



**COMMISSION
AGENDA MEMORANDUM**

Item No. 7e

BRIEFING ITEM

Date of Meeting October 24, 2017

DATE: September 25, 2017

TO: Dave Soike, Interim Executive Director

FROM: Aaron Pritchard, Commission Issue and Policy Manager
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SUBJECT: Port of Seattle Women and Minority Business Enterprise Policy

EXECUTIVE SUMMARY

The Port of Seattle Commission is currently reviewing a proposed Women and Minority Business Enterprise (WMBE) policy to promote equity in Port contracting. The policy is designed to increase the Port's utilization of Woman and Minority Owned Business Enterprises. Increased utilization means increasing both the amount of contracting dollars paid to WMBE firms as well as to increase the number of WMBE firms under contract to the Port. The Commission is currently scheduled for first reading on the proposed policy on November 14, 2017.

The Port of Seattle has sought to increase women and minority business enterprise (WMBE) participation in Port contracting since 2003, with two race-neutral Resolutions, 3506 and 3618, and one disparity study (completed in 2014), with very limited success. While the Port's data collection has not been consistent, it appears as though the Port is currently around a 5% level of women and minority business utilization. The Port's 2014 disparity study of over 1000 construction and construction related service contracts validated a substantial disparity in Port WMBE contracting.

The March 20, 2017 Attorney General opinion on use of race based preferences on state contracting stated that I-200 allows the use of measures that take race or gender into account, without elevating a less qualified contractor. The opinion also identified the narrow circumstances when narrowly tailored race and gender based preference could be available to remedy demonstrated discrimination or when it was necessary to avoid losing federal funds.

The Port must improve its WMBE contracting numbers. Port staff recommends creating a new small business policy focused on women and minorities to include a Port-wide Annual WMBE plan, division level goals, contract specific WMBE inclusion plans with enhanced compliance, and prompt payment measures. The proposed policy requires affirmative efforts to increase WMBE utilization by the Port and businesses that contract with the Port.

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Commission staff proposes that policy sunset in four years to place a premium on the importance of results. The four year time-frame would create a sense of urgency and accountability, with internal audit available to review the results. The four year time-frame would also bookend the passage of the policy by 2018 and 2021 disparity studies. While a disparity study alone is not necessarily sufficient to justify a race or gender based preference, the study could be used to build a case for race and gender preferences if the Port is unable to attain its WMBE contracting goals after four years.

At the sunset review date, the Commission would have the opportunity to scrutinize the data over time, review the goals, and make a well-reasoned decision as to whether to extend the program or whether race and gender based preferences were appropriate. While the Attorney General calls the circumstances that would allow for preferences “strikingly rare,” the proposed policy could at least satisfy the element of “exhausting all race and gender neutral avenues towards parity.” Staff, however, believes that the policy proposed today will help the Port close the disparity in Port contracting.

Background

In 1999, the state codified I-200 under RCW 49.60.400. In brief, the RCW says that the state **shall not discriminate against, or grant preferential treatment to**, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

In 2003, in response to I-200, the Port passed Resolution 3506, its first small business resolution that included a race neutral approach to increasing small business, women and minority business participation: “establishing a program to develop mutually advantageous business relationships with small businesses, and firms owned and operated by minorities, women and disabled.”

The resolution set a goal of \$20 million or 10% of all goods and services from qualified small businesses – a definition that included small, minority, women and emerging small businesses, with future targets set by the CEO and approved by the Commission. Quarterly reports were required to document expenditures. Data was to be collected “as deemed reasonable.” In practice, the tracking of small business participation was done by staff as an “add-on” or “extra” task. Information was extracted from either (a) the Port payment system in which case only direct payments were tracked; or (b) contract data system (CDS) which tracked payments to prime contracts and subcontracts for construction contracts.. The Port operated under this policy for seven years. Very little of this data is readily available today.

In 2010, the Port of Seattle passed Resolution 3618, “a program to develop mutually advantageous business relationships with small businesses including those owned and operated by people of color, women, people with disabilities, veterans, and the socio-economically disadvantaged.” The resolution focused on the Small Contractor and Supplier (SCS) Program

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with attendant efforts around outreach and programs to support SCS firm's capacity to work with the Port. It also instructed the Port to develop, implement, and operate a system of data collection.

The SCS program included a mandatory 5% pricing incentive for SCS firms, mandatory utilization requirements, proposal evaluations versus low-bid, and set a smaller size for "small business" than the national standard. Implementation included annual Port-wide participation goals, division level goals and mandatory education and training. The Office of Social Responsibility was tasked with goal setting, monitoring and reporting on the program, as well as tracking ethnic groups, and data for professional services and purchased goods. Voluntary WMBE goals for major construction projects were authorized but not required.

In 2014, the Port released the results of its disparity study. The Port's disparity study analyzed construction and construction services contracts including 344 prime contracts and 704 subcontractors during the study period of January 1, 2010 through September 30, 2014. The findings showed 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. 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 have been 24.

The Attorney General recently offered an opinion on I-200 that is relevant to the Port's minority business participation and disparity study results. The question was posed by the Department of Enterprise Services Director Chris Liu to the Attorney General:

Does I-200 prohibit the state from implementing race or sex-conscious measures to address significant disparities in the public contracting sector that are documented in a disparity study if it is first determined that race and sex-neutral measures will be insufficient to address those disparities?

"Initiative 200 does not categorically prohibit all uses of race- or sex-conscious measures in state contracting. The measure allows the use of measures that take race or gender into account in state contracting without elevating a less qualified contractor over a more qualified contractor."

Under this standard the Port could use race as a tie-breaker for equally qualified firms, or conduct outreach, training and set aspirational goals targeted to women- and minority-owned firms, or other measures designed to increase participation in public contracting by underrepresented groups.

"In narrow circumstances, an agency may be allowed to use a narrowly tailored preference based on race or sex when no other means is available to remedy demonstrated discrimination

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in state contracting. State agencies may also employ race- or sex-based preferences when necessary to do so in order to avoid losing eligibility for programs providing federal funds.”

The Port of Seattle must “exhaust available alternatives to the use of preferences.” Currently the Port race-neutral policies including training and outreach have not remedied a disparate impact over 14 years, a result that was validated by our 2014 disparity study. However, the current proposal has shown results for the City of Seattle and could, if properly and vigorously implemented, and bookended by Port-wide disparity studies, change the trajectory of the Ports WMBE contracting. If not, the Port may be able to build the “strong basis in evidence” necessary to illuminate the exceedingly narrow circumstances where preferences may be applicable.

Current Efforts to Improve WMBE and Small Business Contracting

In an effort to promote equity in Port contracting, staff is making a significant effort to identify best practices in the utilization of WMBE’s. Increased utilization means increasing both the amount of contracting dollars paid to WMBE firms as well as to increase the number of WMBE firms under contract to the Port.

Commissioners Bowman and Albro held a stakeholder meeting on May 22nd titled “Advancing Small Business opportunities at the Port. The attendees offered insight into barriers and current opportunities at the Port. Those recommendations were incorporated into how the Port does business including changing the size of IDIQ contracts and insurance requirements.

The follow up small business roundtable focused on what policies are needed at the Port to improve minority contracting. The attendees largely focused on the data that was presented and the need for better accounting of how the Port is currently performing for minority businesses.

As part of this initiative staff has already implemented several steps to improve overall outreach and contracting processes for small business:

- The Port has expanded and continues to offer “PortGen” training sessions for small businesses. Over the past nine months the Port has held 11 PortGen sessions with 343 participants. Classes are typically focused on specific bid opportunities but the Port has also offered training on WMBE/ACDBE/DBE certification and Airport Dining and Retail opportunities
- A list of WMBE firms has been developed and distributed to internal Port staff with purchasing authority (P-Card holders)
- Small works project contracts have been reduced from 130+ pages to 67
- Adjusted payment terms for small businesses on Category 1 contracts to an automatic “Pay upon receipt” vs. the standard 30 days
- Unbundled IDIQ consulting contracts (i.e. architectural services) to create small business carve outs

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- Eliminated insurance endorsements on IDIQ contracts until first work order/service directive is issued. For major construction the Port will get insurance endorsements as well as performance and payment bonds after contract execution and before physical work begins.

Efforts are also unfolding to improve the Port's Disadvantaged Business Enterprise (DBE) program. A grant writer will soon be hired to aid in securing funds for DBE projects (FAA funding) and a consultant will complete a peer review of our airport program to identify how the Port can increase DBE utilization.

Small business staff is also exploring a construction/contracting "incubator" concept in cooperation with six public sector agencies (City of Seattle, King County, Sound Transit, Washington State Department of Transportation, and University of Washington). This center would provide information, access, education and assistance, and other resources to small WMBE and DBE firms. This effort will be jointly supported and co-branded.

New WMBE Policy Directive

Commission staff has drafted a new Policy Directive on Equity in Port Contracting to increase utilization of Women and Minority Business Enterprise. This proposed policy provides the maximum practicable opportunity for increased participation by minority and women-owned and controlled businesses in Port contracts.

Based on comprehensive review of WMBE contracting best practice, staff is recommending that the Port institute a new WMBE policy. The policy will repeal existing Small Business Resolution 3618 and pertain to all businesses that contract with the Port of Seattle. The proposed policy will provide Commission authorization for a new WMBE program and authorize the Executive to pursue progressively bold and challenging goals to increase WMBE utilization in all business transactions. The policy requires the Port to:

- Develop of an Annual WMBE Plan within 180 days of passage of the new resolution that includes:
 - Develop specific Division goals that encourage utilization of WMBE firms;
 - Responsibilities, policies, practices and processes that can change the culture of Port contracting and provide a more responsive environment for WMBE firms, businesses and contractors of all tiers working on Port contracts;
- Annual reporting to the Commission on performance and attainment of the utilization goals in Annual WMBE Plans
- Bidders to use specifically developed tools (such as an Inclusion Plan) appropriate to the contracting method and scope of work requiring contractors to actively solicit the employment of women and minority group members, in order to sustain and improve participation of WMBE in Port contracts
- Enhanced compliance, prompt payment and other provisions needed to

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implement Port WMBE program

- The WMBE program would be phased over the course of 2018. Resolution 3618, the current small business policy, would be phased out by the end of 2018.

Key Information:

ATTACHMENTS TO THIS BRIEFING

- (1) Presentation slides
- (2) March 20, 2017 Attorney General Opinion in response to Chris Liu, Department of Enterprise Services on race or sex conscious preferences
- (3) WSDOT Diversity Roadmap

PREVIOUS COMMISSION ACTIONS OR BRIEFINGS

March 28, 2017 – Small Business Development Update

March 22, 2016 – Small Business Utilization briefing

December 14, 2014 – Disparity Study briefing

August 19, 2014 – Small Business Utilization briefing

January 26, 2010 – Adoption of Resolution No. 3618 concerning small business utilization