

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**  
**Wednesday, April 11, 2018**  
**9:00 AM**

# 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

## 1<sup>st</sup> 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<sup>nd</sup> 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 23<sup>rd</sup> 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

- ❖ Draft “Hybrid” Equal Business Opportunity (EBO) Program and Purchasing Manual Procedures
- ❖ 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 11<sup>th</sup>)
- 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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