

June 22, 2015

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Reference No.: 13-0242

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Dear Attorneys Hill and Taft:

WHH Nisqually Federal Services, LLC (WHHNFS) appeals the Washington State Office of Minority and Women's Business Enterprises (OMWBE) determination that it is ineligible for certification as a Disadvantaged Business Enterprise (DBE) under criteria set forth in the DBE Program Regulation 49 C.F.R. Part 26. The Department reviewed the entire administrative record as §26.89(f)(1) requires and concludes that substantial evidence supports OMWBE's decision.

According to its DBE certification application, WHHNFS is a construction management and general contracting firm established in April 2011. The Nisqually Board of Economic Development, LLC (NBED), an entity of the Nisqually Indian Tribe, owns 60% of WHHNFS and the remaining 40% is owned by three non-disadvantaged persons each possessing 13.3%—Karl P. Hedlund (Executive Operations Manager), David F. Walsh (General Manager), and Randy Harlow (Executive Program Manager). Richard J. Rinehart, Jr., a Native American, is the firm's CEO and Board Chairman; and he and two other Native Americans Charles (Bob) R. Iyall and Charles F. Blacketer serve on the Board of Managers.

Firms such as WHHNFS that are owned by an Indian tribe or Native Hawaiian organization, rather than by Indians or Native Hawaiians as individuals, may be eligible for certification as stated in §26.73(h) of the Regulation. This provision requires such a firm to meet the size standards of §26.65 and be controlled by socially and economically disadvantaged individuals, as provided in §26.71. As in all cases, applicants for DBE certification (including WHHNFS) bear the burden of demonstrating their eligibility for the program by satisfying each eligibility requirement per §26.61(b); and a failure to meet its burden of proof regarding any substantive certification requirement results in a determination that it is ineligible.

We affirm OMWBE's denial decision under §26.89(f)(1) because substantial evidence in the record supports a determination that WHHNFS failed to demonstrate, by a preponderance of the evidence, that: Richard Rinehart met the requirements of §26.71(g); and the firm met §§26.71(e) and (f) requirements given the disproportionate involvement of WHHNFS' non-disadvantaged owners (Messrs. Harlow, Hedlund, and Walsh).<sup>1</sup> In its denial letter OMWBE cites, among other (control related) denial grounds WHHNFS' lack of independence as required by §26.71(b) and considerations of whether the firm owns equipment necessary to perform its work §26.71(m). The firm on appeal vigorously disputes each of OMWBE's findings. It suffices for purposes of this appeal for us to affirm on the specific §26.71 grounds discussed below because WHHNFS' failure to show that it satisfies any one certification requirement renders the firm ineligible. *See generally* §26.61(b).

### Ownership

The applicant firm's creation can be traced back to the current non-disadvantaged owners, David Walsh, Karl Hedlund, and Randy Harlow, who incorporated Walsh, Hedlund, and Harlow Construction, LLC (WHHC) in 2005 and later incorporated WHH Construction Management, LLC (WHHCM) in 2007. They formed the applicant firm, WHHNFS on April 13, 2011. Two days later (April 15<sup>th</sup>), the 3 businesses executed an "Asset Assignment and Transfer Agreement" whereby WHHC delivered to WHHNFS its business assets (accounts receivable; equipment, contracts, intangible assets, claims, etc.) and liabilities, which according to Mr. Rinehart in his March 15, 2013, letter totaled REDACTED.<sup>2</sup> WHHCM also assigned, conveyed, and transferred its rights to its long-term Sound Transit contract. Contemporaneously on April 15, WHHC together with WHHCM, and Messrs. Walsh, Hedlund and Harlow executed a Unit Purchase Agreement (WHHCM and these individuals are collectively termed seller principals in this document). Recitals in the agreement are that (1) the seller principals own all of the outstanding interests in WHHC and WHHCM; (2) WHHC formed WHHNFS as its wholly owned subsidiary and in connection with its formation, WHHC and WHHCM contributed assets necessary for it to conduct business pursuant to the asset assignment and transfer agreement; (3) WHHC owns all of the outstanding interests in WHHNFS and wishes to sell 60% to NBED.

In his March 15, 2013, letter to OMWBE, Mr. Rinehart explained that during negotiations WHHC provided a REDACTED valuation of its assets, and that the parties continued to negotiate from this position, ultimately agreeing to a purchase price of REDACTED for the fair market value of WHHC's assets. Pursuant to the terms of the Unit Purchase Agreement, the REDACTED was made with a cash payment of REDACTED; a promissory note of REDACTED from NBED to WHHC (paid in full before the time of OMWBE's denial decision via three wire transfers from the Nisqually Indian Tribe to WHHC); a "working capital" note of REDACTED

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<sup>1</sup> OMWBE applied the higher "clear and convincing" standard of proof under §26.71(1) to the facts in this case, because the agency reasoned that the non-disadvantaged individuals (Hedlund, Walsh, and Harlow) transferred majority ownership and/or control of WHHNFS to the Nisqually tribe (the eligible disadvantaged entity).

<sup>2</sup> As Mr. Rinehart describes, this member equity amount REDACTED was split according to the respective percentages (i.e., NBED REDACTED Dave Walsh REDACTED; Karl Hedlund REDACTED and Randy Harlow REDACTED

from WHHNFS to WHHC;<sup>3</sup> and potential future “Earn-Out Payments” of a maximum of REDACTED should WHHNFS meet certain performance levels, that in Mr. Rinehart’s characterization, would cover some of the gap between the parties’ pricing differences.<sup>4</sup>

Mr. Rinehart further alleges that additional funds were contributed by NBED after it purchased its ownership interest, to the tune of REDACTED, comprised REDACTED in cash (evidenced by a June 4, 2012, check) and REDACTED in additional capital. (This amount was first a note due to NBED as evidenced in the record, but according to WHHNFS’ 2011 financial statement, the firm and NBED agreed to convert this note to contributed capital).

OMWBE denied WHHNFS DBE certification for failure to meet the ownership criteria of §26.69(c), (e), and (h) with the agency concluding that NBED paid inadequate consideration for its 60% stake in the firm. Here too, the agency applied the “clear and convincing” evidence standard of §26.69(h), because in its view non-disadvantaged individuals transferred the firm to the tribe and remains involved in WHHNFS.<sup>5</sup> OMWBE’s specific objections are: (1) part of purchase price was based on the future contingent payments or “earn-out” based on performance that has not yet been paid; (2) according to a January 21, 2010, valuation, WHHC was worth REDACTED, an amount that exceeds the sale price by REDACTED;<sup>6</sup> (3) current and pending multimillion dollar contracts transferred to the new firm<sup>7</sup> support a conclusion that WHHNFS paid a low value to “purchase” 60% of WHHC; and that the value the parties set

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<sup>3</sup> The Unit Purchase Agreement specified that if, within 60 days of closing, the total current assets minus the liabilities of WHHNFS is more than 10% (i.e., REDACTED less than REDACTED (i.e., the total current asset minus the actual total current liabilities of WHHNFS as reflected in its balance sheet), then the principal amount of the note shall be reduced by an amount equal to the difference.

<sup>4</sup> Wire transfers appear in the record related to the REDACTED promissory note REDACTED on March 16, 2012 and REDACTED on December 6, 2012, (reflects interest paid)). The applicant demonstrated actual payments of REDACTED (reflecting the promissory note plus interest); REDACTED (the working capital note and interest evidenced by a check from the tribe to the firm); REDACTED converted note of REDACTED for a total of REDACTED. Thus the total price that WHHNFS’ previous 100% owners would ultimately receive for the 60% member interest sold to NBED would be between this amount and that potentially due under the earn-out REDACTED. We note that REDACTED is exactly 60% of the overall value the parties placed on WHHNFS’ assets REDACTED, as the parties agreed; and actual cash paid is above this figure. Liabilities also transferred to WHHNFS that were listed in Schedule 2.6 to the Unit Purchase Agreement were REDACTED (comprised of REDACTED in liabilities and REDACTED in members’ equity). Accordingly, enterprise value could well have been below REDACTED; in which case a fair value of REDACTED for 60% ownership is reasonable.

<sup>5</sup> We do not consider the presumption of §26.69(h)(1) to be operative, for failure of the condition precedent that there be a gift or transfer without adequate consideration.

<sup>6</sup> OMWBE appears to confuse enterprise value (100%) with the ownership interest NBED purchased. NBED bought 60% of WHHNFS, however, not all of it.

<sup>7</sup> OMWBE cites the value of a change order contract between WHHCM at time of transfer with Sound Transit of REDACTED. It also cited a schedule of 9 material contracts held by WHHC with the Veterans Administration REDACTED per year 2008–2012) the Army (approximately REDACTED per year 2009–2012), State of Washington-Sound Transit, dollar amount not provided). OMWBE stated the schedule shows other contracts that are active or final payment is due.

REDACTED does not account for REDACTED Sound Transit professional services contract held by WHHCM that was also transferred to the applicant firm; and (4) according to Mr. Rinehart, to date, WHHNFS has not met the revenue goals necessary to trigger the Earn-Out, so no funds have been paid nor is there any guarantee that the goals will be met to actually pay out Messrs. Walsh, Hedlund, and Harlow.

#### Rebuttal

You argue two central points on appeal—(a) the purchase price of the company was fair and the result of an arms-length transaction; and (b), the contributions of capital and expertise are real and substantial. On the first point, you repeat many of Mr. Rinehart's assertions, adding that each of WHHC's contracts was factored into the overall valuation and ultimate sales price, including the contracts of WHHCM. For those contracts stretching out over a period of time, a contract's value may not be worth its face value, in part because of uncertainty of performance and in part because of unknown costs. There is a significant amount of unknown in any contract, and persons in the construction industry are better positioned to evaluate this "delta." For OMWBE to attribute the full contract value without accounting for any applicable performance costs is inappropriate (the value of a contract does not represent 100% profit to a firm).

#### *Discussion and Decision*

In the Department's view, the sellers valued the entirety of the assets, net of liabilities, at REDACTED but it appears the tribe disagreed about the implied asking price for the 60% interest it wished to purchase. The purchaser, NBED favored an enterprise value of an even REDACTED according to Mr. Rinehart, implying a price of REDACTED for the 60% stake it wished to buy. The sellers' negotiating position was that the entirety of WHHNFS could be worth up to REDACTED depending on contract performance (an unknown and unknowable at the time of negotiations). Hence, the earn-out, conditioned on such performance metrics, was the parties' arm's length mechanism to bridge the gap in perceived value. Under that provision, NBED would pay no more than about REDACTED if the contract underperformed but would pay substantially more if the contract actually proved to have the value the sellers ascribed to it. We are reluctant to second guess the judgment of willing and experienced parties to the transaction.

Regardless of the various negotiations concerning contracts, pay-outs, costs, and valuations, the form of the transaction is a purchase of an ownership interest in the new entity. We are unwilling under the circumstances to recast the transaction as something that the underlying ownership and transfer documents belie. WHHNFS has met its burden of proof by a preponderance of the evidence that its ownership is in accordance with §26.69 requirements and we do not uphold OMWBE's denial on its stated grounds. We do however; find OMWBE's denial decision on control grounds supported by the record evidence as explained below.

#### Control

1. In order to meet §26.71(g) requirements, Mr. Rinehart, as the qualifying socially and economically disadvantaged individual claiming control of WHHNFS, must as this section requires, “have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which [WHHNFS] is engaged and the firm’s operations.” Pursuant to this provision, Mr. Rinehart is not required to have experience or expertise in every critical area of the firm’s operations, or to have greater experience or expertise in a given field than managers or key employees; however, he must have the ability to intelligently and critically evaluate information presented by other participants in the firm’s activities and to use this information to make independent decisions concerning the firm’s daily operations, management, and policymaking.<sup>8</sup>

As the record demonstrates, WHHNFS is engaged in construction management and bids and/or contracts for projects involving stream restoration, temporary road building and crossings, excavating, and backfilling (see Red Salmon Slough Restoration Project); earthwork and underground site utilities (JBLM Two Small TEMP project bid); professional services consulting for design build construction including professional land surveying, architectural design services; and civil, and structural engineering and landscape design. (See WHHNFS/NBED Agreement) According to his résumé, Mr. Rinehart’s experience and background is predominantly financial, tangentially related to the construction management operations of WHHNFS. He holds degrees in business administration (Bachelor of Science and a Masters), and is a certified financial manager and certified management accountant. Before joining WHHNFS and NBD, he held several financial related positions throughout his career, some of which were for manufacturing and construction firms (Auditor with the Oregon Department of Revenue; Controller and Director of Pacific Wood Windows, Inc.; Chief Financial Officer at Hooker Creek Companies; Vice President, CFO and Corporate Controller with Sealaska Corporation). For instance, his work at his firm Raven Potlach Development, LLC (RPD) is described as providing merger and acquisition advisory services; and at Sealaska Corporation directing and managing all accounting, tax, treasury, investment and risk management activities. One of his accomplishments at Sealaska, was providing financial and business leadership and leading an acquisition teams’ merger of an environmental remediation and construction firm. There does appear a single entry of his leadership of Interstate Concrete Profilers, Inc., but the description offered is that this firm was a “successful contracting business. . . subcontracting on state and federal highway projects. . .[which] grew from start-up to become respected in the highway construction and trucking industry.”

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<sup>8</sup> The full text of §26.71(g) is: “The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm’s operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm’s operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm’s activities and to use this information to make independent decisions concerning the firm’s daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.”

By Mr. Rinehart's own description at OMWBE's on-site interview, WHHNFS's primary line of business is construction management and general contracting. He expanded upon this statement with "site work, grading, sewer, and waterline; explaining that the firm wants to get into "MSE." (On-Site Report, p. 2) (OMWBE noted when asked by the interviewer what is MSE, Mr. Rinehart was unable to answer). Mr. Rinehart further explained the firm would like to build retaining walls, heavy civil work, block walls, and poured-in-place walls, guardrails, barriers, and commercial vertical construction." When asked what is the firm's secondary line of business? his response was "construction management-already doing work for Sound Transit. This is an area that is profitable and without a lot of risk. Randy [Harlow] is the resident engineer." (Ibid, p. 2) The interviewer asked why the Nisqually tribe didn't start the business on its own; Mr. Rinehart stated-"wouldn't get the work because of a lack of experience." (Ibid, p. 4) He further explained the tribe wanted to get into construction and "wanted a firm that had an in for DOD work." Mr. Rinehart's daily duties at WHHNFS are such that he "talks to everyone; check[s] email and repl[ies], schedule meetings, and oversee everything that is going on." (Ibid, p. 7) He stated: "I hear everything that is going on based on where I sit. Discussing which jobs we are going to bid on; going over bid components, listening to things going on in the job; staying on track and staying in budget. Planning the future growth..." (Ibid) When asked other than the owners, who are the key employees and what are their duties Mr. Rinehart stated: "The owners are the most key employees, let me look at the org chart. Yes, the managers and supers and myself are the key employees." (Ibid, p. 9).

2. Sections §26.71(e) and (f) address the involvement and responsibilities of the socially and economically disadvantaged owners and non-disadvantaged individuals in a DBE or DBE applicant firm; and pursuant to §26.71(i), recipients may consider differences in remuneration between the disadvantaged owner and other participants in determining whether to certify the DBE. As §26.71(e) states: non-disadvantaged individuals may not "possess or exercise the

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<sup>9</sup> §26.71(e): "Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

§26.71(f): "The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy."

§26.71(i)(1): "You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm. (2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current

power to control the firm, or be disproportionately responsible for the operation of the firm.” Disadvantaged owners may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm; however as §26.71(f) states in part, ‘the managerial role of the socially and economically disadvantaged owners in the firm’s overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm’s operations, management, and policy.’”

The individuals at issue here are of course the socially and economically disadvantaged member (Mr. Rinehart), the non-disadvantaged owners of WHHNFS (Messrs. Hedlund, Walsh and Harlow- all licensed and registered professional engineers), and the two other Native American Board members (Bob Iyall and Charles F. Blacketer). Résumés for these individuals are contained in the record and relevant facts are as follows:

David Walsh was a career officer in the Navy Civil Engineer Corps and led construction management and engineering organizations for over 40 years; in his words “maintaining cradle- to-grave responsibility for major design, construction and engineering programs from master planning through construction and operations worldwide.” He holds a Bachelor of Science Degree and a Master of Engineering Degree. Mr. Walsh served as construction manager for the runway and airfield programs at Seattle-Tacoma International airport managing a staff of 13 construction management professionals. He stated that he went on to win numerous federal construction, design build, construction management, and program management contracts with public agencies. He currently performs program management and project management functions for WHHNFS on over \$4 million of projects annually in constructing these projects. Mr. Walsh described his duties at WHHNFS during the on-site interview as performing “a lot of the day-to-day management of the company; overall oversight of the company-both the business side and operations.” (On-Site Report, p. 22.) He further stated that he relies upon Karl Hedlund to manage the operations and construction management. (Ibid)

Karl Hedlund is WHHNFS’ executive operations manager with over 22 years of construction and construction management experience in the structural, building, heavy site/civil and transportation arenas (including new construction, renovation, and rehabilitation). He holds a Bachelor of Science degree in civil engineering and lists several design and construction management projects he has overseen as construction manager, resident or project engineer. Mr. Hedlund stated that his involvement at WHHNFS is to “manage the operations that primarily involve bidding and estimating and subcontracting/procuring materials, equipment, and labor or needs.” (On-Site Report, p. 22). He further states that he “oversees the management of the projects; the [project managers] report to [him].” (Ibid). His daily duties he described are in two phases:

One is the bidding estimating phase. We have an estimator on staff and [I] get involved with soliciting pricing from subs and suppliers. The second side, the

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controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.”

actual construction, the daily scheduling, working with the supers, negotiation of subcontractor agreements, doing daily site visits and overall management of the forces to make sure we stay productive. Communicating with customers and agency representatives. Make sure we have labor force to perform the self-performed items. We don't have equipment. Then there is the overall safety part. Jeff Richards is our safety officer and I provide oversight for that. Also recruiting, Dave [Walsh] and I get involved with the recruiting of [project managers] and will go to NBED to get funding approval. Ultimate hiring is done by NBED. (On-Site Report, p. 26)

Randy Harlow, the firm's executive program manager, has 15 years of construction management experience and holds a Bachelor of Science Cum Laude degree in civil and environmental engineering from the University of Washington. He has taken coursework toward a master's degree in construction management. He currently serves as WHHNFS' resident engineer for Sound Transit's University of Washington Station project. He also lists several design and construction management projects he has overseen as resident or project engineer. During OMWBE's on-site interview, he indicated his involvement at WHHNFS is to manage the construction management line of business which involves "wearing [the] resident engineer hat and [manage] the individuals who are part of the contracts." (On-Site Report, p. 22). Randy is present at the job sites 100% of the time where he walks the job, and performs project management duties including cost and scheduling. (Ibid. p. 29)

OMWBE identified Messrs. Hedlund, Walsh, and Harlow signing several contracts, subcontracts, change orders, etc. (Denial letter pp. 14-15). OMWBE stated that neither Mr. Rinehart nor the other disadvantaged Board members (Iyall and Blacketer) signed these documents.<sup>10</sup>

The three non-disadvantaged owners all received the top salaries in 2012 and 2011 according to W-2 statements in the record; and as OMWBE concluded, there are no W-2 statements for Mr. Rinehart from WHHNFS, but there is a statement indicating a payment of \$46,000 from WHHNFS to Mr. Rinehart's firm, Raven Potlatch Development, LLC. (RPD) OMWBE opined that Messrs. Walsh, Harlow, and Hedlund are paid higher amounts than Mr. Rinehart, citing employment agreements between these non-disadvantaged individuals stating base salaries of \$137,000 and the existence of W-2 statements to these individuals. OMWBE observed that the only payment made by WHHNFS that could be linked to Mr. Rinehart is one for \$46,000 to his financial advisory services firm, Raven Potlatch Development, LLC (RPD). Mr. Rinehart described this as a "holdover" from his initial involvement with the Nisqually Indian Tribe and that his compensation from WHHNFS was paid through Raven Potlatch Development, LLC. (April 22, 2013, response to OMWBE).

### *Discussion and Decision*

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<sup>10</sup> OMWBE stated that in some cases, Mr. Rinehart signed the contract but was acting as NBED's representative not on behalf of WHHNFS.



We affirm OMWBE's decision under §26.89(f)(1). There was substantial evidence; all of it provided by the firm and its principals, that Mr. Rinehart's duties at WHHNFS are primarily administrative/financial and not the actual construction management operations WHHNFS engages in. His experience at construction, manufacturing, and supply firms are all described in his résumé; but clearly his role is financial management, auditing, and strategic planning.<sup>11</sup> He equates his financial background with those skills needed to run a firm such as WHHNFS. Mr. Rinehart's skills are undoubtedly essential to WHHNFS, but under the Regulation, Mr. Rinehart's involvement and expertise in the firm's overall affairs must be such that OMWBE could reasonably conclude that he meets all §26.71(g) requirements. We note that although Mr. Rinehart likely has an "overall understanding of" WHHNFS' activities, the firm did not present sufficient evidence that he possess managerial and technical competence and experience directly related to "the type of business" in which WHHNFS is engaged in and its operations, which is a part of the requirement of this provision. As the applicant firm bearing the burden of proof, it is WHHNFS that must prove that Mr. Rinehart has the "the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking." We agree with OMWBE's conclusion that the firm has not met its burden of proof in this regard.

The pertinent construction management and technical experience rests with the non-disadvantaged owners, Messrs. Hedlund, Walsh, and Harlow who clearly disproportionately control the firm contrary to §§26.71(e) and (f). In fact, it is they who oversee and supervise WHHNFS' day-to-day project operations which is disproportionately under their purview. Their combined expertise and skills are used precisely in the manner for which the firm has been engaged in; and they clearly have substantial duties managing and overseeing WHHNFS' construction management projects.

You stated in your appeal that the firm's Board of Managers and Mr. Rinehart approve all contracts entered into by the non-disadvantaged owners; and the fact that they signed several contracts does not determine who operates the company. Signing contracts obligates the firm and commits it to action; and the fact that non-disadvantaged individuals have done so is a highly relevant factor in assessing whether the disadvantaged owner (Mr. Rinehart) exercises control over firm operations.

You stated on appeal that Mr. Walsh ended his employment before OMWBE's decision. The record does show Mr. Walsh resigned from the firm's Board of Managers in May 2012 but he clearly remained as a general manager. The document you attach to your appeal in which Mr. Walsh resigns as general manager is dated May 8, 2013, but he states he wishes to remain as a

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<sup>11</sup> He stated: "With over 20 years of experience in the construction industry, I am well suited for my role as Chairman of the Board. . . and CEO of WHHNFS. My experience includes extensive management and ownership background with companies such as Sealaska (a diversified manufacturing and services MBE company); Hooker Creek Companies, LLC; Pacific Wood Windows, Inc., and Interstate Concrete Profilers, Inc. (where I was the DBE owner). When this experience is combined with my education (Masters of Business Administration and Financial Manager/Accountant certifications), I am more than qualified to control WHHNFS as CEO and Chairman of the Board." (Rinehart Letter to OMWBE, Sept. 28, 2012)

business consultant and to rejoin the Board of Managers. There is no record evidence that this document was provided to OMWBE, which could not and did not consider it in reaching its conclusions under §26.71. For purposes of this appeal record, the firm's status and present circumstances at the time of OMWBE's decision unequivocally included Mr. Walsh. *See generally* §§26.73(b), 26.89(f)(6). (OMWBE could certainly consider Mr. Walsh's new role if the firm reapplies for DBE certification).

You further allege that OMWBE overlooked the fact that Bob Iyall and Charles Blacketer (the two other disadvantaged board managers) have substantial construction experience, are qualified to operate the company along with Mr. Rinehart, and are available 24 hours a day, 7 days a week. (Appeal pp. 9, 12). In the Department's reading of the record, Mr. Iyall does have masonry experience but he is employed at another firm (Keystone Masonry, Inc.). Similarly, Mr. Blacketer is self-employed but his "construction" experience that you allude to appears related to landscaping and environmental debris removal; and highlights in his résumé skills in broad terms—"negotiation skills, complex problem solving, strategic planning, planning and organizing, collaboration skills, interpersonal abilities, communication skills." OMWBE notes their involvement in Board of Managers meetings, decisions, "to sign papers," visit job sites, and in the case of Bob Iyall—attend pre-submission conferences (See On-Site Report (pp. 11–13); but viewing the record as a whole, the non-disadvantaged owners clearly disproportionately control the firm's operations in comparison to these board members as well as Mr. Rinehart. There is one statement appearing on page 32 of the on-site report to the effect that Bob Iyall runs a job and Mr. Blacketer visits the Red Creek and Muk Creek Salmon jobs; however, both Mr. Iyall and Mr. Blacketer are noted as "never" supervising field operations and signing business checks, and "seldom" work on bidding, estimating, and making purchasing decisions. (Duties of Owners and Key Persons Statement).

The remaining issue that the Department addresses here is the differences in remuneration between Mr. Rinehart and the non-disadvantaged owners. As stated above, remuneration is a consideration in considering whether to certify a firm as a DBE pursuant to §26.71(i).

You make several arguments on appeal that Mr. Rinehart is in fact paid higher amounts: (1) Pursuant to an agreement dated March 1, 2012, NBED agreed to compensate Mr. Rinehart's RPD for financial advisory services and interim management based on a monthly retainer of REDACTED. RPD you allege is a payment vehicle for his fees for services to the Nisqually tribe, and the arrangement is no different than if WHHNFS pays him directly. (2) You argue that although Mr. Rinehart was originally receiving compensation from NBED; in September 2012 (prior to WHHNFS' DBE application), this was changed to WHHNFS paying Mr. Rinehart directly (four payments REDACTED, as shown on the W-2). (3) You stated that this information was communicated to OMWBE in detail.

The agreement you reference appears not to have been provided to OMWBE nor is it apparent as you allege that the information was communicated to OMWBE in detail.<sup>12</sup> If there were

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<sup>12</sup> OMWBE inquired about an entry WHHNFS' income statement that possibly may be related to Mr. Rinehart providing financial advisory services. The entry OMWBE questioned was "Business development salaries of REDACTED with OMWBE asking what is the expense for and to whom it is paid. Mr. Rinehart responded: "Obtaining new contracts and promoting WHHNFS is an important part of developing new business...Employees

payments of REDACTED to Mr. Rinehart, these were not documented. In our view OMWBE appropriately considered differences in remuneration between Mr. Rinehart and the non-disadvantaged owners of WHHNFS.

Substantial record evidence supports OMWBE's conclusion that WHHNFS did not meet its burden of proof concerning Mr. Rinehart's control of WHHNFS and we affirm.<sup>13</sup>

Conclusion:

The Department affirms, as supported by substantial evidence and not inconsistent with the substantive or procedural provisions concerning certification, OMWBE's determination that WHHNFS is ineligible for certification as a DBE based on the firm's failure to satisfy the requirements of the §26.71 subsections as discussed above. This decision is administratively final and not subject to petitions for reconsideration. **WHHNFS, if it believes that it has cured impediments to certification, may reapply at any time.**

Sincerely,

Marc D. Pentino, Lead Equal Opportunity Specialist  
External Civil Rights Programs Division  
Departmental Office of Civil Rights

cc: OMWBE

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that engage in business development (as directed by the Board of Managers) essentially code their time performing business development activities for tracking purposes. Although tracked separately, these salaries are simply a portion of the current salary for the employee that is performing the business development activity. It is not additional salary on top of the current employee's current salary. The tracking records are provided at tab 9." (March 15, 2013, Rinehart response to OMWBE) It is unclear whether Mr. Rinehart is referencing himself.

<sup>13</sup> We do not uphold OMWBE's conclusion that Mr. Rinehart has not met §26.710) requirements. OMWBE acknowledges Mr. Rinehart's statements that he devotes 8-10 hours a day to WHHNFS and that when asked during its on-site interview whether he spends time at other firms; he responded "NBED-same time commitment, it's hard to say because they (NBED and WHHNFS) are so interrelated." (On-Site Report, p. 7) Mr. Rinehart serves as NBED's CEO which he describes in his April 22, 2013, letter to OMWBE as an asset management company and majority owner of the applicant firm. In this same correspondence he stated that his responsibilities for WHHNFS and NBED are one in the same. He also stated that RPD has no active business operations, no employees, and no assets; and Raven Potlatch Real Estate, LLC is a real estate holding company where he devotes no time. OMWBE's decision on this element of eligibility is underdeveloped.