



**TO:** Tacoma Community Workforce Advisory Committee  
**FROM:** Tadd Wille, Assistant City Manager; City Manager's Office  
**SUBJECT:** Staff Responses to January 9<sup>th</sup> TCWAC Meeting  
**DATE:** January 30, 2019

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The following memo provides staff follow up to Committee Members questions and comments from the December 21<sup>st</sup> and January 9<sup>th</sup> meeting of the Tacoma Community Workforce Advisory Committee (TCWAC).

### **Question Subject**

Committee members asked for:

1. Information on the residency of Local Employment and Apprenticeship Training Program (LEAP) participants. (Meeting 1 request)
2. A summary of Seattle's point system used in some procurement.
3. A summary of "best value" procurement method used by Seattle
4. Sample challenges that are raised with respect to CWAs that the group could potentially focus discussion on.
5. An overview of the City's "Section 3" plan.
6. A summary of I-200, I-1000 and the Corson case.
7. Information on what strategies the Tacoma School District used to increase WMBE hiring.

### **Staff Responses**

1. LEAP utilization by zip code from 1/1/2015-12/31/2017 is provided in Attachment 1.
2. Seattle MWBE inclusion plans require bidders on public works projects to submit an inclusion plan that identifies aspirational WMBE goals (6 points), business support strategies (4 points), and WMBE guarantees (6 points). Proposals that total less than 10 points are considered non-responsive. The full inclusion plan instructions are provided in Attachment 2.
3. "Best value" procurement is where the awarded contract is based on a combination of selection criteria, rather than just price. The desired outcome is a contractor who presents the best combination of qualifications, proposed methodology, and cost. A good example of best value procurement method is the Request for Proposal (RFP), most commonly used for procurement of consulting or professional services.

Public agencies have recently expressed interest, or in a few other states, begun using a best value procurement method for construction contracts. Other agencies have used best value procurement to address concerns about performance issues on low bid awarded contracts or change orders increasing the final contract value. Other than a couple exceptions, the State of Washington has not authorized the best value selection process for using a Request for Proposals for construction projects.

As an alternative to the traditional low bid contracting method for public works Chapter 39.10 RCW does authorize several alternative public works contracting processes, such as design-build (DB), general contractor/construction manager (GCCM) and job order contracting (JOC).

4. See agenda item #7.



5. Staff are still gathering information for this request.
6. In the 1989 decision typically referenced as the "Croson" case, the United States Supreme Court decided that governmental programs which provided race and/ gender conscious advantages to women and minority contractors were unconstitutional unless supported by evidence of discrimination. The Croson case established that a statistical analysis that showed a race and/or gender disparity in contracting was sufficient to support a race and or gender conscious program, without the need to show any intent to discriminate. In addition to an analysis, to comply with Croson a program must be designed to remedy only the disparity identified in the statistical analysis, and no more.

Washington State Initiative 200, approved in 1998, added a section to the Washington Law Against Discrimination (RCW 49.60). The initiative stated: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." RCW 49.60.400(1). At the time, State law did not clearly define "preferential treatment." Subsequently, the Washington Supreme Court has construed the statute to prohibit discrimination where race or gender is used by government to select a less qualified applicant over a more qualified applicant." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. 1*, 149 Wn.2d 660 (2003).

In public contracting, Initiative 200 is applicable only in projects where no federal funding is utilized. Where federal funding comes into a project, local jurisdictions must apply federal program requirements, which do involve some race and gender conscious standards. Where no federal funding is involved, Washington state law allows race-conscious goal setting and outreach programs, but even where a disparity study has established a race and/or gender based disparity in public contracting, it is not clear as a matter of law that a program which requires race or gender conscious outcomes would survive a challenge under I-200.

An initiative to repeal I-200 was filed this year. Initiative 1000 was filed July 31, 2018, for the November 5, 2018 ballot. It has until January 4, 2019 to gather 259,622 valid signatures. The explanatory statement is:

*This measure would allow the state to remedy documented or proven discrimination against, or underrepresentation of, certain disadvantaged groups. It would allow the state to implement affirmative action in public education, employment, and contracting if the action does not use quotas or preferential treatment. It would define affirmative action and preferential treatment. The measure would establish a Governor's commission on diversity, equity, and inclusion, and require the commission to draft implementing legislation and publish reports.*

If adopted, it is important to note that I-1000 gives authority only to the State to create a program or programs to remedy "proven" discrimination or underrepresentation. No direct authority would be given to local jurisdictions.

7. Tacoma School Community Inclusion Commitment includes the following goals:
  - a. 30% local (Pierce County) businesses
  - b. 10% minority-owned businesses



- c. 6% woman-owned businesses
- d. 5% small businesses

To help achieve these goals Tacoma Public Schools (TPS) use networking events for general contractors and subcontractors prior the RFP for every project with extensive outreach to WMBE's. Additionally Tacoma Public School's RFP evaluation awards 30 points of 200 total based on the bidders WMBE/hire local plan, which are mandatory. Established WMBE and local hire goals emphasize action are and are not aspirational.

In their 2017-2018 Annual Report TPS identify traditional Design-Bid-Build as a barrier to increasing inclusivity. To combat this barrier TPS has utilized alternative contract delivery methods such as General Contractor Contract Management (GCCM), Design Build, and using RFQ/RFP processes in construction contracting.

Attachment 1

LEAP Utilization by Zip Code 1/1/2015-12/31/2017

City	Zip Code	LEAP Hours	Percent
Tacoma	98408	13,317.87	13.73%
Shelton	98584	8,630.08	8.90%
Tacoma	98409	7,289.22	7.51%
Roy	98580	7,151.91	7.37%
Tacoma	98405	5,220.86	5.38%
Parkland	98444	5,115.00	5.27%
Tacoma	98404	4,349.25	4.48%
Chehalis	98532	4,276.00	4.41%
Tacoma	98406	3,861.25	3.98%
Eatonville	98328	2,880.00	2.97%
Tacoma	98445	2,629.25	2.71%
Tacoma	98407	2,593.50	2.67%
Toledo	98591	2,166.14	2.23%
Tacoma	98403	2,109.00	2.17%
Rochester	98579	2,089.00	2.15%
Puyallup	98375	1,997.00	2.06%
Elma	98541	1,855.50	1.91%
Spanaway	98387	1,674.16	1.73%
Tacoma	98418	1,577.98	1.63%
Puyallup	98373	1,472.50	1.52%
Centralia	98531	1,414.50	1.46%
#N/A	98654	1,351.50	1.39%
Puyallup	98372	1,011.00	1.04%
Wilkeson	98396	950.5	0.98%
Fife	98424	890	0.92%
Tacoma	98422	813.75	0.84%
Tacoma	98465	746.25	0.77%
Lakewood	98499	716	0.74%
#N/A	0	650.75	0.67%
Carlsborg	98324	621	0.64%
Bonney	98391	604.5	0.62%
Graham	98338	464	0.48%
Longbranch	98351	427	0.44%
#N/A	98487	398	0.41%
Buckley	98321	289	0.30%
Montesano	98563	225	0.23%
Napavine	98565	215.5	0.22%
Marysville	98271	206	0.21%
Gig Harbor	98329	199	0.21%
Morton	98356	179.5	0.19%
Tacoma	98446	176	0.18%
Orting	98360	172	0.18%
#N/A	98049	166.25	0.17%
Tenino	98589	164	0.17%
Puyallup	98374	158.75	0.16%
Allyn	98524	156.9	0.16%
Puyallup	98371	147.5	0.15%
Gig Harbor	98332	141.5	0.15%
Tacoma	98402	112.75	0.12%
Sumner	98390	106	0.11%
Bellingham	98226	96	0.10%
University			
Place	98467	93.5	0.10%
Dayton	99328	90	0.09%
Lakewood	98498	86.5	0.09%
Rainier	98576	81	0.08%
Lakebay	98349	67.5	0.07%
#N/A	9844465	56	0.06%
Carbonado	98323	48	0.05%
Port			
Orchard	98366	46.5	0.05%
#N/A	98455	42.5	0.04%
Tumwater	98512	39	0.04%
Gig Harbor	98335	34	0.04%
Tacoma	98466	25	0.03%
Tumwater	98501	24	0.02%
Seattle	98198	21	0.02%
Marysville	98270	20.5	0.02%
Milton	98354	12	0.01%
Lacy	98506	5	0.01%
		Total	
		Hours:	97,017.87

## Attachment 2

### City of Seattle: Public Works Women and Minority Business Inclusion Plan Instructions

*Carefully review all instructions. All Bidders must complete this form. The City public works inclusion plan requires the Bidder identify the good faith efforts the Bidder will use to include woman-owned and minority-owned business (WMBE) firms on the City project. There are 3 options for evidencing good faith efforts. Each option is worth points which can vary depending on information supplied by the Bidder. There are a maximum of 16 points available. The Bidder must earn at least 10 points. Bidders that earn less than 10 points will be found non-responsive and the Bid will be rejected. This Inclusion Plan becomes a material part of the Bidder's contract if the project is awarded to Bidder.*

*WMBE firms are state certified or self-identified firms that are at least 51% WMBE owned (per SMC 20.42). A WMBE need not be self-identified within the City Online Directory at bid time, but in such case must self-identify and register by time of award. These resources may assist bidders:*

City On-Line Directory: <http://web6.seattle.gov/fas/registration/>

OMWBE Directory: [http://www.omwbe.wa.gov/certification/certification\\_directory.shtml](http://www.omwbe.wa.gov/certification/certification_directory.shtml)).

#### 1. INSTRUCTIONS

- a. All Bidders (including WMBE Primes) must complete and submit this form as part of the Bid for City design-bid-build public works project having an Engineer's Estimate of \$300,000 or greater, unless the City expressly instructs otherwise in the bid package.
- b. There are three commitments Bidders can use to establish an Inclusion Plan – Aspirational WMBE Goals, Business Support Strategies, and WMBE Guarantees:
  1. Aspirational WMBE Goals are goals Bidder believes can be achieved by good faith efforts. This option is worth a maximum of 6 points;
  2. Business Support Strategies are those the Bidder commits to employ for qualified firms. This option is worth a maximum of 4 points;
  3. WMBE Guarantees identify WMBE firms the Bidder guarantees to contract with for this project, with agreement reached about the work and pricing for the WMBE scope, including any terms and conditions important to the WMBE for their performance. This option is worth a maximum of 6 points.
- c. Work performed by a WMBE must be commercially useful and a distinct element of work that includes managing and supervising the work. The Contractor should evaluate the amount of work subcontracted, industry practices, and other relevant factors to determine whether the work is commercially useful.
- d. A Bidder scored less than 10 points will be deemed non-responsive. See Scoring section below.
- e. All dollars cited shall exclude sales tax (including references to the Total Bid Cost and estimates made by Prime when completing this form).

#### 2. SCORING INSTRUCTIONS

- a. The average percentage of WMBE utilization on past City projects has been calculated by CPCS and is provided in the table below. This average is used to score the points that will be awarded for the aspirational goals and guarantees. These percentages are updated annually. Note that these averages include total WMBE utilization, not subcontracting alone, since aspirational goals may include prime self-performance.
- b. In addition to the Past Performance, scoring also recognizes an intent to exceed past performance by at least 2 percentage points above past performance.
- c. If the project is characterized by work of various types, CPCS may calculate a unique utilization rate for the project given the weight of each. CPCS determination is not subject to challenge.
- d. The project type and percentage of past WMBE utilization will be stated in the bids advertisement and documents.
- e. If past utilization for a project type was zero, an Aspirational Goal above two percent will receive 6 points. Bidder must still identify Business Support Strategies and Guarantees it is willing to employ and will be scored accordingly.

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- f. Points awarded for WMBE Guarantees will be calculated based upon total available work for subcontract given past performance. This section can be awarded as many as 6 points.
- g. A Bidder who has received a formal Deficiency Report issued by the City as a result of unfulfilled WMBE Inclusion Plan commitments on past projects will lose one point from the total score.
- h. When calculations are used to evaluate the points, the City will calculate points to the nearest tenth decimal place. The City will round up to the nearest tenth.

2018	Roadway	Facility	Parks*	Under ground	Boundary	Structural Paint	Structural	Natural Habitat	Roof	Trenchless / Sewer Lining
3 year average Past performance	20%	25%	25%	18%	1%	4%	9%	19%	27%	4%

**Note:** Boundary refers to projects performed in Pend Oreille County (Boundary). Parks utilization rate excludes the mandatory self-performed WMBE work for a prime.

### 3. ASPIRATIONAL WMBE GOAL INSTRUCTIONS

- a. Aspirational WMBE Goals represent a serious commitment to use good faith efforts to reach the stated goals.
- b. The City will rely upon the Total WMBE Goal to determine responsiveness. The City will correct the Total WMBE Goal if that provided by the Bidder does not match the MBE and WBE goals.
- c. Aspirational WMBE Goals are a percentage of the Base Bid and during the course of the project will apply to the total contract amount including all contract change orders (additives, alternates and deductives). Contractor may seek a goal adjustment if such changes may merit a greater or lesser goal; CPCS will consider such requests, approve if appropriate, and modify the Plan accordingly.
- d. A WMBE Bidder may include in their goals and guarantees that percentage of contract base bid for work which the WMBE intends to self-perform that is in excess of the mandatory 30% they are otherwise required to perform as required by the City Specifications Section 1-08.1(3).
- e. Bidder will receive between 0 and 6 points for its Aspirational WMBE Goals, with proportional points based on a straight line formula to Past Performance (plus 2%) identified for the project as advertised in the bid solicitation. Bidder receives 3 points if the Total Aspirational Goal is half of Past Performance + 2%. Six points are awarded if the Bidder meets or exceeds Past Performance by 2 or more percentage points. For example, a project with Past Performance of 14%, would receive 3 points if the Total Aspirational Goal was 8% or 6 points if the Total Aspirational Goal was 16%.

$$P_A = 6A / (P + 2),$$

Where  $P_A$  = Points awarded for Bidder's Aspiration Goal  
 $A$  = Bidder's Aspiration Goal (%)  
 $P$  = Applicable Past Performance Trend (%)

### 4. BUSINESS SUPPORT STRATEGIES INSTRUCTIONS

The Bidder may elect to provide the business support identified on Page 2 for qualified firms. The City will provide two points for each choice selected. There are two options, allowing a total of 4 points if both options are chosen:

1. Early Retainage Release. The prime and any sub-tier primes will release retainage held for the subcontractor, within thirty (30) days of acceptance of the work performed by the qualified subcontractor.
2. For mobilization, the Prime and any sub-tier primes will pay all qualified firms five days in advance of the on-site performance, except if a unique situation prohibits such as an emergency or event requiring an immediate mobilization response. In those events, the Prime (including any sub-tier primes) shall deliver the payment no later than 5 days after job mobilization begins.

### 5. WMBE GUARANTEE INSTRUCTIONS

- a. This guarantees the City and WMBE that they shall be used for at least the amount given, following the remaining rules below. A WMBE Guarantee expects the Bidder achieved agreement about scope, terms and cost of the work for the WMBE at bid time. The burden is upon the Bidder to resolve any differences, once the guarantee is given.

## Attachment 2

- b. The Prime should clearly document in writing, agreements made with the WMBE firm upon which the guarantee was predicated, such as unit price or lump sum pricing as applicable, scope, terms or conditions, and subcontractor concurrence. This protects both parties when completing and executing the resultant subcontract before work begins.
- c. The City may contact the WMBE firm or Prime after Bid opening to verify the firm has agreement to perform work as described in the plan. Failure to have agreement may result in rejection of the Inclusion Plan, rendering the Bid non-responsive.
- d. A bidder will receive between 0 and 6 points for WMBE Guarantees, receiving a proportional number of points based on a straight line formula to Past Performance. A bidder will receive 3 points if the dollar-value of the Guarantees equals half of the Past Performance percentage. Six points are awarded if the Bidder commitments meet or exceed Past Performance.

$$P_G = 6 G / P$$

Where  $P_G$  = Points awarded for Bidder's Guaranteed Goal  
 $G$  = Bidder's Guaranteed WMBE Goal (%)  
 $P$  = Applicable Past Performance Trend (%)

- e. A WMBE bidder may only include self-performed work above 30%. This is based on the self-performance minimum required by the City Specifications Section 1-08.1(3).
- f. Substitution of a Guaranteed WMBE firm is prohibited absent a waiver granted by the CPCS as a result of:
  - 1. Bankruptcy of the WMBE firm;
  - 2. Failure of the WMBE firm to provide the required bond;
  - 3. The WMBE firm cannot perform the work because they are debarred, not properly licensed, does not meet the subcontractor approval criteria, or in some other way is ineligible to work;
  - 4. Failure of the Subcontractor to comply with a requirement of law applicable to subcontracting;
  - 5. Death or disability of the principal of the WMBE firm rendering it unable to perform the work;
  - 6. Dissolution of the WMBE firm;
  - 7. Failure of the WMBE firm to perform satisfactorily in previous projects not known to Bidder at the time of bid;
  - 8. Failure or refusal of the WMBE to perform work for reasons other than contract term or pricing disputes;
  - 9. A change in scope of the contract which removes the guaranteed work from the project.
  - 10. WMBE Subcontractor does not execute an offered contract that reflects the terms and pricing that was agreed upon as a condition of the Guarantee. The Prime must evidence that the WMBE Subcontractor failed to execute a contract offered by the Prime which reflected such agreements, after the Subcontractor was given adequate time to execute the offered subcontract.
  - 11. Change order that reduces the scope of work of a WMBE guarantee.

### 6. INCORPORATION OF PLAN INTO CONTRACT AND REPORTING REQUIREMENTS

- a. CPCS may discuss the Plan with the Apparent Successful Bidder before incorporating into the contract and may amend the Plan by mutual consent.
- b. CPCS reserves the right to require a completed Social Equity Plan as a condition for contract execution if no WMBE guarantees are provided in order to demonstrate results of good faith efforts.
- c. The Contractor must provide reports and documents as required by CPCS within 15 days.
- d. CPCS will evaluate Contractor's WMBE utilization throughout the project.
- e. Contractor may not substitute a WMBE firm identified in the guaranteed portion of the plan unless the substitution is approved by CPCS. Such a substitution will not be considered unless Contractor can demonstrate clear necessity for such substitution. A Contractor granted permission to substitute for a guaranteed WMBE firm shall use good faith efforts to recruit another WMBE firm to perform the Work.
- f. If CPCS determines the Contractor is not making good faith efforts, it may take action as described in the project specification such as withholding invoice payments and breach of contract.
- g. The City will evaluate the WMBE utilization at close-out and may assign a Deficiency rating for failure to demonstrate good faith efforts. Deficient ratings are used by the City to determine Bidder responsibility on future work and debarment. To avoid a deficiency rating, the Contractor must demonstrate:

## Attachment 2

1. A good faith effort to achieve Aspirational goals. Attainment under 80% of the goal will likely be considered deficient;
2. Timely submittal of required and requested materials and reports to CPCS;
3. Having advance agreements with each WMBE Guarantee, such that the WMBE understands and agrees that the WMBE Guarantee represents mutual agreement at time of the bid submittal;
4. Using all "WMBE Guarantees" named in the Inclusion Plan, unless Prime received written authorization from CPCS for substitution;
5. WMBE relationships are harmonious, clearly communicated and free of undue dispute; and
6. WMBE work was commercially useful as defined above.