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# CITY OF PORTLAND

## OFFICE OF MANAGEMENT AND FINANCE

September 6, 2016

EXHIBIT C

TO: Mike Stuhr, Portland Water Bureau Director  
FR: Fred Miller, Chief Administrative Officer  
RE: Community benefits and opportunities

The City of Portland executed its first modified Community Benefits Agreements (CBAs) on two Water Bureau construction projects: Kelly Butte Reservoir and Interstate Maintenance Facility Renovation in October 2012. In discussions with the City Council last year on the Portland Building Reconstruction project, Council requested that OMF complete an outside review of the CBAs used on these two projects to determine what lessons we should apply to future projects. That evaluation was completed and I shared it with you and the Council on May 9, 2016.

This memo has two purposes:

- Summarize the key findings from the outside evaluation.
- Identify issues for consideration in crafting a future agreement or plan.

I understand that the Water Bureau is scheduled to present the final report to Council on the two projects in late September, so I want to get this in your hands before then.

### **Key findings from the CBA Pilot Evaluation**

Community stakeholders, the construction contractor and City employees worked hard on some very important equity contracting goals for these two projects. While we should acknowledge this effort and recognize that these projects were successful in meeting the goals, the evaluation identified opportunities to improve future agreements or plans. The evaluation found:

**CBA-funded programs had limited direct impact on the two pilot projects.** Few of the workers and firms participating in CBA-funded programs were placed on or subcontracted to the two Water Bureau projects.

**The Labor Management Community Oversight Committee (LMCOC) had too many responsibilities.** The CBA assigned the LMCOC roles and responsibilities that were inappropriate for a volunteer organization with no legal identity and no formal staff.

**CBA governance created potential for conflicts of interest.** CBA programs and strategies were designed, executed and managed by a relatively small number of individuals, and a number of the organizations on the LMCOC were also awarded contracts by the LMCOC. This created the appearance of conflict of interest. Meeting minutes noted the need for conflict of

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interest statements, but the LMCOC did not require members to sign conflict of interest statements.

**Contractual relationships, or lack of them, complicated how the funds were administered.**

The City contracted with Hoffman Construction, and Hoffman issued a Purchase Order to Construction Apprenticeship Workforce Solutions Inc. (CAWS). CAWS and Worksystems Inc. (WSI) were jointly identified in the CBA to be the recipient of a portion of the funds, but are separate legal entities. The LMCOC agreed to have WSI/CAWS administer the funds but there was no contract or agreement between WSI/CAWS and the LMCOC.

**CBA program administration and start-up costs were relatively high.** Costs to develop and administer the CBA programs were estimated at 17% of total program expenditures. This is higher than some City programs that also administer grants or contracts. These administrative costs did not include City staff time spent in LMCOC meetings and other CBA sessions, the full cost of LMCOC participant time, or time spent by Hoffman Construction representatives to attend LMCOC meetings or to meet CBA reporting requirements.

**CBA contracts were not performance-based.** Contractors and community-based organizations selected by the LMCOC to provide services were not required to complete deliverables or achieve specific outcomes in order to receive payment.

**Comparable projects without a CBA also met comparable goals.** The consultant evaluated the diversity achievements of four comparable City projects which used equity plans, and all but one would have achieved or exceeded CBA goals.

**The CBA did not include audit provisions.** The CBA did not include a requirement for a financial or program audit. In comparison, the Children's Levy and its programs are subject to independent financial audits and review by the City Auditor.

**There are opportunities to now examine best practices for community benefits**

San Francisco, LA, Seattle and other jurisdictions have found that comprehensive policies, rather than project-by-project solutions, to be the most effective means to establish a consistent worker pipeline and continuous job opportunities for women and minorities and women- and minority-owned businesses.

**Issues to consider in crafting a future agreement or plan**

As the City develops an approach to support equity in contracting and community benefits on future projects, it should review relevant issues central or related to the key findings communicated above. I asked my staff to begin to identify the various issues that any new agreement or plan would need to address. That starting list is below:

**Public officials and ethics law**

- Members of a group responsible for administering public funds would likely be considered public officials and public officials fall under Oregon Government Ethics Law. The procedures for the group would need to address conflicts of interest and other provisions.
- State ethics law outlines the process where public officials can receive official compensation or reimbursement of expenses associated with performing their role.

- Members would likely be considered City officials, as they were authorized to distribute funds for public benefit. City officials fall under the City Code Chapter 1.03 Code of Ethics. The procedures for the group would need to address steps for recusal and disqualification from decision making.

#### **Public body, public meetings and public records**

- Depending on its duties and how it is structured, the group may be considered a public body and would need to comply with public meetings and public records requirements.

#### **Financial policies and best practices**

- Members of a group responsible for administering funds would need to comply with disclosure requirements of GASB 56 related party transactions.
- The program and contracts issued with program funds should be subject to independent financial audits and review and audit by the City Auditor.
- The program should include a cap for administrative expenses and track those separately from direct service expenses.
- The program should include close-out procedures at project completion.

#### **Contracting best practices**

- The agreement or plan should have clearly defined deliverables and requirements. Contracts related to implementing plan components should clearly define the specific outcome or performance required of the contractor.
- Contracting opportunities should be widely publicized and the agreement or plan itself should not identify fund recipients.

#### **Use of ratepayer funds**

- The City should examine how projects funded by ratepayer dollars should participate in community benefits plans.

#### **Legal requirements for race-based or gender-based decision-making**

- The City should examine how efforts to include race or gender as a basis for contracting decisions should be tailored.

#### **Legal requirements for union preferences**

- Inclusionary practices, allowing both union and non-union workers, would seem to allow for the largest eligible contracting and workforce participants to best meet the City's goals.
- Efforts to give union preferences should be based on actual project-specific issues and should be scope-specific. The necessity for such efforts should be verified through measurable, objective outcomes that union agreements address.
- Projects with a CBA should be compared with projects without a CBA to determine if there were impacts. The City should examine the four comparable projects the pilot evaluation report reviewed that did not have a CBA but had an equity plan to determine if the projects reported any issues with labor disruption, strikes or lockouts. The City should also examine if the projects reported any issues with workforce productivity, efficiency and workmanship and if the projects reported any issues with prediction of labor costs or labor and production schedules. Prevailing wage was required on all projects.

### **Legal considerations for multiple parties to the same contract**

- City contracts have specific provisions and remedies for breach of contract and are usually between two parties – the City and the prime contractor, with provisions that implicate subcontractor obligations as well. Adding third parties to this contract may create a legal murkiness in determining obligations, enforcement and remedies for breach of contract.
- Where unions are involved, practices that allow the City contractor to “pierce the list” to hire minority and women workers to meet contracting goals may be practices we could put in place without requiring additional parties to be signatories to the contract.

### **Looking ahead**

The City is committed to creating an improved tool for meeting minority and women contracting objectives on a broader range of projects in the form of a Community Equity and Inclusion Plan. With the assistance of the Office of Equity and Human Rights, the Equitable Contracting and Purchasing Commission, the contracting and minority contracting community, and with input from all bureaus, the City is working to create a plan. This plan would enable construction projects to achieve aggressive equity goals both in subcontracting and workforce diversity. This plan would also include the best ideas from prior approaches and incorporate improvements from the key findings and issues identified through the pilot CBAs and Community Benefit Plans (CBPs). The City will continue to engage stakeholders to develop a recommendation to ensure that the City achieves its social equity goals on these types of projects.

Please let me know if you need further information.