

RESOLUTION NO. 3167, as Amended

A RESOLUTION of the Port of Seattle establishing minority, women and disadvantaged business and equal employment opportunity requirements for the procurement of materials and supplies and construction, consultant and other services by the Port and superceding Resolution Nos. 3026, 3046.

MINORITY/WOMEN/DISADVANTAGED

and

EQUAL EMPLOYMENT OPPORTUNITY

PROCUREMENT REQUIREMENTS

WHEREAS, by Chapter 61 of the Laws of 1981, the Legislature of the State of Washington required that state and local agency procedures and guidelines for the procurement of architectural and engineering services include a plan to ensure that minority and women business enterprises are afforded the maximum practicable opportunity to compete for and obtain public contracts for services; and

WHEREAS, by Chapter 120 of the Laws of 1983, as amended by Chapter 328 of the Laws of 1987, the Legislature of the State of Washington found that minority and women businesses are significantly under-represented and have been denied equitable competitive opportunities in contracting; and

WHEREAS, the United States Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) established new standards by which to judge the constitutionality of minority business enterprise programs of state and local governments; and

WHEREAS, by Resolution No. 3046, adopted March 28, 1989, the Port amended Resolution No. 3026 to respond to issues raised in the Croson decision and authorized the Executive Director to conduct a general program review of minority/women/disadvantaged businesses and to recommend appropriate changes in the Port's M/WBE and EEO Requirements; and

WHEREAS, pursuant to said authorization, the Port participated in funding two studies of such discrimination and received reports entitled "Utilization of Minority and Women's Business in the Construction and Consulting Fields in King and Pierce Counties" (dated January 1990) and "Study of Minority/Women Business Participation in Purchasing and Concessions" (dated July 1990); and

WHEREAS, both studies concluded that discrimination against minority and women businesses on the basis of race or gender is a serious and significant problem in local construction, consultant and purchasing industries; and

WHEREAS, in addition to said studies, the Port conducted meetings to receive comments and documentation regarding discrimination and the effects thereof on minority and women business enterprises in the Seattle-King County metropolitan area; and

WHEREAS, the Port received comments and documentation regarding perceptions of discriminatory treatment and impact resulting from actions by employees of the Port or policies of the Port and

WHEREAS, the comments and documentation received by the Port substantiated the conclusions set forth in said studies; and

WHEREAS, after considering said studies, comments and documentation, the Executive Director has recommended certain revisions to the Port's M/WBE and EEO Requirements to comply with the constitutional requirements set forth in the Croson decision and to ensure that minority and women businesses have the maximum practicable opportunity to compete for and participate in contracts with and for the Port; and

WHEREAS, this Resolution is necessary to overcome the present effects of past discrimination and to achieve the goals of equitable utilization of minority and women businesses in contracting with and by the Port;

NOW, THEREFORE, BE IT RESOLVED by the Port of Seattle as follows:

Section 1. Findings.

After careful consideration of the reports entitled "Utilization of Minority and Women's Business in the Construction and Consulting Fields in King and Pierce Counties" (dated January 1990) and "Study of Minority/Women Business Participation in Purchasing and Concessions" (dated July 1990) and of the comments and documentation provided otherwise to the Port, the Port makes the following findings:

A. Minority and women businesses have been systematically discriminated against and excluded on the basis of race and/or gender from contracting and subcontracting opportunities in private commerce in the Seattle/King County metropolitan area.

B. Such discrimination has deprived minorities and women of numerous employment, investment, ownership and management opportunities, and has precluded opportunities for the Port to equitably utilize minority and women businesses in its contracts.

C. In effect, the Port became a passive participant in such discrimination.

D. Race and gender-neutral measures previously employed by the Port did not overcome discrimination against minority and women businesses in contracting and did not prevent or protect the Port from becoming a passive participant in such discrimination.

E. State and local governments in Washington State have declared and determined that public policy and the public interest require the elimination of discrimination against minority and women businesses and the increased utilization of such businesses in Port contracts.

F. There exist no race and gender-neutral measures that in, of and by themselves will prevent the Port from continuing such passive participation in such discrimination.

Section 2. Purpose and Scope.

A. The purpose of this Resolution is to mitigate the past and present effects of discrimination, to achieve the goal of equitable utilization of minority, women and disadvantaged businesses and to provide the maximum practicable opportunity for their increased participation in contracts with and for the Port. Further, it is the purpose and intent of this Resolution to ensure that neither the Port nor its contractors shall discriminate on the basis of creed, race, religion, color, sex, sexual orientation, age, national origin or the presence of any sensory, mental or physical disability in the award and performance of contracts with the Port.

B. The provisions of this Resolution shall apply to all contracts awarded by the Port and services utilized by the Port, except as may be hereinafter specifically exempted, and shall be liberally construed for accomplishment of the policies and purposes of this Resolution.

Section 3. Definitions.

All words shall have their ordinary and usual meanings except those defined in this section which shall have in addition the meanings set forth below. In the event of conflict, the specific definition set forth below shall presumptively, but not conclusively, prevail.

A. "Affirmative Efforts" means making vigorous attempts in good faith to contact and contract with certified businesses.

B. "Bidder or Proposer" means any person, firm or corporation which formally submits a bid or proposal to provide materials, supplies or services, including expert personal, professional or technical services and construction services, to the Port in response to a solicitation for bids or proposals issued by the Port.

C. "Certification" means the process by which the State of Washington Office of Minority and Women's Business Enterprises (hereinafter "OMWBE") determines that a business meets the requirements and criteria as a minority, women, combination, or disadvantaged business under applicable state and federal laws and regulations.

D. "Certified Business" means a firm which has been notified by the OMWBE in writing that it has met the requirements and criteria as either a minority, women, combination, or disadvantaged business.

E. "Combination Business Enterprise" or "CBE" means a business certified as such by OMWBE, in accordance with applicable state laws and regulations.

F. "Commercially Useful Function" means the performance of a distinct element of work for which a firm has the skill and expertise as well as the responsibility of actually performing, managing and supervising. In order to evaluate whether a business is performing a commercially useful function, the Executive Director shall establish criteria including, but not limited to, the type and amount of work to be performed, industry practices and other relevant factors. The criteria shall be consistent with applicable state and federal laws, and shall be developed to accomplish the purpose and intent of this Resolution.

G. "Construction Contract" means a contract entered into the Port for the construction, repair, rehabilitation, alteration or improvements to capital facilities to real property, other than ordinary maintenance.

H. "Consultant Contract" means a contract entered into by the Port for the procurement of expert personal, professional and/or technical services or assistance.

I. "Contract" means a mutually binding legal relationship or any modification thereof obligating a contractor to provide materials, goods or services and the Port to pay therefor.

J. "Contractor" means the person, firm, business, organization, company, partnership or corporation which has a contract with the Port to provide materials, goods or services, including construction or consultant services.

K. "Contract Administering Department" means the Port's department, officer or employee, authorized to administer contracts on behalf of the Port.

L. "Department" means any organizational unit of the staff of the Port so designated by the Executive Director.

M. "Disadvantaged Business Enterprise" or "DBE" means a business certified as such by OMWBE, in accordance with applicable federal laws and regulations.

N. "Eligible Certified Business" means a business which has been certified by the OMWBE for contracts identified by the Executive Director, is located in the Puget Sound area or can demonstrate that it has suffered from the effects of racial or gender based discrimination in the Puget Sound area.

O. "Executive Director" means the Executive Director of the Port or the Executive Director's designee.

P. "Goods and Services" means all goods and services, including construction, consultant services, materials, equipment, supplies and miscellaneous services.

Q. "Joint Venture" means an association of two or more persons, partnerships, corporations or any combination of them, established to carry on a single business activity which is limited in scope or purpose. The association's members in the single business activity have combined their capital, efforts, skills, knowledge or property, and they exercise control and share in profits and losses in proportion to their contribution to the business activity.

R. "Minority" or "Minorities" means those persons described in Section 12 of this Resolution or otherwise under applicable state and federal laws and regulations.

S. "Minority Business Enterprise" and "MBE" means a business certified as such by OMWBE, in accordance with applicable state laws and regulations.

T. "Minority and Women Business Enterprise Advisory Board" or "M/WBE Advisory Board" means a board appointed by the Executive Director to provide information and recommendations related to the implementation of this Resolution to the Executive Director.

U. "Purchasing Contracts" means those contracts awarded by the Port for the purchase of goods and services, excluding construction and consultant contracts.

V. "Reserved Contract" means a contract for which the consideration of bids or proposals is limited to or reserved for the bids or proposals submitted by certified businesses.

W. "Small Business Concern" means a small business as defined pursuant to Section 3 of the federal Small Business Act and relevant regulations promulgated pursuant thereto.

X. "Solicitation" means a request for the provision of goods, materials and services. Solicitation shall include requests for proposals, quotes, invitations to bid and similar efforts.

Y. "Subcontract" means a contract or agreement to perform a specified part of the work, or to provide specified goods or services, under or subordinate to a previous contract between a contractor and the Port.

Z. "Subcontractor" means an individual or business obtaining a subcontract with a contractor, to perform a specified part of the work, or to provide specified goods or services, under or subordinate to a previous contract between a contractor and the Port.

AA. "Substitution, Substitutes" means replacing one certified business for another, or increasing the level of utilization of certified businesses in order to maintain the required level of utilization in accordance with the bid contract or proposal specifications and commitments.

BB. "Utilization Goals" means those biennial and specific minimum contract goals for the participation of minority, women and disadvantaged businesses in contracting opportunities with the Port, whether as prime contractors or subcontractors. The goals shall be expressed as a numerical percentage of the total dollar value of all contracts or a specific contract, as the case may be, to be awarded by the Port. These goals shall be applicable to businesses organized for profit, along with governmental agencies and quasi-governmental agencies, unless otherwise provided in this Resolution or under applicable state and federal laws and regulations.

CC. "Utilization Requirements" means those efforts which bidders, contractors, subcontractors and the Port shall make to meet the utilization goals.

DD. "Women Business Enterprise" or "WBE" means a business certified as such by OMWBE, in accordance with applicable state laws and regulations.

EE. "Minority Women's Business Enterprise" or "MWBE" means a small-business concern, organized for profit, performing a commercially useful function, which is legitimately owned and controlled by one or more minority women and is certified by the office. The owners must be United States citizens or lawful permanent residents.

Section 4. Powers and Duties.

A. The Executive Director is hereby authorized to take such actions as may be necessary to implement the policies of this Resolution or such responsibilities as may be assigned hereunder by the Port or its standing committees. The Executive Director is further authorized to revise or substitute the definitions and requirements of this Resolution as may be necessary to ensure that the policies and implementation of this Resolution comply with all applicable federal and state laws and regulations, and to delegate such responsibilities and authority as necessary to implement this program.

B. In addition, the Executive Director shall be authorized to:

1. Establish biennial utilization goals for the Port in accordance with the factors and considerations set forth in Section 5 of this Resolution;

2. Enter into cooperative agreements with other government agencies for the purpose of increasing the participation of certified businesses in government contracting;

3. Establish rules, regulations and procedures for implementing and administering this Resolution;

4. Monitor and enforce the goals and utilization requirements set forth in this Resolution;

5. Provide a list of certified businesses provided by the State of Washington Office of Minority and Women's Business Enterprises;

6. Ensure that eligible certified businesses are placed, where possible, on solicitation and bidding lists maintained by the Port;

7. Implement alternatives for arranging or reserving contracts by size and type of work so as to enhance the possibility of participation by eligible certified businesses;

8. Designate employees of the Port to assist in the administration and implementation of this Resolution;

9. Develop and implement appropriate notice procedures to advise eligible certified businesses of contracting opportunities with the Port;

10. Establish technical assistance and other programs and strategies as may be necessary and if such funds are available to assist eligible certified businesses in overcoming the effects of past and present discrimination, and to increase or maximize contracting opportunities for eligible certified businesses; and

11. Monitor the implementation and accomplishment of the provisions and objectives of this Resolution by the employees of the Port.

C. The Executive Director shall designate a Minority/Women/Disadvantaged Business Liaison Officer (M/W/DBE Liaison Officer) who shall have direct and open access to the Executive Director for the purpose of implementing the requirements of this Resolution. In addition, the M/W/DBE Liaison Officer shall:

1. Serve as a resource to eligible certified businesses for participating in contracts with the Port and to staff of the Port for maximizing participation by eligible certified businesses in such contracts;

2. Be responsible for the daily oversight and monitoring of the Port's implementation of this Resolution;

3. Prepare and provide reports related to the implementation of this Resolution; and

4. Work with and provide staff support to the M/WBE Advisory Board.

D. 1. The Executive Director shall appoint a Minority and Women Business Enterprise Advisory Board (M/WBE Advisory Board) which shall provide to the Executive Director information and recommendations related to the implementation of this Resolution.

2. The M/WBE Advisory Board shall report to the M/W/DBE Liaison Officer and assist him/her in carrying out its work.

3. The Executive Director may issue rules and procedures further defining the activities and operation of the M/WBE Advisory Board.

E. The M/W/DBE Liaison Officer will investigate the feasibility of developing and implementing a mentoring program to assist businesses in the construction trades.

Section 5. Biennial Utilization Goals.

A. Pursuant to the following procedures, the Executive Director shall establish separate and reasonably achievable biennial goals for the utilization of minority, women and disadvantaged businesses in contracts to be awarded by the Port. The goals shall be used to direct the efforts of the Port in securing utilization of eligible certified businesses and to measure the success of those efforts. The goals shall be expressed in terms of the total dollar value of all contracts to be awarded by the Port, and may be established for categories of contracting, such as planning, architectural, engineering consultant, general consultant, construction and purchasing.

B. To the extent relevant information is available, the Executive Director shall consider the following factors in developing and establishing biennial goals:

1. The number and types of contracts likely to be awarded by the Port;

2. The number and types of minority, women and disadvantaged businesses likely to be available to compete for such contracts or subcontracts under such contracts;

3. The past levels of participation by minority, women and disadvantaged businesses in contracts awarded by the Port and other governmental agencies in the Seattle-King County Metropolitan Statistical Area;

4. The level of participation recommended by governmental and private agencies in the Seattle-King County Metropolitan Statistical Area whose purpose is to promote the use of minority, women and disadvantaged businesses;

5. Demographic and other business ownership data provided by the Bureau of the Census of the U.S. Department of Commerce, the State of Washington and other sources; and

6. Any other information relevant to achieving the purposes of this Resolution.

C. The Executive Director shall publish a notice announcing the proposed biennial utilization goals and requesting comments from the public, and private and public agencies. The period during which comments may be submitted shall not be less than thirty (30) days from the date of publication of the notice. In accordance with the requirements and factors set forth in this Resolution and after due consideration of timely comments received from the public, and from private and public agencies, the Executive Director shall establish the biennial utilization goals for the Port. The Port's goals, whether biennial or otherwise, for federally and state-assisted projects shall be established by the Executive Director in accordance with applicable federal and state laws, regulations and grant conditions.

D. Each department within the Port shall annually formulate a plan for achieving the biennial goals. The plan must be filed with the Executive Director for review. Each department plan shall include:

1. The method(s) the department will use to encourage eligible certified business participation in the procurement and contracting process for goods, materials and services for which they have been delegated authority to issue such contracts;

2. The method(s) the department will use to achieve the biennial goals;

3. A forecast of contracts to be administered by the department, including estimates of the number, probable monetary value, if known, type of contracts to be awarded, and the estimated solicitation dates; and

4. A statement indicating the method of recording and reporting the utilization of eligible certified businesses.

E. The sum of the dollar amounts of contracts or subcontracts awarded to eligible certified businesses shall be compared to the Port's biennial goals to measure, in part, the success of the Port's efforts to utilize eligible certified businesses.

Section 6. Contract Utilization Goals.

A. In addition to biennial goals, separate contract goals shall be established for the utilization of eligible certified businesses. Such contract goals shall be based upon factors in Section 5 of this Resolution, the extent of the contracting opportunities for eligible certified businesses, the availability of eligible certified businesses to perform such work, and provide goods and services and any other information or factors relevant to achieving the purposes of this Resolution such as equitable utilization of firms to ensure balance among groups.

Contract goals may be set as follows:

1. As a reserved contract goal in which eligible certified businesses will be the only allowable bidders or proposers. Under such goal, the contract may further specify that:

- a. the entire contract must be performed by eligible certified businesses;
- b. the contract must be performed to a designated level by eligible certified businesses; or
- c. the contract must include additional eligible certified business participation for subcontracting opportunities.

2. As a goal in which eligible certified businesses may participate as contractors or subcontractors, and that such participation may be required by use of:

- a. separate goals for MBEs and WBEs;
- b. as a combined goal for MBEs or WBEs or both in those instances where contract sizes are small or the reasonable opportunity exists for only one subcontract;
- c. as a single goal for either MBEs or WBEs;
- d. as a competitive factor in which required minimum participation is not specified but respondents to solicitations must demonstrate affirmative efforts to utilize eligible certified businesses and are evaluated on their effort and success.

3. Any other approach calculated to achieve the purposes of this Resolution.

B. For all contracts, accomplishment of contract utilization goals established in accordance with this Resolution shall be based on the dollar amount of the contract or subcontract. Utilization of eligible certified businesses toward accomplishment of the goals shall be calculated in the following manner:

1. General. The dollar value of all contracts awarded to an eligible certified business shall be counted towards accomplishment of the applicable contract utilization goal, except as provided in this Section 6.
 - a. The total dollar value of each contract awarded to a combination business shall be apportioned on the basis of the percentage of ownership to the contract goals for minority and women businesses, respectively.
 - b. The total dollar value of each contract awarded to a business owned and controlled by minority women shall be counted either toward the minority or women business contract goal, but not to both.
 - c. For federally assisted contracts, utilization of certified businesses shall be counted in accordance with applicable federal rules and regulations. Such federally assisted contracts shall also be counted toward the accomplishment of the Port's biennial utilization goals.

2. Subcontracts. If a bidder or contractor utilizes eligible certified businesses, the amount of the subcontract awarded to the eligible certified business is counted toward meeting the applicable goals under the formula set forth in paragraph 1 above. The dollar value of any work that the eligible certified business will further subcontract to other than eligible certified firms shall not be counted toward the applicable contract goals.

3. Joint Ventures. In the case of a joint venture, a portion of the total dollar value of a contract awarded to the joint venture equal to the percentage and control of the eligible certified business joint venture partner is counted toward the applicable goal; provided, that the portion of the joint venture's work which is the responsibility of the eligible certified business partner must be set forth in detail and in a manner sufficiently demonstrating that the work to be performed by the certified business partner is of a commercially reasonable dollar value commensurate with the eligible certified business joint venture partner's percentage and control of the joint venture. Further, the eligible certified business' participation in a joint venture shall be based on the sharing of real economic interest and risks in the venture, and shall include proportionate control over management, interest in capital acquired by the joint venture, and interest in earnings.

4. Goods and Services. A contract for goods and services awarded to an eligible certified business which assumes the actual and contractual responsibility for the provision of the supplies and materials shall be counted as follows:

a. Biennial Utilization Goal: The total dollar value of a contract for goods and services directly awarded by the Port to an eligible certified business which is a manufacturer/supplier is counted toward the biennial utilization goal.

b. Contract Goal: The total dollar value of a subcontract for goods and services awarded by a contractor to an eligible certified business which is a manufacturer (i.e., a business that produces goods from raw materials or substantially alters them before resale) is counted toward the goal. The total dollar value of a subcontract for goods and services awarded by a contractor to an eligible certified business which is a regular dealer (i.e., a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business) is counted toward the goal. For construction contracts only twenty percent (20%) of the total dollar value of a subcontract for goods and services awarded by a contractor to an eligible certified business which is not a manufacturer or regular dealer is counted toward the applicable goal.

c. Only eligible certified businesses which perform a commercially useful function shall be counted toward accomplishment of a utilization goal. Consistent with normal industry practices, an eligible certified business may enter into subcontracts. If the eligible certified business subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the eligible certified business will be presumed not to be performing a commercially useful function; provided the eligible certified business may present evidence to rebut this presumption. To determine whether an eligible certified business will or is performing a commercially useful function, the amount of work subcontracted, industry practices, and any other relevant factors shall be evaluated.

Participation by businesses acting as brokers (unless such is consistent with normal industry practice), fronts, conduits or similar pass-through arrangements shall not be acceptable and businesses determined to be acting under such arrangements may be disqualified from contracting with the Port as provided elsewhere in this Resolution.

d. The Port may reserve contracts or portions thereof for competition solely among eligible certified businesses and in accordance with guidelines set by the Executive Director. Primarily, the reserved contract approach shall be used to counteract the effects of past and present discrimination that have prevented eligible certified businesses from participation as contractors with the Port. The reserved contract approach may also be used to ensure increased participation by eligible certified businesses, including businesses owned by specific racial groups or owned by women. In order to ensure competitive procurement, contracts shall not be reserved unless there are a sufficient number of eligible certified businesses available with capabilities consistent with the requirements of the contract to be reserved. Reserved contracts will be utilized only when all other methods provided for in this resolution have proved unsuccessful in remedying past discrimination. The guidelines for the use of reserved contracts will be submitted to the Commission for approval. Should the need arise to use reserved contracts, the Commission will be informed prior to implementation.

e. The Executive Director may authorize other strategies that are calculated to accomplish the Port's biennial goals. Those strategies may include, but are not limited to, setting goals for prime contracting and developing other approaches to address issues regarding the equitable utilization of eligible certified businesses (including specific racial groups).

Section 7. Solicitation and Contracting Requirements—Construction, Consultant Service and Purchasing Contracts.

A. The opportunity shall be optimized for eligible certified businesses to compete for construction, consultant and purchasing contracts which are not subject to formal advertised competitive bidding or competitive negotiations. In addition, if the soliciting department is not currently meeting or exceeding the Port of Seattle W/MBE goals for the category of solicitations at the time of solicitation, then available eligible certified firms must be included in such a solicitation, unless otherwise approved by the Executive Director. Bid conditions and requests for proposals for such contracts shall require bidders and proposers to make affirmative efforts to utilize eligible certified businesses as subcontractors and suppliers.

B. For construction, consultant and purchasing contracts subject to formally advertised competitive bidding or competitive negotiations requirements, bid conditions and requests for proposals shall require, in addition to the requirements set forth in Subsections C and D below and elsewhere in this Resolution, that bids, quotations and proposals include participation by eligible certified businesses as established in Section 6 of this Resolution.

C. In order to implement the provisions of this Resolution, efforts including, but not limited to, the following shall be made:

1. Every reasonable effort shall be made to solicit bids and proposals from eligible certified businesses; such efforts may include advertising contracting opportunities in media which focus on minority and women business communities, arranging contracts by size and type of work so as to enhance the possibility of participation by eligible certified businesses, and, when advisable, reducing or waiving bid bonding and other public bidding requirements except those as may be specifically established by the Port or imposed by state law.

2. For all contracts for which utilization goals have been established, bidders or proposers shall be informed in the solicitation that each bidder or proposer shall submit MBE or WBE and DBE participation information to the Port and that award of the contract will be subject to compliance with the utilization requirements established by the Port. The solicitation shall provide when such information shall be submitted. Such information shall include at least the following:

a. The names and addresses of the eligible certified businesses the bidder or proposer will utilize under the contract;

b. A description of the work each named eligible certified business will perform; and

c. On competitively bid procurement, the dollar or percentage of participation, as may be required, for each named eligible certified business.

3. No contract shall be awarded to any person or business which is disqualified from doing business with the Port, nor shall any contract be awarded to any person or business which is currently disqualified from doing business with any agency of the federal government or any governmental agency in King County or with the State of Washington based on failure to comply with minority, women or disadvantaged business utilization, or contract compliance requirements which are substantially the same as those of this Resolution, subject to appeal to the Executive Director.

D. All contract documents for which utilization goals have been established shall include the following:

1. A provision stating that this Resolution is incorporated by reference into each contract and that failure to comply with any of the requirements of this Resolution by a contractor will be considered a breach of contract;

2. A requirement that during the term of the contract the contractor shall comply, as to tasks and dollar amounts throughout the term of the contract, with all commitments made in the contractor's bid submittal or proposal for the participation by eligible certified businesses unless otherwise approved by the Executive Director and that, unless otherwise approved by the Executive Director, the eligible certified businesses which for any reason no longer remain associated with the contract, or the contractor, shall be substituted with other eligible certified businesses;

3. A requirement that, prior to entering into subcontracts with eligible certified businesses, the contractor shall provide to all eligible certified businesses participating on the contract a copy of all commitments made in the contractor's bid submittal or proposal for the participation by certified businesses, along with copies of contract provisions regarding Minority, Women, or Disadvantaged Business Enterprise utilization and compliance entered into by the contractor with the Port;

4. A provision stating that failure to comply with contract requirements related to utilization of eligible certified businesses will be considered a material breach;

5. A provision requiring the contractor to ensure that its subcontractors make affirmative efforts to utilize eligible certified businesses;

6. A provision requiring the contractor to maintain sufficient records to enable the Port to monitor compliance with these utilization requirements;

7. For construction and consultant contracts, where applicable, a provision requiring the contractor to submit with each progress payment request and final payment request a statement of amounts actually paid to each eligible certified business under the contract;

8. A provision setting forth sanctions or other actions that may be taken in the event the contractor fails to comply with the utilization requirements as provided in Section 13 below; and

9. A provision requiring that participation by eligible certified businesses be taken into account in contract supplements, amendments or change orders such that, insofar as practicable, overall utilization will remain at levels not less than those committed to at contract award.

E. All contracts or other agreements between the Port and other governmental or quasi-governmental agencies or public corporations, whereby such agencies or corporations receive funds from or through the Port for the purpose of contracting with businesses to perform public improvements, shall require such agencies or corporations to award and administer such contracts consistent with the provisions of this Resolution.

Section 8. Monitoring, Reporting and Enforcement.

A. The Executive Director shall be responsible for monitoring compliance with the provisions of this Resolution by the Port and by all contractors to the Port. The Executive Director is hereby authorized to require contractors to provide any records, information and documents deemed relevant for such monitoring activities.

B. Complete and detailed records shall be maintained regarding compliance with this Resolution. Such records shall include the dollar value and the subject matter of each contract along with the name of the contractor, the participation levels (in dollars, number of contracts awarded and type of work) of eligible certified businesses where the contract award provides for such participation, and other information appropriate to demonstrating compliance with this Resolution.

C. Upon receipt of a written and signed allegation that any contractor or subcontractor has violated any provision of this Resolution, or if an apparent violation is discovered from information gained through compliance monitoring, an investigation shall be ordered. If, based on such investigation,

it is determined that a violation may have occurred, then the contractor or subcontractor shall be notified of the circumstances and provided an opportunity to rebut the determination that a violation has occurred, according to procedures established by the Executive Director. Contract payments may be suspended or withheld pending the final determination that a violation has occurred. If it is determined that a violation has occurred, one or more of the sanctions set forth in Section 13 of this Resolution may be imposed.

D. Any person, firm, corporation, business, union or organization which prevents or interferes with a contractor's or a subcontractor's efforts to comply with the requirements of this Resolution or which submits false or fraudulent information to the Port concerning compliance with this Resolution shall be subject to such fines, penalties and sanctions as may be provided under this Resolution and local, state and federal law.

E. Any person, firm, corporation, business, union or organization which retaliates against or otherwise seeks retribution from an eligible certified business or other interested party who has brought a complaint or concern to the attention of the Port regarding policies, practices, actions or efforts to circumvent the implementation of this Resolution shall be subject to such fines, penalties and sanctions as may be provided under this Resolution and local, state and federal law.

F. In order to ensure compliance with the provisions of this Resolution, the Executive Director may issue rules and procedures for the monitoring, reporting and enforcement of this Resolution, and of contracts awarded by the Port or in which funds from the Port are involved.

Section 9. Certification.

A. Pursuant to Chapter 328, Laws of 1987, as may be amended or succeeded, the State of Washington Office of Minority and Women's Business Enterprises (OMWBE) shall be the sole authority for certifying and decertifying MBEs, WBEs, DBEs and CBEs. Unless expressly provided otherwise in a solicitation request, all businesses identified in bid submittals or proposals in response to solicitations requesting or requiring certified business participation must be certified by OMWBE at the time of bid or proposal submittal in order to comply with such participation goals or requirements.

B. Certification notwithstanding, the Port may not count or otherwise recognize the participation of an eligible certified business on a particular contract, may require a contractor to substitute, and/or may resort to sanctions for any of the following reasons:

1. Failure to demonstrate that the business is acting in a manner consistent with the requisite ownership and control by the minority or women owner(s);
2. Failure to perform a commercially useful function;
3. Participation as a business or in cooperation with a business acting as a front, conduit or similar pass-through arrangements;
4. Failure to provide information requested by the Port in its effort to evaluate the legitimacy of the work to be performed on the contract, including issues of ownership, control and performing a commercially useful function;
5. Providing false or misleading statements to the Port in order to circumvent compliance with M/WBE participation requirements or to frustrate the Port's effort to evaluate the legitimacy of the work to be performed on the contract; and
6. Failure to meet the requirements and eligibility criteria under this Resolution and/or the rules and procedures established hereunder.

C. When the Port determines that it will not count or otherwise recognize the participation of an eligible certified business for reasons enumerated under paragraph B of this Section 9, the Port shall provide to the OMWBE information relevant to that determination for OMWBE review regarding certification or recertification of the business in question, as appropriate.

D. In instances where businesses become certified or are decertified or become ineligible to participate on contracts after a selection or bid opening but prior to award, or subsequent to the award of a contract, the participation of such businesses may be counted as provided in rules and procedures issued by the Executive Director.

Section 10. DBE Participation on Federal DOT Assisted Projects.

A. In order to secure financial assistance from the federal Department of Transportation, the Port is required to provide for the participation of disadvantaged businesses in certain federally assisted projects.

B. The Executive Director is hereby authorized to issue rules and procedures and take steps necessary to implement and comply with applicable federal laws and regulations, including the establishment of annual goals and contract goals for disadvantaged business utilization, under 49 Code of Federal Regulations, Part 23, as may be amended or succeeded.

Section 11. Exceptions, Revisions and Waivers.

A. The Executive Director may grant exceptions, revisions and waivers to the utilization requirements set forth herein and goals established pursuant hereto according to the following provisions:

1. A waiver or revision may be granted for reasons such as but not limited to:

a. The reasonable and necessary requirements of the contract render subcontracting or other participation of businesses other than the bidder or proposer infeasible or improbable; or

b. Sufficient certified businesses capable of providing the goods or services required by the contract are not readily available in the market area of the project despite affirmative efforts to locate such businesses. Each contract for which the Executive Director grants such a waiver or revision shall include a provision requiring the contractor to make affirmative efforts to utilize eligible certified businesses should subcontracting or participation of businesses other than the contractor become necessary to accomplish the work.

2. In determining whether participation by eligible certified businesses is infeasible or improbable, or whether sufficient eligible certified businesses are not readily available, the following factors shall be considered:

a. Whether all forms of participation have been thoroughly examined by the administering department;

b. Whether the technical requirements of the contract which tend to prohibit or reduce the opportunity for participation of businesses other than the bidder or proposer are reasonable and necessary to achieve the purpose of the contract;

c. The cost to the Port of requiring participation of businesses other than the bidder or proposer, or of altering the contract requirements to increase opportunities for such participation;

d. Whether the administering department has made affirmative efforts to locate eligible certified businesses capable of providing the goods and/or services required by the contract, including seeking assistance of the M/W/DBE Liaison Officer;

e. Whether participation by eligible certified businesses has been achieved on similar contracts by the Port or another local government in King County; and

f. Whether other methods of achieving participation by eligible certified businesses as described in Section 6 of this Resolution have been considered.

3. No waiver of subcontracting goals may be granted without first attempting to use the competitive factor approach referenced in Section 6A of this Resolution.

4. Revisions or waivers of goals established for a particular contract may be granted during the period of solicitation for bids or proposals based on consideration of the above factors set forth in paragraph 2 above. Increases of such goals may be effected at any time prior to submittal of bids or proposals.

B. The requirements of this Resolution may be waived for a particular contract under any of the following circumstances:

1. If it is determined that an emergency exists which requires goods and/or services to be provided with such immediacy that a contractor would not be able to comply with the requirements of this Resolution and the contractor is an eligible certified business, or, if not, that the contractor will make affirmative efforts to subcontract to certified businesses should subcontracting be utilized; or

2. If it is determined that compliance with the requirements of this Resolution would impose an unwarranted economic burden on, or risk to, the Port as compared with the degree to which the purposes and policies of this Resolution would be furthered by requiring compliance; or

3. If it is determined that the needed goods and/or services are readily available from only one source and such one source is not currently disqualified from doing business with the Port or any other governmental agency based on a failure to comply with minority, women or disadvantaged business utilization requirements; provided, that the contractor shall make affirmative efforts to utilize eligible certified businesses should subcontracting be necessary.

C. The requirements of this Resolution shall not apply to contracts for which the Port receives financial assistance from a state or federal agency which has established minority, women or disadvantaged business enterprise utilization requirements with which the Port must comply in order to receive such funds, and such requirements conflict with provisions in this Resolution.

Section 12. Equal Employment Opportunity Requirements.

A. The following definitions and standards shall apply to this Section 12:

1. "Affirmative Action" shall mean policies, procedures and programs designed to increase the representation of minorities and women in employment, applications for employment, and employment-related training programs of minorities and women.

2. "Discrimination" shall mean different treatment of or pursuit of policies or practices that have a disproportionate impact upon persons due to their creed, race, color, religion, sex, sexual orientation, age, national origin or the presence of any sensory, mental or physical disability, unless such policies or practices are necessary for the performance of the job and no less discriminatory alternatives are possible.

3. "Employment" shall mean any and all terms and conditions and policies and practices of employment including, but not limited to, hiring, firing, upgrading, demotion, recruiting, apprentice and training programs, transfer, lay-off, termination, pay rates and advertisement, hours and conditions of work.

4. "Minority" shall include Blacks or African Americans, Asians, Pacific Islanders, Native American Indians, Alaskan Natives and Hispanics or Latinos.

5. "Permanent Employees" or "Permanent Workforce" shall mean those persons whom the bidder, proposer, or contractor employed for at least six (6) continuous months immediately prior to the bid or proposal opening or the award of a contract by the Port, and who are currently employed by the bidder, proposer or contractor.

6. "Rehire" or "New Hire" shall mean a person who has worked for the bidder, proposer or contractor for less than six (6) continuous months immediately prior to the bid or proposal opening or the award of a contract by the Port.

7. "Under-representation" shall mean presence in a contractor's permanent workforce of minorities and women in proportionate numbers lower than the goals established for the contractor's business under this Resolution.

B. Non-discrimination: No contractor, subcontractor, or union doing business with the Port, or furnishing workers or services in connection therewith, shall discriminate against any person on the basis of race, color, religion, creed, sex, sexual orientation, age, nationality, or the presence of any sensory, mental or physical disability (provided that such disability does not hinder the performance of the job) in employment, and no such contractor, subcontractor, or union shall violate any of the terms of Chapter 49.60 of the Revised Code of Washington, Title VII of the Civil Rights Act of 1964, or any other applicable federal, state or local law or regulation regarding non-discrimination in employment.

C. Goals and Timetables; Affirmative Action Required:

1. The Executive Director may set goals and timetables for minority and female employment by contractors doing business with the Port, which goals shall be based on the appropriate permanent workforce, demographic or other relevant data. Employment goals established by this section are not intended and shall not be taken to diminish the contractor's responsibility and obligation under other sections of this Resolution.

2. Specifications for contracts to be awarded by the Port may require the bidder or proposer to sign and submit a sworn statement specifically setting forth a plan of affirmative action to be followed in the event a contract is awarded to the bidder or proposer to ensure equal opportunity in employment is afforded by the contractor and its subcontractors while providing specific materials and supplies, consulting or construction services for the Port.

3. The plan of affirmative action contained in such sworn statement shall include, but need not be limited to, the following:

a. Designation of a certain person who has been charged by the bidder or proposer with the responsibility for carrying out and reporting the bidder's or proposer's compliance with its plan of affirmative action;

b. Assurance that the plan of affirmative action will be communicated to supervisors and other employees of the bidder or proposer;

c. Assurance that the bidder's or proposer's new hires and rehires will include substantial percentages of women and minorities;

d. Assurance that the bidder or proposer will proceed in good faith and make every reasonable effort to comply with the employment goals established and provided in the specifications;

e. Assurance that the bidder or proposer shall correct deficiencies of under-represented persons at all levels of the workforce by considering under-represented persons to fill new hire or rehire positions;

f. Assurance that the bidder or proposer will make continuing efforts to recruit minority and female employees and to advertise employment opportunities in a way which will effectively reach minorities and females; and

g. Assurance that the bidder or proposer will communicate to subcontractors and labor unions its affirmative action obligations. If a bid or proposal is opened and it is found that the bidder or proposer has not submitted the sworn statement, the bid or proposal will not be considered. Whenever the Executive Director finds that a contractor's sworn statement is in need of review or updating, he shall notify the contractor who shall take steps as are necessary to review or update its sworn statement to meet the requirements of the Port; provided, that if changes in the sworn statement would have a substantial financial impact on the contractor with regard to contracts already entered into, the changes shall not apply to such contracts.

4. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the contractor has a collective bargaining agreement to refer either minorities or women, shall excuse the contractor's obligation under the sworn statement.

D. Requirements for Consultant, Construction and Services Contracts:

1. All consultant, construction and services contracts shall contain the following provisions:

a. "During the performance of this contract, the contractor agrees as follows: The contractor will not discriminate against any employee or applicant for employment because of religion, color, race, sex, sexual orientation, age, national origin, or the presence of any sensory, mental or physical disability, unless based upon a bona fide occupational qualification. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their creed, color, race, religion, sex, sexual orientation, age, national origin, or the presence of such disability. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause."

b. "The contractor will, prior to the commencement and during the term of this contract, furnish the Port, upon request and on such forms as may be provided by the Port, a report of the affirmative action taken by the contractor in implementing the terms of this provision, and will permit access by the Executive Director to the contractor's records of employment, employment advertisements, application forms, other pertinent data and records for the purpose of investigation to determine compliance with this provision."

c. "The contractor will implement and carry out the obligations contained in its sworn statement regarding equal employment opportunity. Failure to implement and carry out such obligations in good faith may be considered by the Port as a material breach of this contract and grounds for withholding payment and/or termination of the contract and dismissal of the contractor. The contractor shall require that a sworn statement substantially in the form of those required by the Port from the contractor be submitted by its subcontractors and that substantially the foregoing provisions be contained in all such subcontracts."

2. The specifications may require that a bidder or proposer be prequalified regarding equal employment according to such procedures as may be determined by the Executive Director and that failure to so prequalify will result in the refusal to consider or the rejection of a bid or proposal.

E. Requirements for Purchase of Goods and Services Contracts:

1. All goods and services contracts shall contain the following provision:

During the performance of this contract, the contractor agrees as follows: The contractor will not discriminate against any employee or applicant for employment because of creed, color, race, religion, sex, sexual orientation, age, national origin, or the presence of any sensory, mental or physical disability, unless based on a bona fide occupational qualification. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their creed, color, race, religion, sex, sexual orientation, age, national origin, or the presence of any sensory, mental, or physical disability. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause.

2. The specifications may require that a bidder or proposer be prequalified regarding equal employment according to such procedures as may be determined by the Executive Director and that failure to so prequalify will result in the refusal to consider or the rejection of a bid or proposal.

F. If, upon investigation, the Executive Director determines that a contractor or subcontractor has failed to meet the equal employment opportunity requirements of the contract or has otherwise failed to implement and carry out the obligations contained in the contractor's sworn statement regarding equal employment opportunity in violation of the contract, written notice of such breach shall be given to the contractor and the contractor shall be required to correct such breach within a specified period of time. In the event the contractor fails to correct a breach in a manner satisfactory to the Port, the Executive Director may effect any remedies and sanctions that may be available under the contract, Section 13 of this Resolution, other relevant sections of this Resolution, or applicable laws and regulations.

1. Under-representation of minorities and women will not itself be deemed a violation of this Resolution where the contractor adopts reasonable affirmative action measures in good faith. Affirmative action measures shall be based on what is reasonably required to achieve employment goals which will cure under-representation.

Section 13. Sanctions and Appeals.

A. After reasonable notice to the contractor involved and reasonable opportunity to respond, the Executive Director is authorized to impose such sanctions or take other actions as are designed to ensure compliance with the provisions of this Resolution including, but not limited to:

1. refusal to award a contract;
2. suspension of a contract;
3. withholding of funds;
4. rescission of a contract;
5. disqualification of a bidder, contractor or other business from eligibility for providing goods or services to the Port for a period not to exceed two (2) years;
6. termination of the contract; and
7. any remedies that may be available under the contract or applicable laws and regulations.

B. 1. In the event the Executive Director determines that a contractor or subcontractor has materially breached the contract provisions regarding M/W/DBE utilization and participation, the Port shall, in addition to imposing sanctions and effecting remedies, refer the circumstances of the breach to the appropriate federal, state and local agencies for further action. Such referral may be in the form of a third-party complaint where appropriate.

2. In the event the Executive Director determines that a contractor or subcontractor has materially breached the contract provisions regarding equal employment opportunity, the Port shall, in addition to imposing sanctions and effecting remedies, refer the circumstances of the breach to appropriate federal, state and local civil rights enforcement agencies for further action. Such referral may be in the form of a third-party discrimination complaint where appropriate.

Section 14. Use of Sheltered Workshops and Private Disabled Entrepreneurs.

It is the intent of the Port to utilize Sheltered Workshops as defined in RCW 82.04.385 as it may be amended or succeeded and Private Disabled Entrepreneurs for the purchase of goods and services whenever practical. Such utilization is intended to complement other Port programs.

Section 15. Use of King County Residents and Local Businesses.

All parties doing business with the Port shall be encouraged to utilize King County residents and local businesses to the maximum extent possible, where qualifications and cost-effectiveness are deemed competitive.

Section 16. Affirmative Action.

Where employment statistics demonstrate that women and/or minorities are under-represented in a job category, affirmative action measures shall be taken to increase the representation of women and/or minorities at the Port or at such locations and establishments where work is being performed on behalf of the Port. The Port may establish an Affirmative Action Plan with goals and timetables for achieving increased women and minority employment. Employment goals shall be based on appropriate work force, demographics, and other relevant data. Affirmative action measures shall be based upon what is reasonably required to achieve employment goals.

Section 17. Effect of State and Federal Laws and Regulations.

If any provision of this Resolution is found to be in conflict with state or federal laws and regulations or requirements imposed by the State of Washington or the federal government as conditions of financial assistance, then the Executive Director is hereby authorized to revise such provision as may be necessary to comply with such laws or regulations or to benefit from such assistance; provided, that any significant or material revision shall be brought to the attention of the Port prior to implementation.

Section 18. Repealer.

Resolution No. 3046, adopted March 28, 1989 is hereby superseded; provided, however, that all actions of the Port and Executive Director taken pursuant to said resolutions are hereby ratified and approved.

Section 19. Severability.

The provisions of this Resolution shall be effective in all cases unless otherwise provided for by state or federal law. The provisions of this Resolution are separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or other portion of this Resolution or the invalidity of the application thereof to any person or circumstance shall not affect the validity of the remainder of this Resolution or the validity of the application to other persons or circumstances.

Section 20. Review.

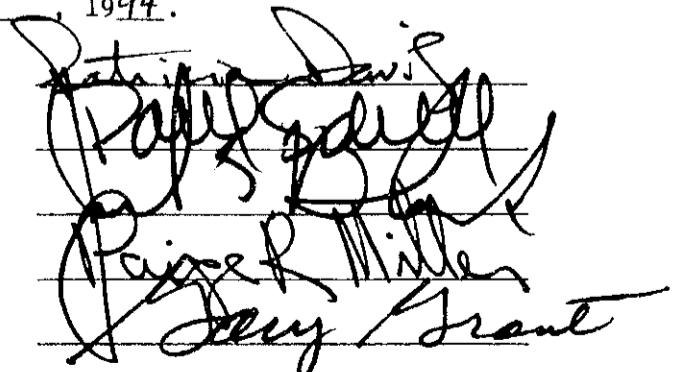
The provisions, policies and implementation of this Resolution shall be reviewed at least annually by the Port Commission.

Section 21. Effective Date and Sunset.

The provisions of this Resolution shall be effective on March 1, 1994, and shall apply to all contracts for which bids or proposals are requested after said effective date.

The provisions of this Resolution shall remain in effect for five years from said effective date without further action by the Port Commission. At least six months prior to the end of the period in which this Resolution shall remain in effect, the Executive Director shall report to the Port Commission the accomplishments of the programs implemented under this Resolution and shall provide recommendations on the need for further program efforts.

ADOPTED by the Port of Seattle at a regular meeting thereof held on the 26th day of July, 1994.



PORT COMMISSION