applied neither DBE contract goals nor voluntary MBE/WBE goals in response to the 2005 *Western States Paving Company vs. Washington State DOT* decision.

Overall, certified DBEs received 2.8% of the dollars on those contracts. WSDOT used myriad race- and gender-neutral measures to encourage DBE participation on those contracts (for details, see Chapter 10 of the 2012 Disparity Study report). The agency still uses most of those measures and will continue using them through the time period that the amended DBE goal will cover. Figure 3 presents a description of those measures.

Figure 3.
Current WSDOT race- and gender-neutral measures

Current measures	
Provides plans and specifications to small businesses, including DBEs, statewide	Encourages firms that could potentially qualify for DBE certification to apply
Offers enrollment in business related courses	Trains internal staff on the social and economical importance of supplier diversity, diverse supplier sourcing techniques, proper DBE reporting, and the benefits of certifications
Provides training programs	Offers technical assistance in estimating and bidding; financing and accounting; prompt payment and retainage; and general business practices
Conducts on-site reviews of all DBE contractors performing work on contracts to verify that DBEs are performing commercially useful functions	Offers enrollment in business development programs
Has prompt payment mechanisms that require prime contractors to pay subcontractors within 10 business days of receiving payment from WSDOT	Sponsors outreach at the annual Regional Contracting Forum and other networking events
Operates a DBE fraud and abuse hotline	Works with the Washington State DBE Work Group, which advises WSDOT on DBE issues
Contacts all qualified certified DBE firms in the database, which shows relevant NAICS classifications for engineering contracts	Offers DBE-certified firms individual business counseling services
Operates the Washington Electronic Business Solution program to disseminate notifications of available WSDOT contracts	Conducts outreach events with small businesses statewide
Hosts roundtables for the DBE community	Operates the Small Business Portal, which is available at: www.wsdot.wa.gov/Business/opportunities/
Utilizes a Limited Public Works roster for awarding contracts under \$35,000 to businesses that have less than \$1 million in average gross receipts	Contracts with the Seattle Business Assistance Center to assist small, minority-owned, and women-owned businesses in obtaining certification and with bidding on transportation projects
Tracks whether there are adequate contracts of a reasonable size for small businesses	Hosts pre-bid meetings and site walkthroughs
Maintains a bidder's list	Offers DBE training and one-on-one consulting sessions on construction and consulting-related issues.

Source: Washington State Department of Transportation Office of Equal Opportunity, 2012.

In addition to the measures presented in Figure 3, WSDOT has developed a small business participation plan that USDOT approved on July 13, 2013 and which WSDOT fully implemented in July 2013. The small business participation plan includes the following measures:

- Setting aside certain small public works contracts—that is, construction contracts worth \$35,000 or less—for small business bidding;
- Requiring prime contractors to submit small business participation plans as part of bidding on design-build projects; and
- Applying aspirational small business goals on FHWA-funded contracts to which DBE contract goals do not apply, including requiring prime contractors to submit small business participation plans.

In 2008, WSDOT implemented a similar participation plan to encourage the utilization of minority- and women-owned businesses and experienced a relatively large increase in DBE participation. WSDOT expects a similar increase in DBE participation as a result of its approved small business participation plan, because many small businesses are owned by minorities and

women. Considering the 2.8% DBE participation that WSDOT has previously achieved on contracts to which DBE contract goals did not apply (see above for details), and considering the additional DBE participation that the agency expects to achieve as a result of its approved small business participation plan, WSDOT projects that it will be able to meet 4.0% of its proposed DBE goal through race- and gender neutral measures. WSDOT projects that it will meet the remainder of its proposed 11.6% overall DBE goal—7.6%—through the use of race- and gender-conscious measures (i.e., DBE contract goals).

Note that the 4.0% of its proposed overall DBE goal that WSDOT projects to meet through race- and gender-neutral measures is just that—a projection. Based on the information that WSDOT has on hand, the agency estimates that its small business participation plan will result in a 1.2 percentage point increase above the 2.8% DBE participation that it has previously achieved on contracts to which DBE contract goals did not apply. If that estimate turns out to be incorrect, WSDOT will adjust its projections accordingly based on current and detailed utilization information.

DBE Groups Eligible for Race- and Gender-Conscious Measures – 49 CFR Section 26.15

Several seminal court cases—particularly in the Ninth Circuit—have indicated that, in order to implement the Federal DBE Program in a narrowly tailored manner, agencies should limit the use of race- and gender-conscious program measures to those minority groups “that have actually suffered discrimination” within its transportation contracting industry.^{11, 12} In addition, in *H.B. Rowe v. Tippett*, the Fourth Circuit Court of Appeals ruled that the North Carolina Department of Transportation (NCDOT) did not provide an “exceedingly persuasive justification” for including women-owned businesses in its use of race- and gender-conscious program measures, because the statistical evidence did not support an inference of discrimination against women-owned businesses.¹³ The Court found that there was strong evidence of overutilization of women-owned businesses in the public sector. As a result, the court held that NCDOT’s inclusion of women-owned businesses in its use of contract goals was invalid. The Court thus held that the state legislation as applied to women-owned businesses was unconstitutional.¹⁴

Moreover, USDOT official guidance states that “even when discrimination is present in a state, a program is narrowly tailored only if its application is limited to those specific groups that have

¹¹ *AGC, San Diego Chapter v. California DOT*, 713 F.3d 1187, 1191, 1199, 2013 WL 1607239 (9th Cir. April 16, 2013)

¹² *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 997-98 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006)

¹³ *H.B. Rowe Corp., Inc. v. W. Lyndo Tippett, North Carolina DOT, et al*; 615 F.3d 233 (4th Cir. 2010)

¹⁴ Although the state presented anecdotal evidence that suggested the existence of gender-based discrimination in the local marketplace, the Court ruled that the anecdotal evidence did not overcome the strong, statistical evidence of overutilization of women-owned businesses and it fell short of justifying NCDOT’s inclusion of women-owned businesses in its use of contract goals.

actually suffered discrimination or its effects.”¹⁵ As provided in 49 CFR Part 26, such guidance is “valid, and express[es] the official positions and views of the Department of Transportation ...”¹⁶

As part of the 2012 Disparity Study, BBC assessed whether there were any disparities between WSDOT’s utilization of MBE/WBEs and the availability of those businesses for WSDOT transportation contracts (for details, see Chapter 7 and Appendix K of the 2012 Disparity Study report). The study showed substantial disparities—that is, disparities whereby utilization was less than 80% of availability—for all minority-owned business groups, particularly on contracts to which race- and gender-conscious measures did not apply and on contracts that WSDOT awarded after FFY 2009. In general, the study did not show substantial disparities for non-Hispanic white women-owned businesses on WSDOT contracts.

Consistent with key court rulings and USDOT official guidance, based on all available information including results from the 2012 Disparity Study, WSDOT proposes that the following groups will be eligible to participate in the race- and gender-conscious measures that will be part of the agency’s implementation of the Federal DBE Program:

- Black American-owned businesses;
- Asian-Pacific American-owned businesses;
- Hispanic American-owned businesses;
- Native American-owned businesses; and
- Subcontinent Asian American-owned businesses.

WSDOT will request a waiver to consider women-owned businesses as ineligible to participate in any race- and gender-conscious measures. DBEs that are owned by minority women will still be eligible to participate in WSDOT’s race- and gender-conscious measures if they are DBE-certified along with their corresponding minority groups.¹⁷ Non-Hispanic white women-owned businesses will still 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. WSDOT will monitor its utilization of non-Hispanic white women-owned businesses and reassess the appropriateness of the requested waiver on a semiannual basis. Several state departments of transportation have requested similar waivers that have been approved by USDOT including the California Department of Transportation and the Oregon Department of Transportation.

¹⁵ United States Department of Transportation Official Questions and Answers (Q&A’s) Disadvantaged Business Enterprise Program Regulation (49 CFR 26), <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/official-questions-and-answers-26>

¹⁶ 49 CFR Section 26.9

¹⁷ 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.

Public Participation – 49 CFR Section 26.45(g)

Public participation is a key component of WSDOT's process for amending its overall DBE goal. WSDOT has made efforts to engage the public as part of the goal-setting process and will make additional public engagement efforts in finalizing its Goal and Methodology.

Public notice. WSDOT published a public notice announcing its proposed amended overall DBE goal and rationale for the goal. The notice stated that WSDOT was accepting comments on its overall DBE goal for 45 days, and it provided physical addresses and e-mail addresses where the public could send any comments. The public notice appeared for 30 days at the WSDOT Office of Equal Opportunity's principal office (310 Maple Park Ave. SE, Olympia, WA 98504). The notice was also posted on WSDOT's website and was published in general circulation media and trade association publications (e.g., Seattle Daily Journal of Commerce). WSDOT also e-mailed the public notice to all registered DBEs and prime contractors.

Consultation with organizations. WSDOT has consulted with several contracting groups, community organizations, and other organizations that have information about local marketplace conditions for MBE/WBEs. During those meetings, WSDOT has discussed its proposed overall DBE goal and rationale for the goal and also solicited comments about the goal from meeting participants. WSDOT has consulted with the following organizations:

- American Council of Engineering Companies (ACEC) – Washington;
- Associated General Contractors (AGC) of Washington;
- African-American, Hispanic, Asian, and Native American (AHANA) of Spokane;
- Council for Tribal Employment Rights;
- Inland Northwest Associated General Contractors;
- National Association of Minority Contractors (NAMC) – Washington;
- National Association of Women in Construction (NAWIC) – Tri Cities;
- Northwest Minority Supplier Development Council (NMSDC);
- Seattle Building & Construction Trades Council;
- Tabor 100; and
- Washington Asphalt Pavement Association.

Public forums. WSDOT conducted nine public forums throughout the state of Washington to provide information about its proposed overall DBE goal and rationale for the goal as well as to solicit comments about the goal from meeting participants. During each public forum, WSDOT solicited participants for testimony about its goal and about local marketplace conditions for minority- and women-owned businesses. Participants were invited to submit testimony in either verbal or written format. The public forums that WSDOT conducted (along with the dates that they were conducted) were:

- North Seattle, Washington, June 18, 2013;

- Yakima, Washington, June 19, 2013;
- Spokane, Washington, June 20, 2013;
- Vancouver, Washington, June 25, 2013;
- South Seattle, Washington, June 26, 2013;
- Tacoma, Washington, June 27, 2013;
- Spokane, Washington, January 7, 2014;
- North Seattle, Washington, January 9, 2014; and
- Tacoma, Washington, January 13, 2014.

Appendix A presents testimony that WSDOT collected from each of the nine public forums as well as written testimony that individuals submitted outside of forums. Key themes that emerged from that testimony include the following:

- Many individuals—primarily representatives of non-Hispanic white women-owned businesses—commented that if WSDOT requests and receives a waiver to consider women-owned businesses ineligible to participate in any race- and gender-conscious measures, it would substantially decrease the utilization of non-Hispanic white women-owned businesses and adversely affect the success of those businesses. Many of those individuals urged WSDOT not to consider requesting such a waiver.
- Other individuals—primarily representatives of minority-owned businesses—commented that, based on the results of the 2012 Disparity Study, requesting a waiver to consider women-owned businesses as ineligible to participate in any race- and gender-conscious measures is the most appropriate course of action for WSDOT to take.
- Several individuals—primarily representatives of non-Hispanic white women-owned businesses—commented that, despite what disparity analysis results indicate, there is still a great deal of gender-based discrimination in the local marketplace that makes it difficult for women-owned businesses to be successful.
- Several individuals indicated that WSDOT’s base figure is too low to appropriately represent the availability of potential DBEs in the marketplace and should be adjusted upward. A few other individuals indicated that WSDOT’s base figure is too high and should be adjusted downward.
- A few individuals indicated that the 2012 Disparity Study should have done a better job of accounting for the effects of Initiative 200 on the utilization and availability of minority- and owned-owned businesses. Other individuals indicated that there were issues with how BBC conducted the 2012 Disparity Study.
- A few individuals indicated that certain minority groups are underutilized on WSDOT contracts, and that WSDOT should structure its program so that only underutilized groups are eligible to participate in race- and gender-conscious measures.
- Some individuals indicated that a relatively small number of DBEs account for the majority of DBE utilization on WSDOT contracts. Those individuals suggested that WSDOT should

consider measures to encourage the participation of larger number of DBEs in its contracting.

- Several individuals indicated that DBE fronts in the local marketplace make it more difficult for legitimate DBEs to be successful. Some of those individuals further suggested that the existence of DBE fronts was a primary reason why the disparity analysis results indicated no disparities for non-Hispanic white women-owned businesses.
- Several individuals indicated that prime contractors use perfunctory good faith efforts processes to comply with the DBE contract goals program rather than seek meaningful participation of DBEs on projects.

In addition, as part of the public participation process, Alhers & Cressman, PLLC, a Seattle, Washington-based law firm wrote a letter presenting several comments and questions related to WSDOT's implementation of the Federal DBE Program. Appendix B presents Ahlers & Cressman's letter as well as WSDOT's response. The Associated General Contractors of Washington (AGC-Washington) also wrote a letter presenting several comments related to WSDOT's implementation of the Federal DBE Program. Appendix C presents AGC-Washington's letter as well as WSDOT's response.

To the extent possible, WSDOT has considered testimony that we received as part of the public participation process in establishing our amended overall DBE goal. Most of the comments that we received were related to WSDOT's implementation of the Federal DBE Program and not to WSDOT's overall DBE goal. However, we considered comments relevant to our overall DBE goal and marketplace conditions for minority- and women-owned businesses in determining whether a step-2 adjustment was needed to the base figure. Due in part to that testimony, WSDOT proposes to make an upward adjustment to its base figure for a proposed overall DBE goal of 11.6%.

APPENDIX A

Appendix A presents verbal and written testimony from each of the six public forums that WSDOT conducted throughout the state of Washington related to the agency's overall DBE goal. Appendix A also presents written testimony that WSDOT collected outside of public forums. Verbal testimony from a particular public forum is identified with a prefix unique to each forum and a number that pertains to the order in which participants gave testimony at the forum. The prefixes corresponding to each public forum are:

- "NSPF" for North Seattle;
- "YPF" for Yakima;
- "SKPF" for Spokane;
- "VPF" for Vancouver;
- "SSPF" for South Seattle; and
- "TPF" for Tacoma.

Written testimony is identified with the prefix "WT."

Changes to WSDOT's implementation of the Federal DBE Program. Many individuals submitted verbal or written testimony related to changes to WSDOT's implementation of the Federal DBE Program, particularly as those changes relate to the eligibility of women-owned businesses.

NSPF2: "We do traffic control for state and federal highway construction projects. And I have been a certified firm since 1992, for a long time, been in business for a long time. And I applied to recert my DBE last September and still have not been approved. So I guess this is what that's all about is why I haven't got my renewal. I got my letter that I use for bidding, but I have not gotten my renewal. So I'm thinking it has something to do with this. So I need to make sure that I understand what's happening here is this is going to eliminate white women businesses in the DBE program, okay, because it's going to be a voluntary thing for the prime to hire us as opposed to we will no longer be a condition of award. Am I understanding this correctly? Because if we are no longer a condition of award, we will not get work. We will not get work. The majority of work that I have this year, okay, is all DBE, all of it. That's like 97 percent. Okay? My company will close the doors. My employees will lose their jobs. So it's imperative that we are included in that program, because the primes won't hire us. I guarantee it, they will not hire us."

NSPF4: "Mostly directed to Governor Inslee and Secretary Peterson; if you take women out of this program, white women out of this program, you're going to end up with the same thing that happened in California, and how many people are going to lose their jobs before WSDOT notices that, oh, my gosh, there's some disparity again. As everybody in this room knows, if there are not requirements set aside for this, if they're voluntary, we all know there's very little participation in voluntary goals. We've all thought that. And again, how many people are going to lose their jobs, how many people are going to lose their businesses before we come around and say, hey, we have to get rid of this waiver."

NSPF5: “We’ve been certified as a WBE/DBE since 1998. The first DBE contract that we got was in 2011. And the reason why is because we were not -- there was absolutely no goals, there was no -- WSDOT had not said, hey, there's going to be accounting for these DBE goals. We've been on several projects. We had a listed dollar amount. As soon as that dollar amount hit, we were off the project. If you have voluntary goals, as everyone else here has said, we'll be gone. We have ten employees. I have two African-Americans, I have Iraqi vets, I have two senior citizens that I employ. They will all lose their jobs. I'm going to tell you, because residential commercial – residential businesses went away four years ago and this is the only thing that's keeping us alive are these WSDOT projects and DBE certification. So I guess I want to emphasize how important it is as a white woman-owned business. It's not just about who I am, it is about who I employ as well. So I wanted to make sure that we understand that it's not just about white women. You know, my employees also are a very ethnic diversified group.”

NSPF5: “The other point I wanted to make is basically the fact as women in the construction industry, we're highly underutilized and if we're taken out, we will basically be gone. I know that in some other industries, four months later we've been put back on, but I don't know how many businesses will be out of the business by the time they recognize the fact that the women-owned businesses were basically not used after they were taken out of the process.”

NSPF7: “I also employ a diverse group of men and women of different ethnic backgrounds and my average electrician is paid, you know \$70,000, \$75,000 a year. They go through a four-year, sometimes five-year apprenticeship program, so I support apprenticeship programs and families, and I will not survive if this program is taken away. I know that I would not have a place at the table for those projects or even other projects if it were not for the fact that there's a condition of work goal.”

NSPF7: “So last time I checked, there's not a lot of women construction company owners out there. The ones of us that are still here have to scarp for everything we get, just like our minority counterparts.”

NSPF7: “If anything, I think WSDOT should consider perhaps having a goal that is maybe a step for -- instead of taking more women out of the program, have a goal that's a stair step or maybe the DBE businesses that are in the north, whether it's minority, male or female, minority DBE, so how about have a goal for that, a subgoal, and its higher perhaps. That's a way you address it without just throwing out all the white women that are legitimate business owners.”

NSPF7: “I'm not going to speak, you know, to who should or shouldn't be in the program, because I will just worry about my business. But it's not right to take some statistics that are weighted on commitments that haven't been made yet and say that we're just doing right and throwing everybody out of the program and then wait for us to go broke, and say, oops, we made a mistake, and now we're going to bring you back in. Now there's no capacity, because like many of the construction professionals and tradespeople, we've gone on to do something else, because it's a tough business as it is. You don't need to make it tougher for us.”

NSPF7: “On projects that have been voluntary, the percentage of participation by DBE firms has been two percent. So basically we would look at whatever percentage we have to being two percent. I also question the wisdom of two or three states in the entire United States deciding

that white women are doing just great so we don't need them in the program. Why should the State of Washington decide that they're more wise than the Federal Government who's already decided that white women and women in general have a disparity against them in the construction industry and decide to ask for a waiver."

NSPF8: "You know, I've been in the business forever, and what I can say about that is I don't see how waivering people who are successful in a program is going to advance the goals of the anybody. Okay? I just – Tell me how that's going to help. I just don't see it. And, also, those of us who come up through the field, we really look up to minorities, and I have to say, I look up to white women who own businesses, who run businesses, who are successful at business. If you're talking about sidelining them, I hope there's some litigation to straighten this out."

NSPF9: "The numbers in the disparity study do not reflect my personal experiences. We received our DBE certification in 1998. The first job we were contacted to use our certification was in 2010 and that was because WSDOT had redone their program and required DBE participation and good faith efforts were no longer smiled upon. I am used on projects for a certain dollar amount that have been provided to WSDOT and as part of the contract. When those dollars spending limits have been met, we no longer see any business, even if the project is not yet complete. It is not that we haven't performed well and provided product at a competitive price. It is that contractors resent having to fulfill DBE requirements, and once they've met their goal, they are done. We understand that we are removed from the condition of award contract requirements of WSDOT's project, that WSDOT will be monitoring the effect it will have on WBE firms. If WSDOT does not actually monitor the dollars that are spent by contractors with WBE firms, there will be another case of skewed data on which decisions are made. We spent 12 years waiting for construction firms to voluntarily purchase product from us. If we are removed from the DBE program, we will not see any business on further WSDOT projects."

NSPF10: "While we appreciate the measures that WSDOT plans to use to assist white women-owned businesses with the waiver in place, we object to any action that makes legitimately DBE-certified businesses ineligible for race- and gender-conscious measures offered through the DBE program. We feel this will only weaken the program, make it more difficult for prime contractors to fulfill DBE goal requirements by reducing the number of firms ready, willing, and able to do the work. It will have a direct impact on Birch Equipment and other women-owned businesses like us to successfully pursue these valuable contracts. And, additionally, once a waiver is requested and accepted, it is – it can be difficult to reverse."

NSPF11: "The new designation of race-conscious DBE is counteractive to building diversity and encouraging inclusion of all small women- and minority-owned businesses. The proposed waiver will significantly reduce the pool of DBE consultants and increase the likelihood that the same race-conscious DBE firms will receive a disproportionate share of contracts. The workplace for DBE will become less fair and lack the competition that will cultivate the development of highly capable firms. Contractors will be considered non-responsive if they do not meet the race-conscious DBE goal, and this process is costly, both to the contractor and, consequently, passed on to us, the taxpayers. Caucasian women-owned DBE firms will be relegated to race-neutral or good faith efforts. Given that the specialty contracts are usually the first contracts that are let, for firms like mine, by the time the contractor gets to the race-neutral contracts, our work will be

gone. So, our WSDOT work will be significantly, if not completely, eliminated. WSDOT's assurance that they will closely monitor the effects of the waiver on Caucasian women-owned DBE firms is going to require additional disparity studies. Swift correction is not likely. The race-conscious DBE is not a viable long-term solution to maintain a healthy, diverse population of disadvantaged businesses. Defining the scope of diversity and inclusion in terms of only race exhibits a very narrow view of the issues involved. Building inclusion and leveraging diversity requires continuous support of all women- and minority-owned businesses to accomplish true diversity."

NSPF12: "I only have a few comments, and one of those is that instead of just throwing us out in the sidelines with white men and trying to figure out who was doing what, if we at least had maybe a two-tier process where the contractor was required to either contact a minority firm first and, if they couldn't find a qualified minority firm, to contact a woman firm next, before they contacted the white men-owned firms, at least we'll still be in the study and then you will find out for sure or not if we are being disparaged against or not so you have some sort of statistical data."

NSPF14/TPF14: "The prime contractors already cannot meet the goals. That's been stated repeatedly in many forums. Your study proves it. Statistically, the goals were not met, good faith effort or not. Good faith effort. And DOT's hanging their hat on good faith effort. They're going to have 7.6 [condition of award], 4 percent good faith. That's important for them because any time we do happen to get used as a WBE, it's going to feather their coffer as far as being able to say, 'See, look. We're going to meet that goal.' It may be meaningful for DOT, but it is completely not meaningful for women-owned businesses. Good faith goals are useless to us. Contractors reach their condition of award and that's all they are required to do, that's all they'll do. And why? Because it costs them money. It costs them money. This program costs them money. It's about cost, which translates into costs to the taxpayer."

NSPF14/TPF14: "I hear a lot of lip service about outreach, but I don't know how many of you DBEs in this room really feel that their outreach has helped you in any way. Probably not, is my guess. It's a more inclusive approach, overall. Removing half of your database is not going to help the prime contractors meet their goals. Not only that, since condition of award is, really, the end-all-be-all for the firms – not your side, but for ours – good faith effort is meaningless."

NSPF14/TPF14: "I'm one of the lucky few that have been around long enough where my name and reputation, if they can, they would be able to use me. At the same time – And I'm in a specialty trade, and I'm the first trade that gets subbed out. So, regardless of how much they'd like to use me because of our reputation, they're just not going to be able to. They're just going to go to minority firms because they've got to fill that condition of award goal. It will have an impact on my business, I assume about 20 to 30 percent, and that is a big hole of revenue to fill. It will require me to, in fact, start thinking of a different business model."

NSPF17/TPF11: "You know, so, it's unfortunate that women that really know how to drive a truck, do electrical work, that really is struggling to pay their bills. It's not fair to them that something like this has to happen. You know, in order -- I mean, it's really unfortunate. You know, so, I would say it's not fair that women-owned businesses are, you know, excluded and/or a waiver has to be filed in order to get some kind of inclusion for firms like mine, because it's

pretty pathetic to see all of this DBE money come out, hundreds of millions of dollars, and over 50, 60, 70 percent go to women-owned firms. African-American firms have probably had 0.0023 percent.”

NSPF18: “If you take the DBE goal away from the white women, we won't have that opportunity to get our foot in the door. Many of us will have to close our business, and by the time you take a look at it and see how it's all working, okay, we'll be out of business and then we'll have to wait for another disparity study to see what's happening. We're going to be gone then. All of us employ a lot of people. All those people will lose their jobs. We've all had, years and years and years, blood, sweat, and tears to get our company to where it is.”

NSPF18: “Voluntary goals don't work. They don't work. Okay. Prime contractor is not going to say, ‘Well there's a voluntary goal on here, so, I'm going to hire your company because you're really good,’ okay, and then give me the job. That's just not going to happen because they have to fulfill the DBE goal on that project. So, it's just not going to happen for us. That does us no good whatsoever.”

NSPF19/TPF17: “It would be devastating if the DBE program for women businesses like myself would be taken away. I mean, like so many other women have said, we have worked very hard over the years to get where we're at and with our employees and they make our company right along with what we do. So, I just think that this analysis is, like everybody has said, very skewed and I just hope that you guys take a hard, good look at it, how it can affect us women.”

NSPF21/TPF16: “I'm in this program -- I've been here for about three years, but I've been in this industry for 29 years. I'm an expert in my industry and I do everything myself. I wear many hats. And I'm very much in favor of this change in this program, and I want to urge you to move forward swiftly with it because there's people like me who are hanging on with a thread. The longer you delay this, the harder it is for us to survive.”

SKPF2: “You mentioned Oregon. Oregon is a mess with the DBE thing. They've broken down so many categories that you can't even believe the periodicals begins and to try to figure out which one gets and as a percentage. It's a mess. So I just came from Oregon and talked with them about their study. So I just ask you to let's start moving forward. We've been doing this and doing this and doing this. Let's set goals for each region. We need to acknowledge the differences in the regions. Again, with your study and where you are with the region, when you looked at King, Pierce, Snohomish, and Kitsap, they have the largest population. They have the biggest private and public jobs. They got the largest number of WSDOT projects by dollars. They have the greatest number of small companies. They have the greatest number of small companies, greatest number of projects for small companies to work by both private and publicly. And there's a greater diversity. And I want to spend 20 to 30 years working with these people to try to get their company going on construction, and it's extremely difficult in these regions. And so I think you need to pull some of the realities, and when you take and break out the number of white women in this region and all of a sudden say, well, that's not going to be counted the same, just – we begin to pull the fabric, and that's what's happened in Oregon. You're pulling the fabric so fine that it's unraveling.”

SKPF4: "Subcontractors will – I guess the other major thing I wanted to know is part of the study – I want to know the number of DBE firms that work heavy highway, what the number on each group on their – if they're Hispanic, if they're black, whatever. I'd like to see them numbers, and then I want to see the numbers from – on the east side of the state, how many there are over here. Just the goals are just going to be too high, and the businesses over here – you guys do a – put a waiver out to not have white minority women to bid on these projects, they're going to get offended immediately. And, you know, you wait six months to a year down the road, they're SOL. I mean, there can't be just a cut-off, say, and they can't be considered towards the goal. It's not fair to them, and it's not fair to us over here. And we use DBEs all the time, even when there's no rules. So I think – I hate hammering on the east and west, but there's a big difference. So that's about all I have."

SSPF1: "The disparity study taken as a whole does not support the conclusions that DBEs should be waived from the program. Though the study illustrates the tremendous inroads made by WBEs in becoming successful businesses, it just as clearly demonstrates that gender remains an impediment to entry and acceptance. To interpret otherwise is to twist the study data to fit a social or political agenda."

SSPF1: "I have no doubt that the DBE program opened doors that would have otherwise been closed for me. No one could have -- no one would have used my company unless they had to. Men told me to my face numerous times exactly that. However, the DBE program only offers an opportunity. It is dedication and discipline that keeps the door open and that turns opportunity into success. The study's data and comments support this credo as well."

SSPF1: "Though I may have crossed the gender divide and established myself in construction, unequal treatment still exists for women, especially those just getting started. The construction industry lags behind in accepting the legitimacy of women in positions of decision-making. The disparity study statistics speak for themselves. During the study period, DOT never attained the 15.5 -- or 1, excuse me -- percent goal of utilization even with the inclusion of WBE businesses. When race- and gender-neutral goals were in place, DBE utilization was even lower, under 5 percent."

SSPF1: "There are not enough qualified DBEs to meet the existing goals. It is already a constant dilemma for the general contractors of Washington State. Removing WBEs in the condition of award calculation will remove the consistency currently afforded general contractors by using established firms to fulfill goals. The resulting additional risk will be passed on as added cost to the owner and taxpayer. Voluntary goals – neutral – are not going to cut it. We need DBEs – new and established ones – to help lift the entire DBE program and make it and women thrive."

SSPF4: "The biggest problem with doing these disparity studies is collecting the data. Certain folks within the DBE program are not going to be happy with that data. Live by the sword, die by the sword. If we don't have the data and the report to gather, we don't have a program. If the data shows that your particular group is overserved, it is what it is. And I would say that for minorities. I would say that specifically for Hispanic firms, and I would say that for women-owned firms. If the data shows they're being overutilized, it is what it is. And I hope that WSDOT takes under consideration the million dollar report that it hired that says that women-owned business are overutilized and a suggestion of a waiver. I know there's been outcry from the

women-owned firms. I want to remind everyone here that they can still be used. So I just want, for the record, to make sure that WSDOT understands that it would be a disservice for the minority community if WSDOT decided, because of political pressure, to not take the recommendations of one of the DBE categories that are being overutilized.”

SSP74: “We are unique because of I-200, as is California with their Proposition 209 and some other states. There were many discussions about disparity studies. Each of the groups there had their particular interests. In some states, African Americans were found to be overutilized. In other states, Hispanics were found to be overutilized. In other states, women were found to be overutilized. But the result was the same: If you were overutilized, you were overutilized. And the states had an option to use a waiver to attempt to help assure that everyone had an opportunity to have contracts and do business with their particular state.”

TPF2: “I have, quite frankly, serious reservations about not having mandatory goals for the SBE program simply because it really truly hasn't worked even with the mandatory goals with the DBE program. And without the funding, proper funding, I see no way that this can really prevent problems in the future.”

TPF5: “I am legit. I do my work. I kind of resent the fact that white women who were certified and then debarred and then the rest of the women-owned businesses are being punished for that. And I think that's very unfair. I don't reach any kind of goal every year. I'm still in the program. Okay. So I'm not up there where the women have reached the goal. I'm not there yet. Probably never will be there. But I just wanted to say that this study is going to get the women out of this program. We will not be in the DBE program. We will be in SBE, a voluntary goal.”

TPF5: “There is no prime contractor in the state of Washington that is going to hire us on a voluntary goal. It's just not going to happen. And if you want to talk about scrutinized, I get scrutinized all the time. I got them out on my project: My cones aren't the right color; this isn't going on. I'm just a small company. Why don't they go after the prime contractors, see what they're doing with all of their equipment and their employees?”

TPF5: “If they take us out of the program – okay, if they take us out of the program with the waiver, and then they say, oh, it doesn't work and then they're going to put us back in the program, it will take another study, another two years, and the majority of us will be out of business by that time.”

TPF6: “In terms of the waiver/no waiver issue, that, too, was a big discussion item in Los Angeles. There are states where African Americans were determined not to be substantially disadvantaged. So waivers were sought by those states to remove them from the category where they were condition of award. There are other states where there were women in that category, and they were removed. In California, in their previous study, it was Hispanic Americans. So they were removed. It's just the way the process works. And we're looking forward to having the process work here the way that it's determined to work.”

TPF7: “And then the other part was that part of it – the dollars amounts, for instance, in the tunnel bridge, they are state funding and then you have federal funding. So if you have, say, just for lack of better words, an African-American or Hispanic – it doesn't matter; one of the minority

groups – got a really good contract in that project, but because it's state funding, they won't consider the numbers. So it's like you never did anything. No, it's like if you're something, it should be represented of what you're asking, get the credits for what you're doing, or no credits for that matter. What I found out – or we found out at Diversified Builders and Engineers Council, is that the forms include exactly like you said, is the total dollar amount. It doesn't matter how it's divided or who is it given to. In our case, there was two Hispanics that got – one, \$12.5 million and the other one, \$4.5 million. And then that's it. The rest of the Hispanic community got kicked out because two individuals who got that amount. Now, what happened to the Native Americans, same thing: one very successful DBE that got another \$10 million. They were out. Same thing with one of the Asian classifications.”

TPF7: “If you have one contractor with a bridge builder making \$12.5 million and you have a landscaper – which typically Hispanics are – we're mowing lawns – you're going to reach all your goals with one individual, and the rest of the community is out. So I'm grateful that at least we are right now. What's going to happen in one year and two years, when you find that Hispanics are out because of one or two individual? I don't know if that's happening with women. It happened with the African-American because you found one ... I think it needs to be small DBEs, big DBEs; otherwise, you're eating each other up.”

TPF9: “And so I came over to bid on a WSDOT contract with STP, and did win a contract to transport segments to the tunnel. I have a three-year contract or two- year -- two-year. Probably going to go further because of the delays. But I have invested in equipment for this project: seven trucks and fourteen trailers. And it's of great concern to me that, if they take away my status, I've invested a five-year commitment, hoping that I could put myself in the position that I could gain contracts in the future. And now what they're doing is, they're going to take away my status, to where now I have seven trucks and fourteen trailers that I can't utilize on WSDOT projects without my DBE status. I guess I could go in with a women-owned, but I won't be part of the goal. And that's what I did get this contract for.”

TPF12: “And I love the government picking the winners and losers in this whole thing. Love that. That's what a government does. Instead of us standing together here and working as a team, we want to pine against each other. Six-month trial -- we might do this. Who is going to lose their companies in six months because you're doing a trial? That's what just enamors me about this whole thing; the trial balloon. What happens to your company or whoever's company in here because they're going to ax you out of the program because there's going to be a six-month trial balloon?”

TPF14/NSPF14: “As I stated before in the previous public meeting, I find that the waiver is a radical and unnecessary solution. I realize the STP investigation has put the DBE program in Washington under the microscope and the waiver may give the feds an initial whiff of compliance to save future funding. In the long term, DOT's quest to assure the feds that its affirmative action program is a functional one will be a casualty. By this, I mean that it's not a zero-sum game. By removing one-half of the participants does not ensure that the other half will thrive. There is no shortage of competition amongst the DBE community itself when bidding for projects. I can think of at least eight other M/WBE firms that I bid against just within my own construction niche in landscaping. The premise that MBEs will overcome barriers and achieve

business success through exclusionary policies such as a waiver is ill-founded. Instead, DOT should be answering the question that the study begs: Why aren't MBEs getting their fair share of construction dollars? The answer is elusive. It has been for four decades.”

TPF16/NSPF21: “But time has already told us the story with the firms that have been up here, the gentleman that just spoke. Time's already told that story and the proof's in the pudding. The proof is already on paper. The statistics have not lied about that for years and years and years. And I haven't heard much comment from the women speakers tonight, or the night before, about your solutions about if you were to put in an injunction to stop this, what's that going to do to the people who have already been hurt, that's been proven disparity? This has to be taken into consideration. It has to be taken into consideration about everybody having a (inaudible) to win.”

WT2: “To compare the success of one certification over another in a small group that survives on its certifications makes no sense and serves no purpose. If the WBE's are eliminated from this program, in 5 years there will be a new group that will have had more success than their fellow minorities, will they then be booted from the program until there is only one group left? And will the determination be at that time that there is no longer any need for the program? DBE's are all minorities in the Construction/Transportation Industry. We are all competing for the same small percentage of these projects that have been set aside. To determine that white women have had more success (and that figure has been questioned due to fraud in the DBE program) and therefore can survive outside the program is seriously erroneous. The numbers in the disparity study do not reflect my personal experiences.”

WT2: “We received our DBE certification in 1998. The first job we were contacted to use our certification was in 2010 and that was because WSDOT had redone their program and required DBE participation and good faith efforts were no longer smiled upon. I am used on projects for a certain dollar amount that has been provided to WSDOT and is part of the contract. When those dollar spending limits have been met we no longer see any business even if the project is not yet complete. It is not that we haven't performed well and provided product at a competitive price, it is that contractors resent having to fulfill DBE requirements, and once they've met their goal they are done. We spent 12 years waiting for construction firms to “voluntarily” purchase product from us. If we are removed from the DBE program we will not see any business on WSDOT projects.”

WT4: “I have searched the OMWBE database and found the following: There are 12 businesses listed in the OMWBE's directory for NAICS 484110 - Three are WBE's, two are MWBE's, and of these five there are only three DBE's. There are 4 business listed in the OMWBE's directory for NAICS 484121 - Two are WBE's, no MWBE's, and of the two there is only one DBE. There are 69 businesses listed in the OMWBE's directory for NAICS 484220 - Eighteen are WBE's, five are MWBE's, and of the twenty-three there are only fourteen DBE's. In the BBC Research & Consulting final report (Chapter 6, Page 2 and 3), Overall Utilization Results it states: "A small number of business accounted for a large percentage of MBE/WBE utilization on WSDOT and local agency transportations contracts during the study period." Upon review of the six companies listed three are Highway and Street Construction firms, two are Electrical Contracting firms, and one is a Painting and Striping firm. Let it be noted that none of the companies listed in

the study are Motor Freight Carriers. It is imperative that WSDOT and OMWBE continues to have goals that encompass WBE's and MWBE's with NAICS index of 484100 and 484121. As a women owned business that transports freight local and long distance we have experience numerous challenges. These challenges include but are not limited to: ability to purchase equipment, bonding capabilities, access to affordable fleet and health insurance, operating capital, etc. Over the last seven years it has been very difficult and my business partner and I have worked extremely hard to ensure our business survives. We have competed in a market against very large companies in the freight industry, and our service and work ethics has enabled us to continue to grow as a small company."

WT4: "[My business partner] and I have both worked in the transportation industry over 30 years each. We have experienced lower pay grades, condescending remarks about women in the trucking industries, and even more so, comments about DBEs being some sort of charity case. As you can see from the number of established women owned freight transporters in Washington we are a very rare entity. We pride ourselves on offering a service that not many companies offer... we transport nuclear waste and radioactive materials (medical waste) as well as construction equipment and materials. Transporting specialized freight (nuclear, radioactive material, and construction materials) has enabled us to grow and sustained our business. We recognize that diversity in a business is essential for survival. If WSDOT removes Women businesses from the DBE listings it will be devastating to our business. It is imperative that WSDOT look at the entities (women owned DBE's) individually and not as a whole. Not all women are in the same type of business and some women owned businesses in the same industries are truly disadvantaged and others are not."

WT5: "We are a certified DBE firm located in SW Washington and have worked statewide as Prime and Sub for WSDOT. It has been my experience that using race conscious goals are inhibitive for all firms. It is also my experience that if DBE firms want to compete they should all be given the opportunity. Segregating groups only increases underutilization in the future. Primes will seek out and begin the process of only using those firms which are mandated. This process essentially eliminates firms that are not mandated by race conscious goals. In the end, another disparity study will be done and then I am sure the results will show that those firms who were once known to be over utilized, will now be underutilized, thus punishing the once "over utilized" firms. In the end fairness for all firms is what I feel is important. The fact is that not all firms will succeed, as is with all business, but a fair and competitive platform in which to operate in is what is desired."

WT8: "WIHC (Women in Highway Construction) would like to take this opportunity to express its grave concern with the fact that Study seemingly emphasizes "race conscious," but "gender neutral" goals. Moreover, it concludes on its disparity index that women-owned businesses did not experience any disparity for FFY 2009-2011. Most significantly, those figures are based on project commitments/awards, not on actual dollars spent. If WSDOT uses this to determine that only certain DBE groups, and not other groups, like women-owned business, are eligible and submits a waiver request to FHWA, (in effect creating the "under-utilized DBE" preference) this would in effect prevent women-owned businesses from competing for contract specific DBE goals on federally funded contracts. When combined with the adverse effect of Initiative 200, the

potential harm to women-owned businesses in the highway industries in Washington is immeasurable.”

WT8: “The Study also points out the “barriers that minorities and women appear to face entering and advancing within the Washington construction and engineering industries may have substantial effects on business outcomes for MBE/WBEs.” Figure 4-2 of the Study also shows that non-Hispanic white women own construction businesses at rates that are substantially lower than their male counterparts. These conclusions should not be marginalized simply because of the broader “disparity index” set forth in the Study that concludes women-owned businesses do not suffer disparity in the transportation construction industry.”

WT8: “WSDOT’s overall DBE goals have been around roughly 15% over the last several years. Yet, according to the Study, WSDOT has never met that goal, based on awards and commitments to DBE-certified Businesses, coming in with merely single digit DBE participation percentages. This weighs in favor of continuing to consider women-owned businesses as DBEs, eligible for contract-specific DBE goals on federally funded contracts.”

WT8: “Moreover, because of Initiative 200, WSDOT cannot have race or gender goals on state-funded projects. This provides a unique comparison opportunity, which shows that on state funded transportation contracts, DBEs only received roughly two percent of the contract dollars. Additionally, for Public Transportation Division projects where local agencies only used race- and gender-neutral measures to encourage MBE/WBE/DBE participation, it was determined that there was no utilization of certified DBEs. The Study also concluded that overall MBE/WBE utilization on WSDOT and local agency transportation prime contracts and subcontracts, including FHWA projects, was only 11.7% over the three year period of the Study and only a 6.5% utilization of women-owned businesses. These depressing statistics provide further support for continuing to consider women-owned businesses as DBEs providing eligibility for DBE specific contract goals on federally funded projects.”

WT8: “The above statistic, showing that DBEs only received two percent of the state funded transportation contracts demonstrates what would likely happen if all goals were made gender neutral for federally funded projects as well. Moreover, the Study concludes the neutral measures that WSDOT and other local agencies currently have in place are extensive, and there are extensive neutral measures in place for the future.”

WT8: “In short, in considering the U.S. Department of Transportation questions, and WIHC’s own practical experiences, we feel it would be an egregious error on the part of WSDOT to determine that based on the disparity indices set forth in the Study only certain DBE groups, and not other groups, such as women-owned business, be considered for DBE status, or to create an “under-utilized DBE” category, and to seek a waiver request from FHWA to that effect. Women-owned businesses in the highway industry so in fact face practical disparity and their continued success is largely dependent on the DBE specific contract goals on federally funded projects. To punish them for their limited success thus far, based solely on the analyses set forth in the Study’s overall disparity indices would be counter-intuitive and would ignore or marginalize several other conclusions reached by the Study.”

WT9: “My tenure throughout the past 30 years as a white female owned business, has proven to be a roller coaster ride with all the changes that have been made by OMWBE and WSDOT in regards to their MBE/WBE/DBE programs. After Thursday night’s meeting, where a paltry few of our contractors as well as DBE firms attended, it was apparent that our entire area is more than discouraged with the newest changes being discussed regarding this study.”

WT9: “I was one of the contractors questioned during the study by BBC. I felt that most of their questions were straight forward but that the interpretations of this study by WSDOT may lead to discrimination against “white women owned businesses.” I have felt discrimination as a Woman owned business with the respect that my firm has been monitored and scrutinized by the same entities that were supposedly here to help firms like mine become solid independent contractors. If WSDOT removes white women owned businesses from the Condition of Award the discrimination will again become a reality as it was when I first started my company in 1983. If WSDOT requests a waiver through the FHWA to exclude white female businesses a repeat of what happened in California, when they did this same study, would inevitably happen here. This is not California or Oregon or Idaho but Washington and we need to look at the availability of all DBE’s regardless of race or gender here in our own state.”

WT12: “The idea of using a disparity study to measure access to WSDOT contracts and then use those same results to pit one minority group against another minority group when all members of the group combined are not even finding success in obtaining work of WSDOT contracts is absurd. This logic will create further dissention and deterioration of the Minority/Women Business Enterprises, rather than help those groups as a whole to increase opportunity. Rather than use the disparity study data to discriminate against one group or another, requesting a “waiver” from FHWA, in this case white women, WSDOT would be better served to utilize the data to help. Understand the “why and what” behind the results in order to assist all members of the MBE/DBE/WBE community to become more successful in obtaining and performing WSDOT work. In addition, the statistical data used to suggest the white women are performing better than other groups for the 2009-2011 period is flawed in that it “counts” as work performed the proposed DBE participation on two of the biggest WSDOT projects ever undertaken, the SR 99 Bored Tunnel and the SR 520 Floating Bridge projects. There is already evidence on the SR 99 Bored Tunnel project of DBE contractors being awarded work and the data included, without actually performing the work.”

WT13: “The Disparity Study Results and possibility of taking program measures away from our business just when we have started to see results is disheartening on several levels, especially because in Whatcom and Skagit County alone, [our company] has fallen within 50-100 employee grouping. Even during the recession, [we] did not lay off employees. The company has plans to grow/move south.”

WT13: “If the goal is to give good businesses that qualify to do the work and contribute consistently to their communities access to compete for highway contracting projects, then it will be counter-productive to allow the success of two companies to effect access to the program.”

WT13: “The [DBE] program is in place to “level the playing field” in transportation construction projects for all businesses ready, willing and able to participate. Plainly speaking, the intent is to help as many small businesses as possible get work and grow. The implication that there is no disparity within the construction industry for women, regardless of race, is a simplistic conclusion with which to base a significant change to the DOTs use of program measures. The success of a tiny percentage of WBE/DBEs (two firms out of the 100 identified by the study team garnering 44% of the contracting dollars) within the program should not reflect the reality of the majority of women-owned businesses as a whole and their efforts to win valuable contracts.”

WT13: “Some comments from other business that attended the DOTs Disparity Study Meeting support of the waiver based on 1) past abuses of the program by unscrupulous business owners and 2) the decision by contractors to utilize the same firms on their projects. These issues are irrelevant to disparities within the marketplace but rather a 1) function of the certification process and 2) management and goals of contract awards by primes which could be addressed through implementation of an underutilized DBE incentive. They should not be reasons to undermine the program goal of benefiting all certified DBEs which fight daily to get their businesses to the negotiating table.”

WT13: “The prospect that many legitimately DBE certified businesses will be denied access to the most significant program measure available in Washington State – mandated DBE goals on contracts – will weaken the program and further limit the pool of viable businesses for contractors to choose from. Instead of punishing subcontractors and suppliers, [our company] urges WSDOT to implement an underutilized DBE incentive that would give additional incentives to contractors for working with businesses showing substantial disparities. We appreciate any effort on the part of WSDOT to improve the program that will continue to allow all legitimately certified DBE – whether DBE, WBE or MBE companies – the chance to earn the DOT’s business, especially when these contracts are being paid for by the same tax dollars that [our company] and so many other companies contribute. Find a way to keep the program inclusive for all groups instead of fostering a culture of dividing and conquering small, women and minority-owned businesses.”

WT14: “Lastly, the AGC questions the validity of the data supporting any finding that women owned businesses should be removed from DBE certification.”

WT14: “In keeping with the holding of *Western States Paving v. WSDOT*, 407 F.3d 983 (2005), the Department is required to take into consideration both the capability and capacity of minority and women owned companies when making its disparity analysis. Our reading of the disparity study is that this has not been done. There has been no analysis of minority and women contractors’ qualifications other than by subjective survey and self-identification means. This does not constitute an objective analysis. If properly done, the AGC believes that the Overall DBE Goal would be reduced from even the current base level of 8.4%.”

WT14: “To the extent DBE requirements are imposed by the Department, the AGC believes that women owned businesses should not be removed from the list of certified DBEs. At a minimum, the AGC believe the data is possibly suspect. The data would be skewed improperly upward if any work was included from companies that were recently decertified as women owned

businesses. In addition, removal of women owned businesses from being certified DBEs would only exacerbate the concerns previously raised regarding the availability of qualified DBEs.”

WT15: “The primary (really only) race and gender conscious measure available to DBE qualified businesses rests in contract specific DBE percentage goals included as a condition of award for bidders. If a waiver is submitted and accepted by the FHWA, contractors will have no incentive to work with an entire class of businesses that have been deemed eligible for the DBE certification in Washington State, because they are owned by white women.”

WT18: “I am deeply concerned about the study’s indication that all businesses in the program are showing substantial disparity in obtaining contracts except for Caucasian women-owned businesses. I am adamantly opposed to the DOT submitting a waiver to the Federal Highway Administration to remove Caucasian women-owned business from consideration for race and gender conscious measures allowed for in the DBE program.”

WT18: “The primary race and gender conscious measure available to DBE-qualified businesses rest in contract-specific DBE percentage goals included as a condition of award for bidders. If a waiver is submitted and accepted by the FHWA, contractors will have no incentive to work with an entire class of businesses that have been deemed eligible for the DBE certification in Washington State, because they are owned by Caucasian women.”

WT18: “I have worked with Caucasian women-owned businesses which, before meeting the criteria to be included in the DBE Program, had difficulty connecting with prime contractors for consideration, and inclusion in their projects went largely unnoticed. While becoming a certified DBE has not resulted in anything substantial, at least contractors are now returning their phone calls and their products have been used on, or purchased for, several mega projects. It has been an effective tool for these small companies to help level the playing field. Removing them from the program would have devastating consequences for these businesses. They would no longer be able to compete against larger companies.”

WT19: “Regardless of what the numbers say, women are still frequently overlooked in teaming opportunities, meetings and other business activities. It will be very important to closely monitor the participation of women-owned firms and WBEs on WSDOT contracts. I am requesting that this study be repeated within a few years of the new goals taking effect.”

WT21: “I have been a certified DBE/WBE since 1994 and have worked many WSDOT projects that have DBE goals. My company has been in business for 20 years and we do traffic control for state and federal projects. We also contract to public works and private businesses. It has been my experience in this industry that WSDOT projects are awarded only to DBE firms because it is mandatory and required by WSDOT. Prime contractors have told me that they wouldn’t hire my company if there wasn’t a DBE goal on projects. No prime contractor will hire a DBE/WBE if the goal is voluntary – voluntary goals do not work. In all my years in business I have NEVER been awarded a project with voluntary goals requirements. If WBE/DBE firms are eliminated from this program I will not have an opportunity to bid on WSDOT projects – “Condition of Award” is vital to the survival of my company and my employees. It protects small businesses from primes who take parts of our bid items or only want to take some bid items and helps us get paid.”

WT21: “The numbers in the “Disparity Study” do not reflect my personal experiences in the highway construction industry. Although these projects are smaller in dollars awarded, these projects account for more than 95% of my company’s work load, therefore, if we are removed from the DBE program, we could not survive. In our busy season, we have employed up to 80+ people, all would lose their jobs – we would have to close our doors and cease to do business.”

WT21: “In the 20 years that I have been in business we have NEVER been awarded a project that had voluntary goals for WBE/DBE. Voluntary goals do not work.”

WT21: “The disparity study states that over 3,000 companies were interviewed for this study. No one ever contacted me concerning these issues. Perhaps there are a few DBE/WBE firms that have awarded “mega projects” but this is not the case for my company. My company has not exceeded or even come close to the goals set forth by WSDOT. To remove WBE (white women owned businesses) from the DBE program would be unfair and discriminatory. White women owned businesses cannot survive without the DBE program and no work will be awarded on “voluntary goals.” Please reconsider this devastating decision you are about to make for all of the WBE/DBE firms in the state of Washington.”

WT21: “Without my DBE/WBE certifications, I would not be awarded any WSDOT projects. In all my years in business, the majority of my work is due to my DBE/WBE certifications. I would not be hired for any projects if I do not have these certifications. This year alone (2013) our company has been awarded 6 WSDOT projects with DBE goals. This is 97% of our work in any given year. If we are denied the DBE certification, our business would greatly decline and our company would be forced to close.”

WT21: “In reviewing the DBE Disparity Study, I am confused as to how this group came up with the percentages of women owned companies that have exceeded the DBE goals. It is stated in this study that over 3,000 companies were interviewed; but I haven’t met one company that states they were contacted. No one from any agency contacted my company or did any form of an interview. I would think if your goal is to delete women owned business from the DBE program based on the numbers in the Disparity Study, then perhaps interviewing them first hand would have been appropriate.”

WT22: “I feel the SBE certification program will be used as a catch-all program for all the woman-owned small businesses that fall out of the DBE program when WA state files for a waiver, and they will.”

WT22: “I like that the woman-owned businesses participation in projects will still apply to DBE goals even as SBE’s.”

WT22: “I don’t understand how the Department and the OMWBE feel that they have adequate time and resources to implement a new program much less monitor it. Given the track record, I think this will be difficult at best as they already have too much work to do now and not enough people.”

WT26: "The detrimental effect this will have on my firm along with other up and coming Caucasian-women-owned firms will be long-lasting. I strongly urge WSDOT to reconsider measures, policies and programs—such as contracting goals for WBE utilization—that assist in more equal representation of women in the transportation field."

WT27: *"Birch Equipment Co, Inc. is a certified DBE in the State of Washington and the only independently owned and operated, woman-led firm providing quality construction equipment and tool rental and sales in the state - and one of the few in the nation. In fact, Birch Equipment is one of the few remaining local, U.S.- owned full-line rental companies in the nation. Birch Equipment is compelled to argue against the DOTs plans to submit a waiver removing white-women owned businesses from DBE contracting goals. The DBE program is a tool for small businesses like Birch that meet the criteria of being disadvantaged to get invited to the table and win contracts. Goals are the meat of the DBE program."*

WT30: "First, contractors will have to rely on good faith efforts because they will not be able to solicit enough DBE participation to meet the contract goals. This will most likely result in either a significant increase in bid protests or increased costs as contractors add cost in an attempt to reach the contract goal."

WT30: "Second, there are not enough minority DBE firms to meet the proposed reduced goal. There will be significant pressure on the currently approved minority DBE firms to participate in more contracts. This will result in the underperformance of the minority DBE firms as they are stretched too thin and it will result in drastically higher minority DBE costs as these firms take advantage of the increased demand for their services."

WT30: "DBE's comprise over 50% of the firms that we utilize to meet our DBE goal on WSDOT projects. Simply lowering the goal from 15.17% to 11.6% will not fill the substantial void in DBE participation that will result from excluding WBE's."

WT31: "We urge WSDOT to reconsider this action due to the fact that under federal law, women are presumed to be socially and economically disadvantaged. We encourage WSDOT to spend their efforts and tax dollars on meeting their participation goals by hiring, rather than excluding, more DBE certified businesses and ensuring an equal opportunity for ALL disadvantaged businesses."

WT32: "We believe that WSDOT's purported proposal is an extreme and unnecessary measure. We believe that it incorrectly concludes that WBEs do not face "substantial disparities" in federally-funded transportation contracts. This action is also in violation of specific provisions of the governing rules (Code of Federal Regulations, Title 49, Part 26) and federal Ninth Circuit Court of Appeals precedent (see *W. States Paving Co., v. Washington State Dep't of Transp.*, 407 F.3d 983, 990 (9th Cir. 2005)). In addition to causing substantial detrimental impacts to WBEs and the General Contractors who hire them, in enacting these changes WSDOT will be exposing itself and Washington Tax Payers to the serious threat of costly litigation. By seeking to exclude WBEs, WSDOT is depriving non-minority women of the right to participate in this program, directly contrary to the program goals provided in the CFRs and in violation of non-minority women's rights to equal protection under the laws of the United States of America."

WT33: “My concern here is obvious. If OMWBE refuses to allow white, women owned DBE subcontractors to meet contract-specific DBE goals, there will not be a conceivable way that we, as a general contractor, will be able to meet these goals unless they are substantially decreased or eliminated.”

WT33: “There is something seriously wrong with the DBE program. It is discriminatory, currently deciding that white women owned businesses are no longer eligible to be DBE businesses. It has also divided up Asian Americans and decided that only Subcontinent Asian Americans are disadvantaged.”

WT34: “I'm an owner operator of my own dump truck, I have been driving truck since I was 15 years old. I was able to buy my own truck in 2008 after working years for other companies. It has been a struggle over the past 5 years being a women owner operator. I was so excited when I received my DBE in October because as soon as I received my certification I started receiving bid request that I would never have had an opportunity before I received my DBE . I have been able to expand my business by leasing another dump truck since I have received my DBE. I'm afraid if I lose my DBE certification I will not be able to expand my business and I will not have enough work for the second truck I have leased. I hope you will PLEASE look at all the hard working hands on WBE's in this program that this program is the reason that women have had a chance in this industry. I think WBE's are still a minority in the construction Industry so please don't take away the chance for us to succeed in this Industry. If the WBE's are eliminated from the DBE program the WBE's will be left behind and unable to compete on an equal basis.”

WT35: “The program will use our minority status to meet federal goals but will not allow us opportunity in the bidding process to get work. The statistical data will never show a disparity to Caucasian women as long as WSDOT uses our DBE contract dollars to meet goals. Many Caucasian woman-owned businesses that have had success will unknowingly disappear. Women that have built successful businesses will be robbed of the opportunity to get work.”

WT35: “Removing Caucasian women owned businesses from the bidding process will have a negative effect on the DBE program. It is a drastic and unnecessary step. Transportation construction is a male dominated industry. The goal of the entire program is to level the playing field for women and minority owned firms and to prevent discrimination. Removing Caucasian women from the goal attainment process will increase costs to public works projects, ie, less competition increases costs, more competition decreases costs. Competitive bidding is good for the construction industry. All women and minority firms should be allowed the opportunity to compete and to succeed. It is a huge investment in time, equipment, training and manpower.”

WT35: “Being the white woman owner of Pavement Surface Control, I have been harassed and discriminated against I have spent thousands of dollars in attorney fees proving my ownership and ability to run my company. I have experienced first-hand the impact of losing my DBE certification when my company graduated from the traffic control NACIS code. My main source of revenue was traffic control prior to graduating. After graduating, my company could not get traffic control work and could not exist on revenue generated by traffic control. Pavement marking and concrete barrier became the main source of revenue. I am concerned that removing my company from the goal attainment bidding process will affect my ability to get work in those areas I am certified to work.”

WT36: "This letter is in response to WSDOT's intent to seek a waiver from the USDOT that would exclude all Caucasian woman owned businesses from the present DBE program. This action would cause an extreme hardship on the businesses that would be excluded. I work for Dorothy McDaniel, owner of Construction Ahead, Inc, dba Pavement Surface Control, a Caucasian woman owned business. The hardships endured by her to get to this point in her career were many, but it would have been impossible to achieve what she has without the ability to meet DBE goals in the Federal /State construction market."

WT36: "The number one question asked of me during the bidding process is can we help to meet the DBE goal and if so in what areas is she certified. If you remove this bidding opportunity by removing White women owned companies from this portion of the process you will be causing a great financial hardship to each company removed. It will also disrupt the entire DBE program and the goal of the Federal Government to increase all woman and minority owned business participation in transportation contracting."

WT36: "When Pavement Surface Control graduated from the traffic control portion of the DBE program that portion of Dorothy's business declined by 30%. Traffic control has shown a steady decline in each year since her graduation. The only portions of her business that has increased over the last 3 years are those areas in which she is still certified to meet the Condition of Award goals."

WT38: "I am the owner/president of The Traffic Control Company, Inc. and have been in business for 21 years. Our field of work is in traffic control for state and federal highway construction projects. I have been a certified DBE/WBE for most of those years and as such, have been awarded many WSDOT projects because of my DBE/WBE certification. Without my DBE/WBE certifications, I would not be awarded any WSDOT projects. In all my years in business, the majority of my work is due to my DBE/WBE certifications. I would not be hired for any projects if I do not have these certifications. Last year alone (2013) our company was awarded 6 WSDOT projects with DBE goals. This is 97% of our work in any given year. If we are denied the DBE certification, our business would greatly decline and our company would be forced to close."

WT38: "It has been my experience in this industry that WSDOT projects are awarded ONLY to DBE firms because it is mandatory and required by WSDOT. Prime contractors have told me that they wouldn't hire my company if there weren't DBE goals on these projects. No Prime contractor is going to hire a WBE firm if the goal is voluntary – this just won't happen."

WT38: "By allowing the work done by WBE on projects requiring DBE participation and having this work count towards the overall statewide goal but not count towards the COA on projects is proof that Washington state needs these businesses to achieve their goal. So eliminating them from the COA makes no sense at all. On that note, why would WBEs stay in the program in Washington if the only person it benefits is the State of Washington! This program was set up to help businesses that qualify for the DBE federal program, not to help the state achieve their goals. I think this has been lost in our state."

WT38: “The following is a from the USDOT DBE overview web page: There has been, since 1983, a statutory provision requiring DOT to ensure that at least 10% of the funds authorized for the highway and transit financial assistance programs be expended with DBEs. DOT has established a single DBE goal, encompassing both firms owned by women and minority group members. If this statement is true, why would there even be a disparity study done? This leads me to believe WSDOT is making the program more complicated than it was designed to be by breaking it down to race and gender, which seems to oppose the very purpose of the program.”

WT39: “The assertion that woman-owned firms are somehow overrepresented in the world of design and construction seems absurd on its face. And while there is statistical analysis to back up this assertion, it is well known that statistics can be designed to support a wide range of viewpoints. The idea that WBEs should no longer be allowed DBE status because they are overrepresented in the granting of contracts is one of these statistical situations. WBEs may get a higher proportion of work than the quantity of firms would indicate. However, if one were to take a different view, and ask how woman-owned firms are represented in proportion to their presence in the population, you would come up with a much different answer.”

WT39: “The data included in the report show low utilization of DBEs without race- or gender-conscious measures. It seems logical that removing gender-conscious goals would lower participation by WBEs.”

WT39: “Asian Americans also seem to be overutilized, according to the data. Why are certain race-based goals not also being examined, and only gender-based goals?”

WT39: “My name is Jill Cody, I own a small lighting design firm, Dark Light Consulting, LLC in Seattle Washington. Our firm was established in 2008, certified as a WBE in 2010 and as a DOT DBE in 2012. I am deeply concerned about the proposed changes in the DBE system and how they impact our business. As a woman-owned firm in the design and construction industry, we are constantly impacted by the barriers that woman-owned businesses face. Large among these is the lack of connection points to our client firms, which are generally well-established firms with existing connections to other well-established firms, nearly none are owned or run by women or minorities.”

WT40: “It is my personal and professional experience that by allowing the removal of WBE's and specifically white women-owned businesses from the ability to compete for project goals will be highly disruptive, in fact, killing the opportunity to do effective business in the future. As a good example, I was proud to win a contract on a large megaproject , two years ago, which is now publicized after two years of struggle and involved in breach of contract. Had it not been for the WBE DBE goal need of the project, I would not have even had the opportunity to achieve this contract. There are very few, if ANY opportunities in my particular field, for even small projects, let along larger ones. The idea of removing one's professional competitive ability is not a healthy one, and must not be allowed.”

WT41: “I am a white woman who owns a saw cutting firm. I personally do the saw cutting myself. I have been told by several general contractors they would only use my services when a WBE goal needed to be met. That is blatant discrimination. If the WBE goal is taken away for white women, I will lose my business altogether.”

WT41: “I understand you will be monitoring any changes in the participation of WBE’s in the market place. My fear is that your monitoring will show that I have gone out of business and if this gets re-instated it will be too late for my firm. Please do not request a waiver from USDOT making White WBE’s ineligible to participate. I make all my money in roadways and need the USDOT and FHWA stipulation/goal to compete. It goes without saying that a reduction in percentage will hurt, but not as bad as an elimination of the white women-owned clause.”

WT43: “I am the Traffic Control Superintendent for the company. After graduating from the DBE program in traffic control we experienced a major reduction in work, although the areas of striping/barrier portion where she is still certified did increase. I am concerned that the Caucasian females' ability to get work will decrease tremendously if they are removed from the DBE goal attainment program. The financial impact to our company and its employees and other Caucasian female owned businesses will negatively affect all of us.”

WT43: “I believe removing white women from the WSDOT minority goal attainment is a huge mistake. I was in attendance at the meeting in Spokane with other contractors that spoke of their concern about inexperienced DBE contractors that do not have the proper equipment, manpower, and financial ability to do the work they are given. The program will benefit more by helping these companies, than from destroying the Caucasian women-owned businesses. After all, the goal of the federal program is to increase all women and minority owned business participation in transportation contracting and level the playing field in a traditionally male dominated industry.”

WT44: “Using the required methodology set forth by the Federal Highway Administration (FHWA), we understand WSDOT must request a waiver that will eliminate a category of women-owned firms—white-women owned firms—from qualifying as a part of WSDOT’s race- and gender-conscious measures/contract goals. While WTS’ mission is specific to the advancement of women, we are a race-neutral organization. To this end, our interest is in promoting all measures, policies and programs—such as contracting goals for WBE utilization—that assist in more equal representation of women in the transportation field. We believe your agency’s recommendations are the unintended consequence of the required methodology set forth by federal agencies. However, we look forward to continued discussions with WSDOT and FHWA regarding the methodology, WSDOT’s waiver and how we can work together to continue advancing women in the transportation field.”

WT45: “I have two of the largest public works projects in the history of the State, being performed in my immediate vicinity. I have solicited the contractors working on these projects, I have been to meetings related to the projects, I absolutely have the staffing, equipment, experience and know how to perform the vacuum services and yet my counterparts, who are more than 20 miles away, are on this project continuously. This alone does not substantiate "discrimination" based on gender. I was shocked and saddened to hear about the latest discussions pertaining to removal of women from the federal disadvantaged status.”

WT46: “I have been a WBE cert company in Oregon and Washington for over 20 years. I’ve had to slowly built my business in order to compete with the bigger established competitive business. The jobs with a WBE goal helped me achieve a steady growth for my business. Cutting the goals

now would destroy any achievements we have made over the years. I oppose the waiver request and ask WSDOT to keep the WBE goals in force.”

WT47: “As an employee of a Caucasian women owned business participating in the program I know removing our business from the program would put us at an unfair disadvantage when bidding projects. I seriously hope you reconsider removing Caucasian women owned businesses.”

Overall DBE Goal. Some individuals submitted verbal or written testimony related to WSDOT’s overall DBE goal.

TPF8: “BBC examined the availability of potential DBEs for FHWA- funded transportation-related construction contracts that WSDOT and local agencies awarded between May 9th, 2005, and September 30th, 2006. Those contracts were awarded prior to the economic downturn of 2008 and were not affected by American Recovery and Reinvestment Funds. The types and sizes of transportation contracts at WSDOT and local agencies awarded during that time period may have been more representative of the overall mix of FHWA-funded transportation contracts that WSDOT and local agencies anticipate awarding in the future.”

TPF8: “Potential DBEs would have been available for 14.9 percent of WSDOT’s FHWA-funded transportation prime contract and subcontract dollars between May 9, 2005, and September 30th, 2006. If WSDOT determines that the mix of types and sizes of contracts in that time period is representative of future FHWA-funded contracts, then it might consider an upward adjustment to its base figure, ranging up to 14.9 percent. My comment is that the goal for WSDOT should be 14.9 percent, not 11.6 percent. All of the groups that are having discussions about the effects of the goal, if the goal is raised, everybody has more.”

TPF14/NSPF14: “The goal of the program is to give disadvantaged firms a chance at business success. As this disparity study so amply illustrates, setting a goal is not always -- you don’t always achieve that goal. You just set it. Likewise, being a DBE does not guarantee success. Let me repeat that: it is not a guarantee of success. To combine the two, success and goals, DOT should work to turn those success stories upon its own DBE community, open up the goal and not restrict the application of NAICS codes in the way the feds intended them to apply, and give the larger contract to the community; meaningful assistance, instead of working against them.”

WT1: “I believe that a DBE goal of 8.4% would dramatically lower the success rate of small disadvantaged businesses. As stated at the disparity study meetings, the 8.4% goal is based on the current availability of DBE firms and what could be considered DBE firms. It is known that during the recent recession, DBE/MBE businesses were impacted at a greater percentage than non DBE/MBE businesses, therefore reducing the number of available DBE businesses.”

WT1: “The current DBE disparity study shows that there is still considerable disparity in this region. If we continue at this lower rate we will continue to discourage DBE business growth. The next time there is a study there will be even fewer DBE’s to do the work. This downward spiraling effect of DBE businesses going out of business is something that none of us want to see.”

WT1: “Therefore, because of the other two factors (sizes of WSDOT projects and barriers to DBE/MBE’s) mentioned in the disparity study along with the reasoning above, I request that the DBE goal be set to a value greater than 14.9%. As a new business owner that just received DBE certification, I believe that we can meet a 14.9% or greater goal if we continue to encourage, not discourage, small disadvantaged businesses.”

WT10: “While we agree with the overall findings of the disparity study, there are certain areas that were not sufficiently analyzed or are so compelling that they should be reinforced when discussing the proposed goals for Disadvantaged Business Enterprises (DBEs) in the future. In Chapter 4, for example, the topic of bonding and insurance requirements creating a barrier for small businesses, and especially for Minority-owned businesses, highlights a significant issue. Access to capital in general is a continuing problem, with delays in payment of invoicing and difficulty obtaining lines of credit, and even the micro-loan programs through the federal government are insufficient to equalize the financial deficits of small businesses.”

WT10: “We believe that you should set the WSDOT proposed DBE goal for 2014-2016 at the high end of the recommendations from BBC, with a significant race-conscious percentage. Goals should not only include Engineering, Architecture, A&E-related services and other non-construction professional services in non-construction contracts, but also as components of construction contracts. The proposed Small Business Participation is a step in the right direction, but, based on the evidence, certified DBE firms are still at a disadvantage in transportation contracting, and every effort should be made to correct the situation.”

WT11: “We propose that the meaning of “regularly assess” be defined as annually. Also, the term regularly to include the adjustments of overall goal submissions made by the recipient along with the recipient’s best practices such as development of a DOT standardized methodology. The current practice of allowing recipients to choose the goal-setting method they believe is most appropriate and then overriding their choice at a higher level is inefficient, inaccurate and wastes time. Most importantly, we proposed that any ODOT overall goal submissions made from 2011-2015 be immediately assessed, reviewed and adjusted as per the findings in your Office of Inspector General – Audit Report.”

WT11: “While the OSDBU’s DBE website provides a significant amount of information, there is room for improvement, including showing each recipient’s current approved goals (both race-conscious and race-neutral) and overall performance, for the past three to five years.”

WT13: “The stated purpose of the disparity study is to help WSDOT determine an overall percentage goal moving forward. [Our company] supports raising the goal to the maximum suggested level of 14.9%. Why not aim the program for success? Raise the bar for a higher distribution of government contracting dollars to go to more small businesses across the board.”

WT14: “The AGC also believes it is absolutely imperative that setting a DBE goal complies with both legal requirements and with practical considerations. The AGC believes that doing so provides credibility to the DBE program and also provides minority and women owned contractors with reasonable and rational opportunities which help those firms to become fully functional and competitive contractors. The focus should not be on delivering certain monetary

levels of contracts to DBE's, but should instead be ensuring that qualified DBE's are given fair and open opportunities to compete based upon demonstrated skill and historical capacity."

WT14: "In addition to being legally required, the AGC also believes that this absent analysis is critical to the success of the DBE program, to the applicable WSDOT projects, and, ultimately, to the success of the minority and women contractors themselves. Placing minority and women owned contractors into work place environments that they are with incapable of performing technically of from performing functionally sets them up for failure. Any such failure discredits the program, creates hardship for the project, and causes general contractors to carry unwarranted and unnecessary contractual risk for such nonperformance. The lack of any capability and capacity analysis also necessarily militates against any increase in the proposed overall DBE goal."

WT14: "Lastly, the AGC believes that an overall DBE goal that is legally and/or practically unsupportable incentivizes parties to act improperly. This neither helps the program, projects, or the minority and women contractor community. We have recently seen the outcomes of when this occurs. MBE's that are not necessarily qualified or capable are incentivized to not provide any meaningful function and act as conduits only and others are incentivized to obtain DBE certification improperly to be able to compete for work. Again, this helps nobody."

WT16: "Please use the 14.9% adjustment for the DBE goal. Considering the nature of the economy over the past few years, there can't be too level of a playing field. There can't be too much of an effort to provide the best opportunity to small businesses."

WT21: "In the last five years, our company has been awarded 30 projects with DBE goals – mostly under \$400,000 and we have completed them successfully. This year in 2013, we have been awarded 6 projects to date, all with DBE goals, these projects are small dollar amounts due to the goal being so low."

WT23: "I believe that the DBE goal of 8.4% would dramatically lower the success rate of small disadvantaged businesses. As stated at the disparity study meetings, the 8.4% is based on the current availability of DBE firms and what could be considered DBE firms. Unfortunately, I believe because of the current disparity that still occurs in our area, during the recent recession DBE/MBE businesses were impacted at a greater percentage than non DBE/MBE businesses, therefore reducing the number of available DBE businesses that the 8.4% is based on. Also, as shown in the current DBE disparity study, there is still considerable disparity in this area, and if we continue at this lower rate, the next time we have another study there will be even less DBEs to do the work. This spiral[ing] downward effect of DBE businesses going out of business is something which none of us want to see. Therefore because of the other two factors (sizes of WSDOT projects and barriers to DBE/MBEs) mentioned in the disparity study, along with my reasoning above, I request that the DBE goal be set to a value greater than 14.9%. Also, as a new business owner that just received our DBE certification, I believe that we can meet a goal of 14.9% or greater."

2012 Disparity Study. Several individuals submitted verbal or written testimony related to the 2012 Disparity Study.

NSPF3: “I have a couple of concerns with the disparity study. One of them is one question that I did have is that the graphs that are on the executive summary show African-American firms showing no disparity. There, you know, I’m – what I am concerned with is how many African-American firms have received that amount of money. To my knowledge, I think one firm has received at least over 90 percent, maybe 80, 85. So would you consider that a substantial disparity if only one person has received that amount of WSDOT contracting?”

NSPF3: “I also am learning that the study is made up of certified firms and noncertified firms, so that actually took out a lot of my questions. I thought that this one African-American firm was decertified in the program in 2003, so why should he be included in today’s last three years of this study?”

NSPF3: “You mentioned that this study consists of dollar-weighted contracts, I guess. I also was wondering how many firms; was it five, ten, 15 firms in those last three years that have actually collected all of this WSDOT work? I think that’s really important to know. It could be 20 firms, 30 firms. But I know there’s only several prime contractors and over and over and over they get the same jobs, you know, all of the contracting and there’s – there are favorite DBE firms that get the work.”

NSPF4: “One of the things I’m concerned about is there could be certified firms. I think that people that could be certified should be included in the disparity study should have been certified. It’s not that difficult. Most of the people in this room have been certified. We went through all the same hoops everybody else does and I think that might change your study somewhat.”

NSPF5: “I also have a very – I don’t understand the disparity project. I don’t understand why we are being pitted against the other DBEs in our – who are in the same boat we are in. The construction industry – we are probably 25 percent of the construction industry. As 25 percent, we are basically being torn against each other. Well, should we do African-Americans, should we do women, should we do Asians? It’s about the fact that we as an entire group are being associated against the general male population. I’m not trying to intimidate anyone. But the actual construction industry is probably 75 percent male, at least 75 percent male. As women-owned businesses, we are a very small minority of that part.”

NSPF9: “I find it appalling that this disparity study was even conducted and I question the validity of why such a study is being required. It appears to be an effort to pit all the minority groups against one another, as opposed to the purpose of a DBE program, which is to provide a circuit for MBE and WBE firms to attain a modicum of success in the transportation market, which is overwhelmingly controlled by white male-owned construction firms. I question the validity of the disparity study that was conducted by BBC for several reasons. First, I know that I have been available for WSDOT work since 1998. My NAICS code is 423610. I doubt that this NAICS code shows up in the BBC study, and if I don’t register, how many other firms whose NAICS codes sit on the fringe of construction projects have also been excluded from this study. Since 2010, my firm has been fairly active on WSDOT projects with DBE requirements. I find it

disturbing that I was not contacted to participate in this study and I know of only one other firm that was.”

NSPF9: “I understand that the dollars used in the study were committed dollars, not actual dollars spent. As we all know, contracts are changed and broken daily. The dollar values to determine WBE's overachievement are flawed and inaccurate. For example, I was listed on a previous project for one million actual dollars; however, at the end of the project, only \$303,000 had actually been spent with my firm. In the study done by BBC, how many dollars they reported have actually been spent with WBEs? It is common knowledge that dollars recorded on the 520 Bridge contract have not been spent, as the project is nowhere near completion. I also question how they determine what dollar value WBEs were proposed to earn on these contracts. How many firms actually received these dollars? We are all aware of the Grady Trucking scandal and that those dollars were used in this study even though it was determined that Grady was not a qualified WBE/DBE firm. Those dollars that have been accredited to a WBE actually were spent with an MBE and, yet, not reported as such. Another example of skewed data.”

NSPF10: “After rereading WSDOT's July 2011 letter to the Federal Law Administration proposing interim overall DBE goals, we're a little befuddled. The document states that based on the nationally recognized economics consultant firm and DBE participation data for 2009, 2010, and 2011, the same three years used by BBC to conduct its disparity study, that, quote, Discrimination continues to impede the ability of disadvantaged minority-owned and women-owned firms to compete fairly, unquote. It also cites a substantial drop in DBE participation during WSDOT's suspension of DBE contracts from 2005 to 2006. So, in one year, DBE participation dropped to four percent. Prior to that, from '99 to 2005, DBE participation averaged 12 percent. September 2012, the disparity study is released and, suddenly, white women-owned businesses no longer face discrimination. We've noted that the study finds two white women-owned non-DBE contractors received 44 percent of the contracting dollars in the time frame used to evaluate the program. The study ultimately concludes that, statistically, no disparity exists for white women-owned businesses. And we don't agree that the summary basis provided means there's no disparity for white women.”

NSPF14/TPF14: “I went out and did a mass e-mail to everyone on the WBE list. There were 800. By the time I took off bounce-backs, et cetera, people that don't really participate in the bidding services construction sector, there were maybe 700. Not one. One. I'm sorry, one, out of the 700, came back with an answer that they were interviewed. One.”

NSPF14/TPF14: “The committed versus actual dollars are a real problem, even at the federal level, and they know it. Committed dollars on these megaprojects were huge, but they are not paid off until several years throughout the long-term projects, specifically that are money that came in. Someone mentioned it. You're absolutely right. These megaprojects were here with millions upon millions of committed dollars. And I can point to a lot of people in this room, including myself, who have actually received, as revenue of those dollars, a fractional percent of the committed, but that was counted in the study. It's skewing the data. The other skew, of course, is actual versus committed, which goes away. Everyone in this room has a story about my contract was three million; I ended up receiving a total of 300,000. That also skews the study.”

NSPF14/TPF14: "The participation level in Appendix K – All right. You're justifying your sample as real at 1.5 percent, but I don't think that truly reflects the true market conditions. It certainly doesn't reflect the market conditions for available WBEs in other states that I looked up. They were more in that, you know, double digits, low double digits, ten, 11, that kind of thing. So, when you then apportion those dollars to that 1.5 percent, your ratio is horribly skewed. And there you get your parity. But it skews parity. The other parts of the study -- With that one metric, you're basing your entire decision for the waiver, but every other component of that study, in the four other areas that you researched, did not conclude that the barriers were gone for women-owned businesses. The OEO is hanging their hat on that one metric. I understand that you may have to. The logic is, Well, if we don't, we're going to lose funding. We have to. This is the regulation. These are the rules. Well, I disagree. That solution is extreme. It's radical. It's based on the premise that MBE utilization is going to go up if you just take away WBE. They're mutually exclusive. We have to get rid of those women because they are taking it away from the minority contractors. That's a flawed premise right there. One does not automatically rise because the other is removed."

NSPF15/TPF13: "This study is skewed by the few. And I'm going to give you some examples. We all know that the SR 99 bored tunnel project has an eight percent condition of award goal and we know that the Federal Highway Administration has investigated WSDOT's management of that project, in particular. And I can say, with my own personal example, I have done a fair amount of work on that project and it's come to the attention of Federal Highway and WSDOT that, of my one million dollars' worth of work that I've done -- or that I've been given contracts for -- I've only actually performed \$800,000 of that work because \$200,000 of it STP self-performed. Now, they've had their hand slapped and there's investigations and I have every confidence that Secretary Peterson is going to do what she can to hold them accountable to that goal, but that's just one example. But, yet, that money is counted in this study. And, again, on that project, there's one company that was a WBE that was, you know, given 23 million-dollar contract that, later, that money went to an MBE. But, yet, that's still in the bucket of the WBE because it's a flawed data in the study. Again, the megaprojects, they definitely are skewing the results."

NSPF15/TPF13: "I think that the study needs to not be certified. I think that WSDOT should commission a new study with a new firm that has current real-time data that has been gathered in such a way that it takes into account the effect of megaprojects on the data and what's really happening in our marketplace, and I think that the very fact that not one of us in this room were contacted as far as availability, that should speak volumes."

NSPF16: "The first point is that this sample of firms that was actually included in the custom census database that BBC created is not representative of the true marketplace. So, I didn't have the numbers in front of me earlier, but the total number of firms identified by the researchers was 14,528. After, you know, people didn't answer the phone, there were over a thousand firms that said they just didn't want to talk to the researchers about this study, we got down to a number of 988 businesses. This is WBE -- or DBEs and non-DBEs. So, that's the total subset of the Washington businesses that were included as a result of the custom census methodology. So, I think that's 6.8 percent, which is our opinion that that is not representative of the true marketplace, and certainly everyone's testimony here before me has indeed corroborated that. The underestimation of availability has skewed the disparity index analysis that is in the bulk of

the study. For example, in 2011, the study posits that the availability for women-owned businesses in construction and engineering contracts is 1.5 percent. That's in Exhibit K, Table -- or something -- You'll see it. It's in the letter. I have a citation. To exclude women based on that percentage we believe is unsupportable."

NSPF22: "Second, as Ellie had talked about quite a bit and is as detailed in the letter, this disparity index is -- kind of what the point that I was getting at earlier -- is based on a fraction and which uses two numbers. If one of those numbers is flawed or if both of those numbers are flawed, you're going to get skewed results. Now, I am not a professional statistician, and I've been counseled on that today, but I do read footnotes. That is something that lawyers are very good at. And on part of their study, notice -- The numbers and everything is buried in a 700-page report, but in the disparity graph that they include in their executive summary, in one year, African-American DBE companies are listed at almost 200 plus, which is the basis on why they're eliminating women from the program. In Footnote 7, it says that the reason for this is from one single African-American-owned electrical company that was not a DBE, and that's where the vast majority of that revenue that factored into that fraction came from. So, to me, this actually proves that just one firm can skew that entire disparity number, which is then what WSDOT is being told to eliminate women off of, and that's a very big jump for me to take, and I would think that a lot of these people in this room would agree with me."

NSPF22: "The disparity study is designed to show barriers to women in this industry, and they say that those have been removed, or they're not substantial, and, again, those are just based on this fraction, which, in my opinion, is potentially very flawed. Representing women-owned companies, I have heard story after story of instances -- and I know others have spoken about those, about the way that women have been treated and the actual barriers that exist in this industry, and for this disparity study to say that, well, there's only 1.5 percent of women available to do work in this state, which has actually decreased over the past two years, that that means, oh, well, we should get rid of that only 1.5 percent, which is such a low number."

SKPF2: "We'll just start out with the study on page three. You talked about the local marketplace conditions, and it's very spelled out in there, but there's very little collected in the data of local marketplace conditions. You use the region, and you use basically where the majority of the money is spent as you state and I'll cover later, and that, of course, is King, Pierce County area. It's not Spokane County and it sure isn't up in Colville where there's no work. You can use Whitman for your research reason, because WSU is there, but other than that, you basically have Spokane in this Eastern Region. I guess our emphasis is to look at the local marketplace and what is here when we take and we look at what DBE and MBEs, et cetera. Also, where are the companies and how many are located? I also asked before that we talk about the length of the construction season. It's totally different in Seattle for building and highway transportation and engineering than it is in this region, which is totally different than what it is in Yakima."

SKPF2: "I don't see that being brought into the study, because I said before I consult with a lot of minorities who go into construction, and one of the things we talk about is the short season that's over here and the fact that you have bills that are due all year long on the equipment, but you have a short season to save the money to make those payments all year long. So when we talk about what's available and the disparities, you need to take into account those barriers. And

the only barriers I saw that was in your report in reading it was the whole issue of education, and I'll address that when I get to that part of your study."

SKPF2: "The North Spokane corridor, it's 20 years we've been trying to build this thing out. It would create 10,000 jobs included alone. We can't get the funding to get us built up to create economic development, because you've got the 520 Floating Bridge, the CRC in Vancouver, the Alaskan Viaduct, and now you've got Highway 167 and 904. Those things is where all the money is going. And you have to look at the economic impacts over here when you're looking at the disparity, because those are what create jobs, and I think that's sad and that that's missing."

SKPF2: "You talk about the potential of your base figure at 8.4 percent. What is that for each region? Give it overall an 8.4 percent. Why don't you break down each one of the regions? Why is it just 8.4 percent? I'd like to see that broken down. Locations of businesses in chapter three, page 6, you say relevant geographic marked area. And then you go on to say it's the area in which the agency spends the substantial majority of its contracting dollars. Okay. If that's what you're using as a geographic market area, that doesn't include us. We're totally left out of that. And so I think you need to, with the federal highway people, let them know that there's more than just Western Washington. We do have the Cascades and there is another world over here."

SKPF2: "So Eastern Washington. You divided it up in regions. You had Southwest, Northwest. You had all those. So who do you have in the Eastern region? Adams County, Ferry, Lincoln, Pend Oreille, Spokane, Stevens, and Whitman. As I said earlier, only two of those counties really have any ability econometrically. And so what are the small little contractors supposed to do in these other areas? Where are they supposed to go obtain work? The weighted availability that you use on page 11, the Northwest region you have 76,101 contractors and you said it's at 7.2 percent, so that's 547. You take the Eastern region, you said we had 14,006, so all those counties at 15.4 percent, but you separate out the fact that 5.4 percent is white women, so you come up with 15.4 percent."

SKPF2: "So in our region compared to the Northwest, we only have 216 contractors, then, compared to 547 in the Western region. It makes a big difference. And those things need to be spelled out in detail. Appendix A, you talk about 14,500 attempted contacts. You say 12,400 were construction, and of that, there were 4,700 contacted and only 3,300 of them of the 14,500 completed the endeavor. That's only 23 percent, not 45 percent, not 70 percent. That's strictly 23 percent of the people. And you go on to say that the majority of the people didn't reply at all, which is true. They didn't respond. Out of 14,000, we had 3,300. Then, again, out of the 3,300, at 23 percent, what were the numbers for construction and what were the numbers for engineering broke out? I think they need to be broken out. And, again, I think they need to be broken out by region."

SKPF2: "Your question says, "Could you do work in other areas?" Of course, everybody can do it. That's a different question than saying – asking the 3,300 people have you done the work in North Central? Did you work in South Central? Did you work in the Eastern region? But you didn't ask the question in the survey about the Olympic region and the Southwest region of the Northwest. So I don't know why that in your study was separated out. You didn't ask, in addition, could you do the work? You didn't ask, in addition to that, what its availability and have you done the work, those other two pieces instead of could. I think could is misleading. I think those

questions should have been asked to see how far are they willing to go. They have families. They have overhead, and you can't just take them and start a small little DBE here and travel clear over here and try to set up a business and compete. It just doesn't work. I've met with those people on the coast, and I've tried this with the tribes."

SKPF2: "The barriers. The only thing I saw in the study was education and the barrier issues that you elaborated on. Again, I'm not picking on you personally. We have to have our region spelled out in clear, because we're not part of that Western Washington crowd. But you talk about education as the barrier. Again, I'm back to my issue. What about needs? What about population? What about increase? What about industries? What about the construction season? Since 2007 we had a major economic downturn, and I didn't see the economic downturn had an impact in the studies. Again, you go to the west side, there's a lot of construction going on there. And if you take them down to Whitman WSU, you'll see construction going on, but you won't see anything here. The only thing we've had was the medical school. That's the only project of significance."

SKPF2: "You talk about apprentices. One of my very pet peeves and viral arguments is we can show thousands of people an apprenticeship. The bottom line is how many did we graduate? That's the statistic that's important, not how many are apprentices, how many graduated, because it's those minorities that stick with the program and get work and graduate that go on to become the entrepreneurs. And that's where we're missing the boat. We can put them in programs, but it's the graduation that's important, and you don't have any statistic in your report on graduation, 'cause they are our future. The private public. Again, your original statistics are within the region of the state and not the state by region. And, again, Washington being what it is, there's great disparities."

SKPF2: "The other part is in Appendix J. You only use white male comments on eliminated the program. There wasn't one person of color or minority that had that comment? All you put was like seven white males' comments in the eliminating program. I felt that a little disturbing."

SKPF2: "Where is the list of WSDOT jobs by region? If we use WSDOT jobs as a whole, I think we need to break them down by region, because as I already said earlier, I'm in the fight for my life in Olympia right now to get projects funded in Eastern Washington, and there's people in this room who know it. We're fighting to get \$4 million to replace a bridge. Okay? We fight to get every little nickel and dime over here. And so I think you need to look at the WSDOT jobs by region, and you've got to look at the amount of money in those projects in each region. Okay. That's a huge difference. And the DBE's availability within each region to be able to perform the work that's being left. It really is tough, and we've talked about this each time I've testified, the fact that you've got to take this into consideration."

SKPF4: "I've looked at the disparity study, and I just don't think that Washington looks at it as -- I mean, they look at it as a whole. They need to divide it like east to west, because on our side of the state, like Al said, we just don't have -- we have white women over here. For the majority of it, we got -- he mentioned Spokane Concrete Cutting, Nappel Electric out at Moses Lake, and then there's Gilbert Patterson out of Wapato, and that's basically the only non-Caucasian females we have in this area, and for the goals to be more than zero is ridiculous. I mean, we just can't obtain them without having white females doing the work. I mean, it's just been proven."

SKPF5: “But I think the disparity study –I think there were some flaws in it. I wasn't too sure about the committed dollars. I mean, I've seen the news on King 5 about the committed dollars versus the actual dollars paid to some of the DBEs on that side, and it's just didn't balance out. I think this is a radical and unnecessary change.”

SSPF5: “First, I'd like to point out for the record that the executive summary of the disparity study excluded people with disabilities that are currently certified under Appendix E as bona fide DBE firms. I think that's discrimination in itself. We should have been included.”

SSPF5: “Basically, what I'm saying is that this CUF problem has undermined the integrity of the DBE program unbeknownst to other trades that are involved with the program. Fortune 500 firms have hijacked this program and have used it as a tool to create a monopoly. Fortune 500 firms are providing quality and quantity and project management services to illegitimate DBE firms, which has directly affected your disparity study.”

SSPF7: “And I still feel that the impacts of I-200 should have had a greater bearing on some of the data in the study. I feel that, if you look at the participation numbers pre-I-200 and you look at the numbers post-I-200, that would have had an impact on the 8.4, the 11.6, and the 14.9. They would all be higher.”

TPF6: “When you look at the availability numbers that were shown from the consultant study, that 8.4 to us is a direct result of I-200. If you look at the attainment figures prior to I-200, they're here. You look at the information, now it's here. We understand that there are parameters to any study. The state chose to use 2009, 2010, 2011. Our concern again that, if you look at the availability numbers prior to I-200, you would have one set of numbers. The regulations should allow for states, if they cannot afford to do a 10-year study or 12-year study, to include that type of information that they at least be able to have the consultant use the information that was compiled in those years and make an analysis based on that, and they can asterisk however they want to, put in a disclaimer that they did not create those numbers that they're using. But the value to us is that, if those numbers were included, we would be looking at a base number much higher than 8.4. And then the subsequent numbers, the 11.6 and the 14.9, would also be higher. And a higher number benefits us all. We're all looking for work. We all have to get work based on whatever the goal number is. The higher the number, the more opportunity for everyone.”

TPF6: “I had an opportunity to see how the study was done. I did not question that. I do question some of the parameters that were set around the study. And perhaps the only way that we can have that changed is by those of us here let our officials, the people in the state administration, and our congressional representatives know that, in cases like Washington State with I-200, and California with Proposition 209, that there has to be a difference that – regulations regarding these studies so that there will be equity for the people in those states.”

TPF9: “And nobody here, not one person, contacted – I think I talked to 12 construction women in construction at Hanford and said, ‘Did anybody from WSDOT contact you? Did anybody – in this disparity study, did anybody contact any one of us in Richland?’ And nobody knows anything about this. And so I don't know where the study – I don't know who you were talking to, because it surely wasn't the people in construction.”

TPF13/NSPF15: "But the study itself is flawed. There is either one reason or another, and I – I'm just going to throw out the two reasons, and I'm not going to conclude what I think it is, but it's either a genuine statistical data extrapolation that was incorrect based on the mega projects and kind of skewed by the few dollars, and/or it could be a study that was designed in order to get a certain result."

TPF13/NSPF15: So in this case, 1.5 percent of the white female participation, and that came from a group that originally started with – I think BBC identified 14,000 – let's see – 14,000 businesses that are firms in our state of Washington. And they used a methodology that was not even recommended or recognized by USDOT's guidance in the CFRs, which is the federal regulations. Federal regulations typically by USDOT say use NAICS codes and census data. Makes perfect sense, doesn't it? Well, instead, what BBC's research did is, they created what you would call a custom census approach. Instead, what they did – and that's in the study, of course, if you read all 900 and some pages, and I actually have – BBC identified 14,528 business establishments in the relevant local marketplace, 12,474 construction firms, 2,054 engineering firms. Then it attempted to conduct – or contact every business and interview the business in its interest in bidding in the market and its ability and qualifications to do so. They were only successful in contacting 4,784 of the total 14,528 firms. And some of the reasons why, some of the businesses didn't answer the BBC's email or call. BBC couldn't reach a responsible staff member at the business at more than 4,000 firms; they were unable to speak to 90 firms because of a language barrier; and 1,440 were not interested in discussing their availability for WSDOT work. So that left 988 firms of the 14,000 that they actually got ahold of, which was less than 7 percent. And of that, 6.8 percent – let's see – 6.8 percent of the total sampling – so they only reached 6.8 percent of the whole marketplace. And then of the 988 firms, a hundred were WBEs. Well, there's over 700 WBEs in our state of Washington."

TPF14/NSPF14: "The study's deductive conclusions have the unintended consequence of pitting minority and women firms against each other. This is the opposite of what should be happening. I think that many people have made that statement here tonight. And it certainly is not representative of the spirit and goals of the DBE program."

TPF14/NSPF14: "The study did show how barriers exist to the advancement in the marketplace. Some of the barriers and marketplace conditions are race neutral, universal to all of us here. Some of you more unique. For instance, the study shows quite illustratively how success to access to capital and bonding goes hand in hand with things like educational attainment, home ownership, and business stability, to name a few. Furthermore, as DBEs have graduated, there is no backfill of firms supplementing the dwindling pool. This is a significant issue."

WT2: "I find it appalling that this disparity study was even conducted, and I question the validity of why such a study is being required. It appears to be an effort to pit all the minority groups against one another as opposed to the purpose of the DBE program which is to provide a circuit for MBE & WBE firms to attain a modicum of success in the Transportation Market which is overwhelmingly controlled by white male owned construction firms."

WT3: "We publically stated our support for the study and our concerns related to the process to be utilized for the study and the time limitations, three years 2009-2011, imposed by WSDOT as the study period. We stated from the beginning that we were confident that the study would

show discrimination and disparity. A review of any records prepared by the State, clearly demonstrate the gross inequity in contracting for M/WBE and DBE firms in this state. Limiting the time period of the study to 2009-2011 also resulted in a predictable low availability number. A fair and legally defensible approach would have been to include at least one year of data that was before the implementation of I-200. The result of not utilizing pre I-200 data is/was to guarantee a low availability number because the purpose of I-200 is/was to reduce opportunities for minorities and women in contracting and employment. A review of state contracting records clearly show the success of I-200 in limiting opportunities and reducing contracts in the years the State utilized only good faith efforts to achieve contracting equity for M/WBE and DBE firms.”

WT3: “The disparity study is complete and the remaining steps are for WSDOT to submit proposed goals and an implementation plan for its DBE Program. We believe, and records support the fact, that the Base availability figure determined by the consultant is very low based on the time frame allocated for the study and the implementation of I-200. Even considering the base availability number would be another nail in the coffin of M/WBE and DBE firms in this state and a major victory for those organizations and individuals that have as a primary goal the elimination of contracting and employment equity. In a state where the State spends over ninety-seven percent (97%) of its dollars with non-M/WBE and DBE firms reducing the current attainment level of DBE spending should not be a consideration. None of the adjustment options presented by WSDOT and the consultant are fair to M/WBE and DBE firms because of the effects of I-200 but the least damaging is the 14.9%. NAMC-WA supports 14.9% as the proposed contracting goal for WSDOT.”

WT3: “Disparity study methodologies and guidelines should be modified to accommodate states such as Washington and others that must operate under state initiatives and propositions that damage the DBE Program and those businesses that are part of the DBE Program. Designing disparity studies for those states that meet the court required definition of narrowly tailored is required and a must to insure that each state DBE Program provides the same level of opportunities to all DBE Program participants nationwide.”

WT8: “Furthermore, despite the Study’s claim to have conducted quantitative analyses of the success of women-owned businesses in the industry, and qualitative information about potential barriers that small businesses, quite surprisingly, most of the women comprising WIHC were never interviewed for the Study. The members of WIHC have specific examples substantiating the barriers facing women in the highway construction industry.”

WT10: “The disparity study considered several different ways of grouping and categorizing DBEs, and other businesses that might work on WSDOT projects, but we believe there was not enough emphasis given to the role of DBEs as Prime Contractors versus sub-contractors. By lumping DBE prime and sub-contractors, and using the combined dollar amounts as the primary indicator of utilization, they discredited the function of the firms. In addition, there may be cases where a very small number of firms were responsible for a disproportionate percentage of the dollars within a group. If the same few firms are responsible for the majority of the participation attributed to any one group, the results are not representative of the group as a whole. We

encourage you to reevaluate the disparity of each presumptive group with an analysis of number of unique firms representing each group and the functions in which they act.”

WT11: “We propose that in developing a data system the race-neutral data be tracked and divided as DBE prime contracting work and DBE subcontracting work (large number of small DBEs). The current form combines the large dollar amounts that are awarded to the DBE prime contractors and uses this number to automatically weight the overall utilization, overshadowing a lack of utilization of small DBE subcontractors. Further, the “Utilization of Minority Contractors” determines OVERALL group utilization independent of NAICS code, prime/subcontractor function, or auditing and verification. The result is that a small number of DBE firms may present an inaccurate picture of the actual utilization of a particular group. Codifying these elements on a bidders list and documenting and tracking the award results can support percentages achieved and success in the two categories and the various NAICS codes, which is critical to creating a robust program.”

WT22: “Regarding ... disparity study results as they apply to the women-owned businesses, I feel the study should have been focused on Washington construction-related firms.”

WT27: “After re-reading WSDOT's July 2011 letter (enclosed) to the Federal Highway Administration proposing Interim Overall DBE goals, we are befuddled. The document states that based on a nationally recognized economics consultant firm and DBE participation data for 2009, 2010 and 2011 – the same three years used by BBC to conduct WSDOT's 2012 disparity study – that "discrimination continues to impede the ability of disadvantaged minority-owned and women-owned firms to compete fairly." It also cites a substantial drop in DBE participation during WSDOT's suspension of DBE contracts from 2005 -2006 when no race or gender-conscious goals existed. In one year, DBE participation dropped to 4%. Prior to that, from 1999 - 2005, DBE participation averaged 12%. These statistics clearly show the impact of removing race and gender-conscious goals from contracts. In September 2012, the BBC/WSDOT disparity study was released and suddenly white women- owned businesses no longer face discrimination? We have noted that BBC's study finds two white women-owned non-DBE contractors received 44% of the contracting dollars (committed, not spent) in the timeframe used to evaluate the program. The study ultimately concludes that statistically no disparity exists for white women-owned businesses. We do not agree that the summary basis provided means there is no disparity for white women.”

WT35: “WSDOT is making its recommendation based on a study that does not reflect accurate information. The study underestimates the actual relative availability of DBEs in Washington and does not reflect true market conditions. Therefore, it incorrectly concludes that WBEs do not face disparities in the market place. The study did not use WSDOT's commonly accepted methodology, it used a custom census that is not accepted by USDOT. Also, the study only used a very small percentage of eligible firms to determine the disparity.”

WT39: “The report notes the barriers that MBE/WBEs face in terms of obtaining bonding, financing, and insurance. The report uses this as justification for an upward adjustment in DBE goals but excludes some of those parties (WBEs), who still clearly face many barriers to market equity, from the benefit of expanded DBE goals.”

WT39: "I was very disappointed at the response of the D.O.T. The survey that the BBC presented was very bios to say the least and none of the WBE business represented at that meeting had been contacted for this survey, I know I wasn't!"

WT38: "In reviewing the DBE Disparity Study, I am confused as to how this group came up with the percentages of women owned companies that have exceed the DBE goals. It is stated in this study that over 3,000 companies were interviewed, but I haven't met one company that states they were contacted. No one from any agency contacted my company to do an interview concerning these issues."

WT38: "The first issue I feel need to be discussed is the disparity study itself. I feel the study does not truly reflect an accurate portrayal of money being earned by DBE companies through WSDOT projects. I believe the accurate measure would be on the money actually paid on these contracts to DBE companies, not the amount awarded. The amount of money paid varies substantially from project to project. There are some good things that come from this variance, contractors expediting schedules, value engineering and savings to taxpayers. During the duration of the study, I believe there are some great variances from DBE dollars awarded to the amounts paid to the contractors."

WT39: "The methodology for determining the 'base figure' of DBEs seems questionable. Assuming that "potential DBEs" should be counted is a bad assumption. Firms may choose not to certify for a number of reasons, but the burden of certification is certainly high on the list."

WT40: "The disparity study on which you have based the recommendation to remove Caucasian Women's businesses from the goal settings for future State project Bids is: unlawful by federal government standards; biased and flawed in the manner in which the Disparity Study was conducted, without reflecting the true and real market conditions, and therefore inadequate in its findings; disruptive to the basic and firm ideology of the use of small and minority Businesses."

WT45: "I have been hesitant to pursue my WDBE certification for myriad reasons, all of which are too lengthy to go into on this form. I have however, recently began filling out the mountains of paperwork involved because I feel that there are specific and substantial barriers for breaking in to some of these larger public works projects because of my gender."

Underutilization of minority- and women-owned businesses. Some individuals submitted verbal or written testimony related to the underutilization of minority- and women-owned businesses.

NSPF3: "I'm an African-American firm, been in the industry for a long time. We've been discriminated against for years. There is absolutely – it is dismal. I mean, year after year – struggle year after year. We're not – a lot of us are not fortunate to get contracts or even our foot through the door, a lot of favoritism by the prime. There's a lot of manipulation, bid rigging, collusion that's going on with these primes. And you know, all we want is a job. So there's underutilization of African-American firms and there's always been underutilization. So I think WSDOT should consider maybe a goal that's an underutilization goal that's set aside for firms that are underutilized. I would consider us being underutilized because of that one firm. I don't

think that's – it's something that should be looked at. But I mentioned before that I would love to see direct contracting with WSDOT. I don't want to work for a prime ever again. They're not fair. They will never cheat – I mean, they'll always somehow, for some reason find some way to finagle the system, game the system, you know, find a way. We could never, ever get a fair shake. But you know, if it's possible to do direct contracting with WSDOT, that would be a phenomenal - that would be a good thing.”

NSPF18: “Also, the commitment dollars versus the actual paid dollars to the DBE companies, totally a different scenario there. They can promise me and put down whatever they want, but that's not what I actually get at the end of the project.”

VPF1: “The reason I'm here is to point out the great disconnect between the, between WSDOT's front office for DBE and your actual project managers that actually write the contracts and issue those contracts and put those DBE language in those contracts. There is a big disconnect there, and my interest will deal mostly with A&E aspects of this because for most A&E professionals, our product is just a paper, a piece of paper with a plan on it. It's not something that the public sees, and so the evaluation project is kind of treated different from the actual construction, DBE monitoring and evaluation. I can tell you that you can pick any WSDOT plan that's about 1600 pages, and you're not going to see one DBE firm in it with a plan in it. If you are lucky, you're going to see probably a couple of pages of landscaping from some landscaping firm, they call it DBE macaroni, it's in there. So when it comes to implementing all these good steps, we are always shortchanged. We are always holding the short end of the stick.”

VPF1: “We are always shortchanged, and the reason we are shortchanged is Dennis, Mike, and the staff from WSDOT, your project managers are disconnected from the possibilities of actual DBE participation by professional engineers and professional service providers, because what happens is these projects are bid out to big firms. I can name about six firms that do WSDOT projects, six consulting firms. These are huge firms. They do exactly what we do, but at least with all these big projects, they can cut a little piece of the project and hand it over to us to participate. They don't do that.”

VPF1: “So my concern is when this great program is implemented in July, there's no way that A&E professionals like myself and any other person that's here is going to see any dime out of this. I mean, for the past 20 years, I've seen great projects here around me in Clark County and Vancouver, and here I'm here and most of the dollars went to white women. What about us professionals? We got zero.”

VPF1: “So I'm really pleading and entreating you guys to really concentrate on the A&E aspect of this implementation because we're going to be left out, and I know that for sure. We're going to be left out.”

VPF2: “I'm the owner of a certified firm in Washington and in Oregon. And my comment will be that the professional services need to be looked at closer, and I propose that the 14.9 percent be considered as your hard goals to help increase the utilization in the professional services. CRC, ten years ago, I'm still trying to talk to them on providing opportunities for small businesses. This is ten years already in the CRC, \$500 million used for professional services to do the assessment, \$500 million, and if you see any firms in there that they are DBE's, they are the usual

suspects, the same large DBE's. I think if their consideration for your program is that you diversify NAICS codes and apply potentially a percentage to those NAICS codes so that there is a distribution of wealth equally, if not, at least not consider that. But CRC, I agree, we won't see anything. I was in OTIA I, II, III and IV, zero. Zero. So when you talk about those numbers that you used it on commitment, I got a lot of commitment. But zero came my way. So there's a lot of consideration. Like I said I was on everybody's list, and I got everybody's dollars, but nothing hit my bank."

SSPF3: "So there's a serious, severe underutilization of African American firms nationwide. I don't agree with this Alcon issue. I mean, I understand – you know, you gave me your answer there. Just -- I still don't understand why one firm can – can reap the benefits of – of these contracts and – you know, and leave us behind."

SSPF3: "But, you know, I would suggest WSDOT come up with a UDBE, underutilized disadvantaged business goal. Leave the DBE program the way it is, you know, and come up with a UDBE goal, and put it to 30 percent. And you know something? We can't handle this. You give us contracts, give us mobilization lines to climb, and we're able to perform."

SSPF4: "I think if we had an inclusion plan, I think that there would be different opportunities created. Now I do understand that you cannot force a prime to use a certain subcontractor. I understand that clearly. But there are other agencies in Washington State and elsewhere that are under laws like I-200 that have things that encourage primes to truly reach out to the underutilized firms in our community. One of the largest problems in this letter is that WSDOT, over the last – well, the data shows three years, but I would assume the last 15 years – the same firms are being used."

SSPF4: "We keep adding certified firms. It doesn't change anything. The primes are using the same firms. And there's 21 firms. We did a public request, and 85 percent of all DBE projects in a six-month period went to 21 firms, 11 women owned and 10 minority. So, although WSDOT can't tell a contractor who to use, I believe there's ways to incentivize reaching firms that have not been used before."

SSPF5: "I'd like to recommend that WSDOT take a similar approach that Caltrans did with regard to DBE and how they implemented a UBE program. So basically we'd have – with the UBE program, the recommendation would be that they would be race- and gender-conscious to include people who qualified as other, such as myself with a disability. In light of the severe utilization in past years for certain minority groups and persons who qualified for DBE programs under Appendix E, I would like to recommend the condition of award goal to be slightly higher than the 14.9 percent."

SSPF5: "As a person with a disability, I want to advocate for people with disabilities and would like to request that if there's any way I can be used as an outreach, I'd like to offer my services and encourage other people with disabilities to be involved in the DBE program. I think they're severely underutilized beyond any other group in this room. And for that reason, I would like to request the UDBE be implemented and to include people who are qualified under Appendix E to be included in that UDBE classification."

SSPF7: "It's interesting to see that we generally all have the same problem, and that is that we're underutilized. And we're underutilized for a lot of reasons. The primary reason is an unwillingness on the part of large contractors to share with the contracting that's available and, in some cases, with the agencies that are responsible for ensuring that work is more evenly distributed based on whatever formula that they're required to use, whether it's federal or state."

SSPF7: "We also have a problem in this state that was confirmed by the disparity study that there's only a handful of firms that get the vast majority of the work. So there should be a process whereby either in the bid process or the award process that there can be a benefit to those bidders who are willing to use firms other than those that are used over and over and over again. So that somehow we can get more and better utilization of a larger pool of firms as opposed to the number 20 or 21 firms getting most, if not all of the work."

TPF1: "The third thing is to develop internal project management – or, I'm sorry, PMIs to track whether the prime – if the prime does use us in a proposal and they win, that they actually give us the work. Not only that, but actually pay us. I know, in some of the projects that we're working on in Colorado and other places, they have forms – say, for instance, in Colorado, there's the E2 form that we have to submit to the DBE office at the agency every month that says what the contract value is and that they're paying us whatever per month. And it's all recorded, and they're tracking that way. I mean, a simple form like that might take us 10, 15 minutes to fill out and submit."

TPF4: "The proposed adjustment, Washington State goal, to be presented to the Federal Highway Administration, I think it doesn't – I don't think it matters if it's even at 50 percent. You know, these goals are not being met."

WT11: "We strongly support the requirement that Operating Administrations work with recipients to develop ways to improve utilization rates and require the establishment of Business Development programs for firms that have not received DBE work for several years, including professional services DBEs. While FHWA does have funds available for supportive services, the process for applying for funds, the reporting requirements and the limitations on how the funds are spent create barriers to providing a program that will help small businesses grow or will encourage firms not already certified as a DBE to tackle the paperwork and eligibility support documents to become certified. The benefits of support services and training must be so compelling that it would be foolish not to participate, rather than relying on the possibility of being awarded a contract. Such programs must be developed with significant input from recipients, prime contractors and small businesses to identify skills and attributes that will make DBE firms more attractive and marketable, and an emphasis on building capabilities and capacity is critical. If small DBE firms are to grow they must be provided with the ability to diversify in order to become prime contractors, and the programs must include assistance for all small businesses, not just construction. In the past there have been directives to "unbundle" work to allow smaller firms to participate as prime contractors. That directive should be reinforced, with a mechanism for oversight to track the success rates and the ongoing effect on the firms that are awarded these contracts."

WT20: “One concern has been that even when DBE firms are used, the contracts generally go to the same small set of DBE firms. Why not do something “out of the box” to help change this? Such as give extra points to a prime who uses a “first-time” DBE contractor as a subcontractor. This would help build the pool of DBE firms with state experience over time.”

WT28: “When the Associated General Contractors (AGC) encouraged the USDOT to let white females in the DBE program under just one goal with the original “minority” people, Blacks have been losing out on federal assisted USDOT work in every state. When I reviewed the DBE reports from most US DOT modals two years ago, white females in 99% of the states reporting had more contract dollars as a prime and as a sub and more overall contracts as a race and gender than any other group in the DBE category.”

WT29: “The contractor on that project continues the practices that caused harm to the DBE contracting community and the negligible DBE goal attainment. WSDOT is aware of these practices but has not taken the actions necessary to correct the situation. At their rate of change and enforcement of DBE requirements they will have a lower DBE goal attainment for 2014 and if they are authorized lower goals through this process WSDOT will go back to FHWA and request even lower goals for 2015.”

Race- and gender-based discrimination. Some individuals submitted verbal or written testimony related to race- and gender-based discrimination occurring in the local marketplace.

NSPF7: “With almost 20 years experience and the group of people that came with me when I started my own company, I know the only reason I’m on those projects is because I’m a DBE business. And unfortunately, I’ve also found some direct instances of discrimination against me because I am female. Right now I have a complaint that was filed with the WSDOT Office of Equal Opportunity, a Title VI complaint on a project that was a 15 percent condition of award project in the City of Burien and the investigation was filed – the complaint was filed last September and, frankly, nothing has been done about it. My own attorney can't get through a public disclosure request what activity has happened, who's been interviewed, where is it.”

NSPF7: “I’m honestly very disappointed with WSDOT. And not everybody in OEO has not been – been sympathetic to my cause. It just seems when discrimination is right out there and you file a complaint and you go to the people who are supposed to help you and the agencies that are paid to help you, and I know that some of the African-American business people have had this experience as well, you know, it's – I think the system is broken in terms of even having some teeth and merit to a complaint. So I’m having to pursue my complaint civilly at great expense and the only reason I'm still alive as a business is because I have other great contracts that are in the works.”

NSPF13: “In Washington state, according to the Washington Department of Licensing, women currently number 14 percent of licensed architects in the state. When you get to the numbers of women being promoted to leadership roles and, therefore, hopefully, ownership in the future, in larger companies, the numbers fall dramatically off. It's about two percent. So, let's talk about those barriers. The fact remains that, especially when it comes to women who choose to have families, the larger companies that contract with WSDOT, as they are the ones with the access to these contracts, have not yet figured it out – and that's putting it nicely – how to retain and

promote women in leadership and ownership. If the larger A/E firms, prime in typical WSDOT contracts, are not given the incentive to bring a WBE firm onto their team, you can be sure that the numbers of WBE firms participating will decline substantially if totally decline. If you remove the metrics, the numbers will fall off because the disadvantages and lack of access – and that's the important part – to the opportunity still exists.”

NSPF13: “So, the few companies that are consistently going after the incentives are doing well -- so, the available companies -- but are you suggesting that we now pit one disadvantaged community against each other? Because white women and women, in general, are still very disadvantaged in the design and contracting industry. The engineering, architectural, and construction industries are still woefully inadequate when it comes to supporting and promoting women, retaining women past entry level or pre-family raising years and finding paths to leadership and ownership for women. Most contracts in the public sector are awarded to larger firms and companies. These are also, coincidentally, the companies that seem to have the most difficulties retaining and promoting women. In architecture – and I'm pretty sure the statistics are similar for engineering – the schools have consistently been graduating at about 50 percent women per class since the '80s; however, when you get to the point in a woman's career where she should be getting licensed, the numbers fall off.”

NSPF15/TPF13: “And the other barriers that have not gone away, by any stretch of the imagination: Discrimination. I mean, it's still out there. I personally have a Title VI civil rights complaint that's got no attention. It's been filed for over two years. So, you know, to act as though everything's just great in white women businesses is just totally completely flawed. This war on white women, I'm going to call it, began about seven years ago, and it's been about seven years in the making. And, unfortunately, I believe that this study is an extrapolated data to achieve a desired result, which is to say that white women don't belong in the program. It is really just a program -- the DBE program should just be for minority businesses, minority male and female businesses. Our own State of Washington has used NAICS codes as a tool to harm and decertify WBE businesses.”

SSPF1. “You talked about inference of discrimination. Well, I'll start out with that. A truckload of men stalked me while on a remote job site. A subordinate told me – not asked – to sweep the floor and go fetch coffee. A former employee told me how much he hated working for an “expletive” woman. Routinely in the early years of my business, I was asked, “But who do I really talk to at your office?” I believe these incidences would meet the legal standard for an inference of discrimination. My examples in the data presented in the disparity study support that conclusion that gender still matters.”

SSPF5: “For example, up until one year ago, there was only one epoxy coater in the Pacific Northwest. This epoxy coater basically has dictated who they would sell to and who they would not sell to. As a DBE, I could only buy epoxy rebar through a broker, and by the time I price my bid, I'm paying somewhere between 25 and 30 percent more than the big Fortune 500 firms are paying for the exact same steel. This is also the same case on certain other steel products where it's not just epoxy it's other rebar parts as well where only certain firms get special pricing. But DBEs, or in my case, I'm a DBE, I get a special price that's about 30 percent higher than everybody else.”

TPF15: “I mean, I took one day—I took a white lady and a black lady. They were running ads in the paper, construction. And I took them to two other places and I said, watch this. I will have the black lady go in there – they put their jobs in the paper. They used to. Now they put it online. In other words, send the black lady in there first. She get denied. They tell her it's been filled, the position has been filled already. And they just ran that ad over the weekend on a Sunday. And Monday, it's filled. And then she goes back to the car – we park the car down the street. She goes back to the car, the white lady goes in, they interview her just like that. It blew their mind. It just blew their mind. So it's the people's attitude about color of people. That's it. And the agency doesn't do much to back it up with their tax dollar.”

TPF17/NSPF19: “I think the disparity study is – the numbers are totally skewed. Over the 21 years, I've developed relationships with my customers because we do give competitive pricing, we do good work, we perform on the job, and we get repeat business. But again, we have to do that time and time again on every job. We have to go through the same hoops. So when you say, in 21 years, that is a process of growing and that's what I've done over the 21 years. So when people make statements, I feel like that's very discriminative. Again, I think we're a small percentage in this industry, and dealing with all sorts of individuals, every day I have to work just as hard as anybody else. So I think this really needs to be thought through.”

WT8: “As women owned businesses active throughout Washington and actively engaged in the highway industry, WIHC maintains that there is ample evidence of discrimination in the local transportation contracting marketplace. The opportunities for advancement and access to capital are less for women-owned businesses, and the general air of discrimination is significantly higher.”

WT12: “While I filed a Title VI Civil Rights Complaint in September 2012, to date nothing has resulted from the investigation, to my knowledge. There are many ways to discriminate against DBE businesses, but the facts are that there is no better way than to financially starve the DBE business until it no longer survives.”

WT17: “[Our company] has been in business since 1997, yet it has been a challenge and uphill battle dealing with discrimination in all forms with some individuals in our line of work.”

WT37: “This issue is incredibly important to me because I am a graphics technician for The Greenbusch Group, a multidisciplinary firm that is certified as a Women’s Business Enterprise (WBE). I was recently hired by Greenbusch after completing an Associates of Applied Science in Engineering Design Technology. I feel very fortunate I was hired in a field where there are few women. Not only am a women but I am an older women and if it wasn't for the enlightenment (the owner is a women) of the owners of Greenbusch I would most likely still be searching for a job in the field I just completed a degree in.”

WT43: “White women have been discriminated against a long time. I have been employed at Pavement Surface Control since 1996 , and I have seen this first hand. I have seen the harassment that the company and female workers have dealt with over the years. Construction is still a man's world.”

Issues with WSDOT's implementation of the Federal DBE Program. Some individuals submitted verbal or written testimony related to issues with WSDOT's implementation of the Federal DBE Program.

NSPF6: "I would like to say one thing concerning, you know, the woman situation, right? We don't have anything against women being in the program, but it did a lot of harm for some of the women that was in the program and those dollars went to where they shouldn't have gone. I think the women maybe should have spoke up, right, and cleaned their own house, because we really need to stay together. Divide and conquer, I've heard that before. Right? So – but I think that some of the women took such a bad advantage by coming in and the dollars went back to successful white firms, and these people did not use other DBEs. They could have, but they chose to be very greedy about the whole thing. I think that's what threw everything off, because it messed everything up for the legitimate women that's trying to have a DBE company and it certainly destroyed us. It was an outright attack. It lowered the rate in trucking. I mean, it just – it did something to trucking where it just wasn't responsible to almost to the point to where, I mean, it's criminal. So I mean, so I don't know what's going to happen, whether you guys will stay on the program or go off, but I just wanted to say that nobody spoke of that, right? But that's one of the problems that really hurt the program overall."

NSPF12: "The other thing that I would like to see is with regards to professional firms that are DBE certified is that the owner is licensed in what they are proposing on. I am so tired – I mean, there's very few women-owned land surveying firms that are run by licensed professional surveyors. Same thing with minority firms. Maybe I can name one minority firm that I know of that is run by a man that's a minority and he's a land surveyor. All the other land surveying firms are owned by minorities, structural engineers, civil engineers, but they're not land surveyors, and all the land surveys that they hire are white men. So, talk about your disparity. You know, it's like that's what I would like to see, is more of a – more strict qualifications on what the DBE qualifications are for. If you're going to offer that service, you should be licensed in that profession."

NSPF14/TPF14: "There are a lot of WBE firms that aren't going to feel that recertification is really worth it. It's intrusive. It's burdensome. I dread my annual report coming to my desk every year, my recertification. I would think long and hard whether I wanted to go through it if it really wasn't gaining me any benefit."

NSPF15/TPF13: "And I'll give you an example of my friend Jody Behrendt who just won, yesterday, her third review of her NAICS code certification for the third time before an Administrative Law Judge. She has spent \$475,000 fighting the State of Washington with your taxpayer dollars to prove that her NAICS codes. She is not in the right NAICS code, that, you know, what she should be is – you know, what, she three times has been found what her NAICS code should be – and I'm not speaking correctly about what her code is. But to have to fight your own agency that's supposed to be here to help you and have to have that kind of treasure chest to fight for your right to survive is – that's completely ridiculous. And I know she's not here tonight, and she does have – I think her sisters are here and I'm taking, maybe, their thunder, but, you know, to me that's just sickening, that a WBE would have to spend that kind of time,

treasure, and talent, taking her focus off of her business and that – you know, her counterparts – to fight their own State of Washington.”

NSPF15/TPF13: “You know, so, there's a lot of things that are screwed up in this whole certification process, and, you know, it seems like, you know, it's the white women that are being attacked with, you know, Well, you don't – you're not certified because of this or because of that. You know, correct me if I'm wrong, but I don't think there's been too many MBEs who have had to go through the NAICS code, other than like one. Okay. So, we know one MBE that has had to go through a NAICS code. The rest have all been white women. So, again, it's kind of a divide-and-conquer strategy, and, you know, pitting one disparity group against another doesn't do anybody any good and it doesn't help to raise the ceiling that we know is still definitely there.”

NSPF20: Tell me, how do you keep track of your women business minorities? How do you keep track of any of your DBEs? What are your standards? When do these people graduate from these programs? Apparently, it's changed a lot since we graduated. We know women business minorities, we know regular minority businesses that bring in more money than we do, but yet we have graduated and we have forged forward like this program was supposed to be.”

NSPF22: “Well, I was going to give an example of an impact of not having your DBE certification as a woman on the firm, with Rebar's permission. And part of the testimony during her recent hearing, where she was being told that she was being graduated and we asserted prematurely that it was improper, one of the things that we looked at back is it had been a repeated instance of people telling her that she was not properly certified, which she had reversed and been successfully reversed four different times. In one of those times, WSDOT – and I'm not trying to make any point about that – but WSDOT had incorrectly stated that she was no longer certified. After that statement by WSDOT, she did not receive a contract for over a year as a non-certified woman-owned company. Over a year. Luckily, they had enough back log to carry them over through that year. Had they not, I don't know if Rebar would be here today.”

SKPF4: “I started this business 30 years ago and in the women's business enterprise portion of it and struggled with the different set goals between the women's business enterprise and the minority business enterprise. Then the government decided to do the best thing and combine both of them, and my business did better. Over here, just like everybody has said, there are no minority DBE companies. They have come; they have gone. I don't know. It must be the snow or the climate ... I don't think they like the east side. So once they combined them, my business flourished to the point where OMWBE graduated me. Then I lost enough money to get back into the program, which I thought was kind of unusual, and they tried to certify me several times. I have been discriminated against in this program for the last 30 years I have been involved in it.”

SKPF5: “We have a sister state, Idaho, that has had not mandatory goals, but they have never seemed to not be able to meet the goals that they have set aside. They have lots of federal money. The contractors are more than willing to utilize DBEs on all of their jobs to attain that, and the supportive services of the DBE program over there are fabulous. I wish that WSDOT would reconsider and take a look at Idaho. And they did a disparity study or they're in the process. It's been finalized, but they don't seem to have that problem. And to be honest with you, the western state's decision in 2005, I had more work in that year than I've ever had. So have fun. Thank you.”

SSPF2: “But I think you should set [the DBE goal], you know, on the low side and see how it goes. And, you know, I believe in the DBE program. I always have. But the biggest hurdle that a lot of these companies have is that they're hardworking people. I mean, they'll knock themselves out for you, but they don't have the management skills, they're short of working capital – I mean, companies that aren't even DBEs are having that problem. We get calls in the office, you know, people looking for \$2,000 on a pay estimate or retainage of 2- to 5,000 dollars. And it's just – it's tough times.”

SSPF3: “I think that, you know, there's many loopholes that need to be closed and/or addressed within the WSDOT program before I think we move further with the plan trying to put numbers out there, because these numbers don't make a difference. They don't make a difference at all.”

SSPF3: “It's like there's a thumb on – on minority-owned businesses. And that's not right. There's never been -- I've mentioned this before – in the history of this program, an African American firm ever graduating from this program. And that's pathetic. Other people of color, too. But, you know, there's a serious problem that needs to be addressed with the contracting practices within WSDOT.”

TPF4: “Since 2010, I bid on every single WSDOT job in the state, and I was able to get three. And that's under 250,000. I'm always bidding against the rebar companies, the traffic control, the landscaping, and the trucking firms, the same people over and over and over again. And these prime contractors know who they are. They're not meeting DBE goals. And they're definitely not getting sanctioned by the prime for not meeting goals. So they're getting away with a lot that really shouldn't happen.”

TPF9: I submitted -- oh, probably about seven months ago – some of the NAICS codes that I had asked for to be added to our profile. And they told me that they were making changes in the program and that they'd be looking at that. And I had two auditors come out on two different occasions, look at me, said nothing's been done with it. It sat in their office. And I just think that they're sitting on it so that I can't continue to be certified in the realm of what I've asked for. And I am – I'm a transportation -- I'm certified to do long-haul and short-haul transportation. However, I do have a warehouse and I do warehousing for Pacific Northwest National Labs, and I've proven that I do that, but for some reason, they keep sitting on it.

TPF12: “I've been at this company for four years, and I just – the anal exam that she has got from OMWBE is amazing. Four and five different times. They want to know the barometric pressure of our office. It's astounding. And yet all we do is care about ourselves. It's somewhat shameful.”

TPF13/NSPF15: “And I totally agree with what Bob said. We need to have more of the pie, not be fighting over what pie is left. And because this program has been a dismal failure, frankly, and we have so much dysfunction within WSDOT, within OMWBE, now we are asking – WSDOT is asking, let's settle for less. We can't meet this goal, so let's settle for less, and then let's fight amongst it amongst ourselves. It is not up to the State of Washington to decide whether women or minorities are disadvantaged and underrepresented in construction. The federal government's already decided that. And, yes, 51 percent of the U.S. population is female. And in the state of Washington, 50.5 percent of the population is female, but yet only – and this is research – 1.5 percent of the available DBEs were found to be white women/female.”

TPF14/NSPF14: "Certainly the ongoing policy of illogical manipulation of NAICS codes doesn't spur any advancement either. I've heard here tonight that that's been an issue. It's been an ongoing issue for, I know, a lot of WBEs; perhaps even MBEs in the program. And it certainly can't be summed up by the overly simplistic claim that WBEs are taking all the work away from MBEs. That's just not the answer. It's not how it's worked."

VPF3: "So it's very difficult that if a lot of the people in here are DBE's, they know how difficult it was providing the paperwork to get certified and then recertified every year. I want to utilize that DBE, and it's very difficult, because I belong in the beginning part, and I don't see how to get there."

WT6: "It is my professional opinion that basing a business inclusion program on race and gender issues is a dangerous proposition and a slippery slope. Once you include race and gender as a basis for any kind of program, you trigger constitutional issues, which are subject to strict scrutiny, the most stringent of the various legal standards of review. This makes it very difficult to get anything done, as I'm sure you have noticed over the years in your long and illustrious career. Instead of creating economic parity, we are spending millions of dollars addressing the legal issues, because of this constitutional basis. It is time to take a new strategy."

WT6: "As a practical matter, it is not about race or gender, it is about building healthy communities. You can't have a healthy community when you have entire elements of the community suffering economic disparity. We shouldn't be focusing on race or gender, we should be focusing on creating economic parity for the purpose of creating healthy communities. This topic can be addressed without raising the constitutional issues that arise when you talk about DBE goals. There are different ways to achieve economic parity."

WT11: "Not only must there be a clear and direct line of responsibility, there should be a plan for assuring continued accountability from the Secretary of Transportation all the way down to ground level. The roles and responsibilities for implementing the DBE program must assign functions for oversight of all elements necessary to maintain a valid and viable program."

WT11: "The main problem with the current system, in which each OA collects data from recipients and evaluates the established goal achievement, is that there are not standardized certification and counting processes for defining types of work and assigning NAICS codes. In addition to evaluating the data tracking system within the Department, the contracting and DBE tracking databases of each recipient should be evaluated to assure that they are sufficient to support information submitted to the OA."

WT11: "We propose that oversight not be limited to operation administration employees. We propose to include provisions for outside sub consultants that are involve in providing outreach services, project diversity management, and recruitment of DBE firms for subcontracting, apprenticeship and OJT to meet federal, state and local requirements. The provisions must include that professional oversight does not include in any way making attempts to influence certification or other program decisions, violation of ethical behavior, conflict of interest, and lacking impartiality. The provisions need to include that recruiting DBE firm involvement is limited to developing ways to improve utilization rates and support services, and not practicing selective outreach."

WT21: "I am the owner/president of [a traffic control company] and have been in business for 21 years. I have been certified DBE/WBE for most of those years. Last Sept. 2012 was my renewal date for my DBE/WBE certifications and I applied with all the information, copies and documentation which was required. Not hearing back from OMWBE, I called several times and sent emails; I finally received a letter stating that I was still certified so I could submit bids and that OMWBE would be getting my renewal sent out to me. I have not received my renewal to date, almost seven months since I submitted the paperwork."

WT29: "What is not stated in the Disparity Study is the fact WSDOT is one of the primary reasons that the DBE program and DBE firms are not successful. WSDOT's lack of commitment and dedication to its construction over-site role and lack of managing a successful DBE program caused the *Western States Paving* case to be filed. WSDOT's and Washington State's poor defense of the *Western States Paving* case caused the 9th Circuit to issue its guidelines and conditions for operating a DBE Program. WSDOT is proposing to lower its DBE goals based on conditions which they caused and over which they had control."

WT29: "The DBE contracting community, in part because of the nonsupport of WSDOT, does not have the resources or access necessary to counter the efforts of the large contracting community with support from WSDOT to reduce and eliminate the DBE program."

WT29: "For fiscal year 2010 state expenditures with certified minority and women-owned businesses was 2.87%. For fiscal year 2011 state expenditures with certified minority and women-owned businesses was 3.95%. Washington State in 2009 requested a waiver from USDOT prompt payment requirements that would have weakened DBE's ability to receive prompt payments. Even with the refusal by USDOT to grant the prompt payment request waive that included an explanation for the refusal, WSDOT continues to not enforce prompt payment requirements."

WT29: "WSDOT states their DBE goal attainment for 2013 will be lower than it has been for the last three years. What WSDOT is not stating is that they (WSDOT) are the cause of the lower DBE goal attainment. The FHWA November 1, 2013 report describes the actions and inactions by WSDOT that allowed its prime contractor to harm the DBE contracting community and greatly under-achieve the DBE contract goal. Not managing and enforcing DBE contract requirements on that contract had a substantial impact on the statewide or program DBE goal. WSDOT not only chose not to manage and enforce DBE requirements on that contract but WSDOT's AWV Project Administrator set the stage for the contractor not making the goal by testifying at a Seattle City Council meeting that they knew of the contractor's past history of DBE fraud before they were awarded the contract, but considered those actions just a part of contracting and nothing to be concerned about."

WT33: "I also heard from one subcontractor that they didn't want to take on any more work because if they had more work, they would be in jeopardy of graduating from the program . As a side note, this brings up one thing that really troubles me with the DBE program. Why does the DBE program punish a subcontractor for being successful? You heard from Chris Anderson's testimony that her business, North Star Enterprises, was graduated from the program because she made too much money. Subsequently her revenue went down because she had been de-certified. She was able to get re-certified only because of declining revenue."

WT33: "Then this program "graduates" businesses from the program only to have them experience failure and then allows them to be re-certified. It takes work away from businesses that know what they are doing and supplants them with businesses that don't. It pushes financially fragile DBE businesses out into the contracting community without a safety net and then puts general contractors at financial risk when the DBE contractor cannot perform. What I have observed is that the DBE program only allows businesses that are not successful to remain in the program and doesn't reward them for being successful. If these DBEs realize financial success, they are booted out of the program leaving only the unsuccessful (and the smart ones who recognize where the financial line is that will prevent them from "graduating" from the program)."

WT33: "The DBE program also restricts and prevents DBE Contractors from diversifying their businesses. It decides what work they can do and what work they cannot do. For example, let's say that I need an additional \$5,000.00 of work from a subcontractor to meet the project DBE goal. And let's say there is 350 L.F. of fencing that needs to be done on the project. It is simple work; almost any homeowner can figure it out and complete the work. But I can't have this subcontractor complete the work AND count the dollars towards the DBE goal because this subcontractor isn't approved or certified by the DBE program to do this kind of work."

WT33: "What you don't understand is that when I am bidding a project, I will use the lowest responsive and responsible quote I have in my hands to put my final pricing together. I am color blind when I am evaluating subquotes. I don't care what race, creed or color the subcontractor is. I honestly, really don't care. If the sub is low and I am comfortable that they can do the work, I will use their price. And I believe that this is true of most general contractors. The best way to end these problems perceived or otherwise, is to eliminate this program and let the market place sort it out. The businesses that are run well will survive and the poorly run ones will disappear; just like what happens in the real world. This program has done more damage than good and separates people when we should be trying to bring people together."

WT38: "In addition to establishing goals, state and local recipients also certify the eligibility of DBE firms to participate in DOT-assisted projects . Some groups are presumed to be socially and economically disadvantaged for the purposes of participation in this program. In 1987 Congress added women to the groups presumed to be disadvantaged. The main objectives of the DBE Program are: to ensure that small disadvantaged business enterprises (DBE) can compete fairly for federally funded transportation-related projects, to ensure that only eligible firms participate as DBEs, to assist DBE firms in competing outside the DBE Program. At the state and local level the above statement should be the only concern. In my 22 years of construction experience in the state of Washington, both as management at a DBE firm and as project manager with a heavy highway general contractor, this is not the case when it comes to the DBE program in the state. I can testify to the fact that the major reason that Caucasian women owned businesses in the state of Washington are utilized is the condition of award. All contractors want to do as much of the work as possible on a project for control and profitability. The fact that any DBE is competent and effective is not taken into consideration if it is not a requirement."

WT39: “It seems strange that WSDOT has not met its DBE goals in the last 3 years, yet now currently seeks to reduce the goal itself. The Seattle Tunnel Partners debacle shows that there are still clear and persistent barriers to market entry for DBE firms of all types.”

WT39: “The truth is, we need a higher proportion of WBEs in the design and construction field. The goal should be to increase WBE growth beyond their “utilization/availability” (number of firms) as noted in this study. The number of “available” firms is lower than it should be in this industry as a whole. Streamlining the certification process to lower barriers to entry would fulfill the goal of greater woman-owned business participation the awarding of these contracts. There are certainly many firms who have chosen not to go through the DBE certification process due to the resources of time and money required. I can say from my personal experience that getting certified as a WBE took a lot of time, the DBE process was about 3 times worse in terms of the time required to put the application packet together. So creating a more streamlined DBE process to garner a greater number of WBE firms might be a goal that brings the industry to greater parity with the population as a whole.”

WT39: “I can say that our firm would have to seriously consider dropping all certification if this change goes into effect. The amount of work required for the certification process is burdensome to the very firms who can least afford it. I would encourage WSDOT to instead work toward race and gender parity in alignment with the general population as a more beneficial goal.”

WT42: “As a legitimate women owned business I struggle with barriers and access to the industry with my business success in the areas of daily operation, access to capital, bonding, insurance, and customer relations. I embraced the 2013 OMWBE certification despite the more rigorous process because I felt that non legitimate firms may not become certified. Going forward there is a possibility that I will discontinue my certification.”

WT42: “The issues for me as a women owned business dealing with WSDOT and the OMWBE is that the agencies try to be separate in judgment and even though I was certified WBE/DBE I still needed to contact WSDOT for clarification and approval prior to bid. Often times I could not contact the one person I needed to prior to bid day and when I did that person was useless in that no specific answers could be given and in one situation I even went as high as Washington DC for a final decision. The NAICS codes are a problem and difficult to interpret. I was asked by OMWBE “why do you want so many NA ICS codes?” The reason is I could potentially lose an opportunity because of an incomplete description. My opinion of WSDOT and the OMWBE offices of equal opportunity is that the employees do not have a good knowledge of the construction industry and are not qualified to judge the businesses seeking certification.”

General issues with WSDOT. Two individuals submitted verbal or written testimony related to general issues with WSDOT.

SSPF5: “I want to provide this panel some real barriers that my firm faces as a small DBE that fabricates and sells rebar. These barriers that I'm going to be discussing basically would impact that 11.6 percent that was shown on the PowerPoint presentation. It's going to get into some certain specifications, but bear with me 'cause I think it's important that everybody hears that WSDOT only specs out a certain kind of product that are proprietary in nature, such as epoxy-

coated rebar. This, in some ways, has created a monopoly and real opportunity to thwart competitive pricing.”

SSPF5: “Another related barrier that I – that we have that's in regards to epoxy rebar is that the large firms always getting their steel first, and we are forced to wait. This puts my firm in a real legal problem with the GC, the general contractor, because I'm now liable for liquidated damages because I can't get the bar on site on time, even though it was ordered on time. One solution where WSDOT could help is to spec out alternative materials for epoxy rebar, such as galvanized rebar or other steel that has corrosive-resistant properties, and they are available in the marketplace and they can be competitive. I can be available to consult with WSDOT outside this meeting to provide WSDOT other steel options if – if you want to talk to me about it.”

SSPF5: “WSDOT, OMWBE, nor EEO are not monitoring the CUF with regards to determining quantity and quality in ordering the steel as required in the CFRs. This is mandated by the CFRs. So what I'm asking this – this public meeting what I'm asking is that there be better enforcement with these types of items.”

SSPF5: “Another barrier that creates a severe impact to my firm is the ongoing problem with WSDOT pay quantities. In regards to rebar, some of the WSDOT bid items require lump sum price schemes, while other bid items are on unit price per pound. However, the unit price per pound – let me restate it. The... However, the unit price items come with a self-serving language within the specifications that is harmful to the subcontractor. For example, if WSDOT wanted to build a hundred foot long concrete wall and specified that the rebar be spaced at 1 foot on center, as an estimator I would calculate that 101 bars would be required to build the wall. Hypothetically speaking, and for the purposes of this example, based upon my 101 takeoff, there would be a thousand pounds needed to build the wall. However, WSDOT has misrepresented the pay quantities on the bid form because WSDOT says it requires 2,000 pounds, which is twice the amount that I estimated to build that same wall. Upon building the wall and providing WSDOT with the paperwork of the materials used and proving that they're American made with all the quantities, WSDOT realizes that their bid quantity was incorrect. Now WSDOT wants a thousand pound credit. Well, we still have to build the wall according to the original plans and specifications, which is a hundred foot long. So we're providing the same bar either way. The problem with this is that I – that I bid the job based upon the lower 1,000 pound that's I knew the job would require. When WSDOT requests that we give them now a credit for the other thousand pounds that they were wrong about, we basically have to give WSDOT the credit twice, once before bid time and the second after we build it.”

WT6: “There's no reason why an owner like WSDOT can't address the topic of economic development in this same context of “labor harmony” or other topics commonly contained in RFPs. The tender documents can ask contractors how they are going to use the project as a springboard for the economic development of the community that will be paying for and using the project. This can be a scored element of the RFP, just like quality, safety and the other more quantitative elements such as technical experience. WSDOT would have the opportunity to review the contractor's economic development plan, just as WSDOT reviews the contractor's project management manual or safety plan. In this manner, the goal, helping achieve economic

parity, becomes the basis of award, not race or gender per se. I would be very happy to help WSDOT address this issue.”

WT6: “That being said, the contractor only cares about things the owner demonstrates it cares about. If WSDOT is serious about facilitating use of small businesses, DBEs or not, on WSDOT project, WSDOT needs to send this message to the contractors loud and clear. If this means you must have a DBE or SBE goal, then, that goal should be as large as possible. However, WSDOT should be prepared to pay contractors for the extra costs of administering a multitude of small subcontracts.”

WT22: “For example, AGS worked on a project in 2009 that had a subcontract value of “X” but the DBE COA was reduced by tens of thousands of dollars resulting in the dollars to be unpaid. Yet the process in place to reduce the amount per the CFR was not enacted. Also, another subcontractor was used to perform our work for a full month but AGS was to be the DBE used for this work resulting in 1 month of lost work. Nothing was done about this.”

Positive experiences with the DBE Program. A few individuals submitted verbal or written testimony related to positive experiences with the DBE Program.

NSPF1. “We were certified in late 2011, after getting over a number of hurdles to get there, several number of years. But in this year that we’ve been certified, I have had a lot more meaningful contacts with the businesses that we’ve approached in the past.”

NSPF1. “I’ve been with [this company] for four years. I’ve been attending supplier diversity fairs for that 18 amount of time and had wonderful discussions with lots of prime contractors in those times. Only in this last year have those discussions resulted in contacts, visits to our site to see what we have to offer, all with positive and surprise responses that we can do what we do and compete with the other firms in our industry, which will remain nameless, but all of the multibillion dollar international companies that we compete against, we do the same thing and we do it well. But it’s taken getting the certification for people to take us seriously and actually look at us.”

NSPF1. “So for us, the certification is very important to be able to utilize it as it was designed. You know, since we’ve gotten certification, we’ve sold equipment and/or rented equipment to some of the big projects going on right now. It’s a slow build, but we anticipate with the condition of the certification program as it is, that we would continue to benefit from it and get the exposure we needed to eventually, you know, if we graduate, but eventually prove ourselves to these companies and maintain business with them. So our hope is it’s able to continue the way it is.”

NSPF1. “Being a small business, we have a hard time competing with big marketing budgets that are out there. So really [certification] is an effective marketing tool for us, simply put.”

SSPF1. “I’ve been a WDBE for 27 years. I have an established business with a fine reputation built on hard work and perseverance. I am an example of what the disparity study abundantly illustrates:• that longevity and experience pay off. Access to bid opportunities, financing, business advancement, and good trade relationships are the result. The previous barriers, borne in complex social issues, diminish.”

WT13. “Meaningful conversations and actions by prime contractors did not materialize until [our company] became a certified DBE. In 2012-2013, contractors have returned phone calls and emails; [we] eventually rented or purchased for several mega projects including the 520 Floating Bridge project and the Seattle Tunnel Project; [our company] is now being considered by the Max Kuney Company for the Skagit Bridge Replacement Project; Purchasing and diversity department staff members have conducted on-site tours of [our] facilities. All have been impressed and surprised with the depth of [our company's] fleet, processes and knowledge. Simply put, the DBE certification is getting [our company] to the table. So far, it has been an effective tool for a small company by leveling the playing field.”

WT26: “As a female owner of a small civil engineering firm, these DBE goals have opened doors for me and my firm. In 2005, we were a one-person firm when we were brought on to I-405 Kirkland Nickel Design Build project to meet DBE goals. I attribute part of my firm’s growth and the jobs that we have created to the DBE program allowing small firms to have a part of big projects and gain valuable experience. We’ve built from that experience and branched out to other clients outside of WSDOT, where we are priming projects and providing sub-opportunities to other WBE and MBE firms, fueling job creation for our company as well as our subconsultants.”

DBE fronts. A few individuals submitted verbal and written testimony related to DBE fronts and frauds.

NSPF17/TPF11: “I personally know people that have decided to not compete in the standard contracting industry and decide to put their business or new-formed business in their girlfriend's or their wife's names, you know, from contractors to – I mean, you know, everybody knows it. It's nothing new. It's done nationwide. And I'm glad that this is finally coming to a head. This needs to be the downfall of the good-old-boy system because, year after year, I'm bidding on every state job, year after year, and you know something? I'm out there advocating for better inclusion, for inclusion period. I'm not even getting any work. Kind of sucks. It really does.”

NSPF20: “I put the accountability on WSDOT, not on any minority business, not any woman minority business. I agree with the gentleman that was up here earlier. There are women minority businesses who are fraudulent, who are here under – you know, just they aren't who they [say they] are. What more can we say? As a primary contractor, it's not easy to sit there and figure out, when your bid gets to you, is this a legit minority business? Is this a legit DBE? When we have to put a bid together, you have one hour to get those numbers crunched.”

NSPF22: “First, I'd like to say that somehow this got turned into a fraud discussion and the position that somehow – eliminating women from the program and that maybe women are the only people who are defrauding the program. I would like to say that that's appalling. There is fraud on both sides of the aisle, and eliminating women is certainly not going to end that. And that is, I know, something that OMWBE is working hard to try and fix and – but, again, using the goals to do that is not how you fix that issue.”

NSPF23: “The truth of the matter – And I'm not saying one diverse group is more fraudulent than the other, but the bottom line: There are spouses of contractors creating companies out of thin air and there are primes giving them business. That's the truth. That is the truth. Now, maybe it's

not 100 percent fraudulent, but I'll guarantee you, it's over 85 percent and we need to fix that. Let's focus together on fraudulent firms, primes that have history on the other coast, being fined for fraudulent behavior, getting awards here in our town. It's ridiculous. Really, that's where the energy really needs to be."

NSPF23: "I mean, the reality is – I'm not saying women are not faced with the same prejudices that minorities are, but give me a break. It's not us. It's not the minorities that put this study out. We didn't spend the money to put this study out. The study is what it is. And I can speak for a lot of our minorities businesses: We're here to build a team. Let's get rid of the fraud. Let's focus our energy on fraudulent behavior, by primes, not all primes. And, yes, the majority have been women-owned firms. That's not to say there are not fraudulent people of color doing business with the state."

SKPF6: "I've bid jobs year after year statewide and did not get one job. You know, companies like mine have been replaced by women-owned firms. There used to be a lot of male-owned firms or minority-owned firms, Hispanic, African-American, Asian, and whatnot. Then all of a sudden, I mean, it just shot up to women-owned businesses. Everybody knows the deal. There's a lot of, you know, women-owned firms that were –you know, they were getting funds from their boyfriends, husbands, whatever they could. I mean, they didn't know anything about the business, and then all of sudden they're in the business. And now it's a hostile takeover. It is what it is. That's what's – everybody knows what's been going on. Is it fair? No, it's not fair. You know, I just – and there are woman-owned firms that have got their own loans and have started their own business, and they know how to drive trucks or landscaping or electrical. And, honestly, I don't think it's fair that a waiver should be implemented, you know, with women-owned businesses that do have the education, that are small businesses, that are struggling too. I don't think it's fair that women-owned businesses that have gained the system, very few of them. You know, and there's a lot more businesses, women-owned businesses, that are really disadvantaged small business. Really, you know, has lost the opportunity to have contracting, I mean, to graduate from the program.

SSPF3: "In the mid-'80s, I witnessed – you know, as the minority program came about in the early '80s, a lot of people were catching on this, you know, inclusion of minority-owned businesses on WSDOT contracts. In the mid-'80s I witnessed white male contractors putting their businesses in their wives' names, girlfriends' predominantly; I mean, just constantly doing that. You know, it didn't matter if you filed complaints or not on these firms. Nothing was ever done. You know, the minority program is flawed. Back then [in the 1980s] there was more than a couple of dozen African American firms, very few women-owned businesses. Today, you'll probably see 90 women-owned businesses and probably less than five African American firms. We were completely devastated by these front-fraudulent businesses reaping the benefits of the DBE program."

SSPF3: "Women-owned firms need to hear where I'm coming from – where other firms like me are coming from. We've worked hard for what we have today. Nothing's ever been handed to me. I didn't inherit anything. Nothing's been given to me. I've worked day and night for what I've got today. And three times in a row I lost it to women-owned fraudulent firms. That's a problem."

SSPF3: "I'm trying to be fair about this. It is not fair with women that doesn't know how to drive a truck or do electrical or do landscaping; I mean, people that really know what they're doing and they're hands-on."

SSPF6: "I also encourage – actually, this is for everyone. This House Bill 1674 still isn't quite dead. For those of you that don't know what this bill is, it gives OMWBE the power and authority to remove a fraudulent firm from the program. This bill is before senators and all – I mean, it's been turned down. The right thing won't be done. That's why this discourages me. You know, we really need the support of that House Bill. So I really do encourage everyone to write to – you know, from the governor on down – senators and all – you need to let them know that we really do need this enforcement. It can solve a problem that we have today."

TPF4: "As far as with the front minority businesses, the concerns that I do raise with legit women-owned businesses that, you know, it kind of isn't fair that people that know what they're doing – you know, not sort of – I don't want to say that it's being penalized, and/or maybe a possible waiver, you know, be filled out to exclude them from this program. I don't think it's fair to legit businesses at all, you know. But on the other hand, I know that, for instance, if this new house bill that was introduced into congress, it's 1674, you know, it would give OMWBE power to remove these fraudulent firms and fine them, you know. And it's being turned down. It's not being – it's being considered, but – I mean, it's just being shut down, as we speak."

TPF9: "So they're questioning my certification, and I feel that it's been questioned because of some of the fraud that has happened with Caucasian women over here in Washington -- on this side of the state...The federal government has taken party to our case because they did concur that there was fraud at Hanford. I have been disadvantaged in Richland, along with the other Caucasian women-owned firms. None of us have been contacted to ask, have we been disadvantaged. Hanford has put a black label over us because we turned in the fraud."

TPF10: "And as far as my opinion goes, I see no way that it could remain as it was, because of all of the problems that it caused for blacks that's trying to be in business. It caused problems for the communities. And it's just redundant that people would think this could really work as it is, because it's been tried over and over. And what seemed to come out of this is a whole bunch of fraud, for one thing. And not that we want women to – or white women to go away and, you know, have their own, but, you know, that's the way it should be, because we have put a lot of effort up to protect being a DBE. And as women, I haven't seen that fight as overall. Everybody has come together and say we're going to protect the DBE industry. It seems like we do all the work, we pay all the cost, we take all of the loss, and white women, they seem to have an advancement from this."

TPF11/NSPF17: "We've got these companies, these rebar companies, these landscape companies, these trucking companies, you know, that are gaming this system. And I'm tired of it. I mean, they're using their husbands and their boyfriends, you know, to – you know, financially. And, you know, that's not right. It's not right at all. You've got prime contractors that used to be a DBE, that's graduated from the program, and now has internally – was successful in certifying a company that's collecting millions of our tax dollars and that has destroyed our community, destroyed our businesses. What are we to do? It's not fair. I suggest that WSDOT implement this waiver immediately, because right now there's an extreme disparity upon African-Americans,

upon Hispanics, every other – you know, my goodness, there's some companies that's been in the program for, what, 30 years, 25 years. You're making \$20 million a year. Really? Is that socially and economically disadvantaged? Is it? Forty, fifty trucks, sixty trucks? They used to have their husband's name on it, title.”

TPF11/NSPF17: “You know, so as far as I'm concerned, the comment to the fact that the – I don't like the fact that, you know, what triggers – you know, if this waiver gets implemented and there is a disparity with the utilization with white women firms, you know, what would trigger – not an investigation, but, you know, a request to Federal Highways to turn it around? Because all I know is that there was one African-American firm that was a front company, that's made millions, that was counted in this program that had no business being counted.”

TPF13/NSPF15: “The other problem we have is with STP and the board tunnel project and the bridge project. They are mega projects. Federal Highways knows that they have skewed the data. And, you know, there's just no question that that bucket of white women dollars, \$23 million – because I do know the answer – that Grady Excavating took was counted in the white women bucket, later given to an MBE, Tahoma, which it shouldn't have been given to an MBE because it was fraudulent, but yet those \$23 million are in that study. So that is flawed right there from [that] basis.”

TPF14/NSPF14: “One word on fraud. Fraudulent firms have existed since the inception of the program, both women and minority-owned. We've talked about it here tonight. I give OMWBE a lot of credit in ferreting out those firms over the years. Sometimes it takes a while because the system has checks and balances intentionally in place to protect firms from the unwarranted accusations. But in the end, the system is generally effective. I do not really think that fraud is relevant to the discussions tonight.”

TPF16/NSPF21: “I have attended a few of these meetings, and I think that it's fair to say that there has been a significant amount of public comment about the fraud in this DBE program. I've also heard it mentioned that the fraud comes in many forms. One woman spoke up last meeting to say that it's not just the women-owned firms where the fraud occurs. I agree with that 100 percent. Fraud comes in many shapes and sizes. For this reason, it's important to bring awareness to this panel of what could be done effectively to work some of this fraud. The DBE program is not intended for big business. In fact, this program is designed to level the un-level playing field that big business creates.”

TPF16/NSPF21: “On another note, I want to mention that I recently sat in on a decertification hearing. I observed it and I also testified at it. This woman-owned DBE firm was a specialty trade subcontractor that had been making upwards of 22, 23, and in one year made over \$25 million. This same DBE firm spent over – well over – \$400,000 of legal costs to pull the wool over the court system's eyes. And that firm is still certified today. They were successful in doing that. I mentioned in my last – the last time I spoke, that I wish I had the \$400,000 they just spent on attorneys' fees. I wish I had a \$400,000 contract that I would perform work on. This is the kind of fraud I'm talking about. This program is for small business, not big business. The DBE regulations, as a general rule, state that DBE specialty trade subcontractor is only allowed to earn up to \$14 million average per year. In my opinion, this is a severe abuse of the program and it hurts the ones who really need to get a hand up. This type of abuse recently really caused a

dysfunctional imbalance within the DBE program, because, as long as there are these large DBE firms abusing the program, then there will not be an incentive for the primes to use other smaller DBE firms. It also lends itself and explains why the disparity shows that the women-owned DBE firms are overutilized.”

WT5: “I believe what is of greater importance is there are firms that have been certified which are clearly fraudulent. These firms in the past have taken millions dollars out of true firms and who will ultimately be responsible for this? Accountability for this is paramount for the DBE program success. I am very pleased to see WSDOT raise its contracting goals and we have seen some increase in our work from this program. In the end it is my opinion that the DBE program must be more stringently looked at from a certification standpoint and that ALL firms be give equal chance at all contracting dollars. I am particularly concerned about the CRC project and the negative consequence that race conscious goals will have to firms not mandated to be used. I would also make a recommendation that there be a market that WSDOT could solicit small projects to be competed for only with DBE firms as a prime contractor. This would enable many small firms an opportunity to compete for projects as a prime and give them great experience. This would also begin to have a way for these firms to learn how to be prime which would eventually lead to them possibly growing out of the DBE program to larger projects.”

WT28: “Most states reporting annually on DBE awards and sub awards by white primes, record white female DBE dollars without caring that these females “inherited” equipment and personnel from their white male fathers/brothers/husbands firms and very, very few of them actually went to a bank and truly got loans to start their WBE/DBE enterprises.”

WT42: “I started my own business in 2006. Being self-employed is no easy task. I have experienced very hard times financially and others placed a great deal of doubt over my success. My husband works in an unrelated career as an agricultural crop consultant. I kept my maiden name because of my need to maintain my identity. So many will question women owned businesses as a front. Businesses not legitimately a WBE are a source of issue for me because regardless of what I am, I am associated with this stereotype.”

Minority- and women-owned businesses going out of business. One individual submitted verbal testimony related to minority- or women-owned businesses going out of business.

SSPF2: “But a lot of the companies – I mean not only DBE companies, but a lot of the firms that have been bidding against us, you know, for years have disappeared. And it seems like when the economy took a turn, for that first summer we were bidding against a lot of companies that did, you know, home plats and things like that. And we didn't even know who half these companies were. And that lasted about one summer, and they disappeared.”

SSPF2: “And I think a lot of the DBE firms and a lot of companies that aren't DBEs have just gone by the wayside and disappeared. And I think you should give that some consideration on these goals. And – and different parts of the state – I mean, in the Seattle area, there might be quite a few companies around town. You get over on the eastside, and you just don't see them.”

Limited work opportunities for DBEs. Some individuals submitted verbal testimony related to limited work opportunities for DBEs.

SKPF2: "I'm in Tacoma two years ago, met with probably 30, 40 different people on an open shop apprenticeship program to help them get going, and they said, well, there's nothing over there for us. There's nothing going on with the Spokane tribe. You know, the Kalispel have entrepreneurs. They have companies. Colville does not have any businesses, and we've been working to try and set up the business. So for the tribes, it's really difficult. We just met with the tribes last week on apprenticeship on trying to spur that on to see if we could help them."

SKPF6: "I mean, I look at the bid results, and it's all traffic control, all electrical, I mean, and time again, and it's horrible. When companies like mine are devastated, it's very hard to compete. I'm in the trucking industry. It is extremely hard to compete, I mean, and have our prices set 125/30 an hour coming all the way across the state, pay hotel, fuel, I mean, everything. It's next to impossible. And I don't want to get in a situation to rob Peter to pay Paul. Next thing you know it becomes a prime struggle."

TPF11/NSPF17: "So as far as I'm concerned, you know, it's on now. You know, I am so – every job I bid, I deal with the prime contractors that bid – that specifically use women-owned firms. Time and time again, from Spokane, Eastern Washington, over in – you can look at the bids, and it's always traffic control, it's always trucking, it's always electrical. It's always the same thing over and over and over again. And the past three years, I picked up two WSDOT projects – two – under \$200,000."

TPF16/NSPF21: "Often times these large Fortune 500 firms will only provide pricing to one or two DBE firms. Fortune 500 firms such as suppliers, material suppliers; not necessarily general contractors, but big industry with supply contracts. In my industry here in Seattle, the large Fortune 500 steel firm only provides products to one DBE. This limits the competition and causes my DBE firm to have to buy these same materials through brokers and pay huge markups. I can say that, on an average, that that I'm having to pay 30 percent more for materials than what the Fortune 500 firm will sell to other firms for. That puts a huge barrier on me. When I get feedback from my contractor, they're saying my prices are too high, way too high. This is the primary reason why I'm high; because I walk into the bid with a 30 percent disadvantage. So my prices are 15, 20 percent higher than the other bidders, it's because I'm having to pay more for labor, I'm having to pay more for materials and other things as well."

VPF3: "My firm provides environmental services, and I'm just getting into looking at WSDOT projects, and I have begun bidding on projects, but it's very difficult because where you do have goals, you don't really have my kind of work. So it's difficult to find little pieces that I can do. I have been utilizing a WSDOT mentor, thank you very much. He's very, very good. But we discussed at the beginning the fact that at the front end, which is where my services would be applied, there are no goals; there are only gigantic companies from somewhere else that you know are going to get all the work, and when you in fact talk to them, they say, well, gee, there are no goals, I don't need you, we can do the work, so there's nothing there for you. There is no way to become involved."

VPF3: “So I think your program is great, but kind of reflecting some of the other comments, the services are not professional services in the sense of professional. I have a licensed profession. My services aren't involved in the ads that come out for WSDOT projects, although I have capability to do some of the smaller plans and similar kinds of work. But there aren't the professional services available at the build end of projects, and so that was an astounding revelation to me to realize that, what did you say, \$500 billion, and there is nothing for small businesses, there will be nothing for small businesses. A lot of the small businesses offer professional services, and it's too late for that.”

VPF3: “And it's my understanding in talking to people who are more familiar with the system than I am, that there really isn't a goal or a mechanism for small businesses to get involved up front in the design and the development of the project. And again, I'm just jumping in to the construction part, and that's difficult for my firm because there's only itty bitty little things that might apply.”

Prompt payment. One individual submitted verbal testimony related to prompt payment.

NSPF7: “So those are some of the comments I have. Other things that I think that WSDOT could do that I actually spoke to in my two-hour interview, which I appreciate the opportunity to share, is prompt pay. Prompt pay is the way that a general contractor punishes you for getting out of line for asking for your payment. And there are issues, but there are things that WSDOT could do right now that could make it so easy to help us stay alive. By the time three or four months has gone by, we haven't got paid, we're in big trouble.”

NSPF7: “If you can't even enforce your prompt pay laws that you have, then why are we even doing any of this. Prompt pay could be verified simply by what STP does at the SR-994 tunnel, and I shared this in my interview. When you have an STP contract with your sub or general, you have to provide proof of payment to your DBE sub, that you as the subcontractor – before you get your next payment. Gosh, how hard is that? You have to provide a copy of the canceled check.”

NSPF7: “The other thing is a DBE utilization, their quarterly report, there's no concurrence from the DBE sub that General Contractor X put you down for X amount of dollars and you actually got paid those dollars. When I was a general contractor non-DBE, I just figured there was some concurrence with the DBEs, yeah, I got paid that much. But not so. So the general contractor can put down what they say they're paying you, but there's no concurrence. That's another easy fix that WSDOT could do.”

Good faith efforts. A few individuals submitted verbal or written testimony related to good faith efforts.

SSPF3: “The so-called good-faith efforts that these primes – those primes are putting forward is completely dismal. You know, I recently – you know, I filed a complaint on a trucking firm that – with no experience, predominantly getting all of the trucking work statewide. And, you know, after this firm got decertified, contractors – you know, they're supposed to replace this firm. But it doesn't happen. What happens is that there is a supposed show-good-faith effort by the prime contractor that is never implemented. For instance, replace that firm that was decertified by a

legit minority-owned business. Instead, we're called to bid this project or many projects and, you know, called in a room, and we're told by the prime contractor that our numbers are too high. That's their show-good-faith efforts. And they continue to use this firm that is not certified – minority certified on a federal-funded project.”

SSPF7: “When you have things like good faith effort as a requirement on some of these contracts, where part of the process is the prime contractor's allowed to submit a statement stating that they made an effort, they contacted a firm or firms, and for whatever reason, no, they had priced too high, didn't understand, whatever the reason that they were unable to – to get a subcontractor. It would benefit the small business women-owned, minority-owned business community if more of the contracts were directly contracted with our firms. We'd have work.”

SSPF7: “In this state, with I-200, it was clearly demonstrated that good faith effort does not work. When this state only has a requirement that states make good faith efforts in order to attain whatever the state goal was, it didn't happen. And it didn't happen miserably. So I guess one of the – and maybe the only benefit of I-200 is that we have clear examples of what happens when there are not gender-conscious goals.”

TPF14/NSPF14: “There is another crucial avenue that's woefully underutilized: prime contractors. But before they can really be of any help to you, DOT must acknowledge that there is a real cost to the prime, to the project and, therefore, the taxpayer for pursuing condition of award goals. One of the constant challenges facing the prime is the dearth of DBEs to use to meet those goals. No matter how altruistic the contractor may be in promoting advancement for minority and women, they are a business first and foremost, and that the bid from the DBE must be competitive, because they have a grueling marketplace and they have to make a profit. What I've heard on the street from most of the primes is: good faith effort be damned; we can't afford it anymore. And that results in a de facto decertification for WBEs. I'm not buying into the good-faith effort part. I know how it works. It doesn't. It just doesn't. DOT is not using its greatest allies – the prime contractors and the successful firms – to make this program work. I see a blithe disregard for this very real fact. It will have a nefarious impact on the program. It really should be changed.”

WT3: “As previously stated the State has records that clearly demonstrate utilizing good faith efforts as a means of accomplishing contracting and employment equity will not work. Neutral methods currently being utilized and proposed by WSDOT can be effective tools when properly implemented and used to support meaningful goals. Race/Gender-conscious measures are required to attempt to combat the discrimination and substantial disparities found in the WSDOT disparity study. In order to achieve some semblance of equity in the distribution of contracts under the WSDOT DBE program those DBE groups found by the disparity study to have no substantial disparities should not be included in race-/gender conscious goals.”

WT22: “Good faith efforts are a farce as far as primes are concerned. They report unverified data as good faith effort documentation.”

WSDOT outreach. A few individuals submitted verbal or written testimony related WSDOT outreach.

NSPF8: “I am very disturbed by what's going on here. There wasn't enough outreach. Clearly, there wasn't enough adequate, efficient outreach to contractors. I just heard about this [public meeting] from an employer today.”

NSPF14/TPF14: “What if you do keep the goal where you feel that aspirational goal of 11.6 percent is, but you lower the condition of award goal in steps? Bring it up in steps instead, and, at the same time, through your outreach, try to get those performing firms to get engaged to help the lesser-performing firms through our good faith effort – good faith effort money.”

SKPF1: “The only thing I would like to see because of the survey would be the more outreach, because it's Indian country, and how that's approached. I had a little chat with you earlier about that. And I think the lack of that outreach to the tribal liaisons, I think they need to be more kind of a find to get a tribal liaison, make sure they're tribal, because we already have trust issues as it is.”

TPF1: “The second thing I'd like to see or have is access to WSDOT's project managers. You do a lot of community outreach where the primes – we go out and meet the primes, and, you know, it's all nice that day, you know, and then it ends right there. What I'd like to see is us having the ability and opportunity to meet the internal project managers ourselves, to develop a relationship with them, so they know who we are, because people do business with people that they know and people that are referred to them. And I don't want to trust somebody else referring me to a project manager. I'd like to build that relationship myself. So I'd like to recommend a kind of meet and greet with some of the primes in our industry. All right. Whether that's a speed-dating thing where you do with – you know, with the primes, because – and I can appreciate the primes wanting to go keep all the meat on their plate. They worked hard for it. I want to work hard for it too. So developing my own relationship with the project managers inside and the program managers inside of WSDOT, so they'll know who we are.”

TPF13/NSPF15: “Now, I know, as you guys might know, I do quite a bit of electrical work. I'm not hard to find. But it was only after a meeting that I had with Jody Peterson on an unrelated topic that she mentioned a disparity study to me. And I said, “What is this about?” And they were almost done with the darn thing. [Sameer Bawa] – sorry, I'm getting there – he actually flew back from Denver to interview me.”

TPF14/NSPF14: “[DOT] needs to do more outreach. I know you got a big outreach thing going and I know that the governor's in on it, and maybe it will help, but maybe it won't. DOT states that the primes regularly rely on 20 or so firms to fill condition of award goals. I've heard that from a few of you here tonight.”

WT7: “In reference to chapter 11, page 12's recommendation for an increase in communication to businesses about the DBE program: Washington PTAC is well positioned to support in this effort. We have 11 counselors deployed in all corners of the state that conduct government contracting workshops and meet one-on-one with small and small disadvantaged firms that may be eligible for DBE certification. We'd enjoy an opportunity to further strengthen our

partnership with OMWBE and WSDOT to increase the amount of DBE education we can provide to Washington businesses. OMWBE recently provided our team with an effective training on DBE certification standards so that we can help our clients determine their eligibility for DBE (thank you OMWBE!). Also, we help promote and often participate in the Small Business Transportation Resource Center's training classes and outreach efforts."

WT7: "We also interact significantly with prime contractors helping them connect to qualified small businesses which helps Primes meet their DBE goals and ensures maximum participation by M/WBEs. PTAC often partners with Prime Contractors on outreach events for M/WBEs. PTAC also disseminates information on sub-contracting opportunities to the M/WBEs we work with. We invite WSDOT to inform prime contractors about this free service available to them."

WT11: "We advocate for a strong involvement of DBE stakeholders from all levels. This includes soliciting the input of small DBE owners and smaller organization such as DBEs. In order for rule changes, best practices and implementation procedures to be comprehensive and valid, all stakeholders must be consulted, and currently there is no requirement that recipients must do so. For example, when a Notice of Proposed Rule Making (NPRM) is published in the Federal Register, it should be required that recipients must hold public meetings to get input from public jurisdictions affected, prime contractors, DBE firms and small non-DBE businesses to analyze the overall impact of changes. If "the regulation is the definitive source of guidance for the DBE program," then not doing more to reach out to all stakeholders for input, and actually considering that input before finalizing changes, is merely a pro forma effort. In addition, if "14 out of 15 States we contacted stated that they lack clear and comprehensive guidance from the Department for the DBE program," it would seem obvious that the regulations, official Q & A, and available training are insufficient. This will only lead to inconsistency and poor enforcement of the program and undermines the intent of the program."

Contracting directly with WSDOT. A few individuals submitted verbal or written testimony related contracting directly with WSDOT.

SKPF6: "So I suggest it to be race specific goals, and I think that would be more acceptable maybe throughout the community. I suggest that contracting, DBE contracting, be done specifically with the State. I would love to do direct contracting with WSDOT. It would take the pressure off the prime from bidding, meeting goals, reaching out statewide, you know, whatever they might do."

SSPF6: "I wanted to also suggest to USDOT that - that DBEs do direct contracting with you. Instead of giving it to the prime - you know, last 40 years, you know, I don't think the right thing - you know, there's some primes that really do mean well. And they will, you know - you know, support you. But majority of them don't. You know, so it sounds like it's a burden for them to meet the DBE goal. WSDOT's a receivership of federal funds, and I'm pretty sure WSDOT don't want to put in jeopardy the federal funding coming to the state. So I would suggest some direct contracting with USDOT."

TPF1: "One of the things that I'd like to say is that right now, the program, like most programs across the country, is structured around DBEs subconsulting or subcontracting to large firms considered as primes. Okay. What I'd like to recommend or like to see is that you somehow restructure the program to support qualified DBEs as prime consultants and contractors so that

we can contract directly to the agency. Again, qualified firms. Because you already have all of our information, our tax returns, everything else, you can determine whether we're qualified or not, based upon our SOQs."

TPF4: "Honestly, you know, I think that I'm encouraging direct contracting within, you know, WSDOT instead of contracting to primes. It's important – this is really important. I know it's a tough challenge, but prime contractors for the last 40 years have never done the right thing. They'll never do the right thing."

WSDOT bidding procedures. Two individuals submitted testimony related to WSDOT bidding procedures.

YPF1: "The comments that I want to make is in regards to the approval process when bidding work on WSDOT projects it is difficult to go through on to OMWB and the WSDOT office. And I feel that there's a real disconnect there. And I find myself having to contact one person, who is very hard to get ahold of, to get an approval for a certain, you know, bid item that I want to bid. It would be nice if there were just one agency to go to that where I could say, hey, am I okay to bid on this? Does this fall within my NAICS code description? But it is not like that right now. So it is a problem for me."

WT33: "If the OMWBE office doesn't like how the paperwork is filled out on the bid documents the bid is rejected. For example, on a recent City of Spokane project, the low bidder showed a certain DBE subcontractor towards meeting the goal and identified their work as 'sweeping.' Their bid was rejected because this subcontractor did not have sweeping listed in their business description. A few weeks later, on a WSDOT project, the low bidder listed this same subcontractor for completing, among other things, 'planing – partial.' And guess what 'partial planing' work they were being contracted to do? That's right – sweeping."

Unbundling contracts. One individual submitted verbal testimony related to unbundling contracts.

SSPF4: "Number two – and I'm sure it was said earlier – unbundle the contracts. That takes man hours and time; I understand that. Unbundling the contracts would provide opportunity."

Engineering contracts. One individual submitted written testimony related specifically to engineering contracts.

WT17: "State consider DBE requirement in Engineering Contract in Design Build and Design bid build."

WT17: "State consider small work roster for A&E firms."

WT17: "WSDOT consultant division be responsive encourage small A&E firms."

Problems working with DBEs. Several individuals submitted testimony related to problems that they have experienced finding and working with DBEs.

SKPF3: “I contact the project engineer. They contact somebody in Olympia, and they come back with a list of what they feel is work that can be done by a DBE subcontractor, but that doesn't mean that the DBE subcontractor's willing to come over here and do the work. So we end up contacting my compadre there, send out an email to every – every subcontractor in – the DBE subcontractor in the state looking for someone who wants to bid it. We get very few responses. We follow that up a few days later with a more targeted email to people that we think are more likely to be quoting the project. If we get more than one or two responses to those emails, it's unusual.”

SKPF3: “So then we run into the situation where we have to hire subcontractors from outside the area. One was an electrical contractor that we hired recently. I guess that was maybe two years ago, three years ago. They didn't pay all of their suppliers, so we ended up with some financial issues. Like I said, we're \$25,000 upside down right now on the project out of pocket because the DBE didn't pay their suppliers.”

SKPF3: “In another case, a DBE walked off the job, went out of business, and we had to hire another DBE subcontractor to complete the work. I believe Shamrock ran into the same problem with the same subcontractor on another project, and we're out of pocket on that one, because he had to hire someone else to do the work. So those are some of the problems we've had to deal with.”

SKPF3: “A lot of it's already been stated, but one of the problems we're had locally is there's a positive DBE contractors narrative. We had basically white woman owned DBE subcontractors, three of them kind of in the area, two in the immediate area. We have one DBE saw cutter and – but like I said previously, the dollar value for saw cutting really doesn't help us too much unless we're really close to getting to the goal. Our biggest criticism when we see DBE goals that we feel are unattainable is that we contact the project engineer and they contact somebody in Olympia and tell them – we state or I state that I feel the goal is too high and can't reach that with what we have available locally.”

SKPF4: “And we also reach out to multiple DBEs on every job, and for them to come from the coast, it just will not bid over here. I mean, it's proven. I mean, I sent out – for the last project, I probably sent out 30 invites to bid, and the only ones I got back were locally, and I called multiple places even after I sent 'em out, and after I called 'em, they said they weren't going to bid it.”

SKPF4: “So we had Doug Jones out of Wenatchee He didn't have control of his company and went out and went bankrupt, and we were stuck with the bill just like Al was. Sometimes [DBEs] just get over their head and can't handle the work.”

WT33: “A portion of my testimony concerned the paucity of DBE subcontractors in the Spokane/Eastern Washington area. Specifically, there are four caucasian, women-owned traffic control subcontractors in the area. There are also a few non-women owned, DBE subcontractors. In addition, there is another DBE that is owned and operated by a white woman that is a

striping/signage subcontractor. It should be noted that only one of these subcontractors is a Spokane area contractor. To attract subcontractors from outside the Spokane area the project work has to be large enough to attract their attention. This is especially true if I need to secure a DBE subcontractor from west of the Cascades.”

WT33: “Inland Asphalt was recently awarded a WSDOT project entitled US 2, Espanola Rd to Jct. I-90. This project had an 11% DBE Condition of Award Goal. To meet this goal, we used North Star Enterprises (a white, women owned DBE) in the amount of \$430,000.00. To meet the remainder of the goal we used Washington State Trucking in the amount of \$150,000.00. And we are loath to use Washington State Trucking for one reason and one reason only (and not the reason that Elton Mason stated in his testimony) . We have a lot of trucks . If I need to, I can find 50 trucks or more from our resources within Oldcastle's Northwest Group. I do not begrudge Mr. Mason wanting to make money; that's why we all are in business, but his rates are considerably higher than if I were to use our own trucks. Some of the other bidders elected to go with Neppel Electrical to meet a portion of the DBE goal. Neppel's price for the electrical/signalization portions of the work totaled approximately \$594,500.00. The low electrical subcontractor's price totaled just over \$404,000.00. Based on this difference, we elected to use the lower electrical/signalization price and agree to subcontract some of our own work to Washington State Trucking.”

WT33: “Another problem that we have had using out of area DBE contractors is that we don't have any idea of what their talents and capabilities are. The only reason that we are using these subcontractors is because of unreasonable and unattainable Condition of Award Goals. The last two experiences we have had with out of area DBE subcontractors have proved to be less than satisfactory.”

WT33: “In my testimony, I had relayed that our first step in attempting to locate DBE subcontractors for a project (especially when we are concerned that meeting the goal will be difficult to attain), is to send out an email to all potential DBE subcontractors. Our second step is to send out more targeted emails to subcontractors that we feel are more likely to respond and quote the project. What I left out of my testimony is that we also take several additional steps as well. We telephone these DBE subcontractors and ask whether or not they are going to quote that specific project. In addition, we publish a note on plan center web sites that we are requesting quotes for the project (from both DBE subcontractors and non-DBE subcontractors). We then send out RFQs to all potential subcontractors as well as DBE subcontractors. We also, on occasion place advertisements in newspapers requesting quotes. As I stated in my testimony, these efforts have not yielded many positive results. As a result of these efforts we seldom get more than one or two responses from DBE subcontractors out of the Spokane/Eastern Washington area. During phone conversations with out-of-the-area subcontractors, the typical responses for not quoting these projects have included, but are not limited to the following: Projects on the other side of the state are more difficult to manage than ones close to home, they project work isn't large enough to justify mobilizing to the other side of the state, they can't find enough work here in the area(s) that they are currently working in and they don't need to work elsewhere, in many cases, for the reasons stated above.”

WT33: “First we used DBE Electric on the Francis Avenue, Freya Street to Havana Street project for the City of Spokane. Their on the job performance was acceptable. We did have some problems with them finishing their work and completing punch list items. The larger problem was that they were not paying some of their suppliers and didn't pay a lower tier subcontractor. Right now we are \$25,000.00 out of pocket because we are paying somebody else's bills.”

WT33: “A second problem arose when we used Doug Jones Concrete on another City of Spokane project: the Spokane Falls Boulevard Enhancement project. It was a challenge to get them on the project; they couldn't get any work done in a timely fashion; their workmanship was substandard and then they abandoned the project and we couldn't get anyone to return phone calls or respond to emails. We then found out that they were filing for bankruptcy and shutting their doors. We ended up having to hire another DBE contractor to finish some of their work, and guess what? We are out of pocket on this project as well.”

DBE dollars go to only a few firms. Some individuals indicated that a few firms account for the majority of contracting dollars that go to DBEs.

NSPF13: “WSDOT's proposal is a giant step backwards. Reducing the percentages of the DBE goals is also a step backwards. You say that a handful of companies are regularly getting jobs and they're faring well. Well, you average about two point -- and I'm looking at the statistics I read in an earlier report -- your average of 2.8 percent available -- this is for WBE – is consistently getting contracts, that's not acceptable. Instead of pitting these groups against each other, instead of saying too many white women are winning contracts and not enough minorities, so, we should ax the white women incentive, why don't we raise the incentives for all disadvantaged businesses? So, a handful of businesses are doing pretty good, that's just not enough.”

NSPF20: “A lot of times, yes, primes will pick the same person they worked with over and over and over because we are just like a family, or just like working – anybody working for anyone else, we start to develop a relationship. You have to trust them, you can rely on them, you know how each other's work, you can, you know, coincide your work better with one another, but when you throw this on a prime contractor, it just does – it's a hard thing to do.”

TPF15: “I mean, they go to D.C., what do they put in there, how do they work the package when they go get the money. When they brings it back, and I know that they get a certain amount of revenue for disadvantaged and minority business, but they also allowed the prime contractors and the way they work their contracts, they just give them to companies that have a record to say, ‘Okay, they did the job, they did fair, they did it on time, and they just favor companies over and over and over and over.’”

WT24: “At last night's meeting it became even more apparent to me and I hope to WSDOT representatives that there is a problem with the DBE program. The problem seems to be that a few large "disadvantaged" businesses are getting most of the contracts. I am not the only person who has suggested that there should be caps on personal net worth of what is considered disadvantaged. This fact hurts small WBE, as well as small MBE. These businesses make DBE a market niche and never intend to graduate to make room for upcoming new businesses. Taking all WBEs out of the equation is a bomb approach that will hurt many innocent small businesses.

The problem should be addressed with precision and focus on the real problem – large businesses getting most of the contracts. Please consider setting limits on net worth.”

WT29: “The Disparity Study finding clearly identified the fact that twenty-one (21) of the six hundred (600) plus DBE certified firms in the state were awarded eighty-five (85) percent of the contracts awarded to DBE firms. This practice of not managing the DBE Program to utilized more firms caused great harm to the 600+ firms that were not utilized. There are hundreds of firms available to meet and exceed a DBE goal higher than the one proposed by WSDOT.”

WT37: “Certainly if, according to WSDOT's 2012 DBE Program Disparity Study, non-Hispanic white women are no longer disadvantaged, it is, perhaps, because a few WBE/DBEs are establishing a trusted business relationship and therefore get repeat business. What happens when new non-Hispanic white women WBE/DBEs come on the scene and would like to get contracts from WSDOT.”

WT39: “If certain firms are overrepresented and skewing the utilization results, this should not affect other firms who have not benefitted. Did the disparity study look at the percentage of DBE firms that had actually received work through the program? It is most certainly nowhere near 100%, leading me to question whether utilization is actually spread across the board or concentrated in the hands of a few firms.”

APPENDIX B



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January 9, 2014

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Re: **Disadvantaged Business Enterprise (DBE) "Goal and Eligibility" Changes**

Dear Ms. Nnambi & Ms. Peterson:

We are writing in response to WSDOT's "proposal" to decrease its overall DBE participation goal from 15.17% to 11.6% and, more importantly, its intention to seek a waiver from USDOT that would exclude Caucasian women-owned businesses ("WBEs") from WSDOT's DBE goal altogether. We urge WSDOT to reconsider this ill-advised course of action for three primary reasons:

First, BBC Research & Consulting's ("BBC's") analysis in its Final Report ("the Report") does not reflect true market conditions. BBC based its analysis on a small, arbitrary and unrepresentative sampling of Washington businesses (approximately 7% of the total firms identified using census data¹). Since BBC's study is not based upon a representative sample or all Washington businesses (DBE and non-DBE) in the relevant marketplace, BBC's conclusions are fundamentally flawed and unreliable.

Second, WSDOT's proposal to exclude WBEs is an extreme and unnecessary measure that will likely be rejected by USDOT. WSDOT need not take the extreme, and unsupportable action of excluding non-minority women from the DBE program goal. Non-minority women face substantial disparities in Washington's transportation contracting market and barriers to entry.

~~USDOT has given WSDOT the authority to quality check BBC's analysis and take steps to ensure it is representative of the true marketplace—indeed, USDOT demands that each state do so. In its "Tips for Goals Setting in the Disadvantaged Business (DBE) Program," USDOT explains that each state take steps to "ensure that [its] goal setting process truly reflects the actual~~

¹ BBC originally identified 14,328 potentially-available Washington businesses (both DBE and non-DBE). After accounting for numerous factors, BBC interviewed just 988 firms for its analysis (~7%), which included just 100 WBEs and 95 MBEs, see Report at Pages 8 and 9.

Brenda Nnambi
Lynn Peterson
January 9, 2014
Page 2

availability of ready, willing, and able DBEs in your local market area."² Instead of blindly accepting BBC's flawed analysis, the Code of Federal Regulations ("CFRs") require that WSDOT take steps to ensure that BBC's data truly reflects Washington's market. Because we believe WSDOT's quality check of BBC's analysis will reveal that BBC's sampling does not reflect Washington's true market conditions, WSDOT must instead create a DBE goal that is based on appropriately-weighted census data of all firms and accurately reflects the true relevant marketplace.

We urge WSDOT to reject BBC's flawed finding that WBEs do not face substantial disparities in the marketplace. BBC's conclusion is based upon a tiny, unrepresentative subset of Washington firms that does not reflect true market conditions. WSDOT must base its DBE goal on appropriately weighted census data of all firms in Washington. Instead of excluding WBEs, WSDOT should propose a goal that "encompasses all minority groups" as is required under the federal rules and clear Ninth Circuit precedent.³

Third, WSDOT's proposal to exclude WBEs from its DBE goal is a violation of federal law. The CFRs provide that women are presumed to be socially and economically disadvantaged. See 49 C.F.R. §26.67(a). This presumption may not be waived. Additionally, a state may not set a DBE goal that differentiates between different subgroups (i.e., the goal may not contain a different percentage participation by WBEs versus other minority-owned firms).⁴

The goal of the DBE program—as established by the Federal Government—is to increase women and minority-owned business participation in transportation contracting, level the playing field for woman and minority-owned firms, and prevent discrimination of these firms in an area traditionally dominated by Caucasian males. See 49 CFR § 26.1. While the Federal Government has given each state the authority to set state-specific DBE goals, the Government provided no authority for states to rewrite the DBE program by excluding an entire subgroup deemed by the Government to be socially and economically disadvantaged, i.e. women.

Below we have provided further context regarding the three reasons we believe WSDOT's proposal to exclude WBEs to be ill-advised. In seeking to exclude WBEs, WSDOT is acting in violation of federal law. If WSDOT moves forward with this proposal, it will expose WSDOT—and Washington taxpayers—to the serious risk of legal action for injunctive relief and damages. Litigation will be imminent and we urge WSDOT to mitigate the risk to Washington taxpayers and cease its illegal actions.

² Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program ("USDOT Tips");

<http://www.dti.gov/ce/bu/disadvantaged-business-enterprisetips-goal-setting-disadvantaged-business-enterprise>, Page 3, ¶ 2.

³ See 49 CFR §26.45(h) and *W. States Paving Co., Inc. v. Washington State Dep't of Transp.*, 407 F.3d 983, 990 (9th Cir. 2003) ("an undifferentiated goal that encompasses all minority groups is required").

⁴ CFR §26.45(h) and *W. States Paving Co.*, 407 at 990. We understand that a few, select states have sought a waiver to exclude certain subgroups from their DBE program goal but believe that—when this issue is presented to the federal court—the Ninth Circuit would reject it as contrary to the goal of the DBE program as mandated by the Federal Government.



1. BBC'S ANALYSIS IS NOT REPRESENTATIVE AND DOES NOT REFLECT TRUE MARKET CONDITIONS.

Each state must base its DBE goals on valid, relevant data that is rationally related to the relative availability of DBEs in its market. 49 CFR §26.45(c)(3) and (5). To this end, USDOT has published an article, "Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program" (the "USDOT Tips") to assist states in developing reliable data and accurate goal-setting measures. In its fourteen-page article, USDOT provides detailed instructions on goal-setting.

In the USDOT Tips, USDOT explains that, as part of its goal-setting process, each state should use census and other data organized by NAICS codes to create a list of all firms that are actually doing business in the market. The state must then supplement the list, if it finds it to be inadequate and not reflective of the marketplace. This measurement is commonly called the "availability" index.

USDOT specifically cautions that each state must take steps to ensure that its availability index truly reflects the actual marketplace; see passage quoted below. Each state must ensure that its DBE goal is based on the actual number of ready, willing, and able DBEs in the local market.⁵ This is important because, if done incorrectly, USDOT cautions that a state can seriously underestimate the actual relative availability of DBEs and skew its entire analysis. *Id.*

USDOT explained that each state:

... should do everything you can to ensure that your goal setting process truly reflects the actual availability of ready, willing, and able DBEs in your local market area [the availability index]. Toward this end, if you are using your DBE Directory and census data in goal setting and you are concerned that your DBE Directory does not accurately reflect the number of potential DBEs in your area, you should seriously consider supplementing the number of firms in your DBE Directory for the purposes of goal-setting. This is especially important because the census data represent all firms in your area whether or not they are ready, willing and able to perform DOT-assisted contracts. If you do not take extra steps to ensure your list of DBEs and potential DBEs is accurate, you may seriously underestimate the actual relative availability of DBEs.⁶

This underestimation is exactly what has happened here—BBC seriously underestimated the actual relative availability of DBEs in Washington, measured an availability percentage that does not reflect true market conditions, and therefore incorrectly concluded that WBEs do not face disparities in the marketplace.⁷

⁵ USDOT Tips at Page 2; see Footnote 2.

⁶ See *id.* at Page 3.

⁷ To reach its flawed finding, BBC used a "disparity index." The "disparity index" calculations were the only figures included in the bulk of the Report. The disparity index is based upon just two numbers—utilization and availability. BBC did not include its

a. **BBC Did Not Use an Accepted Methodology to Derive Its Calculations.**

BBC did not utilize a commonly-accepted methodology for calculating availability of WBEs in the market. If done correctly, availability should measure the actual relative availability of DBEs (MBEs and DBEs) to perform the types of contracts (both prime and sub) that WSDOT intends to let in the relevant fiscal year.

The most common and straight-forward means of calculating availability is to use census data to collect the number of all firms in a particular market (both DBEs and non-DBEs) and then simple division to arrive at a percentage of DBEs in the overall market. USDOT and the federal courts expressly authorize this method.⁸

Under USDOT's commonly-accepted approach, a state may use its DBE Directories and Census Bureau Data to count the number of ready, willing and able DBEs and compare it to the number of all ready, willing and able businesses available in the overall market that perform work in the same NAICS codes as the DBEs. This common method is illustrated by the following equation:

$$\text{Availability} = \frac{\text{Ready, willing, and able DBEs}}{\text{All firms ready, willing, and able}} \\ \text{(including DBEs and non - DBEs)}^9$$

If necessary, to account for other market factors, the census data may also be appropriately weighted. *Id.*

availability or utilization measurements in the Report. Instead, these numbers are hidden in Appendix K. The disparity index calculation is as follows:

$$\text{BBC's Disparity Index} = \frac{\text{DBE "utilization" rate}}{\text{DBE "availability" rate}} \times 100$$

If accurately measured, the "disparity index" would compare the DBE firms that are available to be hired for federal construction contracting work to their actual utilization. This comparison would reveal whether DBE firms were underutilized in the market and whether disparities existed. For example, if WBEs were 50% utilized and 50% available the disparity index would be 100.

Using the above equation, BBC found that women-owned firms ("WBEs") had a 200+ disparity index for fiscal year 2011. *See* Report at Chapter ES, Page 6, Figure ES-2 and Page 7, Figure ES-3. From this measurement, BBC then posited that WBEs were over-utilized and "did not show substantial disparities..." *See id.* This finding is, however, materially flawed, primarily due to BBC's small unrepresentative sample that resulted in inaccurate availability and likely also inaccurate utilization calculations. Since BBC significantly underestimated the availability of WBEs in Washington and likely overstated the utilization, the disparity index ratio is flawed, not representative of true market conditions and, therefore, inaccurate and misleading.

⁸ *See* USDOT Tips at Page 2 ¶ 1 and *W. States Paving Co. Inc.*, 407 F.3d at 989 ("In establishing this goal, a state must first calculate the relative availability of DBEs in its local transportation contracting industry. One acceptable means of making this determination is by dividing the number of ready, willing, and able DBEs in a State by the total number of ready, willing, and able firms").

⁹ *See* USDOT's Tips at Page 2.

b. **BBC Improperly Used the "Common Census" Method and Based its Analysis on a Small, Unrepresentative Subset.**

BBC did not utilize USDOT's commonly-accepted methodology described in § 1(a) above. Instead, it used (what it termed) a "custom census" methodology; this methodology is not accepted by USDOT and only generally described in the Report.

Under this approach, BBC first identified 14,528 business establishments in the relevant local marketplace: 12,474 construction firms and 2,054 engineering firms.¹⁰ It then attempted to contact every business and interview the business on its interest in bidding in the relevant market, and its ability and qualifications to do so. Unfortunately, however, BBC was only successful in contacting 4,784 of the total 14,528 firms. Multiple factors worked to reduce this number:

- some businesses did not answer BBC's call / email
- BBC could not reach a "responsible staff member" at more than 4,000 firms;
- BBC was unable to speak to 90 firms because of a "language barrier;" and
- 1,440 were not interested in discussing their availability for WSDOT work.

Ultimately, BBC only interviewed 988 firms (~7%). Based on its interviews, and each business' answers to BBC's questions, BBC then "developed" its own database of what BBC deemed to be "potentially available" firms. The final number of firms included in BBC's "representative sample" (988) was just 6.8% of the total sampling (of the 14,528 firms BBC originally identified).¹¹ Of those 988 firms, only 100 were WBEs. There are over 700 WBEs in Washington and a vast majority of them were never contacted.

In the Report, BBC does not provide a list of the firms interviewed, or a copy of its database from which all calculations in the Report are based. Rather, WSDOT and the public are expected to blindly rely on the data derived from these ~7% of firms as accurately representing the marketplace—without even knowing the names of the firms BBC used.

BBC's "custom census" approach resulted in a very small sampling of firms. Inclusion of just one additional WBE in its interview process with very large contracting capacity would skewed BBC's entire analysis and changed its conclusions regarding availability. BBC did not include the entire relevant marketplace in its sampling and it took no measures to ensure that its sampling was indeed reflective of true market conditions.¹² Its sample was not created using any established criteria—instead, it was arbitrarily created, based on which firms answered BBC's phone call and were willing to talk with the researchers. As a result, BBC based its entire analysis on a sample that does not reflect true market conditions. WSDOT cannot use BBC's

¹⁰ Report at Appendix D, Page 1.

¹¹ Report at Appendix D, Page 9.

¹² The Report states that its methodology was accepted by the USDOT but that is not accurate. See *id.* at Page 11. In the USDOT Tips, USDOT does not indicate that a qualitative, interview-based approach to measuring DBE availability is acceptable. Instead, consistent with the CFRs, USDOT provides that availability should be calculated using census data and "dividing the number of DBEs ready, willing and able to bid for the types of work you will fund this year, by the number of all firms (DBEs and non-DBEs) ready, willing, and able to bid for the types of work you will fund this year." USDOT does not allow for a sampling to be used; instead "all firms (DBEs and non-DBEs)" must be included in the measurement.

arbitrarily-created and unrepresentative data to deprive non-minority women of their fundamental rights provided to them by the Federal Government in the DBE program.

c. **Based on Its Unrepresentative Sample, BBC Drastically Underestimated the Availability of WBEs.**

Using its flawed "custom census" approach that is set forth in §1(b) above, BBC found that the availability of WBEs in Washington was very small. For example, BBC calculated that in 2011, WBEs were available for just 1.5% of the total contracting dollars for FHWA and state-funded construction and engineering work.¹³ BBC's purported "utilization" and "availability" percentages for WBEs in construction and engineering are summarized below:

Table 1:

BBC's Measurements For Construction and Engineering Contracts (FHWA and state-funded) ¹⁴		
Year	WBE Utilization	WBE Availability
2011	5.2%	1.5%
2010	7.7%	4%
2009	7.9%	4.4%

These extremely low availability ratings—just 1.5% for 2011—caused BBC to posit (incorrectly) that WBEs are able to do a very small percentage of work in Washington. BBC's proposition is facially incorrect and runs directly contrary to actual market conditions and WBEs' experiences of substantial disparities and barrier to entry.

According to the United States Census Bureau, women make up over half of the population in Washington (50.1%)—using common sense principals, therefore, if no disparity existed in federal transportation grants, WBEs therefore engage in roughly half of the federal contracting work, not just 1.5% as found by the researchers at BBC.

Furthermore, BBC provides no explanation for why WBE utilization is substantially higher (over 300%) than availability. Such a finding is illogical, counterintuitive, and should have prompted the researchers to either explain the glaring inconsistency or take steps to ensure that its methods were reliable and resulted in a sample that truly reflected the market place—which, in fact, they did not.

Finally, BBC's availability calculations are vastly out of range with other states'. For example, after a simple Google search, we found three other states' availability percentage calculations. See Table 2, below.

¹³ See Report at Appendix K at Figure K-7.

¹⁴ See Report at Appendix K, Figure K-5 to K-7 (columns (d) and (e)).

Table 2:

State	Industry	Availability
Illinois ¹⁵	Construction	10.85%
	Architecture and Engineering	12.61%
Missouri ¹⁶	Construction	15.87%
Oregon	Construction	11.96%
Washington ¹⁷	Construction and Engineering	1.5%

BBC presents no explanation for why its measurement of availability resulted in such small numbers. *Why is the availability of women-owned construction companies in Washington just 1.5% when it is 11.96% in Oregon, 15.87% in Missouri, and 10.85% in Illinois?* Further, BBC presents no rationalization for why WBE utilization exceeds availability by such a large degree in Washington.

BBC's analysis, findings, and, particularly, BBC's availability index run contrary to our clients' experience in field, are illogical and vastly different that other states' similar calculations. More importantly, BBC measured that both WBE utilization and availability have significantly decreased since 2009. See Table 1, above. To conclude from this data in Table 1 that WBEs should be excluded from Washington's DBE goals, and do not face disparities in the market, is absurd. WSDOT should reject BBC's flawed "study."

2. WSDOT'S PROPOSAL IS AN EXTREME AND UNNECESSARY MEASURE.

WSDOT's proposal to exclude non-minority women owned firms from its DBE goal is extreme, unnecessary, and—as explained above—based on BBC's unreliable data. The Federal Government designed the DBE program to further women's involvement in federal construction contracting and specifically mandated that women be included in the program. By seeking to exclude WBEs, WSDOT is depriving non-minority women of the right to participate in this program, directly contrary to the program goals provided in the CFRs and in violation of non-minority women's rights to equal protection under the laws of the United States.

Under the federal rules, WSDOT must engage in a goal-setting procedure that is based on "valid, applicable" data that is "rationally related to the relative availability of DBEs in [its] market." 49 CFR §26.45(c)(3) and (5). In its USDOT Tips, the USDOT provides that a state must "ensure" that its goal-setting process truly reflects the actual availability of ready, willing, and able DBEs in the local market.¹⁸ USDOT explains that a state must take "extra steps to ensure [its] list of DBEs and potential DBEs is accurate;" otherwise a state "may seriously underestimate the actual relative availability of DBEs."¹⁹ This is exactly what has happened

¹⁵ See <http://diversity.doi.illinois.gov/pdf/Presentation%202-24-13%20.pdf>

¹⁶ See [http://www.mndot.org/csr/documents/NGRAMODO\(D\)isparityStudyFinal3.pdf](http://www.mndot.org/csr/documents/NGRAMODO(D)isparityStudyFinal3.pdf)

¹⁷ See Report, Appendix K at Figure K-7.

¹⁸ See USDOT's Tips at Page 3, Paragraph C.

¹⁹ *Id.*

Brenda Nnambi
Lynn Peterson
January 9, 2014
Page 8

here: BBC has seriously underestimated the actual relative availability of WBEs in the relevant marketplace and all conclusions derived therefrom are flawed and unreliable.²⁰

The extreme measure of excluding WBEs from WSDOT's DBE goal is not necessary and not grounded on reliable data. WSDOT must—at the direction of USDOT—ensure that the data is reliable and truly representative of the Washington marketplace.

Unless WSDOT engages in the extra steps mandated by USDOT to ensure that BBC's analysis accurately reflects the true market, USDOT will likely reject its DBE goal-setting proposals. WSDOT must carefully examine the data in the Report, identify the flaws, and calculate a reliable availability percentage using appropriately-weighted census data and including all firms in the relevant market—not BBC's small subset derived using the "custom census" method. Only after engaging in these steps, may WSDOT submit a supportable proposal to USDOT.

We are satisfied that if WSDOT followed the federal mandate to ensure that its goal-setting process truly reflects the actual market, after even the slightest scrutiny of BBC's data WSDOT should reject the Report as not representative and unreliable.

3. FEDERAL LAW PROHIBITS WSDOT FROM EXCLUDING WBEs FROM ITS DBE GOAL.

In addition to being based on BBC's unreliable data, WSDOT is acting in excess of the authority granted to it by the Federal Government in seeking to exclude WBEs from the DBE goal. The Federal Government (through enactment of the CFRs governing this program) and the Ninth Circuit both require that women are presumed to be socially and economically disadvantaged and that a state cannot apportion its DBE utilization goal among different minority groups and cannot exclude one group entirely from the program. In taking this action, WSDOT is exposing itself—and, more importantly, Washington taxpayers—to the serious threat of potential litigation in the form of injunctive relief and damages.

a. Women are Presumed to be Socially and Economically Disadvantaged—this Presumption Cannot Be Waived.

Subpart A of the CFRs mandate that women are presumed to be socially and economically disadvantaged and included in the DBE Program goals. *See* 49 CFR §26.5(2). Similarly, Subpart D provides that "[each state] must rebuttably presume that citizens of the United States...who are women... are socially and economically disadvantaged individuals." 49 CFR §26.67(a)(1) ("Presumption of disadvantage").

²⁰ *See* Report at Chapter ES, Page 6, Figure ES-2 and Page 7, Figure ES-3. As a result of these small availability ratings, BBC found that women-owned firms ("WBEs") had very high "Disparity Index" numbers. For example, BBC measured a 200+ "Disparity Index" for WBEs in fiscal year 2011. From this disparity index rating, BBC found that WBEs were over-utilized and "did not show substantial disparities..." *See id.* The disparity index was flawed as it was calculating using an inaccurate availability index. *See* Footnote 7 for further explanation.

If a state can demonstrate "special or exceptional circumstances," it may seek a waiver of Subpart B or C of the governing CFR title (the administrative requirements or overall goals of the DBE Program). 49 CFR §26.15(a). A state may only waive the provisions provided in Subpart B or C; however:

[A state] can apply for a waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate a DBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of Subpart B or C of this part.

Id.

WSDOT's intention to seek a waiver (apparently under the authority of 49 CFR §26.15) to exclude all WBEs from participation in the overall DBE goal violates the CFRs. First of all, waivers may only be permitted when a state demonstrates "special or exceptional circumstances." WSDOT has not made such a showing and there is no evidence to supporting such a finding. Secondly, and more importantly, however, the waiver provision only applies to Subparts B and C. It does not provide WSDOT with the authority to waive the provisions in Subparts A and D, that women are presumed to be socially and economically disadvantaged. See 49 CFR §26.5(2)(Subpart A) and CFR 49 §26.67(a)(1)(Subpart D).

The Federal Government's waiver provisions do not permit WSDOT to exclude WBEs from its DBE goal. In attempting to do so, WSDOT is acting in excess of its authority and—instead of setting a goal that is consistent with the overall objectives of the program—WSDOT is seeking to rewrite the rules.²¹ It cannot take such action. WSDOT is legally precluded from taking this drastic and unnecessary action.

b. WSDOT Must Propose a DBE Goal that Encompasses All Minority Groups.

Congress provided states with the authority to set an "overall goal for DBE participation," but Congress specifically prohibited states from excluding certain groups from the goal. Under 49 C.F.R. § 26.45(g):

[each state's] overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals...

(emphasis added). And the Ninth Circuit expressly so held in the seminal *Western States* case:

[the CFRs] expressly prohibit States from apportioning their DBE utilization goal among different minority groups (e.g., allocating 5% to Black Americans, 3% to

²¹ See 64 FR 3096-01 "Waiver is for a situation where a recipient believes that it can better accomplish the objectives of the DBE program through means other than the specific provisions of part 26." Unilaterally eliminating groups that the Federal Government has provided to be presumptively socially and economically disadvantaged, based on unreliable data, does not "accomplish the objectives of the DBE program," as is required. *Id.*

Brenda Nnambi
Lynn Peterson
January 9, 2014
Page 10

Hispanic Americans, 0% to Asian Americans, etc.; rather, an undifferentiated goal that encompasses all minority groups is required").

W. States Paving Co., 407 F.3d at 990 (emphasis added). WSDOT is acting in direct violation of the CFRs and the *Western States* case.

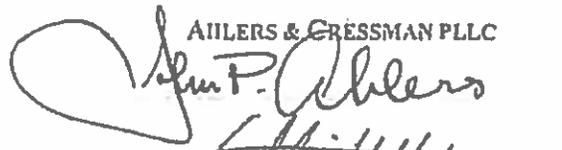
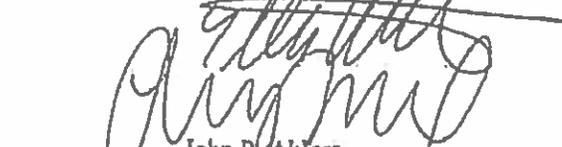
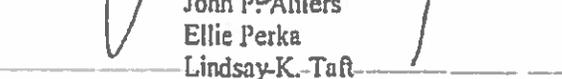
The only authority granted to the states by the Federal Government is that of goal setting—*i.e.*, WSDOT may determine, based on reliable data that truly reflects the relative market, what the appropriate overall goal for DBE participation shall be in this state. It may not, however, rewrite the DBE program or abrogate the Federal Government's presumption that women are "socially and economically" disadvantaged with regard to federal transportation contracting and therefore to be included in WSDOT's DBE program goals.

4. CONCLUSION

We urge WSDOT to reconsider its proposal to exclude WBEs from Washington's DBE goal. This proposal is 1) based on BBC's small subset of Washington businesses that does not reflect the true market place and is therefore flawed; 2) an extreme and unnecessary measure that likely will be rejected by USDOT; and 3) in violation of federal law, exposing WSDOT—and Washington taxpayers – to the serious threat of costly litigation.

Thank you for your consideration. We welcome the opportunity to meet and discuss our concerns prior to WSDOT's submittal to USDOT.

Sincerely,

AHLERS & GRESSMAN PLLC



John P. Ahlers
Ellie Perka
Lindsay-K. Taft

EWP:les

cc: Certified, Woman-Owned DBE Contractors
WIHC – Women in Highway Construction
Bob Ferguson Washington, Attorney General
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March 12, 2014

Elizabeth Waden Perka
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RE: Response to Ahlers & Cressman letter regarding the 2013 WSDOT Disparity Study and WSDOT's proposed overall DBE goal

Dear Ms. Perka:

Thank you for your letter (dated January 9, 2014) regarding the Washington State Department of Transportation's (WSDOT's) 2013 Disparity Study and WSDOT's implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. WSDOT will consider your letter as the agency implements the Federal DBE Program. This letter provides responses to the questions and comments presented in your letter. It also corrects the misrepresentations, factual inaccuracies, and erroneous interpretations that serve as the basis for the arguments presented in your letter. Our responses provide clear and accurate descriptions of the disparity study results; relevant case law; applicable federal regulations and guidance; and the changes that WSDOT is proposing to make to its implementation of the Federal DBE Program.

The 2013 WSDOT Disparity Study was conducted by BBC Research & Consulting (BBC).¹ BBC's methodology for conducting the study—including the availability analysis—has been specifically approved by the Ninth Circuit Court of Appeals in *AGC, San Diego Chapter v. California Department of Transportation (AGC, San Diego v. Caltrans)*.² The *AGC, San Diego v. Caltrans* case, which the Court decided in April 2013, is the most recent, relevant, and significant case in the Ninth Circuit and in the United States related to disparity studies and the implementation of the Federal DBE Program. The Ninth Circuit Court of Appeals completely held in favor of Caltrans and its implementation of the Federal DBE Program. In doing so, the Court approved BBC's 2007 disparity study and availability analysis in support of Caltrans' implementation of the Federal DBE Program.³ (The methodology that BBC used for the 2013 WSDOT Disparity Study was virtually identical to the methodology that BBC used for the 2007 Caltrans Disparity Study.) For details about the case, see Appendix B of the disparity study report. It is noteworthy that your letter and discussion of WSDOT's

¹ <http://www.wsdot.wa.gov/NR/rdonlyres/9F8E685A-9E47-4F13-AA79-E776AC0C576E/0/2012DBEProgramDisparityStudyFinalReport.pdf>

² *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. April 16, 2013).

³ http://www.dot.ca.gov/hq/hcp/study/Avail_Disparity_Study_Final_Rpt.pdf

implementation of the Federal DBE Program and of the 2013 WSDOT Disparity Study excludes any reference to *AGC, San Diego v. Caltrans* and to the Court's seminal decision.

BBC's court-approved availability analysis is based on responses to telephone surveys completed with thousands of businesses in the relevant geographic market area. Your letter incorrectly states that "BBC based its [availability] analysis on a small, arbitrary and unrepresentative sampling of Washington businesses (approximately 7% of the total firms identified using census data)." (*page 1 of your letter*) In addition, your letter incorrectly states that "BBC only interviewed 988 firms (~7%)." (*page 5 of your letter*) Those statements are inaccurate and misrepresent the detailed information that BBC presents in Chapter 5 and Appendix D of the disparity study report. As described in the disparity study report, BBC began the availability analysis by collecting information about business establishments from Dun & Bradstreet (D&B) Marketplace listings.⁴ BBC collected information about all business establishments—regardless of the race/ethnicity and gender of the owner—listed under 8-digit work specialization codes that were most relevant to the transportation contracts that WSDOT awarded during the study period (federal fiscal years 2009, 2010, and 2011).

D&B provided 14,528 business listings related to relevant work specialization codes. Of those listings, 10,560 had valid working phone numbers. BBC attempted to complete an availability telephone survey with each one of those business establishments and was able to successfully contact 4,784 of them, or 45.3% of the business establishments with valid working phone numbers. Of those business establishments, 3,335 completed an availability telephone survey (69.7%). Based on information from availability telephone surveys that the study team conducted with each of those 3,335 businesses, BBC determined which businesses could be considered "ready, willing, and able" for WSDOT work, consistent with the federal regulations, official USDOT guidance, and relevant case law. Each business had to meet the following criteria in order to be considered ready, willing, and able for WSDOT work:

- The business had to report being qualified and interested in performing relevant types of transportation-related work for WSDOT and other local agencies;
- The business had to report being able to perform work in the state of Washington (WSDOT's relevant geographic market area);
- The business had to report having bid on or performed work of sizes that are consistent with the sizes of the contracts that WSDOT awarded during the study period; and
- The business had to report an establishment date that preceded the award dates of WSDOT contract elements for which it might be considered available.

⁴ D&B Marketplace has been approved and accepted by the courts as the most comprehensive and unbiased source of business listings in the nation.

That approach to estimating availability is referred to as a “custom census” availability analysis. BBC’s custom census availability analysis methodology has been specifically approved by the Ninth Circuit Court of Appeals in *AGC, San Diego v. Caltrans*, other courts, and by USDOT and the United States Department of Justice (USDOJ).^{5, 6, 7, 8} Based on that approach, BBC determined that 988 of the surveyed businesses reported characteristics that deemed them potentially available (i.e., ready, willing, and able) for specific WSDOT transportation prime contracts and subcontracts. The fact that BBC identified 988 businesses as ready, willing, and able for WSDOT transportation contracts does not mean that BBC conducted surveys with only 988 businesses. To reiterate, BBC completed surveys with 3,335 businesses throughout the state of Washington, 988 of which reported characteristics that deemed them ready, willing, and able to perform on specific WSDOT prime contracts and subcontracts.

BBC’s custom census availability analysis is much more accurate than a “head count” approach to estimating availability. In your letter, you argue that in order to estimate relative availability an agency should “use census data to collect the number of all firms in a particular market (both DBEs and non-DBEs) and then simple division to arrive at a percentage of DBEs in the overall market.” (*page 4 of your letter*) That approach to estimating relative availability is called a “head count” approach. A head count approach has not been found to be sufficient by the courts in calculating relative availability or in determining whether there are disparities for particular DBE groups. In addition, federal regulations do not provide that a head count approach alone is an acceptable way to calculate relative availability for goal-setting purposes or for disparity study analyses.

Relevant case law has held that a proper availability analysis should take several different factors into account, including businesses’ primary lines of work and their capacity to perform on an agency’s contracts (e.g., *AGC, San Diego v. California Department of Transportation*; *Western States Paving Company v. Washington State DOT*; *Rothe Development Corp. v. U.S. Department of Defense*; and *DynaLantic Corp. v. United States Dept. of Defense, et al.*).⁹ BBC’s custom census availability approach accounted for various relevant factors including type of work, size of contracts, geographic locations

⁵ *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C. Aug. 15, 2012), *appeal pending*, United States Court of Appeals for the District of Columbia, Docket Number 12-5330.

⁶ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, U.S.D.C., E.D. Cal. Civil Action No. S-09-1622, Slip Opinion (E.D. Cal. April 20, 2011), *appeal dismissed, on other grounds Ninth Circuit held Caltrans’ DBE Program constitutional, Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. April 16, 2013).

⁷ *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.*, 2013 WL 4774517 (D. Mont.) (September 4, 2013).

⁸ Brief for the United States as Amicus Curiae Supporting Appellees (California DDT) (filed 2/9/12), at pages 15, 23, 24, fn 8, 26, 27, 28, submitted in the appeal of *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, Appeal No. 11-1622B, United States Court of Appeals for the Ninth Circuit.

⁹ *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

of WSDOT work, relative capacity of businesses, and businesses' qualifications and interest in working for WSDOT. For details, see Chapter 5 and Appendix D of the disparity study report. BBC's availability approach is consistent with, and specifically supported by, relevant case law, the federal regulations, and official USDOT guidance. For details, see Appendix B of the disparity study report.

BBC's custom census availability approach is a census and did not involve sampling. Throughout your letter, you incorrectly suggest that BBC used sampling procedures to conduct the availability analysis (e.g., referring to "BBC's sampling" on page 2 of your letter and to "very small sampling" on page 5 of your letter). As described above and in detail in the disparity study report, BBC used a custom *census* availability approach that did not involve sampling (for details, see Chapter 5 and Appendix D of the disparity study report). Rather than drawing a sample of businesses, the study team attempted to contact each and every business establishment listed under 8-digit work specialization codes that were most relevant to the transportation contracts that WSDOT awarded during the study period. Because each and every relevant business establishment listed in D&B Marketplace was given an equal opportunity to participate in the availability telephone survey, research standards would consider BBC's availability analysis as representative and reflective of true conditions throughout the entire relevant geographic market area.

WSDOT does not propose to exclude women-owned DBEs from its overall DBE goal or from its implementation of the Federal DBE Program. Your letter improperly states that "WSDOT need not take the extreme, and unsupportable action of excluding [women-owned businesses] from the DBE program goal." (*page 1 of your letter*) Your letter then states that, "While the Federal Government has given each state the authority to set state-specific DBE goals, the Government provided no authority for states to rewrite the DBE program by excluding an entire subgroup deemed by the Government to be socially and economically disadvantaged." (*page 2 of your letter*) Your letter misconstrues the Federal DBE Program and the federal regulations promulgated to implement the program. Your letter also confuses WSDOT's overall DBE goal with the race- and gender-conscious measures (i.e., DBE contract goals) that WSDOT uses to meet a portion of its overall DBE goal. The descriptions below clarify that apparent confusion.

a. The Federal DBE Program. The Federal DBE Program is a program designed to increase the participation of minority- and women-owned businesses in USDOT-assisted contracts. The program presumes that businesses owned and operated by individuals of certain racial/ethnic and gender groups are socially and economically disadvantaged—Asian-Pacific American-owned businesses, Black American-owned businesses, Hispanic American-owned businesses, Native American-owned businesses, Subcontinent Asian American-owned businesses, and women-owned businesses. WSDOT is not proposing to exclude women-owned businesses from its implementation of the Federal DBE Program.

Consistent with the federal regulations, WSDOT will continue to presume that women-owned businesses are a socially and economically disadvantaged group.¹⁰ As such, women-owned DBEs are still included as part of WSDOT's implementation of the Federal DBE Program. WSDOT will continue to encourage the participation of all women-owned DBEs in its contracting through various measures and will continue to monitor the participation of women-owned businesses in its USDOT-funded contracting.

b. Overall DBE Goal. As part of the Federal DBE Program, every three years, an agency is required to set an overall goal for DBE participation in its USDOT-funded contracts. The agency must monitor DBE participation in its USDOT-funded contracts and attempt to meet its overall DBE goal on an annual basis. WSDOT is not proposing to exclude women-owned DBEs from its overall DBE goal. The availability of women-owned DBEs was considered when WSDOT set its new proposed overall DBE goal. In addition, WSDOT will continue to encourage the participation of all women-owned DBEs in its contracting through various measures. Moreover, the participation of women-owned DBEs in WSDOT's USDOT-funded contracts will count toward meeting the agency's overall DBE goal in each federal fiscal year.

In addition, your letter states that "a state may not set a DBE goal that differentiates between different subgroups (i.e., the goal may not contain a different percentage participation by WBEs versus other minority firms)." (*page 2 of your letter*) That statement indicates a misunderstanding of the federal regulations. To clarify, the federal regulations actually state: "[An agency's] overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals."¹¹ As clearly stated in *WSDOT's Disadvantaged Business Enterprise (DBE) Program Proposed Amended Three-Year Overall Goal & Methodology for Federal Fiscal Years 2014 and 2015 through 2017*, WSDOT is proposing only one figure for its new overall DBE goal—11.6%.¹² That 11.6% goal will not be subdivided into group-specific goals. In addition, the participation of all certified DBEs—including women-owned DBEs—will count toward meeting WSDOT's overall DBE goal in each federal fiscal year, wholly consistent with the federal regulations.

Furthermore, with regard to WSDOT's overall DBE goal, your letter erroneously states that it is WSDOT's intention "to exclude all WBEs from participation in the overall DBE goal..." As stated above, WSDOT is not proposing to exclude women-owned DBEs from its overall DBE goal. It is proposing only to request a waiver to limit its use of race- and gender-conscious measures to those DBE groups for which compelling statistical evidence of discrimination exists in the relevant geographic market area. Those groups do not include women-owned DBEs at this time. WSDOT's race- and gender-conscious

¹⁰ 49 CFR Part 26.5.

¹¹ 49 CFR Part 26.45(h).

¹² <http://www.wsdot.wa.gov/NR/rdonlyres/677FABAA-4360-4886-9F2C-B0DD5EF148E/D/FHWAOverallDBEGoalandMethodologyDRAFT.pdf>

measures are a means to meet a portion of its overall DBE goal. Race- and gender-conscious measures that WSDOT uses to meet a portion of its overall DBE goal should not be confused with the overall DBE goal itself.

c. Race- and gender-neutral and race- and gender-conscious measures. As part of the Federal DBE Program, in order to meet its overall DBE goal each year, an agency must encourage the participation of DBEs in its USDOT-funded contracts through the use of race- and gender-neutral measures and, if necessary, race- and gender-conscious measures (or a combination of both).¹³ Race- and gender-neutral measures are measures that are designed to remove potential barriers for all businesses attempting to do work with the agency or measures specifically designed to increase the participation of small or emerging businesses (including many minority- and women-owned businesses). Race- and gender-conscious measures are measures that are specifically designed to increase the participation of DBEs and minority- and women-owned businesses. The only race- and gender-conscious measure that WSDOT uses as part of its implementation of the Federal DBE Program is applying DBE contract goals to specific USDOT-funded contracts. As part of that measure, the agency sets condition-of-award DBE participation goals on individual contracts. DBE contract goals are a race- and gender-conscious measure that WSDOT uses to meet a portion of its overall DBE goal. Again, WSDOT's use of DBE contract goals should not be confused with the overall DBE goal itself.

Based on all available evidence and information as well as on relevant case law, the federal regulations, and official USDOT guidance, WSDOT proposes to limit its use of race- and gender-conscious measures to those DBE groups for which compelling statistical evidence of discrimination exists in the relevant geographic market area. Those groups do not include women-owned DBEs at this time. However, women-owned DBEs will continue to be eligible for all of the race- and gender-neutral measures that WSDOT uses and will be eligible to participate in all WSDOT contracting. In addition, as described above, women-owned DBEs will still be included as part of WSDOT's overall DBE goal and as part of WSDOT's implementation of the Federal DBE Program.

WSDOT is acting in compliance with relevant case law, the federal regulations, and official USDOT guidance regarding the participation of women-owned DBEs. Although your letter inaccurately states that WSDOT proposes to exclude women-owned DBEs from its overall DBE goal (as described above, the agency is not proposing to do so), it is nonetheless instructive to describe the support for what WSDOT actually proposes to do. Based on all available evidence and information, relevant case law, the federal regulations, and official USDOT guidance, WSDOT proposes to limit its use of race- and gender-conscious measures to those DBE groups for which compelling statistical evidence of discrimination exists in the relevant geographic market area. More specifically, WSDOT proposes to limit its use of race- and gender-conscious measures to

¹³ 49 CFR Sections 26.45, 26.51; Agencies are required to maximize their use of race- and gender-neutral measures to meet their overall DBE goals.

those DBE groups for which substantial disparities exist between utilization and availability on key sets of WSDOT contracts.

The 2013 WSDOT Disparity Study showed substantial disparities between utilization and availability on key sets of WSDOT contracts for the following DBE groups: Black American-owned businesses, Asian-Pacific American-owned businesses, Hispanic American-owned businesses, Native American-owned businesses, and Subcontinent Asian American-owned businesses. In general, the disparity study did not show substantial disparities between utilization and availability for non-Hispanic white women-owned businesses.¹⁴ WSDOT will request a waiver from USDOT to consider women-owned businesses as ineligible to participate in any race- and gender-conscious measures. For details, see Appendix K of the disparity study report and *WSDOT's Disadvantaged Business Enterprise (DBE) Program Proposed Amended Three-Year Overall Goal & Methodology for Federal Fiscal Years 2014 and 2015 through 2017*.

WSDOT's decision to request a waiver to consider women-owned DBEs as ineligible at this time to participate in the agency's race- and gender-conscious measures is wholly consistent with relevant case law, the federal regulations, and official USDOT guidance. It is not, as erroneously stated in your letter, "in violation of federal law." (*page 2 of your letter*) Relevant court decisions, the federal regulations, and official USDOT guidance support WSDOT's proposal to consider women-owned DBEs as ineligible at this time for the agency's race- and gender-conscious measures. For example, *USDOT's Official Questions and Answers (Q&A's) Regarding the Disadvantaged Business Enterprise Program Regulation (49 CFR 26)* provides that the Ninth Circuit Court of Appeals in *Western States Paving Company v. Washington State DOT (Western States Paving v. WSDOT)* determined that:

*Whether race-based measures are needed depends on the presence or absence of discrimination or its effects in a state's transportation contracting industry. In addition, even when discrimination is present in a state, a program is narrowly tailored if its application is limited to those specific groups that have actually suffered discrimination or its effects.*¹⁵

USDOT's Official Questions and Answers (Q&A's) Regarding the Disadvantaged Business Enterprise Program Regulation (49 CFR 26) also provides that an agency, in determining which groups have actually suffered discrimination, can use information from a disparity study that "quantif[ies] the magnitude of any differences between DBE availability and participation... ." Furthermore, the federal regulations provide that agencies "can apply for a waiver of any provision of Subpart B or C of [49 CFR Part 26]

¹⁴ DBEs that are owned by minority women will still be eligible to participate in WSDOT's race- and gender-conscious measures if they are DBE-certified along with their corresponding minority groups.

¹⁵ *United States Department of Transportation Official Questions and Answers (Q&A's) Disadvantaged Business Enterprise Program Regulation (49 CFR 26)*, <http://www.dot.gov/odhu/disadvantaged-business-enterprise/official-questions-and-answers-26>

including, but not limited to, any provisions regarding the administrative requirements, overall goals, contract goals or good faith efforts.”¹⁶ WSDOT is proposing to request a waiver for a provision only in Subpart B—specifically, provisions in 49 CFR Part 26.51. WSDOT is not proposing to request a waiver for any provisions in Subpart A or D, as erroneously suggested in your letter. (*page 9 of your letter*)

Moreover, several key court decisions have found that an implementation of the Federal DBE Program can be considered narrowly tailored—and thus constitutionally valid—only if race- and gender-conscious measures are limited to those groups for which evidence of discrimination exists. Examples of those court decisions include:

- *AGC, San Diego v. Caltrans*;
- *Western States Paving v. WSDOT*;¹⁷ and
- *H.B. Rowe v. Tippett*.¹⁸

In *AGC, San Diego v. Caltrans*, the Ninth Circuit Court of Appeals considered whether Caltrans' implementation of the Federal DBE Program was narrowly tailored with regard to its use of race- and gender-conscious measures. Caltrans limited its use of race- and gender-conscious measures to those groups for which the BBC disparity study showed substantial disparities between utilization and availability on Caltrans contracts. The Court found that Caltrans' use of race- and gender-conscious measures:

*... is limited to those minority groups that have actually suffered discrimination... . The 2007 [BBC] disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. These disparities support an inference of discrimination against those groups... . California applied for and received a waiver in order to limit its 2009 preference program to African American, Native American, Asian-Pacific American, and women-owned firms. Caltrans' program adheres precisely to the narrow tailoring requirements of Western States.*¹⁹

The courts also have made it clear that anecdotal evidence alone is not sufficient to indicate the presence of discrimination or its effects and that statistical evidence is necessary (e.g., *AGC, San Diego v. Caltrans*; *Western States Paving v. WSDOT*; *H.B. Rowe v. Tippett*). For example, in *H.B. Rowe v. Tippett*, the Court ruled that the North Carolina Department of Transportation (NCDOT) did not provide an “exceedingly

¹⁶ 49 CFR Part 26.15(b).

¹⁷ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

¹⁸ *H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al.*, 615 F.3d 233 (4th Cir. 2010).

¹⁹ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. April 16, 2013).

persuasive justification" for including women-owned businesses in its use of race- and gender-conscious measures, because the statistical evidence did not support an inference of discrimination against women-owned businesses. The Court found that there was strong evidence of overutilization of women-owned businesses in the public sector. As a result, the court held that NCDOT's inclusion of women-owned businesses in its use of contract goals was invalid. The Court thus held that NCDOT's implementation of its program as applied to women-owned businesses was unconstitutional.²⁰

USDOT suggests various data sources that an agency could use to measure relative availability and does not recommend that an agency should just use U.S. Census data. Your letter states that in "Tips for Goals Setting [*sic*] in the Disadvantaged Business Enterprise (DBE) Program ... USDOT provides detailed instructions on goal-setting." (*page 3 of your letter*) Your letter also suggests that, according to USDOT, agencies must use census data as a basis for their availability analyses. (*page 1 and page 3 of your letter*) Those statements are inaccurate and misrepresent the guidance provided in USDOT's *Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program (Tips for Goal-Setting)*. First, your letter demonstrates a fundamental misunderstanding of the intent of *Tips for Goal-Setting*. *Tips for Goal-Setting* is not intended to be a prescriptive or exhaustive document for how an agency should calculate availability. In the opening paragraph, USDOT states: "This [document] is not intended to represent an exhaustive list of techniques for goal-setting. ... Nor is this an exhaustive explication of all of the subjects related to goal setting covered in the rule. This document is intended only to provide you with some additional guidance as you set goals."²¹ Moreover, *Tips for Goal-Setting* does not discuss how to conduct an availability analysis for a disparity study. It is written to give agencies that have different resources and different objectives guidance about various ways they could consider setting their overall DBE goals.

Second, USDOT does not state in *Tips for Goal-Setting* or in other official guidance that "each state should use census and other data" to calculate availability, as erroneously stated in your letter (*page 3 of your letter*). In fact, in *Tips for Goal-Setting*, USDOT lists myriad data sources that agencies could consider using in calculating relative availability including "bidders list, census data and DBE directory, disparity study, alternative method, etc.)" Importantly, USDOT indicates that census data "represent all firms in your area whether or not they are ready, willing and able to perform DOT-assisted contracts." In other words, USDOT does not consider U.S. Census data alone as an accurate source for determining which firms in a relevant geographic market area are ready, willing, and able (i.e., available) for an agency's contracts. USDOT indicates that an agency should

²⁰ Although the state presented anecdotal evidence that suggested the existence of gender-based discrimination in the local marketplace, the Court ruled that the anecdotal evidence did not overcome the statistical evidence of overutilization of women-owned businesses, and it fell short of justifying NCDOT's inclusion of women-owned businesses in its use of contract goals.

²¹ <http://www.dot.gov/osdhu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

go beyond U.S. Census data to determine which businesses are ready, willing, and able to perform on the agency's contracts. USDOT in Section III of *Tips for Goal-Setting* specifically lists "evidence from disparity studies" as information that agencies could use to ensure that its overall DBE goal is "as precise as possible."

BBC used a custom census approach to measuring availability, which is approved and accepted by the courts and other authorities. Your letter erroneously states that "BBC did not utilize a commonly-accepted methodology for calculating availability...." BBC's custom census availability analysis provided WSDOT with accurate estimates of the relative availability of minority- and women-owned businesses for WSDOT transportation prime contracts and subcontracts. BBC's custom census approach to measuring availability has been approved by the Ninth Circuit Court of Appeals, the United States District Court for the Eastern District of California, USDOT, and the United States Department of Justice (USDOJ). In addition, in *AGC, San Diego v. Caltrans*, Caltrans recently defended its implementation of the Federal DBE Program, which was based in substantial part on a BBC disparity and availability study that used a methodology that was virtually identical to that of the 2013 WSDOT Disparity Study. Below are some examples of the approval that BBC's disparity and availability study methodology has received:

- The Ninth Circuit Court of Appeals held that Caltrans' use of race- and gender-conscious measures "is limited to those minority groups that have actually suffered discrimination. ... The 2007 [BBC] disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. These disparities support an inference of discrimination against those groups. ... California applied for and received a waiver in order to limit its 2009 preference program to African American, Native American, Asian-Pacific American, and women-owned firms. Caltrans' program adheres precisely to the narrow tailoring requirements of *Western States*."
- The Ninth Circuit Court of Appeals found that BBC's 2007 disparity study for Caltrans gathered extensive data to calculate relative availability in the California transportation contracting industry. The Court stated: "Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, [BBC] concluded that minority- and women-owned businesses should be expected to receive 13.5% of contact dollars from Caltrans administered federally assisted contracts."
- The Ninth Circuit Court of Appeals also found that BBC's 2007 disparity study for Caltrans "accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs."
- USDOT and USDOJ, in the *amicus curiae* brief that they submitted in connection with *AGC, San Diego v. Caltrans* and in support of Caltrans, said that BBC engaged in a "methodically sound disparity study" that included "robust statistical analysis

(that was missing in *Western States Paving v. WSDOT*.)” USDOT and USDOJ also referred to the “sufficiency of BBC’s study methodology” that “indisputably takes into account the considerations identified by USDOT regulations....” USDOT and USDOJ specifically cited the fact that BBC’s availability analysis “[took] into account factors that may affect the relative capacity of DBEs to undertake contracting work” in stating their approval.

- The United States District Court for the Eastern District of California held in April 2011 that Caltrans’ current implementation of the Federal DBE Program is constitutional and that the information on which Caltrans based its implementation of the program—the 2007 BBC disparity study—is sound and valid: “Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry.”
- The United States District Court for the Eastern District of California also held that Caltrans’ implementation of the program was “supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law.” (Caltrans limits its use of race- and gender-conscious measures to those DBE groups that exhibited substantial disparities between utilization and availability, as WSDOT proposes to do.)
- The United States District Court for the Eastern District of California also stated, “[The BBC] disparity study used by Caltrans was much more comprehensive and accounted for [relative capacity] and other factors... . The disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well, and this evidence before the Court clearly supports a finding that this program is constitutional.”

Your letter also erroneously states that BBC’s availability analysis methodology is “only generally described in the Report.” (*page 5 of your letter*) On the contrary, BBC’s availability analysis methodology and results are described in extensive detail in Chapter 5 and Appendix D of the disparity study report.

The results of the availability analysis indicate that, among all DBE groups, women-owned businesses exhibit the highest relative availability. Your letter erroneously states that “BBC found that the availability of WBEs in Washington was very small.” As an example, your letter arbitrarily cites availability results for federal fiscal year 2011: “BBC calculated that in 2011, WBEs were available for just 1.5% of the total contracting dollars for FHWA and state-funded construction and engineering work.” Contrary to the claims in your letter, the availability analysis results indicated that, in general, non-Hispanic white women-owned businesses have the highest availability among all minority- and women-owned business groups, including for the contract set that your

letter arbitrarily cites as an example (see Table K-7 in Appendix K of the disparity study report, which presents results for FHWA- and state-funded prime contracts and subcontracts in 2011).

Availability estimates for non-Hispanic white women-owned businesses ranged as high as 8.3% on certain contracts sets (see Figure K-30 in Appendix K of the disparity study report, which presents results for FHWA- and state-funded engineering subcontracts across the study period). The only contract sets for which non-Hispanic white women-owned businesses did not exhibit the highest availability among all groups is for FHWA- and state-funded prime contracts across the study period (see Table K-25 in Appendix K of the disparity study report); FHWA- and state-funded construction prime contracts across the study period (see Table K-26 in Appendix K of the disparity study report); and large FHWA- and state-funded prime contracts across the study period (see Table K-38 in Appendix K of the disparity study report).

One potential reason why minority- and women-owned business groups—including non-Hispanic white women-owned businesses—exhibited relatively low availability in the single, arbitrarily-chosen example that you cite in your letter is because in 2011 WSDOT awarded contract elements that tended to be much larger in size than in 2009 and 2010. The average size of contract elements that WSDOT awarded in 2011 was \$968,000, compared to \$449,000 in 2010 and \$328,000 in 2009 (see Tables K-5, K-6, and K-7 in Appendix K of the disparity study report). A pervasive result in availability analyses that properly account for the relative capacity of businesses is that, in general, the availability of minority- and women-owned businesses decreases as contract size increases. That result is due to the fact that a substantial percentage of minority- and women-owned businesses tend to be relatively small and tend to exhibit relatively low capacities.

Your letter also makes the following flawed and legally erroneous argument: “According to the United States Census Bureau, women make up over half of the population in Washington (50.1%)—using common sense principals, therefore, if no disparity existed in federal transportation grants, WBEs [*sic*] therefore engage in roughly half of the federal contracting work, not just 1.5% as found by the researchers at BBC.”²² (*page 6 of your letter*) Relevant case law—in particular, the landmark U.S. Supreme Court decision in *City of Richmond v. Croson*—specifically prohibits and warns against using population statistics when estimating relative availability.²³

²² The 50.1% figure that your letter cites includes all women in the state of Washington. BBC’s assessment of women-owned businesses in the availability analysis pertains to non-Hispanic white women-owned businesses. Non-Hispanic white women only make up 36% of the working adult population in the state of Washington. But regardless of that error, and for the reasons explained above, the entire basis of a population-based argument for measuring relative availability is incorrect and flawed.

²³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

In *City of Richmond v. Croson*, the City of Richmond set a participation quota of 30% for minority-owned businesses based in part on the fact that 50% of the city's population was made up of minorities. The Supreme Court held that the City of Richmond's quota was unconstitutional. The Court found that, "Reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is ... misplaced." The Court also held that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." In addition, the Court held that, "... where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." The Supreme Court further held that "the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."

Based on the Supreme Court's decision in *City of Richmond v. Croson* and on court decisions that have followed *City of Richmond v. Croson*, it is well-established as a matter of law that availability analyses should be based on the percentage of an agency's contracting dollars for which businesses are ready, willing, and able to perform and *not* on population statistics. As described above, that argument has been rejected by the U.S. Supreme Court and by other courts in subsequent court decisions. It is thus noteworthy that your letter includes an argument for measuring relative availability using population statistics.

Your letter then makes misguided comparisons between the relative availability of women-owned businesses for a single, arbitrarily chosen set of WSDOT contracts (FHWA- and state-funded prime contracts and subcontracts in 2011) to availability estimates for different contract sets for different agencies from different studies in different geographical market areas. There are several reasons why such comparisons are inappropriate. For example:

- Different geographical market areas have different contracting environments and marketplace conditions, and those differences can have substantial effects on estimates of relative availability. For example, Initiative 200 amended Washington state law to prohibit government agencies from applying race- and gender-conscious measures to state-funded contracts.²⁴ There is evidence that Initiative 200 has depressed the availability of minority- and women-owned businesses in the

²⁴ RCW 49.60.400(1).

Washington transportation contracting industry (e.g., see Chapter 4 and Appendix J of the disparity study report). Because analogous laws may not exist in other geographical market areas such as Illinois, Missouri, and Oregon, it is inappropriate to make comparisons of availability analysis results across those geographical market areas. In accordance with that point, the federal regulations and relevant case law require that proper availability analyses are tailored specifically to an agency's relevant geographic market area (see e.g., *Western States Paving v. WSDOT, AGC, San Diego vs. Caltrans*, and *Northern Contracting, Inc. v. Illinois DOT*).²⁵

- Different agencies award different types and sizes of contracts, and those differences can have substantial effects on estimates of relative availability. For example, Table 2 in your letter presents the relative availability of non-Hispanic white women-owned businesses from Illinois (10.85%).²⁶ That availability figure was for Illinois Department of Transportation (IDOT) construction prime contracts worth less than \$500,000. The availability figure to which you arbitrarily compare it from the 2013 WSDOT Disparity Study was for construction and engineering prime contracts and subcontracts of all different sizes. If one limits that comparison to results for WSDOT construction prime contracts worth less than \$500,000, then the relative availability of non-Hispanic white women-owned businesses is 9.05%. That example illustrates why the federal regulations and relevant case law require that proper availability analyses are tailored specifically to the actual contracts that an agency awarded (see e.g., *Western States Paving v. WSDOT, AGC, San Diego vs. Caltrans*, and *Northern Contracting, Inc. v. Illinois DOT*). It also illustrates why it is generally inappropriate to compare availability analysis results across different agencies.
- Different disparity study firms use different methodologies to estimate availability, which can have substantial effects on availability analysis results. For example, the disparity study firm that produced the availability estimate that your letter presents for the Missouri Department of Transportation (MoDOT) in Table 2 does not take relative capacity into account when estimating availability.²⁷ Not taking relative capacity into account can result in artificially high estimates of relative availability. BBC takes relative capacity and myriad other factors into account when estimating relative availability, consistent with the federal regulations and relevant case law (e.g., *Western States Paving v. WSDOT, AGC, San Diego v. Caltrans, Rothe Development Corp. v. U.S. Department of Defense*, and *DynaLantic Corp. v. United States Dept. of Defense, et al.*).
- Different study period years can also have substantial effects on availability analysis results. The availability analysis that BBC conducted for WSDOT was based on contracts that the agency awarded in federal fiscal years 2009, 2010, and 2011 (i.e., October 1, 2008 through September 30, 2011), which was during the 2009 economic

²⁵ *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007).

²⁶ <http://diversity.dot.illinois.gov/pdf/Presentation%202-24-12%20.pdf>, Slide 13.

²⁷ <http://www.modot.org/ecr/documents/NERAMODOTDisparityStudyFinal3.pdf>

downturn. There is evidence that the economic downturn depressed the availability of minority- and women-owned businesses in the Washington transportation contracting industry and nationwide (e.g., see Chapter 4 and Appendix J of the disparity study report). The availability estimates that your letter presents in Table 2 come from studies that are based on contracts that were largely awarded prior to the economic downturn, a period of time during which the relative availability of minority- and women-owned businesses was likely much higher all across the nation. For example, the availability estimate for Missouri comes from a study that was based on contracts that MoDOT awarded in federal fiscal years 2005 through 2009. The availability estimate for Illinois comes from a study that was based on contracts that IDOT awarded in 2006 through 2008.

For those and other reasons, one must exercise great caution when comparing relative availability estimates across different contract sets, different agencies, different studies, and different geographical market areas. Not doing so can result in inappropriate and misleading conclusions about relative availability.

Once again, thank you for your letter regarding WSDOT's 2013 Disparity Study and WSDOT's implementation of the Federal DBE Program. This letter has provided sufficient responses to all of your questions and comments. We hope that you have gained a clearer, more accurate understanding of the disparity study results; relevant case law; applicable federal regulations and guidance; and the changes that WSDOT is making to its implementation of the Federal DBE Program. If you have any additional questions or comments, please do not hesitate to contact us.

Sincerely,



Brenda Nnambi
Director
Office of Equal Opportunity

BRN:bbc:erm

cc: Bob Ferguson, Attorney General
Lynn Peterson, Secretary of Transportation
Alexis Oliver, Director, OMWBE



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February 3, 2014

Via Email and Regular Mail

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 EQUAL OPPORTUNITY

Re: AGC Comments on Disadvantaged Business Enterprise (DBE) "Goal and Eligibility" Changes

Dear Sir/Madam:

On behalf of The Associated General Contractors of Washington (AGC), I am pleased to submit the following comments in relation to the Department's recent decision in relation modify its DBE goal and to seek a waiver that would prevent white women business enterprises from counting towards said goal.

The AGC is supportive of the policies and ideals behind assuring opportunities to minority and women owned contractors. It is the AGC's very purpose for existence - to develop and support capable and competitive contractors.

For the reasons stated below, the AGC also believes it is absolutely imperative that setting a DBE goal complies with both legal requirements and with practical considerations. The AGC believes that doing so provides credibility to the DBE program and also provides minority and women owned contractors with reasonable and rational opportunities which help those firms to become fully functional and competitive contractors. The focus should not be on delivering certain monetary levels of contracts to DBE's, but should instead be ensuring that qualified DBE's are given fair and open opportunities to compete based upon demonstrated skill and historical capacity.

Lastly, the AGC questions the validity of the data supporting any finding that women owned businesses should be removed from DBE certification.

Lack of Capability and Capacity Evaluation. In keeping with the holding of Western States Paving v. WSDOT, 407 F.3d 983 (2005), the Department is required to take into consideration both the capability and capacity of minority and women owned companies when making its disparity analysis.

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Page 2 of 4

This oversimplified statistical evidence is entitled to little weight, however, because it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work. Indeed, the fact that DBEs constitute 11.17% of the Washington market does not establish that they are able to perform 11.17% of the work. See *Md. Troopers Ass'n v. Evans*, 993 F.2d 1072, 1077(4th Cir.1993) ("Inferring past discrimination from statistics alone assumes the most dubious of conclusions: that the true measure of racial equality is always to be found in numeric proportionality."). DBE firms may be smaller and less experienced than non-DBE firms (especially if they are new businesses started by recent immigrants) or they may be concentrated in certain geographic areas of the State, rendering them unavailable for a disproportionate amount of work. See *Coral Constr. Co. v. King County*, 941 F.2d 910, 919(9th Cir.1991) ("Statistical evidence often does not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral."); *Associated Gen. Contractors of Ohio, Inc.*, 214 F.3d at 736 ("If [minority-owned firms] comprise 10% of the total number of contracting firms in the state, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete."); *O'Donnell Constr. Co.*, 963 F.2d at 426(holding that the small proportion of D.C. public contracts awarded to minority-owned firms did not establish discrimination because "[m]inority firms may not have bid on ... construction contracts because they were generally small companies incapable of taking on large projects; or they may have been fully occupied on other projects; or the District's contracts may not have been as lucrative as others available in the Washington metropolitan area; or they may not have had the expertise needed to perform the contracts; or they may have bid but were rejected because others came in with a lower price."). The State's statistical evidence controls for none of these factors.

Western States Paving, at 1000-1 (Emphasis added).

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Page 3 of 4

As can be seen, it is a DBE's objective individual capacity and capability to perform that is critical to the analysis and calculation of the DBE goal. This is of particular concern when one considers that the majority of DBE contractors are located within the central Puget Sound area and are being simultaneously recruited to fulfill DBE requirements associated with the federally required performance on Sound Transit's construction projects.

Our reading of the disparity study is that this type of analysis was not been done. There has been no analysis of minority and women contractors' qualifications or their capacity to absorb WSDOT work other than by subjective survey and self-identification means. Again, this has to the best of our knowledge not been done with consideration that these DBE contractors will most likely also have their availability and capacity impacted by the competing requirements of Sound Transit's projects. This being the case, the AGC believes that a proper objective analysis of true market conditions would have resulted in an overall DBE goal that would be reduced from what is currently being proposed.

In addition to being legally required, the AGC also believes that this absent analysis is critical to the success of the DBE program, to the applicable WSDOT projects, and, ultimately, to the success of the minority and women contractors themselves. Placing minority and women owned contractors into work place environments that they are either incapable of performing technically or from performing functionally sets them up for failure. Any such failure discredits the program, creates hardship for the project, and causes general contractors to carry unwarranted and unnecessary contractual risk for such nonperformance.

Too High of Goals Incentivizes Bad Actors

Lastly with regards to the overall DBE goal, the AGC believes that an overall DBE goal that is legally and/or practically unworkable incentivizes parties to act improperly. This neither helps the DBE program, WSDOT projects, nor the minority and women contractor community. We have recently seen the outcomes of when this occurs. DBE's that are not necessarily qualified or capable are incentivized to not provide any meaningful function and act as conduits while others are incentivized to obtain DBE certification improperly to be able to compete for work. Again, this helps nobody.

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ASSOCIATED GENERAL CONTRACTORS of WASHINGTON

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February 3, 2014

Brenda Nnambi
Lynn Peterson
Page 4 of 4

Women Owned Businesses

To the extent DBE requirements are imposed by the Department, the AGC believes that the WSDOT's decision to seek a waiver that would disallow women owned businesses from the list of certified DBEs and therefore counting against DBE project goals is unwarranted and improper.

With the permission of its authors, the AGC hereby references and incorporates herein as if fully set forth the letter of Ahlers & Cressman, PLLC, dated January 9, 2014, a copy of which is attached hereto. The AGC adopts the same comments and objections as are set forth in said letter as its own.

Thank you for your consideration

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March 20, 2014

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**Re: Response to AGC letter regarding WSDOT's implementation of
the Federal DBE Program**

Dear Mr. Collins:

Thank you for your letter (dated February 3, 2014) regarding the Washington State Department of Transportation's (WSDOT's) 2013 Disparity Study and WSDOT's implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. A substantial portion of your letter appears to question the disparity study results by suggesting that the disparity study and WSDOT's implementation of the Federal DBE Program do not follow the Ninth Circuit Court of Appeals' 2005 decision in *Western States Paving v. Washington State DOT (Western States Paving v. WSDOT)*.¹ The 2013 WSDOT Disparity Study was conducted by BBC Research & Consulting (BBC).² BBC's methodology for conducting the study has been approved by the Ninth Circuit Court of Appeals' decision in *AGC, San Diego Chapter v. California Department of Transportation (AGC, San Diego v. Caltrans)*.³ The Court found that the study satisfies and complies with the Court's ruling in *Western States Paving, v. WSDOT*.

The *AGC, San Diego v. Caltrans* case, which the Court decided in April 2013, is the most recent, relevant, and significant case in the Ninth Circuit and in the United States related to disparity studies and the implementation of the Federal DBE Program. The Ninth Circuit Court of Appeals completely held in favor of Caltrans and its implementation of the Federal DBE Program. In doing so, the Court approved BBC's disparity study in support of Caltrans' implementation of the Federal DBE Program.⁴ (The methodology that BBC used for the 2013 WSDOT Disparity Study was virtually identical to the methodology that BBC used for the Caltrans Disparity Study.) In direct

¹ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

² <http://www.wsdot.wa.gov/NR/rdonlyres/9F8F685A-9E47-4F13-AA79-F776AC0CS76E/0/2012DBEProgramDisparityStudyFinalReport.pdf>

³ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. April 16, 2013).

⁴ http://www.dot.ca.gov/hq/bep/study/Avail_Disparity_Study_Final_Rpt.pdf

contrast to the suggestions in your letter, the Ninth Circuit Court of Appeals expressly found that BBC's disparity study for Caltrans "accounted for the factors mentioned in *Western States* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs." For details about the case, see Appendix B of the disparity study report.

This letter provides responses to the specific comments presented in your letter. Our responses provide accurate descriptions of the disparity study results; relevant case law; applicable federal regulations and guidance; and the changes that WSDOT is proposing to make to its implementation of the Federal DBE Program.

WSDOT does not propose to prevent white women-owned DBEs from counting towards its overall DBE goal. Your letter states that WSDOT has decided to "modify its DBE goal and to seek a waiver that would prevent white women business enterprises from counting towards said goal." (*page 1 of your letter*) As part of the Federal DBE Program, every three years, an agency is required to set an overall goal for DBE participation in its United States Department of Transportation (USDOT)-funded contracts. The agency must monitor DBE participation in its USDOT-funded contracts and attempt to meet its overall DBE goal on an annual basis. WSDOT is not proposing to exclude women-owned DBEs from its overall DBE goal. The availability of women-owned DBEs was considered when WSDOT set its new proposed overall DBE goal. In addition, WSDOT will continue to encourage the participation of all women-owned DBEs in its contracting through various measures. Moreover, the participation of women-owned DBEs in WSDOT's USDOT-funded contracts will count toward meeting the agency's overall DBE goal in each federal fiscal year.

As part of the Federal DBE Program, in order to meet its overall DBE goal each year, an agency must encourage the participation of DBEs in its USDOT-funded contracts through the use of race- and gender-neutral measures and, if necessary, race- and gender-conscious measures (or a combination of both).⁵ Race- and gender-neutral measures are measures that are designed to remove potential barriers for all businesses attempting to do work with the agency or measures specifically designed to increase the participation of small or emerging businesses (including many minority- and women-owned businesses). Race- and gender-conscious measures are measures that are specifically designed to increase the participation of DBEs and minority- and women-owned businesses. The only race- and gender-conscious measure that WSDOT uses as part of its implementation of the Federal DBE Program is applying DBE contract goals to specific USDOT-funded contracts. As part of that measure, the agency sets condition-of-award DBE participation goals on individual contracts. DBE contract goals that are applied to specific contracts are race- and gender-conscious measures that WSDOT uses to meet a portion of its overall DBE goal. WSDOT's use

⁵ 49 CFR Sections 26.45, 26.51; Agencies are required to maximize their use of race- and gender-neutral measures to meet their overall DBE goals.

of DBE contract goals is different from and should not be confused with the overall DBE goal itself.

Based on all available evidence and information as well as on relevant case law, the federal regulations, and official USDOT guidance, WSDOT proposes to limit its use of race- and gender-conscious measures to those DBE groups for which substantial statistical evidence of discrimination exists in the relevant geographic market area. Those groups do not include women-owned DBEs at this time. However, women-owned DBEs will continue to be eligible for all of the race- and gender-neutral measures that WSDOT uses and will be eligible to participate in all WSDOT contracting. In addition, as described above, women-owned DBEs will still be included as part of WSDOT's overall DBE goal and as part of WSDOT's implementation of the Federal DBE Program. Finally, DBEs that are owned by minority women will still be eligible to participate in WSDOT's race- and gender-conscious measures if they are DBE-certified along with their corresponding minority groups.

WSDOT will not remove women-owned DBEs from the list of certified businesses and will continue to encourage women-owned businesses to become DBE certified. Your letter states, "... the AGC questions the validity of the data supporting any finding that women-owned businesses should be removed from DBE certification." (*page 1 of your letter*) No such finding is presented in the disparity study. Moreover, none of the results from the 2013 WSDOT Disparity Study indicate that women-owned businesses should be prohibited from DBE certification. Your letter also states that WSDOT is seeking "a waiver that would disallow women-owned businesses from the list of certified businesses." (*page 4 of your letter*) WSDOT is not proposing that women-owned businesses should be removed or prohibited from DBE certification. On the contrary, WSDOT will continue to encourage women-owned businesses to maintain their DBE certifications, or if they are not currently certified, to become DBE-certified.

WSDOT's proposal to request a waiver will not affect women-owned businesses' eligibility for DBE certification. In the event that USDOT approves the waiver, women-owned businesses will still benefit from being DBE-certified. WSDOT's use of DBE contract goals is just one of many components of the agency's implementation of the Federal DBE Program. Women-owned DBEs will still be eligible for all of the race- and gender-neutral measures that WSDOT uses and will be eligible to participate in all WSDOT contracting. In addition, being DBE-certified automatically deems women-owned DBEs as certified as small business enterprises (SBEs). SBE certification qualifies women-owned DBEs for many of WSDOT's SBE-specific measures as well as those of other local agencies.

In addition, in the event that USDOT approves the waiver request, WSDOT will be diligent about monitoring the effects that the potential waiver has on women-owned DBEs and particularly on non-Hispanic white women-owned DBEs. If the potential

waiver has substantial, detrimental effects on the overall use of non-Hispanic white women-owned DBEs, WSDOT will take prompt corrective action. Women-owned DBEs maintaining their DBE certifications will help WSDOT monitor the impacts of the potential waiver. If WSDOT, based on all available evidence, determines that revoking the waiver is appropriate in accordance with federal regulations women-owned DBEs would again become eligible for meeting DBE contract goals.

WSDOT is acting in compliance with relevant case law, the federal regulations, and official USDOT guidance regarding the participation of women-owned DBEs. Your letter suggests that WSDOT's proposal to limit its use of race- and gender-conscious measures to those DBE groups for which compelling statistical evidence of discrimination exists in the relevant geographic market area is "unwarranted and improper." (page 4 of your letter) The 2013 WSDOT Disparity Study showed substantial disparities between utilization and availability on key sets of WSDOT contracts for the following DBE groups: Black American-owned businesses, Asian-Pacific American-owned businesses, Hispanic American-owned businesses, Native American-owned businesses, and Subcontinent Asian American-owned businesses. The disparity study did not show substantial disparities between utilization and availability on key sets of contracts for non-Hispanic white women-owned businesses. WSDOT will request a waiver from USDOT to consider women-owned businesses as ineligible to participate in any race- and gender-conscious measures. For details, see Appendix K of the disparity study report and *WSDOT's Disadvantaged Business Enterprise (DBE) Program Proposed Amended Three-Year Overall Goal & Methodology for Federal Fiscal Years 2014 and 2015 through 2017*.⁶

WSDOT's decision to request a waiver to consider women-owned DBEs as ineligible at this time to participate in the agency's race- and gender-conscious measures is wholly consistent with relevant case law, the federal regulations, and official USDOT guidance. For example, WSDOT's decision and the 2013 WSDOT disparity study comply with the Ninth Circuit Court of Appeals' decision in *Western States Paving v. WSDOT*, and specifically, the portion of the decision restated on page 2 of your letter (see AGC, *San Diego vs. Caltrans*). Moreover, *USDOT's Official Questions and Answers (Q&A's) Regarding the Disadvantaged Business Enterprise Program Regulation (49 CFR 26)* provides that the Ninth Circuit Court of Appeals in *Western States Paving v. WSDOT* determined that:

Whether race-based measures are needed depends on the presence or absence of discrimination or its effects in a state's transportation contracting industry. In addition, even when discrimination is present in a state, a

⁶ <http://www.wsdot.wa.gov/NR/rdonlyres/677FABAA-4360-4886-9F2C-B0DDB5EF14BE/0/FHWAOverallDBEGoalandMethodologyDRAFT.pdf>

program is narrowly tailored if its application is limited to those specific groups that have actually suffered discrimination or its effects.⁷

USDOT's Official Questions and Answers (Q&A's) Regarding the Disadvantaged Business Enterprise Program Regulation (49 CFR 26) also provides that an agency, in determining which groups have actually suffered discrimination, can use information from a disparity study that "quantif[ies] the magnitude of any differences between DBE availability and participation..." Furthermore, the federal regulations provide that agencies "can apply for a waiver of any provision of Subpart B or C of [49 CFR Part 26] including, but not limited to, any provisions regarding the administrative requirements, overall goals, contract goals or good faith efforts."⁸ WSDOT is proposing to request a waiver for a provision only in Subpart B—specifically, provisions in 49 CFR Part 26.51.

Several key court decisions have found that an implementation of the Federal DBE Program can be considered narrowly tailored—and thus constitutionally valid—only if race- and gender-conscious measures are limited to those groups for which evidence of discrimination exists. Examples of those court decisions include:

- *AGC, San Diego v. Caltrans*;
- *Western States Paving v. WSDOT*; and
- *H.B. Rowe v. Tippett*.⁹

In *AGC, San Diego v. Caltrans*, the Ninth Circuit Court of Appeals considered whether Caltrans' implementation of the Federal DBE Program was narrowly tailored with regard to its use of race- and gender-conscious measures. Caltrans limited its use of race- and gender-conscious measures to those groups for which the BBC disparity study showed substantial disparities between utilization and availability on Caltrans contracts. The Court found that Caltrans' use of race- and gender-conscious measures:

... is limited to those minority groups that have actually suffered discrimination... . The 2007 [BBC] disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. These disparities support an inference of discrimination against those groups... . California applied for and received a waiver in order to limit its 2009 preference program to African American, Native American, Asian-

⁷ *United States Department of Transportation Official Questions and Answers (Q&A's) Disadvantaged Business Enterprise Program Regulation (49 CFR 26)*, <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/official-questions-and-answers-26>

⁸ 49 CFR Part 26.15(b).

⁹ *H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al.*, 615 F.3d 233 (4th Cir. 2010).

*Pacific American, and women-owned firms. Caltrans' program adheres precisely to the narrow tailoring requirements of Western States.*¹⁰

The courts have also made it clear that statistical evidence is necessary to indicate the presence of discrimination in the local transportation contracting industry (e.g., *AGC, San Diego v. Caltrans*; *Western States Paving v. WSDOT*; *H.B. Rowe v. Tippett*). For example, in *H.B. Rowe v. Tippett*, the Court ruled that the North Carolina Department of Transportation (NCDOT) did not provide an “exceedingly persuasive justification” for including women-owned businesses in its use of race- and gender-conscious measures, because the statistical evidence did not support an inference of discrimination against women-owned businesses. The Court found that there was strong evidence of overutilization of women-owned businesses in the public sector. As a result, the court held that NCDOT’s inclusion of women-owned businesses in its use of contract goals was invalid. The Court thus held that NCDOT’s implementation of its program as applied to women-owned businesses was unconstitutional.

BBC used a custom census approach to measuring availability that has been approved and accepted by the courts and other authorities. Your letter states, “There has been no analysis [in the disparity study] of minority and women contractors’ qualifications or their capacity to absorb WSDOT work other than by subjective survey and self-identification means.” (page 3 of your letter) BBC takes the relative capacity of businesses and myriad other factors—including type of work, size of contracts, geographic locations of WSDOT work, and businesses’ qualifications and interest in working for WSDOT—into account when estimating relative availability, consistent with the federal regulations and relevant case law (e.g., *Western States Paving Company v. Washington State DOT*, *AGC, San Diego v. Caltrans*, *Rothe Development Corp. v. U.S. Department of Defense*, and *DynaLantic Corp. v. United States Dept. of Defense, et al.*).^{11, 12}

BBC’s approach to measuring availability has been approved by the Ninth Circuit Court of Appeals, the United States District Court for the Eastern District of California, USDOT, and the United States Department of Justice (USDOJ).¹³ In addition, in *AGC, San Diego v. Caltrans*, Caltrans recently defended its implementation of the Federal DBE Program, which was based in substantial part on a BBC disparity and availability study that used a methodology that was virtually

¹⁰ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. April 16, 2013).

¹¹ *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C. Aug. 15, 2012), appeal pending, United States Court of Appeals for the District of Columbia, Docket Number 12-5330.

¹² *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

¹³ Brief for the United States as Amicus Curiae Supporting Appellees (California DOT) (filed 2/9/12), at pages 15, 23, 24, fn 8, 26, 27, 28, submitted in the appeal of *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, Appeal No. 11-16228, United States Court of Appeals for the Ninth Circuit.

identical to that of the 2013 WSDOT Disparity Study. Below are some recent examples of the approval that BBC's disparity study methodology has received:

- The Ninth Circuit Court of Appeals specifically found that BBC's disparity study for Caltrans "accounted for the factors mentioned in *Western States* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs."
- The Ninth Circuit Court of Appeals held that Caltrans' use of race- and gender-conscious measures "is limited to those minority groups that have actually suffered discrimination. ... The 2007 [BBC] disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. These disparities support an inference of discrimination against those groups. ... California applied for and received a waiver in order to limit its 2009 preference program to African American, Native American, Asian-Pacific American, and women-owned firms. Caltrans' program adheres precisely to the narrow tailoring requirements of *Western States*."
- The Ninth Circuit Court of Appeals found that BBC's disparity study for Caltrans gathered extensive data to calculate relative availability in the California transportation contracting industry. The Court stated: "Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, [BBC] concluded that minority- and women-owned businesses should be expected to receive 13.5% of contract dollars from Caltrans administered federally assisted contracts."
- The USDOT and USDOJ in its *amicus curiae* brief informed the Ninth Circuit Court of Appeals that BBC's study methodology and analysis is sound and strongly supported by the federal government. USDOT and USDOJ said that BBC engaged in a "methodically sound disparity study" that included "robust statistical analysis (that was missing in *Western States Paving v. WSDOT*)." USDOT and USDOJ also referred to the "sufficiency of BBC's study methodology" that "indisputably takes into account the considerations identified by USDOT regulations...." USDOT and USDOJ specifically cited the fact that BBC's availability analysis "[took] into account factors that may affect the relative capacity of DBEs to undertake contracting work" in stating their approval.
- The United States District Court for the Eastern District of California held that Caltrans' current implementation of the Federal DBE Program is constitutional and that the information on which Caltrans based its implementation of the program—the BBC disparity study—is sound and valid: "Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry."

- The United States District Court for the Eastern District of California also held that Caltrans' implementation of the program was "supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law." (Caltrans limits its use of race- and gender-conscious measures to those DBE groups that exhibited substantial disparities between utilization and availability, as WSDOT proposes to do.)
- Specifically in connection to the *Western States Paving vs. WSDOT* decision, the United States District Court for the Eastern District of California also stated, "[The BBC] disparity study used by Caltrans was much more comprehensive [than the analysis that the Ninth Circuit Court of Appeals found to be 'oversimplified and entitled to little weight' in *Western States Paving*] and accounted for [relative capacity] and other factors... . The disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well, and this evidence before the Court clearly supports a finding that this program is constitutional."

The positions asserted in the Ahlers & Cressman letter contradict the positions stated in the AGC's letter. Your letter states: "With the permission of its authors, the AGC hereby references and incorporates herein as if fully set forth the letter of Ahlers & Cressman, PLLC, dated January 9, 2014... . The AGC adopts the same comments and objections as are set forth in said letter as its own." (*page 4 of your letter*) It is noteworthy that the AGC adopts the same comments and objections of the Ahlers & Cressman letter, because the positions asserted in the Ahlers & Cressman letter contradict the positions stated in the AGC's letter.¹⁴ The Ahlers & Cressman letter argues that, in order to estimate relative availability, an agency should "use census data to collect the number of all firms in a particular market (both DBEs and non-DBEs) and then simple division to arrive at a percentage of DBEs in the overall market." (*page 4 of the Ahlers & Cressman letter*) That approach to estimating relative availability is called a "head count" approach. A head count approach takes no steps to account for the relative capacity of businesses or any other factors related to the degree to which firms are "ready, willing, and able" to perform on an agency's contracts, wholly inconsistent with relevant case law, the federal regulations, and the arguments presented on pages 2 and 3 of your letter.

A head count approach has not been found to be sufficient by the courts in calculating relative availability or in determining whether there are disparities for particular DBE

¹⁴ WSDOT has, by separate letter, directly responded to the Ahlers & Cressman letter.

groups. In addition, federal regulations do not provide that a head count approach alone is an acceptable way to calculate relative availability for goal-setting purposes or for disparity study analyses. Relevant case law has held that a proper availability analysis should take several different factors into account, including businesses' primary lines of work and their capacity to perform on an agency's contracts (e.g., *AGC, San Diego v. California Department of Transportation*; *Western States Paving Company v. Washington State DOT*; *Rothe Development Corp. v. U.S. Department of Defense*; and *DynaLantic Corp. v. United States Dept. of Defense, et al.*). BBC's availability analysis accounted for various relevant factors including type of work, size of contracts, geographic locations of WSDOT work, relative capacity of businesses, and businesses' qualifications and interest in working for WSDOT. For details, see Chapter 5 and Appendix D of the disparity study report. BBC's availability approach is consistent with, and specifically supported by, relevant case law, the federal regulations, and official USDOT guidance. For details, see Appendix B of the disparity study report.

The Ahlers and Cressman letter also makes the following flawed and legally erroneous argument, which the AGC supports by adopting the comments and objections of that letter: "According to the United States Census Bureau, women make up over half of the population in Washington (50.1%)—using common sense principals, therefore, if no disparity existed in federal transportation grants, WBEs [*sic*] therefore engage in roughly half of the federal contracting work, not just 1.5% as found by the researchers at BBC." (*page 6 of the Ahlers and Cressman letter*) Like a head count approach, a population-based approach to measuring availability does not take into account any of the factors—including relative capacity—that the courts have determined are relevant to accurately measuring relative availability. In fact, relevant case law—in particular, the landmark U.S. Supreme Court decision in *City of Richmond v. Croson*—specifically prohibits and warns against using population statistics when estimating relative availability.¹⁵

In *City of Richmond v. Croson*, the City of Richmond set a participation quota of 30% for minority-owned businesses based in part on the fact that 50% of the city's population was made up of minorities. The Supreme Court held that the City of Richmond's quota was unconstitutional. The Court found that, "Reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is ... misplaced." The Court also held that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." In addition, the Court held that, "... where special qualifications are necessary, the relevant statistical pool for

¹⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." The Supreme Court further held that "the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."

Based on the Supreme Court's decision in *City of Richmond v. Croson* and on court decisions that have followed *City of Richmond v. Croson*, it is well-established as a matter of law that availability analyses should be based on the percentage of an agency's contracting dollars for which businesses are ready, willing, and able to perform and *not* on population statistics. As described above, the argument for using a population-based approach to measuring availability has been rejected by the U.S. Supreme Court and by other courts in subsequent court decisions. It is thus noteworthy that your letter supports an argument for measuring relative availability using population statistics, particularly because such an approach is inconsistent with the arguments presented on pages 2 and 3 of your letter.

Once again, thank you for your letter regarding WSDOT's 2013 Disparity Study and WSDOT's implementation of the Federal DBE Program. Like the AGC, WSDOT believes that it is vitally important that the agency implements the Federal DBE Program in a manner that complies with legal requirements and reflects local marketplace conditions. If you have any additional questions or comments, please do not hesitate to contact us.

As an attachment to this letter, WSDOT has also included our response to the Ahlers & Cressman letter that you reference in your original correspondence.

Sincerely,



Brenda R Nnambi
Director, Office of Equal Opportunity

BRN:bbc:erm

Enclosure: Response Letter to Ahlers & Cressman, Dated 3/12/14

cc: Bob Ferguson, Washington Attorney General
Lynn Peterson, Secretary of Transportation
Alexis Oliver, OMWBE Director



**Washington State
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March 12, 2014

Elizabeth Waden Perka
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RE: Response to Ahlers & Cressman letter regarding the 2013 WSDOT Disparity Study and WSDOT's proposed overall DBE goal

Dear Ms. Perka:

Thank you for your letter (dated January 9, 2014) regarding the Washington State Department of Transportation's (WSDOT's) 2013 Disparity Study and WSDOT's implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. WSDOT will consider your letter as the agency implements the Federal DBE Program. This letter provides responses to the questions and comments presented in your letter. It also corrects the misrepresentations, factual inaccuracies, and erroneous interpretations that serve as the basis for the arguments presented in your letter. Our responses provide clear and accurate descriptions of the disparity study results; relevant case law; applicable federal regulations and guidance; and the changes that WSDOT is proposing to make to its implementation of the Federal DBE Program.

The 2013 WSDOT Disparity Study was conducted by BBC Research & Consulting (BBC).¹ BBC's methodology for conducting the study—including the availability analysis—has been specifically approved by the Ninth Circuit Court of Appeals in *AGC, San Diego Chapter v. California Department of Transportation (AGC, San Diego v. Caltrans)*.² The *AGC, San Diego v. Caltrans* case, which the Court decided in April 2013, is the most recent, relevant, and significant case in the Ninth Circuit and in the United States related to disparity studies and the implementation of the Federal DBE Program. The Ninth Circuit Court of Appeals completely held in favor of Caltrans and its implementation of the Federal DBE Program. In doing so, the Court approved BBC's 2007 disparity study and availability analysis in support of Caltrans' implementation of the Federal DBE Program.³ (The methodology that BBC used for the 2013 WSDOT Disparity Study was virtually identical to the methodology that BBC used for the 2007 Caltrans Disparity Study.) For details about the case, see Appendix B of the disparity study report. It is noteworthy that your letter and discussion of WSDOT's

¹ <http://www.wsdot.wa.gov/NR/rdonlyres/9F8F685A-9E47-4F13-AA79-F776AC0C576E/D/2012DBEProgramDisparityStudyFinalReport.pdf>

² *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. April 16, 2013).

³ http://www.dot.ca.gov/hq/bep/study/Avail_Disparity_Study_Final_Rpt.pdf

implementation of the Federal DBE Program and of the 2013 WSDOT Disparity Study excludes any reference to *AGC, San Diego v. Caltrans* and to the Court's seminal decision.

BBC's court-approved availability analysis is based on responses to telephone surveys completed with thousands of businesses in the relevant geographic market area. Your letter incorrectly states that "BBC based its [availability] analysis on a small, arbitrary and unrepresentative sampling of Washington businesses (approximately 7% of the total firms identified using census data)." (*page 1 of your letter*) In addition, your letter incorrectly states that "BBC only interviewed 988 firms (~7%)." (*page 5 of your letter*) Those statements are inaccurate and misrepresent the detailed information that BBC presents in Chapter 5 and Appendix D of the disparity study report. As described in the disparity study report, BBC began the availability analysis by collecting information about business establishments from Dun & Bradstreet (D&B) Marketplace listings.⁴ BBC collected information about all business establishments—regardless of the race/ethnicity and gender of the owner—listed under 8-digit work specialization codes that were most relevant to the transportation contracts that WSDOT awarded during the study period (federal fiscal years 2009, 2010, and 2011).

D&B provided 14,528 business listings related to relevant work specialization codes. Of those listings, 10,560 had valid working phone numbers. BBC attempted to complete an availability telephone survey with each one of those business establishments and was able to successfully contact 4,784 of them, or 45.3% of the business establishments with valid working phone numbers. Of those business establishments, 3,335 completed an availability telephone survey (69.7%). Based on information from availability telephone surveys that the study team conducted with each of those 3,335 businesses, BBC determined which businesses could be considered "ready, willing, and able" for WSDOT work, consistent with the federal regulations, official USDOT guidance, and relevant case law. Each business had to meet the following criteria in order to be considered ready, willing, and able for WSDOT work:

- The business had to report being qualified and interested in performing relevant types of transportation-related work for WSDOT and other local agencies;
- The business had to report being able to perform work in the state of Washington (WSDOT's relevant geographic market area);
- The business had to report having bid on or performed work of sizes that are consistent with the sizes of the contracts that WSDOT awarded during the study period; and
- The business had to report an establishment date that preceded the award dates of WSDOT contract elements for which it might be considered available.

⁴ D&B Marketplace has been approved and accepted by the courts as the most comprehensive and unbiased source of business listings in the nation.

That approach to estimating availability is referred to as a “custom census” availability analysis. BBC’s custom census availability analysis methodology has been specifically approved by the Ninth Circuit Court of Appeals in *AGC, San Diego v. Caltrans*, other courts, and by USDOT and the United States Department of Justice (USDOJ).^{5, 6, 7, 8} Based on that approach, BBC determined that 988 of the surveyed businesses reported characteristics that deemed them potentially available (i.e., ready, willing, and able) for specific WSDOT transportation prime contracts and subcontracts. The fact that BBC identified 988 businesses as ready, willing, and able for WSDOT transportation contracts does not mean that BBC conducted surveys with only 988 businesses. To reiterate, BBC completed surveys with 3,335 businesses throughout the state of Washington, 988 of which reported characteristics that deemed them ready, willing, and able to perform on specific WSDOT prime contracts and subcontracts.

BBC’s custom census availability analysis is much more accurate than a “head count” approach to estimating availability. In your letter, you argue that in order to estimate relative availability an agency should “use census data to collect the number of all firms in a particular market (both DBEs and non-DBEs) and then simple division to arrive at a percentage of DBEs in the overall market.” (*page 4 of your letter*) That approach to estimating relative availability is called a “head count” approach. A head count approach has not been found to be sufficient by the courts in calculating relative availability or in determining whether there are disparities for particular DBE groups. In addition, federal regulations do not provide that a head count approach alone is an acceptable way to calculate relative availability for goal-setting purposes or for disparity study analyses.

Relevant case law has held that a proper availability analysis should take several different factors into account, including businesses’ primary lines of work and their capacity to perform on an agency’s contracts (e.g., *AGC, San Diego v. California Department of Transportation*; *Western States Paving Company v. Washington State DOT*; *Rothe Development Corp. v. U.S. Department of Defense*; and *DynaLantic Corp. v. United States Dept. of Defense, et al.*).⁹ BBC’s custom census availability approach accounted for various relevant factors including type of work, size of contracts, geographic locations

⁵ *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp 2d 237, 2012 WL 3356813 (D.D.C. Aug. 15, 2012), appeal pending, United States Court of Appeals for the District of Columbia, Docket Number 12-5330.

⁶ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, U.S.D.C., E.D. Cal. Civil Action No. S-09-1622, Slip Opinion (E.D. Cal. April 20, 2011), appeal dismissed, on other grounds Ninth Circuit held Caltrans’ DBE Program constitutional. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. April 16, 2013).

⁷ *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.*, 2013 WL 4774517 (D. Mont.) (September 4, 2013).

⁸ Brief for the United States as Amicus Curiae Supporting Appellees (California DOT) (filed 2/9/12), at pages 15, 23, 24, fn 8, 26, 27, 28, submitted in the appeal of *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, Appeal No. 11-1622B, United States Court of Appeals for the Ninth Circuit.

⁹ *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

of WSDOT work, relative capacity of businesses, and businesses' qualifications and interest in working for WSDOT. For details, see Chapter 5 and Appendix D of the disparity study report. BBC's availability approach is consistent with, and specifically supported by, relevant case law, the federal regulations, and official USDOT guidance. For details, see Appendix B of the disparity study report.

BBC's custom census availability approach is a census and did not involve sampling. Throughout your letter, you incorrectly suggest that BBC used sampling procedures to conduct the availability analysis (e.g., referring to "BBC's sampling" on page 2 of your letter and to "very small sampling" on page 5 of your letter). As described above and in detail in the disparity study report, BBC used a custom *census* availability approach that did not involve sampling (for details, see Chapter 5 and Appendix D of the disparity study report). Rather than drawing a sample of businesses, the study team attempted to contact each and every business establishment listed under 8-digit work specialization codes that were most relevant to the transportation contracts that WSDOT awarded during the study period. Because each and every relevant business establishment listed in D&B Marketplace was given an equal opportunity to participate in the availability telephone survey, research standards would consider BBC's availability analysis as representative and reflective of true conditions throughout the entire relevant geographic market area.

WSDOT does not propose to exclude women-owned DBEs from its overall DBE goal or from its implementation of the Federal DBE Program. Your letter improperly states that "WSDOT need not take the extreme, and unsupportable action of excluding [women-owned businesses] from the DBE program goal." (*page 1 of your letter*) Your letter then states that, "While the Federal Government has given each state the authority to set state-specific DBE goals, the Government provided no authority for states to rewrite the DBE program by excluding an entire subgroup deemed by the Government to be socially and economically disadvantaged." (*page 2 of your letter*) Your letter misconstrues the Federal DBE Program and the federal regulations promulgated to implement the program. Your letter also confuses WSDOT's overall DBE goal with the race- and gender-conscious measures (i.e., DBE contract goals) that WSDOT uses to meet a portion of its overall DBE goal. The descriptions below clarify that apparent confusion.

a. The Federal DBE Program. The Federal DBE Program is a program designed to increase the participation of minority- and women-owned businesses in USDOT-assisted contracts. The program presumes that businesses owned and operated by individuals of certain racial/ethnic and gender groups are socially and economically disadvantaged—Asian-Pacific American-owned businesses, Black American-owned businesses, Hispanic American-owned businesses, Native American-owned businesses, Subcontinent Asian American-owned businesses, and women-owned businesses. WSDOT is not proposing to exclude women-owned businesses from its implementation of the Federal DBE Program.

Consistent with the federal regulations, WSDOT will continue to presume that women-owned businesses are a socially and economically disadvantaged group.¹⁰ As such, women-owned DBEs are still included as part of WSDOT's implementation of the Federal DBE Program. WSDOT will continue to encourage the participation of all women-owned DBEs in its contracting through various measures and will continue to monitor the participation of women-owned businesses in its USDOT-funded contracting.

b. Overall DBE Goal. As part of the Federal DBE Program, every three years, an agency is required to set an overall goal for DBE participation in its USDOT-funded contracts. The agency must monitor DBE participation in its USDOT-funded contracts and attempt to meet its overall DBE goal on an annual basis. WSDOT is not proposing to exclude women-owned DBEs from its overall DBE goal. The availability of women-owned DBEs was considered when WSDOT set its new proposed overall DBE goal. In addition, WSDOT will continue to encourage the participation of all women-owned DBEs in its contracting through various measures. Moreover, the participation of women-owned DBEs in WSDOT's USDOT-funded contracts will count toward meeting the agency's overall DBE goal in each federal fiscal year.

In addition, your letter states that "a state may not set a DBE goal that differentiates between different subgroups (i.e., the goal may not contain a different percentage participation by WBEs versus other minority firms)." (*page 2 of your letter*) That statement indicates a misunderstanding of the federal regulations. To clarify, the federal regulations actually state: "[An agency's] overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals."¹¹ As clearly stated in *WSDOT's Disadvantaged Business Enterprise (DBE) Program Proposed Amended Three-Year Overall Goal & Methodology for Federal Fiscal Years 2014 and 2015 through 2017*, WSDOT is proposing only one figure for its new overall DBE goal—11.6%.¹² That 11.6% goal will not be subdivided into group-specific goals. In addition, the participation of all certified DBEs—including women-owned DBEs—will count toward meeting WSDOT's overall DBE goal in each federal fiscal year, wholly consistent with the federal regulations.

Furthermore, with regard to WSDOT's overall DBE goal, your letter erroneously states that it is WSDOT's intention "to exclude all WBEs from participation in the overall DBE goal..." As stated above, WSDOT is not proposing to exclude women-owned DBEs from its overall DBE goal. It is proposing only to request a waiver to limit its use of race- and gender-conscious measures to those DBE groups for which compelling statistical evidence of discrimination exists in the relevant geographic market area. Those groups do not include women-owned DBEs at this time. WSDOT's race- and gender-conscious

¹⁰ 49 CFR Part 26.5.

¹¹ 49 CFR Part 26.45(h).

¹² <http://www.wsdot.wa.gov/NR/rdonlyres/677FABAA-4360-4886-9F2C-B0DD85EF14BE/0/FHWAOverallDBEGoalandMethodologyDRAFT.pdf>

measures are a means to meet a portion of its overall DBE goal. Race- and gender-conscious measures that WSDOT uses to meet a portion of its overall DBE goal should not be confused with the overall DBE goal itself.

c. Race- and gender-neutral and race- and gender-conscious measures. As part of the Federal DBE Program, in order to meet its overall DBE goal each year, an agency must encourage the participation of DBEs in its USDOT-funded contracts through the use of race- and gender-neutral measures and, if necessary, race- and gender-conscious measures (or a combination of both).¹³ Race- and gender-neutral measures are measures that are designed to remove potential barriers for all businesses attempting to do work with the agency or measures specifically designed to increase the participation of small or emerging businesses (including many minority- and women-owned businesses). Race- and gender-conscious measures are measures that are specifically designed to increase the participation of DBEs and minority- and women-owned businesses. The only race- and gender-conscious measure that WSDOT uses as part of its implementation of the Federal DBE Program is applying DBE contract goals to specific USDOT-funded contracts. As part of that measure, the agency sets condition-of-award DBE participation goals on individual contracts. DBE contract goals are a race- and gender-conscious measure that WSDOT uses to meet a portion of its overall DBE goal. Again, WSDOT's use of DBE contract goals should not be confused with the overall DBE goal itself.

Based on all available evidence and information as well as on relevant case law, the federal regulations, and official USDOT guidance, WSDOT proposes to limit its use of race- and gender-conscious measures to those DBE groups for which compelling statistical evidence of discrimination exists in the relevant geographic market area. Those groups do not include women-owned DBEs at this time. However, women-owned DBEs will continue to be eligible for all of the race- and gender-neutral measures that WSDOT uses and will be eligible to participate in all WSDOT contracting. In addition, as described above, women-owned DBEs will still be included as part of WSDOT's overall DBE goal and as part of WSDOT's implementation of the Federal DBE Program.

WSDOT is acting in compliance with relevant case law, the federal regulations, and official USDOT guidance regarding the participation of women-owned DBEs.

Although your letter inaccurately states that WSDOT proposes to exclude women-owned DBEs from its overall DBE goal (as described above, the agency is not proposing to do so), it is nonetheless instructive to describe the support for what WSDOT actually proposes to do. Based on all available evidence and information, relevant case law, the federal regulations, and official USDOT guidance, WSDOT proposes to limit its use of race- and gender-conscious measures to those DBE groups for which compelling statistical evidence of discrimination exists in the relevant geographic market area. More specifically, WSDOT proposes to limit its use of race- and gender-conscious measures to

¹³ 49 CFR Sections 26.45, 26.51; Agencies are required to maximize their use of race- and gender-neutral measures to meet their overall DBE goals.

those DBE groups for which substantial disparities exist between utilization and availability on key sets of WSDOT contracts.

The 2013 WSDOT Disparity Study showed substantial disparities between utilization and availability on key sets of WSDOT contracts for the following DBE groups: Black American-owned businesses, Asian-Pacific American-owned businesses, Hispanic American-owned businesses, Native American-owned businesses, and Subcontinent Asian American-owned businesses. In general, the disparity study did not show substantial disparities between utilization and availability for non-Hispanic white women-owned businesses.¹⁴ WSDOT will request a waiver from USDOT to consider women-owned businesses as ineligible to participate in any race- and gender-conscious measures. For details, see Appendix K of the disparity study report and *WSDOT's Disadvantaged Business Enterprise (DBE) Program Proposed Amended Three-Year Overall Goal & Methodology for Federal Fiscal Years 2014 and 2015 through 2017*.

WSDOT's decision to request a waiver to consider women-owned DBEs as ineligible at this time to participate in the agency's race- and gender-conscious measures is wholly consistent with relevant case law, the federal regulations, and official USDOT guidance. It is not, as erroneously stated in your letter, "in violation of federal law." (*page 2 of your letter*) Relevant court decisions, the federal regulations, and official USDOT guidance support WSDOT's proposal to consider women-owned DBEs as ineligible at this time for the agency's race- and gender-conscious measures. For example, *USDOT's Official Questions and Answers (Q&A's) Regarding the Disadvantaged Business Enterprise Program Regulation (49 CFR 26)* provides that the Ninth Circuit Court of Appeals in *Western States Paving Company v. Washington State DOT (Western States Paving v. WSDOT)* determined that:

*Whether race-based measures are needed depends on the presence or absence of discrimination or its effects in a state's transportation contracting industry. In addition, even when discrimination is present in a state, a program is narrowly tailored if its application is limited to those specific groups that have actually suffered discrimination or its effects.*¹⁵

USDOT's Official Questions and Answers (Q&A's) Regarding the Disadvantaged Business Enterprise Program Regulation (49 CFR 26) also provides that an agency, in determining which groups have actually suffered discrimination, can use information from a disparity study that "quantif[ies] the magnitude of any differences between DBE availability and participation..." Furthermore, the federal regulations provide that agencies "can apply for a waiver of any provision of Subpart B or C of [49 CFR Part 26]

¹⁴ DBEs that are owned by minority women will still be eligible to participate in WSDOT's race- and gender-conscious measures if they are DBE-certified along with their corresponding minority groups.

¹⁵ *United States Department of Transportation Official Questions and Answers (Q&A's) Disadvantaged Business Enterprise Program Regulation (49 CFR 26)*, <http://www.dot.gov/osdhu/disadvantaged-business-enterprise/official-questions-and-answers-26>

including, but not limited to, any provisions regarding the administrative requirements, overall goals, contract goals or good faith efforts.”¹⁶ WSDOT is proposing to request a waiver for a provision only in Subpart B—specifically, provisions in 49 CFR Part 26.51. WSDOT is not proposing to request a waiver for any provisions in Subpart A or D, as erroneously suggested in your letter. (*page 9 of your letter*)

Moreover, several key court decisions have found that an implementation of the Federal DBE Program can be considered narrowly tailored—and thus constitutionally valid—only if race- and gender-conscious measures are limited to those groups for which evidence of discrimination exists. Examples of those court decisions include:

- *AGC, San Diego v. Caltrans*;
- *Western States Paving v. WSDOT*,¹⁷ and
- *H.B. Rowe v. Tippett*.¹⁸

In *AGC, San Diego v. Caltrans*, the Ninth Circuit Court of Appeals considered whether Caltrans’ implementation of the Federal DBE Program was narrowly tailored with regard to its use of race- and gender-conscious measures. Caltrans limited its use of race- and gender-conscious measures to those groups for which the BBC disparity study showed substantial disparities between utilization and availability on Caltrans contracts. The Court found that Caltrans’ use of race- and gender-conscious measures:

*... is limited to those minority groups that have actually suffered discrimination... . The 2007 [BBC] disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. These disparities support an inference of discrimination against those groups... . California applied for and received a waiver in order to limit its 2009 preference program to African American, Native American, Asian-Pacific American, and women-owned firms. Caltrans’ program adheres precisely to the narrow tailoring requirements of Western States.*¹⁹

The courts also have made it clear that anecdotal evidence alone is not sufficient to indicate the presence of discrimination or its effects and that statistical evidence is necessary (e.g., *AGC, San Diego v. Caltrans*; *Western States Paving v. WSDOT*; *H.B. Rowe v. Tippett*). For example, in *H.B. Rowe v. Tippett*, the Court ruled that the North Carolina Department of Transportation (NCDOT) did not provide an “exceedingly

¹⁶ 49 CFR Part 26.15(b).

¹⁷ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

¹⁸ *H. B. Rowe Co., Inc. v. W. Lynda Tippett, NCDOT, et al.*, 615 F.3d 233 (4th Cir. 2010).

¹⁹ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. April 16, 2013).

persuasive justification” for including women-owned businesses in its use of race- and gender-conscious measures, because the statistical evidence did not support an inference of discrimination against women-owned businesses. The Court found that there was strong evidence of overutilization of women-owned businesses in the public sector. As a result, the court held that NCDOT’s inclusion of women-owned businesses in its use of contract goals was invalid. The Court thus held that NCDOT’s implementation of its program as applied to women-owned businesses was unconstitutional.²⁰

USDOT suggests various data sources that an agency could use to measure relative availability and does not recommend that an agency should just use U.S. Census data. Your letter states that in “Tips for Goals Setting [*sic*] in the Disadvantaged Business Enterprise (DBE) Program ... USDOT provides detailed instructions on goal-setting.” (*page 3 of your letter*) Your letter also suggests that, according to USDOT, agencies must use census data as a basis for their availability analyses. (*page 1 and page 3 of your letter*) Those statements are inaccurate and misrepresent the guidance provided in USDOT’s *Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program (Tips for Goal-Setting)*. First, your letter demonstrates a fundamental misunderstanding of the intent of *Tips for Goal-Setting*. *Tips for Goal-Setting* is not intended to be a prescriptive or exhaustive document for how an agency should calculate availability. In the opening paragraph, USDOT states: “This [document] is not intended to represent an exhaustive list of techniques for goal-setting. ... Nor is this an exhaustive explication of all of the subjects related to goal setting covered in the rule. This document is intended only to provide you with some additional guidance as you set goals.”²¹ Moreover, *Tips for Goal-Setting* does not discuss how to conduct an availability analysis for a disparity study. It is written to give agencies that have different resources and different objectives guidance about various ways they could consider setting their overall DBE goals.

Second, USDOT does not state in *Tips for Goal-Setting* or in other official guidance that “each state should use census and other data” to calculate availability, as erroneously stated in your letter (*page 3 of your letter*). In fact, in *Tips for Goal-Setting*, USDOT lists myriad data sources that agencies could consider using in calculating relative availability including “bidders list, census data and DBE directory, disparity study, alternative method, etc.)” Importantly, USDOT indicates that census data “represent all firms in your area whether or not they are ready, willing and able to perform DOT-assisted contracts.” In other words, USDOT does not consider U.S. Census data alone as an accurate source for determining which firms in a relevant geographic market area are ready, willing, and able (i.e., available) for an agency’s contracts. USDOT indicates that an agency should

²⁰ Although the state presented anecdotal evidence that suggested the existence of gender-based discrimination in the local marketplace, the Court ruled that the anecdotal evidence did not overcome the statistical evidence of overutilization of women-owned businesses, and it fell short of justifying NCDOT’s inclusion of women-owned businesses in its use of contract goals.

²¹ <http://www.dot.gov/osdhu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

go beyond U.S. Census data to determine which businesses are ready, willing, and able to perform on the agency's contracts. USDOT in Section III of *Tips for Goal-Setting* specifically lists "evidence from disparity studies" as information that agencies could use to ensure that its overall DBE goal is "as precise as possible."

BBC used a custom census approach to measuring availability, which is approved and accepted by the courts and other authorities. Your letter erroneously states that "BBC did not utilize a commonly-accepted methodology for calculating availability...." BBC's custom census availability analysis provided WSDOT with accurate estimates of the relative availability of minority- and women-owned businesses for WSDOT transportation prime contracts and subcontracts. BBC's custom census approach to measuring availability has been approved by the Ninth Circuit Court of Appeals, the United States District Court for the Eastern District of California, USDOT, and the United States Department of Justice (USDOJ). In addition, in *AGC, San Diego v. Caltrans*, Caltrans recently defended its implementation of the Federal DBE Program, which was based in substantial part on a BBC disparity and availability study that used a methodology that was virtually identical to that of the 2013 WSDOT Disparity Study. Below are some examples of the approval that BBC's disparity and availability study methodology has received:

- The Ninth Circuit Court of Appeals held that Caltrans' use of race- and gender-conscious measures "is limited to those minority groups that have actually suffered discrimination. ... The 2007 [BBC] disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. These disparities support an inference of discrimination against those groups. ... California applied for and received a waiver in order to limit its 2009 preference program to African American, Native American, Asian-Pacific American, and women-owned firms. Caltrans' program adheres precisely to the narrow tailoring requirements of *Western States*."
- The Ninth Circuit Court of Appeals found that BBC's 2007 disparity study for Caltrans gathered extensive data to calculate relative availability in the California transportation contracting industry. The Court stated: "Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, [BBC] concluded that minority- and women-owned businesses should be expected to receive 13.5% of contact dollars from Caltrans administered federally assisted contracts."
- The Ninth Circuit Court of Appeals also found that BBC's 2007 disparity study for Caltrans "accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs."
- USDOT and USDOJ, in the *amicus curiae* brief that they submitted in connection with *AGC, San Diego v. Caltrans* and in support of Caltrans, said that BBC engaged in a "methodically sound disparity study" that included "robust statistical analysis

(that was missing in *Western States Paving v. WSDOT*.)” USDOT and USDOJ also referred to the “sufficiency of BBC’s study methodology” that “indisputably takes into account the considerations identified by USDOT regulations....” USDOT and USDOJ specifically cited the fact that BBC’s availability analysis “[took] into account factors that may affect the relative capacity of DBEs to undertake contracting work” in stating their approval.

- The United States District Court for the Eastern District of California held in April 2011 that Caltrans’ current implementation of the Federal DBE Program is constitutional and that the information on which Caltrans based its implementation of the program—the 2007 BBC disparity study—is sound and valid: “Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry.”
- The United States District Court for the Eastern District of California also held that Caltrans’ implementation of the program was “supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law.” (Caltrans limits its use of race- and gender-conscious measures to those DBE groups that exhibited substantial disparities between utilization and availability, as WSDOT proposes to do.)
- The United States District Court for the Eastern District of California also stated, “[The BBC] disparity study used by Caltrans was much more comprehensive and accounted for [relative capacity] and other factors... . The disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well, and this evidence before the Court clearly supports a finding that this program is constitutional.”

Your letter also erroneously states that BBC’s availability analysis methodology is “only generally described in the Report.” (*page 5 of your letter*) On the contrary, BBC’s availability analysis methodology and results are described in extensive detail in Chapter 5 and Appendix D of the disparity study report.

The results of the availability analysis indicate that, among all DBE groups, women-owned businesses exhibit the highest relative availability. Your letter erroneously states that “BBC found that the availability of WBEs in Washington was very small.” As an example, your letter arbitrarily cites availability results for federal fiscal year 2011: “BBC calculated that in 2011, WBEs were available for just 1.5% of the total contracting dollars for FHWA and state-funded construction and engineering work.” Contrary to the claims in your letter, the availability analysis results indicated that, in general, non-Hispanic white women-owned businesses have the highest availability among all minority- and women-owned business groups, including for the contract set that your

letter arbitrarily cites as an example (see Table K-7 in Appendix K of the disparity study report, which presents results for FHWA- and state-funded prime contracts and subcontracts in 2011).

Availability estimates for non-Hispanic white women-owned businesses ranged as high as 8.3% on certain contracts sets (see Figure K-30 in Appendix K of the disparity study report, which presents results for FHWA- and state-funded engineering subcontracts across the study period). The only contract sets for which non-Hispanic white women-owned businesses did not exhibit the highest availability among all groups is for FHWA- and state-funded prime contracts across the study period (see Table K-25 in Appendix K of the disparity study report); FHWA- and state-funded construction prime contracts across the study period (see Table K-26 in Appendix K of the disparity study report); and large FHWA- and state-funded prime contracts across the study period (see Table K-38 in Appendix K of the disparity study report).

One potential reason why minority- and women-owned business groups—including non-Hispanic white women-owned businesses—exhibited relatively low availability in the single, arbitrarily-chosen example that you cite in your letter is because in 2011 WSDOT awarded contract elements that tended to be much larger in size than in 2009 and 2010. The average size of contract elements that WSDOT awarded in 2011 was \$968,000, compared to \$449,000 in 2010 and \$328,000 in 2009 (see Tables K-5, K-6, and K-7 in Appendix K of the disparity study report). A pervasive result in availability analyses that properly account for the relative capacity of businesses is that, in general, the availability of minority- and women-owned businesses decreases as contract size increases. That result is due to the fact that a substantial percentage of minority- and women-owned businesses tend to be relatively small and tend to exhibit relatively low capacities.

Your letter also makes the following flawed and legally erroneous argument: “According to the United States Census Bureau, women make up over half of the population in Washington (50.1%)—using common sense principals, therefore, if no disparity existed in federal transportation grants, WBEs [*sic*] therefore engage in roughly half of the federal contracting work, not just 1.5% as found by the researchers at BBC.”²² (*page 6 of your letter*) Relevant case law—in particular, the landmark U.S. Supreme Court decision in *City of Richmond v. Croson*—specifically prohibits and warns against using population statistics when estimating relative availability.²³

²² The 50.1% figure that your letter cites includes all women in the state of Washington. BBC's assessment of women-owned businesses in the availability analysis pertains to non-Hispanic white women-owned businesses. Non-Hispanic white women only make up 36% of the working adult population in the state of Washington. But regardless of that error, and for the reasons explained above, the entire basis of a population-based argument for measuring relative availability is incorrect and flawed.

²³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

In *City of Richmond v. Croson*, the City of Richmond set a participation quota of 30% for minority-owned businesses based in part on the fact that 50% of the city's population was made up of minorities. The Supreme Court held that the City of Richmond's quota was unconstitutional. The Court found that, "Reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond is ... misplaced." The Court also held that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." In addition, the Court held that, "... where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." The Supreme Court further held that "the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."

Based on the Supreme Court's decision in *City of Richmond v. Croson* and on court decisions that have followed *City of Richmond v. Croson*, it is well-established as a matter of law that availability analyses should be based on the percentage of an agency's contracting dollars for which businesses are ready, willing, and able to perform and *not* on population statistics. As described above, that argument has been rejected by the U.S. Supreme Court and by other courts in subsequent court decisions. It is thus noteworthy that your letter includes an argument for measuring relative availability using population statistics.

Your letter then makes misguided comparisons between the relative availability of women-owned businesses for a single, arbitrarily chosen set of WSDOT contracts (FHWA- and state-funded prime contracts and subcontracts in 2011) to availability estimates for different contract sets for different agencies from different studies in different geographical market areas. There are several reasons why such comparisons are inappropriate. For example:

- Different geographical market areas have different contracting environments and marketplace conditions, and those differences can have substantial effects on estimates of relative availability. For example, Initiative 200 amended Washington state law to prohibit government agencies from applying race- and gender-conscious measures to state-funded contracts.²⁴ There is evidence that Initiative 200 has depressed the availability of minority- and women-owned businesses in the

²⁴ RCW 49.60.400(1).

Washington transportation contracting industry (e.g., see Chapter 4 and Appendix J of the disparity study report). Because analogous laws may not exist in other geographical market areas such as Illinois, Missouri, and Oregon, it is inappropriate to make comparisons of availability analysis results across those geographical market areas. In accordance with that point, the federal regulations and relevant case law require that proper availability analyses are tailored specifically to an agency's relevant geographic market area (see e.g., *Western States Paving v. WSDOT, AGC, San Diego vs. Caltrans*, and *Northern Contracting, Inc. v. Illinois DOT*).²⁵

- Different agencies award different types and sizes of contracts, and those differences can have substantial effects on estimates of relative availability. For example, Table 2 in your letter presents the relative availability of non-Hispanic white women-owned businesses from Illinois (10.85%).²⁶ That availability figure was for Illinois Department of Transportation (IDOT) construction prime contracts worth less than \$500,000. The availability figure to which you arbitrarily compare it from the 2013 WSDOT Disparity Study was for construction and engineering prime contracts and subcontracts of all different sizes. If one limits that comparison to results for WSDOT construction prime contracts worth less than \$500,000, then the relative availability of non-Hispanic white women-owned businesses is 9.05%. That example illustrates why the federal regulations and relevant case law require that proper availability analyses are tailored specifically to the actual contracts that an agency awarded (see e.g., *Western States Paving v. WSDOT, AGC, San Diego vs. Caltrans*, and *Northern Contracting, Inc. v. Illinois DOT*). It also illustrates why it is generally inappropriate to compare availability analysis results across different agencies.
- Different disparity study firms use different methodologies to estimate availability, which can have substantial effects on availability analysis results. For example, the disparity study firm that produced the availability estimate that your letter presents for the Missouri Department of Transportation (MoDOT) in Table 2 does not take relative capacity into account when estimating availability.²⁷ Not taking relative capacity into account can result in artificially high estimates of relative availability. BBC takes relative capacity and myriad other factors into account when estimating relative availability, consistent with the federal regulations and relevant case law (e.g., *Western States Paving v. WSDOT, AGC, San Diego v. Caltrans, Rothe Development Corp. v. U.S. Department of Defense*, and *DynaLantic Corp. v. United States Dept. of Defense, et al.*).
- Different study period years can also have substantial effects on availability analysis results. The availability analysis that BBC conducted for WSDOT was based on contracts that the agency awarded in federal fiscal years 2009, 2010, and 2011 (i.e., October 1, 2008 through September 30, 2011), which was during the 2009 economic

²⁵ *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007).

²⁶ <http://diversity.dot.illinois.gov/pdf/Presentation%202-24-12%20.pdf>, Slide 13.

²⁷ <http://www.modot.org/eccr/documents/NERAMODOTDisparityStudyFinal3.pdf>

downturn. There is evidence that the economic downturn depressed the availability of minority- and women-owned businesses in the Washington transportation contracting industry and nationwide (e.g., see Chapter 4 and Appendix J of the disparity study report). The availability estimates that your letter presents in Table 2 come from studies that are based on contracts that were largely awarded prior to the economic downturn, a period of time during which the relative availability of minority- and women-owned businesses was likely much higher all across the nation. For example, the availability estimate for Missouri comes from a study that was based on contracts that MoDOT awarded in federal fiscal years 2005 through 2009. The availability estimate for Illinois comes from a study that was based on contracts that IDOT awarded in 2006 through 2008.

For those and other reasons, one must exercise great caution when comparing relative availability estimates across different contract sets, different agencies, different studies, and different geographical market areas. Not doing so can result in inappropriate and misleading conclusions about relative availability.

Once again, thank you for your letter regarding WSDOT's 2013 Disparity Study and WSDOT's implementation of the Federal DBE Program. This letter has provided sufficient responses to all of your questions and comments. We hope that you have gained a clearer, more accurate understanding of the disparity study results; relevant case law; applicable federal regulations and guidance; and the changes that WSDOT is making to its implementation of the Federal DBE Program. If you have any additional questions or comments, please do not hesitate to contact us.

Sincerely,



Brenda Nnambi
Director
Office of Equal Opportunity

BRN:bbc:erm

cc: Bob Ferguson, Attorney General
Lynn Peterson, Secretary of Transportation
Alexis Oliver, Director, OMWBE

APPENDIX D



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MEMORANDUM

To: Jackie Bayne
From: Todd Pickton and Sameer Bawa
Re: WSDOT Step 2 Adjustment
Date: January 29, 2015

Research indicates that there is a relationship between the size of projects and the availability of current and potential DBEs to participate on those projects. BBC Research & Consulting (BBC) assessed information that the Washington State Department of Transportation (WSDOT) provided about the size of construction projects that it anticipates awarding in Federal Fiscal Years (FFYs) 2013 through 2015. Assessment of that information could help WSDOT make decisions about setting its overall DBE goal for FFYs 2014 through 2017.

BBC's assessment of the size of construction projects that WSDOT anticipates awarding in FFYs 2013-2015 indicates that the construction projects that the agency anticipates awarding in the future will be more similar in size to the construction projects that the agency awarded in FFYs 2009-2011 than to the FHWA-funded construction projects that the agency awarded between May 9, 2005 and September 30, 2006.¹ Three key metrics illustrate that point:

- The average size of the construction projects that WSDOT anticipates awarding in FFYs 2013-2015 is approximately \$5.4 million, which is similar to the average size of the construction projects that WSDOT awarded in FFYs 2009-2011 (\$6.1 million). The average size of the FHWA-funded construction projects that WSDOT awarded between May 9, 2005 and September 30, 2006 was only \$3.0 million.
- Approximately 5.8 percent of the construction projects that WSDOT anticipates awarding in FFYs 2013-2015 will be worth more than \$20 million, which is similar to the percentage of construction projects that WSDOT awarded in FFYs 2009-2011 that were worth more than \$20 million (5.4 percent). Only about 2.5 percent of the FHWA-funded construction projects that WSDOT awarded between May 9, 2005 and September 30, 2006 were worth more than \$20 million.

¹ BBC analyzed FHWA-funded construction projects that WSDOT and local agencies awarded between May 9, 2005 and September 30, 2006 as part of the 2012-2013 WSDOT disparity study.

- Approximately 43 percent of the dollars associated with the construction projects that WSDOT anticipates awarding in FFY 2014 will be part of projects that are worth more than \$50 million. Similar to that figure, approximately 61 percent of the dollars associated with the construction projects that WSDOT awarded in FFYs 2009-2011 were part of projects that were worth more than \$50 million. None of the dollars that were associated with the FHWA-funded construction projects that WSDOT awarded between May 9, 2005 and September 30, 2006 were part of projects that were worth more than \$50 million.

The similarities in size between the construction projects that WSDOT anticipates awarding in FFYs 2013-2015 and the construction projects that WSDOT awarded in FFYs 2009-2011 — among other factors — indicates that it would be appropriate for WSDOT to consider information about contracting and marketplace conditions in FFYs 2009-2011 when setting its overall DBE goal for FFYs 2014-2017.

The disparities in size between the construction projects that WSDOT anticipates awarding in FFYs 2013-2015 and the construction projects that WSDOT awarded between May 9, 2005 and September 30, 2006 — among other factors — indicates that an upward step 2 adjustment to WSDOT's base figure to a 14.9 percent overall DBE goal may not be supported.² WSDOT should continue to adhere to USDOT guidance, federal regulations, and relevant court decisions when setting its overall DBE goal.

² See WSDOT Disparity Study, Chapter 9, page 9 for additional information.