

**Port KC  
Affirmative Action Policy  
August 15, 2016  
Resolution 2016-08-03**

**Section 1 – Background**

1. City of Kansas City, Missouri

- a. In the 1990s, a consortium composed of the City of Kansas City, Missouri (the “City”), the Kansas City Area Transportation Authority, and the Kansas City Missouri School District undertook a study to analyze contracting activities in their respective marketing areas to determine whether a disparity existed between Minority Business Enterprise/Women Business Enterprise (“MBE/WBE”) firms who were willing and able to provide goods and services and the utilization of those firms by the consortium members and their general contractors. The study concluded that MBE/WBE firms received significantly fewer contracts and contract dollars than would be expected given their availability in the geographic market from which the consortium members procure construction services, professional services, and other goods and services. The disparity was statistically significant and was corroborated by anecdotal evidence of discriminatory practices. The study concluded that the principal cause of the disparity was race, ethnicity, and gender discrimination.
- b. Accordingly, on May 7, 1996, the City amended Article II, Chapter 38 of the Code of General Ordinances by adding new sections 38-84 through 38-100. On May 1, 2013 the City repealed various provisions of Chapters 2, Code of Ordinances; repealing and reenacting various provisions of Chapter 38, Code of Ordinances; enacting a new Chapter 3, Code of Ordinances, dedicated to city contracting processes and programs titled Contracts and Leases, Article IV – Contracting Program Requirements, Division 2 – Minority and Women’s Business Enterprises (M/WBE) to be known as the “Minority and Women’s Business Enterprise Program of Kansas City, Missouri” (hereafter “City MBE/WBE Ordinance”). The City MBE/WBE Ordinance has been amended from time to time, including in response to a second disparity study commissioned by the City and published in October 2006.

2. State of Missouri

- a. The State of Missouri has established the Minority Business Development Commission under Chapter 37, sections 37.013-37.023, as amended from time to time, in order to address historical disparity issues at the state level.
- b. In order to conform with regulations put forth by the U.S. Department of Transportation in 49 CFR Part 26, the Missouri Department of Transportation

(MoDOT) External Civil Rights Division administers the Disadvantaged Business Enterprise Program, which provides certification for Disadvantaged Businesses under the federal transportation guidelines.

## **Section 2 – Policy Statements**

Port KC desires to maintain an affirmative action program that adopts the goals set forth in the City MBE/WBE Ordinance, as amended, and establish an MBE, WBE and DBE Utilization Plan (defined below) consistent with the above stated goals. Further, as a political subdivision of the State of Missouri established pursuant to Chapter 68 of the Revised Missouri Statutes, Port KC desires to utilize the opportunities and resources available under RSMo 37.013 and through MoDOT in order to achieve those goals set forth in the City MBE/WBE Ordinance.

The purpose of this Affirmative Action Policy (the “Policy”) is to establish and maintain such a program and to enhance the participation of qualified historically disadvantaged businesses in providing goods and services required by Port KC. This Policy describes procedures to accomplish this purpose and to monitor and evaluate progress. It is Port KC’s intent to foster economic development in Kansas City, Missouri by establishing its MBE/WBE Goals. The scope of this Policy shall include requirements that Port KC shall:

1. Identify and work to eliminate barriers that inhibit MBE, WBE and DBE participation in Port KC’s procurement process;
2. Establish goals to increase MBE, WBE and DBE utilization;
3. Meet or exert Best Faith Efforts to meet the Goals established by Port KC;
4. Provide information and assistance to MBEs, DBEs and WBEs regarding procurement opportunities with Port KC;
5. Implement mechanisms and procedures for monitoring MBE, WBE and DBE compliance by Contractors; and
6. Implement mechanisms to evaluate the Policy’s progress.

Port KC shall also require its Contractors to do the following:

1. Meet or exert Best Faith Efforts to meet the Goals established by Port KC
2. Comply or exert Best Faith Efforts to comply with the Utilization Plans approved by Port KC;
3. Comply with all reporting requirements set forth in this Policy; and
4. Contractually require each Contractor, subcontractor and assignee to comply with this Policy and to enforce such contractual provisions.

Notwithstanding any of the foregoing, nothing in this Policy shall be interpreted to supersede the terms of any agreement between Port KC and a casino, including the Isle of Capri and Ameristar or their successors in interest. Casinos, to the extent possible, shall be encouraged to follow this Policy.

### **Section 3 – MBE, WBE and DBE Definitions**

As used in this Policy, the following terms have the following definitions:

1. Statement of Intended Utilization: The statement that must be submitted with a Bid stating the Bidder's intent to meet the MBE, WBE and DBE goals or to request a timely waiver of MBE, WBE and DBE goals.
2. Best Faith Efforts: Best faith efforts are efforts that, given all relevant circumstances, a Bidder or Proposer actively and aggressively seeking to meet the Goals can reasonably be expected to make, including efforts more fully described in Section 6 hereinafter.
3. Bid: An offer to enter into a Contract submitted to Port KC or party to which this Policy applies pursuant to an Invitation for Bid.
4. Bidder: Any Person who submits a Bid in response to an Invitation for Bid.
5. Bid Opening: The event whereby Bids are opened and read aloud at the place, date and time specified in the Invitation for Bid and any subsequent amendment thereto.
6. Certified DBE: A business enterprise certified by the Missouri Department of Transportation as listed on the most current Missouri Regional Certification Committee (MRCC) Directory or addendum thereto on the date the Contractor Utilization Plan is submitted.
7. Certified MBE: A minority owned business enterprise certified by the Human Relations Department of the City of Kansas City, Missouri OR the State of Missouri Office of Equal Opportunity as listed in their respective MBE/WBE Directory or addendum thereto on the date the Contractor Utilization Plan is submitted.
8. Certified WBE: A woman owned business enterprise certified by the Human Relations Department of the City of Kansas City, Missouri OR the State of Missouri Office of Equal Opportunity as listed in their respective MBE/WBE Directory or addendum thereto on the date the Contractor Utilization Plan is submitted.
9. City: The City of Kansas City, Missouri.
10. City MBE/WBE Ordinance: Article IV of Chapter 3 of the Code, and particularly Division 2, as amended.
11. Code: The Code of Ordinances of the City, and particularly Article IV, Division 2 of Chapter 3 of that Code.

12. Commercially Useful Function: A Certified MBE, WBE or DBE is providing a commercially useful function when it is performing real and actual services that are a distinct and verifiable element of the contracted work based upon private sector trade or industry standards. In determining whether a Certified MBE/WBE is performing a Commercially Useful Function, factors including but not limited to the following will be considered:
  - a. Whether the MBE, WBE or DBE has the skill and expertise to perform work for which it is being utilized;
  - b. Whether the cost of materials is an ordinary and necessary part of the subcontractor's responsibility;
  - c. Whether the MBE, WBE or DBE is in the business of performing, managing or supervising the work for which it has been certified and is being utilized;
  - d. Whether the MBE, WBE or DBE is participating in the Contract as a middle person or broker in the normal course of that business or trade by purchasing the goods and/or services from another business, thereby qualifying expenditures for such goods and/or services to be counted toward utilization requirements for Certified MBEs, WBEs or DBEs.
  - e. Whether the MBE, WBE or DBE is responsible for the purchase and quality of, and payment for, materials used to perform its work under the Contract.
13. Compliance Officer: The individual(s) designated by Port KC to monitor a compliance with this Policy on behalf of Port KC.
14. Construction Services: Activities undertaken to complete the construction, reconstruction, improvement, enlargement or alteration of any fixed work that relates to the implementation of a Contract, including environmental remediation and demolition, but excluding Professional Services.
15. Contract: Any construction contract for more than \$300,000.00, adjusted as set forth herein, and all other contracts for more than \$117,000.00 in which Port KC is a party, except the following:
  - a. Personal services contracts;
  - b. Emergency contracts;
16. Contractor: Any Person who enters into a Contract.
17. Contractor Utilization Plan or Utilization Plan: The statement that must be submitted by a Bidder or Proposer pursuant to this Policy that states its plan to utilize Qualified, Certified MBEs, WBEs and/or DBEs in the performance of a Contract.

18. Default Goals: Goals set forth in the attached **Exhibit A** that may be amended from time to time to reflect the results of any disparity study conducted by the City.
19. Directories: Lists compiled by the Department or State containing names and addresses of Certified MBEs, WBEs and DBEs in the business of providing Construction Services, Professional Services and other services and goods from whom Bids and Proposals can be solicited. The Directories facilitate identifying MBEs, WBEs and DBEs within categories relevant to general contracting requirements and to particular solicitations.
20. Disadvantaged Business Enterprise (DBE): A for-profit small business concern that:
  - a. is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
  - b. Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it; and
  - c. Is certified by the Missouri Regional Certification Committee (MRCC).
21. Port KC: The Port Authority of Kansas City, Missouri.
22. President/CEO: The President/CEO of Port KC, or that President/CEO 's authorized representative.
23. Goal: A numerical objective stated as a percentage of contract dollars for participation by Qualified, Certified MBEs, WBEs or DBEs in Contracts.
24. Good Faith Waiver: A waiver that is granted by Port KC based upon a showing by a Contractor that despite undertaking in good faith the actions outlined in this Policy, the Contractor may be unable to achieve the goals set forth in the Contractor Utilization Plan.
25. Invitation for Bid: A request or invitation for submission of an offer to enter into a Contract pursuant to a competitive bidding process.
26. Minority: A person who is a citizen or lawful permanent resident of the United States and who meets the definition of a "minority" in the City MBE/WBE Ordinance OR RSMo 37.013 *et. seq.*
27. Minority Business Enterprise (MBE): A for-profit small business concern that:
  - a. Is at least 51 percent owned and independently controlled by one or more Minorities;
  - b. Meets the size standards imposed by 13 CFR 121.201; and
  - c. Is certified by the Department or State, with preference given to those certified by the Department.

28. Person: One or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint stock companies, limited liability companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, fiduciaries and other organizations; except “Person” does not include any local, state or federal governmental entity.
29. Professional Services: Advisory or consulting activities including, but not limited to, architectural, engineering, legal, accounting, marketing, environmental studies and financial services, but excluding Construction Services.
30. Proposal: Any offer or list of qualifications submitted to Port KC in response to a Request for Proposals or otherwise, but not pursuant to an Invitation for Bid.
31. Proposer: Any person who submits a Proposal, either in response to a Request for Proposals or otherwise, but not pursuant to an Invitation for Bid.
32. Qualified: Possessing the demonstrated ability to perform the contracted task.
33. Request for Proposals: An invitation for submission of an offer to enter into a Contract pursuant to a negotiated process and not a competitive bid, including a request for proposals and a request for qualifications.
34. State: The State of Missouri, including the Missouri Department of Transportation (MoDOT) and the Missouri Office of Equal Opportunity (OEO).
35. Utilization Goals: Goals for individual Contracts as set and/or agreed to by Port KC.
36. Woman: A person who is a citizen or lawful permanent resident of the United States and who is a female.
37. Women’s Business Enterprise (WBE): A for-profit small business concern that is not an MBE and that:
  - a. Is at least 51 percent owned and independently controlled by one or more Women; and
  - b. Meets the size standards imposed by 13 CFR 121.201.
  - c. Is certified by the Department or State, with preference given to those certified by the Department.
38. Workforce: Those individual persons employed to perform Construction Services, Professional Services and other services.

#### **Section 4 – Port KC or Contractor Compliance**

Reasonable efforts shall be made to:

1. Advertise contract opportunities in general circulation media, trade and professional publications, small business media and publications of minority and women's business organizations;
2. Send written notice of specific contract opportunities to minority and women's business organizations and those MBEs, WBEs and DBEs listed on Port KC's approved provider lists;
3. Shape the scope, specifications and size of a Contract to enhance participation opportunities for Qualified, Certified MBEs, WBEs and DBEs;
4. Give preference to MBEs and WBEs certified by the City or State when possible;
5. Include Qualified, Certified MBEs, WBEs and DBEs on Port KC's approved provider lists; and
6. Add, within all Invitations for Bid and Requests for Proposals, a provision that encourages MBEs, WBEs and DBEs to become certified with the City.

#### **Section 5 – MBE, WBE and DBE Policy Statement and Goals**

It is the policy of Port KC that specific Goals shall be set for MBE/WBE participation in Port KC's procurement process in order to ensure that MBEs/WBEs have equal opportunity to participate in Port KC Contracts and subcontracts. DBEs should only be counted if no MBE or WBE Certification can be identified, and should be assigned to the appropriate MBE/WBE category, if applicable. The Utilization Goals for participation of such MBEs and WBEs are expressed as a percentage of the totals of (a) the dollar amount spent for Professional Services, (b) the dollar amount spent for Construction Services, (c) the dollar amount spent on other services, and (d) the dollar amount spent on materials and supplies. Unless Port KC establishes individualized Utilization Goals, Port KC Contracts and subcontracts will use the Default Goals, as set forth in the attached **Exhibit A**, for Professional Services, Construction Services, other services, materials and supplies, and Workforce.

1. The Goals set forth in **Exhibit A** are Goals for individual Contracts. Goals for individual Contracts may be determined on a contract by contract basis upon the availability of Qualified, Certified MBEs and WBEs to perform all or part of the Contract. If the Contractor believes that they may be unable to achieve the Default Goals, the Contractor shall timely request a Good Faith Waiver as set forth in Section 7 of this Policy.
2. The established overall Goals should not be construed as a limitation on contracting and Workforce opportunities. MBEs and WBEs shall be eligible to be awarded Contracts consistent with bidding or other contract procedures over and above the percentages listed.
3. When Goals have been established for a Contract, each Bidder or Proposer shall submit a notarized Contractor Utilization Plan to Port KC which shall include the following:

- a. Names and addresses of each Qualified, Certified MBE or WBE that will participate in the Contract;
  - b. The work to be performed by each Qualified, Certified MBE and/or WBE, and the amounts each is to be paid for such work;
  - c. Verification letters from each listed MBE and WBE evidencing that it has agreed to execute a formal agreement for the work and indicating the price agreed upon for completion of the work.
4. All employees of Port KC and bound Contractors are responsible for implementing this Policy and for making every reasonable effort to utilize MBEs and WBEs when opportunities are available. The President/CEO of Port KC will take the lead role in the process by taking active steps to encourage full participation of Qualified MBEs/WBEs. This effort will involve monitoring MBE/WBE participation levels and informing staff of MBE/WBE availability.
  5. Staff to Port KC and bound Contractors shall include a Statement of Intended Utilization in all requests for proposals to all Contractors and subcontractors requiring bidders to acknowledge compliance with this Policy. Such Statement of Intended Utilization shall notify bidders in writing of the requirement that upon award they shall obtain Utilization Goals from the President/CEO for each Contract. Not less than seven (7) days prior to the date of the meeting at which the Contract is to be considered for approval by Port KC, the Contractor shall communicate, in writing, to Port KC either (a) the specific scopes of work for the Contract in sufficient detail so that specific Utilization Goals can be established or (b) that specific scopes of work for such Contract have not been established, and in which case, the Default Goals shall apply; provided however, such Default Goals may be modified by the President/CEO at such time as the specific scopes of work for such Contract are presented by the Contractor to the President/CEO pursuant to a Good Faith Waiver as set forth in Section 7.

## **Section 6 – MBE, WBE and DBE Administrative Responsibilities**

The President/CEO or Compliance Officer will be responsible for the coordination of this Policy and will ensure full compliance by Port KC.

1. The President/CEO or Compliance Officer shall review each proposed project, Proposal or Bid to determine potential for utilization of MBEs, WBEs or DBEs. This review is to be based on known availability of Qualified, Certified MBEs, WBEs or DBEs in the area as it relates to the scope of the Bid or Proposal package and is intended to identify ways in which a project might be broken down into sub-bids.
2. The President/CEO or Compliance Officer shall have the responsibility of setting project Utilization Goals.
3. Language regarding this Policy will be inserted in the form of the Statement of Intended Utilization into Bid and Proposal specifications to ensure that prospective Bidders and

Proposers are aware of a requirement to make Best Faith Efforts to utilize MBEs, WBEs and DBEs.

4. Plans and specifications will be made available by the President/CEO or Compliance Officer, along with any special instructions.
5. No Contracts will be deemed awarded pursuant to a Bid or Proposal until the Contractor has provided specific detailed documentation on how MBEs, WBEs or DBEs will be utilized and the Contractor Utilization Plan is approved by the President/CEO.
6. The Contractor Utilization Plan for a specific project and the Contractor commitment to carry out the program will become a part of the Contract awarded by Port KC. Failure to keep these commitments will be deemed as noncompliance with the Contract and may result in a breach of the Contract.

### **Section 7 – Compliance with Port KC Goals and Good Faith Waiver**

1. Contractors shall make good faith efforts to meet or exceed the Contractor Utilization Goals under this Policy during the period beginning with the date bids are received on the Contract and ending on the date the Contractor completed all work under the Contract.
2. A Contractor shall be presumed conclusively to be in compliance with this Policy as it relates to good faith efforts if (i) Contractor has met the Utilization Plan, or (ii) Port KC determines that the Contractor has made good faith efforts to achieve the goals set forth in the Utilization Plan and grants the Contractor's request for a Good Faith Waiver.
3. Port KC shall grant a Good Faith Waiver if the Contractor demonstrated to Port KC's reasonable satisfaction that it has made good faith efforts to achieve the Utilization Plan. In determining whether to grant a Good Faith Waiver, Port KC shall consider whether the Construction Contractor undertook the following actions:
  - a. Requested in writing the assistance of the President/CEO or Compliance Officer with respect to efforts to meet the Utilization Plan;
  - b. Provided notice to a reasonable number of Minority and Women's business organizations of specific opportunities to participate in the Contract in sufficient time to allow MBE, WBE and DBE firms to participate effectively;
  - c. Sent written notices, by certified mail, e-mail or facsimile, to Qualified, Certified MBEs, WBEs and DBEs soliciting their participation in the Contract in sufficient time to allow them to participate effectively;
  - d. Attempted to identify portions of the work for Qualified, Certified MBE, WBE and DBE participation in order to increase the likelihood of meeting the Goals, including breaking down Contracts into economically feasible units;

- e. Requested assistance in achieving the Goals from the President/CEO and acted on the recommendations;
- f. Conferred with Qualified, Certified MBEs, WBEs and DBEs and explained the scope and requirements of the work for which their Bids or Proposals were solicited;
- g. Attempted to negotiate in good faith with Qualified, Certified MBEs, WBEs and DBEs to perform specific subcontracts and has not rejected them as unqualified without sound reasons;
- h. For Contracts for Construction Services, within five (5) working days after drawing the Bid specifications, Bidder sent certified letters, e-mails or facsimiles to Qualified, Certified MBEs, WBEs and DBEs listed in the Directories.

A Bidder, Proposer or Contractor shall submit documentation of its Best Faith Efforts when requested by Port KC.

### **Section 8 – Participation Credit for MBEs, WBEs and DBEs**

1. The following Contract amounts shall be credited toward achieving the Goals:
  - a. The total Contract dollar amount that a prime Contractor has paid or is obligated to pay to a subcontractor that is a Qualified, Certified MBE, WBE or DBE;
  - b. Sixty percent (60%) of the total dollar amount paid or to be paid by a Contractor to obtain supplies or goods from a supplier who is not a manufacturer and who is a Qualified, Certified MBE, WBE or DBE. If the MBE, WBE or DBE is a manufacturer of such supplies then one hundred percent (100%) may be credited;
  - c. Subcontractor participation with a lower tier MBE, WBE or DBE subcontractor by the subcontractor using one of the above methods of participation.
2. Notwithstanding any other provision of this section, at the discretion of the President/CEO or Compliance Officer, credit toward achieving the Goals on an individual Contract *may* be given for:
  - a. Participation in a Contract by any Qualified, Certified MBE, WBE or DBE that does not perform a Commercially Useful Function. The prime Contractor shall have the burden of proving that a Certified MBE, WBE or DBE is performing a Commercially Useful Function;
  - b. Any portion of the value of the Contract that an MBE, WBE or DBE subcontractor subcontracts back to the prime Contractor or any other Contractor who is not a Qualified, Certified MBE, WBE or DBE;
  - c. A Certified MBE, WBE or DBE prime Contractor's own participation in its Contract with Port KC.

3. In order to be credited towards the MBE, WBE or DBE goals on a particular solicitation, an application for certification as a MBE, WBE or DBE must be filed no later than forty-five (45) days prior to the Invitation for Bid or Request for Proposals. An MBE, WBE or DBE must have received its certification by the date on which the Bid or Proposal is due.

### **Section 9 – Enforcement**

In addition to remedies set forth in any Contract, if Port KC finds, after due notice and hearing, that the Contractor has not made a good faith effort to comply with the applicable Utilization Plan or has otherwise not complied with this Policy, Port KC may take such action as it deems appropriate, including but not limited to temporarily suspending Contract rights, ordering a cessation of Contract activity, or noting such non-compliance in any future application by the Contractor. In addition, Port KC may take into account the past compliance record of any Contractor's proposed subcontractors in evaluating such Contractor's applications.

### **Section 10 – MBE, WBE and DBE Reporting**

All Contractors shall provide to the President/CEO or Compliance Officer monthly reports as and a final overall report set forth herein:

1. Throughout the duration of the Contract, monthly reports shall be provided in a format acceptable to Port KC, as provided by the President/CEO or Compliance Officer.
2. The Compliance Officer shall have access, at all reasonable times, to all books, papers, records, reports or accounts in possession of or under the control of the Contractor and its subcontractors as may be reasonably necessary to ascertain compliance with this Policy. The Contractor and its subcontractors shall furnish such further information as may be required by the Compliance Officer within ten (10) working days of the date it is requested in writing. The Contractor shall require all of its subcontractors to comply with the requirements of this subsection. All Bidders, Proposers and Contractors shall maintain such records as reasonably may be required in order to demonstrate Policy compliance including, but not limited to:
  - a. A copy of the Utilization Goals established by the President/CEO or Compliance Officer for each project;
  - b. Utilization Plans approved by the President/CEO or Compliance Officer; and
  - c. Documentation that evidences the use of Best Faith Efforts requirements to meet the Utilization Goals.
3. The Compliance Officer shall be authorized to conduct on-site audits and records inspections of the Contractor and its subcontractors without prior notice as may be necessary to ascertain compliance with this Policy. The Contractor shall require all of

its subcontractors to comply with the requirements of this subsection. Such records shall be made available for audit by Port KC from time to time upon reasonable notice.

4. After completion of work on the Contract but before release of retainage, final acceptance and closeout, the Contractor shall submit a final report in a form provided by the Compliance Officer documenting the overall project total spend on work performed by Minorities and Women on the Contract as compared to the total Contract spend and request the Compliance Officer to have a final Determination of Compliance with the Policy.

**Exhibit A**

Below are the default Contractor Utilization Goals that may be amended from time to time to reflect the results of the most recent disparity study conducted by the City.

<b>Classification</b>	<b>Construction</b>	<b>Professional Service</b>	<b>Other Services</b>	<b>Materials and Supplies</b>
<b>African American</b>	9%	8%	13%	9%
<b>Hispanic American/ Latino American</b>	5%	3%	3%	3%
<b>Native American/Asian American/Pacific Islander American</b>	1%	2%	2%	2%
<b>White Women</b>	7%	8%	10%	9%