The Policy Deliberation Phase: Prescribing Effective Remedies for Identified Barriers to M/WBE Participation

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Business Stakeholder Work Group
Solid Waste Authority of Palm Beach County
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The Legal Framework: Potential Challenges to Economic Inclusion Policies

- **Strict Scrutiny**
  - When is it required?
    - To examine government use of a racial preference
    - To examine government use of a racial classification
Two Prongs of Strict Scrutiny

1st Prong: Compelling Interest

- MTA Disparity Study update provided a ‘strong basis in evidence’
- That “factual predicate” provides a roadmap to remedies
  1. Identification of where disparities exist
  2. Identification of the nature & form of barriers, and root causes of disparities.
Two Prongs of Strict Scrutiny

2\textsuperscript{nd} Prong: Narrow Tailoring of Remedies

- Consideration of “race-neutral” remedies
- Consideration of appropriate “race-conscious” remedies only when it appears that neutral remedies, in and of themselves, are inadequate
- Limited duration; periodic review; limited by ethnicity/gender, industry, & form of discrimination
- Forms of remedies: Follow the Road Map of the Factual Predicate
The Policy Deliberation Phase

- Policy Option Matrix
  - Identifies appropriate administrative reforms and policy “remedies” for addressing barriers identified in Disparity Study
    - Race- and gender-neutral medicine
    - Race- and gender-conscious medicine
  - Policy options that are legally defensible
  - Policy options that are effective / best practices
The Policy Deliberation Phase

- **Policy Option Matrix**
  - Describes the features of each proposed policy option.
  - Cites relevant findings and “diagnoses” from Disparity Study that support consideration of proposed policy option.
  - Discussion guide that identifies key pros and cons for each proposed policy option remedy to facilitate debate and policy deliberation process.
Finding the Right Prescription: The SWA Doctor’s Bag for Economic Inclusion...
Treatment Options for Economic Disparity...

Race-Neutral vs. Race-Conscious Remedies

- Non-industry specific: bid-debriefings, financing, technical assistance, commercial non-discrimination, de-bundling, specification review, centralized bidder registration system.

- Industry-specific
  - Construction
  - Professional Services
  - Commodities / Other Services / Trade Services
Treatment Options for Economic Disparity...

**Definition: Affirmative Procurement Initiatives (“APIs”)**

- Industry-specific tools for enhancing prime and subcontract opportunities for S/M/WBE firms
- APIs enhance market access
- APIs may be race/gender-neutral or race/gender-conscious in form
- APIs are applied on contract-specific basis
Generic Examples of APIs:

- Annual Aspirational Goals
- Prime Contract / Direct Contracting Program
- Evaluation Preferences
- Joint Venture Incentives
- Mandatory Subcontracting Goals
- M/WBE Segmented Subcontracting Goals
- Mentor-Protégé Program
- Competitive Business Development Demonstration Projects
- Bid Preferences
Treatment Options for Economic Disparity...

**Administrative Reforms (All Industries)**

**Race-Neutral Remedies**

- **R/N-1:** Centralized Bidder Registration, Data Extraction / Management Enhancements
- **R/N-2:** Administrative Strategies / De-bundling
- **R/N-3:** Subcontract Remedies (Mobilization and Working Capital Payments)
- **R/N-4:** Contract Monitoring & Reporting (Multi-year Contracts and Change Orders)
- **R/N-5:** Website Enhancement Strategies
- **R/N-6:** Uniform Lead Times for Bid Submittals
Treatment Options for Economic Disparity...

**Administrative Reforms (All Industries)**

**Race-Neutral Remedies (con’t)**

- R/N-7: Debriefings for Unsuccessful Bidders
- R/N-8: Establish Position for EBO Ombudsman (Mediation of Disputes)
- R/N-9: Expedited Payment Program
- R/N-10: Disputed Invoice Five Day Notice Requirement
- R/N-11: Commercial Non-discrimination Policy
Treatment Options for Economic Disparity...

Administrative Reforms (All Industries)

Race-Neutral Remedies (con’t)

- R/N-12: Direct Periodic Reporting of EBO Office to Executive Director & Board
- R/N-13: EBO Office Representation on Evaluation Panels
Treatment Options for Economic Disparity...

**Administrative Reforms (All Industries)**

**Race-Conscious Remedies**

- **R/C-1:** Penalties and Sanctions for Non-Compliance with S/M/WBE Requirements
- **R/C-2:** Penalties and Sanctions for Fraud (Certification and S/M/WBE Compliance)
- **R/C-3:** EBO Office Prior Approval of S/M/WBE Subcontractor Substitutions
- **R/C-4:** SWA Staff Training (S/M/WBE Program Procedures and Responsibilities)
Treatment Options for Economic Disparity...

Construction Industry

Race-Neutral Remedies

- R/N-14: Bond Waivers and Assistance Programs (Work Group)
- R/N-15: Direct Contracting Program for Small Contracts
- R/N-16: Small Business Enterprise Prime Contract Program
- R/N-17: SBE Subcontracting Program
- R/N-18: SBE Mentoring-Protégé Program
Treatment Options for Economic Disparity...

Construction Industry

Race-Conscious Remedies

- R/C-5: Annual Aspirational Goals
- R/C-6: M/WBE Subcontracting Goals
- R/C-7: M/WBE Segmented Subcontracting Goals
- R/C-8: M/WBE Joint Venture Incentive
- R/C-9: M/WBE Mentor-Protégé Program
- R/C-10: M/WBE Evaluation Preference for “Best Value” RFPs
REMAINING STEPS FOR A NEW PROGRAM

- Board Presentation and Approval of Phase I Amendments to SBE Program and Purchasing Manual Procedures (April 23rd Board Meeting)
- Ongoing Feedback from SWA Staff, Business Stakeholder Work Group, on Draft Policy Option Matrix
- Revision of Policy Option Matrix and Presentation to SWA Governing Board;
- Board Approval to Draft Revised EBO Policy Based on Program Elements in Revised Matrix
REMAINING STEPS FOR A NEW PROGRAM

- Feedback from SWA Staff, Disparity Study Work Group, and other Stakeholders on Draft EBO Policy
- Revision of Draft EBO Policy and Presentation to SWA Board
- Board Approval of Revised EBO Policy and Procedures following public comment period
REMAINING STEPS FOR A NEW PROGRAM

Timeline for Completion:

• Presentation of Draft Policy Option Matrix to SWA Staff and Work Group (April 11th)
• Public Comment / Revision Period, SWA Board Presentation of Revised Policy Option Matrix (May, 2018)
• Draft EBO Policy and Procedures based upon elements of revised Policy Option Matrix (June 7, 2018)
REMAINING STEPS FOR A NEW PROGRAM

Timeline for Completion:

- Presentation of draft EBO Policy to SWA Board with public comment (June 15, 2018)
- Final approval by SWA Board of revised final EBO Policy and Procedures following public comment period. (June 30, 2018)
QUESTIONS???

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