



U.S. Department
of Transportation
**Federal Highway
Administration**

1200 New Jersey Avenue, SE.
Washington, DC 20590

JUN 26 2017

In Reply Refer To: HCR-20
DOT# 2016-0198

(b) (6)

Roger Millar
Acting Secretary for Transportation
Washington State Department of Transportation
320 Maple Park Avenue SE
P.O. Box 47300
Olympia, Washington 98504-7300

Subject: Letter of Finding, DOT# 2016-0198

Dear (b) (6) and Mr. Millar:

The Federal Highway Administration-Office of Civil Rights (FHWA) has completed its investigation for the administrative complaint referenced above against the Washington State Department of Transportation (WSDOT or Respondent). The complaint alleged that WSDOT failed to ensure that (b) (6), the prime contractor on the Alaska Way Viaduct (AWV) Project, complied with DBE Program prompt payment requirements with respect to (b) (6) work on the Project, and allowed (b) (6) to discriminate against the Complainant in (b) (6) negotiations for a potential 600,000 gallon fuel supply contract.

Based on the evidence, the FHWA finds that WSDOT did not violate the DBE prompt payment regulations, or otherwise allow (b) (6) to discriminate against (b) (6).

This Letter of Finding (LOF) summarizes the results of FHWA's complaint investigation. Kevin Resler, FHWA National Title VI Coordinator, was FHWA's lead investigator (Investigator), with assistance from Pamela Woodruff, FHWA EEO Program Coordinator, and the FHWA Washington State Division Office.

The FHWA works to ensure non-discrimination and equity as part of its mission to improve mobility on our Nation's highways through national leadership, innovation, and program delivery. This responsibility includes ensuring that recipients of FHWA's Federal financial

(b) (6)

assistance (Recipients) comply with Title VI of the Civil Rights Act of 1964² and the Disadvantaged Business Enterprise (DBE) Program.³ Because Congress created the DBE Program partly through the legal authority of Title VI,⁴ a Recipient's compliance with the DBE Program is part of its compliance with Title VI.

When individuals file discrimination complaints under Title VI, the FHWA Headquarters Office of Civil Rights (HCR) will process the complaints. If HCR accepts the complaint, it will investigate and may issue a LOF with potential findings and recommendations. The U.S. Department of Justice (DOJ), as the Federal government's coordinating agency for Title VI, implemented its Title VI program in 28 C.F.R. Part 42 and issued complaint-related guidance in two main documents: the Title VI Legal Manual and the Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes.

The U.S. Department of Transportation (USDOT) implemented its Title VI program in 49 C.F.R. Part 21. Specific provisions regarding the investigation of Title VI complaints are found at 49 C.F.R. § 21.11. Additionally, the DBE regulations provide that any person who believes that a recipient has failed to comply with its DBE Program regulations may file a written complaint with the FHWA.⁵ The FHWA's complaint investigation procedures are contained in its Procedures Manual for Processing External Complaints of Discrimination.⁶

This LOF will reference a prior investigation of WSDOT by FHWA, (b) (6) v. WSDOT (b) (6),⁷ but the facts and findings herein will only bear on the complaints that are the subject of this LOF. In (b) (6) FHWA responded to formal and informal DBE complaints against WSDOT on the federally-assisted Alaskan Way Viaduct Bored Tunnel Project (AWV Project).⁸ FHWA investigated the complaint and notified WSDOT on November 1, 2013, that it was in noncompliance with its DBE Program obligations for the AWV Project. After negotiating in good faith, WSDOT signed a Conciliation Agreement with FHWA on March 20, 2014. In the Conciliation Agreement, WSDOT committed to making changes to its DBE Program—both for the AWV Project and at the program level.

I. Procedural History and Allegations

On March 22, 2016, (b) (6) the African-American owner of (b) (6), filed a Title VI complaint on his company's behalf with the FHWA against WSDOT. The Complainant alleged that:

² Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program receiving Federal financial assistance." 42 U.S.C. § 2000d.

³ 49 C.F.R. Part 26.

⁴ 64 FR 5126, Feb. 2, 1999.

⁵ 49 C.F.R. §26.103(a).

⁶ FHWA Procedures Manual For Processing External Complaints of Discrimination, <https://www.fhwa.dot.gov/civilrights/programs/finalcomplaintmanual110410.cfm>.

⁷ DOT# 2012-0257.

⁸ Federal-aid #: BR-NH-STP-STPF-0099(111).

1. WSDOT failed to comply with DBE Program requirements in regards to (b) (6) on the AWV Project because prime contractor (b) (6) did not issue payments promptly.
2. WSDOT failed to comply with DBE Program requirements by allowing (b) (6) to discriminate against the Complainant in their negotiations for a potential 600,000 gallon fuel supply contract.

FHWA accepted the complaint on April 13, 2016, and sent a Request for Position Statement and Information to WSDOT, requesting documentation related to the complaint. On May 27, 2016, WSDOT responded timely with a letter and access to files related to FHWA's request. FHWA reviewed WSDOT's case files throughout June and July, 2016. On June 27 – 28, 2016, Kevin Resler and Pamela Woodruff from the FHWA Office of Civil Rights conducted onsite interviews in Washington State.

II. Factual and Legal Background

The Complainant alleged that in June, 2013, he entered into negotiations with (b) (6) for (b) (6) to provide fuel on the Project. According to the Complainant's interview with FHWA,⁹ the parties negotiated terms related to prevailing wages, fuel delivery methods, and pricing, and (b) (6) made a verbal commitment to contracting with the Complainant for approximately 600,000 gallons of fuel. The Complainant stated in interviews with FHWA that (b) (6) signed an agreement with (b) (6) but that only one of the (b) (6) partner firms signed it. The record does not contain this agreement, but (b) (6) representatives did not dispute this claim in an interview with the FHWA. On July 16, 2013, (b) (6) agreed to rebid the fuel contract, and (b) (6) submitted a bid to (b) (6) on July 17, 2013.¹⁰ On July 18, 2013, (b) (6) informed the Complainant via email that his quote was "out of a competitive range" compared to other bidders and requested a final offer.¹¹ On July 29, 2013, (b) (6) informed the Complainant that the contract for his original bid had not been executed and that the proposed contract terms that had been considered in earlier negotiations would be different in future negotiations.¹² (b) (6) has alleged the parties did not agree to the final terms of the agreement, and the negotiations broke down. (b) (6) ultimately awarded the 2013 contract for fuel to a different supply firm.

On August 22, 2013, the Complainant received notice from WSDOT that the Complainant's firm had exceeded the small business size standards for the DBE Program¹³ and was no longer eligible to be certified as a DBE in Washington State.

Pursuant to a contract change order executed between (b) (6) and WSDOT on March 19, 2014, (b) (6) agreed to engage in "Commercially Reasonable Discussions" with (b) (6) in May, 2014.¹⁴ During those discussions, (b) (6) offered the Complainant a purchase order contract for 200,000

⁹ Interview with (b) (6) Seattle, WA, June 26, 2016.

¹⁰ Email from (b) (6) to (b) (6) July 17, 2013.

¹¹ Email from (b) (6) to (b) (6) July 18, 2013.

¹² Email from (b) (6) to (b) (6) July 29, 2013.

¹³ 49 C.F.R. § 26.65 et seq.

¹⁴ Interview with (b) (6) Seattle, WA, June 26, 2016.

gallons of fuel (Current Contract) and both parties agreed during this investigation that the Current Contract was fully executed by both parties. The Current Contract was executed by both parties on July 14, 2014, and states that (b) (6) will pay (b) (6) within ten days of receipt of an invoice from (b) (6)¹⁵

Regarding the Current Contract, the Complainant fulfilled his obligations and (b) (6) continued to request fuel from the Complainant. In order to do so without a change to the Current Contract signed on July 14, 2014, (b) (6) stated that (b) (6) must submit a change order form with WSDOT in order to receive payment from (b) (6). In other words, for each new order for fuel from (b) (6) based on the Current Contract, (b) (6) submitted a change order form to (b) (6). After the form was submitted to (b) (6), (b) (6) then paid (b) (6).

Records submitted to FHWA show that twenty-four (24) change orders were executed by the parties, and (b) (6) made eighty-six (86) total payments to (b) (6). Of these, (b) (6) made ten payments to (b) (6) on the Current Contract that exceeded ten days between when (b) (6) submitted an invoice and when it received payment from (b) (6) as agreed to by the parties but (b) (6) payments did not exceed the 30 days required by FHWA regulations. The Complainant alleged the delays in payment were due to the need for change orders on this contract. (b) (6) did not dispute these facts.

On March 22, 2016, the Complainant filed a complaint against the WSDOT alleging discrimination pursuant to Title VI and alleging violations of the DBE regulations.

Recipients of federal financial assistance from the FHWA, such as WSDOT, are required to enforce the prompt payment requirements found in 49 C.F.R. § 26.29 and establish, as part of their DBE program, contract provisions and mechanisms to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment the Recipient makes to the prime contractor. The DBE regulations further provide that Recipients may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after the Recipient's payment to the prime contractor.¹⁶

Finally, the DBE regulations provide that Recipients must provide "appropriate means to enforce the requirements" of the prompt payment provisions. In addition, the contract terms required for all federally funded contracts under the Form 1273 also require prompt payments to subcontractors through the DBE Regulations. Washington State has additional prompt payment requirements for state contracts, provided by Washington State law RCW 39.04.250. Those provisions provide that when payment is received by a contractor or subcontractor for work performed on a public work, the contractor or subcontractor shall pay to any subcontractor not later than ten days after the receipt of the payment, amounts allowed the contractor on account of the work performed by the subcontractor, to the extent of each subcontractor's interest therein.

¹⁵ Purchase order from (b) (6) to (b) (6) Order Number DB-179, final signature on July 14, 2014.

¹⁶ 49 C.F.R. § 26.29(b)(3).

III. Analysis

The Complainant alleged (b) (6) should have awarded him the original 600,000 gallon contract and that (b) (6) actions constitute discrimination. The record does not contain sufficient evidence that this agreement was finalized and executed. Through interviews with the Complainant, Respondent, and (b) (6), it is clear the Complainant and (b) (6) disagreed about the terms of the original contract. In addition, email communications between the Complainant and (b) (6) show that (b) (6) informed the Complainant on July 29, 2013, that an agreement had not been executed. Regardless, whether or not both (b) (6) joint-venture partners to the initial 600,000 gallon fuel contract proposal were required to execute the contract is a contract law matter that is outside the jurisdiction of the FHWA to determine. After WSDOT ended (b) (6) DBE certification on August 22, 2013, (b) (6) and (b) (6) executed a complete contract for delivery of 200,000 gallons of fuel through a signed purchase order on June 24, 2014.

Regarding the Complainant's prompt payment allegations, the checks for (b) (6) payments to (b) (6) show that none of (b) (6) eighty-six (86) payments to the Complainant's firm on the Current Contract were made beyond the 30 days required by the DBE regulations. To the extent that (b) (6) made payments to the Complainant beyond the ten days agreed upon by (b) (6) and (b) (6) the weight of evidence in the record shows that the payment timing on the Current Contract was consistent with the use of change orders, and was not caused by discrimination.

IV. Findings

Based on the evidence, FHWA makes the following conclusions regarding this contract:

1. There is no clear evidence to determine whether (b) (6) and Complainant entered into a binding contract for delivery of 600,000 gallons of fuel. Whether a valid contract existed is a matter of contract law that is outside of the jurisdiction of the FHWA.
2. FHWA finds that WSDOT met the prompt payment requirements of the federal regulations because (b) (6) payments were sufficiently timely given the change orders involved in the payment process and did not discriminate against (b) (6). To the extent that the change order payments under the Current Contract were covered by standard contract prompt payment terms for both federally funded and Washington State contracts, any delays were due to the change order process, were sufficiently timely to meet standard contract requirements, and did not discriminate against (b) (6).

This letter concludes FHWA's investigation, and the case will be closed with no further action. If you have any questions regarding this matter, please contact Mr. Kevin Resler, at (202) 366-2925, or kevin.resler@dot.gov.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Irene Rico', written in a cursive style.

Irene Rico
Associate Administrator for Civil Rights

cc: Daniel Mathis, Division Administrator, FHWA Washington Division Office
Melinda Roberson, Assistant Division Administrator, FHWA Washington Division Office
Jodi Petersen, Civil Rights Program Manager, FHWA Washington Division Office
Lisa MacPhee, Senior Attorney-Advisor, FHWA's Office of Chief Counsel
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Martha Kenley, DBE/Contractor Compliance Team Leader, DOT Departmental Office of Civil Rights (ACR-30)