

**REMEDIAL POLICY OPTIONS FOR SOLID WASTE AUTHORITY OF PALM BEACH COUNTY'S  
EQUAL BUSINESS OPPORTUNITY PROGRAM (PART II –PROFESSIONAL SERVICES)**

**(Prepared by Franklin M. Lee, Esquire 4-19-18)**

**Introduction**

The following policy option matrix and recommendations related to Professional Services Industry-related remedies are based upon our legal review of the March 2017, Final Report entitled “Solid Waste Authority of Palm Beach County, Florida, Disparity Study Final Report” (“Study”) performed for the Solid Waste Authority of Palm Beach County (“SWA”) by Mason Tillman Associates, LTD. (“MTA”).

Tables III-A and III-B below summarize respectively the remedial industry-specific race-neutral Small Business Enterprise (“SBE”) policy options and the race- and gender-conscious minority/women business enterprise (“M/WBE”) policy options for the Professional Services Industry that may be legally defensible and somewhat effective in addressing identified barriers to M/WBE participation in Solid Waste Authority (“SWA”) contracts. Table III-A reflects those recommendations for industry-specific remedial policy options that are race- and gender-neutral. Table III-B reflects those recommendations for industry-specific remedial policy options that are race- and gender-conscious (i.e., they do not include the use of racial or gender classifications). As a result of U.S. Supreme Court precedents requiring narrow tailoring of remedies under the “strict scrutiny” standard, the SWA should first consider the use of race- and gender-neutral remedial options as reflected in Table III-A, and only resort to the race- and gender-conscious remedial options reflected in Tables III-B when it has reason to believe that neutral remedies, in and of themselves, will be insufficient to fully eliminate disparities resulting from discrimination.<sup>1</sup>

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<sup>1</sup> This “Part II” of the draft Policy Option Matrix includes a total of 10 various policy recommendations, of which 5 are race-and gender-neutral, and 5 are race- and gender-conscious in nature. A “R/C” reference within the numerical label of a policy option means that the proposed policy is a “race- and gender-conscious” remedy. A “R/N” reference within the numerical label of a policy option means that the proposed policy is a “race- and gender-neutral” remedy.

**TABLE III-A: RACE / GENDER-NEUTRAL PROFESSIONAL SERVICES INDUSTRY  
POLICY OPTIONS FOR SWA'S EQUAL BUSINESS OPPORTUNITY PROGRAM**

(Prepared by Franklin M. Lee, Esquire 4-19-18)

<u>Industry Specific Policy Option</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Professional Services (R/N-19)</p> <p><i>SBE Vendor Rotation</i></p>		<p><u>Option 1:</u> Selective use of vendor rotation of pre-qualified panel of SBE Professional Services firms for smaller Authority contracts valued at less than \$50,000. Assignment of work tasks is rotated among this pre-qualified panel of SBE Professional Services firms. Periodically, SBE Vendor Rotation list is re-ordered from least dollars received to most dollars received based upon cumulative dollars in work tasks each firm has received within past year.</p>	<p>Significant underutilization of M/WBE firms (with exception of Native American firms) in Professional Services prime contracts of various sizes; (Study pp. 8-27 and 12-3 to 12-4); see also Study pp. 9-6 to 9-7, and 9-11, and PUMS regression analysis reflecting significant disparities adversely affecting business ownership rates, firm earnings, and loan access for M/WBE professional services firms. (Study pp. 10-15 to 10-16; 10-18 to 10-20;</p>	<p><i>Pro: Automated centralized bidder registration system combined with pre-qualification process will enable rotation of SBE firms to get a fair chance to prove capabilities on smaller projects and overcome bias against unknown firms. Facilitates building a track record and overcoming lack of SWA experience barrier.</i></p> <p><i>Con: Reduces</i></p>

<p>Professional Services (R/N-19)</p> <p><i>SBE Vendor Rotation (continued)</i></p>		<p><u>Option 2:</u> To ensure there is price competition, for those professional services contracts valued at \$50,000 or less where price may be a factor in selection, price quotations must be solicited from the next three prequalified SBE vendors in rotation.</p>	<p>and 10-28)</p>	<p><i>competition in the short-run and may adversely affect cost. However, this risk is mitigated under Option 2. Note also, that for certain professional services contracts in Florida, the CCNA prohibits selection based solely upon low cost.</i></p>
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<u>Industry Specific Policy Option</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Professional Services (R/N-20)</p> <p><i>Evaluation Preferences for <u>New SBE</u> Prime Bidders</i></p>		<p>Provide preferences only for first time entrants seeking professional services contracts. Evaluation point preferences (award up to 15% of available evaluation points) to SBE firms bidding as first-time Professional Services prime consultants. Once SBE Professional Services firm is awarded a contract on this basis, they are no longer eligible for such evaluation preferences in the future.</p>	<p>Significant underutilization of M/WBE firms (with exception of Native American firms) in Professional Services prime contracts of various sizes; (Study pp. 8-27 and 12-3 to 12-4); see also Study pp. 9-6 to 9-7, and 9-11, and PUMS regression analysis reflecting significant disparities adversely affecting business ownership rates, firm earnings, and loan access for M/WBE professional services</p>	<p><i>Pro: Encourages more natural evolution of successful S/M/WBE Professional Services sub-consultant firms into full-service Professional Services firms that bid as primes. Helps overcome natural bias in favor of incumbent firms that repeatedly perform Professional Services prime contracts for SWA</i></p> <p><i>. Con: SBA size</i></p>

<p>Professional Services (R/N-20)</p> <p><i>Evaluation Preferences for <u>New</u> SBE Prime Bidders (continued)</i></p>			<p>firms. (Study pp. 10-15 to 10-16; 10-18 to 10-20; and 10-28)</p>	<p><i>standards for SBEs may not be workable for Professional Services firms, which typically may have fewer employees.</i></p>
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<u>Industry Specific Policy Option</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Professional Services (R/N-21)</p> <p><i>SBE Reserve for Contracts Up to \$5,000 and Required SBE Quotations or Informal Solicitations up to \$50,000</i></p>		<p>Reserve some smaller professional services contracts valued at less than \$5,000 for competition among SBE professional services firms only. For larger informal professional services contracts valued at up to \$50,000, require quotations from at least two or three SBE professional services firms.</p>	<p>Significant underutilization of M/WBE firms (with exception of Native American firms) in Professional Services prime contracts of various sizes; (Study pp. 8-6 to 8-7; 8-27; and 12-3 to 12-4); see also Study pp. 9-6 to 9-7, and 9-11, and PUMS regression analysis reflecting significant disparities adversely affecting business ownership rates, firm earnings, and loan access for M/WBE professional services firms. (Study pp. 10-15 to 10-16; 10-18 to 10-20; and 10-28).</p>	<p><i>Pro: Encourages more natural evolution of successful S/M/WBE Professional Services sub-consultant firms into full-service Professional Services firms that bid as primes. Helps overcome natural bias in favor of incumbent firms that repeatedly perform Professional Services prime contracts for SWA</i></p> <p><i>Con: SBA size standards for SBEs may not be workable for Professional Services firms, which typically may have fewer employees.</i></p>

<u>Industry Specific Policy Option</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Professional Services (R/N-22)</p> <p><i>SBE Evaluation Preference for Prime Bidders</i></p>		<p>Evaluation point preferences (award up to 15% of total available evaluation points) to any SBE firms bidding as professional services prime consultants on contracts valued at less than \$500,000. **One alternative is to restrict this API to professional services SBE prime consultant bidders that have not previously won a professional services prime contract with the SWA. (Compare with R/N- 20 above.)</p> <p>** 2<sup>nd</sup> Alternative is to have a sliding scale for award of up to 15 SBE Evaluation Preference Points awarded based upon relative dollar value (from 10% up to 100%) of bidder’s team total SBE participation.</p>	<p>Significant underutilization of M/WBE firms (with exception of Native American firms) in Professional Services prime contracts of various sizes; (Study pp. 8-6 to 8-7; 8-27; and 12-3 to 12-4); see also Study pp. 9-6 to 9-7, and 9-11, and PUMS regression analysis reflecting significant disparities adversely affecting business ownership rates, firm earnings, and loan access for M/WBE professional services firms. (Study pp. 10-15 to 10-16; 10-18 to 10-20; and 10-28).</p>	<p><i>Pro: Encourages more natural evolution of successful S/M/WBE Professional Services sub-consultant firms into full-service Professional Services firms that bid as primes. Helps overcome natural bias in favor of incumbent firms that repeatedly perform Professional Services prime contracts for SWA.</i></p> <p><i>Con: SBA size standards for SBEs may not be workable for Professional Services firms, which typically may have fewer employees.</i></p>

<u>Industry Specific Policy Option</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Professional Services (R/N-23)</p> <p><i>SBE Subcontracting Goals for Professional Services</i></p>		<p>Establish mandatory SBE subcontracting goals for subcontract participation of at least 20% with opportunity for good faith waivers or reductions in goal based upon documentation of inadequate availability. Contract-specific subcontracting goals should be weighted to availability of SBE firms in required sub-specialties; this provision should be limited in its application to M/WBE prime bidders, which, as significantly underutilized SBE firms themselves, should be permitted to self-perform such SBE subcontracting goals. Project-specific</p>	<p>Significant underutilization of M/WBE firms (with exception of Native American firms) in Professional Services prime contracts and subcontracts of various sizes; (Study pp. 8-6 to 8-7; 8-27; and 12-3 to 12-4); See also Study pp. 9-6 to 9-7, and 9-11, and PUMS regression analysis reflecting significant disparities adversely affecting business ownership rates, firm earnings, and loan access for M/WBE professional services firms. (Study pp. 10-15 to 10-16; 10-18 to 10-20; and 10-28).</p>	<p><i>Pro: Enhances ability of S/M/WBE professional services firms to gain experience on larger contracts and establish a track record with SWA. May also develop referral source with prime consultant.</i></p> <p><i>Con: Not all professional services contracts have commercially useful subcontract opportunities, so EBO Office will need to carefully evaluate each prime contract opportunity. Also, SBA size standards may not effectively</i></p>



<p>Professional Services (R/N-23)</p> <p><i>SBE Subcontracting Goals for Professional Services (continued)</i></p>		<p>goals should vary by project and be based upon realistic measurement of available SBE firms for the particular project. Documented excessive prices or poor performance by SBE subcontractors should be recognized as a basis for disqualification from bid. EBO Office should undertake analysis to set subcontracting goals on a project-specific basis where there is a commercially useful function to be subcontracted.</p> <p><b>**Alternatively, consider limiting availability of this policy option to larger professional services contracts greater than \$175,000 in value.</b></p>		<p><i>benefit M/WBE firms since professional services firms typically have relatively small numbers of employees and gross revenues.</i></p>
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**TABLE III-B: RACE / GENDER-CONSCIOUS PROFESSIONAL SERVICES INDUSTRY  
POLICY OPTIONS FOR SWA'S EQUAL BUSINESS OPPORTUNITY PROGRAM**

(Prepared by Franklin M. Lee, Esquire 4-19-18)

<b><u>Industry Specific Policy Option</u></b>	<b><u>MTA Recommendations</u></b>	<b><u>Additional Options</u></b>	<b><u>Relevant Findings / Justifications</u></b>	<b><u>Pros &amp; Cons</u></b>
<p align="center">Professional Services (R/C-11)</p> <p align="center"><i>Annual Aspirational M/WBE Goals</i></p>		<p>Establishment of annual aspirational goals for M/WBE participation in SWA professional services contracts (base goals starting at 27% MBE and 19% WBE for professional services prime contract dollars, and 26% MBE and 19% WBE for subcontract dollars awarded, with some adjustment on an annual basis as warranted based upon CBR registration). See Study pp.8-6 to 8-7 and 9-6 to 9-7. These goals</p>	<p>Flexible benchmarks are important to managing the M/WBE program and finding the appropriate mix of race- and gender-neutral and race- and gender-conscious policies. Annual goals also provide an up-to-date measure of availability by overall industry categories, and can be useful for outreach purposes. Disparity Study findings obtained with benefit of threshold analysis greatly diminish smaller</p>	<p><i>Pro: Provides a useful tool for evaluating success of program and making necessary adjustments to aggressiveness of remedies and outreach efforts. Provides realistic targets for M/WBE participation in SWA contracts that are data-driven based upon bona fide measures of availability.</i></p>

<p>Professional Services (R/C-11)</p> <p><i>Annual Aspirational M/WBE Goals (continued)</i></p>		<p>are not to be necessarily applied to individual contracts, but rather serve as a guidepost to evaluate the effectiveness of the SBE and M/WBE Affirmative Procurement Initiatives (“APIs”) on an annual basis, and to identify and direct adjustments as necessary to the mix and aggressiveness of applied policy options.</p>	<p>M/WBE capacity as a plausible explanation for significant disparities observed at prime contract and subcontract levels. (Study at pp. 8-2 to 8-27; see also pp. 9-3, 10-4 to 10-28, and 12-5.)</p>	<p><i>Con: Must guard against reflex to apply annual goals to specific projects without justification. If not updated periodically, can also undermine ability to narrowly tailor program’s application in the future.</i></p>
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<u>Industry Specific Policy Option</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Professional Services (R/C-12)</p> <p><i>M/WBE Evaluation Preferences for Professional Services</i></p>	<p>In professional services contracts that are “best value” contracts where selection is through an RFP process instead of lowest responsible bidder IFBs, include language in RFP to encourage M/WBE participation on bidder’s team as one element in selection criteria. This option assigns evaluation point preferences (awarding up to 15% of total available evaluation points on a sliding scale basis based upon the level of M/WBE participation) to any firms bidding on professional services contracts. (See Study at p. 12-9 to 12-10)</p>	<p>FML concurs. (Currently, SWA maximizes evaluation S/M/WBE preference points at 10% of total available points. We propose increasing this to 15% for M/WBE firms). Evaluation preference points are assigned to team based upon the percentage dollar value of the contract that will be performed by team members that are M/WBE firms.</p>	<p>MTA Study finds significant underutilization of M/WBE firms (with exception of Native American firms) in Professional Services prime contracts and subcontracts of various sizes; (Study pp. 8-6 to 8-7; 8-27; and 12-3 to 12-4); See also Study pp. 9-6 to 9-7, and 9-11, and PUMS regression analysis reflecting significant disparities adversely affecting business ownership rates, firm earnings, and loan access for M/WBE professional services firms. (Study pp. 10-15 to 10-16; 10-18 to 10-20; and 10-28).</p>	<p><i>Pro: Encourages more natural evolution of successful S/M/WBE Professional Services sub-consultant firms into full-service Professional Services firms that bid as primes. Helps overcome natural bias in favor of incumbent firms that repeatedly perform Professional Services prime contracts for SWA.</i></p> <p><i>Con: Requires careful compliance monitoring by SWA to ensure that M/WBE team members get to perform agreed upon scope of work at</i></p>

<p>Professional Services (R/C-12)</p> <p><i>M/WBE Evaluation Preferences for Professional Services (continued)</i></p>				<p><i>agreed upon dollar value.</i></p>
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<u>Industry Specific Policy Option</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Professional Services (R/C-13)</p> <p><i>M/WBE Subcontracting Goals for Professional Services</i></p>	<p>Require prime bidders to exercise good faith efforts to meet an M/WBE subcontract participation goal with firms owned by African Americans and Women. Subcontracting goals should also contain waiver provisions for those instances where sufficient ready, willing, and able M/WBE subcontractors are not available. (Study p. 12-12).</p>	<p>FML concurs. There should be opportunity for good faith waivers or reductions in subcontracting goals based upon documentation of inadequate M/WBE availability. Contract-specific subcontracting goals should be weighted to availability of M/WBE firms in required sub-specialties. This provision should be limited in its application to M/WBE prime bidders, which, as significantly underutilized M/WBE prime firms themselves, should be permitted to self-perform such M/WBE subcontracting goals. Project-specific</p>	<p>MTA Study concludes there is significant disparity in M/WBE prime contract participation in SWA Professional Services contracts. (Study at p. 12-4). There is also significant disparity in subcontract utilization of M/WBEs in SWA Professional Services contracts for African American and Women-owned subcontractors. (See Study at p. 12-6). Good old boy networks provide a built-in advantage for incumbent firms in SWA contracts. (See also Study pp. 7-9 and 7-14; 8-28; and 9-3).</p>	<p><i>Pro: Enhances ability of M/WBE professional services firms to gain experience on larger contracts and establish a track record with SWA. May also develop referral source with prime consultant.</i></p> <p><i>Con: Not all professional services contracts have commercially useful subcontract opportunities, so EBO Office will need to carefully evaluate each prime contract opportunity.</i></p>

<p>Professional Services (R/C-13)</p> <p><i>M/WBE Subcontracting Goals for Professional Services (continued)</i></p>		<p>goals should vary by project and be based upon realistic measurement of available M/WBE firms for the particular project. Documented excessive prices or poor performance by M/WBE subcontractors should be recognized as a basis for disqualification from bid. EBO Office should undertake analysis to set subcontracting goals on a project-specific basis where there is a commercially useful function to be subcontracted.</p> <p><b>**Alternatively, consider limiting availability of this policy option to larger professional services contracts greater than \$175,000 in value.</b></p>		
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<u>Industry Specific Policy Option</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Professional Services (R/C-14)</p> <p><i>M/WBE Vendor Rotation</i></p>		<p><u>Option 1:</u> Selective use of vendor rotation of pre-qualified panel of M/WBE Professional Services firms for smaller Authority contracts valued at less than \$50,000. Assignment of work tasks is rotated among this pre-qualified panel of M/WBE Professional Services firms. Periodically, M/WBE Vendor Rotation list is re-ordered from least cumulative dollars received to most cumulative dollars received by each firm in work tasks assigned within past year.</p> <p><u>Option 2:</u> To ensure there is price</p>	<p>MTA Study concludes there is significant disparity in M/WBE prime contract participation in SWA Professional Services contracts. (Study at p. 12-4). There is also significant disparity in subcontract utilization of M/WBEs in SWA Professional Services contracts for African American and Women-owned subcontractors. (See Study at p. 12-6). Good old boy networks provide a built-in advantage for incumbent firms in SWA contracts. (See also Study pp. 7-9 and 7-14; 8-28; and 9-3).</p>	<p><i>Pro: Automated centralized bidder registration system combined with pre-qualification process will enable rotation of M/WBE firms to get a fair chance to prove capabilities on smaller projects and overcome bias against unknown firms. Facilitates building a track record to overcome SWA experience barrier.</i></p> <p><i>Con: Reduces competition in the short-run and may adversely affect cost. However, this risk is mitigated under Option 2. Note also,</i></p>



<p>Professional Services (R/C-14)</p> <p><i>M/WBE Vendor Rotation</i></p> <p><b>(continued)</b></p>		<p>competition, for those professional services contracts valued at \$50,000 or less where price may be a factor in selection, price quotations must be solicited from the next three prequalified M/WBE vendors in rotation.</p>		<p><i>that for certain professional services contracts in Florida, the CCNA prohibits selection based solely upon low cost.</i></p>
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<u>Industry Specific Policy Option</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Professional Services (R/C-15)</p> <p><i>Required M/WBE Quotations for Informal Solicitations Up to \$50,000</i></p>		<p>For larger informal professional services contracts valued at up to \$50,000, require quotations from at least two or three M/WBE professional services firms.</p>	<p>Significant underutilization of M/WBE firms (with exception of Native American firms) in Professional Services prime contracts of various sizes; (Study pp. 8-6 to 8-7; 8-27; and 12-3 to 12-4); see also Study pp. 9-6 to 9-7, and 9-11, and PUMS regression analysis reflecting significant disparities adversely affecting business ownership rates, firm earnings, and loan access for M/WBE professional services firms. (Study pp. 10-15 to 10-16; 10-18 to 10-20; and 10-28).</p>	<p><i>Pro: Automated centralized bidder registration system combined with pre-qualification process will enable rotation of M/WBE firms to get a fair chance to prove capabilities on smaller projects and overcome bias against unknown firms. Facilitates building a track record to overcome SWA experience barrier.</i></p> <p><i>Con: Reduces competition in the short-run and may adversely affect cost. However, this risk is</i></p>

<p>Professional Services (R/C-15)</p> <p><i>Required M/WBE Quotations for Informal Solicitations Up to \$50,000 (continued)</i></p>				<p><i>mitigated by requirement for multiple quotes. Note also, that for certain professional services contracts in Florida, the CCNA prohibits selection based solely upon low cost.</i></p>
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