

**Report of Investigation
Disadvantaged Business Enterprise (DBE) Complaint (DOT# 2012-0257)**

I. Complainant Name

Elton Mason
Washington State Trucking
P. O. Box 633
Kirkland, Washington 98083

II. Respondents

Washington State Department of Transportation (WSDOT)
320 Maple Park Avenue SE
P. O. Box 47300
Olympia, Washington 98504-7300

Seattle Tunnel Partners (STP) – A Joint Venture (Dragados USA and Tutor Perini Corp.)
999 3rd Avenue, Suite 2424
Seattle, Washington 98104

III. Applicable Regulations

49 CFR §§26.37; 26.51; 26.53; 26.103; and 49 CFR Part 26 Appendix A

IV. Background

The Alaskan Way Viaduct (AWV) Bored Tunnel Project (the Project) is a design-build, Federally-assisted contract in the City of Seattle (Federal-aid #BR-NH-STP-STPF-0099(111)).

The Project scope is to build a new State Route 99 corridor through Seattle that includes a two-mile-long tunnel beneath downtown Seattle; a mile-long stretch of new highway that connects to the south entrance of the tunnel; a new overpass at the south end of downtown that allows traffic to bypass train blockages near Seattle's port terminal; demolition of the viaduct's downtown waterfront section in 2016; and a new Alaskan Way surface street along the waterfront that connects SR 99 to downtown. According to the Washington State Department of Transportation (WSDOT), this project includes a considerable amount of specialty work, especially pertaining to the bored tunnel.

The WSDOT is the contract owner. The Seattle Tunnel Partners (STP) is a Joint Venture between Tutor Perini Corp. and Dragados USA and was the successful proposer. Their "proposal" price was \$1,139,700,002.

The “Conformed Request for Proposal (Design Build Contract)” states that WSDOT had established a Disadvantaged Business Enterprise (DBE) goal in the amount of 8% of the compensation payable to the Design-Builder. The DBE Performance Plan, submitted by STP as part of its proposal, states, “STP is committed to exceeding the 8% DBE participation goal established for the Alaskan Way Viaduct Alternative Project.” The project is anticipated to be completed in 2015.

V. Allegations

The complainant, Elton Mason (Mason, or Complainant), alleges failure by WSDOT to ensure compliance by properly monitoring its DBE Program as part of the Alaskan Way Viaduct project, when:

- WSDOT determined that the Project prime contractor, STP, used adequate good faith efforts, pursuant to the requirements set forth in 49 CFR 26.53(g), to find another DBE to substitute for Grady Excavating, Inc. (Grady), after Grady was decertified and WSDOT determined that it no longer could be counted toward the contract goal.
- WSDOT failed to provide adequate oversight of STP’s efforts to achieve the project’s DBE goal.

Subsequent to the Mason filing his complaint, the Federal Highway Administration (FHWA) Washington Division Office and the FHWA Headquarters Office of Civil Rights (HCR) received four additional written complaints and several informal allegations against STP by DBEs with assertions similar to Mason’s: that WSDOT is not providing adequate oversight of its DBE Program by permitting STP to use merely *pro forma* efforts to meet the Project’s DBE goal.

VI. Investigative Procedure

Pursuant to 49 CFR §26.103, anyone who believes that a recipient has failed to comply with its DBE program obligations may file a written complaint with the concerned U.S. Department of Transportation (USDOT) Operating Administration. The HCR received Mason’s complaint on August 20, 2012. Upon review, HCR accepted the complaint and forwarded it to the FHWA Washington Division Office for investigation. In addition, HCR elected to assist the FHWA Division Office with the investigation. The on-site portion of the investigation took place on October 24-26, 2012, in Seattle, Washington.

During the on-site, FHWA conducted interviews with the following individuals:

- Elton Mason, Owner of Washington State Trucking (DBE - Complainant)
- Barry O’Young, Owner of OMA Construction (DBE)
- Daniel Assefa, Owner of Pro-USA LLC (DBE)

- Brian Nielsen, WSDOT AWW Contract Administrator
- Linea Laird, WSDOT AWW Program Administrator
- Greg Bell, WSDOT Office of Equal Opportunity External Civil Rights Program Manager
- Chris Dixon, AWW Project Manager for Seattle Tunnel Partners. (Mr. Dixon was a current employee with AWW at the time of his interview.)
- Reggie Smith, AWW Commercial Manager for Seattle Tunnel Partners. (Mr. Smith was a current employee of AWW STP at the time of his interview.)
- Erin Lopez-Nielsen, DBE Compliance Manager for Seattle Tunnel Partners. (Ms. Lopez-Nielsen was a current employee of AWW STP at the time of his interview.)
- Randy Everett, FHWA Major Projects Engineer

The FHWA Division Office subsequently conducted telephone interviews with the following former STP staff:

- Ms. Lorrie Day, former DBE Compliance Manager for STP (assistant to Erin Lopez Nielsen and acted in her absence). (Ms. Day separated from STP prior to her interview.)
- Mr. Clyde Joseph, former STP Engineering Manager. (Mr. Joseph separated from STP some time after his interview.)

HCR and the Division Office also conducted telephone interviews with the following DBE owners, one of whom wishes to remain unidentified:

- Susan Belcher, owner of UniPro Caulking & Restoration Inc.
- Ardith Lanstra-Nothdurft, owner of Wakerobin, LLC
- Fred Anderson, owner of Leajak
- Duane May, owner of Western Industries
- Catherine Bassetti, DBE photographer
- DBE owner who wishes to remain anonymous
- James Hasty, owner of Allied Fuel

As part of its investigation, the FHWA reviewed the following documents obtained from WSDOT and STP representatives during and subsequent to the on-site visit:

- May 26, 2010 Instructions to Proposers (for contract procurement)
- December 10, 2010 Design Build Contract (Conformed Document)
- DBE Performance Plan Submitted by STP at time of Proposal
- STP Agreements/Subcontracts Listing
- STP Listing of Potential DBE Opportunities (created by Chris Dixon, Feb. 2012)

- DBE Participation Plan Monthly Progress Reports (a sampling of those submitted to date by STP to WSDOT)
- DBE CUF On-Site Reviews to date
- WSDOT Construction Manual (Section 1-2.7F)
- Original Truck Hauling RFP and results
- STP's Procurement Procedures, Workflows and References (May11, 2012)
- DBE and EEO Forms required by STP (as part of bid documents they require of subcontractors via the Aconex electronic project/document management system)
- Haul & Disposal RFP South Portal (August 14, 2012)
- Subcontract documents for OMA (DBE) and JH Kelly (non-DBE)
- Bid Analysis Sheets and various emails/correspondence regarding STP's DBE decision-making
- Copy of a Short-Form Subcontract and a Not to Exceed (NTE) Subcontract
- Two letters from WSDOT (Linea Laird) to FHWA Washington Division (Jodi Petersen, Civil Rights Specialist) dated November 2012 and March 15, 2013, which provided further explanation of STP's DBE procurement efforts
- Documents from DBE owner who wishes to be unidentified

VII. Issues

For analysis purposes, this report breaks down the allegations into the following two issues:

1. Did WSDOT provide requisite DBE program oversight by ensuring STP used adequate good faith efforts when it attempted to replace Grady with another DBE on the Project?
2. Is WSDOT meeting the requisite oversight and monitoring obligations to ensure DBE program compliance by STP? Specifically, is WSDOT monitoring STP's Project DBE goal attainment, including whether STP's procurement practices do not place barriers for DBEs to allow them equal opportunities to participate on the Project as subcontractors?

Issue 1

Did WSDOT provide requisite DBE program oversight by ensuring STP used adequate good faith efforts when it attempted to replace Grady with another DBE on the Project?

Issue 1: Authorities

- **49 CFR §26.37:** “[The recipient] must implement appropriate mechanisms to ensure compliance with the part’s requirements by all program participants.”
- **49 CFR §26.87(j)(2):** “If a prime contractor has executed a subcontract with the [DBE] before [the recipient has] notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm’s work.”
- **49 CFR §26.53(f)** “You must require that a prime contractor not terminate a DBE subcontractor listed in the response to paragraph (b)(2) of this section (or an approved substitute DBE firm). This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.”
- **49 CFR §26.53(g):** “When a DBE subcontractor is terminated or fails to complete its work on the contract for any reason, [the recipient] must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal [the recipient] established for the procurement.”
- **49 CFR §26.53(h)** “You must include in each prime contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with the requirements of this section.”

Issue 1: Background Facts

During the investigation, the following facts were discovered that provided some background into Complainant’s allegations. Those who provided the information are identified after each bullet below:

- Prior to advertisement of the Project, WSDOT held pre-bid meetings during which WSDOT told proposers that the DBE goal would likely be somewhere between 12% and 15%. STP, as a prospective bidder, commented at the time that the goal was too high. STP researched similar types and sizes of projects in California where DBE goals ranged from 3% to 4%. STP shared this information with WSDOT during the pre-bid meetings. (Joseph)
- Prior to advertisement of the Project, WSOT Project staff met with WSDOT’s Office of Equal Opportunity (OEO) to discuss the appropriate DBE goal. OEO’s goal setting methodology, which included an analysis of subcontracting and subconsulting opportunities and identification of certified DBEs qualified to perform the work, concluded that the Project could support a DBE goal between 12% and 21%. Despite this, the WSDOT Project staff

advocated for a 3% goal due to the specialized nature of the Project. (Bell) (Laird)

- WSDOT ultimately set and advertised the Project with an 8% DBE goal. (Bell)
- When the RFP was ultimately issued, it had an 8% goal which STP and WSDOT project staff believed was too high. (Joseph) (Laird)
- The “Conformed Request for Proposal (Design Build Contract)” states “WSDOT has established a Disadvantaged Business Enterprise (DBE) goal in the amount of 8% (of the compensation payable to the Design-Builder).”
- In response to the RFP, each proposer submitted a DBE Participation Plan with its bid. It is not WSDOT’s practice for the OEO to review DBE Participation Plans submitted by proposers. These are reviewed by WSDOT contract staff as part of the selection process and by the Contract Administrator’s staff when final selection is made. WSDOT’s review of proposers’ participation plans is a “pass/fail” process. (Bell)
- In a May 2, 2012 letter to STP, the WSDOT Contract Administrator changed the goal (as stated in the Conformed Request for Proposal) from 8% of “the compensation payable to the Design Builder” to 8% of the Design Builder’s Price Proposal, plus the value of the South U-Section Fund. This was expressed as a dollar figure (\$91,176,000) in order to provide STP with a set dollar amount of expected DBE participation. (Nielsen)
- During the investigation, an STP representative and former STP representative stated that the 8% goal was too high for this project. (Dixon, Joseph)
- WSDOT’s Project Administrator stated during the investigation that she believed a 3% goal, as opposed to an 8% goal, was more reasonable, considering the specialized nature of the Project. (Laird)
- As much of the Project involves excavating and removing dirt, STP determined that it would achieve most of its DBE participation through hauling services. Joseph (formerly of STP) drafted an RFP for the original trucking work (South Portal) for the Project; however, the RFP was not publically advertised. Joseph developed a list of DBE contractors who had expressed interest in the work during a previous “Meet and Greet” (prior to STP’s selection as the successful proposer). There were 6-7 firms interested – one non-DBE and six DBEs. Day requested that Joseph add a couple of additional DBEs to the list. Each firm was contacted (via email and/or telephone) by Day and asked to submit a list of qualifications, along with their bid and prices. Ultimately, 6 firms – two non-DBEs and four DBEs, bid on the trucking work. (Joseph, Day, Smith)
- Contacts made to DBE trucking firms by the DBE Compliance Manager (Day) for the original trucking subcontract did not initially include Grady. Joseph later emailed Day instructing her to contact Grady and solicit a bid for the trucking work. (Day)
- STP met with some DBEs who had requested a meeting to better understand how STP wanted the hauling and disposal work priced. Mason was one of the

DBEs who had requested a meeting. Joseph instructed Mason to prepare his bid on a “per load” basis. Mason’s ultimate bid came in on a “per hour” basis as did all other DBEs, except Grady (the successful bidder, and a DBE). Joseph stated that Mason did not follow his instructions when preparing his bid. (Joseph)

- Bid instructions given by Joseph to Mason were different from those provided to Grady. (Day)
- Joseph indicated that in order for him to compare bids as “apples-to-apples,” he adjusted Mason’s bid to reflect “per load.” Joseph also estimated how much time it would take a truck to get to the dump site and back. A comparison matrix was developed using Joseph’s adjusted figures. (Joseph)
- STP’s bid analysis (dated Oct. 28, 2010) for the trucking work shows all firms’ unit prices as “per ton.” The total comparison costs were as follows: \$26,433,300 (Budget, a non-DBE); \$24,967,700 (Mason, a DBE); \$24,316,800 (Silver Streak, a DBE); \$24,174,150 (American Pride, a DBE); \$23,698,930 (HOS Brothers, a non-DBE); and \$22,015,850 (Grady, a DBE). A comparison matrix was developed after review of subcontractor qualifications and respective bids. The matrix was forwarded to STP’s Executive Committee, who made the final decision on firm selection. (Dixon, Smith, Joseph, Day, and Lopez-Nielsen)
- Bid “per ton,” as opposed to bid “per hour,” is more advantageous to the Prime contractor. Trucking companies take the risk for downtime, delays, etc. (O’Young, Mason)
- STP hired Grady Excavating, Inc. (Grady), through the informal bid process (mentioned above), to perform the original hauling and disposal work associated with the South Portal. (Day, Joseph, Smith, Lopez-Nielsen)
- Pat Grady, brother-in-law of Kim Grady (owner of Grady Excavating), is an employee of Dragados (at their Seattle Corporate office). (Mason, Dixon, Day, Joseph)
- Pat Grady’s employment with Dragados did not influence Joseph’s decision to contact and invite Grady to bid. (Joseph)
- Grady was decertified as of July 6, 2012; a complaint investigation by the UCP and an administrative hearing found Grady’s owner, a non-minority female, did not control the business as required for qualification as a DBE (49 CFR 26.71). Following the announcement of Grady’s decertification as a DBE, some of the local minority contractors protested at the Project site and contended that STP was continuing to use Grady for work when there were other qualified DBEs available to perform the remaining work. (Mason, Assefa, O’Young, Bell)
- While STP would have been within its rights to retain Grady and continue to count Grady’s participation,ⁱ ambiguous clauses in their contract (with WSDOT) and public outcry led to discussions between STP and WSDOT and the ultimate decision to terminate Grady’s contract and substitute the remainder of Grady’s work to another DBE. (Bell)

Issue 1: STP's Efforts to Replace Grady

- It was Dragados' decision to ask for bids for all subcontracting items to ensure lowest cost. (Dixon)
- Smith developed a second RFP for hauling services to substitute for Grady. Dixon worked with WSDOT to get their concurrence on the RFP and to develop an outreach process for DBE haulers. The advertisement process was similar to the first: STP emailed and telephoned known DBE trucking firms. The new RFP required responding firms to submit bids through an electronic bid system called Aconex. This process (requiring subcontractors to use Aconex to submit bids) was not used at the time of the original RFP, and therefore, was not required of Grady. (Smith, Dixon, Lopez-Nielsen, Joseph)
- WSDOT's contract with STP requires the use of an electronic communication system to document communications between STP and WSDOT. There is no requirement in that contract that STP use an electronic system for *subcontractor* bidding. Requiring the use of Aconex as a means of receiving subcontractor bids was a business decision made solely by STP. (Nielsen)
- Dragados' subcontracting submission process is onerous, but it's what Dragados requires. (Dixon)
- There were five DBEs that submitted bids in response to the second RFP (for the remainder of Grady's work): Washington State Trucking (owner is Mason, Complainant); OMA Construction; Pro USA; Kiawa; and Truckers Consortium. (Dixon, Smith, Lopez-Nielsen)
- FHWA interviewed the owners of three of the above- referenced DBEs. All owners stated that the Aconex electronic bidding system was extremely difficult to use. None had previous experience with this type of bidding system. (Assefa, Mason, O-Young)
- In addition to the Aconex submittal requirement, the RFP for the remainder of Grady's work contained several requirements that posed considerable challenges/barriers for DBEs. These requirements included bonding requirements; proof that the company owns and operates 20 trucks; all trucks and trailers be dedicated full-time to the project; and the inability to build into their bid delays and/or standby time. (Assefa, Elton Mason, O'Young)
- No certified DBE trucking company in Washington State other than Grady owns 20 trucks.
- Unlike the original RFP, the new RFP required the haulers to submit personal and business information, including financial statements with all bids on STP's DBE 03 Form. (Elton Mason, Lopez-Nielsen)
- As stated above, the second RFP also contained a bonding requirement. (Dixon, Smith, Joseph, Lopez-Nielsen, Assefa, Mason, O'Young)
- Surety companies do not bond trucking companies; bonding is unnecessary for trucking companies because their work typically consists of just loading and dumping. One of the DBEs interviewed stated that he pleaded with a

surety company to give him a bond so that his bid would be responsive to STP's bid requirement. (Assefa)

- On August 12, 2012, STP convened a meeting with all DBEs having submitted a bid for the remainder of Grady's work. The purpose of the meeting was to explain the process STP followed in arriving at their decision. (Smith)
- STP viewed the meeting as a good faith effort in attempting to hire DBEs in that there would be discussion of issues associated with their recent response to the RFP and communication of upcoming work on the North Portal portion of the Project. (Dixon)
- STP announced at the August 12 meeting that none of the bidders' bids came in low enough; therefore, STP was continuing to use Grady. (Assefa, Mason, O'Young)
- DBEs interviewed were not aware that their bids (prices) would be compared to Grady's previous contract. They would not have bothered with preparing their bids, as they knew they would not be able to compete with Grady due to Grady's size and contracting connections. (Assefa, Mason, O'Young)
- Dixon presented the DBEs with a bid price matrix that showed all bids were higher than Grady's. Of the bids submitted, OMA's was the lowest. (Dixon, Mason)
- Dixon also told the firms that they were all found nonresponsive because they either, submitted their proposal to an incorrect website, submitted via email, or submitted under protest due to a short bid period. While all bidders used the Aconex system to download the required forms, they did not submit the completed forms through Aconex. (Assefa, Mason, O'Young, Dixon)
- OMA challenged STP, stating that its bid was the lowest of those who bid on Grady's remaining work and wanted to know why STP would not consider his bid. (O'Young, Dixon)
- STP ultimately chose to use OMA to perform the work previously contracted to Grady, but required OMA to reduce its bid price. WSDOT was not involved in the decision. (O'Young, Nielsen, Dixon)
- STP admitted that at this meeting he (Dixon) advised the DBEs that STP would not meet the 8% goal. (Dixon)
- OMA was not required to obtain a bond for the remainder of Grady's work that the company was ultimately selected to perform. (O'Young)
- STP had to get approval from the STP Executive Committee to waive the bonding requirement for OMA. (Smith)
- Grady was not required to obtain a bond or to submit financial information prior to hire. (Mason, Day, Smith)
- STP was not willing to unbundle the remaining hauling/disposal work into smaller contracts to provide opportunities for more than one trucking company. (Assefa, Mason, O'Young, Dixon)
- STP did not want to unbundle because they preferred to deal with only one hauling subcontractor. (Dixon)

- Interview team asked Mr. Dixon if they could interview Jack Frost, principal of Tutor Perini, and were informed by Mr. Dixon that Mr. Frost was not available to interview and that he (Mr. Dixon) could answer any question related to the project on behalf of Mr. Frost and STP.
- When asked about WSDOT's role in reviewing STP's RFP to replace Grady, WSDOT's Contract Administrator responded that WSDOT does not get involved in STP's procurement policies/decisions. (Laird)

Issue 1: Discussion

STP originally hired Grady – as a DBE, to perform the Project's entire south tunnel excavation work. STP did not publicly advertise for these services, and it is not required to do so. Pursuant to a third-party complaint that Grady's owner (a non-minority female) did not qualify for DBE certification, WSDOT's certifying entity, the Office of Minority and Women Business Enterprises (OMWBE), held a hearing which resulted in Grady's decertification. Pursuant to 49 CFR 26.87(j)(2), since STP had executed a contract with Grady prior to its decertification, STP would have been within its rights to retain Grady and continue to count its services toward the goal. However, STP's contract contained ambiguous clauses with respect to its responsibilities in the event a DBE becomes decertified during the life of the contract. While one clause mirrored the regulation set forth above, another clause required STP to substitute for a DBE that becomes decertified during the Project. WSDOT asked its State Attorney General's Office for an interpretation of the contract. The State Attorney General advised that due to the ambiguous clauses in the contract, WSDOT should replace Grady. Because of this opinion of the contract and the public outcry that resulted from Grady's continued involvement with STP, STP chose to terminate Grady.

Once a contractor chooses to terminate and replace a DBE, it must follow the procedures set forth in 49 CFR 26.53(g): "When a DBE subcontractor is terminated...for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement."

Although STP did not publicly advertise for Grady's services, STP chose to issue an RFP targeted solely at DBE excavating and hauling firms as a means of replacing Grady. The RFP contained a lengthy list of requirements that were not required of Grady, such as ownership of a minimum of twenty trucks; submission of personal financial information; a bonding requirement (bonding is normally not a requirement for trucking companies and is known to be a barrier to DBEs and small businesses); and that the submittal of the response be made through an electronic system that STP had recently purchased. Again, STP did not publicly advertise before hiring Grady and few, if any, of these requirements were demanded of Grady when it was hired.

While it is likely the onerous requirements of the RFP discouraged many DBEs from responding, FHWA interviewed three DBE hauling companies that submitted a response. All described an arduous, lengthy and stressful process of attempting to meet the RFP's requirements.

After STP received the DBEs' responses, it called them all to a meeting, without disclosing the meeting's agenda. Chris Dixon, STP Project Manager, stated that the meeting was intended to discuss the RFP and upcoming opportunities on the North Portal portion of the Project. Dixon viewed this as part of STP's good faith efforts. All responding DBEs attended the meeting at which time they were told that none of them would be hired because all of their prices exceeded Grady's price; all but one response met all RFP requirements; and that STP intended to retain Grady. At the meeting, STP distributed a matrix comparing all DBE competitors' pricing to the "current price" (which is assumed to be Grady's bid) and a copy of the relevant section of 49 CFR Part 26 which supported its right to retain Grady.

The DBEs interviewed stated that they would not have submitted responses had they known their prices would be compared to Grady's prices. They understood that they could not compete with Grady as it was a much larger and more established firm. Interviews with DBEs revealed that as smaller, newer businesses, they are charged more for supplies; are charged more for the ability to dump dirt at the identified landfill; have higher fees for financing their business and equipment; and they find bonding unattainable. Thus, they are unlikely to bid at lower prices than larger businesses.

Despite STP's initial decision to retain Grady, for the reasons stated above, among other things, STP then decided to terminate Grady and hire OMA (the largest of the DBE respondents) with the lowest price in response to the RFP. It was at the meeting described above that STP through its project manager, Chris Dixon, announced that it would not meet the Project's 8% DBE goal.

Once STP decided to replace Grady, it was WSDOT's responsibility to ensure STP made good faith efforts to find another DBE. WSDOT failed to intervene when STP created an RFP with unnecessary and onerous requirements that were not required of Grady. WSDOT failed to intervene when STP misled DBEs into coming to a meeting at which they reasonably believed STP would announce Grady's replacement. It was at this meeting that, instead, STP told the DBE bidders they were actually competing with Grady's bid and that they would continue to use Grady as well as telling the DBE bidders that STP would not meet the 8% contract goal. It was only due to an argument by OMA that STP replaced Grady with another DBE.

Issue 1: Conclusion

While STP ultimately hired another DBE to replace Grady, the procedures it followed created barriers and hardships for DBEs which do not conform to good faith efforts requirements. WSDOT failed in its oversight responsibility to ensure STP used good faith efforts to find other DBEs once the decision was made to replace Grady.

Issue 2

Is WSDOT meeting the requisite oversight and monitoring obligations to ensure DBE program compliance by STP? Specifically, is WSDOT monitoring STP's Project DBE goal attainment, including whether STP's procurement practices do not place barriers for DBEs to allow them equal opportunities to participate on the Project as subcontractors?

Issue 2: Authorities

- **49 CFR §26.37:** “[The recipient] must implement appropriate mechanisms to ensure compliance with the part’s requirements by all program participants.”
- **49 CFR §26.53 (a)** “When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder/offeror has made good faith efforts if the bidder/offeror does either of the following things:
 - (1) Documents that it has obtained enough DBE participation to meet the goal; or
 - (2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. ...”
- **Appendix A to Part 26—Guidance Concerning Good Faith Efforts**
 - I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation even if they were not fully successful.
 - II. . . . It is important for [the recipient] to consider the quality, quantity, and intensity of the different kinds of effort that the bidder has made. The efforts

employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements.

...

- IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.
- A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
 - B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
 - C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
 - D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.
(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of

the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

- E. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.
- F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
- G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

Issue 2: Facts

- After STP was identified as the successful bidder, there were conversations between WSDOT and STP about difficulty in meeting the goal, but WSDOT contract administrator did not recall statements made by STP that they were not going to meet the goal. (Nielsen)
- STP did not intend to meet the DBE goal. Rather, Dixon and Joseph told DBE compliance staff to document for good faith. (Day)
- STP and the WSDOT Project staff have, on more than one occasion, made statements to various individuals that the goal assigned to this project is too high. (Laird, Dixon)
- STP's *Procurement Procedures, Workflows and References* states: "The selection and award to the successful provider will be based on the qualifications, capabilities, responsiveness, competitiveness, **and the DBE Goal.**"
- During the investigation, the STP Project Manager stated that because of STP's procurement policy (subcontractors are chosen strictly on basis of low bid) and the specialized nature of the project, an 8% goal cannot be met. (Dixon)
- In January 2013, STP communicated to FHWA that they feel there is only \$49 million of DBE opportunities remaining, instead of the \$73 million necessary to achieve the goal -- \$91,176,000 as expressed by the Project staff. (Smith)
- Subsequently (March 2013), WSDOT's Project Contract Administrator reported that STP is claiming \$10,990,848 in commitments and \$4,676,169 in attainment. (Laird)
- At the time of this report, the paid-to-date attainment is less than 1%. As of March 2013, the project was 33% complete. (Laird)

STP Subcontracting Process

- STP's subcontracting selection criteria states that decisions are made based on the lowest responsive bid. (Day, Lopez-Nielsen)
- STP's procurement procedures are used for soliciting DBE participation. A standard question for procurement is what the subcontracting firm's bonding capacity is and whether or not they are a financially stable company. If the company has a weak balance sheet, STP needs to know this in advance. All contracts are awarded to the lowest, responsible bidder. (Joseph)
- STP's Executive Committee (Jack Frost of Tutor Perini and Alejandro Canga of Dragados) has to approve all contracts/procurements over \$50,001. A bid analysis for each subcontract is developed by staff for review and approval by the Executive Committee. (Dixon, Smith, Day)
- Prospective subcontractors are reviewed on their experience, their capacity to perform the work of the subcontract, their ability to follow directions, and their price. (Smith)
- STP issues "not to exceed" contracts to DBEs. These "not to exceed" amounts are listed as commitments toward goal achievement. (Bell, Smith)
- DBEs have reported that they are terminated without STP having met the "not to exceed" commitment. (DBEs requesting anonymity)
- There are problems with subcontractors not paying their bills, so STP is checking their financial information to ensure they can pay their bills. (Dixon)

DBE Participation/Good Faith Efforts

- STP's DBE Compliance Manager is responsible for soliciting DBE participation and documenting good faith efforts. She does not monitor DBE participation on-site. Dragados expects a team effort on DBE matters. Field staff is expected to monitor DBE participation. (Lopez-Nielsen)
- STP voiced concerns about firms being certified in NAICS Codes (work type) that are not reflective of the work they perform. Therefore, DBEs are not hired because they could not be counted toward the goal for failure to provide a commercially useful function. (Lopez-Nielsen)
- STP and WSDOT requested WSDOT's certifying entity, OMWBE, to expedite their review of DBEs' requests for added NAICS Codes for participation on this project. (Nielsen, Lopez-Nielsen)
- STP solicited bids from/awarded contracts to Minority and Women Business Enterprises (M/WBE – a Washington State program for state-funded projects) and then requested OMWBE to expedite review for DBE certification so that STP could count these firms towards the DBE goal. (Everett, Bell)
- STP's DBE Compliance Manager and WSDOT's OEO communicate regularly about DBE matters such as NAICS, Commercially Useful Function (CUF), Good Faith Efforts, and training. (Bell, Lopez-Nielsen)

- WSDOT Contract Administration staff believes STP is making outstanding efforts to reach out to DBEs because they've hired a DBE Compliance Manager who spends a considerable amount of time recruiting suitable DBEs for the project and hosting public open houses and "meet and greet" events for DBEs and STP. (Laird, Nielsen)
- Similarly, STP believes that the efforts made by their DBE Compliance Manager to aggressively recruit suitable DBEs and host open house/meet and greet events are adequate evidence of good faith efforts. (Dixon, Smith)

Additional complaints were received (via email and telephone) from other DBEs concerning issues they have experienced in attempting to bid on or work with STP on the Project:

- Oct. 25, 2012 complaint by Susan Belcher, owner of UniPro Caulking & Restoration Inc., that STP only asked her company to bid the Project because STP had to have a document to show they made a Good Faith Effort. She was not hired.
- Nov. 6, 2012 complaint by Ardith Lanstra-Nothdurft, owner of Wakerobin, LLC, that HNTB (design partner of STP) terminated her contract before her work was complete and believes it was in retaliation of her having complained about working conditions.
- March 26, 2013 complaint by Fred Anderson, owner of Leajak that STP confiscated Leajak's materials and equipment, suspended all payments and imposed several thousand dollars of additional work on the firm without payment.
- April 29, 2013 complaint by Duane May, owner of Western Industries that STP invited his firm to bid, stating that they would waive the bond requirement, and then later (after May submitted his bid) recanted, stating that the performance bond is mandatory with STP.
- November 13, 2012 email from Nielsen states that NHTB (STP's design partner) ended their work early by approximately 6 months; however, STP's Monthly Progress Report (No. 23) for the period January 1, 2013 through January 31, 2013 (submitted with Laird's March 15, 2013 letter to FHWA) states "STP continues to work with NHTB with their DBE participation to 8%. NHTB continues to identify scopes for firms and make adjustments to their plan as DBE applicable value is determined."
- Conversation with Catherine Bassetti, DBE photographer, on June 27, 2013. In 2011, DBE photographer, Catherine Bassetti, signed a contract with STP for \$40,000 to take photographs of the Project and its progression. As a result, she kept her schedule free and turned down other work. To date, she has never been called, and when she inquired about when they would need her services, STP told her to seek other work.

- Conversation on July 16, 2013, with a DBE who wishes to remain anonymous who had a contract with STP that was decreased pursuant to a change order; her work was then given to a subcontractor associated with Tutor-Perini.
- Conversation on August 15, 2013 with James Hasty, owner of Allied Fuel (a DBE company). Mr. Hasty submitted a proposal to STP on a fueling contract that STP had advertised in June 2013. STP responded to Mr. Hasty's bid proposal by sending him a contract to sign. Mr. Hasty signed and returned the contract as instructed by STP. On June 13, 2013, STP's Aconex bid system reflected that Allied had been awarded the contract (subject to agreement on terms and conditions). The supplier of the fuel storage tanks notified Mr. Hasty that STP (Brian Reagan) told him that the fuel tanks were not needed on the Project. When Mr. Hasty contacted STP, he was told to rebid the contract in a different manner than his original bid proposal (changed the scope after the Aconex system identified Allied as the successful bidder). Mr. Hasty rebid the contract, and then received notice from STP (Chris Dixon), that he was not the low bidder. When he asked STP about the signed contract, STP told him that they never signed the contract. The contract was subsequently awarded to a non-DBE.

Issue 2: Discussion

Federal regulations provide that once a DBE goal has been set, the contractor is obligated to make good faith efforts to meet the goal, by either obtaining enough DBE participation to meet the goal or by documenting its good faith efforts to do so. STP was selected as the successful bidder in part because it agreed to meet the Project's 8% DBE goal. The Project operates pursuant to a "design-build" contract. As such, a contractor may be unable to identify individual DBEs at the beginning of the contract; however, the contractor has a responsibility to use ongoing good faith efforts to hire DBEs to meet the contract goal.

"Good faith efforts" are defined as a showing that the contractor "took all necessary and reasonable steps to achieve a DBE goal...which, by their scope, intensity and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful." Appendix A to 49 CFR Part 26. In determining whether a bidder's good faith efforts were sufficient, the recipient must "consider the quality, quantity, and intensity" of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. Further, "the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable." Appendix A to 49 CFR Part 26.

STP submitted its response to the Project RFP with full knowledge of, and a commitment to meet, the 8% DBE goal. According to interviews, STP will not consider a DBE subcontractor if its price is higher than a non-DBE. DBEs, by definition, are small businesses; therefore, as stated above, their prices will likely always be higher than larger firms.

All contractors, as part of substantive good faith efforts, must balance the desire to maximize profits with their responsibility to hire small, disadvantaged businesses onto federally-assisted contracts. Recipients that accept federal funding for transportation contracts are required to do more than construct a roadway or tunnel; federal funds also require creating opportunities for small businesses which have been historically excluded from the construction industry.

DBE contract goals and proper program administration are not optional. Meaningful good faith efforts require not only absorbing some higher costs if necessary, they also mean removing barriers such as those found in STP's RFP to replace Grady. FHWA form 1273, included in the contract between WSDOT and STP, specifically states that "the contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts..."

STP is commended for hiring a DBE Liaison and conducting outreach sessions; however, if all of STP's outreach sessions yield few meaningful contracts for DBEs, they are but pro forma window dressing rather than authentic good faith efforts. STP's DBE Liaison has no authority to hire any DBEs she identifies or recruits.

STP's practices of awarding "not to exceed" contracts is misleading to DBEs and yields inflated commitment numbers. STP's practice of allowing change orders to decrease DBE commitments and failing to use good faith efforts to replace a DBE in order to meet the Project goal, fail to follow DBE requirements. STP's practices of requiring personal and financial business information and unnecessary bonding from DBEs prior to contract award is not conducive, and is in fact, contrary to making good faith efforts to achieve the Project goal.

STP's announcement in 2012, that it will not meet the contract goal for a project that is not scheduled for completion until 2015, does not evidence a good faith attempt to exercise all reasonable measures to achieve the contract goal which was a basis for contract award.

WSDOT is responsible to ensure STP's good faith efforts to meet the Project's DBE goal are compliant with federal regulations. WSDOT must provide effective program oversight. WSDOT may not aid and abet STP's outright refusal to meet the goal, despite project managers' beliefs that the goal is too high. WSDOT, once made aware of artificial barriers created by STP and its low bid policy, is obliged to intervene. WSDOT required STP to provide periodic DBE participation reports. These periodic reports included commitments that inflated participation data. Even with the inflated commitment reports, however, the reports showed STP was clearly not on track to

meet the 8% goal. Once aware of the contents of the reports, WSDOT is obliged to make meaningful attempts to correct the problem. WSDOT's "hands-off" approach to STP's practices used to attain the Project goal does not meet the requirements of DBE program regulations to provide oversight and ensure compliance from program participants such as STP.

Issue 2: Conclusion

WSDOT failed to oversee and adequately monitor STP's efforts to achieve the DBE goal. WSDOT failed to intervene when it recognized STP's efforts to meet the DBE goal were not of the nature of the efforts contemplated and required under the DBE regulations.

VIII. Conclusion

The evidence supports a noncompliance finding in that WSDOT has failed to provide sufficient or effective oversight of STP's efforts to meet the 8% DBE goal on the Project, and has provided insufficient oversight of STP's procurement practices to ensure STP does not create barriers for DBE participation. While STP ultimately replaced Grady with another DBE, it failed to follow the procedures set forth in the regulations; it placed artificial barriers in its RFP, and created hardships for DBE respondents that were not required of Grady.

WSDOT has failed to intervene when there is clear evidence to support that STP is not making adequate good faith efforts to achieve the Project goal which was a condition of contract award. It is clear that STP is not actively and aggressively using all measures that one would reasonably undertake if intending to meet the Project's DBE goal; it continues to engage in pro forma efforts that do not yield DBE participation while submitting inflated DBE participation reports based upon unsubstantiated commitments.

IX. Required Actions

- FHWA Division Office must arrange a meeting with STP, WSDOT, and FHWA to identify specific actions that will be taken to achieve the 8% DBE goal by the Project's completion date in 2015.
- FHWA Division Office must advise WSDOT that it must take all appropriate actions against STP available under its contractual agreement.
- The FHWA Division Office must issue a written notice to WSDOT advising it that there is reasonable cause to find it in noncompliance pursuant to 49 CFR §26.103(c). This notice must set forth the reasons for the finding and direct WSDOT to reply within 30 days to indicate whether they wish to begin conciliation proceedings. The result of these proceedings should include a commitment to revise its DBE Program Plan to include how WSDOT, going forward, will institute effective monitoring and oversight measures for all

contracts, including the design-build model, to ensure contractors either meet contract goals or provide documentation of meaningful good faith efforts to do so.
