

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AUTHORIZING)	RESOLUTION NO. 94-1860A
THE EXECUTIVE OFFICER TO)	
EXECUTE AN INTERGOVERNMENTAL)	
AGREEMENT WITH THE CITY OF)	Introduced by Rena Cusma,
PORTLAND FOR A PREDICATE STUDY)	Executive Officer

WHEREAS, a group of procurement professionals from various governmental agencies have met since October, 1991 to discuss and share information on their past and present minority and women-owned business enterprise (MBE/WBE) programs; and

WHEREAS, the group determined that, if MBE/WBEs were to receive preferential procurement treatment to remedy the present effects of past discrimination, a predicate study documenting past discrimination would be necessary; and

WHEREAS, the Metro Council in September, 1992 authorized a Multi-Jurisdictional Statement of Mutual Understanding supporting and permitting a feasibility study to be pursued by Multnomah County as a precursor to a major predicate study; and


WHEREAS, that study by Sara Glasgow Cogan & Associates outlined the requirements for and projected costs of such a multi-jurisdictional predicate study; and

WHEREAS, the City of Portland has endorsed a regional approach to such a predicate study, authorized \$175,000 in funding and directed the Mayor to seek funding partners to complete such a regional study; now, therefore,

BE IT RESOLVED,

That the Metro Council authorizes the Executive Officer to execute an intergovernmental agreement with the City of Portland in substantial conformance with Exhibit A attached, so as to support and promote a regional predicate study.

ADOPTED by the Metro Council this 13th day of January, 1994.



Judy Wyers, Presiding Officer

4. To ensure that the CITY's Project Manager provides periodic written progress summaries and meets with the METRO Project Manager each month during the course of this Agreement to discuss all developments and outline the progress of all tasks related to the Study; and
5. To provide METRO with all documentation generated by the Study without further solicitation and at no additional cost; and
6. To document and acknowledge on all final documents arising from this Study that partial funding was provided by METRO; and
7. To hold harmless, indemnify, protect and defend upon request METRO and its officers, employees and agents from any and all claims, suits or actions of any nature, including, but not limited to all costs and attorney fees arising out of or related to CITY's study activities or those of its officers, subcontractors, agents or employees.

If CITY fails to defend or indemnify METRO, METRO may, at its option, bring an action to compel same or undertake its own defense.

In either event, CITY shall be responsible for all of METRO's costs, expenses and attorney fees including the reasonable market value of any services provided by METRO employees.

METRO agrees:

1. That it supports CITY's intent to pursue a Regional MBE/WBE Disparity Study as outlined hereinabove and seeks to facilitate the Study's immediate commencement; and
2. That METRO intends to contribute up to \$50,000 in both the 1993-94 and 1994-95 fiscal years for a total commitment to the Study cost of up to ONE HUNDRED THOUSAND AND NO/100THS (\$100,000.00) DOLLARS; and
3. That METRO's contribution will be strictly limited to the above amount and there are no further obligations expressed or implied by such action; and
4. That METRO neither intends or seeks any direct involvement, sponsorship privileges or supervisory responsibilities for this project except at the behest of CITY; and
5. That it will, from whatever records currently exist, provide information on its past competitive bidding, contracting and MBE/WBE activities; and
6. That METRO may withhold funding and terminate this Agreement in whole, or in part, at any time prior to Study completion, if METRO, in its sole discretion, determines that CITY has failed to comply with the terms and conditions of this agreement.

In the event of such action, METRO shall promptly notify CITY in writing as to the circumstances and the reasonable means, if any, for resolution.

BOTH PARTIES AGREE:

1. That METRO's Project Manager shall be appointed by and act on behalf of METRO's Liaison Officer, who is specifically authorized to review and approve all activities and work products; and
2. That CITY's Project Manager shall be Madelyn Wessel, Deputy City Attorney or other person designated in writing by the Mayor, and she is specifically authorized to execute all project tasks and render all project services; and
3. That all legal notices provided under this Agreement shall be delivered personally or by certified mail to the individuals and addresses listed herein below and that they may only be changed by written notice delivered in accordance with this provision:

CITY:

Madelyn Wessel
Deputy City Attorney
City of Portland
1120 S.W. Fifth Avenue
Portland, Oregon 97204

METRO:

Director, Regional Facilities
Metro
600 N.E. Grand Avenue
Portland, Oregon 97232

4. That both parties shall hold harmless, indemnify, protect and defend the other and its officers, employees and agents from any and all claims, suits or actions of any nature, including, but not limited to all costs and attorney fees arising out of or related to these Study activities or those of its officers and employees; and
5. That execution of this Agreement does not bind either party to the findings and recommendations of the Study; and
6. That this Agreement may be terminated in whole, or in part, whenever both parties agree that the continuation of the Study will not produce the beneficial results anticipated or results commensurate with the proposed level of funding; and

That if termination is required, the parties shall agree upon the terms, conditions and effective date(s) for such action, or in the case of partial termination, the specific Study aspects or activities to be abandoned; and

7. That this is the entire Agreement between the parties. There are no understandings, agreements or representations, oral or written, not specified herein.

No waiver, consent, modification or change of terms shall bind either party unless committed to writing and signed by both parties, and if such action is taken, it shall be effective only in the specific instance and for the specific purpose given; and

8. That if any portion of this Agreement is found to be illegal or unenforceable, this Agreement shall nevertheless remain in full force and effect and the offending provision shall be stricken; and
9. That this Agreement is binding on each party, its successors, assigns and legal representative and may not, under any circumstances or conditions, be assigned or transferred by either party; and
10. That the situs of this Agreement is Portland, Oregon. Any litigation over this Agreement shall be governed by the laws of the state of Oregon and shall be conducted in the circuit court of the state of Oregon, for Multnomah County, or, if jurisdiction is proper, in the U.S. District Court for the District of Oregon.

CITY, by signature of its duly authorized representative, hereby acknowledges that it has read, understands and agrees to be bound by the terms and conditions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have set their hands on the day and year set forth below.

CITY OF PORTLAND

METRO

By: _____

By: _____

Vera Katz, Mayor

Rena Cusma, Executive Officer

By: _____

Barbara Clark, Auditor

APPROVED AS TO FORM

By: _____

By: _____

Madelyn Wessel
Deputy City Attorney

Daniel B. Cooper
General Counsel

Exhibit 1

**INTERGOVERNMENTAL AGREEMENT
FOR THE PURSUIT OF A
REGIONAL MBE/WBE DISPARITY STUDY**

THIS Agreement is entered into between METRO, a metropolitan service district organized under the laws of the state of Oregon and the 1992 Metro Charter, located at 600 N.E. Grand Avenue, Portland, Oregon 97232-2736, and the City of Portland, hereinafter referred to as CITY, located at 1120 S.W. Fifth Avenue, Portland, Oregon 97204.

W I T N E S E T H

WHEREAS, CITY has generated a "Fair Contracting and Employment Initiative " wherein it proposes to initiate the start-up funding for a Regional Disparity Study which would provide the "statistical underpinnings" for enforceable Minority and Women-Owned Business Enterprise (MBE/WBE) Opportunity Goals as outlined in Section Five of the draft attached hereto as Exhibit A (and hereinafter referred to as the Study); and

WHEREAS, METRO acting by a through its Executive Officer and Council concurs that those negatively impacted by past discrimination deserve immediate, preferential and remedial action, and the findings of a Regional MBE/WBE Disparity Study are essential to the establishment of such programs; and

WHEREAS, METRO supports a cooperative regional approach among governments to accomplish such a Study and seeks to contribute to the initial start-up funding as proposed by City; and

NOW THEREFORE, the premises being in general as stated in the foregoing Recitals, it is agreed by and between the parties hereto as follows:

CITY AGREES:

- 1. To act as lead agency in the solicitation of funding partners to complete a regional disparity study including the Metropolitan Exposition Recreation Commission and Multnomah, Clackamas and Washington Counties; and**
- 2. To act as a competent and professional independent contractor for all aspects of the Study and for all Study purposes without specific compensation save the Study contribution referenced herein; and**
- 3. To secure all services, document all work products, and complete all tasks required for completion of a regional disparity study within METRO boundaries and in accordance with METRO Study Requirements attached hereto as Exhibit B; and**

EXHIBIT " A "

FAIR CONTRACTING AND EMPLOYMENT INITIATIVE

DISCUSSION DRAFT

Proposed to
the City Council
City of Portland, Oregon
by Mayor Vera Katz
June 3, 1993

INTRODUCTION

FAIR CONTRACTING AND EMPLOYMENT INITIATIVE

The Council has recognized a critical need to set in motion a determined effort to help the City's economically distressed groups reclaim ground they lost during more than a decade of neglect of America's inner cities. Toward that end, I am recommending the attached package of reforms to begin to improve the City's minority contracting record and expand minority employment opportunities with the City's contractors. It is a step the Council has identified as one of its highest priorities.

This package of initiatives, taken as a whole, is intended to provide a policy framework for efforts that already are under way and other initiatives proposed for completion in the near future. It constitutes a set of administrative actions and new ordinances aimed at leveling the playing field in the competition for City contract dollars for those who have been economically impacted by the effects of discrimination and economic neglect. It is also intended to promote equal employment opportunities for those who seek work with the City's contractors.

It is our hope that this package, when approved and fully implemented, will provide clear policy direction to City bureaus and contractors regarding minority and female contractor issues. The reforms represent an integral part of a plan to make the City government more effective and more responsive to the needs of all our citizens. It does so by enhancing City government's role as a catalyst for action, by holding bureau managers accountable for achieving explicitly stated results, and by promoting a collaborative effort with community-based organizations and other local government agencies in the region.

The growing gap between the "haves" and "have-nots" in our society is as painfully evident in Portland as it is elsewhere in the country and shows itself in the widening disparity of incomes among many of our neighborhoods. City government can and must do a better job of addressing this problem. There is strong evidence that in recent years minorities and women, as groups, have lost much of what they gained in an earlier period of affirmative action efforts and have suffered disproportionately to their numbers from the policies of neglect.

African Americans, in particular, have complained that they have been shut out of business and employment opportunities in the local construction industry. A recent study by the City Attorney's Office supports their concerns. The study analyzed the employment patterns of all contractors awarded major City of Portland public works contracts in 1992.

The workforce records examined showed that of the 1535 people employed by the 50 companies receiving contracts of \$50,000 or more in value, only 4.8% were minorities and less than 1% African-Americans. That compares to a minority population in Portland in the neighborhood of 15%, and to a qualified minority construction workforce in the region ranging from an estimated 6% to 20%, depending on the craft or trade. Moreover, 54% of the minorities who were employed worked as laborers, which are among the lowest paid construction jobs.

These findings, while far from an indictment of any specific company, constitute serious evidence, says Deputy City Attorney Madelyn Wessel, that a systemic problem may exist. The study demonstrates that discrimination prohibited under federal, state and local laws may be prevalent in the industry and that concerns about equal employment opportunity are legitimate.

On the business contracting side, as you are aware, the opportunities for minority businesses have declined significantly since the 1989 U.S. Supreme Court decision in City of Richmond v. J.A. Croson Co., which held that state and local set-aside programs must meet a "strict scrutiny" test in the courts, must serve compelling government interests, and must be narrowly tailored to serve those interests.

Minority-owned businesses have lost ground since Croson in obtaining valuable sub-contracting work through the prime bidders on regional construction contracts. Most state and local programs aimed at assisting minority and women-owned businesses have been stopped in their tracks or thrown substantially off course because responding to the Croson requirements has been so difficult and expensive.

Ineffectual or inadequate government actions and programs have failed to address the economic pain of the neediest groups among us, despite the best of intentions and an array of "good faith efforts" programs. To ignore for too long the economic plight of these groups puts at risk our long-term survival as a diverse and functioning community.

As a community, we must find a better answer.

It is our hope that you will agree that the "Fair Contracting and Employment Initiative" discussion draft is an important first step in a four-year effort to find better answers. The proposed initiatives are clustered around seven sections targeting major issues which have been identified as the critical needs or barriers to equal participation in contracting and employment.

Section One

SET MBE AND WBE CONTRACTING TARGETS

This section establishes broad City-wide contracting goals coupled with quarterly monitoring systems. It is clear that such targets cannot be established as fixed requirements in individual City contracts (i.e. "set-asides") in the absence of a Croson disparity study. (This is one of the reasons I recommend moving forward with such a study in Section Five, below.) Nevertheless, I believe that establishing specific numerical standards will provide a benchmark against which to measure the overall success or failure of the new City programs, as well as measure the performance of individual City bureaus. These particular numerical targets were selected to be somewhat more ambitious than current federal targets as a means of setting a high level of expectations. I also believe it is important to articulate goals separately for minority business enterprises (MBE) and women business enterprises (WBE), unlike the federal government which, during the Reagan/Bush administrations, merged the two through a disadvantaged business enterprise (DBE) standard. This will enable the City to specifically identify the impact of its programs on these different groups of entrepreneurs whose needs and experiences are not always the same. (For the sake of comparison, in 1991, the City's figures translated to 5.6% MBE and 4.8% WBE in construction, 6.8% MBE and 5% WBE for professional services).

These goals must, of course, be reviewed by the Council on a yearly basis in light of actual performance to determine whether they are appropriate. The quarterly reports on the progress being made by the City as a whole and by individual City bureaus in reaching these targets will provide the Council with hard empirical data for measuring success and will provide Council with an indispensable diagnostic tool for determining what further efforts need to be made to improve performance.

A. Council Establishes Minority Business Enterprise (MBE) and Women Business Enterprise (WBE) Contracting Targets.

1. Council approves the following targets for contracting and/or subcontracting with certified MBE and WBE contractors:

<u>MBE</u>	9%
<u>WBE</u>	5%
<u>TOTAL:</u>	14%

2. Only contractors and subcontractors certified by the State of Oregon Office of Minority, Women and Emerging Small Business (OMWESB) or who have applied for state certification may be counted towards meeting the city's MBE and WBE contracting targets established by Council.
3. Council will review appropriateness of established MBE/WBE contracting targets no later than June 30, 1994.

See attachment A for copy of MBE and WBE contracting targets for Portland Development Commission.

B. Council Requests Quarterly Report on MBE/WBE City Contracting Targets

1. The Auditor's Office, working with the Bureau of Purchases and Stores, will produce a quarterly report on the status of MBE/WBE contracting targets. The reports will include data indicating the number of contracts, the types of contracts and the value of contracts awarded to certified MBE and WBE contractors.
2. In her annual proposed budget, the Mayor will report the status of city-wide and individual bureau efforts to achieve the city's established MBE and WBE contracting targets.

Section Two

INCREASE MBE/WBE CONTRACTING OPPORTUNITIES

The initiatives in this section focus on the need to increase MBE and WBE contracting opportunities. As our work on the impediments to full and fair MBE/WBE contracting participation has made clear, there is a lot more the City and other regional governments can do to open our doors to the full community of which we are a part. The steps I am proposing here make it clear that business as usual no longer will be tolerated: The City's resources - which, after all, come from taxes that fall on all citizens regardless of gender, race or ethnic origins — must be dispensed in an evenhanded way for the benefit of all citizens and in a way designed to give all potential contractors a fair opportunity. All City bureaus will be required to address this issue in concrete ways and not simply give lip service to it. Prime contractors will be required to document their outreach efforts to the minority community if they wish to continue doing business with the City.

A. Council Directs City Bureaus to Expand and Document PTE Contract Solicitation Outreach to Certified MBE and WBE Contractors.

1. At the Mayor's request, the City Attorney's Office developed amendments to the Portland City Code (PCC) Chapter 5.68 that require Professional, Technical and Expert (PTE) contracts to include at least one bid solicitation to MBE and WBE certified firm.

NOTE: City Council approved this ordinance (#166419) on April 7, 1993, effective May 8, 1993.

See attachment B for copy of revised PTE ordinance and copy of contract cover sheet.

B. Council Requires City's Prime Contractors to Expand and Document Outreach to MBE and WBE Contractors and Subcontractors.

1. Working with the City's major contracting bureaus, the City Attorney's Office will revise PCC 3.100.080 - .089 to require the city's large potential prime contractors to take more comprehensive steps and to provide more systematic documentation of their outreach towards MBE and WBE contractors.

The current "Minority/Female Purchasing Program" outlined in PCC 3.100.080 - .089 will be replaced with a "good faith efforts" program modelled after Metro's recently enacted program.

The City Attorney's Office will submit their proposed PCC revisions to Council for consideration no later than August 31, 1993.

See attachment C for copy of PCC 3.100.080 - .089 and attachment D for copy of METRO's "good faith efforts" program.

C. Council Authorizes Study to Create a Contracting Pilot Project in the North/Northeast Enterprise Zone

1. The Council directs the City Attorney's Office to develop policy guidelines that would create a pilot project in the N/NE Enterprise Zone to provide bidding advantages to eligible contractors based in that area. The purpose of the project will be to provide better opportunities to current businesses who have demonstrated a commitment to Northeast Portland.

Criteria to be examined will include location of the work, the size of the city contract, the location of the contractor's business, the EEO status of the contractor's workforce, and other criteria.

The Oregon Legislature has provided for affirmative action innovations (ORS 279.059) and granted authority to local jurisdictions to limit bidding for selected affirmative action purposes.

The City Attorney's Office will submit a set of proposed policy guidelines and a proposed program description to Council for consideration no later than November 1, 1993.

See attachment E for copy of ORS 279.059 which grants bidding specifications for affirmative action purposes.

D. Council Establishes City Policy to Support Special Outreach to Minority Community on Individual Projects

1. The City Attorney's Office, working with the appropriate city bureaus, will draft a policy to require an examination of each significant public works project in the inner North/Northeast area to determine whether special community needs are present. Some of these projects may allow for special provisions for mandatory inclusion of MBE and/or WBE contractors when compelling need exists.

The City Attorney's Office will submit their proposed policy guidelines and program description to Council for consideration no later than November 1, 1993.

Section Three

PROVIDE BUSINESS AND FINANCIAL ASSISTANCE TO EXISTING AND EMERGING MBE/WBE CONTRACTORS

This section addresses the technical and financial impediments to fuller participation by new and struggling businesses in the City. It is my hope that these initiatives will address key issues MBE/WBE contractors have identified as impediments in competing for City business. The initiatives making up this group also recognize the need for intergovernmental cooperation in funding programs to address the financial and technical needs of MBEs and WBEs, so that government resources are invested coherently, wisely, and economically. It obviously makes no more sense for different governments in the same region to separately fund and administer parallel programs than to expect the local MBE/WBE community to attempt to cope with competing and confusing systems. I envision the start of a functional intergovernmental system of "one stop shopping" for MBEs and WBEs seeking technical and financial assistance. I believe that the sooner we are able to establish streamlined programs delivering such assistance, the sooner MBEs and WBEs will have the ability to enter confidently into the economic mainstream.

A. Council Authorizes Creation of a Loan Program to Assist Contractors

1. The Portland Development Commission will create a loan guarantee program to be implemented in conjunction with local commercial banks and Multnomah County. The program will entail commercial bank financing of city and county contracts for materials, services and construction, underwritten by a 75% loan guarantee from the city and the county. The city's guarantee would be supported by existing budgeted contract dollars of the city bureau letting the specific contract. The council further endorses the transfer of approximately \$118,700 in residual funds from the Model Cities Economic Development Trust Fund to the Portland Development Commission, which will act as administrator of the program. The Council further directs all city bureaus to participate in this program.

See attachment F for draft copy of "Opportunity Loan Fund," and authorizing memo.

B. Council Seeks Funding Partners to Establish Program to Enhance the Bonding Capacity of MBE and WBE Contractors

1. The Mayor is authorized to negotiate with other local governments, including the Port of Portland, Tri-Met, Multnomah County and others, to establish a multi-jurisdictional coordinated program to improve the bonding capacity of existing and emerging MBE and WBE contractors.

The Mayor will submit to Council for consideration a proposed inter-governmental agreement establishing a multi-jurisdictional coordinated bonding assistance program.

See attachment G for draft copy of "Advocacy Surety Support program for Minority and Women Subcontractors" proposed by the Port of Portland.

C. Council Seeks Funding Partners to Establish Program to Provide Technical Assistance to MBE and WBE Contractors, and Potential Contractors.

1. The Mayor is authorized to negotiate with other local governments, including the Port of Portland, Tri-Met, Multnomah County and others, to establish a multi-jurisdictional program to provide coordinated technical business assistance, including Mentor-Protege programs, to current or potential MBE and WBE contractors.

The Mayor will submit to Council for consideration a proposed inter-governmental agreement establishing a multi-jurisdictional coordinated bonding assistance program.

See attachment H for draft copy of "Mentor-Protege Program" Proposed By Association of General Contractors.

2. The Bureau of Purchases and Stores, working with the City Attorney's Office, will develop technical training on the city's bidding, contracting and purchasing procedures and offer such training in settings accessible to the MBE/WBE community on a regular basis.

Section Four

EXPAND MINORITY/WOMEN EMPLOYMENT OPPORTUNITIES WITH CITY CONTRACTORS

The initiatives in this section stem from a dual premise: First, we have an obligation to use the market power we have available to us through the disbursement of the community's tax dollars to foster equal employment opportunities ("EEO") in the private sector through careful monitoring of those companies receiving the City's business. Second, the development of the City's internal workforce should be utilized, along with broader community training and apprenticeship programs, to extend the opportunities for jobs to a broader segment of the population.

These dual objectives are embodied in the initiatives aimed at better "EEO" monitoring of the City's contractors and vendors, in the proposed modifications to the existing Public Works First Source Program, and in the proposal that the City participate in proposed regional apprenticeship and training programs.

A. Council Requires City's Contractors and Vendors to Make Enhanced Commitments to Equal Employment Opportunity

1. The City Attorney's Office will prepare revisions to PCC 3.100.030 - .040 to provide for more effective EEO monitoring of city contractors and vendors.

The City Attorney's Office will submit their proposed code revisions to Council for consideration no later than August 31, 1993.

See attachment I for a copy of the PCC 3.100.030 - .040.

2. The Bureau of Purchases and Stores has been provided with 1.5 FTEs for FY 93-94 to provide for additional contract compliance. One FTE staffer will monitor the ongoing EEO status of city contractors and vendors. The second part-time staffer will provide oversight for the city's amended PTE contracting program.
3. Within the next fiscal year, the Bureau of Purchases and Stores will develop a database, accessible to all city bureaus, which tracks an individual contractor's compliance with the city's EEO ordinance requirements.

B. Council Authorizes Six-month Extension of Modified Public Works First Source Agreement with CH2A, Inc.

1. Public Works First Source Program contracts and specifications have been revised by the City Attorney's Office. The definition of "existing employee" has been changed from 400 hours to 800 hours or more over a nine-month period, mechanisms for exempting contractors from union hall requirements where appropriate developed, and mechanisms for enhanced monitoring by the Bureau of Purchases and Stores and City Attorney's Office initiated. Council endorses the revisions to the Public Works First Source Program's contracts and specifications.

See attachment J for a copy of April 15, 1993 memo from Madelyn Wessel, Deputy City Attorney, recommending changes to First Source Construction Hiring Program documents.

2. Council authorizes a six-month extension of a modified contract with CH2A, Inc. In six months, the Public Works First Source Program agent's contract will be put out for competitive bid. Interns already placed with bureaus will continue their assignments. New interns will be placed only at the request of bureaus specifically desiring such placements.

The Mayor's Office will submit Public Works First Source contract bid specifications for Council consideration no later than November 15, 1993.

See attachment K for copies of correspondence detailing status and outcomes of Public Works First Source Program.

C. Council Authorizes Development of New Intergovernmental Community-Based Pre-Apprenticeship and Apprenticeship Programs.

1. The city will explore means of linking its Public Works First Source Program to apprenticeship efforts in the community, with the aim of implementing such a linkage by January 1, 1994.
2. The Portland Development Commission, Department of Economic Development, will coordinate the city's involvement in new pre-apprenticeship and apprenticeship training programs and present recommendations to the Council on city involvement with such programs.
3. The City Attorney's Office and the Bureau of Purchases and Stores will work to ensure that city construction contracts support and enforce any programs approved by Council, (i.e. through development of contract terms requiring contractors to register as certified training agents with the State of Oregon Bureau of Labor and Industries and mandating utilization of apprentices on city-funded projects.)

D. Council Authorizes Development of Internship Program Accessible to all City Bureaus.

1. The Bureau of Personnel, working with the Mayor's Office and the Portland Development Commission, Department of Economic Development, and city bureaus, will develop a comprehensive internship program targeting minorities residing in the city, using the existing resources of the city's JobNet program.

See attachment L for a copy of correspondence detailing status and outcomes of Public Works First Source Internship Program.

E. Utilize City Inspectors to Monitor City Contracting and Employment Equity Programs.

1. CH2A and the City Attorney's Office have worked with Bureau of Environmental Services inspectors to encourage broader monitoring of the Public Works First Source Program requirements. Council directs other bureaus employing inspectors who monitor construction projects, such as Transportation and Water, to work with CH2A and the City Attorney's Office to train inspectors to monitor First Source and similar programs.

Section Five

INVESTIGATE AND DOCUMENT DISCRIMINATION

The initiatives in this section recognize what we may wish away but cannot ignore -- that racism and sexism are real issues affecting many in our community. Such entrenched attitudes have a devastating impact on individual lives. As has been shown through the City's experience with the costly Public Works First Source Program, resistance to including minorities and women can also negatively affect the very programs we fund to facilitate positive change. I believe we must develop the legal tools to support the many positive actions included in this proposed package of reforms. I therefore propose that the City initiate the start-up funding for a regional Croson disparity study which will provide the statistical underpinning required to establish enforceable goals. As the City Attorney's Office has put it "what we can require without a Croson study are actions; what we can require with a Croson study are results."

I also believe it important to specifically endorse the concept that the City Attorney's Office may occasionally find it appropriate to investigate cases of potential discrimination affecting City programs aimed at minorities and women.

Finally, industry trade associations and labor groups will be encouraged to work cooperatively with the City in responding to questions of potential discrimination or other barriers to full participation of minorities and women in the regional construction industry.

A. Council Recognizes the Need to Document the Status of Minorities and Women Participating in Public Contracting.

1. The Council endorses a regional approach to completing a Croson study and authorizes the expenditure of \$175,000 from the FY 1993-94 Approved Budget "Special Opportunity Programs" Special Appropriation line item to provide "seed money" to complete such a regional study.
2. The Council authorizes the Mayor to seek funding partners to complete a regional Croson study. Funding partners may include, but are not limited to, Clackamas County, Housing Authority of Portland, Metro, Metro E-R Commission, Multnomah County, Port of Portland, Portland Community College, Portland Public Schools, Oregon Department of Transportation, Oregon Department of General Services, Oregon State System of Higher Education, Tri-Met and Washington County.

The Mayor will report to Council the results of her partnering efforts on an ongoing basis.

See attachment M for a copy of draft letter from Mayor Katz to potential regional funding partners. See attachment N for copy of final report dated December 4, 1992 "Multi-Jurisdictional Disparity/Predicate Feasibility Study." See attachment O for copy of memo from Wendy Robinson, Oregon Assistant Attorney General, on Croson dated October 27, 1992.

3. Council authorizes the City Attorney's Office to investigate cases of potential discrimination affecting city programs such as the First Source Public Works Program, or other programs designed to assist minorities and women. In the event that legal proceedings should be initiated in order to protect rights secured under PCC Chapter 23.01.010 et seq., other civil rights laws, or to remedy harms suffered by the city under any of its programs, the City Attorney will propose such litigation to Council for its consideration.

B. Council Encourages Industry and Labor Representatives to Increase Investigations into Questions of Discrimination in Employment and Contracting

1. Council authorizes the City Attorney's Office and the Bureau of Purchases and Stores to work cooperatively with the Associated General Contractors, and other industry trade and organized labor groups to facilitate an increase in the number of investigations into questions of potential discrimination in employment and contracting.

Section Six
INCREASE THE NUMBER OF ELIGIBLE CERTIFIED
MBE/WBE CONTRACTORS

This section addresses the fact that reliable data about MBEs and WBEs in the State is unavailable. I believe that City bureau managers can play an important role in encouraging MBEs and WBEs with whom they have contact to initiate the state certification process. I am asking the Council to endorse the Mayor's Office, the City Attorney's Office and the Bureau of Purchases and Stores to work with the State to improve its MBE/WBE certification process and reduce the turnaround time for processing applications.

- A. Council Directs Bureau Managers to Encourage Non-Certified MBE and WBE Contractors Doing Business with the City to Be Certified.**
1. Bureau managers are encouraged to provide information to MBE and WBE contractors not certified as MBE or WBE with the State of Oregon to do so. The Bureau of Purchases and Stores will provide bureau managers with the necessary materials to provide contractors.
- B. Council Authorizes the Mayor's Office to Work with State of Oregon to Improve MBE/WBE Certification Process**
1. The Mayor's Office, City Attorney's Office and Bureau of Purchases and Stores are authorized to work with the State of Oregon to improve the MBE/WBE certification process, to reduce turnaround time of processing applications and to minimize paperwork.

See attachment P for a copy of State of Oregon MBE/WBE certification application and process outline.

Section Seven

INCREASE INTERNAL COORDINATION OF LOCAL MBE/WBE ISSUES

This final section recognizes the obvious -- that coming to grips with the myriad of complex concerns and issues surrounding contracting and employment issues must be an on-going process for the City. A criticism of the City has been the lack of coordination in responding to the issues raised by the minority community. To address this concern, I propose that Council establish a City MBE/WBE Contracting Coordinating Committee to coordinate our efforts in these areas and to push forward the initiatives articulated here.

A. Council Authorizes Creation of a City MBE/WBE Contract Coordinating Committee

1. Council establishes a staff work group to coordinate efforts and push policy agenda forward. This committee will recommend, review and advise the city on how to improve MBE and WBE contractors' participation on city contracts.

Membership in the MBE/WBE Contract Coordinating Committee will include representatives from the Bureau of Environmental Services, Bureau of Water Works, Bureau of General Services, City Attorney's Office, Bureau of Purchases and Stores, the Portland Development Commission, Department of Economic Development, Office of Transportation and Office of Finance and Administration.

The MBE/WBE Contract Coordinating Committee will be chaired by the Mayor's Office.

Exhibit B

Metro Study Requirements

1. Address potential Metro disparity in contracting and anecdotal evidence of discriminatory practices by industry sectors.
2. Document available MBE firms annually since 1979 by industry sector.
3. Document all available firms annually since 1979 by industry sector.
4. Profile of Metro utilization of MBE firms by industry sector since 1979.
5. Develop a Utilization Percentage Ratio (UPR) for each industry sector based on Metro's contracting/purchasing history.
6. Provide anecdotal evidence of discriminatory practices by industry sector with emphasis on evidence of such practices on the part of Metro.
7. Recommend remedial measures by industry sector should a basis for such measures be justified based on statistical disparity in contracting practices and on discrimination which caused such disparity.

STAFF REPORT

CONSIDERATION OF RESOLUTION NO. 93-1860, FOR THE PURPOSE OF AUTHORIZING THE EXECUTIVE OFFICER TO EXECUTE AN INTERGOVERNMENTAL AGREEMENT (IGA) WITH THE CITY OF PORTLAND FOR A PREDICATE/DISPARITY STUDY

Date: September 29, 1993

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 an overt preferential requirement as with set-asides or 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 discussing and sharing information on their MBE/WBE programs, activities, statistics and problems. The group was divided over the issue of whether agency programs should emphasize equal opportunity and outreach or return to the format of pre-Croson programs which incorporated set-asides and numerical goals. The members decided 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 was deemed necessary in order to determine if programs to remedy the present effects of past discrimination are appropriate.

As a result, the participating jurisdictions including Metro agreed to a feasibility study designed to define the proper scope of a predicate study. The scope of that study included a definition of the essential elements of proof necessary to support a remedial program(s); the geographical area to be studied; the industry/commodity/service areas to be studied; a review of post-Croson programs and results; and an estimate of predicate study cost. Additionally, agency legal staffs were asked for input on Croson-derived legal requirements and a review of pre-Croson agency programs.

The multi-jurisdictional feasibility study performed by Sara Glasgow Cogan and Associates offered the following logic in citing the reasons for a disparity study:

- Governmental agencies must show a "compelling interest" to provide equitable opportunities to minorities and women in order not to perpetuate or reinforce past and present discriminatory practice;
- There has been evidence that higher participation rates for MBEs and WBEs result from mandated projects;
- A documented disparity study is necessary to sustain any race-based preference programs;
- Such studies are not only essential for establishing such programs, but a clear means of demonstrating governmental concern on discrimination issues.

In of June 1993, the City of Portland published a "Fair contracting and Employment Initiative," committed \$175,000 to institute a predicate study, and requested other governmental entities to become "funding partners" in this regional endeavor. Multnomah County has already responded by pledging \$100,000 over the next two years.

ANALYSIS

The Metro Council first adopted Minority Business Enterprise Utilization Guidelines through passage of Ordinance No. 147629 on May 2, 1979. Even after the Croson decision ten years thereafter, Metro continued its goal based program until September 24, 1992 when it was replaced by the present outreach and good faith efforts program through Ordinance No. 92-466A.

The present program, implemented on January 1, 1993, has impacted a multitude of MBE/WBEs through its outreach provisions and has resulted in documented success stories. However, it was not designed to specifically remedy the impact of historical patterns of exclusion and discrimination or to specifically compensate for the passive barriers within the marketplace of today.

The proposed disparity study would specifically document Metro's "compelling interest," if any, in pursuing specific remedial action to include the use of objective goals, set-asides or other definite and certain preferences as means to ensure restitution and equitable representation.

As an expression of Metro's on-going and justifiable commitment both to the minority community and to overcoming and avoiding even passive discrimination now and in the future, the Executive Officer hereby proposes a \$100,000 Metro commitment to be budgeted and expended over the 1993-94 and 1994-95 fiscal years and pursuant to the terms of the attached intergovernmental agreement.

POLICY IMPACT

1. Council action on this and all IGAs transferring or assuming a function of or to another governmental unit is required by Metro Code Section 2.04.033(a)(2).
2. Metro execution of this IGA should be interpreted as a continuation of Metro's commitment to the fair contracting practices of this community and on-going support for pre-Croson procurement policies including the use of numerical goals and set-asides when necessary to ensure MBE/WBE participation.

FINANCIAL IMPACT

The predicate study will be financed half from the General Fund contingency (\$25,000) and half from the Support Services Fund contingency (\$25,000) in both the 1993-94 and 1994-95 fiscal year budgets for a total cumulative cost of \$100,000. This will require a budget amending Ordinance for the current fiscal year should this Resolution be adopted.

RECOMMENDATION

The Executive Officer recommends approval of Resolution No. 93-1860.

GOVERNMENTAL AFFAIRS COMMITTEE REPORT

RESOLUTION NO. 93-1860A, AUTHORIZING THE EXECUTIVE OFFICER TO EXECUTE AN IGA WITH THE CITY OF PORTLAND FOR A PREDICATE STUDY

Date: December 21, 1993

Presented by: Councilor Hansen

COMMITTEE RECOMMENDATION: At its December 16, 1993 meeting the Governmental Affairs Committee voted 4-1 to recommend Council adoption of Resolution No. 93-1860A. Voting in favor were Councilors Gates, Gardner, Hansen, and Wyers. Councilor Moore voted in opposition.

COMMITTEE DISCUSSION/ISSUES: Discussion of this resolution is addressed in the committee report on Ordinance No. 93-521A. There were only two issues discussed that were specific to the resolution. The first was Councilor Gardner's point in moving Council adoption of the resolution that his motion included amending the Intergovernmental Agreement to stipulate that Metro's commitment was "up to" \$50,000 for 1993-94 and 1994-95. This had been discussed in deliberations on the ordinance.

The second issue concerned who is to be Metro's Project Manager for the disparity study. Council Analyst Casey Short said the IGA stipulates Amha Hazen as project manager, but Mr. Short's discussions with former Regional Facilities Director Neil Saling indicated Mr. Saling intended to name Berit Stevenson as project manager. Mr. Short said he wanted to raise this issue with the committee so they would know the question of who is to manage the project for Metro might be raised when Council considers the resolution. Councilor Wyers asked why General Counsel was not designated as project manager. Mr. Short suggested he work with General Counsel Dan Cooper and Deputy Executive Officer Dick Engstrom to determine whom to recommend as project manager. Councilor Wyers agreed to let staff work this out, but supported naming a representative from General Counsel as project manager because that office is responsible to both Council and the Executive Officer.

[Note: The version of the resolution before Council will contain the amendment approved by the committee, which states, "That Metro intends to contribute up to \$50,000 in both the 1993-94 and 1994-95 fiscal years. . ." (page 2, Section 2). As of this writing, the name of the Metro project manager has been deleted, pending assignment of that responsibility. The IGA also deletes reference to Neil Saling, Regional Facilities Director, as the recipient of legal notices pertaining to the agreement.]

Exhibit 1

INTERGOVERNMENTAL AGREEMENT
FOR THE PURSUIT OF A
REGIONAL MBE/WBE DISPARITY STUDY

THIS Agreement is entered into between METRO, a metropolitan service district organized under the laws of the state of Oregon and the 1992 Metro Charter, located at 600 N.E. Grand Avenue, Portland, Oregon 97232-2736, and the City of Portland, hereinafter referred to as CITY, located at 1120 S.W. Fifth Avenue, Portland, Oregon 97204.

W I T N E S E T H

WHEREAS, CITY has generated a "Fair Contracting and Employment Initiative " wherein it proposes to initiate the start-up funding for a Regional Disparity Study which would provide the "statistical underpinnings" for enforceable Minority and Women-Owned Business Enterprise (MBE/WBE) Opportunity Goals as outlined in Section Five of the draft attached hereto as Exhibit A (and hereinafter referred to as the Study); and

WHEREAS, METRO acting by a through its Executive Officer and Council concurs that those negatively impacted by past discrimination deserve immediate, preferential and remedial action, and the findings of a Regional MBE/WBE Disparity Study are essential to the establishment of such programs; and

WHEREAS, METRO supports a cooperative regional approach among governments to accomplish such a Study and seeks to contribute to the initial start-up funding as proposed by City; and

NOW THEREFORE, the premises being in general as stated in the foregoing Recitals, it is agreed by and between the parties hereto as follows:

CITY AGREES:

1. To act as lead agency in the solicitation of funding partners to complete a regional disparity study including the Metropolitan Exposition Recreation Commission and Multnomah, Clackamas and Washington Counties; and
2. To act as a competent and professional independent contractor for all aspects of the Study and for all Study purposes without specific compensation save the Study contribution referenced herein; and
3. To secure all services, document all work products, and complete all tasks required for completion of a regional disparity study within METRO boundaries and in accordance with METRO Study Requirements attached hereto as Exhibit B; and

4. To ensure that the CITY's Project Manager provides periodic written progress summaries and meets with the METRO Project Manager each month during the course of this Agreement to discuss all developments and outline the progress of all tasks related to the Study; and
5. To provide METRO with all documentation generated by the Study without further solicitation and at no additional cost; and
6. To document and acknowledge on all final documents arising from this Study that partial funding was provided by METRO; and
7. To hold harmless, indemnify, protect and defend upon request METRO and its officers, employees and agents from any and all claims, suits or actions of any nature, including, but not limited to all costs and attorney fees arising out of or related to CITY's study activities or those of its officers, subcontractors, agents or employees.

If CITY fails to defend or indemnify METRO, METRO may, at its option, bring an action to compel same or undertake its own defense.

In either event, CITY shall be responsible for all of METRO's costs, expenses and attorney fees including the reasonable market value of any services provided by METRO employees.

METRO agrees:

1. That it supports CITY's intent to pursue a Regional MBE/WBE Disparity Study as outlined hereinabove and seeks to facilitate the Study's immediate commencement; and
2. That METRO intends to contribute up to \$50,000 in both the 1993-94 and 1994-95 fiscal years for a total commitment to the Study cost of up to ONE HUNDRED THOUSAND AND NO/100THS (\$100,000.00) DOLLARS; and
3. That METRO's contribution will be strictly limited to the above amount and there are no further obligations expressed or implied by such action; and
4. That METRO neither intends or seeks any direct involvement, sponsorship privileges or supervisory responsibilities for this project except at the behest of CITY; and
5. That it will, from whatever records currently exist, provide information on its past competitive bidding, contracting and MBE/WBE activities; and
6. That METRO may withhold funding and terminate this Agreement in whole, or in part, at any time prior to Study completion, if METRO, in its sole discretion, determines that CITY has failed to comply with the terms and conditions of this agreement.

In the event of such action, METRO shall promptly notify CITY in writing as to the circumstances and the reasonable means, if any, for resolution.

BOTH PARTIES AGREE:

1. That METRO's Project Manager shall be ~~Amha Hazen, MBE/WBE Advocate, acting appointed by and act~~ on behalf of METRO's Liaison Officer, ~~Neil E. Saling~~, who is specifically authorized to review and approve all activities and work products; and
2. That CITY's Project Manager shall be Madelyn Wessel, Deputy City Attorney or other person designated in writing by the Mayor, and she is specifically authorized to execute all project tasks and render all project services; and
3. That all legal notices provided under this Agreement shall be delivered personally or by certified mail to the individuals and addresses listed herein below and that they may only be changed by written notice delivered in accordance with this provision:

CITY:

Madelyn Wessel
Deputy City Attorney
City of Portland
1120 S.W. Fifth Avenue
Portland, Oregon 97204

METRO:

~~Neil E. Saling~~
Director, Regional Facilities
Metro
600 N.E. Grand Avenue
Portland, Oregon 97232

4. That both parties shall hold harmless, indemnify, protect and defend the other and its officers, employees and agents from any and all claims, suits or actions of any nature, including, but not limited to all costs and attorney fees arising out of or related to these Study activities or those of its officers and employees; and
5. That execution of this Agreement does not bind either party to the findings and recommendations of the Study; and
6. That this Agreement may be terminated in whole, or in part, whenever both parties agree that the continuation of the Study will not produce the beneficial results anticipated or results commensurate with the proposed level of funding; and

That if termination is required, the parties shall agree upon the terms, conditions and effective date(s) for such action, or in the case of partial termination, the specific Study aspects or activities to be abandoned; and

7. That this is the entire Agreement between the parties. There are no understandings, agreements or representations, oral or written, not specified herein.

No waiver, consent, modification or change of terms shall bind either party unless committed to writing and signed by both parties, and if such action is taken, it shall be effective only in the specific instance and for the specific purpose given; and

8. That if any portion of this Agreement is found to be illegal or unenforceable, this Agreement shall nevertheless remain in full force and effect and the offending provision shall be stricken; and
9. That this Agreement is binding on each party, its successors, assigns and legal representative and may not, under any circumstances or conditions, be assigned or transferred by either party; and
10. That the situs of this Agreement is Portland, Oregon. Any litigation over this Agreement shall be governed by the laws of the state of Oregon and shall be conducted in the circuit court of the state of Oregon, for Multnomah County, or, if jurisdiction is proper, in the U.S. District Court for the District of Oregon.

CITY, by signature of its duly authorized representative, hereby acknowledges that it has read, understands and agrees to be bound by the terms and conditions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have set their hands on the day and year set forth below.

CITY OF PORTLAND

METRO

By: _____

By: _____

Vera Katz, Mayor

Rena Cusma, Executive Officer

By: _____

Barbara Clark, Auditor

APPROVED AS TO FORM

By: _____

By: _____

Madelyn Wessel
Deputy City Attorney

Daniel B. Cooper
General Counsel