

Responses to Questions
from the Disparity Study Work Group to Mason Tillman Associates Ltd.
Regarding the Disparity Study Final Report Findings and Recommendations
(Responses submitted by Franklin M. Lee, Esq.)

March 8, 2016

1. Are the Race and Gender Specific Recommendations listed in the study (pages 12-23 through 12-12-30) the only program strategies that can be used in a SBBC M/WBE program?

No. There may be other race- and gender-conscious and race- and gender-neutral policy options that are considered “best practices” from other jurisdictions that may be appropriate and legally defensible given the findings from the disparity study. Part of my scope of work is to include such policy options in a comprehensive menu of program elements that will be provided in the policy option matrix document for review and consideration by business and SBBC stakeholders.

2. Can the SBBC Disparity Study Workgroup recommend additional strategies that expand the options for eliminating the disparities, while remaining within the limitations of the legal definition of narrowly tailored?

Yes, provided there is a strong basis in evidence contained in the disparity study supporting consideration of such remedies to address identified barriers to M/WBE participation.

3. Can the Data Prime Contractor Availability Source List (p. 7-3) be updated to include the list of membership organizations that work directly with Black contractors (i.e., Minority Builders Coalition, Miami-Dade Chamber of Commerce, Florida Minority Supplier Diversity Council, West Palm Beach Black Chamber, nor National Association of Black Women In Construction) that were consulted?

The disparity study is now complete and it has been formally accepted and adopted by the School Board. No further changes to the study are possible at this time. However, that is not to say that this suggestion cannot be taken into consideration in terms of any outreach, programmatic recommendations, and administrative procedures developed pursuant to this policy deliberation phase. In addition, one of the likely policy option recommendations to come out of this policy deliberation phase will be for the SBBC to establish a mandatory centralized bidder registration system that will enable it to recruit contractors and prospective vendors from such organizations and encourage their registration on the web-based centralized bidder registration system if they are interested in selling goods or services to the SBBC as either a prime contractor or subcontractor. In this way, their availability can appropriately be taken into account in the setting of any contract-specific goals.

4. How could a sheltered market program be included without jeopardizing the SBBC program?

Due to the constraints imposed by “strict scrutiny”, any such sheltered market or set-aside program that restricts competition to a certain category of firms will have to be race-neutral in its utilization of business categories in order to be legally defensible (e.g., set asides are a permissible tool under programs for SBE or Small Business Enterprise, Small Local Business Enterprise, or HUBZone firms).

5. Can a tiered incentive strategy based upon levels of disparity (i.e., groups with most significant disparity get higher goals) be included in the SBBC narrowly tailored program based upon the findings? For example, White women and Hispanic subcontractors had significantly less disparity than Black subcontractors. Therefore, a solicitation awards more points for including the most underutilized firms in descending order according to their levels of disparity (i.e., Black subcontractors get highest, followed by White women, then Hispanic, etc.).

One approach that I have recommended to address situations in which certain categories of M/WBE firms are significantly more underutilized than others is referred to as “Segmented Subcontracting Goals.” In the example you have given, an overall M/WBE subcontracting goal might be applied on a contract with the proviso that no less than 7% of that 20% goal must be attained through utilization of Black contractors based upon the relative availability of Black contractors for that type of subcontract work (e.g., 7%) and patterns of near exclusion of Black contractors from participation in similar contracts in the past.

6. Are there any legal restrictions to the penalties/consequences (sanctions for failure to meet minimum goals) to go along with the rewards (bid credits, etc.) that may be included in the SBBC narrowly tailored program based upon the findings?

From a legal perspective, there are a variety of provisions that should be included in the bid solicitation and contract language to properly impose sanctions against a contractor for its failure to exercise good faith in meeting mandatory M/WBE subcontracting goals. Among these is a process that permits bidders to seek waivers or reductions in the applied subcontracting goals in advance of bid opening. Appropriate good faith efforts waiver requests should be objectively evaluated on a ‘pass or fail’ basis to determine whether elimination or reduction of the subcontracting goal is warranted due to properly documented lack of availability of ready, willing, and able M/WBE subcontractors. If it is, then the subcontracting goal bid specification should be eliminated or modified through an addendum to the bid prior to the bid due date, and all bidders should then be offered the same opportunity to adjust their bids accordingly prior to submission. On the other hand, if there are no waiver requests or if all the waiver requests are denied, then the M/WBE subcontracting goal is mandatory and is a material deliverable under the bid specifications. Any subsequent bid submitted by a prime bidder that fails to attain the M/WBE subcontracting goal is therefore deemed “non-responsive” and is not considered in determining the lowest responsible bidder. Moreover, any winning prime contractor bidder that is awarded a contract wherein it has committed to attaining the M/WBE subcontracting goal is obligated to meet the goal absent prior written approval from the SBBC for a contract modification based upon legitimate changed

circumstances that prevent attainment of the goal. Failure to satisfy this term of the contract will be considered a material breach of the contract under such circumstances and will subject the contractor to damages and other appropriate remedies available under the terms of the contract (e.g., liquidated damages equal to the dollar value of committed M/WBE participation not obtained) and under law (e.g., default on a material term of a contract may render such contractor as “not responsible” for the purpose of future bids).

7. Can a policy that achieves reciprocity for M/WBE certification and prequalification with other agencies (i.e., Miami-Dade Public Schools, West Palm Beach County, etc.) be included in the revised SBBC M/WBE program?

It is not a “best practice” to permit reciprocity in M/WBE certification and prequalification with other agencies unless they are part of the same relevant geographic and product markets, and disparity studies have demonstrated that the proper definition of M/WBEs and “qualified” firms is the same for those different jurisdictions. Moreover, even in instances where M/WBE certification or prequalification reciprocity is permissible, care should be given in considering whether the certification and prequalification standards and procedures are similar among those jurisdictions. Otherwise, the integrity of all of the M/WBE programs may be undermined because of shoddy certification standards and less rigorous certification procedures on the part of one jurisdiction.

8. Can SBBC policy state that target goals are minimum required while encouraging, though not requiring, and additional aspirational goals to exceed the minimum goal?

It is a “best practice” to always state the M/WBE subcontracting goal as the minimum amount of participation that is required under the terms of the contract, while encouraging bidders to utilize M/WBE subcontractors to the maximum extent practicable. That is to say that such goals should be considered as a “floor” in terms of desired M/WBE participation, but not as a ceiling or quota.

9. If it is determined that Black subcontractors (for example) were undercounted, can SBBC modify its goals to reflect a higher percentage upon confirmation of the accurate disparity calculation?

It is important to understand that disparity studies provide only an historical snapshot of the marketplace in terms of availability, utilization, and disparity in the participation of M/WBE firms over a limited time frame. It is appropriate to rely upon this snapshot of the marketplace in reaching conclusions regarding the likelihood of ongoing effects of past discrimination and the need for race-conscious remedial relief. Prospectively, however, it is a “best practice” to establish an independent means of identifying the relative availability of M/WBE firms within discrete industry segments on an ongoing basis through the use of a mandatory automated centralized bidder registration system as described above in response to question #3. In this way, subcontracting goals can be set in a more precise and logical fashion based upon current availability calculations that are narrowly tailored to the weighted mix of goods and services that are being purchased on a particular contract. By definition, those contractors and vendors that go through the process of registering and establishing an online profile of their firms are

asserting that they are “ready, willing, and able to sell goods and services to the government. This approach will result in the most legally defensible subcontract goal-setting process based upon the narrow tailoring requirements of the “strict scrutiny” standard.

10. Can Mason Tillman Associates assist the SBBC Disparity Study Workgroup with identifying best practices that have been effective and legal defensible in other agencies the firm has worked with? Assistance could include, but is not limited to, providing a summary of programs and practices or identifying the agencies with contact persons that the Workgroup could contact to obtain summaries of programs and practices.

This is now part of my scope of work in facilitating the work of the Disparity Study Work Group.

11. Can the study or market area for construction be expanded, similar to the other categories, from just Broward County to include the tri-county area, including Miami Dade and Palm Beach?

The disparity study is now complete and has been formally accepted by the School Board. No further changes to the study are possible. The relevant geographic market for purposes of the study was determined by Mason Tillman Associates, Ltd. based upon its analysis of purchasing patterns of SBBC and the relevant legal framework for disparity study methodology. Therefore, the geographic scope of the M/WBE Program must also be limited to the same geographic market upon which relevant findings and recommendations from the study have been based.

12. If the District adopts Race-Gender Neutral strategies, does that have any negative effect on the District’s ability to develop a comprehensive Race-Gender Specific (M/WBE) program?

No. In fact, I have advocated in favor of “hybrid” programs as a “best practice.” Hybrid programs combine race- and gender-neutral program elements with race- and gender-conscious program elements under circumstances where there is a strong basis in evidence supporting the consideration of race-conscious remedies due to ongoing effects of marketplace discrimination and the apparent inability of race-neutral remedies (in and of themselves) to overcome significant marketplace disparities. The determination as to whether to employ a race-conscious or a race-neutral program element is then made on a contract-by-contract basis.