



In Reply Refer to: HCR-20
DOT# 2020-0172

August 18, 2020

(b) (6)

Lacey, Washington 98516

Subject: Complaint DOT# 2020-0172

Dear (b) (6),

The Federal Highway Administration (FHWA) Office of Civil Rights has received your updated complaint dated August 10, 2020, which alleges violations that may be related to Title VI of the Civil Rights Act of 1964, the U.S. Department of Transportation (USDOT) Title VI implementation regulations at 49 C.F.R. Part 21 and/or FHWA's Title VI regulations at 23 C.F.R. Part 200 (hereinafter Title VI). Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance.

Your August 10 complaint is based on the same set of facts presented in your original complaint dated May 4, 2020. In its dismissal letter, dated May 26, 2020, FHWA determined the allegations and facts in your complaint do not meet the minimum jurisdictional criteria under Title VI. Therefore, your complaint is considered closed with no further action.

If you have any questions, please contact Nichole McWhorter at (202) 366-1396.

Sincerely,

Nichole McWhorter

Nichole McWhorter
Title VI Team Leader
Office of Civil Rights

cc: Daniel Mathis, Division Administrator, FHWA Washington Division Office
Melinda Roberson, Assistant Division Administrator, FHWA Washington Division Office
Jodi Peterson, Civil Rights Specialist, FHWA Washington Division Office
Jim Esselman, Senior Attorney-Advisor, FHWA Office of Chief Counsel
Yvette Rivera, Associate Director, Equal Employment Opportunity Programs Division,
Departmental Office of Civil Rights



In Reply Refer to: HCR-20
DOT# 2020-0172

May 26, 2020

(b) (6)

Lacey, Washington 98516

Subject: Dismissal of Complaint DOT# 2020-0172

Dear (b) (6),

This letter is to inform you that the Federal Highway Administration (FHWA) Office of Civil Rights has determined that it will dismiss the above complaint, which alleges violations that may be related to Title VI of the Civil Rights Act of 1964, the U.S. Department of Transportation (USDOT) Title VI implementation regulations at 49 C.F.R. Part 21 and/or FHWA's Title VI regulations at 23 C.F.R. Part 200 (hereinafter Title VI). Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance.

To be accepted for investigation, a complaint must meet the jurisdictional requirements provided by 49 C.F.R. § 21.11. First, complaints must be filed within 180 calendar days of the alleged discriminatory act, unless the time for filing is extended by FHWA. Second, the matters must concern recipients of federal financial assistance for a program or programs authorized under a law administered by FHWA. Finally, the complaint must describe an alleged discriminatory act or acts that, if true, would fall under FHWA's jurisdiction and potentially violate FHWA's Title VI regulations.

You allege that Skillings Connolly, Inc. discriminated against your company, (b) (6) when it released (b) (6) from the design team on the US 12/Nine Mile to Frenchtown Vic – Build New Highway project. After careful consideration, FHWA has determined the allegations and facts in your complaint do not meet the minimum jurisdictional criteria under Title VI. Your complaint reflects a contract dispute with a private company and does not allege a violation of Title VI by a recipient of FHWA financial assistance. For these reasons, the complaint will be dismissed by FHWA and closed with no further action.

If you have any questions, please contact Nichole McWhorter at (202) 366-1396.

Sincerely,

Nichole McWhorter

Nichole McWhorter
Title VI Team Leader
Office of Civil Rights

cc: Daniel Mathis, Division Administrator, FHWA Washington Division Office
Melinda Roberson, Assistant Division Administrator, FHWA Washington Division Office
Jodi Peterson, Civil Rights Specialist, FHWA Washington Division Office
Jim Esselman, Senior Attorney-Advisor, FHWA Office of Chief Counsel
Yvette Rivera, Associate Director, Equal Employment Opportunity Programs Division,
Departmental Office of Civil Rights
Kevin Resler, National Title VI Program Coordinator, FHWA Office of Civil Rights

(b) (6)

May 4, 2020

Mr. Bob Hooker PE
Project Engineer, WSDOT South Central Region
2809 Rudkin Rd., Union Gap, WA 98903-1648

Ms. Jackie Bayne
2D08 Transportation Bldg.
310 Maple Park Avenue SE, Olympia, WA 98504-7314

RE: (b) (6)

Dear Mr. Hooker and Ms. Bayne:

This letter expresses a formal complaint and protest for the selection of the US 12 / Nine Mile to Frenchtown Vic Build New Highway Design-Build Project team. (b) (6) has participated on this team for several months providing structural design services for the team. During this time, we've provided ideas, provided a Structural Lead Engineer, (b) (6) that exceeds WSDOT requirements, and provided a meaningful role in helping the Atkinson team fulfill the qualifications and proposal requirements.

We've been notified as of April 24th, by the Lead Designer, Skillings that we're no longer a member of the team. We believe this team rearrangement is without cause and should materially affect WSDOT's selection of this team since the project requires the construction of several structures including many bridges.

Our protest is founded on the following grounds:

1. Removing our firm from the team participation materially changes the proposal submitted by the Atkinson Design Build team.
2. The Design Builder in making this change without cause (or an opportunity for us to remedy any presumed cause) breeches our Teaming Agreement with Lead Designer, Skillings. We contributed sweat equity to the proposal effort with the understanding that we would be made financially "whole" later in the project and complete the final design of all the bridge structures. We no longer have that opportunity.
3. WSDOT jeopardizes design quality by issuing NTP to a team which may no longer fulfill the RFP requirements for a Structural Lead Engineer.
4. This action changes the makeup of the team's effort to fulfill WSDOT's aspirational goals of MSVWBE participation. We understand that we've been replaced by a non MSVWBE firm – Pace Engineers.

(b) (6)

5. This action appears to be “bid-shopping” and may violate the Brooks Act which prohibits the selection of design services based on price and not qualifications.
6. After numerous calls to the Lead Designer, we were just paid today for an invoice that has been outstanding for more than 150 days. We understand this may violate state law.
7. A Title VI violation may have also happened here.

We’ve included our teaming agreement, a few submittal examples, and an email documenting acceptance of our work supporting the Atkinson proposal. We feel that this action on the part of the Design Builder is without cause. Further, we haven’t been given an opportunity to remedy any presumed cause. We therefore appeal to WSDOT to review this situation and make a revised determination of the proposal selection and issuance of NTP for this project. Additionally, we are requesting that WSDOT and US Department of Justice investigate the possibility of a Title VI violation in this matter.

For these reasons, we formally request a review by WSDOT of Apparent Best Value Determination for this project. We’re not sure how or with whom to submit this protest, but trust that by forwarding it to you, it will find the hands of the parties at WSDOT responsible for these matters. Please feel free to reach me at my cell phone number of (b) (6) for further clarification or questions in this matter.

Respectfully Submitted,

(b) (6)



Cc:

Bhooker@wsdot.wa.gov; Baynej@wsdot.wa.gov; TREPANTV@wsdot.wa.gov; KEYE@wsdot.wa.gov

Attached:

- Teaming agreement dated April 1, 2019
- Confidentiality agreements (signed by (b) (6))
- Sample project submittal
- Email of acceptance from Design Builder, Atkinson

(b) (6)





Proposal Phase Teaming Agreement

(b) (6)



(b) (6)



(b) (6)



Signatures:

(b) (6)



(b) (6)





SKILLINGS CONNOLLY, INC. TEAMING CONCEPT

PREBID:

(b) (6)



(b) (6)



POSTBID:

(b) (6)



End of Agreement

(b) (6)



(b) (6)

CONFIDENTIALITY AGREEMENT

PROJECT: US-12 Nine Mile Hill to Frenchtown

(b) (6)

(b) (6)

CONFIDENTIALITY AGREEMENT

(b) (6)



Agreed and Accepted:

(b) (6)

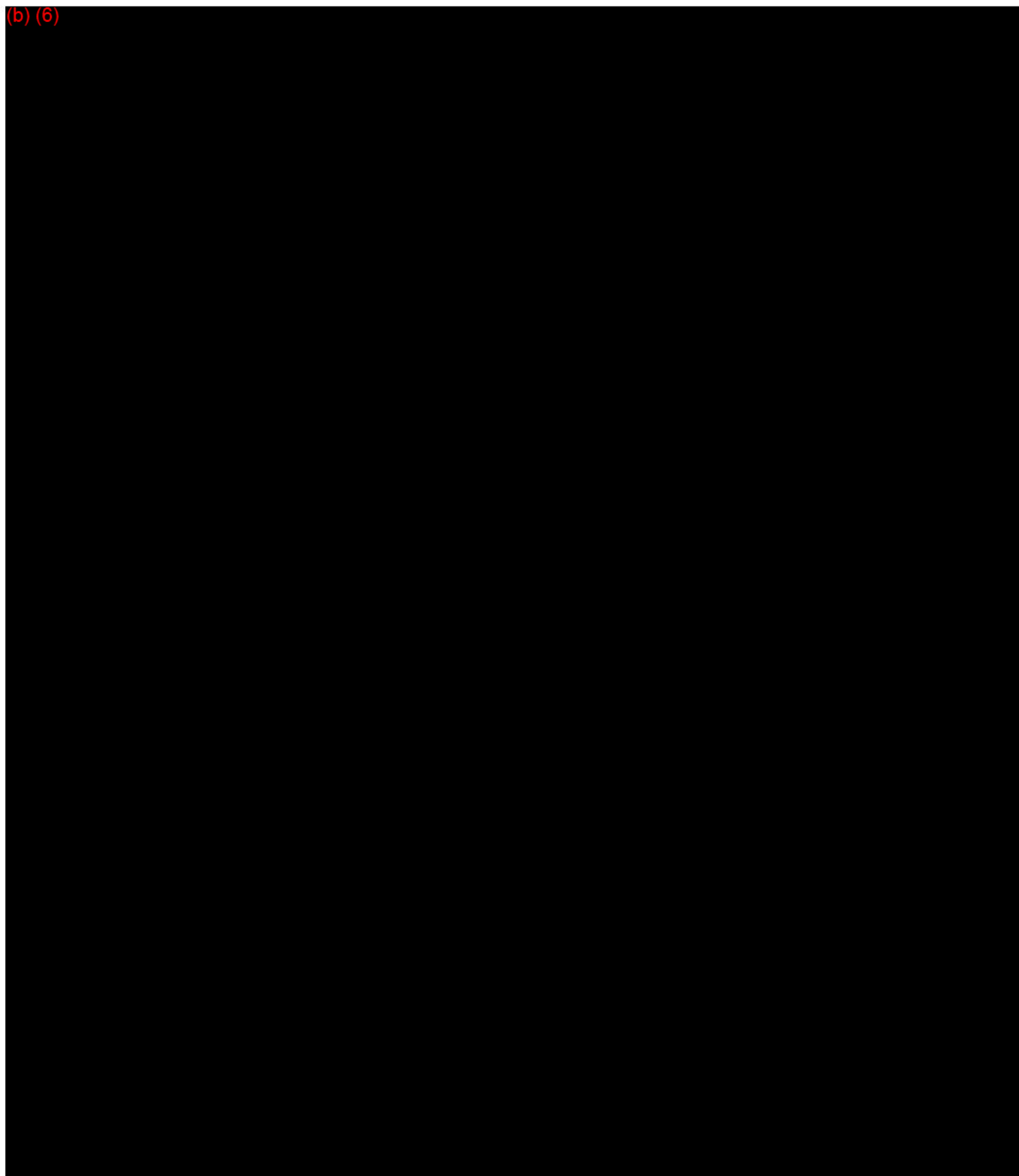


(b) (6)



CONFIDENTIALITY AGREEMENT

(b) (6)



CONFIDENTIALITY AGREEMENT

(b) (6)



Agreed and Accepted:

(b) (6)



Skillings Connolly, Inc.

(b) (6)

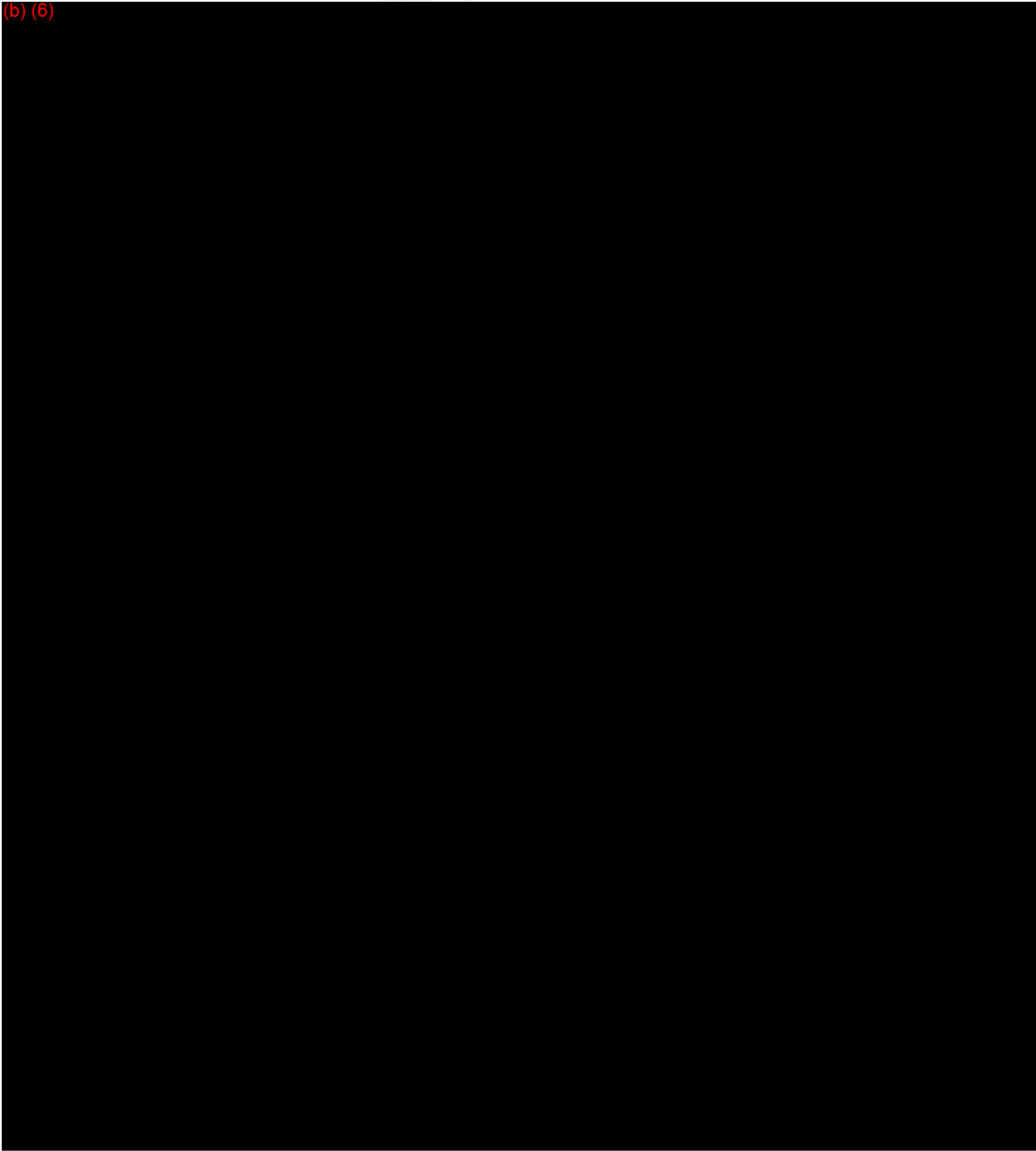


CONFIDENTIALITY AGREEMENT

(b) (6)

CONFIDENTIALITY AGREEMENT

(b) (6)



(b) (6)

CONFIDENTIALITY AGREEMENT

(b) (6)



Agreed and Accepted:

(b) (6)



(b) (6)



Santosh Kuruvilla

From: (b) (6)
Sent: Tuesday, December 17, 2019 11:22 AM
To: Stuart Moore
Cc: Tony Richards; Mike Horton; David Talcott
Subject: RE: (b) (6)s
Attachments: Bridge Length Question.pdf; Bridge Length Question with KNK edits in blue pen 12 17 2019.pdf

Stuart,

I have taken a look at the Table and the Plans in the 1st PDF you sent. There were some last minutes station changes about the time this was going out that do result in a few bridge length adjustments plus and minus.

I have adjusted the Bk to Bk of Pavt numbers slightly for a few of the bridges as shown with blue color on the 2nd PDF, in the table and/or in the Plans so they are consistent.

Regards,

(b) (6)

(b) (6)

From: Stuart Moore <stuart.moore@atkn.com>
Sent: Tuesday, December 17, 2019 10:33 AM
To: (b) (6)
Cc: Tony Richards <tony.richards@atkn.com>; Mike Horton <mhorton@skillings.com>
Subject: (b) (6)

(b) (6)

Can you take a llok at the lengths in the table versus the drawings and fix the table so it is good if it is wrong.

Thanks

Stuart Moore
GUY F. ATKINSON CONSTRUCTION
707 S Grady Way | Renton, WA | 98057

m. (b) (6)
www.atkn.com

----- Forwarded message -----

From: **Tony Richards** <tony.richards@atkn.com>

Date: Tue, Dec 17, 2019 at 1:09 PM

Subject: US 12 Nine Mile to Frenchtown Vic - Bridge Lengths

To: Stuart Moore <stuart.moore@atkn.com>

Stuart,

Please ask the engineer the following:

Does the "Bridge Information Table" determine the bridge lengths from Bk to Bk of Pav't Seat or do the plans determine this length? See attached file for discrepancies.

Best Regards,

Tony Richards | Project Engineer

ATKINSON CONSTRUCTION

69802 State Route 906 | Snoqualmie Pass, WA | 98068

p. 425.434.0586 m. (b) (6)

tony.richards@atkn.com

(b) (6)

Bridge Information Table

Revised 11/21/2019 3:30pm

No.	Bridge Name	Crossing Alignment	Bridge Crossing Type	Bridge Skew (deg.)	Number of Bridge Spans	Bridge Girder Type and Size	Design Bridge Super Structure Depth (ft.)	Abutment Wall Start Station (Approx.)	Abutment Wall End Station (Approx.)	Abutment to Abutment Opening (ft.)	Bridge Length Bk to Bk Pav't Seat (ft.)	Crossing Road Station Intersection
12	(b) (6)	WX LINE	Overcrossing	0	1	PC Slab 24in.	3.0	E LINE 51+16	E LINE 51+60	44.0	50.0	WX LINE 202+30 = W LINE 51+38
13	(b) (6)	WX LINE	Overcrossing	0	1	PC Slab 24in.	3.0	W LINE 50+95	W LINE 51+39	44.0	50.0	WX LINE 201+55 = W LINE 51+18
1	(b) (6)	R LINE	Undercrossing	0	1	WF74G	7.5	R LINE 17+69	R LINE 19+18	149.0	156.0	R LINE 18+81 = E LINE 121+74 R LINE 18+08 = W LINE 121+54
2	(b) (6)	Waterway	Over River	0	5	WF74G	7.5	E LINE 138+13 W LINE 137+92	E LINE 144+81 W LINE 144+60	660.0 660.0	668.0	N/A
3	(b) (6)	CX LINE	Overcrossing	0	1	PC Slab 24in.	3.0	E LINE 148+00	E LINE 148+57	57.0	63.0	CX LINE 51+06 = E LINE 148+39
4	(b) (6)	CX LINE	Overcrossing	0	1	PC Slab 24in.	3.0	W LINE 147+93	W LINE 148+50	57.0	63.0	CX LINE 51+45 = W LINE 148+20

Bridge Information Table

5	(b) (6)	GX LINE	Undercrossing	0	1	WF74G	7.5	GX LINE 19+54	GX LINE 21+13	159.0	166.0	GX LINE 20+71 = E LINE 309+93 GX LINE 19+96 = W LINE 309+71
6		Waterway	Over Creek	0	1	WF50G	5.5	E LINE 354+59	E LINE 355+70	111.0	117.0	N/A
7		Waterway	Over Creek	0	1	WF50G	5.5	W LINE 354+55	W LINE 355+78	123.0	129.5	N/A
8		HX LINE	Overcrossing	0	1	PC Slab 24in.	3.0	E LINE 383+25	E LINE 383+75	50.0	56.0	HX LINE 609+20 = E LINE 383+51
9		HX LINE	Overcrossing	0	1	PC Slab 24in.	3.0	W LINE 383+16	W LINE 383+62	46.0	52.0	HX LINE 609+94 = W LINE 383+40
10		LX LINE	Overcrossing	27	1	PC Slab 18in.	3.0	E LINE 527+23	E LINE 527+63	40.0	46.0	LX LINE 2112+19 = E LINE 527+44
11		LX LINE	Overcrossing	27	1	PC Slab 18in.	3.0	W LINE 526+98	W LINE 527+39	41.0	47.0	LX LINE 2113+03 = W LINE 527+19

No.	Bridge Name	Crossing Alignment	Bridge Crossing Type	Bridge Skew (deg.)	Number of Bridge Spans	Bridge Girder Type and Size	Design Bridge Super Structure Depth (ft.)	Abutment Wall Start Station (Approx.)	Abutment Wall End Station (Approx.)	Abutment to Abutment Opening (ft.)	Bridge Length Bk to Bk Pav't Seat (ft.)	Crossing Road Station Intersection
12	(b) (6)	WX LINE	Overcrossing	0	1	PC Slab 24in.	3.0	E LINE 51+16	E LINE 51+60	44.0	50.0 ✓	WX LINE 202+30 = W LINE 51+38
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1	(b) (6)	R LINE	Undercrossing	0	1	WF74G	7.5	R LINE 17+69	R LINE 19+18	149.0	156.0 ✓	R LINE 18+81 = E LINE 121+74 R LINE 18+08 = W LINE 121+54
2	(b) (6)	Waterway	Over River	0	5	WF74G	7.5	E LINE 138+13 W LINE 137+92	E LINE 144+81 W LINE 144+60	660.0 660.0	668.0	N/A
3	(b) (6)	CX LINE	Overcrossing	0	1	PC Slab 24in.	3.0	E LINE 148+00	E LINE 148+57	57.0	63.0 ✓	CX LINE 51+06 = E LINE 148+39
4	(b) (6)	CX LINE	Overcrossing	0	1	PC Slab 24in.	3.0	W LINE 147+93	W LINE 148+50	57.0	63.0 ✓	CX LINE 51+45 = W LINE 148+20

Kuk
12/1/19

Bridge Information Table

5	(b) (6)	GX LINE	Undercrossing	0	1	WF74G	7.5	GX LINE 19+54	GX LINE 21+13	159.0	166.0 ✓	GX LINE 20+71 = E LINE 309+93 GX LINE 19+96 = W LINE 309+71
6		Waterway	Over Creek	0	1	WF50G	5.5	E LINE 354+59	E LINE 355+70	111.0 123.0	117.0 129.5 ✓	N/A
7		Waterway	Over Creek	0	1	WF50G	5.5	W LINE 354+55	W LINE 355+78	123.0	129.5 ✓	N/A
8		HX LINE	Overcrossing	0	1	PC Slab 24in.	3.0	E LINE 383+25	E LINE 383+75	50.0	56.0 ✓	HX LINE 609+20 = E LINE 383+51
9		HX LINE	Overcrossing	0	1	PC Slab 24in.	3.0	W LINE 383+16	W LINE 383+62	46.0 50.0	52.0 56.0 ✓	HX LINE 609+94 = W LINE 383+40
10		LX LINE	Overcrossing	27	1	PC Slab 18in.	3.0	E LINE 527+23	E LINE 527+63	40.0	46.0 47.0 ✓	LX LINE 2112+19 = E LINE 527+44
11		LX LINE	Overcrossing	27	1	PC Slab 18in.	3.0	W LINE 526+98	W LINE 527+39	41.0	47.0 ✓	LX LINE 2113+03 = W LINE 527+19

Kug
12/17/19

(b) (6)

From: Stuart Moore <stuart.moore@atkn.com>
Sent: Tuesday, January 14, 2020 1:00 PM
To: (b) (6)
Cc: (b) (6)
Subject: Touchet

Karl,

I think we are good now with enough info to base our bid.

Thank you

(b) (6)

August 10, 2020

Mr. Chris Christopher
Construction Division Director
Washington State Department
of Transportation (WSDOT)
PO Box 47354
Olympia, WA 98504-7354

Ms. Lisa Van Der Lugt
Executive Director
Washington State Office of Minority
& Women's Business Enterprise
PO Box 41160
Olympia, WA 98504-1160

Mr. Earl Key
Director, Office of Equal Opportunity
WSDOT
PO Box 47314
Olympia, WA 98504-7314

Office of Inspector General
US Department of Transportation
1200 New Jersey Ave SE
West Building 7th Floor
Washington, DC 20590

Mr. Stephen McKerney
Director of Internal Audit
WSDOT
PO Box 47320
Olympia, WA 98504-7320

Ms. Nichole McWhorter
Title VI Team Leader
Headquarters Office of Civil Rights
Federal Highway Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Request for Review and Investigation of Disparate Treatment and Disproportionate Impacts in Award of the WSDOT US 12, Nine Mile to Frenchtown Vic Build New Highway Design Build Project – Contract 9406

Dear Mr. Christopher, Mr. Key, Mr. McKerney, Ms. Van Der Lugt, US DOT Office of Inspector General, and Ms. McWhorter:

(b) (6) a minority-owned, certified Underutilized Disadvantaged Business Enterprise (UDBE), received a verbal notification that we were not part of the Guy F. Atkinson Construction (Atkinson) Design-Build team for the above noted project, despite having executed a formal agreement and providing structural design services over a period of eight months to support the preparation of Atkinson's Statement of Qualifications (SOQ) and Proposal. The notification was received two months after the Contract Award date.

(b) (6) submitted a formal complaint to WSDOT regarding the award of the US 12, Nine Mile to Frenchtown Vic Build New Highway project (US 12 Project), which WSDOT denied due to the formal complaint not being filed in a timely manner. We also submitted a Title VI complaint that was also denied by FHWA as not being applicable, as they determined it to be a contract dispute issue.

Subsequently, we filed a Public Records Request with WSDOT on June 10, 2020 for copies of Atkinson's SOQ, Proposal, and related documents. We received the Atkinson SOQ on June 23, 2020, and the Atkinson Proposal on July 20, 2020.

(b) (6)

Upon review of the Atkinson SOQ and proposal documents WSDOT provided, I question whether the US 12 Project was improperly awarded to Atkinson, based on:

- WSDOT’s failure to question why Atkinson’s proposal for the US 12 Project, which involves 12 structures/bridges, did not identify a structural engineering firm as a Major Participant and why Atkinson was allowed to progress into the RFP phase while not meeting the Pass/Fail Criteria set forth in Table 7.2 of the Request for Qualifications (RFQ),
- Disparate treatment of (b) (6) by Atkinson (b) (6) was engaged as a subconsultant on Atkinson’s Design-Build team in an executed Teaming Agreement, with assurance of future US 12 Project work if Atkinson was awarded the contract. Atkinson requested and received technical information from (b) (6) to include in their SOQ and proposal. (b) (6) provided 145 hours of bridge and retaining wall design consulting services as Atkinson’s US 12 Project Design-Build team Structural Engineer between April 2019 and January 2020 and contributed (discounted) the first 10 percent of our time towards the Design-Build team’s Pre-Proposal Expense. Atkinson did not fully reimburse (b) (6) for its services. Atkinson was compensated \$400,000 by WSDOT (Form M Stipend Agreement) after award of the contract for work performed by Atkinson “and its team members” for its efforts preparing a US 12 Project proposal; (b) (6) did not receive a share of the stipend, and was subsequently dropped from Atkinson’s team after they were awarded a \$110 million design-build contract, after the deadline for protesting the award had passed.
- Atkinson’s questionable documentation and omission of a potential Organizational Conflict of Interest (OCOI),
- WSDOT’s negligence in failing to recognize this omission.

This letter of complaint details the disparate treatment and disproportionate impact to (b) (6) (b) (6) in the award of the WSDOT US 12 Project (Contract 9406) to Atkinson. **We respectfully point out that this matter concerns a recipient of federal financial assistance — WSDOT—and request that that either FHWA or US DOT OIG review or investigate this procurement, whether WSDOT followed their procurement process and regulations, and also provide clarification regarding the 180-day deadline to file a complaint;** our presumption is that this period commenced on the last date of disparate action, a telephone call on April 24, 2020 from Tom Skillings of Skillings Connolly, Inc. (Skillings), Atkinson Design-Build Team Design Lead.

This disparate treatment has had a negative, disproportionate impact on (b) (6) and constitutes a potential barrier to (b) (6) future participation in WSDOT design-build contract acquisition and procurement activities.

(b) (6)

We provide the following information to support our complaint, with hyperlinks (URLs) to documents stored on (b) (6) secure server and WSDOT’s project procurement website contained within the text of this letter.

Disparate Behavior and Impact of Exeltech Not Being Listed as a “Major Participant”

Neither Atkinson’s SOQ or Technical and Cost Proposal (Proposal) mentioned (b) (6) or any of our employees, despite (b) (6) to support the preparation of Atkinson’s SOQ and Proposal, under contract as a member of Atkinson’s Design-Build team.



WSDOT’s RFQ and Request for Proposal (RFP) instructed Submitters/Proposers to identify “Major Participants.” I am perplexed as to how a project that includes 12 structures would not qualify the “Structural Design Subconsultant,” i.e., (b) (6) to meet the requirements of “Major Participant” as defined in RFQ Section 5.1.E: ***Each engineering/design Subconsultant who is expected to perform 30 percent or more of the design Work.***



Atkinson’s failure to disclose (b) (6) involvement as a Major Participant has had a significant disparate impact on (b) (6) resulting in lost revenue. Assuming that the value of the design engineering portion of the project is approximately 8 percent of the Engineer’s Estimate for the project,¹ the total estimated project design fee would be approximately \$8.7 million. A conservative estimate would be that at least 30 percent of the \$8.7 million design fee would be for structural-related work, which equates to a **lost revenue of at least \$2.6 million to (b) (6)** WSDOT’s internal bridge design cost records from past Design-Bid-Build projects performed in-house should confirm our assertion that bridge design costs comprise at least 30 percent of projects of similar size and complexity (i.e., “12 bridges” on a

¹ WSDOT posted the Apparent Best Value Determination on February 26, 2020 for the project (Contract no. 9406); the Engineer’s Estimate was \$108,510,000, and the Upset Amount was \$121,750,000. Atkinson was named the Apparent Best Value Determination awarded Design-Build team.

(b) (6)

fairly straightforward alignment), and validate (b) (6) claim that we should have been listed as a Major Participant.

US 12 Project SOQs were due from the Submitters on July 16, 2019, and WSDOT posted the SOQ Submitter’s List with Single Point of Contact the same day. Submitters and their “Major Participants” (Limited to Lead Designer or Design Subconsultant) are listed below.

PROPOSER COMPANY	MAJOR PARTICIPANTS – SUBMITTER AND DESIGN SUBCONSULTANTS ONLY
Flatiron West, Inc.	Flatiron West, Inc.: Submitter Wood: Lead Designer GeoEngineers, Inc.: Design Subconsultant CivilTech Engineering Inc.: Design Subconsultant IBI Group: Design Subconsultant
Graham Contracting, Ltd.	Graham Contracting, Ltd.: Submitter Parsons Transportation Group: Lead Designer
Guy F. Atkinson Construction, LLC	Guy F Atkinson Construction, LLC: Submitter, Quality Assurance Skillings Connolly Inc: Lead Engineering Design Firm
Hamilton-Scarsella, a Joint Venture	Hamilton-Scarsella, a Joint Venture: Submitter KPFF Consulting Engineers: Lead Designer
Kiewit-Kuney JV	Kiewit Infrastructure West Co.: Managing Joint Venture member Max J. Kuney Company: Joint Venture member Kiewit Engineering Group Inc.: Lead Engineering/Design firm J-U-B Engineers, Inc.: Engineering/Design Subconsultant

The Major Participants/Subconsultants that are listed above in **bold/italics** are companies that provide structural engineering consulting services. Atkinson’s listed Major Participants/Design Subconsultants did not include a structural engineering consultant, though their Lead Designer had contracted with (b) (6) to provide structural design services to Atkinson’s team.

Atkinson was the only one of five firms that submitted a SOQ to WSDOT for the US 12 Project that did not identify a structural engineering consultant as a Major Participant. Atkinson’s US 12 Project Lead Designer, Skillings does not have structural engineering capabilities in-house. WSDOT should have questioned this omission, as the RFQ required that SOQs identify Major Participants, and each of the other four SOQs WSDOT received identified consulting firms with structural engineering expertise as a Major Participant. This oversight by WSDOT contributed to the disparate treatment and resulting disparate impacts to (b) (6) in lost revenue.

RFQ Form E. Section 5.1, subsection E, of the RFQ defines a “Major Participant” as:

(b) (6)

Request for Review and Investigation of Disparate Treatment and Disproportionate Impacts in Award of the WSDOT US 12, Nine Mile to Frenchtown Vic Build New Highway Design Build Project – Contract 9406

“E. Each engineering/design Subconsultant who is expected to perform 30 percent or more of the design Work”

Atkinson did not identify (b) (6) as a team member in its SOQ, though (b) (6) provided structural design consulting services to support the development of Atkinson’s SOQ and Proposal over a period of eight months. The US 12 Project includes 12 structures, yet (b) (6) did not meet the 30 percent or more of the design work criteria above?

By not identifying (b) (6) as a Major Participant in their SOQ, Atkinson did not have to request written permission from WSDOT to remove or replace (b) (6) as a member of their team or list (b) (6) as a Major Participant in their Proposal. WSDOT’s RFQ required written approval of changes to the design-build team organization. Section 5.4 of the WSDOT US 12 Project RFQ states:

“5.4 Team Continuity and Changes to Organizational Structure

“Following Submittal of the SOQ, Key Personnel, or Major Participants identified in the SOQ may not at any time be removed, replaced, or added without the written approval of the WSDOT Technical Point of Contact. The WSDOT Technical Point of Contact may revoke the Short-Listed status of a Submitter if any Key Personnel or Major Participant identified in the SOQ is removed, replaced, or added without written approval of the WSDOT Technical Point of Contact. **Requests for removal, replacements, and additions shall be submitted in writing. To qualify for approval, the written request shall document that the proposed removal, replacement, or addition will be equal to or better qualified than the Key Personnel or Major Participant provided in the SOQ.** The WSDOT Technical Point of Contact will use the criteria specified in this RFQ to evaluate all requests.”

Please refer to Atkinson’s signed Proposal Form E, identifying Major Participants, below.



Atkinson SOQ Form E

(b) (6) was formally engaged by Atkinson’s Design Lead (b) (6) to provide structural engineering services as a member of Atkinson’s US 12 Project Design-Build team. (b) (6) participated as a member of the Atkinson team, executed Teaming Agreement and Confidentiality Agreements, attended team meetings, and provided information to Atkinson and other members of the team to support development of Atkinson’s SOQ and Proposal.

Email correspondence from November 2019 through early January 2020 documents that Atkinson’s Project Manager, Stuart Moore, PE, requested and received information directly from (b) (6) which supported Atkinson’s bid for

(b) (6)

four (4) separate bridge packages (a total of 12 bridges). (b) (6) was not requested to provide a bid at any point in the process, and we assumed that the information we provided was being incorporated into the total bid price by Atkinson, as shown in the emails below.



After WSDOT shortlisted Atkinson in August 2019 to submit a US 12 Project proposal, (b) (6) continued to provide structural engineering support to Atkinson's US 12 Project Design-Build team through January of 2020.

Atkinson's Proposal Form R – Organizational Conflicts of Interest – Disclosure and Avoidance/Neutralization/Mitigation Plan, which was signed by their Design Lead and Design Subconsultants. (b) (6) was not requested to provide such Disclosure and was not included in Atkinson's Form R, as shown below, though structural engineering (12 bridges) comprises a significant portion of the design effort for the US 12 Project, and (b) (6) had been engaged to provide structural engineering support to Atkinson's team.



WSDOT posted the Apparent Best Value Determination on February 26, 2020 for the US 12 Project, and named Atkinson as the Apparent Best Value Proposer.

Atkinson was awarded the US 12 Project contract on April 13, 2020. (b) (6) was notified by Atkinson's Design Lead Consultant, Skillings Connolly, Inc., on April 24, 2020, that (b) (6) was no longer a member of Atkinson's US 12 Project Design-Build team. Atkinson's actions, in dropping (b) (6) from its Design-Build team *after* award of the contract, and not notifying (b) (6) of this action until after the deadline to protest the award had passed, has had a disparate, disproportionate impact on (b) (6).

Undisclosed Potential Organizational Conflict of Interest (OCOI)

WSDOT's US 12 Project RFQ required Submitters to "disclose all relevant facts concerning any past, present, or currently planned interests, activities, or relationships which may present organizational conflicts of interest. Submitters shall state how their interests, activities, or relationships, or those of the chief executives, directors, Key Personnel, or any proposed Consultant, Subconsultant at any tier, Contractor, or Subcontractor at any tier may result, or could be viewed as, organizational conflicts of interest prior to or in the SOQ, in accordance with WSDOT Secretary's Executive Order E-1059 and WSDOT *Organizational Conflicts of*

(b) (6)

Interest Manual M 3043. The *Organizational Conflicts of Interest Manual* states that “it is the Proposer’s responsibility to avoid, neutralize, or mitigate potential conflicts of interest. Proposers are required to disclose all relevant facts concerning any past, present, or currently planned interests, activities, or relationships which may present an organizational conflict of interest.”²

Atkinson’s SOQ failed to disclose—and WSDOT neglected to question—the omission of a perceived OCOI. Atkinson has an ongoing contractual relationship with a member of the consultant team that assisted in the development of WSDOT’s US 12 Project RFQ and RFP, Jacobs Engineering Group (Jacobs). **Atkinson did not disclose this relationship in its US 12 Project SOQ OCOI Certification Form B1 and did not submit an OCOI Avoidance/Neutralization/ Mitigation Plan on SOQ Form B2. WSDOT scored these required forms on a Pass/Fail basis, and Atkinson passed.**



WSDOT’s US 12 Project [RFQ](#), Section 5.2 of May 23, 2019 states:

“WSDOT has retained the consulting firms ***Jacobs Engineering Group Inc., and David Evans & Associates, Inc.*** to provide guidance in preparing this RFQ, the RFP, and advice on related financial, contractual, and technical matters. These firms are prohibited from joining any Submitter’s team or otherwise assisting any Submitter in connection with the procurement.”

The US 12 Project is one of two recent examples of projects for which for Jacobs provided guidance to the WSDOT Project Office (and was prohibited from joining a submitter’s team) and Atkinson submitted a proposal, as shown below:

ADVERTISEMENT DATE	CONTRACT NO.	PROJECT NAME
3/22/2018	9247	I-82, South Union Gap Interchange Construct Ramps
5/23/2019	9406	US 12 Nine Mile Hill to Frenchtown Vic - Build New Highway

² ftp://ftp.wsdot.wa.gov/contracts/9406-NineMileHillToFrenchtownVic-BuildNewHighway/RFP/instructions_to_Proposers.pdf

(b) (6)

We assume that the relationship between Atkinson and Jacobs is well known to WSDOT contracting staff and SOQ/Proposal evaluators, as prior to the US 12 Project solicitation Atkinson and Jacobs had teamed on and been awarded or completed nearly \$1 billion in design-build contracts with WSDOT, as listed below in data compiled from WSDOT's website.

AWARDED/COMPLETED ATKINSON-JACOBS WSDOT DESIGN-BUILD PROJECTS	APPROX. VALUE (\$ MILLION)
I-405 South Bellevue Widening	126.0
SR 9/SR 92 Intersection Improvements	3.5
I-405/SR 520 Bellevue Braids	107.5
I-405/SR 518 Concrete Pavement Rehabilitation	7.3
SR 167 Puyallup River Bridge Replacement	23.2
I-90 Snoqualmie Pass East	177.0
SR 167/8 th St. E Vic to S277th St. Vic – SB HOT Lane	54.0
I-5/NB MLK Jr. Way to NE Ravenna Br. – Pavement Repair	38.6
I-5 Steilacoom-Dupont Rd. to Thome Lane – Corridor Improvements	180.9
I-5 Portland Ave. to Port of Tacoma Road – SB HOV	159.9

Other projects the Atkinson/Jacobsteam have been awarded/shortlisted, while Jacobs provided consulting services directly to WSDOT, include:

WSDOT DESIGN-BUILD PROJECT	APPROX. VALUE (\$ MILLION)
SR 167 70 th Ave E. Vic. Bridge Replacement	40.9
SR 3, Chico Ck. And Tributary – Remove Fish Barrier	43.2
SR 509 Completion – Stage 1B	300.0*

*Shortlisted

Atkinson and Jacobs have worked or are presently working together on several WSDOT design-build projects, listed below.

CONTRACT NO.	CURRENT WSDOT DESIGN-BUILD PROJECT	CONTRACT STATUS
8811	I-405 SR 167 Interchange Direct Connector	Awarded 6/23/2016
8952	I-5 NB MLK Jr. Way to NE Ravenna Br Pavement Repair & More	Awarded 5/9/2017

(b) (6)

CONTRACT NO.	CURRENT WSDOT DESIGN-BUILD PROJECT	CONTRACT STATUS
9133	I-5 Steilacoom-Dupont Rd to Thorne Lane – Corridor Improvements	Awarded 5/23/2018
9333	SR 167 70 th Avenue E Vicinity Bridge Replacement	Awarded 7/15/2019
9475	SR 3 Chico Creek and Tributary – Remove Fish Barriers Project	Awarded 6/1/2020
9424	SR 509 Completion – Stage 1B	Shortlisted 12/9/2019

The US 12 Project procurement also overlaps the procurement timeline of two WSDOT design-build projects on which Atkinson and Jacobs teamed, as shown below.

SR 3, Chico Creek and Tributary – Remove Fish Barriers Project Procurement Timeline

Advertisement Notice.....Posted 8/14/2019
 Request for Qualifications.....Posted 8/28/2019
 Voluntary Submitters Meeting – Sign-In SheetPosted 9/9/2019
 Conformed Request for Qualifications.....Posted 9/19/2019
 Submitters List with Single Point of ContactPosted 10/17/2019
 Shortlist LetterPosted 11/18/2019
 Instructions to ProposersPosted 11/18/2019
 Apparent Best Value DeterminationPosted 5/20/2020
 Project AwardPosted 6/11/2020
Awarded to Atkinson – Lead Design Jacobs (Bid Amount \$43,195,895)

SR 509 Completion – Stage 1B Procurement Timelines

Advertisement Notice.....Posted 8/12/2019
 Request for Qualifications.....Posted 9/5/2019
 Voluntary Submitters Meeting – Sign-In SheetPosted 9/13/2019
 Conformed Request for Qualifications.....Posted 10/7/2019
 Submitters List with Single Point of ContactPosted 11/7/2019
 Shortlist LetterPosted 12/19/2019
 Instructions to ProposersPosted 5/12/2020
 Apparent Best Value DeterminationEst. 12/2/2020
 Project AwardEst. 01/13/2021
Atkinson – Lead Design Jacobs Shortlisted (Est. Amount \$300 Million)

WSDOT’s [Organizational Conflicts of Interest Manual](#) (M3043.02) describes a variety of circumstances that could constitute a conflict of interest:

(b) (6)

Request for Review and Investigation of Disparate Treatment and Disproportionate Impacts in Award of the WSDOT US 12, Nine Mile to Frenchtown Vic Build New Highway Design Build Project – Contract 9406

7. **“Organizational Conflict of Interest (OCOI) means that because of other activities or relationships with other persons or entities, a person or entity:**
 - a. Is unable or potentially unable to render impartial assistance or advice to WSDOT;
 - b. Is or might be otherwise impaired in its objectivity in performing the contract work; or
 - c. Has an unfair competitive advantage.
8. **Perceived Conflict of Interest** - A situation where a person’s official duties or entity’s official duties are in a circumstance where interests have the appearance of being influenced or conflicted.
9. **Potential Conflict of Interest** - A situation where a person’s official duties or entity’s official duties may cause a conflict in the future.
10. Proposal – The document submitted by the Design-Builder in response to the Request for Proposal, which includes price information, technical approach, clarifications and supplements thereto.
11. **Real/Actual Conflict of Interest** - A situation where a person’s official duties or entity’s official duties are in a circumstance where their interests are conflicted.”

The manual also states:

- III. **“Responsibilities** - The responsibility to avoid or neutralize Organizational Conflicts of Interest (OCOI) ultimately rests with the person or firm potentially conflicted. WSDOT’s determinations are with regard to WSDOT’s interests but cannot protect against challenges from outside interested parties. Nevertheless, WSDOT retains sole discretion to determine on a case-by- case basis whether an OCOI exists and whether actions may be appropriate to avoid or neutralize any actual, potential or perceived conflict. It is understood that any determination by WSDOT with regard to the existence of an actual, potential or perceived OCOI or with regard to whether the OCOI may be avoided, neutralized, or mitigated is based solely on the facts made available at the time the determination is made. Unknown facts or a change in the facts over time may necessitate a re-evaluation of the original conclusion. Risks and costs associated with a successful legal challenge to an OCOI are the sole responsibility of the person or firm potentially conflicted. WSDOT reserves the right to reassess and revise any determination made regarding an OCOI at any time. ”

Atkinson and Jacobs were teaming on WSDOT projects throughout the state of Washington while Jacobs was providing consulting services to a WSDOT project office which oversees the US 12 Project in the South Central Region. A reasonable person would assume that Atkinson

(b) (6)

should have disclosed a potential OCOI and submitted a plan to avoid, neutralize, or mitigate this OCOI, and that WSDOT was knowledgeable of and should have questioned why this relationship was not disclosed in Atkinson's SOQ and Proposal.

WSDOT has not avoided circumstances that result in an actual or perceived competitive advantage for a potential consultant, submitter, proposer, or bidder:

- Atkinson and Jacobs have teamed on over \$500 million dollars of awarded WSDOT design-build contracts since 2015.
- Jacobs, as a consultant to WSDOT, helped to prepare WSDOT's US 12 Project RFP.
- Although Jacobs was prohibited from teaming with Atkinson on the US 12 Project while under contract with WSDOT on two other concurrent projects worth approximately \$350-400 million, the two firms' business relationship can be perceived as presenting an Organizational Conflict of Interest for Atkinson, and creating an unfair advantage.
- Jacobs' consulting services to WSDOT's South Central Region office, which manages the US 12 Project, provided Jacobs with knowledge that, if shared with a prospective bidder, such as Atkinson, on design-build projects managed by the South Central Region office, could provide that bidder an unfair advantage in the competitive procurement process.

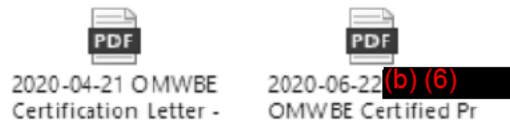
We question whether WSDOT adequately ensured that individuals involved in the preparation of the US 12 Project procurement package, evaluation of SOQs and Proposals, and Design-Builder selection were not influenced by organizational conflicts of interest, and whether Atkinson had an unfair competitive advantage. WSDOT's RFQ states "If the Submitter was aware of organizational conflicts of interest prior to award of a Contract and did not disclose the conflict to WSDOT, WSDOT may terminate the Contract for default."

The engineering consultant community is aware that, industry-wide, Atkinson and Jacobs team on virtually every WSDOT design-build project and have been very successful doing so. This perceived conflict of interest may have had material effects on the procurement process on other WSDOT design-build projects with similar or overlapping procurement timelines.

Disparate Actions

The actions against (b) (6) by Atkinson and WSDOT's subsequent award of the contract to Atkinson have had a disproportionate adverse impact on (b) (6), an Underutilized Disadvantaged Business Enterprise (UDBE) and Minority Business Enterprise (MBE) certified by the Washington State Office of Minority and Women's Business Enterprises.

(b) (6)



The disparate treatment of (b) (6) spanned the duration of the US 12 Project procurement activities:


Date	WSDOT US 12 Project Procurement Key Dates
5/23/2019	<u>Project advertised</u>
7/16/2019	<u>Statements of Qualification (SOQ) due</u>
7/16/2019	<u>Submitters list posted</u>
8/9/2019	<u>List of shortlisted submitters invited to submit proposals</u>
8/19/2019 – 1/30/2020	<u>Request for Proposal (RFP) and addenda posted</u>
2/26/2020	<u>Apparent Best Value Determination posted</u>
4/13/2020	Contract awarded to Atkinson

A timeline of key events and communications between (b) (6), Atkinson, and its Design Lead during this period follows below.







Communications Between (b) (6) and the Atkinson Design-Build Team

DATE	COMMUNICATION	DOCUMENT
4/1/2019	Skilling Connolly Inc. (Skilling), Lead Engineering/Design Firm on Atkinson’s team, engages (b) (6) to join the Atkinson US 12 (b) (6)	(b) (6)
Early April 2019	(b) (6)	(b) (6)
8/9/2019	Atkinson was selected (shortlisted) by WSDOT as one of three firms invited to submit a proposal for the US 12 Project. Please note that Jacobs helped to prepare WSDOT’s RFP, while also working with Atkinson on other WSDOT design-build contracts.	ftp://ftp.wsdot.wa.gov/contracts/9406-NineMileHillToFrenchtownVic-BuildNewHighway/ProjectInformation/ShortlistLetter.pdf



(b) (6)

DATE	COMMUNICATION	DOCUMENT
10/25/2019	(b) (6) was requested to sign a Confidentiality Agreement with Skillings, as David Talcott, Exeltech Director of Engineering Services, and Santosh Kuruvilla, President of Exeltech, had done previously.	(b) (6)
Late October 2019	(b) (6) was requested to sign a second teaming agreement with Skillings; this agreement was fully executed on 10/28/2019.	 REVISED Executed Skillings (b) (6) ear












Shortly thereafter, the flow of communications regarding structures on the project changed from (b) (6) working directly with Skillings, who either passed our information on to Atkinson or Atkinson was included as a cc, to a direct relationship between Atkinson and (b) (6) with Skillings being cc'd. (b) (6) was included in internal and external meetings and correspondence with various external team members, including Atkinson, as requested to support the preparation of Atkinson's US 12 Project SOQ and Proposal.

DATE	COMMUNICATION	DOCUMENT
10/30/19	Email request from Skillings to (b) (6) regarding Bridge Layout Information	 2019-10-30 US 12 Bridge Layout.pdf
11/05/19 and 11/06/19	Two (2) emails between from Skillings and (b) (6) regarding Bridge Layout Information	 2019-11-05 Bridge Info.pdf  2019-11-06 Bridge Info.pdf
11/8/19	Email from Skillings to Exeltech regarding shared box (cloud-based file-sharing tool), importance of (b) (6) to team, and coordination effort importance	 2019-11-08 US 12 Files Posted to box 1
11/11/19 and 11/13/19	Two (2) Emails from Skillings requiring active involvement by (b) (6) during RFP Phase	 Email Tom Skillings  Email Tom Skillings requesting active part coordinating with LSE

(b) (6)

DATE	COMMUNICATION	DOCUMENT
11/12/19	Two (2) Emails between from Skillings and (b) (6) regarding Woodard Bridge Layout	 2019-11-12 Woodward Bridge L  2019-11-12 Woodward Bridge L










Beginning on November 14, 2019, requests for information and direction to Exeltech came directly from Stuart Moore (Atkinson) to (b) (6) in the process of obtaining submittal packages from (b) (6) for all structures on the US 12 Project. In response to these requests from Atkinson, (b) (6) provided four submittal packages, as evidenced below:

DATE	COMMUNICATION	DOCUMENT
11/14/19	Email response from (b) (6) to Atkinson (1st Submittal Package) for eight Precast Prestressed Concrete Slab Girder Bridges	 Email US12 Dry Ck. Precast Girder Br. Ge  US12 Slab Bridges for Bidding knk 11 1
11/15/19	Email from Atkinson to (b) (6) regarding the provided 1st Submittal Package was what Atkinson needed for attachment for the eight Precast Prestressed Concrete Slab Girder Bridges	 Email Atkinson Confirm Geometry f
11/15/19	Email response to Atkinson and (2nd Submittal Package) for two U'Xing Prestressed Concrete WF74G Girder Bridges	 Email US12 UXing Bridges WF74G Gird for Bidding knk 11 1  US12 UXing Bridges  US12 Cummins and Woodward Bridge S
11/18/19	Email to Atkinson and (3rd Submittal Package) from (b) (6) for two Dry Creek O'Xing Precast Prestressed Concrete WF50G Girder Bridges US12	 Email 2 Dry Creek O'Xing Precast Prest  US12 Dry Creek Bridges for Bidding
11/20/19	Email to Atkinson and Skillings (4th Submittal Package) for the Touchet River Precast Prestressed Concrete WF74G Girder Bridge and providing a bridge information table for all bridges on the US 12 Project	 2019-11-20 Touchet River PPCGB Email re  12 Touchet River Br for bid (b) (6) pdf  Bridge Information Table 11 20 2019.pd

Additional communications with Atkinson regarding structure-related questions include:

(b) (6)

Request for Review and Investigation of Disparate Treatment and Disproportionate Impacts in Award of the WSDOT US 12, Nine Mile to Frenchtown Vic Build New Highway Design Build Project – Contract 9406

DATE	COMMUNICATION	DOCUMENT
12/4/19	Email from Atkinson and (b) (6) response to questions regarding Dry Creek Bridge(s)	 2019-12-04 Atkinson Questions t (b) (6)
12/16/19	Email from Atkinson and (b) (6) response to questions regarding Touchet River Bridge	 Questions and Response for Touch
12/17/19	Email from Atkinson with attached table requesting revisions to 1st (b) (6) provided Bridge Length Table and (b) (6) responseto the request	  Atkinson Email Bridge Length Bridge Lengths Reqi Question with (b) (6)
1/6/2020	Email request from Atkinson and (b) (6) response regarding bridge pedestrian rails and/or barriers	 2020-01-06 Sidewalks on Count
01/08/2020	Email request from Atkinson regarding Touchet Bridge Deep Foundation Alternative	 2020-01-08 Atkinson Email and
01/08/20 and 01/09/2020	Email request from Atkinson regarding additional request for Touchet Bridge and (b) (6) response	  2020-01-08 Touchet Bridge.pdf 2020-01-09 Touchet Bridge.pdf
12/2019 and 1/14/2020	Stuart Moore of Atkinson requested our (b) (6) to provide adjustments to previously submitted technical information. The last correspondence between Atkinson and (b) (6) dated 1/14/2020, from Stuart Moore of Atkinson, and (b) (6) response.	(b) (6)
2/26/2020	WSDOT announces Atkinson as the Apparent Best Value Proposer	ftp://ftp.wsdot.wa.gov/contracts/9406-NineMileHillToFrenchtownVic-BuildNewHighway/ProjectInformation/ABV.pdf
3/3/20	Email from Skillings confirming “cryptic” messages (and unclear communication) from Atkinson during RFP Phase	 Email Tom Skillings validating cryptic me
4/13/2020	WSDOT awards Atkinson the \$110 million US 12 Project contract	

(b) (6)

DATE	COMMUNICATION	DOCUMENT
4/24/2020	Atkinson Design-Build team Lead Designer, Skillings President Tom Skillings, called (b) (6) and informed him that at the direction of Atkinson, (b) (6) was no longer part of the team, and that (b) (6) has been replaced by Pace Engineers. During this same call, (b) (6) requested Tom provide a letter regarding this action by Atkinson, to document the matter. Tom said that he would provide an official letter when he returned to the office the following Monday, 4/27/20. To date, we have yet to receive a letter from Skillings.	

It should be noted that documents provided above do not include all communications shared between (b) (6) Atkinson, and other members of the Design-Build team.

After learning that (b) (6) had been dropped from Atkinson’s Design-Build team, we submitted a formal complaint and protest letter to WSDOT regarding the selection of Atkinson for the US 12 Project on May 5, 2020. WSDOT denied the complaint on the grounds that it was received after the deadline for filing a complaint.



2020-05-04 Protest Letter to WSDOT.pd



2020-05-08 WSDOT Protest Response.pc

“Notice of protest of any award by WSDOT must be filed within 9 Calendar Days after WSDOT’s opening of the Price Proposals, (announcement of Apparent Best Value Proposer). The announcement of Apparent Best Value Proposer occurred on February 26, 2020. (b) (6) request is well outside of the timeline established in the ITP.”

Please note that (b) (6) could not have protested the award within nine calendar days, as our protest was based on having been dropped from Atkinson’s team—which we were not notified of until almost two months after WSDOT’s announcement of Apparent Best Value Proposer.

WSDOT forwarded our complaint letter to FHWA. FHWA denied our protest as a Title VI violation, stating that no action would be taken due to (b) (6) formal complaint and protest letter not meeting the requirements of Section 8.1.2 of the Instruction to Proposers (ITP).



2020-05-26 FHWA Dismissal of Compla

(b) (6)

FHWA’s rejection of our complaint stated that:

“To be accepted for investigation, a complaint must meet the jurisdictional requirements provided by 49 C.F.R. § 21.11. First, complaints must be filed within 180 calendar days of the alleged discriminatory act, unless the time for filing is extended by FHWA. Second, the matters must concern recipients of federal financial assistance for a program or programs authorized under a law administered by FHWA. Finally, the complaint must describe an alleged discriminatory act or acts that, if true, would fall under FHWA’s jurisdiction and potentially violate FHWA’s Title VI regulations.”

Suggested Topics for Investigation

Our subsequent receipt of Atkinson’s SOQ and Proposal, obtained through a Public Records request, has raised numerous questions for which we seek review or investigation.

Why was Exeltech led to believe that we were part of the US 12 Project Design-Build team throughout the procurement process? Atkinson used information provided by Exeltech during the preparation of their proposal, as shown in the drawings, calculations, and emails directly between Exeltech and Atkinson.

Why was (b) (6) “excluded” from Atkinson’s Design-Build team after award of the contract, and did Atkinson intentionally remove (b) (6) from the Design-Build team after the formal protest period elapsed?

Why wasn’t (b) (6) listed as a Major Participant in Atkinson’s SOQ? (b) (6) consulting services to the Atkinson Design-Build team between (b) (6). It cannot be disputed that (b) (6) was involved in the US 12 Project SOQ and Proposal stages, worked directly with the Design-Builder, met the requirements of Section 2.13.3 of the RFP in the role of Structural Lead Engineer, and provided information Atkinson needed to bid on the project.

WSDOT’s “shortlisting” process for the US 12 Project RFQ stage, described in Section 5.1 of the RFQ, defines a “Major Participant” as follows:

“Section 5, Teaming Parameters, subsection 5.1 Major Participant.

5.1 Major Participant

As used herein, the term “Major Participant” means any of the following entities:

- A. The Submitter, or if the Submitter is a partnership, joint venture, limited liability company, or other form of association, any general partners, joint venture members, or members of the Submitter

(b) (6)

- B. All individuals, Persons, proprietorships, partnerships, limited liability partnerships, corporations, professional corporations, limited liability companies, business associations, or any other legal entity however organized holding (directly or indirectly) a 15 percent or greater interest in the Submitter
- C. Each entity providing WSDOT pre-qualification in accordance with Section 7.4 of this RFQ
- D. Each lead engineering/design firm
- E. **Each engineering/design Subconsultant who is expected to perform 30 percent or more of the design Work**
- F. Each Subcontractor who is expected to perform 20 percent or more of the construction Work
- G. The firm or Personnel who will be providing or performing QA as a Key Personnel for the Project”

Why is it important to be listed as a “Major Participant” during the RFQ/SOQ response stage of the procurement? Section 5.4 of the US 12 Project RFQ states:

“5.4 Team Continuity and Changes to Organizational Structure

Following Submittal of the SOQ, Key Personnel, or Major Participants identified in the SOQ may not at any time be removed, replaced, or added without the written approval of the WSDOT Technical Point of Contact. the WSDOT Technical Point of Contact may revoke the Short-Listed status of a Submitter if any Key Personnel or Major Participant identified in the SOQ is removed, replaced, or added without written approval of the WSDOT Technical Point of Contact. **Requests for removal, replacements, and additions shall be submitted in writing. To qualify for approval, the written request shall document that the proposed removal, replacement, or addition will be equal to or better qualified than the Key Personnel or Major Participant provided in the SOQ.** The WSDOT Technical Point of Contact will use the criteria specified in this RFQ to evaluate all requests.”

Should WSDOT have questioned Atkinson’s omission of a Structural Engineering consultant as a Major Participant on their team? Who reviewed the SOQs? Did any WSDOT consultants participate in SOQ review, contributing to a potential organizational conflict of interest? Omission of (b) (6) from the list of Major Participants in Atkinson’s SOQ had a disparate impact on (b) (6). Atkinson’s Lead Designer, Skillings, has no structural engineering capabilities in-house. In fact, Mr. Skillings and his team confirmed this to (b) (6) throughout

(b) (6)

the RFP phase and stated several times “we are not Bridge Engineers — that’s why we have (b) (6) on the US 12 [Project] Team to design all the bridges and retaining walls.”

In addition to identifying Major Participants, RFP Section 2.13.3 (below) required Design-Builders to include a Structural Lead Engineer on their project team:

“2.13.3 Personnel Requirements

The Design-Builder shall provide a Structural Lead Engineer (SLE) to manage and review all aspects of the structural Work completed for the Project. The SLE shall ensure that all design and construction of permanent Work is in conformance with the Request for Proposal and Quality Management Plan, and shall be responsible for the quality of the structural Work performed and for coordinating all structural design elements of the Project.

The SLE shall have a minimum of 10 years of experience in the design of bridges, retaining walls, and other highway related structures. The SLE shall be in responsible charge of all bridge and structures design elements. This individual shall be a Licensed Structural Engineer with endorsements in Civil and Structural Engineering.

The Engineer of Record (EOR) for all structural engineering Design Documents for the Project shall have a minimum of 10 years of experience in the design of bridges, retaining walls, and other highway related structures. The EOR shall be a Licensed Professional Engineer with endorsements in Civil and Structural Engineering.

For single span and culvert structures, the stamp of EOR shall be applied in accordance with RCW 18.43.”

The US 12 Project Design-Build Submitter’s List with Single Point of Contact is provided below.



Four of the five design-build teams listed on the Submitter’s List included a subconsultant firm with structural engineering capabilities as a “Major Participant,” perhaps due to the US 12 Project having 12 structures, and assuming that the structural engineering subconsultant would qualify under 5.1.E described above.

Atkinson was the only firm that did not include a Major Participant/subconsultant firm that provides structural engineering services on their team. Did Atkinson view the project differently

than the other teams? Was it an oversight? Was (b) (6) ever intended to be on the team at any point in time? Did anyone on the WSDOT review team question why Atkinson was the only submitter that did not include a firm that provides structural engineering services as a Major Participant?

Who is providing structural engineering design services for the US 12 Project? Why were they not identified in Atkinson’s SOQ or Proposal? Atkinson’s Lead Designer, Skillings, is the only design firm listed on SOQ Form C – Reference Information for Major Participants:



Atkinson SOQ Form C
- Major Participants R

Atkinson’s Proposal Form E – Identification of Proposer, Guarantors, Major Participants, Earthwork Subcontractors, Structures Subcontractors and Each Subconsultant and Subcontractor Performing 20 Percent or More of the Design-Build Work – lists Skillings as the Lead Designer, but their Proposal Section 7 – M/S/V/WBE Participation Plan – states that Skillings, a Veteran Owned Business, is anticipated to be utilized for only 3.3 percent of the contract amount.



Atkinson Proposal
Form E



Atkinson Proposal
Section 7 M-S-V-WBE

Why does WSDOT allow consultants to work directly for them on projects (e.g., Jacobs assisting WSDOT in preparing the US 12 Project RFQ and RFP) and to also team with design-build contractors on other concurrent WSDOT design-build projects, but not monitor and enforce adherence to the procedures detailed in its Organizational Conflict of Interest Manual, Publication Number M 3043.02, and WSDOT Executive Orders? In the event that Atkinson has submitted an OCOI Section on the SR 509 Completion – Stage 1B RFQ, similar to their response on the US 12 RFQ, we respectfully point out that this matter concerns a recipient of federal financial assistance—WSDOT—and request that that either WSDOT, FHWA, or US DOT OIG also review or investigate the SR 509 Completion – Stage 1B procurement.

WSDOT Secretary’s Executive Order Number E 1059.00, Organizational Conflicts of Interest, Section II Secretary’s Executive Order states in part:

“The objectives:

1. Establish a contracting environment that helps ensure the consultant or contractor renders impartial assistance or advice to WSDOT and is objective in performing their work for WSDOT.

(b) (6)

2. Protect the integrity, fairness, and competitive spirit of the design-build and design-bid-build procurement process.
3. **Avoid circumstances that result in an actual or perceived competitive advantage for a potential consultant, submitter, proposer, or bidder.**
4. Protect confidential and sensitive project-specific information.
5. Inform potential consultants, contractors, proposers, and bidders of the department's rules and procedures for managing organizational conflict of interest."

Furthermore, Paragraph 6 of the same section states in part:

"The Federal Highway Administration (FHWA) addresses OCOI in relation to federally funded highway project in general...WSDOT adopts these rules for use on all WSDOT DB contracts, whether federally funded or not."

In addition, 23 CFR 636.116, Section (2)(v) states as follows:

"(v) Requires offerors to provide information concerning potential organizational conflicts of interest in their proposals. The apparent successful offerors must disclose all relevant facts concerning any past, present or currently planned interest which may present an organization conflict of interest. Such firms must state how their interests, or those of their chief executives, directors, key project personnel, or any proposed consultant, contractor or subcontractor may result, **or could be viewed as**, an organizational conflict of interest..."

The WSDOT Project Office retained assistance from two (2) consulting firms in development of the US 12 Project RFQ. The spreadsheets below summarize the current Atkinson-Jacobs teaming situation on WSDOT design-build projects. The Atkinson-Jacobs active projects that are highlighted in "orange" or "yellow" were awarded after either the first or second contracts for which Jacobs provided WSDOT RFP assistance and for which Atkinson submitted a bid. Jacobs may also have been "teaming" on WSDOT design-build projects during the same time period.



2020-06-22
Atkinson-Jacobs Act



2020-06-22
Atkinson-Jacobs WS



2020-06-22 Jacobs
WSDOT Assist DB Pr

The US 12 Project RFQ states:

"Section 5.3 Organizational Conflicts of Interest

Organizational conflicts of interest mean that because of other activities or relationships with other Persons or entities, a Person or entity:

(b) (6)

- A. Is unable or potentially unable to render impartial assistance or advice to WSDOT
- B. Is or might be otherwise impaired in its objectivity in performing the Contract Work
- C. Has an unfair competitive advantage

The integrated nature of the design-build project delivery method creates the potential for organizational conflicts of interest. **Disclosure, evaluation, neutralization, and mitigation of these conflicts and of the appearance of conflicts are in the interest of the public, WSDOT, and the consulting and construction communities.**

WSDOT will take steps to ensure that individuals involved in the preparation of the procurement package, evaluation of SOQs and Proposals, and Design-Builder selection are not influenced by organizational conflicts of interest, and that no Submitter is given an unfair competitive advantage over another.

Attention is directed to the requirement for disclosure of organizational conflicts of interest set forth in 23 CFR Section 636.116(a) (2), WSDOT Secretary's Executive Order E-1059, and WSDOT Organizational Conflicts of Interest Manual M 3043. Submitters are required to identify any potential organizational conflicts of interest in Appendix C of the SOQ.

Submitters are required to disclose all relevant facts concerning any past, present, or currently planned interests, activities, or relationships which may present organizational conflicts of interest. Submitters shall state how their interests, activities, or relationships, or those of the chief executives, directors, Key Personnel, or any proposed Consultant, Subconsultant at any tier, Contractor, or Subcontractor at any tier may result, or could be viewed as, organizational conflicts of interest prior to or in the SOQ, in accordance with WSDOT Secretary's Executive Order E-1059 and WSDOT Organizational Conflicts of Interest Manual M 3043. Submitters shall include the Organizational Conflicts of Interest Certification and if needed the Organizational Conflicts of Interest Disclosure and Avoidance/Neutralization/Mitigation Plan (forms contained in Appendix A) in the SOQ Submittal package as Appendix C.

If an organizational conflict of interest is determined to exist, WSDOT may, at its sole discretion: offer the Submitter the opportunity to avoid, neutralize, or mitigate the organizational conflicts of interest; disqualify the Submitter from further participation in the procurement; cancel this procurement; or, **if award has already occurred, declare the Proposal nonresponsive and award the Contract to the next responsive Apparent Best Value Proposer, or cancel the Contract. If the Submitter was aware of organizational conflicts of interest prior to award of a Contract and did not disclose**

the conflict to WSDOT, WSDOT may terminate the Contract for default. WSDOT may also disqualify a Submitter if any of its Major Participants, listed in Categories A, B, C, or D in Section 5.1 belong to more than one Submitter organization.

The Submitters shall complete Form B1, Organizational Conflicts of Interest Certification, which is included in Appendix A of this RFQ. If necessary, the Submitters shall also complete Form B2, Organizational Conflicts of Interest Disclosure and Avoidance/Neutralization/Mitigation Plan, which is included in Appendix A of this RFQ. The completed Form B1 (and B2 if necessary) shall be included in the SOQ Submittal package as Appendix C to the SOQ.”

The WSDOT Organizational Conflicts of Interest Manual, M 3043.02, Section IV Guidelines for Evaluating (OCOI) states:

“A. General

WSDOT is obligated to follow applicable state and federal laws regarding OCOIs. Nothing contained in the manual is intended to limit, modify, or otherwise alter the applicability or effect of federal and state law, rules, and regulations.

WSDOT in its sole discretion evaluates the following for WSDOT purposes on a case-by-case basis.

- Whether or not an OCOI exists
- Whether or not the OCOI can be avoided, neutralized, or mitigated
- Reasonable and acceptable steps to avoid, neutralize, or mitigate OCOI, again we are not in a position to warrant the effectiveness of such steps.”

Atkinson did not disclose any potential organizational conflicts of interest, and did not identify any procedures to avoid, neutralize, or mitigate potential conflicts of interest. We suggest that Atkinson’s failure to disclose a perceived appearance of conflict of interest is contrary to the best interests of the public, WSDOT, and the consulting and construction communities.

Does Atkinson’s US 12 Project Design-Build team meet the M/S/V/WBE Participation Goals stated in WSDOT’s RFP? The goals for voluntary M/S/V/WBE participation as a percentage of the Design-Builder’s Total Proposal Price, as established in the RFP, and Atkinson’s anticipated Diverse Business Utilization stated in their US 12 Project Proposal, are listed below.

(b) (6)

STATE CERTIFICATION CATEGORY	WSDOT VOLUNTARY GOAL (%)	ATKINSON ANTICIPATED DIVERSE BUSINESS UTILIZATION (%)
Minority	10	1
Small	5	1
Veteran	5	3.3
Women	6	5.3

As stated earlier, (b) (6) is a Washington State-certified minority-owned, Underutilized Disadvantaged Business Enterprise (UDBE) that should have been identified in Atkinson’s US 12 SOQ and Proposal as a Major Participant.

Conclusion

I request that the US 12 Project procurement/award process be reviewed and/or investigated. Atkinson’s behavior is not conducive to the short- or long-term welfare of businesses, particularly UDBEs. WSDOT’s negligence in not following its own policies and enforcing RFQ/RFP requirements led to Atkinson’s unfair competitive advantage and facilitated the disparate treatment of (b) (6).

I believe that Atkinson’s actions described herein are in violation of Washington State and FHWA efforts to afford fair and equal opportunity to compete for contracts. Atkinson’s disparate actions are contrary to professional standards of conduct and have had a disproportionate negative impact on (b) (6), resulting in estimated lost revenue of at least \$2.6 million.

When participating on a design-build team as a subconsultant, access to Design-Builders’ proposals is limited, at best. At no time was (b) (6) made aware that it was removed from the Atkinson team prior to the phone call received from Atkinson’s Design Lead on April 24, 2020—after award of the contract—and past the deadline for protesting the award. It has taken some time for us to document these actions.

The events described in our letter of complaint clearly go against the spirit and intent of WSDOT’s stated objective to maintain an open, fair, competitive (as much as possible) and transparent procurement process. It is my hope that WSDOT’s design-build procurement process can be improved to provide greater process transparency and more fair and equal contracting opportunities.

I suggest that in the future, WSDOT should require Design-Builders to list all proposed subconsultants/subcontractors in their proposals; this would provide a more fair and open

(b) (6)

procurement process and greater protection for UDBE (and all) subconsultant firms that invest time and resources participating in WSDOT design-build procurements.

Thank you for considering our request to review and/or investigate our complaint regarding the US 12 Project procurement/award process, and to extend the deadline for submitting this request.

Respectfully Submitted,

(b) (6)

A large black rectangular redaction box covers the signature area. The text "(b) (6)" is written in red at the top left corner of the redaction.

cc: Secretary Roger Millar
Deputy Secretary Keith Metcalf
Assistant Secretary Kevin Dayton
WSDOT Civil Rights Program Manager Jodi Petersen
Senator Karen Keiser
Senator Rebecca Saldana
Senator Steven Conway
Senator Robert Hasegawa
Senator Samuel Hunt
Senator Joe Nguyen
Representative Sharon Tomiko Santos