

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

**COMMISSION AGENDA**  
**STAFF BRIEFING**

**Item No.** 7a

**Date of Meeting** December 2, 2014

**DATE:** November 26, 2014  
**TO:** Ted Fick, Chief Executive Officer  
**FROM:** Luis Navarro, Director of Social Responsibility  
Mian Rice, Small Business Program and Policy Manager  
**SUBJECT:** Port of Seattle Disparity Study Results

**SYNOPSIS**

Disparity studies are analysis of contracts during a given period of time. They are typically utilized to support government agencies efforts related to the Federal Disadvantaged Business Enterprise (DBE) program requirements for federally assisted contracts. Uses include the justification or modification of the agencies' race-conscious or race-neutral small business goals in federally assisted projects. For the Port of Seattle (Port), the main purpose to conduct a disparity study was to inform and/or modify, if appropriate, the Port's overall Small Business Program (Program) to better address underrepresentation of women and minority businesses in Port contracts as prime contractors or subcontractors. Agencies in the Ninth Circuit Court of Appeals such as the Port of Seattle that consider using race-and-gender conscious measures have a legal requirement to conduct a disparity study before applying such measures.

In September 2013, the Port hired BBC Consulting, a firm with significant expertise in conducting disparity studies to conduct a Port of Seattle specific disparity study, which was completed in October 2014. BBC analyzed over one thousand Port construction contracts, and construction related professional services contracts covering the period of January 1, 2010 through September 30, 2013. The results show evidence of disparity or under-representation of minority and women owned businesses in Port contracting during the study period.

**BACKGROUND**

On July 9, 2013, the Port of Seattle Commission approved the funding necessary to hire expert consultants to conduct a disparity study. The study analyzed Port contracting of construction and construction related professional consulting services from 2010 – 2013. This is to determine if disparity existed 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.

## **COMMISSION AGENDA**

Ted Fick, Chief Executive Officer

November 26, 2014

Page 2 of 6

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.

Specifically, this 2005 decision concluded that the Washington State Department of Transportation (WSDOT) had failed to present sufficient evidence of discrimination adequate to allow the application of race-conscious remedies. WSDOT and other local Washington governments that receive federal funding realized that absent the strong basis in evidence of discrimination required by federal courts, they 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 such evidence of discrimination adequate to justify race-conscious remedies. Therefore, the Port 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 –

## **COMMISSION AGENDA**

Ted Fick, Chief Executive Officer

November 26, 2014

Page 3 of 6

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. 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.

On contracts that are not federally funded, the Washington State Initiative 200 (RCW 49.60.400) prohibition against the use of race- and gender-based preferences applies. The majority of contracts awarded by the Port are not federally funded. 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.

The disparity study provided 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 also helped 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.

### **KEY TERMS**

- **Disadvantaged Business Enterprise (DBE):** A small business that is owned and operated by one or more individuals who are socially and economically disadvantaged and received this specific classification through a federal certification process.
- **Minority Business Enterprise (MBE):** A business which is at least 51 percent owned, operated and controlled by an ethnic minority.

## COMMISSION AGENDA

Ted Fick, Chief Executive Officer

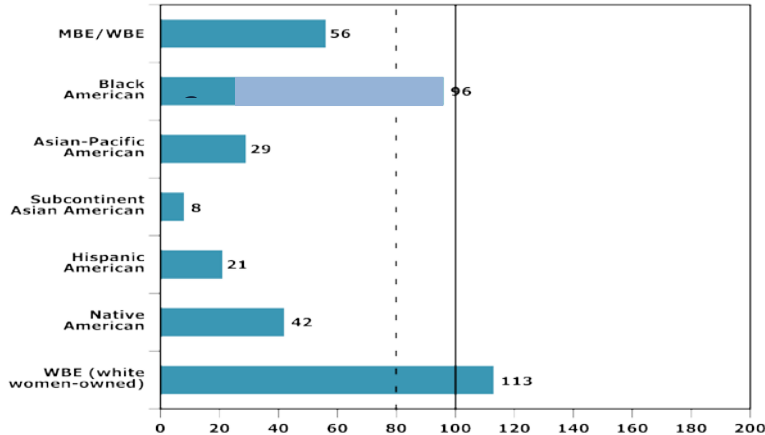
November 26, 2014

Page 4 of 6

- **Small Business Enterprise (SBE):** A business of small size (based on number of employees) or with small revenue relative to other businesses in the industry, as certified by the Washington State Office of Minority and Women Business Enterprises (OMWBE).
- **Small Contractor and Suppliers (SCS):** A joint partnership with King County to encourage prime contractors to use SCS-certified subcontractors.
- **Woman Business Enterprise (WBE):** A business which is at least 51 percent owned, operated and controlled by women.

## STUDY RESULTS

To complete a meaningful disparity study, BBC Consulting analyzed 344 prime contracts and 704 subcontractors during the study period of January 1, 2010 through September 30, 2014. Their findings show a combined utilization of Minority and Women Business Enterprises (MBE and WBE) disparity index of 56. An index of 100 signifies parity with the availability of businesses in the marketplace. A disparity index less than 80 is considered substantial. The following table shows results by each of the groups analyzed. It is important to indicate that a single black-owned business received the majority of the construction dollars in that ethnic category. If that business is not included, the disparity index for Black American owned business would be 24.



## OPPORTUNITIES

Disparity studies provide public agencies with the opportunity to consider adjusting their DBE “race-neutral” program to a DBE “race-conscious” program. This type of adjustment to the DBE program is limited to Federally assisted projects. The Port conducted a disparity study that included a review of both Federally assisted and locally funded projects, and with the results of the study, the Port now has the option to review and/or modify its DBE and small business programs to better address disparities or under-representation of minority and women owned businesses in Port contracts.

## **COMMISSION AGENDA**

Ted Fick, Chief Executive Officer

November 26, 2014

Page 5 of 6

Approximately 9.5% of the Port's contracts are federally assisted, meaning that the remaining contracts are locally funded, and are subject to State contracting laws such as Initiative 200 (RCW 49.60.400), which prohibits the use of race and gender-based preferences. However, this does not preclude the Port from pursuing proactive and systematic refinements of the Port's Program in response to the results of the disparity study. However, the option of implementing race-conscious remedies can be limited only to those federally assisted contracts.

## **RECOMMENDATIONS**

Staff from the Office of Social Responsibility (OSR) provides the following initial recommendations to begin the process of providing remedies to the historical under-representation of minority and women owned firms in Port contracts. OSR will fully analyze the results of the disparity study and will develop an action plan for review by Port executives and Commissioners. Staff will present the plan elements to the Commission in April 2015, and begin implementation thereafter. The following are the initial recommendations and the expected implementation timeline:

- January 2015: Rebrand and refresh the Port's current Small Business program to Small Business & Inclusion Program.
- January 2015: Port division leaders set annual small business and MBE/WBE goals for their divisions.
- July 2015: Recommend modifications to the Small Business Resolution 3618.
- September 2015: Consider the option of going Race and Gender conscious within our DBE program.
- September 2015: Develop and implement a training and capacity building program (Accelerator program).
- Ongoing: Continue collaborative work with other public agencies, and the Small Business Group, which includes community representatives, and staff from Capital Development Division, Central Procurement Office, Commission Office and OSR.
- 2018-2020: Conduct another disparity study.

## **COMMISSION AGENDA**

Ted Fick, Chief Executive Officer

November 26, 2014

Page 6 of 6

## **ATTACHMENTS TO THIS BRIEFING**

- Slide presentation.

## **PREVIOUS COMMISSION ACTIONS OR BRIEFINGS**

- December 4, 2012 Commission adoption of the Century Agenda establishing a goal of 40% small business participation.
- July 9, 2013 – Approved request to hire BBC Research and Consulting to conduct a disparity study of Port contracting for an amount not to exceed \$300,000.