



**Washington State
Department of Transportation**

Transportation Building
310 Maple Park Avenue S.E.
P.O. Box 47300
Olympia, WA 98504-7300
360-705-7000
TTY: 1-800-833-6388
www.wsdot.wa.gov

May 1, 2018

Mr. Daniel Mathis, P.E.
Division Administrator
Federal Highway Administration Washington Division
711 S. Capitol Way, Suite 501
Olympia, Washington 98501

RE: Disadvantaged Business Enterprise Program Waiver Request

Dear Mr. Mathis,

The purpose of this letter is to request an exemption from 49 Code of Federal Regulations (CFR) § 26.45(h). This section provides that the Washington State Department of Transportation (WSDOT), as a recipient of Federal-aid highway funds, must provide for participation by all certified Disadvantaged Business Enterprises without setting group-specific goals. Under 49 CFR § 26.15(b), WSDOT may apply for a waiver of a provision in subpart B or C when it is able to show that compliance with a specific provision is impractical or would undermine the objectives of 49 CFR Part 26. The objectives of 49 CFR Part 26 include ensuring nondiscrimination in the award and administration of DOT-assisted contracts and the removal of barriers to DBE participation in such contracts. Under market conditions in Washington, a group-agnostic approach is no longer compatible with these objectives.

I. Background and Summary of Request

At this writing, the current application of § 26.45(h) in Washington is producing an increasingly unlevel playing field for DBE firms owned and controlled by African Americans. The [2017 Disparity Study](#), conducted by Colette Holt & Associates (CHA) at the direction of WSDOT in conformance with 49 CFR § 26.45(c)(3), indicates that while all presumptive groups suffer a disparity in contracting opportunities, that disparity is particularly pronounced for African American-owned businesses. Analysis of FHWA-funded contracts owned by WSDOT shows that WSDOT's utilization of African American-owned firms as prime and sub-contractors comprised 22 percent of the availability of these firms in the relevant markets. In comparison, WSDOT's utilization of all DBE firms comprised 92.5 percent of their availability. In substance, the study by CHA finds that African American owned businesses receive far fewer dollars, relative to their availability than any other DBE group. Furthermore, strong anecdotal evidence of the continuing existence of barriers, including bias and exclusion

from networks, leads CHA to support WSDOT's continued use of race-conscious contract goals.

In order to ensure that WSDOT is not a passive participant in this discriminatory market, WSDOT intends to increase the condition of award credit prime contractors receive for using African American firms up to fourfold, depending upon current DBE participation and new disparity study data. Supporting African American construction and consulting firms in this manner would bring African American firm utilization to a level comparable to the participation rates of other Washington certified DBE groups. Under this proposed change to current practices, WSDOT would continue to report on actual dollars paid and would adjust individual contract goal setting as necessary and as required by 49 CFR Part 26. Prior to implementation of any approved exemption, WSDOT will consult with the DBE community and submit a summary of the public participation process and the information gathered through it. In light of the above, I hope you will agree that an exemption from § 26.45(h) is an appropriate corrective action to the problems currently undermining the objectives of the DBE program.

II. Discussion

Under 49 CFR 26.15(b), an application for a waiver must satisfy the requirements of § 26.15(b)(2): (1) a reasonable basis exists to conclude that a recipient could achieve a level of DBE participation consistent with the objectives of 49 CFR Part 26 using different or innovative means other than those that are provided in § 26 subpart B or C; (2) conditions in the jurisdiction are appropriate for implementing the proposal; (3) the proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and (4) the proposal is consistent with applicable law and program requirements of the concerned operating administration's financial assistance program.

(1) The proposed fourfold¹ increase of the condition of award credit prime contractors receive for using African American firms is an innovative means of achieving a level of DBE participation consistent with the objectives of 49 CFR Part 26.

As stated above, 49 CFR Part 26 aims to ensure nondiscrimination in the award and administration of DOT-assisted contracts. 49 CFR 26.45(h) requires that recipients provide for participation by all certified DBEs without setting group-specific goals. Under § 26.15(b), an exemption is appropriate when a recipient of federal funds can demonstrate a reasonable basis exists to conclude that an

¹ The Washington State Department of Transportation reserves the right to utilize a less than fourfold increase for African American owned firms, depending upon DBE participation and/or new disparity study data.

alternative practice will result in a level of DBE participation consistent with the objectives of 49 CFR Part 26. The current disparity ratio between WSDOT's utilization of African American firms on FHWA-funded contracts and the availability of these firms is 22 percent. The disparity ratio between WSDOT's utilization of other DBE firms and their availability is greater than 90 percent. This evidence shows that African American-owned businesses are not comparable to other DBEs in the degree of discrimination they face in the marketplace. Increasing the condition of award credit prime contractors receive for using African American DBEs fourfold is a narrowly tailored means to remedy this disparity and bring the disparity ratio for African American-owned firms closer to that of other participating DBE firms.

(2) Statistical data and anecdotal testimony demonstrates the proposed arrangement to be an appropriate remedy to marketplace conditions in Washington.

49 CFR § 26.15 requires conditions in the jurisdiction to be appropriate for implementing a proposed exemption or waiver. That is, a waiver request should not be generally applicable, but should be based on conditions specific to the requesting jurisdiction. The proposed exemption and means of increasing African American firm utilization is based on evidence of the availability of ready, willing and able DBEs in the local market area. The statistical and anecdotal analysis contained within the disparity study constructed by CHA provide WSDOT with a sufficient basis for the use of narrowly tailored remedial race-conscious measures. Despite the fact that barriers to equal contracting opportunities may be similar to those found in other jurisdictions, market conditions in Washington are unique and make this jurisdiction appropriate for implementing the proposal.

(3) The proposed change to current practices is designed to bring one DBE group to utilization rates on par with all other DBE groups without discriminating against any individual or group in access to contracting opportunities or other benefits.

In order for an exemption to be approved under § 26.15, a proposal must prevent discrimination against any individual or group in access to contracting opportunities or other benefits of a DBE program. With a current disparity ratio of utilization to availability of 22 percent, it can be concluded that further measures are needed in order to remedy the degree of discrimination faced by African American construction and consulting firms. The level of discrimination African American firm's face is further evidenced by their disparity ratio on state-funded contracts: 1.3%. The 49 CFR § 26.45(h) mandate to treat all DBEs alike hinders WSDOT's ability to remedy this profound disparity. An innovative, more tailored solution is required.

The proposal neither in theory nor in effect supports or encourages discrimination against any individual or group in access to contracting opportunities. WSDOT merely proposes to use a group-specific remedy in response to a group-specific type of discrimination. To the degree that the multiplied credit becomes an undue burden to any group, it will be modified to better serve the purposes of 49 CFR part 26.

(4) The proposal is consistent with § 26.15 and is within § 26.1 which provides appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

Finally, to be approved, a proposed waiver or exemption to a provision in § 26 subpart B or C must be consistent with applicable law and program requirements. The use of race-conscious classifications in federal programs is subject to strict scrutiny, whereby state actors must demonstrate a compelling governmental interest and show the classification to be narrowly tailored. To date, the courts have consistently recognized remedying the effects of past and continuing discrimination as a compelling governmental interest. The critical question is whether a state action that uses racial classifications is narrowly tailored.

In this instance, several considerations show that the proposed waiver is neither over nor under-inclusive, but is the least restrictive means to remedy past and continuing discrimination. First, WSDOT has applied race-neutral methods to increase African American firm utilization, such as the implementation of the Small Business Enterprise program. Only after finding that these methods were not successful did WSDOT set out to implement race-conscious actions. Second, the proposed waiver would not require a particular prime contractor to work with any particular African American-owned firm, and indeed the multiplier would make it *easier* for a prime contractor to meet its Condition of Award goal than it would be otherwise. Finally, the proposed action would also be limited in duration as there exists a specific target to be reached, African American firm utilization that approximates the disparity ratio of other DBE groups.

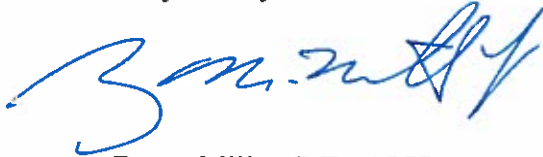
Furthermore, provision § 26.15(b) allows for waivers or exemptions to § 26 subpart C when specific compliance with these provisions is impractical or undermines the objectives of 49 CFR § 26. DBE program requirements mark nondiscrimination in the award and administration of DOT-assisted contracts as an objective. Under the circumstances of Washington's market, strict compliance with 49 CFR § 26.45(h) hinders WSDOT from meeting these objectives because it cannot offer a tailored solution to the severe discrimination that African Americans face. Through this proposal, WSDOT intends to use the flexibility within the regulatory system to design a mechanism that reflects local

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conditions and uses the best locally available data to increase utilization and decrease contract award disparity.

In closing, I am respectfully requesting a program waiver approving the option identified above. If you have any specific questions regarding this request, please contact Earl Key, Director of the Office of Equal Opportunity for the Washington State Department of Transportation at KeyE@wsdot.wa.gov or (360) 705-7095.

Respectfully,

A handwritten signature in blue ink, appearing to read "Roger Millar", is written over the typed name.

Roger Millar, P.E., AICP
Secretary of Transportation
Washington State Department of Transportation

cc: Jodi Petersen, FHWA
Keith Metcalf, WSDOT
Earl Key, WSDOT

Enclosures: Public Participation Process
Public Comments
WSDOT Analysis