

BEFORE THE COUNCIL OF THE  
METROPOLITAN SERVICE DISTRICT

FOR THE PURPOSE OF AUTHORIZING )  
THE EXECUTIVE OFFICER TO EXECUTE )  
A STATEMENT IN SUPPORT OF )  
DETERMINING THE FEASIBILITY OF )  
A PREDICATE/DISPARITY STUDY )

RESOLUTION NO. 92-1661

Introduced by Rena Cusma,  
Executive Officer

WHEREAS, a group of procurement professionals from the region began meeting in October 1991 to discuss and share information regarding individual agencies' MBE/WBE statistics, activities, problems and successes; and

WHEREAS, the group determined that, if MBE/WBE firms were to be accorded preferential procurement treatment designed to remedy the present effects of past discrimination, a predicate study documenting and demonstrating past discrimination would be required; and

WHEREAS, a feasibility study of patterns of disparity in MBE/WBE participation in agency procurements was recommended as a basis for agency decisions on participation in a major predicate study; and

WHEREAS, Multnomah County and Tri-Met representatives agreed to fund and administer such a feasibility study; and

WHEREAS, the group proposes to formalize the effort through execution of a Multi-Jurisdictional Statement of Mutual Understanding; and

WHEREAS, execution of the Statement of Mutual Understanding does not bind Metro to participate in any major predicate study which could be suggested by the feasibility study; now, therefore,

BE IT RESOLVED,

That the Council of the Metropolitan Service District authorizes the Executive Officer to execute the Multi-Jurisdictional Statement of Mutual Understanding attached as Exhibit A.

ADOPTED by the Council of the Metropolitan Service District this 24<sup>th</sup> day of September, 1992.

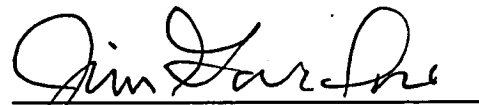
  
\_\_\_\_\_  
Jim Gardner, Presiding Officer

Exhibit A

MULTI-JURISDICTIONAL STATEMENT OF MUTUAL UNDERSTANDING

The signatories hereto wish to memorialize their mutual understandings with regard to a multi-jurisdictional effort regarding MBE/FBE/DBE program development and a disparity feasibility study. Authorization for this undertaking is found in ORS 191.010, ORS 191.080, and ORS 191.110.

R E C I T A L S

- A. The signatories hereto have come together to respond to the decision of the United States Supreme Court in Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
- B. The Croson decision established new standards by which the constitutionality of set-aside programs would be judged. Under Croson, state and local set-aside programs are subject to strict judicial scrutiny and must be narrowly tailored to rectify the clearly identified present effects of discrimination.
- C. Jurisdictions which have undertaken disparity studies sufficient to justify continuing MBE/FBE programs have found such studies to be extremely expensive undertakings, and have found themselves nonetheless faced with continuing litigation.
- D. It is prudent to obtain preliminary information regarding the feasibility, cost and scope of such a disparity study so that informed decisions can be made in regard to initiating and funding such a costly and complicated undertaking.

E. Continuation of the existing working group with representatives from the signatories hereto is necessary, as well as cooperation from purchasing managers, legal counsel, and others associated with the governments in question.

T E R M S O F U N D E R S T A N D I N G

- 1) Multnomah County and Tri-Met shall sponsor a feasibility study like or substantially similar to the Request For Proposal attached hereto as Exhibit A. All contracting functions in relation to this study shall be undertaken by Multnomah County and Tri-Met, as they mutually agree.
- 2) The signatories shall continue to ensure representation on a working group for planning and studying disparity study issues.
- 3) The signatories shall make purchasing staff, legal counsel, and others available, where appropriate, to study the results of the feasibility study and collect other data and information necessary to developing broad regional perspectives on the issues raised by the Crosen decision.
- 4) Any government desiring to discontinue participation in this multi-jurisdictional effort shall give written notice to that effect to all the signatories hereto.

SIGNED:

\_\_\_\_\_  
Dept of General Services  
Purchasing Division, State of Oregon

\_\_\_\_\_  
Date

Multnomah County

Date

Clackamas County

Date

Washington County

Date

City of Portland

Date

METRO

Date

Tri-Met

Date

Port of Portland

Date

*School District #1, Portland*

*Date*

Housing Authority of Portland

Date

Portland Community College

Date

Metropolitan Exposition Recreation Center

Date

Oregon State System of Higher Education

Date

Office of Minority, Women Emerging Small Business

Date

PLEASE NOTE: The following is the proposed FINAL document. This was developed over the course of several meetings. This includes fine tuning that answers many concerns raised about more clearly defining the scope. The new material is underlined. Please review it carefully. CLP 7/2/92

F I N A L     D R A F T

MULTI-JURISDICTIONAL/DISPARITY FEASIBILITY STUDY  
REQUEST FOR PROPOSAL

Contractor to prepare information to be used to determine the feasibility of conducting a predicate and disparity study<sup>1</sup>.

BACKGROUND:

The use of set-aside programs and numerical goals for MBE and WBE participation by political subdivisions and the State of Oregon has all but disappeared unless required by federal law. This is a result of the January 23, 1989, U.S. Supreme Court ruling. Richmond v. J. A. Croson Co., 488 U.S. 469, 102 L. Ed. 2d 854 109 S. Ct. 706 (1989) has thrown the constitutional basis for such programs into doubt.

The Court's decision established new standards by which the constitutionality of set-aside programs would be measured. The main feature of these standards is found in a "strict scrutiny"

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<sup>1</sup>"A predicate study" is one that would document discrimination to serve as a predicate for finding a "compelling state interest". This finding would arguably justify race and/or gender based preference programs. Generally, a "disparity study" would investigate an apparent disparity between the number of minority (or women) firms who are ready, willing and able to perform work and the number of these above firms that win public contract awards. A "utilization index" is developed to show under (or over) utilization of these firms. Both anecdotal and statistical evidence are gathered as part of the process.

clause which will require municipalities and state and local governments, when using racial or gender classifications, to show "compelling interest" or a specific historical basis for the need for M/WBE programs. Under its "strict scrutiny" test, the court also requires that such programs be "narrowly tailored" to address specific areas of discrimination to ensure that a chosen program is designed to remedy the present effects of past discrimination.

Therefore, governments must go to greater lengths to provide historical evidence of a trend of discrimination against a specific group of minorities or women before establishing a purchasing set-aside program. This includes documenting the existence of gender or racial discrimination<sup>2</sup> (or continuing effects thereof) in industries where the public agency contracts for business. The agency involvement need only be passive. There need not be a "smoking gun" or actual discrimination proved against the agency.

PROJECT DESCRIPTION:

A feasibility study is planned by a group of public purchasing professionals and government representatives. This group represents local political and subdivisions and state government. The purpose of the study is to provide information that will guide the governments involved in deciding whether a comprehensive disparity/predicate study should be conducted, what its scope

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<sup>2</sup>The U.S. Court of Appeals, 9th Circuit, has held that gender-based preference programs need only pass intermediate scrutiny. It would be prudent to include WBE firms in a study.

should be. The feasibility study must provide information relating to the following major areas:

1) REQUIRED COMPONENTS OF A POST-CROSON DISPARITY/PREDICATE STUDY:

Taking into account not only the evolving case law but also comparable studies which have been undertaken in other jurisdictions, assess what the necessary components would be for the study. (Particular attention is to be directed to the Seattle area and San Francisco programs.) Discuss whether these components are the same for the different types of governmental entities involved: state, municipal, county, regional and "other". Develop information regarding the most productive and effective scope for a predicate/disparity study.

2) GEOGRAPHICAL AREA:

What is the geographical area to be studied? Which components or sections of a broad disparity study identified above can be examined through a state-wide or regional analysis? Must some components required post-Croson be compiled and analyzed in relation to small or different governmental units (e.g., individual counties, cities, or other governmental entity)?

3) INDUSTRY/COMMODITY/SERVICE AREAS:

Provide information about the systemic usefulness of studying

disparity issues in the context of factors which transcend jurisdictional boundaries. Consider the utility of studying disparity issues in the context of non-governmentally defined areas including, but not limited to, the Northwest regional "construction" industry, commodity or service sectors and the like.

4) COST ESTIMATES:

Prepare cost estimates for conducting the disparity/predicate study including all necessary activities such as interviews, hearings, project design, report preparation, legal analysis, statistical analysis, etc. The cost estimate analysis must convey specific information relating to the component parts of the study. If some components would be useful to all the governments involved, but some governments would need other additional components, provide details. Provide a cost estimate for all of the signatories to the "Multi-Jurisdictional Statement of Mutual Understanding" attached hereto as Exhibit A.

~~A feasibility study is planned by a group of public purchasing professionals and government representatives. This group represents local political subdivisions and state government. An Interagency Consortium (Consortium) has been formed by this group to contract for this study. This study will provide information to be used to determine whether or not a study to document past and/or present race or gender discrimination should be conducted.~~



The purpose of the study is to develop information that will guide the Consortium in deciding whether a disparity/predicate study should be conducted and if so what should be the geographical or jurisdictional boundaries of such a study.

1) GEOGRAPHICAL AREA/SCOPE OF STUDY OPTIONS:

What is the geographical area to be studied? Prepare recommendations as to the geographical area that would be feasible, should such a study be conducted. Identify elements of a cost estimate for a statewide study. Identify elements of a cost estimate for a study including: Multnomah, Clackamas and Washington Counties. Discuss rationale for both options identified above.

Discuss surveying construction industry/commodity/service areas as opposed to geographical areas. Make a recommendation and explain rationale.

2) COST ESTIMATES:

Prepare cost estimates for conducting a disparity/predicate study. Cost estimates must include detail by activity such as interviews, hearings, project design, report preparation, statistical analysis, etc.

3) ] 5) POST CROSON PROGRAMS:

Review purchasing efforts, including race and gender neutral programs, involving public contracts of Consortium members to contract with MBE and WBE firms since the Croson decision in January, 1989. Report any

changes in policy, practice, rules or results. Compare the participation rates of MBE and WBE firms when agencies used numerical goals and or set asides for participation with participation rates of MBE and WBE firms when the public agencies were prohibited from using numerical goals and had to rely on good faith efforts. Also, describe any Emerging Small Business (ESB) programs implemented by Consortium members. Include number of participants (bidders), ethnicity and gender of contract awardees, length of time program has been in place and dollar value of contract awards.

[4) ] 6) REPORT:

Prepare a comprehensive report addressing all of the above points. Include a recommendation to undertake or forego a study and document the basis for the recommendation. Discuss reasons both for and against conducting a study. Prepare a brief outline of how a study should be conducted assuming that is the conclusion.

The contractor will report directly to the designee of the Consortium who will consult with Consortium members and others as appropriate on management of the project. The project is expected to be completed within forty-five (45) days of the signing of the contract.

The contract will not exceed \$20,000. This amount will be the guaranteed maximum price (GMP). This amount will include: consultant salary, travel and all related costs. Payment will be made upon completion to the satisfaction of the designee.

SELECTION PROCESS AND PROPOSED FORMAT:

The Consortium assures that all proposals will be considered without discrimination on the basis of race, age, sex, color, religion, national origin, mental or physical handicap, or marital status. The contractor will be selected based on the following criteria. Each proposal should be presented in a format that directly addresses each criteria:

1. Qualifications and background for conducting a project. Broad experience in government research involving program evaluation, public contracting and complex data analysis [and law] of the scale of this project is required. Research personnel for this project must be identified in the proposal and background information included. Provide at least three references of government research to substantiate expertise and experience necessary to carry out this project successfully and grant permission for the Consortium to contact the references. (Up to 40 points.)
2. Methods and approach for the project, including design of any survey instruments. Describe what analytical tools and methods will be used to meet the scope of work objectives.

Include quantitative measures of surveys to be conducted, if any. (Up to 20 points.)

3. A work plan for conducting and completing this project including milestones and time schedules. Describe how you would propose to accomplish the task. Identify the milestone and time of schedules. (Up to 25 points.)

4. A budget including all expenses, estimated number of hours per person required, and travel expenses associated with the project. (Up to 15 points.)

Proposals will be reviewed by a panel from the Consortium. Up to four proposals may be selected for a final one hour oral presentation.

#### Preproposal Conference

There will be a mandatory preproposal conference.

#### Reservation of Rights

This request for proposal does not commit the Consortium to award a contract. The Consortium reserves the right to accept or reject any or all proposals and to waive formalities and minor irregularities in offers received. Responses to all criteria will determine the selection of the contractor. Cost will not be the sole criterion.

Proposal Submission

Proposals must be submitted by 5 p.m., \_\_\_\_\_, May  
\_\_\_\_, 1992 to: XXXXXXXXXXXXXXXXXXXXXXXX

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XXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

One proposal copy may be faxed to (503) \_\_\_\_\_ by the  
deadline, and the remainder mailed or shipped and/or postmarked the  
same day. A total of eight (8) copies must be received. The

Consortium makes no guarantees as to the availability of the fax  
transmission option and all risks of this method of response are  
born<sup>d</sup> by the proposer.

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Questions regarding this RFP may be directed to \_\_\_\_\_,  
(503) \_\_\_\_\_.

Additional Information:

Consortium members will provide the following information to the  
designee contract administrator within 30 days of the RFP award:

Consortium members will rely on their respective legal staffs to  
prepare the information identified in A below. It is suggested  
that the attorneys prepare information, confer and agree upon the  
necessary legal requirements.

Consortium members will provide information documenting the process by which programs providing preferences for MBE and WBE firms were instituted. See B below for details.

A) LEGAL REQUIREMENTS AND POST CROSON DEVELOPMENTS:

Explain the requirements articulated in the J.A. Croson v. Richmond Case; review and summarize the Court of Appeals, 9th Circuit decisions and other court decisions speaking to the type of data and sufficiency of data required to report numerical Minority Business Enterprise (MBE) and Women Business Enterprise (WBE) goals.

B) METHODS USED TO ESTABLISH PREFERENCE PROGRAMS:

Describe the method by which programs providing preferences for MBE and WBE firms were instituted prior to the January, 1989 Croson decision. I.e., how did the major cities, counties and the State develop rules, ordinances, resolutions and statutes that implemented MBE and WBE preference programs.

GOVERNMENTAL AFFAIRS COMMITTEE REPORT

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RESOLUTION NO. 92-1661, AUTHORIZING THE EXECUTIVE OFFICER TO EXECUTE A STATEMENT IN SUPPORT OF DETERMINING THE FEASIBILITY OF A PREDICATE/DISPARITY STUDY

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Date: September 22, 1992

Presented by: Councilor Collier

**COMMITTEE RECOMMENDATION:** At its September 17, 1992 meeting the Governmental Affairs Committee voted 3-0 to recommend Council adoption of Resolution No. 92-1661. Voting were Councilors Collier, Devlin, and Gronke. Councilor Wyers was absent.

**COMMITTEE DISCUSSION/ISSUES:** Regional Facilities Director Neil Saling presented the staff report. He explained the purpose of a "predicate" or "disparity" study is to determine whether discrimination in public contracting has existed. If so, the public agency can narrowly tailor remedies to correct past discrimination. Such a study is expensive, with costs in other places having run up to \$500,000.

The study proposed in Resolution 92-1661 is much smaller, (not to exceed \$25,000) and is only to determine whether a full disparity study would be feasible; it would also design the full study and suggest possible measures to take to correct past discrimination. This preliminary study has resulted from meetings of purchasing officials from most local governments in the region, under the direction of Mr. Clifford Freeman, the Governor's Advocate for Minority/Women/and Emerging Small Business. Mr. Saling said Tri-Met and Multnomah County are paying for the preliminary study, and have taken steps to select a contractor.

The resolution says Metro supports the study and its goals, though Metro is not a financial participant. If the preliminary study recommends a full study, Metro will decide later whether to participate. This resolution does not commit Metro to participating in the full study, though Mr. Saling said approval of Resolution 92-1661 probably creates an expectation in the community that Metro will participate in a later study.

Councilor Gronke asked how the costs of a full study would be allocated and who would participate. Mr. Saling said that wasn't clear, and that some jurisdictions were not committed to going ahead with a full study.

## STAFF REPORT

### CONSIDERATION OF RESOLUTION NO. 92-1661, FOR THE PURPOSE OF AUTHORIZING THE EXECUTIVE OFFICER TO EXECUTE A STATEMENT IN SUPPORT OF DETERMINING THE FEASIBILITY OF A PREDICATE/DISPARITY STUDY

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Date: July 23, 1992

Presented by: Neil Saling

## BACKGROUND

The ruling of the U.S. Supreme Court on January 23, 1989, in the case of Richmond v. J.A. Croson Co. has negated the use of set-aside programs and numerical goals for participation by minority and woman-owned enterprises (MBE/WBE) in procurement actions by regional political subdivisions. The standards by which the future use of such preferential programs will be judged is a "strict scrutiny" requirement whereby municipalities and state and local governments, when using racial or gender classifications, are required to show "compelling interest" which is a specific historic basis for the need for such programs. Under the "strict scrutiny" test, the court also requires that such programs be "narrowly tailored" to address specific areas of discrimination to ensure that a chosen program is designed to remedy the present effects of past discrimination.

Preferential programs for MBE/WBE must be based upon historical evidence of a trend of discrimination against a specific group of minorities or women before establishing a purchasing set-aside program or utilizing numerical goals. Studies which are conducted to document trends of past discrimination are called disparity or predicate studies. ("Predicate study" is used herein as descriptive of the establishment of a basis for such narrowly tailored programs.)

In October 1991, a group of procurement professionals from within the region began meeting to discuss and share information regarding individual agencies' MBE/WBE programs, activities, statistics and problems. The chairman of the group is Clifford Freeman, the Governor's Advocate for MBE/WBE and Emerging Small Businesses. Metro's representative is Mr. Richard Wiley.

The group determined that it was appropriate to address the issue of past discrimination as a means of shaping future MBE/WBE programs. Under the "strict scrutiny" required by the Croson decision, a study of past discrimination would be necessary in order to determine if programs to remedy the present effects of past discrimination are appropriate. Prudently, the group proposed a preliminary study to address the feasibility of conducting the comprehensive and expensive predicate study. To formalize agency support for the feasibility study, a Multi-Jurisdictional Statement of Mutual Understanding is proposed. Execution of the Statement has been determined to fall within the requirements of Metro Code Section 2.04.033(a)(2) requiring Council approval of intergovernmental agreements.



## ANALYSIS

The group of procurement professionals has been divided over the issue of whether agency programs should emphasize equal opportunity and outreach or should return to the format of pre-Crosron programs which incorporated set-asides and numerical goals to ensure involvement of minority and woman-owned enterprises in agency procurements. Return to the latter format would require a predicate study to determine whether sufficient historical evidence of discrimination exists to support such set-asides and goals as remedial measures. At this point in time there is no evidence upon which to prejudge the impact of a predicate study on the format and direction of Metro's MBE/WBE programs. Neither is there evidence to show that set-asides and numerical goals will ultimately produce a cadre of minority and woman-owned firms which would successfully compete in the open market.

The proposed feasibility study would define the scope of a predicate study. That scope would include definition of the essential components or elements of proof necessary to support the remedial programs; the geographical area to be studied; the industry/commodity/service areas to be studied; a review of post-Crosron programs and results; and an estimate of predicate study cost. The cost of the feasibility study is not to exceed \$20,000, a cost to be borne jointly by Multnomah County and Tri-Met. Additionally, agency legal staffs are asked for input on Crosron-derived legal requirements and a review of pre-Crosron agency programs.

The Multi-Jurisdictional Statement of Mutual Understanding is a formal statement of agency support for the feasibility study. To some extent, it is an outgrowth of an earlier proposal to divide the cost of the feasibility study among the group members. Although it does not bind any agency to participation in the anticipated predicate study, there are members of the group who view execution of the statement as a commitment to participate in the predicate study. Metro Legal Counsel has reviewed the statement and finds no language which would support the latter interpretation.

## POLICY IMPACT

1. Council action is required by Metro Code Section 2.04.033(a)(2).
2. Metro execution of the Multi-Jurisdictional Statement of Mutual Understanding could be interpreted by some members of the community as support for pre-Crosron procurement policies which include the use of numerical goals and set-asides for MBE/WBE participation. Alternatively, the execution of the statement can be viewed as support for a prudent exploratory study to determine the possible impacts on Metro of a study of past discrimination.

## FINANCIAL IMPACT

None. The feasibility study would be financed from resources available to Tri-Met and Multnomah County. The Resolution specifically reserves Metro's rights to make a future decision on commitment of resources to a predicate study.

## RECOMMENDATION

The Executive Officer recommends approval of Resolution No. 92-1661.