U.S. Department of Transportation
Federal Highway Administration

1200 New Jersey Avenue, SE.
Washington, DC20590

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In Reply Refer To: HCR-20
DOT# 2016-0147

(b) (6)

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

Subject: Letter of Finding (LOF), DOT# 2016-0147

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). This Letter of Finding (LOF) will summarize the results of the investigation, which was conducted by Kevin Resler, FHWA National Title VI Coordinator (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 assistance (Recipients) comply with Title VI of the Civil Rights Act of 1964[1] and the Disadvantaged Business Enterprise (DBE) Program.[2] Because Congress created the DBE Program partly through the legal authority of Title VI,[3] 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.

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[1] 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. § 2000(d).
[2] 49 C.F.R. Part 26.
[3] 64 FR 5126, Feb. 2, 1999.

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.[4]

This LOF will reference information gathered from a prior investigation of WSDOT by FHWA, (b) (6) v. WSDOT (b) (6)[5] 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).[6] 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 (Agreement). In the Agreement, WSDOT committed to making changes to its DBE Program—both for the AWV Project and at the program level.

I. Procedural History, Allegations, and Legal Background

On February 22, 2016, the United States Department of Justice sent this office a Title VI complaint by (b) (6) the African-American owner of certified DBE (b) (6) (b) (6) Complainant) against WSDOT. On March, 31, 2016, (b) (6) submitted an amended complaint form providing additional explanation of his complaint. On April 13, 2016, the FHWA accepted for investigation the following allegations as raised in the (b) (6) complaint:

1. Whether the WSDOT failed to comply with the DBE Program requirements regarding prompt payment in regards to (b) (6) work on the AWV Project.

2. Whether WSDOT failed to comply with DBE Program requirements regarding DBE termination for (b) (6) on the AWV Project.

3. Whether, based on allegation #1, WSDOT is in noncompliance regarding its Conciliation Agreement with the FHWA, which resolved a prior complaint (DOT# 2012-0257) on the AWV Project.

[4] 49 C.F.R. §26.103(a).
[5] DOT# 2012-0257.
[6] Federal-aid #: BR-NH-STP-STPF-0099(111).

During its investigation, FHWA determined that it would address allegation #3 through the reporting and review process agreed upon in its Conciliation Agreement with WSDOT. Therefore, this LOF will not discuss allegation #3.

Complainant's firm, (b) (6) was certified as a DBE in Washington State when his firm performed on two subcontracts for the AWV Project. On March 14, 2012, the Complainant executed a contract with the prime design-builder for the AWV Project, (b) (6) (b) (6) was also party to a subcontract with (b) (6) as part of a direct contract (b) (6) had with (b) (6) WSDOT set an 8.0% race-conscious DBE goal on the AWV Project, and (b) (6) initially intended to count the Complainant's work toward achieving the goal on both its direct contract and through the Complainant's work with (b) (6) Because these allegations concern (b) (6) contracts with two separate AWV Project contractors, (b) (6) and (b) (6) the FHWA will address (b) (6) complaints involving (b) (6) and (b) (6) separately below.

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. FHWA interviewed the following individuals during the investigation:

(b) (6)	
John Huff	DBE Program Manager, WSDOT, Office of Equal Opportunity
Earl Key	Director, WSDOT, Office of Equal Opportunity
Bobby Forch	DBE Program Administrator, Consultant to WSDOT
Dawn McIntosh	AWV Project Engineer
Mellody Stell	Regional EEO Officer, OEO
(b) (6)	

FHWA conducted additional interviews by conference call with Linea Laird, WSDOT Chief Engineer, as well as follow up interviews with prior interviewees.

As a Recipient of federal financial assistance from the FHWA, WSDOT is required to carry out the prompt payment requirements found in 49 C.F.R. § 26.29 and establish, as part of its 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 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.[7] Finally, the regulations provide that Recipients must provide "appropriate means to enforce the requirements" of the prompt payment provisions.

Regarding termination of a DBE, a Recipient must require that prime contractors not terminate DBE subcontractors used toward a race-conscious DBE goal without the Recipient's prior written consent. 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.[8] In turn, a Recipient may only give written consent when the Recipient determines the prime had good cause, for which the regulations provide a number of particular circumstances including, for example, the DBE's failure to perform to industry standards or the Recipient determines the DBE is not a responsible contractor.[9] Finally, prior to a prime contractor's written request to terminate and/or substitute a DBE subcontractor, the prime must give notice in writing to the DBE subcontractor, with a copy to the Recipient, of its intent to request to terminate and/or substitute, and the reason for the request.[10] The prime contractor must give the DBE five days to respond to the prime's notice; the DBE may advise the Recipient and the prime of any reasons why it objects to the proposed termination of its subcontract and why the Recipient should not approve the prime contractor's action.

Regarding DBE commitments for design-build projects, Recipients may establish a goal for the project, and the prime contractor then establishes contract goals, as appropriate, for the subcontracts it lets.[11] This differs somewhat from the requirements in design-bid-build contracts, in which prime bidders must submit their DBE commitments—and have them verified by the Recipient—prior to contract award.[12] However, in design-build contracts Recipients must maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of 49 C.F.R. Part 26.

Finally, the regulations provide that no recipient, contractor, or any other participant in the DBE program may intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by 49 C.F.R. Part 26 or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.[13] This provision is in keeping with the overall prohibition against excluding any person from participation in, denying any person the benefits of, or

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[7] 49 C.F.R. § 26.29(b)(3).
[8] 49 C.F.R. § 26.53(f)(i).
[9] *Id.* §26.53(f)(3).
[10] *Id.* §26.53(f)(4).
[11] 49 C.F.R. §26.53(e).
[12] *Id.* §26.53(a)-(d).
[13] *Id.* §26.109(d).

otherwise discriminating against anyone in connection with the award and performance of any contract covered by 49 C.F.R. Part 26 on the basis of race, color, sex, or national origin.

II. Complainant's Direct Contract with (b) (6)

a. Factual Background

The Complainant alleged that (b) (6) made his company perform, without receiving payment, beyond the 30 days following payment by WSDOT required by 49 C.F.R. § 26.29 et seq. and improperly terminated (b) (6) The Complainant alleged that (b) (6) accelerated the pace of his direct contract work and failed to pay his firm timely, per the prompt payment requirements of the DBE Program. The original contract price was $411,386.00 for work related to "Terminal 46 Hide Area BMP Relocation; Terminal 46 Reefer Racks – Foundation Works." The Complainant agreed to furnish and install all items, and was responsible for all related labor, equipment, materials, supplies, and services.

The Complainant's contract with (b) (6) contained what he termed a "takeover clause," at section 19, pages 4-5. This provision states:

> 19. DEFAULT. Should Subcontractor at any time: (a) fail to supply the labor, materials, equipment, supervision and other things required of it in sufficient quantities and of required quality to perform the Work with the skill, conformity, promptness and diligence required hereunder; (b) cause interference, stoppage or delay to the Project or any activity necessary to complete the Project; (c) become insolvent; or (d) fail in the performance or observance of any of the covenants, conditions, or other terms of this Subcontract, then in any such event, each of which shall constitute a default hereunder by Subcontractor, Contractor shall, after giving Subcontractor notice of default and five (5) working days within which to cure, have the right to terminate this Subcontract without thereby waiving or releasing any rights or remedies against Subcontractor and, by itself or through others, **take possession of the Work and all materials, equipment, facilities, plant, tools, scaffolds and appliances of Subcontractor relating to the Work**, for the purposes of completing the Work and securing to Contractor the payment of its costs (plus an allowance for administrative burden equal to fifteen percent (15%) of such costs) and other damages under this Subcontract and for the breach thereof, it being Intended that Contractor shall, for the stated purposes, be the assignee of, and have a security interest in, the property described above to the extent located on the Project site (and Contractor may at any time file this Subcontract as a financing statement under applicable law). . . .

[Emphasis in bold added]. The default/takeover clause explains how the contract provided authority for (b) (6) to cancel the Complainant's contract and take possession of the Complainant's materials and tools. (b) (6) contract with the Complainant only referenced the DBE Program regulations in the required contract clauses list at page 20 of the (b) (6) contract with (b) (6) by listing "Section 8.2 – Disadvantaged Business Enterprises" as one of the contract clauses

provided to (b) (6) with its copy of the (b) (6) contract. A necessary part of those requirements, required on all Federal-aid contracts, is the DBE regulation's prompt payment requirement at 49 C.F.R. §26.29 to pay subcontractors within 30 days after the work is satisfactorily completed and requirement that DBEs only be terminated with the WSDOT's prior written consent at 49 C.F.R. §26.53(f).

According to an (b) (6) email to WSDOT dated January 14, 2013, as well as during interviews with FHWA, (b) (6) acknowledged that it had delayed some payments to (b) (6) but stated that it had just cause for the delay. For example, (b) (6) stated that the Complainant did not understand the labor requirements related to the Project Labor Agreement, which (b) (6) stated led to delays in the Complainant's submittal of union documentation.[14] Court documents ordering default judgment against (b) (6) by the Carpenters Trusts of Western Washington and Pacific Northwest Regional Council of Carpenters for liens support this (b) (6) statement. In addition, (b) (6) claimed the Complainant failed to pay his subcontractors and laborers timely, which led to multiple liens on the Complainant.[15] Documents regarding liens involving (b) (6) subcontractor (b) (6) (b) (6) support this (b) (6) statement. Emails from 2012 and 2013 provide additional details of disputes that (b) (6) had with payments to its subcontractors and for unpaid taxes to the State of Washington Department of Labor and Industries. In addition, a 2014 Court Order involving the Carpenters Trusts of Western Washington and Pacific Northwest Regional Council of Carpenters documents a court finding against (b) (6) involving union payments. Finally, (b) (6) stated in interviews and through email to WSDOT that the Complainant failed to submit certified payroll information pursuant to Department of Labor payroll regulations at 29 C.F.R. § 5.5(a)(3)(ii)(A – C). Documents from the Department of Labor provide support these (b) (6) statements.

The (b) (6) email from January 14, 2013 shows that (b) (6) and the Complainant executed a number of change orders, modifying the terms of the original contract, with a few change orders summarized in the following chart provided by that (b) (6) email:

Change Order	Date Issued	Amount	Execution Date	Description
Subcontract Short-Form 01 [Initial Contract]	3/14/12	$411,386.00	5/8/12	Terminal 46 Hide Area BMP Relocation and Reefer Racks Foundation Work
Change Order #001	4/16/12	$282,115.00	5/17/12	Removal of existing concrete and asphalt, and perform additional concrete for trench drains
Change Order #002	7/27/12	No Cost	8/21/12	Revise sales tax from line items and make lump sum
Change Order #003	8/16/12	No Cost	10/24/12	Addition of administrative federal requirements

[14] Email from (b) (6) to Brian Nielsen (WSDOT), January 14, 2013, p. 1034 of response document.
[15] Email from (b) (6) to Brian Nielsen (WSDOT), January 14, 2013, p. 1034 of response document.

Change Order #004	9/25/12	$48,985.15	9/27/12	Cost additions and deductions; scope adjustments

According to (b) (6) January 14, 2013 email, the Complainant's first day on the jobsite was June 18, 2012, and the last day was October 31, 2012. According to (b) (6) email, the last certified payroll report was dated November 14, 2012. The contract was closed out on July 26, 2013 with the final close-out change order for a total subcontract amount of $739,114.07. This final change order cleared all substantiated costs and liens, and according to (b) (6) list of checks, (b) (6) issued its final check to the Complainant on October 8, 2013.

The (b) (6) list of checks on the (b) (6) contract shows payments from (b) (6) to the Complainant starting on June 18, 2012 and continuing through October 8, 2013. However, the (b) (6) list of checks also shows gaps in the payment schedule. For example, ten payments were made between June and September, 2012. Then, four payments were made on October 16, 2012, one payment was made on October 18, 2012, eight payments on November 2, 2012, fifteen payments on December 20, 2012, and fifteen on July 2, 2013. Email records show that on or around November 20, 2012, the Complainant contacted the Respondent to state that his firm had been removed/terminated from work on the AWV Project without being given a rationale for the termination.[16] In the November email exchange, the WSDOT civil rights office requested that the WSDOT AWV Project office look into the (b) (6) issues and provide information to the civil rights office as to how (b) (6) ensures prompt payment to DBEs. WSDOT's response was reactive to (b) (6) complaint. There is no evidence that WSDOT had processes in place to actively monitor prompt payment compliance on the AWV Project. In December, 2012, a WSDOT email requested a written explanation by January 7, 2013 from (b) (6) as to the reasons for the termination. On January 14, 2013, (b) (6) submitted a written response to WSDOT stating the reasons why it terminated the Complainant, as well as providing work dates for the (b) (6) contract as described above. Although the record shows WSDOT obtained (b) (6) documents regarding liens against (b) (6) there is no evidence to show that WSDOT enforced the DBE termination requirements of 49 CFR §26.53(f) or otherwise sought to investigate or address (b) (6) termination of (b) (6)

A January 31, 2013, email from (b) (6) to WSDOT provided further details of the (b) (6) contract and its termination, including that several of the Complainant's employees quit his firm and that (b) (6) hired them. (b) (6) stated in interviews to FHWA that his difficulties in paying subcontractors were due to delays in payment by (b) (6) An email dated July 26, 2012, shows that (b) (6) knew that (b) (6) was having trouble making regular payments to its employees, and was rushing some July payments to (b) (6) as a result. According to interviews and documents from the site visit with (b) (6) and his employees, on or about October 31, 2012, (b) (6) hired (b) (6) employees to work directly for (b) (6) and ordered those employees to remove (b) (6) (b) (6) tools from his working space to be left outside. The evidence on this record provides conflicting perspectives on the circumstances surrounding (b) (6) hiring of the former (b) (6) employees.

[16] Email dated November 20, 2012 from WSDOT's Brian Nielson to (b) (6)

b. Analysis

The record supports (b) (6) statements about the reasons for any delays in the payments to (b) (6) The record shows the Complainant did have liens filed against his firm for nonpayment. The Carpenters Trusts of Western Washington and Pacific Northwest Regional Council of Carpenters, for example, won a default judgment against (b) (6) concerning the AWV Project contract. Other communications show that the Complainant did not pay certain subcontractors and suppliers on time, and (b) (6) issued joint checks in some cases. However, the Complainant stated to FHWA that his difficulties in paying subcontractors were due to delays in payment by (b) (6) In addition, the Complainant stated that (b) (6) attempted to undermine his contract by verbally persuading his employees to quit his firm to work for (b) (6)

In reviewing the available records from 2012, however, it is difficult for FHWA to determine which party erred first. For example, the record does show gaps in payments from (b) (6) to the Complainant, particularly between September and December, 2012. However, the Complainant's issues with payments to unions and subcontractors/suppliers may have caused (b) (6) to consider withholding payments to the Complainant as "good cause." Indeed, the Complainant alleged the opposite: that the lack of payment from (b) (6) caused the issues with nonpayment to subcontractors, suppliers, and unions. Similarly, the evidence shows that (b) (6) did hire several of the Complainant's employees, but, the record offers contradictory anecdotes as to whether the individuals volunteered to leave the Complainant's firm or were pressured by (b) (6) to leave.

Regardless, the evidence shows that WSDOT did not affirmatively monitor prompt payment compliance regarding the (b) (6) contract. WSDOT's knowledge of the payment disputes between the parties was passive and complaint-driven, resulting in WSDOT acting only after (b) (6) performance was complete on the (b) (6) contract.

In addition, emails and other evidence show that WSDOT allowed (b) (6) to terminate (b) (6) without following the regulatory procedures for DBE termination. When (b) (6) initially committed to using (b) (6) toward meeting the Project DBE goal, (b) (6) was required to follow all other regulations in 49 C.F.R. Part 26, including the requirement to obtain WSDOT's written consent to terminate any DBE, including (b) (6) In this case, (b) (6) decided to terminate (b) (6) without providing written notice to (b) (6) with a 5-day response period, and without submitting a request to WSDOT. WSDOT did not provide (b) (6) with a written consent for the termination. Even though (b) (6) alleged it did not count (b) (6) as a DBE toward the race-conscious goal for the Project, it had already committed to using (b) (6) and was bound by the regulations that govern the commitment. WSDOT's duty to enforce these provisions was not changed because the Project was a design-build contract, and WSDOT failed to ensure (b) (6) followed the termination regulations.

Finally, the default/takeover clause in the (b) (6) contract facially conflicted with the DBE termination regulations. There was no provision in the default clause to address how the default provisions would be harmonized with the DBE termination requirements of 49 C.F.R. §26.53(f). When the default clause was followed, as occurred in (b) (6) contract with (b) (6) the clause provided termination terms that conflicted with the regulatory requirements for termination of (b) (6) or any other DBE.

c. Findings

Based on the evidence and applicable rules, FHWA makes the following findings regarding (b) (6) contract with (b) (6)

1. Prompt payment: The FHWA finds that WSDOT did not sufficiently monitor the payments made to the Complainant. Although (b) (6) did not violate the prompt payment requirements of 49 C.F.R. § 26.29 since record evidence supports (b) (6) stated reasons for delays in payment to (b) (6) WSDOT nonetheless did not carry out its obligation to affirmatively monitor and enforce its prompt payment responsibilities.

2. Termination: The FHWA finds that WSDOT did not comply with, administer and enforce the DBE Program's termination requirements at 49 C.F.R. § 26.53(f) when it allowed (b) (6) to terminate (b) (6) subcontracting in November 2012 without WSDOT's written consent and written notice to (b) (6)

III. Complainant's Subcontract with (b) (6)

a. Factual Background

(b) (6) and certified DBE (b) (6) entered a first-tier subcontract on February 21, 2012, for $304,295, and (b) (6) executed a second tier subcontract with (b) (6) on April 22, 2012, in the amount of $133,405. The Complainant alleged (b) (6) failed to pay (b) (6) both timely and in the full amounts. In the allegations against (b) (6) the Complainant alleged WSDOT did not ensure that (b) (6) perform a commercially useful function (CUF) and meet prompt payment requirements of the DBE regulations for this subcontract.

The record shows the Complainant received payments from (b) (6) however the Complainant alleged this amount falls short of the amount required for his services. The Complainant and (b) (6) disputed what payments were required throughout their performance on the AWV contract. A total of 14 proposals were discussed by the parties, with $60,817 in total requested from the Complainant.[17] The Complainant ultimately filed a lawsuit against (b) (6) on October 10, 2013, in the Washington State Superior Court alleging that (b) (6) failed to pay a total of $49,686.17 to the Complainant on the subcontract. On December 22, 2015, the Complainant won a writ of garnishment order in the amount of $25,000 against (b) (6)

As noted above, the record also shows the Complainant failed to pay certain subcontractors as well as the Pacific Northwest Regional Council of Carpenters. For example, (b) (6) (b) (6) a subcontractor to the Complainant, filed a $25,000 lien against the Complainant in 2013, which was paid through a joint check issued by (b) (6) Likewise, the Carpenters union filed a lien against the Complainant in the amount of $10,371.89, for which (b) (6) issued a check on April 7, 2015. In an email dated February 11, 2016, (b) (6) claimed that there were no funds left in compensation to (b) (6) by (b) (6) because the legal fees incurred by (b) (6) and (b) (6) payment to the Carpenter's Union accounts for the entirety of the remaining balance (b) (6) owes to (b) (6)

[17] Letters between (b) (6) and the Complainant between 10/7/13 and 10/27/15.

A January 2017 WSDOT email notes that by January, 2017, [redacted] had paid [redacted] $29,562.99 to resolve the [redacted] claim.

In interviews for this investigation, responsible representatives from WSDOT stated that, although the culture of the WSDOT is changing, these representatives believe DBEs should negotiate payment disputes on their own. The WSDOT representatives view this as a way to help DBEs develop as businesses.[18]

Regarding [redacted] performance on its subcontract to [redacted], the Complainant alleged [redacted] did not perform a CUF on the project, and WSDOT did not ensure [redacted] performed a CUF. On December 16, 2015, WSDOT submitted a CUF report regarding [redacted] performance to the FHWA – Washington Division Office.[19] That report stated the Complainant was performing all [redacted] work. WSDOT concluded that "[t]he body of collected evidence and documentation clearly shows that [redacted] was not performing a CUF (let alone the actual work) and that the prime contractor has acknowledged such."[20] The report states:[21]

> In short, there are so many issues here that it would be nigh impossible to state that [redacted] was performing a CUF. They were not performing the contracted scopes of work, [redacted] was. [redacted] states that they not only performed the work but that they were taking direction directly from [redacted] construction staff and not [redacted] This would be a management and control issue as well.

The record does not show that [redacted] disputed these findings. In keeping with these findings, however, [redacted] representatives stated to FHWA during this investigation that [redacted] made the unilateral decision to not count [redacted] work toward achievement of the AWV Project DBE goal due to CUF issues.[22] The FHWA's investigation did not find evidence that WSDOT followed the procedures for committing to DBE firms, and removal of DBE participation pursuant to 49 C.F.R. § 26.53 *et seq.*, on the AWV Project for [redacted] and the Complainant's firm concerning CUF issues.

b. Analysis

The regulations are clear that Recipients have an affirmative duty to ensure prompt and full payment. It is true that one aim of the DBE Program is to assist the development of firms so they can compete successfully in the marketplace outside the DBE program.[23] However, the prompt payment regulations apply to all subcontractors and provide that Recipients must establish procedures to ensure prompt payment. WSDOT did not affirmatively monitor prompt payment regarding the [redacted] contract. Had WSDOT intervened, it is probable that the prompt pay issues between [redacted] could have been mitigated. In addition, Recipients have an affirmative duty to ensure that DBE firms perform a CUF. As stated previously

[18] Interview with [redacted] 8/31/16.
[19] CUF 2012-015 [redacted] report from John Huff, WSDOT, submitted to the FHWA-Washington State Division office.
[20] *Id.* at p. 3.
[21] *Id.*
[22] Interview with [redacted], 8/23/16.
[23] 49 C.F.R. § 26.1(g).

regarding DBE termination, this duty is not changed because the Project is a design-build contract. The findings from WSDOT's 2015 CUF review of (b) (6) showed serious problems with (b) (6) performance, which necessarily affected (b) (6) interactions with (b) (6) and (b) (6)

c. Findings

Based on the evidence and applicable rules, FHWA makes the following findings regarding the (b) (6) contract:

1. Prompt Payment: The FHWA finds that WSDOT did not monitor the payments made to the Complainant, as well as to (b) (6) on the AWV Project. The FHWA finds WSDOT did not monitor and enforce prompt payment for this particular case.

2. Termination by (b) (6) This issue is not relevant to the (b) (6) second tier subcontract.

3. Commercially Useful Function: The FHWA finds that WSDOT did not monitor CUF compliance for (b) (6) on the AWV Project before the conciliation agreement. WSDOT was made aware of potential CUF concerns in 2013; however, WSDOT did not perform a CUF review until 2015, after the conciliation agreement was signed in March, 2014. The FHWA's investigation did not find evidence that WSDOT followed the procedures for committing to DBE firms, and removal of DBE participation pursuant to 49 C.F.R. § 26.53 *et seq.*, on the AWV Project for (b) (6) and the Complainant's firm. When a prime contractor commits to using a DBE firm toward meeting its race-conscious goal, it is the duty of WSDOT, as the Recipient, and not the prime contractor, to determine whether the participation is to be counted.

IV. Conclusions

FHWA finds that WSDOT did not comply fully with the DBE Program regulations before or after the 2014 Conciliation Agreement regarding (b) (6) and the events discussed herein. To correct these deficiencies, WSDOT must respond to FHWA in writing within 90 days of receipt of this LOF, detailing how it will address the findings in this LOF. Specifically, WSDOT's response must include:

1. A plan to address how WSDOT intends to proactively ensure that subcontractors are paid promptly. WSDOT's plan must include (1) training for prime contractors, DBE firms, and responsible WSDOT staff, and (2) procedures for WSDOT to carry out periodic, documented compliance reviews of applicable contracts. WSDOT must conduct a sufficient number of reviews to give FHWA a reasonable assurance that WSDOT is in compliance with these requirements. WSDOT's training and reviews must be completed within twelve (12) months of FHWA's acceptance of WSDOT's response to this LOF.

2. A plan to address how WSDOT intends to ensure that prime contractors adhere to the DBE termination regulations, which includes assessing whether DBE subcontracts include "takeover" clauses. WSDOT's plan must include (1) training for prime contractors, DBE firms, and responsible WSDOT staff, and (2) procedures for WSDOT to carry out periodic, documented compliance reviews of applicable contracts. WSDOT must conduct a sufficient number of reviews to give FHWA a reasonable assurance that WSDOT is in compliance with these requirements. WSDOT's training and reviews must be completed within twelve (12) months of FHWA's acceptance of WSDOT's response to this LOF.

3. A plan to address how WSDOT intends to ensure that DBE firms are carrying out a commercially useful function on WSDOT Federal-aid contracts. WSDOT's plan must include (1) training for prime contractors, DBE firms, and responsible WSDOT staff, and (2) procedures for WSDOT to carry out periodic, documented compliance reviews of applicable contracts. WSDOT must conduct a sufficient number of reviews to give FHWA a reasonable assurance that WSDOT is in compliance with these requirements. WSDOT's training and reviews must be completed within twelve (12) months of FHWA's acceptance of WSDOT's response to this LOF.

If after reviewing WSDOT's response, FHWA determines the response to be acceptable, WSDOT will be considered provisionally in compliance, pending the performance of any actions in WSDOT's response. Once WSDOT completes all performance related to the response, FHWA will close this complaint with no further action. If WSDOT fails or refuses to voluntarily implement a written response, the FHWA Washington State Division Administrator shall submit to HCR a recommendation that WSDOT be found in noncompliance with 49 C.F.R. Part 26.

FHWA sincerely thanks WSDOT for its cooperation with this investigation, and looks forward to working in partnership with WSDOT in the future.

If you have any questions regarding this matter, please contact Mr. Kevin Resler, at (202) 366-2925, or kevin.resler@dot.gov.

Sincerely yours,

Irene Rico
Associate Administrator for Civil Rights

cc: Daniel Mathis, Division Administrator, FHWA Washington Division Office
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