

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

**COMMISSION AGENDA & STAFF BRIEFING**

<b>Item No.</b>	7d
<b>Date of Meeting</b>	May 12, 2009

**DATE:** May 6, 2009

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

**FROM:** Elaine I. Ko, Director, Office of Social Responsibility

**SUBJECT:** Draft Resolution No. 3618: Briefing on the Port's Small Business Program

**SYNOPSIS**

The Commission is being briefed on draft Resolution No. 3618, which outlines the components of an enhanced Small Business Program (formerly called the Small Business Initiative). The Resolution includes updated definitions, data, policies and tools to support this Program. Port staff will return to Commission in June for First and Second Reading of the Resolution.

**BACKGROUND AND STRATEGIC OBJECTIVES**

The objective of the Small Business Program is to promote the utilization of small businesses in the overall economy of the region. The Small Business Program further seeks to support the Port's economic interest and social responsibility to encourage competition within the supply chain and to increase the pool of qualified small businesses through expanding outreach and opportunity to a broader pool of small firms. The Office of Social Responsibility (OSR) is engaged in and supporting many efforts to enhance growth and capacity of local small businesses.

The Small Business Initiative was established in 2003 with the adoption of Port Resolution 3506, to provide guidance in the solicitation and use of small, minority, women enterprises, and emerging small businesses as vendors, suppliers, contractors and consultants across all Port operations. There was a 10% small business goal on all goods and services and annual targets were set by the CEO. The Initiative was a race- and gender-neutral small business program in the aftermath of the passage of Initiative-200.

## **COMMISSION AGENDA**

Tay Yoshitani, Chief Executive Officer

May 6, 2009

Page 2

The purpose of an enhanced Small Business Program is to:

1. Fulfill the mission of the newly established Office of Social Responsibility (OSR) in 2008, to engage the community and to assure that all Port business is conducted within a framework of fairness, inclusion, openness and economic development.
2. Establish and update Port policies and procedures.
3. Implement recommendations set forth in the 2007 Talbot, Korvola & Warwick (TKW) performance audit on the Port's Capital Project Delivery Costs and Small and Disadvantaged Business Enterprise Opportunities.

Nationally, inclusive business policies are categorized into eight types: 1) Hortatory Efforts and Vision-making, 2) Goal Setting, 3) Public Disclosure of Data and Information Tracking, 4) Accountability and Enforcement, 5) Outreach and Increasing Access, 6) Mandatory Participation, Set-Asides and Incentives, 7) Education and Training, and 8) Financial Assistance (*INSIGHT Center for Community Economic Development*). The Port seeks to adopt many of these policy approaches.

## **PROGRAM DESCRIPTION AND JUSTIFICATION**

The following sections are further description and explanation of key sections in the Resolution.

### **Definitions (Section 3)**

**Small Business Enterprise:** Currently, there is not a revenue size certification for small businesses either by the Small Business Administration (SBA) or Port. The SBA does certify and administer the 8a and Small Disadvantaged Business Enterprise Programs (SDB), which are used exclusively by federal government agencies (mainly Department of Defense). The Port's current practice is to allow firms to 'self-identify' on the Small Business and Consultant Rosters that they are Small Businesses using 100% of the SBA's size standards and there is not a cap on the owner's personal net worth.

**Minority Business Enterprise (MBE), Women Business Enterprise (WBE), and Disadvantaged Business Enterprise (DBE):** The definitions for Minority, Women, and Disadvantaged Business Enterprises in this Resolution complies with RCW 39.19.120, and further states that the OMWBE (Office of Minority and Women Business Enterprise) shall be the sole authority to perform certification of minority business enterprises, socially and economically disadvantaged business enterprises, and women's business enterprises throughout the state of Washington. This statewide certification process will prevent duplication of effort, achieve efficiency, and permit local jurisdictions to further develop, implement, and/or enhance comprehensive systems of monitoring and compliance for contracts issued by their agencies". As noted in the Resolution, the Port may, in the future, track non-certified MBEs and WBEs such as those who may have graduated from OMWBE's program because of interest in capturing all minority and women-owned business participation, and there are other national certification programs that the Port may wish to recognize for these purposes. Non-certified minority and women-owned businesses

## **COMMISSION AGENDA**

Tay Yoshitani, Chief Executive Officer

May 6, 2009

Page 3

shall not be counted in the Small Business Program, however the Port shall not view ‘non-certified’ status as a barrier for those firms seeking opportunities with the Port.

The DBE designation is used for US Department of Transportation federally-funded projects only. DBEs are for-profit small businesses where socially and economically disadvantaged individuals own at least a 51% interest and also control management and daily business operations. African Americans, Hispanics, Native Americans, Asian-Pacific and Subcontinent Asian Americans, and women are presumed to be socially and economically disadvantaged. Other individuals can also qualify as socially and economically disadvantaged on a case-by-case basis. DBEs must receive DBE certification from the state Uniform Certification Program (UCP) through OMWBE.

Certification: Currently, the Port allows firms to self-identify their status as a Small Business. The Port will be exploring coordination with an existing certification program of another government entity that includes verification of revenues and personal net worth. It is the intent of the Program to adopt a certification (verification) of small businesses. Small businesses who are M/WBEs certified through OMWBE will be counted for this Program at this time, however, if a size standard smaller than 100% of the Small Business Administration revenue size standard is adopted, some certified firms will not be included in the Program. In the future, the Port may also consider recognizing other national certifications primarily for identification purposes (ex: NW Minority Business Council, National Women Business Enterprise Council, National LGBT Certification, etc.).

Second-Tier Contractors: Currently the Port’s PeopleSoft database system records only prime contractor participation while both prime and sub-tier contractors are tracked on major construction. There is a desire to include all second-tier contractors, as this would more accurately capture all small business participation in the Port. There will be financial implications that need to be considered in implementing sub-tier tracking.

Other Small Business Categories: The Port seeks to promote diversity and work with other socio-economically disadvantaged and diverse businesses such as veteran, veteran service disabled, persons with disabilities, and lesbian, gay, bisexual, transgender (LGBT) owned businesses. There shall be no voluntary goals for participation or tracking of these categories at this time although the information may be included on Roster applications for identification purposes only.

### **Establishing Small Business Size Standard and Personal Net Worth (Section 4)**

According to the “Small Business Survival: A Joint Report to the Governor,” by WA State Department of Community, Trade and Economic Development; Employment Security Department; Department of Labor & Industries; and Department of Revenue (2007), about 93% of businesses that register to pay taxes in Washington meet the definition of a small business, i.e., these firms employ 20 or fewer workers, are solely operated by the owner and earn \$3 million or less in annual gross income. (This study mainly focused on goods and services and personal and professional services and, they used their own small business definition).

## **COMMISSION AGENDA**

Tay Yoshitani, Chief Executive Officer

May 6, 2009

Page 4

While the SBA does not certify Small Businesses in non-federal projects, it does set a size standard per NAICS (North American Industry Classification System) codes. There are over 1,800 NAICS codes, and the Port contracts with many key industries. Most NAICS are expressed by either millions of dollars or number of employees. Some of the major categories for the Port include: General & Heavy Construction: \$33.5M; Specialty Trade Contractors: \$14M; Truck Transportation: \$25.5M; Business and Professional Services: \$7M; Architectural, Engineering, Surveying, and Mapping: \$4.5M (2009 figures).

This section would authorize the CEO to establish a maximum average revenue standard for small business classification based on the NAICS that is smaller than 100% of the SBA size standards (as set forth in Title 13, Code of Federal Regulations, part 121), and establishment of a personal net worth cap. The gross annual business revenues would be based on an average over three years. The national SBA size standard is too large and does not accurately reflect the size range of local small businesses. Port staff are currently benchmarking similar programs including one that has adopted a definition as a percentage of the SBA size standard. Adopting a single revenue size for all small businesses is one option, however, such a 'one-size fits all' small business size standard is not ideal because different industries have different ranges of revenues.

***How this could work:*** For example, a firm that provides translation and interpretation services, NAICS code 541930, has a maximum gross revenue is \$7 million, according to SBA size standards. If the CEO establishes a 50% SBA size standard, in order to participate and benefit from the Port's Small Business Program, the translation and interpretation firm cannot exceed an average gross annual revenue of \$3.5 million over the past three years.

***Impact on current Port small business contracting:*** OMWBE has approximately 2,200 certified firms in their data base and King County has over 700 businesses in their Small Contractor Supplier (SCS) certification program (2009). An initial review of 2006 Port construction contractors indicated there were some firms that would no longer qualify as a small business with a size standard of, for example, 50% of SBA standard. Consideration of the impact on existing small business contractors will be evaluated as a new size standard is adopted.

### **Policies Related to Procurement (Section 5)**

#### **Price Incentive in Goods and Purchased Services:**

A price incentive tool is being implemented in King County to increase competitiveness of their SCS firms wherein a small SCS firm will be given incentive ranking if it is within a 5% Fair Market Price Range in goods and services. This Resolution would allow the Port to consider a similar tool as it goes forth with updated goods and services procedures. The Port would establish this pricing incentive or 'equalization credit' and/or could award to the low small business firm that is within an established fair market range of the lowest non-small business bidder.

***How this would work:*** For example, a large business that submits a bid for \$10,000 to provide a service and is the lowest bid, and a small business offers the same service for \$10,400. If the Port establishes a 5% fair market range incentive, the bid could be awarded to the small business since its offer is within 5% of the lowest bid.

## **COMMISSION AGENDA**

Tay Yoshitani, Chief Executive Officer

May 6, 2009

Page 5

**Potential Costs:** King County's Office of Business Relations Economic Development (BRED) conducted a price preference analysis, canvassing both the public and the private sector. In analyzing the general market, they found the competitive factor to be 5%, meaning an entity was willing to invest up to 5% to still receive a benefit. King County estimated that if they paid up to 5% more for goods and services, it would cost up to \$70,000 based on the 2005 contract participation level and no other updated costs are available to date. Port staff will be engaged in further analysis of this incentive option, including the potential financial impact, assessing data to be used to evaluate the impact of incentive, etc.

**Potential Legal Risks:** Whenever an award goes to someone who is not the lowest responsible bidder, the Port will face a potential claim from the lowest responsible bidder. If a contract is challenged, it will be important to show that the Port has in place a process that would "prevent fraud, collusion, favoritism, and improvidence in the administration of public business" and ensures that the Port "receives the best work or supplies at the most reasonable prices practicable" *Edwards v. Renton*, 67 Wash.2d 598, 602 (1965). Port staff will establish parameters and procedures for such a preference prior to implementation.

### **Small Business Utilization Requirement:**

A pass-fail requirement may be used on major construction, small works, and professional and personal service contracts as appropriate. If the prime contractor or proposer is unable to meet the small business utilization requirement, the prime contractor's bid or proposal will be rejected. This requirement shall be a matter of responsibility and not responsiveness. This requirement may be used after careful review of appropriateness for a specific procurement, including whether there is sufficient subcontracting opportunities and availability of qualified small businesses in the specific craft or industry, and other criteria.

### **Aspirational Women and Minority-Owned Business goals:**

A study "The Impact of State Affirmative Action Procurement Policies on Minority and Women-Owned Businesses in Five States" (*The Insight Center for Community Economic Development, 2007, www.insightcced.org*), indicated that MBEs and WBEs did not grow as fast as similar businesses in other states when affirmative procurement policies ended or were interrupted such as in late 1998 when I-200 passed. The most dramatic impact is on formative or start-up firms as 19% of Washington WBEs started between 1993-1998 had at least five employees in 2007 compared to 41% in Florida and Oregon who had in-tact affirmative procurement programs during the same period. MBEs in Washington also were less likely to have five employees in 2007 than in the other four states studied. During the same time periods, there was no significant difference in the growth rate of white male-owned businesses in any of the five states under study (control group).

In the study "State Policies and Programs for Minority- and Women-Business Development" (Insight, Dec. 14, 2007), WA State discretionary spending went from 5.7% MBE and 5.2% WBE in 1997-98 to a low of 1% MBE and .7% WBE in 2004 and had increased to 1.2% and 1.8% respectively in 2006.

## **COMMISSION AGENDA**

Tay Yoshitani, Chief Executive Officer

May 6, 2009

Page 6

In 2007, the Port showed 10% overall small business participation (16.7% goods, services, consultants and 6% major construction); non-construction sub-tiers contractors and vendors were manually counted. The overall breakdown was 6.6% SBE and 2.1% MBE and 1.3% WBE. Figures for 2008 are being tabulated. Prior to 2007, sub-tier contracting data is available only on major construction contracting.

Aspirational (voluntary) women and minority-owned business goals may be established on major construction projects as well as on professional and personal service contracts on a project-by-project basis as appropriate. Port Legal has raised concern of using minority and women-owned business “aspirational goals” overlaid on pass/fail requirements for prime contractors on a single project as it may create confusion between the requirement and the goal, and imposing on prime contractors the requirement that they use good faith efforts will tend to undermine the aspirational and voluntary nature of the M/WBE goal. There shall be no benefit or penalty if the aspirational M/WBE goal is not met.

### **Evaluation Points for Utilization of Small Businesses:**

This section would allow the Port to use evaluation points for the participation of small business as a factor in the award of the prime contract. This incentive establishes a required minimum percentage of the total hours or total dollar amount to be performed by small businesses or number of small firms to be included in the contract and shall be developed in compliance with existing Port procurement procedures. This incentive may apply to goods and services, and professional and personal services.

### **Roles and Responsibilities (Section 6)**

All Port personnel will make reasonable efforts to increase the opportunity for small businesses to compete for opportunities with the Port. In addition, with the Port’s recent departmental re-organization, this Resolution explicitly outlines the significant roles responsible for the implementation and success of the Program. Specific roles include the CEO, Senior Executive Team, Office of Social Responsibility, Central Procurement Office, and Capital Development Division, however all departments must participate fully for the Program’s success.

### **Monitoring and Reporting (Section 8)**

#### **Goal Setting:**

Resolution 3506 states an annual Port goal of at least \$20 million or 10% of all goods and services from qualified small businesses beginning in year 2003. This Resolution does not state a specific percentage or dollar amount. OSR will take the lead in setting annual Port-wide small business participation goals and work with Divisions/Departments to set Division and Department-level goals. This allows flexibility to adjust targets to match market trends, previous Port small business participation levels, and other factors.

## **COMMISSION AGENDA**

Tay Yoshitani, Chief Executive Officer

May 6, 2009

Page 7

### **Tracking:**

In addition to SBEs, it is the desire of the Port to track certified MBE and WBE participation on prime and sub-tier levels. The Port is not currently tracking sub-tier participation on service agreements or goods/services procurements. There may be financial implications to tracking participation in sub-tiers and this evaluation is underway. The Office of Social Responsibility has an interest in tracking participation by ethnic group as this will better focus efforts and establishes good baseline information for future disparity and availability studies that may be required.

### **Performance Measurement (Section 9)**

Each direct report to the CEO will be held accountable for meeting the goals of the small business program in their performance evaluation.

### **FINANCIAL IMPLICATIONS**

As we move forth with the Small Business Program as outlined in the Resolution, there will be continued review and study of the financial impact of the Program's proposed components as such information may not be fully known at this time. Financial impacts will be a consideration in the timing of various components.

### **ALTERNATIVES CONSIDERED**

In considering the proposed components of the Small Business Program outlined in this Resolution, a scan of the various local, regional, and State programs, best practices, and literature review was conducted. To the extent that pertinent small business data is available, it will be updated and reviewed as the Port moves forward with implementation of the Program.

### **TRIPLE BOTTOM LINE**

The Port's Small Business Program supports economic development as increased opportunity for small businesses directly support many jobs within the region and state and contribute to our local tax base. The Program supports social responsibility and social equity in the community as small businesses are able to more fully participate in the varied economic activities of the Port. Many small businesses currently participate in the Port's environmental efforts and continue to seek opportunities with the Port in furthering these efforts.

### **PREVIOUS COMMISSION ACTION AND BRIEFINGS**

Adoption of Resolution No. 3506 in 2003.