

**PORT OF SEATTLE**  
**MEMORANDUM**

**COMMISSION AGENDA**  
**ACTION ITEM**

<b>Item No.</b>	<u>6a</u>
<b>Date of Meeting</b>	<u>July 9, 2013</u>

**DATE:** June 28, 2013

**TO:** Tay Yoshitani, Chief Executive Officer

**FROM:** Ralph Graves, Managing Director, Capital Development  
Luis Navarro, Director, Office of Social Responsibility

**SUBJECT:** Port of Seattle Disparity Study Contract with BBC Research and Consulting

**Amount of This Request:** \$300,000

**Source of Funds:** Contingency Funds

**ACTION REQUESTED:**

Request the Port of Seattle Commission (1) enable sole-source selection of BBC Research and Consulting to conduct a disparity study of Port contracting by exercising the Commission's authority under RCW 53.19.020(5); and (2) authorize the Chief Executive Officer to enter into a consulting contract with BBC to conduct the study for an amount not to exceed \$300,000.

**SYNOPSIS:**

The proposed study will analyze several years of the Port's contracts in public works and consulting services to determine whether there is disparity between availability of able and willing minority and women owned firms and the historic levels of participation by such firms in Port contracts, either as prime contractors or subcontractors.

Disparity studies are typically utilized to support government agency efforts related to their federal Disadvantaged Business Enterprise (DBE) program requirements for federally assisted contracts. This would include justification or modification of their race-conscious or race-neutral activities.

The main purpose of conducting a disparity study for the Port at this time is to inform and to modify, if necessary, the Port's Small Business Program outreach efforts related to underutilized women and minority businesses.

If the study of Port contracting yields evidence of disparity, the option of using race-conscious remedies will be limited to federally assisted contracts.

Unlike other government entities such as the Washington State Department of Transportation (WSDOT) or Sound Transit, only approximately 9.5% of the Port's contracts are federally assisted. The remaining contracts are locally funded and are subject to State contracting laws such as Initiative 200, which prohibits the use of race and gender-based preferences. Since 2007, there were 95 Port major works contracts and only 9 of those contracts were federally assisted.

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This does not preclude the systematic development of small business strategies and programs for proactive outreach efforts in response to disparity study results.

### **BACKGROUND:**

The Port of Seattle periodically receives federal financial assistance from the U.S. Department of Transportation, and as a condition of receiving this assistance, the Port is required to comply with federal regulation 49 CFR Part 26. Part 26 requires the Port to:

- (a) ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
- (b) create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- (c) ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
- (d) ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- (e) help remove barriers to the participation of DBEs in DOT-assisted contracts;
- (f) assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- (g) provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

In a decision commonly referred to as *Western States Paving*, the Ninth Circuit Court of Appeals clarified common law requirements and restrictions around the use of race-conscious goals in public contracts. The Court held that, to be constitutional, race conscious elements of the federal DBE program must be (1) limited to those parts of the country where its race-based measures are demonstrably needed because of discrimination or its effects; and (2) even when discrimination is present in a state, the DBE program must be applied only to those specific groups within the broader category of women and minority-owned businesses that have actually suffered discrimination or its effects.

Following the Ninth Circuit's decision in 2005 that WSDOT had failed to present evidence of discrimination adequate to allow the application of race-conscious remedies, WSDOT and other local governments that receive federal funding realized that absent the strong basis in evidence of discrimination required by federal courts, governments in Washington lacked legal authority to impose contract-specific race-conscious goals. Currently, the Port does not impose contract-specific race-conscious goals because it does not have evidence of discrimination adequate to justify race-conscious remedies.

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Therefore, the Port of Seattle is currently a 'Race-Neutral' government entity, which means all activities or programs will benefit and assist all small businesses equally, including DBEs. However, USDOT still requires government entities that receive federal grant funds, especially within the Ninth Circuit, to establish an overall DBE goal. In accordance with those regulations, the Port of Seattle established a three year (2013 – 2015) overall goal of 5.44% for the participation of DBE firms. This goal was set using the Port's current knowledge of potential federally assisted projects versus the DBE availability within the State of Washington. The FAA approved the Port's Disadvantaged Business Enterprises Program and its overall goal in July 2012.

The Port wishes to follow WSDOT's model by engaging a research and consulting firm to conduct a disparity study to determine whether discrimination exists. If the disparity study yields evidence of discrimination, the Port would then be able to legally access the option to set race-conscious goals on contracts that obtain federal funding through the USDOT.

Because the evidence of discrimination presented by WSDOT was determined to be inadequate to justify race-conscious remedies, before it could resume setting race-conscious goals on contracts, WSDOT had to obtain evidence through a disparity study. WSDOT engaged a firm called BBC Research and Consulting to conduct a disparity study to determine whether discrimination exists in the highway contracting industry. To address the court-imposed limitation that race-conscious remedies be used for only those specific groups that have actually suffered discrimination or its effects, WSDOT's study broke down the statistics on availability of firms versus contracts awarded race-by-race and distinguished Caucasian women-owned businesses. The review of statistics by group showed that some minority groups were not underutilized for the majority of the period studied, whereas other minority groups were substantially underutilized during the majority of the period studied. This is the kind of evidence that the Port will need to obtain to access legally the option of setting race-conscious goals on federally-assisted contracts.

It is important to recognize that, even if the Port's disparity study yields the required evidence of discrimination, the option of using race-conscious remedies will still be limited to federally funded contracts. The majority of the contracts awarded by the Port are for projects that do not receive federal funding. It is the federally assisted contracts where federal regulations mandate race-conscious remedies that fall outside Initiative 200 prohibitions.

On contracts that are not federally funded, the federal funding exception can't be invoked to avoid the prohibition in Initiative 200. Thus, the state law enacted after Initiative 200 will still apply to prohibit the use of race- and gender-based preferences on the majority of the contracts awarded by the Port. However, Initiative 200 does not preclude the systematic development of strategies for small business programs that support proactive outreach efforts that leverage the disparity study results.

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State of Washington Initiative 200 (RCW 49.60.400) prohibits the Port from discriminating against, or granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public contracting; however, the Port can develop specific outreach programs. A disparity study will provide the Port with valuable information on whether there were any historical disparities between the utilization and availability of minority- and women-owned businesses on Port contracts during the study period. The study will also help determine what measures might be most appropriate to include as part of the implementation of the Small Business Program efforts, the federal DBE program, and the setting of an overall DBE goal.

It is the policy of the Port of Seattle to engage in a meaningful outreach program to assist, counsel, and advise all DBE and Small Business Enterprise (SBE) firms on procedures for doing business with the Port on all contracts. Part of the Office of Social Responsibility's (OSR) mission is to assist small businesses of all types (including those owned by minorities, women, and socially disadvantaged groups) to develop, grow, and ensure their long-term success by (a) continually fostering an environment where they can compete successfully on their own merits for a fair share of the Port's contracts and procurement and (b) assisting large businesses to increase subcontracting opportunities for disadvantaged and small businesses.

### **COMPETITION WAIVER:**

The proposed contract is subject to Chapter 53.19 RCW, which requires "open competition for all personal service contracts entered into by port districts unless specifically exempted under this Chapter [53.19]." Based on our review of statutory obligations, open competition means allowing any interested firm an opportunity to compete for the work by issuing a solicitation and including an advertisement and/or posting the opportunity on the Internet if the value of the contract is over \$200,000. These requirements are incorporated in Port of Seattle CPO-1, Procedures for Personal and Professional Services.

RCW 53.19.020 lists five exemptions from competitive solicitation. The fifth exemption is for "other contracts or classes or groups of contracts exempted from the competitive solicitation process by the Commission when it has been determined that a competitive solicitation process is not appropriate or cost-effective." Under RCW 53.19.020(5) the Commission must determine that a competitive solicitation process is not appropriate or cost-effective based on the circumstances. BBC has significant expertise in the field of disparity studies and would be able to draw on their recently completed disparity study for the Washington State Department of Transportation (WSDOT). It is acknowledged as a leading company in this field. Additionally, by using BBC, the cost of the study for the Port will be lower because BBC has developed and analyzed relevant detailed data on this issue recently.

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The areas where BBC has already completed a comprehensive analysis include:

- The success of minorities, women, and MBE/WBEs throughout Washington's transportation contracting industry.
- BBC collected qualitative information about potential barriers that small businesses and MBE/WBEs face in the Washington transportation contracting industry through in-depth anecdotal interviews, public hearings, and public meetings.
- BBC analyzed the percentage of MBE/WBEs that are "ready, willing, and able" to perform on WSDOT transportation prime contracts and subcontracts.
- BBC examined whether there were any disparities between the utilization of MBE/WBEs on transportation contracts that WSDOT and local agencies awarded during the study period. The study team also assessed whether any observed disparities were statistically significant.
- BBC reviewed federal requirements related to the federal DBE program and an assessment of any state requirements concerning the implementation of the federal DBE program.
- BBC is also currently conducting a similar disparity study for Sound Transit, expected to be concluded this summer of 2013.

Because of BBC's ongoing work with the WSDOT and Sound Transit's disparity studies, the company has established a strong network of resources and a significant database of relevant information and knowledge of Washington businesses. This specialized knowledge base will allow BBC not only to produce a high quality study, but has enabled the Port to receive a proposal from BBC at a very reasonable price. Disparity studies usually range between \$500,000 - \$1 million. In addition, because BBC's network is already in place, they can start to work on the Port's disparity study without delay.

### **PROJECT SCOPE OF WORK AND SCHEDULE:**

#### ***Scope of Work:***

BBC will conduct a disparity study on behalf of the Port of Seattle. This effort will include, but not be limited to conducting utilization analysis, availability analysis (outreach to primes and subs), disparity analysis, explanations of any observed disparities, and recommendations.

#### ***Schedule:***

Completion should be accomplished within 10 to 12 months from the date of contract execution.

### **FINANCIAL IMPLICATIONS:**

The amount requested for this professional service contract is not to exceed \$300,000. It is expected that half of the work will be performed in 2013, with completion of the remaining work to be completed in 2014.

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### ***Budget Status and Source of Funds:***

This study was not included in the 2013 budget, so the \$150,000 of funding for work this year will come from a combination of Commission and Corporate Contingency. Funds anticipated for 2014 will be budgeted in the Office of Social Responsibility.

### **STRATEGIC OBJECTIVES:**

The Century Agenda has a goal of 40% small business participation. A disparity study will provide additional data to adjust the small business program, as it will inform the Port on the actual distribution of the Port contract opportunities across the small business community. The historical and statistical analysis will allow staff in OSR and other departments to implement proactive changes ensuring a more effective small business program including more reliable targeted outreach efforts to minority and women-owned firms.

### **TRIPLE BOTTOM LINE SUMMARY:**

The Port's small business program provides an effective conduit for increased participation by all small businesses including those owned by women, minorities and disadvantaged business enterprises as prime contractors or subcontractors. A disparity study is an additional tool to tailor the small business program, ensuring a more strategic outreach effort and more effective contracting types available to small business firms.

### **ALTERNATIVES CONSIDERED AND THEIR IMPLICATIONS:**

**Option 1:** Do not conduct a disparity study and continue with the current small business program without a full statistical analysis of the Port's contracting distribution. This is not a preferred recommendation.

**Option 2:** Conduct a disparity study with open competition for the consulting contract. Staff anticipates that this option would result in higher cost and delayed implementation. This is not a preferred recommendation.

**Option 3:** Conduct a disparity study, which analyzes the Port's contracts for several years and assesses how we are doing regarding inclusion in Port contracting, which in turn will support our Small Business program and outreach efforts. Exercise the provisions of RCW 53.19.020(5) for a sole source contract with BBC as the most appropriate and cost-effective means to accomplish the work. **This is the preferred option.**

### **OTHER DOCUMENTS ASSOCIATED WITH THIS REQUEST:**

- None.

### **PREVIOUS COMMISSION ACTIONS OR BRIEFINGS:**

- None.