



U.S. Department of Justice

Office of Justice Programs

*Office for Civil Rights*

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Washington, D.C. 20531

February 4, 2016

Maurice A. Jones, Secretary of Commerce and Trade  
Commonwealth of Virginia  
Office of the Governor  
Patrick Henry Building  
1111 East Broad Street  
Richmond, VA 23219

Re: [Redacted] v. Commonwealth of Virginia (12-OCR-0349)  
Letter of Resolution

Dear Secretary Jones:

As you know, the Office for Civil Rights (OCR), Office of Justice Programs, U.S. Department of Justice (DOJ), with the assistance of the Federal Coordination and Compliance Section (FCS)<sup>1</sup> of the DOJ's Civil Rights Division, has been investigating an administrative complaint that the DOJ received from [Redacted]. The complaint alleges that the Commonwealth of Virginia (Commonwealth) discriminates against women- and minority-owned businesses in its procurement practices in violation of various nondiscrimination provisions in grants that the DOJ awarded it.

The [Redacted] is [Redacted].

The DOJ is currently providing financial assistance to numerous Commonwealth agencies.<sup>2</sup> The OCR has the administrative responsibility for enforcing several federal civil rights statutes and regulations that prohibit recipients of financial assistance from the DOJ from discriminating against individuals on the basis of race and sex in their services. Discrimination on the basis of race and/or sex is prohibited by Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; the Omnibus Crime Control Safe Streets Act of 1968, as amended, 42 U.S.C. § 3789d(c); Section 1407 of the Victims of Crime Act, 42 U.S.C. § 10604; the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, 42 U.S.C. § 5672(b); the Violence Against Women Act of 1994, as amended, 42 U.S.C. § 13925(b)(13); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; and the DOJ's implementing regulations at 28 C.F.R. pts. 42, 54. These laws also prohibit facially neutral

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<sup>1</sup> The FCS coordinates the enforcement by federal agencies of various civil rights statutes and related Executive Orders that prohibit discrimination in federally conducted and assisted activities.

<sup>2</sup> Agencies that currently receive financial assistance from the DOJ include the following: the Department for the Aging; the Department of Corrections; the Department of Criminal Justice Services; the Department of Forensic Science; the Department of Juvenile Justice; the Department of Social Services, the Department of State Police; the Office of the Attorney General; the Supreme Court of Virginia; Virginia State University; Virginia Workers' Compensation Commission; College of William and Mary; George Mason University; James Madison University; Old Dominion University; University of Virginia; Virginia Commonwealth University; and Virginia Polytechnic Institute and State University.

practices which have the effect of discriminating against individuals based on a protected class. See 28 C.F.R. §§ 42.104(b)(2), 42.203(e).

Throughout the course of our review, the Commonwealth, including you and your staff, has worked cooperatively with the OCR and the FCS to address the matters raised in the [Redacted] Complaint. Thank you for this cooperation and for the efforts by the Commonwealth, as discussed below.

This letter will serve to summarize the [Redacted] concerns raised in [Redacted] Complaint, discuss the steps that the Commonwealth has taken or plans to take to address these concerns, and establish a plan for the OCR to monitor the Commonwealth's implementation of actions to increase the participation of women- and minority-owned businesses in its procurement transactions. If you agree to the terms set forth in this letter, we will move forward jointly to implement the action steps identified below and close the review without further investigation or issuing findings on the merits of the complaint.

#### I. [Redacted] Concerns Regarding the Commonwealth's Procurement Practices

In a letter dated July 27, 2011, The Honorable Robert C. Scott, U.S. House of Representatives, referred a letter of complaint to The Honorable Eric C. Holder, Jr., Attorney General of the United States, which he received from [Redacted ] alleging that the Commonwealth discriminates against women-and-minority-owned businesses in its procurement practices. The complaint was referred to OCR to investigate on April 20, 2012.

In support of its allegations, [Redacted] primarily relied upon a disparity study that the Commonwealth commissioned MGT of America, Inc. (MGT)<sup>3</sup> to conduct for the purpose of updating a prior procurement study that MGT conducted in 2004. In conducting the study, MGT analyzed the procurement transactions of approximately 130 Commonwealth agencies with women- and minority-owned businesses in the categories of construction, architecture and engineering, professional services, other services, and goods and supplies during the period of July 1, 2005 through June 30, 2009. In Phase I of the study, MGT analyzed the utilization of women- and minority-owned businesses by the Commonwealth agencies in comparison to the availability of such businesses, and issued a report finding a substantial underutilization of women- and minority-owned businesses across all categories. MGT of America, Inc., *A Disparity Study for the Commonwealth of Virginia* (January 13, 2010), available at [http://www.dmb.virginia.gov/pdf/Disparity\\_Study\\_January\\_13\\_2010.pdf](http://www.dmb.virginia.gov/pdf/Disparity_Study_January_13_2010.pdf). In Phase II of the study, MGT gathered anecdotal evidence and issued a report discussing best practices and recommendations aimed at increasing the participation of women- and minority-owned businesses in the Commonwealth's procurement program. MGT of America, Inc., *A Disparity Study for the Commonwealth of Virginia* (July 13, 2011), available at <http://www.dmb.virginia.gov/pdf/CoVa-DisparityStudyPhaseIIJuly-13-2011.pdf>.<sup>4</sup> MGT

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<sup>3</sup> MGT is a nationwide professional services firm that provides a variety of services to public sector and nonprofit organizations including financial services, criminal justice and public safety operational reviews, the conduct of disparity studies, facilities evaluation and planning, and performance reviews and program evaluation.

<sup>4</sup> The reports discussing Phase I and Phase II of the MGT's disparity study are also on file with the OCR.

provided the results of the study and its recommendations to the Commonwealth's Director of the Department of Minority Business Enterprise.<sup>5</sup>

MGT's recommendations for increasing the participation of women- and minority-owned businesses included the following: continue to focus on increasing utilization of women- and minority-owned businesses through the Commonwealth's Small Business Enterprise (SBE) Program, including setting goals for SBE utilization and setting aside certain projects for SBEs; establish annual aspirational women- and minority-owned businesses utilization goals by business category; require prime contractors to include in their bids strategies for including women- and minority-owned businesses in the project, and establish good faith effort goal requirements for including women- and minority-owned businesses in their projects; adopt a two-tier standard for small business certification; adopt a joint venture policy; continue regional training of small, women, and minority-owned (SWaM) businesses on the Commonwealth's procurement process; better track the utilization of SWaM subcontractors; and develop a mechanism for contract dispute resolution for a prime contractor's failure to use a SWaM subcontractor who was identified on a bid.

In [Redacted] complaint correspondence, [Redacted] indicated that the remedy that [Redacted] is seeking to address the alleged discrimination is for the Governor of the Commonwealth to issue an executive order implementing MGT's recommendations. [Redacted] also identified a number of the Commonwealth's procurement practices that [Redacted] believes have a discriminatory impact on women- and minority-owned businesses, including an overly broad definition of what constitutes a small business; a preponderance of large, bundled contracts; a lack of available capital; unrealistic bid requirements; and prohibitively expensive bid costs.

## II. The Commonwealth's Actions to Address the Concerns Raised in [Redacted] Complaint

In a letter dated July 10, 2013, the OCR notified The Honorable Robert F. McDonnell, Governor of the Commonwealth of Virginia, of [Redacted] allegations and requested preliminary information about the Commonwealth's procurement practices along with any measures that his Administration has initiated in response to MGT's study. On September 9, 2013, former Secretary of Administration Lisa M. Hicks-Thomas responded on behalf of Governor McDonnell and provided information on the Commonwealth's procurement system and on actions that Governor McDonnell's Administration has taken to improve outreach and financial support to SWaM businesses.

In November of 2013, Terrence R. McAuliffe was elected governor of Virginia and assumed office on January 11, 2014. On March 25, 2014, the OCR wrote Governor McAuliffe to provide him with the opportunity to respond to the allegations in the complaint and to submit information on the actions that his Administration has taken or plans to take to address MGT's findings and recommendations. On June 13, 2014, you submitted a written response on behalf of Governor McAuliffe, stating that Governor McAuliffe specifically tasked you to develop programs, within the Commonwealth's laws, that will facilitate an increase in contracts awarded to SWaM businesses. You denied that Commonwealth agencies receiving DOJ financial assistance are discriminating against women and minority owned businesses in their procurement practices but conceded that

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<sup>5</sup> The OCR understands that subsequent to MGT's study, the Department of Minority Business Enterprise subsequently merged with the Department of Business Assistance to create the current Department of Small Business and Supplier Diversity (DSBSD).

the Commonwealth can do more to increase the participation of SWaM businesses in state procurement. You explained that the Commonwealth does not have a centralized procurement system, as there are variations in procurement policies among institutions of higher education, transportation, technology, and independent agencies, and that such variations present challenges for increasing SWaM participation. You stated that the Administration has been studying MGT's recommendations and that you hired Syd Dorsey as the Advisor for Small Business Equity and Development to identify opportunities and challenges within the Commonwealth's procurement system, and listed a number of options that the Commonwealth is exploring to increase SWaM participation.<sup>6</sup>

Subsequently, on July 22, 2014, Governor McAuliffe issued Executive Order Number 20 (2014), *Advancing Equity for Small, Women, and Minority Owned Businesses*. The stated intention of the Executive Order is to expand contracting opportunities to SWaM businesses in the Commonwealth, and to set a higher bar for SWaM contracting in state government. Executive Order 20 directs all executive branch agencies that have authority for procurement, in conjunction with the DSBSD, to take steps to advance a number of initiatives, including the following:

- Exceed a target goal of forty-two percent of SWaM utilization in discretionary spending in procurement orders, prime contracts, and subcontracts.
- Develop an annual SWaM procurement plan in consultation with the DSBSD.
- Create a micro-business designation which shall include certified small businesses that have no more than twenty-five employees and no more than three million dollars in average annual revenue.
- Expand the set-aside for certified small businesses to include purchases up to \$100,000 for goods and nonprofessional services and up to \$50,000 for professional services, and require that at least one of these bids come from a micro business.
- Set aside purchases under \$10,000 for micro businesses when the price quoted is fair and reasonable.
- Require each prime contractor to include in its proposal/bid a SWaM procurement plan, confirm that the contractor has certified compliance with its SWaM procurement plan before providing final payment, and review a prime contractor's compliance with SWaM procurement plan requirements when considering future awards.
- Implement processes for producing SWaM subcontracting data as established by the DSBSD.
- Review the efficacy of implementing other small business enhancement tools, such as unbundling contracts, relaxing the requirement for mandatory attendance at pre-bid meetings, expanding time to respond to small purchase solicitations, alerting

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<sup>6</sup> During a June 23, 2015, telephone conversation with representatives of the OCR and the FCS, you stated that Ms. Dorsey is no longer employed with the Commonwealth and that her duties as Advisor for Small Business Equity and Development have been transferred to Tracey Jeter, Director of the DSBSD.

businesses to current and future procurement and subcontracting opportunities, and streamlining the paperwork required of small businesses.

- Actively recruit small businesses to compete for state procurement contracts.
- Designate a SWaM equity champion to ensure equity in the solicitation of procurement proposals/bids and awarding of contracts.
- Report quarterly on spending with certified small businesses.
- Review practices, procedures, and proposal evaluation criteria to identify and remove barriers or limitations to SWaM participation.

Additionally, Executive Order 20 directs the DSBSD to implement initiatives to further develop small businesses in the Commonwealth, including, but not limited to, the dissemination of information on access to capital, management and technical assistance programs, partnerships and outreach with local business groups, statewide mentor/protégé and/or joint venture programs, and vendor outreach training programs. The DSBSD is required to provide quarterly reports to the Secretary of Commerce and Trade on the Commonwealth's progress in enhancing opportunities for SWaM businesses, delineating spending by SWaM category and agency. Executive Order 20 also directs the Secretary of Commerce and Trade to conduct a study on a new small business designation and to study the potential advantages of providing start-up incentives to certified small businesses. Pursuant to Executive Order 20, the Secretary for Commerce and Trade is required to assess overall state performance and report quarterly to the Governor, and to prepare and deliver a report to the Governor no later than October 1, 2015, detailing compliance with the Executive Order and providing spend performance metrics from the prior fiscal year. Many of the initiatives required by the Executive Order correlate with the recommendations contained in the MGT study and address specific concerns raised by [Redacted], as discussed on page 3 of this letter.

Subsequent to the issuance of Executive Order 20, the Commonwealth convened six roundtable discussions throughout the state with SWaM business owners between September 2014 and November 2014. The Commonwealth invited SWaM business owners to come and share their thoughts, experiences, and opinions about the challenges and opportunities they face in trying to do business with the Commonwealth.<sup>7</sup> The OCR attended three of these roundtable discussions - in Reston, Newport News, and Richmond - and observed representatives from the Commonwealth discuss Executive Order 20 and solicit feedback from SWaM participants on what challenges and obstacles they have faced in participating in the Commonwealth's procurement system. Following these roundtable discussions, the Commonwealth provided the OCR with a *Report of the 2014 SWaM Roundtable Discussions* (December 2014) that it prepared, which summarizes the feedback that the Commonwealth received during these discussions and provides several recommendations and next steps for increasing SWaM participation in the Commonwealth's procurement transactions.

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<sup>7</sup> Ms. Dorsey informed the OCR that she reached out to [Redacted] to invite [Redacted] to the roundtable discussion being held in Newport News but that [Redacted] indicated that [Redacted] was unable to attend.

On June 23, 2015, representatives of the OCR and the FCS spoke with you by telephone to receive an update on any actions that the Commonwealth has taken to implement the initiatives and recommendations contained in Executive Order 20 or stemming from the roundtable discussions. You stated that the following has occurred:

- The 2015 General Assembly of Virginia enacted Chapters 439 and 442 to amend the definition of “small business” contained in the Code of Virginia<sup>8</sup> to the standards established by the United States Small Business Administration. Chapters 439 and 442 contain an enactment clause stating that the provision of each chapter shall not become effective unless reenacted by the 2016 Session of the General Assembly. Chapters 439 and 442 also require the Secretary of Commerce and Trade to convene a workgroup of interested stakeholders to examine the definition of small business and to report its findings and recommendations to the Governor and the General Assembly on or before December 1, 2015. You told the OCR that you have convened such a workgroup comprised of twenty-five industry representatives, including [Redacted].
- The 2015 General Assembly of Virginia enacted Chapter 696 to amend the Code of Virginia<sup>9</sup> to create a SWaM business loan fund managed by the Virginia Small Business Financing Authority to provide direct loans to eligible SWaM businesses.
- You have convened a coalition of the twelve biggest state vendors in the Commonwealth to discuss what actions they can take to achieve the forty-two percent SWaM utilization goal listed in Executive Order 20. You stated that as of June 23, 2015, SWaM participation in state procurement transactions has increased from thirty-one percent to thirty-five percent.

Additionally, the OCR’s research indicates that the 2015 General Assembly of Virginia enacted Chapter 733 to amend the Code of Virginia<sup>10</sup> to require that SWaM businesses submitting a proposal for a contract with a public body for more than \$10,000, and who intend to subcontract part of their performance, include in the proposal a plan to subcontract to SWaM businesses. Chapter 733 further amends the Code of Virginia<sup>11</sup> to authorize the DSBSD to receive and investigate complaints that a SWaM business has failed to comply with its submitted subcontracting plan.

### III. Future Action Steps

The OCR commends the Commonwealth for its commitment to increasing procurement opportunities for women- and minority-owned businesses and for all of the actions that it has taken to address this matter. So that we may evaluate the Commonwealth’s continued actions to increase the participation of women- and minority-owned businesses in its procurement

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<sup>8</sup> See Va. Code Ann. §§ 2.2-1604, 4310.

<sup>9</sup> See Va. Code Ann. § 2.2-2311.1.

<sup>10</sup> See Va. Code Ann. § 2.2-4310.

<sup>11</sup> See Va. Code Ann. § 2.2-1605.

transactions, by April 4, 2016, the OCR requests that you provide us with the following information or documentation:

1. A copy of the report that you submitted to the Governor on or before October 1, 2015, detailing compliance with Executive Order 20, as required by the Executive Order;
2. Copies of the last four quarterly reports that the DSBSD provided to you regarding the Commonwealth's progress in enhancing opportunities for SWaM businesses, as required by Executive Order 20;
3. An explanation of the progress that the Commonwealth has made in reaching the target goal of forty-two percent SWaM utilization in discretionary procurement transactions, as set forth in Executive Order 20; and
4. An update on any further actions that the Commonwealth has taken to increase the participation of SWaM businesses, including women- and minority-owned businesses, in the Commonwealth's procurement transactions, including any actions that it has taken to implement the initiatives and recommendations contained in Executive Order 20 and the *Report of the 2014 SWaM Roundtable Discussions*.

So that the OCR can continue to monitor the Commonwealth's efforts to address this matter, we also ask that you provide us with one additional update on your efforts to increase the participation of SWaM businesses, including women- and minority-owned businesses, in the Commonwealth's procurement transactions. We propose that you provide this update on August 4, 2016. In the event of a delay, we ask that you notify us in advance so that we can adjust the schedule to a mutually agreed upon date.

Upon our review of the Commonwealth's April and August 2016 updates, if the Commonwealth has taken satisfactory action to address [Redacted] Complaint and no new complaints regarding this issue have arisen, we will close our review of this case. Updates can be sent to OCR attorney [Redacted] at [Redacted] or at the following address: Attention [Redacted]; Office for Civil Rights; Office of Justice Programs; U.S. Department of Justice; 810 Seventh Street NW; Washington, DC 20531. Please be advised that the Commonwealth's failure to provide the OCR with the requested updates, or failure to demonstrate that it has taken satisfactory action to address [Redacted] Complaint, may lead to further investigation by the DOJ of this matter.

To facilitate resolution of this matter, please contact [Redacted] at [Redacted] or at [Redacted] by February 12, 2016. Please be advised that the Commonwealth's agreement to adhere to the terms in this letter does not preclude the DOJ or another federal agency from carrying out its enforcement duties should a new complaint be filed regarding this matter.

Maurice A. Jones, Secretary of Commerce and Trade  
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We look forward to hearing from you soon and working together to resolve this matter.

Sincerely,

/s/ Michael L. Alston

cc: The Honorable Terence R. McAuliffe, Governor  
Commonwealth of Virginia

Tracey Jeter, Director  
Department of Small Business and Supplier Diversity