

**REMEDIAL POLICY OPTIONS FOR SCHOOL BOARD OF BROWARD COUNTY**  
**SUPPLIER DIVERSITY OUTREACH PROGRAM (PART I – CONSTRUCTION & ADMINISTRATIVE REFORMS)**

**(Prepared by Franklin M. Lee, Esquire 3-25-16)**

**Introduction**

The following policy option matrices and recommendations related to the Construction Industry and to Non-Industry-Specific Administrative Reforms are based upon our legal review of the October 4, 2015, Final Report entitled “Broward County Public Schools Disparity Study” (“Study”) performed for the School Board for Broward County (“SBBC”) by Mason Tillman Associates, LTD. (“MTA”). Tables I-A and I-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 Construction Industry that may be legally defensible and somewhat effective in addressing identified barriers to M/WBE participation in School Board of Broward County (“SBBC”) contracts. Table I-A reflects those recommendations for industry-specific remedial policy options that are race- and gender-neutral. Table I-B reflects those recommendations for industry-specific remedial policy options that are race- and gender-conscious. (“R/N” references within the numerical label of a policy option mean that the proposed policy is a “race- and gender-neutral” remedy. “R/C” references within the numerical label of a policy option mean that the proposed policy is a “race- and gender-conscious” remedy.)

Table II summarizes proposed miscellaneous procurement policy and administrative reforms that are not industry-specific small / minority / women business enterprise policies that are worthy of consideration by the SBBC based upon a review of the full factual predicate evidence gathered from this Study effort. As a result of U.S. Supreme Court precedents requiring narrow tailoring of remedies under the “strict scrutiny” standard, the SBBC should first consider the use of race- and gender-neutral remedial options as reflected in Tables I-A and II, and only resort to the race- and gender-conscious remedial options reflected in Tables I-B and II 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 I” of the draft Policy Option Matrix includes a total of 31 various policy recommendations, of which 19 are race-and gender-neutral and 12 are race-and gender-conscious in nature. Twelve of the seventeen non-industry-specific policy options described in Table II are race- and gender-neutral. Five of the seventeen non-industry-specific policy options are race- and gender- conscious. Those 5 non-industry-specific race- and gender- conscious policy options either address administrative problems that undermined the effectiveness of the M/WBE programs, or address identified barriers to the business formation and growth of M/WBE firms that are influenced by race or gender regardless of industry (e.g., unequal access to bonding and capital).

**TABLE I-A: RACE / GENDER-NEUTRAL CONSTRUCTION INDUSTRY  
POLICY OPTIONS FOR SBBC'S SUPPLIER DIVERSITY OUTREACH PROGRAM**

(Prepared by Franklin M. Lee, Esquire 3-25-16)

<b><u>Industry Specific Programs</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">Construction (R/N-1)</p> <p align="center"><i>Bond Waivers and Assistance Programs</i></p>	<p align="center">(Study p. 12-39)</p>	<p>SBBC establishes a pool of up to \$5 million for providing bonding assistance to SBE construction firms; funds used to provide technical and financial assistance to SBE prime bidders to minimize risk of loss and insure management of funds during projects; surety issues bonds at competitive rates with partial guarantee from pool; projects segmented to reduce required bonding limits and to permit waivers of bonds</p>	<p>Significant disparity and underutilization in SBBC M/WBE construction prime contract participation for African American, Asian-Pacific American, Hispanic-American, all M/WBE and some non-minority WBE firms. (Study pp. 9-77); regression analysis based upon PUMS data indicates disparities are not likely explained by differences in capacity, especially at the subcontracting level. (Study pp. 11-9 to 11-15,</p>	<p><i>Pro: Provides enhanced access to prime contracts for SBE and M/WBE firms; strengthens ability to obtain bonds for SBE firms, while reducing risk of loss through technical assistance and financial management support.</i></p> <p><i>Con: Initial \$5 million investment in program may be problematic due to budgetary concerns</i></p>

<p>Construction (R/N-1)</p> <p><i>Bond Waivers and Assistance Programs (continued)</i></p>		<p>on contracts below \$500,000 for qualified and licensed contractors.</p> <p>(See San Diego County Regional Airport Bonding Assistance Program).</p>	<p>and 11-17 to 11-22; see also pp. 8-2 and 11-27 to 11-30)</p> <p>Bonding requirements are hindering ability of M/WBE contractors to bid successfully due to unequal access to capital and bonding. (Study pp. 8-8 to 8-10 and 11-22 to 11-30)</p>	<p><i>and private sources for funding may also be limited by weak economy..</i></p>
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<u>Industry Specific Programs</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Construction (R/N-2)</p> <p><i>Direct Owner Purchasing Program</i></p>	<p>Extend the program for direct purchases of equipment, materials, and supplies for construction contracts by SBBC to include contracts that are less than or equal to \$200,000, thereby reducing bonding requirements and capital needs of prime contractors. (Study p. 12-43)</p>	<p>FML concurs. Levels the playing field for M/WBE bidders that tend to be small and unable to get volume discounts on supplies that larger contractors get. [This approach is best suited on fairly routine projects where there are only one or two supplies and materials that have to be purchased, and the quantity is easily warehoused and promptly deliverable to the jobsite when needed.]</p>	<p>Significant disparity and underutilization in SBBC M/WBE construction prime contract participation for African American, Asian-Pacific American, Hispanic-American, all M/WBE and some non-minority WBE firms. (Study pp. 9-77);</p> <p>Bonding requirements are hindering ability of S/M/WBE contractors to bid successfully. (Study pp. 8-8 to 8-10)</p>	<p><i>Pro: Provides enhanced access to prime contracts for SBE and M/WBE firms; strengthens ability to obtain bonds for SBE firms, while reducing risk of financial failure by shifting financial burden of supplier payments to SBBC. Also may result in lower prices for supplies and materials.</i></p> <p><i>Con: Requires more administrative resources by SBBC to insure that supplies are ordered, purchased, and delivered in a timely fashion.</i></p>



<p><i>Prime Contract Program (continued)</i></p>		<p>construction contracts; permit waiver of bonding requirements for prime contracts below \$200,000)</p> <p>(Reserve subset of small prime contracts valued at below \$50,000 for competition solely among SBEs.)</p>		<p><i>barrier to award of small construction contracts below \$500,000. (Study, p. 6-8).</i></p>
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<u>Industry Specific Programs</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Construction (R/N-4)</p> <p><i>SBE Subcontracting Program</i></p>		<p>Mandatory subcontracting outreach program with SBE subcontract goals.</p> <p>Mandatory good faith outreach by primes to satisfy contract-specific SBE subcontracting goals; centralized bidder registration system can significantly improve outreach and facilitate documentation of availability by specific trade.</p>	<p>Significant disparity and underutilization in City M/WBE construction subcontract participation for African American, Asian-Pacific American, and non-minority WBE categories of M/WBEs; also statistically non-significant disparity for Hispanic American subcontractors. (Study pp. 10-2 to 10-5; 10-9.</p>	<p><i>Pro: Enhances capacity development and competition in subcontracting overall; provides assistance for emerging firms, as well as for more established small firms;</i></p> <p><i>Con: Short term reduction of competition on subcontracts; possible adverse cost impact; requires careful consideration of selection of remedy on project-by-project basis.</i></p>

<u>Industry Specific Programs</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Construction (R/N-5)</p> <p><i>HUBZone Program</i></p>		<p>Apply federal HUBZone program to provide incentives for selection of SBE primes located in locally distressed areas. Reserve subset of prime contracts for competition among federal certified HUBZone firms, with at least 35% of employees residing in Broward County HUBZone and principal place of business located in Broward County HUBZone.</p>	<p>Significant disparity and underutilization in SBBC M/WBE construction prime contract participation for African American, Asian-Pacific American, Hispanic-American, all M/WBE and some non-minority WBE firms. (Study pp. 9-77); regression analysis based upon PUMS data indicates disparities are not likely explained by differences in capacity, especially at the subcontracting level. (Study pp. 11-9 to 11-15, and 11-17 to 11-22; see also pp. 8-2 and 11-27 to 11-30)</p>	<p><i>Pro: Builds capacity of HUBZone primes on mid-sized contracts; provides management experience to HUBZone firms; Enhances economic development attributes of program due to employment aspect; provides local economic development benefits.</i></p> <p><i>Con: Some increase in costs may result. Many M/WBE firms are not HUBZone certified, and it is not known if they would be eligible to be certified as such.</i></p>

<u>Industry Specific Programs</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Construction (R/N-6)</p> <p><i>SBE Mentor – Protégé Program</i></p>		<p>Team up more established and successful construction firm mentors with less established SBE firms to provide management guidance and training. May provide additional incentive to potential mentors by reserving some contracts for pre-approved mentor-protégé teams. (See City of Columbia, SC mentor-protégé program; see also Port of Portland Emerging Small Business Program). Also consider other incentives such as accelerated payment, access to working capital fund, and direct purchasing of supplies by SBBC on behalf of mentor-protégé teams.</p>	<p>Relationship-building is a key component to opening up subcontract opportunities for emerging SBE firms that are not known to prime contractor community. Helps break down barriers inherent in good old boy networks. (Study pp. 8-4 to 8-7), Also, training in such matters as safety programs, payroll, estimating and bidding, management of funds and project management is extraordinarily valuable to newer firms. Mentors benefit from expanded pool of competent subs that are dependable and work well with prime.</p>	<p><i>.Pro: This approach to building capacity is favored by the AGC and may provide a win-win scenario if a long-term prime – sub relationship evolves; mentor will have greater confidence in SBE subs that they have mentored.</i></p> <p><i>Con: There may not be enough mentors to meet needs of SBE subs; incentive for participation as mentor may not be sufficient as some primes perceive protégés to be potential competitors. There is also a need to have safeguards to ensure</i></p>

<p>Construction (R/N-6)</p> <p><i>SBE Mentor – Protégé Program</i> <b>(continued)</b></p>				<p><i>that protégé is not becoming a captive and is gaining intended benefit from mentor-protégé relationship.</i></p>
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<u>Industry Specific Programs</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Construction (R/N-7)</p> <p><i>SBE Low Cost Wrap-up Insurance (OCIP)</i></p>		<p>SBBC negotiates with insurance carriers for construction services firms to provide policy to SBBC that covers its SBE construction firms. SBE firms then deduct from their bids that portion that would have been included to cover the cost of insurance premiums.</p>	<p>Levels the playing field as all SBEs pay the same or less than non-SBE firms for workman's comp insurance, general liability, etc. (See San Diego, CA Minor Construction Program).</p> <p>Bonding and insurance requirements are hindering ability of M/WBE contractors to bid successfully. (Study pp. 8-8 to 8-10; 11-22 to 11-30)</p>	<p><i>Pro: Makes SBE construction firms more cost-competitive with larger firms.</i></p> <p><i>Con: May be difficult to find a carrier willing to write policy that covers firms with less experience and less track record. Rate that SBBC pays may be higher than some of larger construction firms. In addition, legality of Owner Controlled Insurance Programs varies by state-to-state and must be investigated for Florida.</i></p>

**TABLE I-B: RACE / GENDER-CONSCIOUS CONSTRUCTION INDUSTRY  
POLICY OPTIONS FOR SBBC'S SUPPLIER DIVERSITY OUTREACH PROGRAM**

(Prepared by Franklin M. Lee, Esquire 3-25-16)

<u>Industry Specific Programs</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p align="center">Construction (R/C-1)</p> <p align="center"><i>Annual Aspirational Goals</i></p>		<p>Establishment of annual aspirational goals for M/WBE participation in SSBC construction contracts (base goals starting at 37% MBE and 12% WBE for construction prime contract dollars, and 33% MBE and 11% WBE for subcontract dollars awarded, with some adjustment as warranted based upon CBR registration). See Study p. 7-30 and p. 7-41. These goals are not to be necessarily applied to individual contracts, but rather serve as a</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.</p>	<p><i>Pro: Provides a useful tool for evaluating success of program and making necessary adjustments to aggressiveness of remedies and outreach efforts.</i></p> <p><i>Con: Must guard against reflex to apply annual goals to specific projects without justification. If not updated periodically, can also provide another avenue of legal attack against the</i></p>

<p>Construction (R/C-1)</p> <p><i>Annual Aspirational Goals</i> <b>(continued)</b></p>		<p>guidepost to evaluate the effectiveness of the SBE and M/WBE programs and to make adjustments as necessary to the mix and aggressiveness of applied policy options.</p> <p>(See Study pp. 7-29 to 7-45)</p>		<p><i>program on narrow tailoring grounds.</i></p>
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<u>Industry Specific Programs</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Construction (R/C-2)</p> <p><i>Price Evaluation Preference for Prime Contract Bids</i></p>	<p>SBBC should apply a 5 percent bid discount for purposes of bid price evaluations on bids submitted by African American, Asian-Pacific American, Hispanic American, and Non-minority WBE firms. (Study p. 12-24)</p>	<p>FML concurs.</p>	<p>Significant disparity and underutilization in SBBC M/WBE construction prime contract participation for African American, Asian-Pacific American, Hispanic American, and Non-minority WBE firms (Study p. 12-24 and Table 12.14); regression analysis based upon PUMS data indicates disparities are not likely explained by differences in capacity. (Study p. 6-8, 8-9, and 8-10; and pp. 7-9 to 7-27). As M/WBEs tend to be smaller on average with relatively lower sales volume, they probably are less cost-competitive because they are not eligible for the same volume discounts from their suppliers that larger competitors receive.</p>	<p><i>Pros: Helps to level the playing field due to higher costs for M/WBE firms in capital and bonding. Eventually, may expand competition by broadening the number of successful M/WBE bidders on construction contracts.</i></p> <p><i>Cons: Price preferences will increase costs for SBBC in construction bids; could result in negative impression of program by taxpayers due to transparency in premium being paid beyond the lowest bidder's bid.</i></p>

<p>Construction (R/C-2)</p> <p><i>Price Evaluation Preference for Prime Contract Bids</i></p> <p><b>((Continued))</b></p>			<p>Moreover, M/WBE financing costs and bonding cost have been demonstrated to be higher even after controlling for creditworthiness and other relevant factors. (Study pp. 8-2, 11-6 to 11-22; and 11-27 to 11-30)</p>	
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<u>Industry Specific Programs</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Construction (R/C-3)</p> <p><i>M/WBE Subcontracting Goals</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, Asian-Pacific Americans, and non-minority WBEs. Subcontracting goals should also contain waiver provisions for those instances where sufficient ready, willing, and able M/WBE subcontractors are not available. (Study p. 12-25)</p>	<p>FML concurs. Contract-specific subcontracting goals should be weighted to availability of M/WBE firms in required sub-specialties; this provision should apply to both M/WBE prime bidders and non-M/WBE bidders. Project-specific 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 exclusion from bid. A Goal Setting Committee should be formed to undertake analysis to set subcontracting goals on a</p>	<p>MTA Study concludes there is significant disparity in subcontract utilization of M/WBEs in SBBC contracts (with exception of Subcontinent Asian-American, Hispanic American, and Native American subcontractors) and very low M/WBE utilization in private sector construction contracts, even after controlling for capacity and other race-neutral variables. Moreover, there were some particularized accounts of corruption in SBBC construction contracting. (Study pp. 10-2 to 10-4; 8-6; 8-16 to 8-17; 11-9 to 11-11; 11-16 to 11-17; and 11-27 to 11-29.)</p>	<p><i>Pro: Provides narrowly tailored approach to setting realistic M/WBE subcontract goals; built-in flexibility with consideration of good faith efforts documentation; follows federal government model for DBE program which is legally defensible.</i></p> <p><i>Con: Is more administratively burdensome to implement; requires careful consideration in goal-setting stage for each and every project.</i></p>

Construction (R/C-3)  <i>M/WBE Subcontracting Goals</i> <b>(continued)</b>		project-specific basis.		
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<u>Industry Specific Programs</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Construction (R/C-4)</p> <p><i>M/WBE Joint Venture Incentive</i></p>		<p>For contracts greater than or equal to \$10 million (or alternatively \$5 million), establish joint venture policy similar to City of Atlanta's which requires establishment of joint ventures between diverse partners on projects. As few construction projects may exceed \$10 million, reserve some larger prime contracts valued at \$5 million or greater for competition by joint ventures between non-M/WBE firms and M/WBE firms. Consideration of this option should be limited to occasions when the SBBC has several M/WBE prime contractors of sufficient size and capacity to meaningfully joint venture on contracts of</p>	<p>MTA Study concludes there is significant disparity in prime and subcontract utilization of M/WBEs in SBBC contracts and very low M/WBE utilization in private sector construction contracts, even after controlling for capacity and other race-neutral variables. There was also testimony indicating that M/WBE firms have been not had an equal opportunity to bid and receive construction subcontracts in absence of MBE program and in private sector. (Study pp. 8-4 to 8-12; 9-77; 10-2 to 10-4.)</p>	<p><i>Pro: Provides a strong incentive for collaboration across lines of race and gender in bidding on larger construction contracts; enhances opportunities for M/WBEs to gain project management and prime contract experience on larger projects.</i></p> <p><i>Con: Requires careful monitoring of role of M/WBE in contract to insure legitimate share of project management and contribution to joint venture scope of work; not certain if there are sufficient numbers of M/WBE primes of significant size and capacity to match up with other</i></p>

<p>Construction (R/C-4)</p> <p><i>M/WBE Joint Venture Incentive</i> <b>(continued)</b></p>		<p>this magnitude. Alternatively, dollar threshold for contracts for application of this remedy may need to be adjusted. Also consider providing incentives for larger M/WBEs to joint venture with smaller local M/WBEs to build local capacity. For example, on best value construction contracts wherein price is not the only factor, provide a sliding scale of evaluation preference points based upon the percentage ownership in the joint venture that the M/WBE JV partner has in the project.</p>		<p><i>non-M/WBE bidders.</i></p>
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<u>Industry Specific Programs</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Construction (R/C-5)</p> <p><i>M/WBE Mentor-Protégé Program</i></p>		<p>Team up more established and successful construction firm mentors with less established M/WBE firms to provide management guidance and training. May provide additional incentive to potential mentors by reserving some contracts for pre-approved mentor-protégé teams. (See City of Columbia, SC mentor-protégé program; see also Port of Portland Emerging Small Business Program). Also consider other incentives such as accelerated payment, access to working capital fund, and direct purchasing of supplies by City on behalf of mentor-protégé teams.</p>	<p>In the event the SBE program version of the mentor-protégé program (see R/N-6) is unable to recruit enough mentors, then this M/WBE Mentor Protégé Program should be implemented. It is presumed that there will be more certified SBE construction firms than M/WBE firms. MTA Study concludes there is significant disparity in prime and subcontract utilization of M/WBEs in SBBC contracts and very low M/WBE utilization in private sector construction contracts, even after controlling for capacity and other race-neutral variables. There was also testimony indicating that M/WBE firms have been not had</p>	<p><i>Pro: This approach to building capacity is favored by the AGC and may provide a win-win scenario if a long-term prime – sub relationship evolves; mentor will have greater confidence in M/WBE subs that they have mentored.</i></p> <p><i>Con: Incentive for participation as mentor may not be sufficient as some primes perceive protégés to be potential competitors. There is also a need to have safeguards to ensure that protégé is not becoming a captive, and maintains management and</i></p>

<p>Construction (R/C-5)</p> <p><i>M/WBE Mentor-Protégé Program</i> <b>(continued)</b></p>			<p>an equal opportunity to bid and receive construction subcontracts in absence of MBE program and in private sector. (Study pp. 8-4 to 8-12; 9-77; 10-2 to 10-4.)</p>	<p><i>control of its firm.</i></p>
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<u>Industry Specific Programs</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Construction (R/C-6)</p> <p><i>Minority Inclusion Language in RFPs</i></p>		<p>In construction projects that are “best value” contracts such as with construction manager or design-build delivery methods 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. An additional element in selection criteria may be past performance in achieving diversity in subcontract awards on similar projects.</p>	<p>MTA Study concludes there is significant disparity in prime and subcontract utilization of M/WBEs in SBBC contracts and very low M/WBE utilization in private sector construction contracts, even after controlling for capacity and other race-neutral variables. There was also testimony indicating that M/WBE firms have not had an equal opportunity to bid and receive construction subcontracts in absence of MBE program and in private sector. (Study pp. 8-4 to 8-12; 9-77; 10-2 to 10-4.)</p>	<p><i>Pro: Provides a strong incentive for collaboration across lines of race and gender in bidding on larger construction “best value” contracts where price is not the only consideration; enhances opportunities for M/WBEs to gain project management and prime contract experience on larger projects.</i></p> <p><i>Con: Requires careful monitoring of role of M/WBE in contract to insure legitimate share of project management and contribution to</i></p>

Construction (R/C-6)  <i>Minority Inclusion Language in RFPs</i> <b>(continued)</b>				<i>team's scope of work.</i>
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<u>Industry Specific Programs</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>Construction (R/C-7)</p> <p><i>M/WBE Evaluation Preference for “Best Value” RFPs</i></p>		<p>In construction projects that are “best value” contracts such as with construction manager or design-build delivery methods 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 20% of total available evaluation points on a sliding scale basis based upon the level of M/WBE participation) to any firms bidding on construction management or prime</p>	<p>MTA Study concludes there is significant disparity in subcontract utilization of M/WBEs in SBBC contracts (with exception of Subcontinent Asian-American, Hispanic American, and Native American subcontractors) and very low M/WBE utilization in private sector construction contracts, even after controlling for capacity and other race-neutral variables. Moreover, there were some particularized accounts of corruption in SBBC construction contracting. . (Study pp. 10-2 to 10-4; 8-6; 8-16 to 8-17; 11-9 to 11-11; 11-16 to 11-17; and 11-27 to</p>	<p><i>Pro: Provides a strong incentive for collaboration across lines of race and gender in bidding on larger construction “best value” contracts where price is not the only consideration; the greater the level of M/WBE participation, the greater the evaluation preference for the bidder.</i></p> <p><i>Con: Requires careful monitoring of role of M/WBE in contract to insure legitimate share of project management and contribution to</i></p>

<p>Construction (R/C-7)</p> <p><i>M/WBE Evaluation Preference for “Best Value” RFPs (continued)</i></p>		<p>construction design-build contracts. 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>11-29.) Good old boy networks provide a built-in advantage for incumbent firms in SBBC evaluations of proposals to the detriment of locked out M/WBE firms. Evaluation preference points may help to counteract this incumbent advantage for non-M/WBE firms. (See Study pp. 8-4 to 8-7).</p>	<p><i>team’s scope of work.</i></p>
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**TABLE II: NON-INDUSTRY-SPECIFIC POLICY OPTIONS AND ADMINISTRATIVE REFORMS FOR SBBC’S SUPPLIER DIVERSITY OUTREACH PROGRAM**

(Prepared by Franklin M. Lee, Esquire 3-25-16)

<b><u>Administrative Reforms &amp; Non-Industry-Specific Policy Options</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">All Industries (R/N-8)</p> <p><i>Centralized Bidder Registration System/ Data Extraction / and Data Management Enhancements</i></p>	<p>Implement a centralized automated web-based accounting system capable of tracking all availability of prime and subcontractors by industry and by spend dollars. (Study pp. 12-30 to 12-34)</p>	<p>FML concurs. Registration on the Centralized Bidder Registration system (“CBR”) should be mandatory for every prime contractor and subcontractor that wishes to be solicited to bid on SBBC contracts or subcontracts, that desires to submit a bid with the SBBC, or have an</p>	<p>Enables narrow tailoring of project-specific goals based on best available current measure of firms that are ready, willing, and able to bid on SBBC contracts; also provides transparency in contract awards and actual payments at prime contract and subcontract levels for all firms, not just M/WBEs.</p>	<p><i>Pro: Strengthens defensibility of disparity study and program goal-setting; reduces administrative burden in setting goals and tracking payments; facilitates enforcement of prompt payment provisions on behalf of subcontractors;</i></p>

<p>All Industries (R/N-8)</p> <p><i>Centralized Bidder Registration System/ Data Extraction / and Data Management Enhancements</i></p>		<p>invoice paid for goods or services sold to, or on behalf of, SBBC. Due diligence on a number of off-the-shelf software products designed for this purpose should be undertaken. System should have the capability of providing data in real time on relative availability of M/WBE firms by commodity code and ethnicity / gender ownership status, prime contract dollar payments made by SBBC, and subcontractor payments made by SBBC prime contractors. Data should be sortable by firm name, firm size, firm location, commodity codes in bidder profiles, certification status, cumulative dollars paid, contract utilization data, etc.</p>	<p><i>facilitates focused outreach efforts; enhances competition; levels playing field for smaller firms' marketing efforts; and reduces time and expense for next disparity study..</i></p> <p><i>Cons: None.</i></p>
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<u>Administrative Reforms &amp; Non-Industry-Specific Policy Options</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>All Industries (R/N-9)</p> <p><i>Administrative Strategies / De-bundling</i></p>	<p>SBBC should adopt criteria for determining in advance of bid solicitations whether individual contracts should be de-bundled or subdivided into smaller contracts in order to enhance competition and to enhance opportunities for S/M/WBE participation. (Study pp. 12-37 to 12-38).</p>	<p>FML concurs.</p>	<p>Many small and M/WBE firms have difficulty in competing for larger contracts due to lack of access to capital and capacity issues. (Study pp. 8-2, 11-6 to 11-22; and 11-27 to 11-30); regression analysis based upon PUMS data indicates disparities are not likely explained by differences in capacity. (Study p. 6-8, 8-9, and 8-10; and pp. 7-9 to 7-27). As M/WBEs tend to be smaller on average with relatively lower sales volume, they probably are less cost-competitive</p>	<p><i>Pro: Smaller contracts enhance competition and give smaller firms and M/WBE firms a better opportunity to win contracts.</i></p> <p><i>Con: De-Bundling contracts increases the number of contracts that have to be advertised, issued, and monitored by SBBC staff. It is easier to administer and manage a single large contract versus several smaller ones. Sometimes, costs are</i></p>

<p>All Industries (R/N-9)</p> <p><i>Administrative Strategies / De-bundling (Continued)</i></p>			<p>because they are not eligible for the same volume discounts from their suppliers that larger competitors receive. Moreover, M/WBE financing costs and bonding costs have been demonstrated to be higher even after controlling for creditworthiness and other relevant factors.</p>	<p><i>adversely affected by de-bundling.</i></p>
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<u>Administrative Reforms &amp; Non-Industry-Specific Policy Options</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>All Industries (R/N-10)</p> <p><i>Supportive Services (Technical Assistance)</i></p>	<p>Establish low cost or no cost supportive services program for contractors and vendors including written and oral instruction on competitive bidding procedures, management techniques, and general business operations. Continuing education programs should be sponsored by SBBC or offered through referrals to existing academic institutions and technical assistance contractors. (Study at p. 12-44)</p>	<p>FML concurs. SDOP should make needs assessment of S/M/WBE firms at time of initial certification application for technical assistance referrals.</p>	<p>Small firms are at varying stages of development; some are more experienced and knowledgeable about government contracting and procurement rules than others. Lower than average revenues and staffing challenges can place many small and minority businesses at a competitive disadvantage in being able to find and afford such “continuing education” opportunities.</p>	<p><i>Pros: Does not cost SBBC much to serve as a referral source for needed technical assistance. However, benefits include expanding the supplier base of ready, willing, and able contractors and vendors that can compete effectively for SBBC contracts.</i></p> <p><i>Cons: SDOP must have at least one staff member capable of undertaking a needs assessment of contractors and vendors for various types of technical assistance.</i></p>

<u>Administrative Reforms &amp; Non-Industry-Specific Policy Options</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>All Industries (R/N-11)</p> <p><i>Subcontract Remedies (Mobilization and Working Capital Payments)</i></p>	<p>Under circumstances where mobilization fees are paid to prime contractors, include flow-down contractual provisions to insure that subcontractors also are extended a proportional amount of mobilization fees by the primes. SBBC should notify all subs when such mobilization fees have been paid to the prime, and web site postings and emails should provide transparency regarding the availability and payment of such advance fees. (Study at p. 12-45).</p>	<p>FML concurs.</p>	<p>Smaller subcontractors and younger subcontractors are in greater need of mobilization fees due to unequal access to capital. M/WBEs have lower earnings than similarly situated non-minority firms, and therefore likely have less retained earnings to assist in financing upcoming projects. (Study at pp. 11-22 to 11-30)</p>	<p><i>Pros: Minimizes potential for default due to slow payment and inability to finance projects.</i></p> <p><i>Cons: Requires SBBC to issue payments in advance of delivery of goods or services. Undermines ability of SBBC to hold subcontractors and prime contractors accountable for performance.</i></p>

<b><u>Administrative Reforms &amp; Non-Industry-Specific Policy Options</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>All Industries (R/N-12)</p> <p><i>Contract Monitoring &amp; Reporting (Multi-year Contracts and Change Orders)</i></p>	<p>Monthly contract compliance monitoring should be conducted by SDOP Staff to insure integrity of Supplier Diversity program. This helps to minimize hardships on subcontractors and avoids situations where prime has self-performed all of the work promised to the subcontractors. (Study at p. 12-46)</p>	<p>FML concurs, but advocates continual monitoring of contract compliance with S/M/WBE inclusion commitments through CBR system. Advance identification of potential non-compliance enables corrective action to be taken before all project funds have been drawn down and spent. This is especially important on</p>	<p>Slow payment and false reporting of S/M/WBE utilization is fairly commonplace. Online monitoring and verification of purported subcontractor performance and payment is crucial to integrity of SDOP. Economic inclusion requirements are a material deliverable under the terms of the</p>	<p><i>Pros: Monitoring and reporting is essential to contract compliance effort. Tracking goals against utilization on prime contracts with multi-year terms, and unexpected change orders.</i></p> <p><i>Cons: None.</i></p>

<p>All Industries (R/N-12)</p> <p><i>Contract Monitoring &amp; Reporting (Multi- year Contracts and Change Orders)</i> <b>(Continued)</b></p>		<p>change orders and multi-year contracts.</p>	<p>contracts, and breach of this term must be dealt with appropriately. Ongoing monitoring is essential in identifying such non-compliance.</p>	
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<u>Administrative Reforms &amp; Non-Industry-Specific Policy Options</u>	<u>MTA Recommendations</u>	<u>Additional Options</u>	<u>Relevant Findings / Justifications</u>	<u>Pros &amp; Cons</u>
<p>All Industries (R/N-13)</p> <p><i>Website Enhancement Strategies</i></p>	<p>As a result of MTA’s in-depth review of Procurement &amp; Warehousing Department’s website, a series of very detailed recommendations have been made regarding upgrades to the organization and functionality of that website to better integrate SDOP’s objectives and mission into that website and to make key features accessible to all contractors and vendors. These recommendations are summarized at Study pp. 12-47 to 12-59.</p>	<p>FML concurs. These website recommendations should also be carefully reviewed to assure that they also accommodate all recommendations for establishment of a Centralized Bidder Registration system as summarized above in R/N-8.</p>	<p>Study at pp. 12-47 to 12-59.</p>	<p><i>Pros: Enhances transparency and access to bidding process for S/M/WBE contractors and vendors; also enhances outreach and compliance monitoring capabilities for SDOP.</i></p> <p><i>Cons: Short term costs to SBBC of a couple hundred thousand dollars, but these costs will be far outweighed by gained efficiencies through increased staff productivity and enhanced competition for contracts.</i></p>

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<p>All Industries (R/N-14)</p> <p><i>Enhance Lead Times for Bid Submittals</i></p>	<p>Establish standard lead time for prospective bidders to submit bids to at least four weeks after issuance of bid solicitations by SBBC. (Study at p.12-40)</p>	<p>FML concurs.</p>	<p>A few small contractors complained that the bidding process sometimes did not allow enough time to be able to put a bid together and submit it. Smaller contractors often cannot afford to hire additional staff members that are solely dedicated to marketing and bid preparation.</p>	<p><i>Pros: Maximizes competition for SBBC contracts and better enables smaller S/M/WBE firms to compete..</i></p> <p><i>Cons: May delay procurement of goods or services by modest period of time.</i></p>

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<p>All Industries (R/N-15)</p> <p><i>Debriefings for Unsuccessful Bidders</i></p>	<p>Notify unsuccessful bidders that they are entitled to a de-briefing with SBBC to learn why their bids or proposals were not successful and things they might do in the future to strengthen such bids and proposals. (Study at p. 12-41)</p>	<p>FML concurs. Such de-briefings have been quite successful in other jurisdictions in leading to better bids in the future, and have at times resulted in subsequent contract awards to S/M/WBE firms that previously had had unsuccessful bids.</p>	<p>There is a strong perception among some M/WBEs that the bidding process is rigged and that same good old boys always win. De-briefing for unsuccessful bidders could help to make the contract award process more transparent and remove some of the distrust, thereby enhancing competition for future bids. (See Study at pp. 8-4 to 8-7)</p>	<p><i>Pros: Enhances transparency and bidder trust in fairness in the contract award process; also helps keep bid evaluators honest in knowing they will have to defend their contract award decisions.</i></p> <p><i>Cons: May require some additional man hours from SBBC staff in meeting with, or providing written critiques to, unsuccessful bidders.</i></p>

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<p>All Industries (R/N-16)</p> <p><i>Establish Office of Contractor Dispute Resolution (Mediation / Arbitration)</i></p>	<p>Establish office of Contractor Dispute Resolution with mediation and/or arbitration processes available to resolve disputes. (Study at p. 12-41)</p>	<p>FML concurs. Review City of Baltimore's M/WBE Program for requirements relating to mediation of disputes between M/WBE firms and prime contractors. It has been effective in resolving payment disputes, boosting M/WBE participation on change orders, and preventing breaches of M/WBE participation clauses in contracts by non-compliant primes before the defects become incurable. SDOP could also use such procedures to resolve disputes between SBBC and contractors.</p>	<p>See Study at pp. 8-10 and 8-16 to 8-17.</p>	<p><i>Pros: Enhances perceptions of fairness in procurement process; avoids severe financial stress for smaller contractors and vendors in resolving many disputes without exorbitant legal expenses</i></p> <p><i>Cons: It is sometimes difficult for SDOP or other SBBC officials to stay neutral or to be able to lean heavily on both parties to come to a successful resolution.</i></p>

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<p>All Industries (R/N-17)</p> <p><i>Expedited Payment Program</i></p>	<p>Establish a requirement that primes are paid by SBBC for undisputed invoices within fifteen days, and that primes pay undisputed subcontractor invoices within five days of receipt of payment from SBBC. (Study at p. 12-42)</p>	<p>FML concurs. Montgomery County Public Schools served as its own construction manager for new school construction and was able to accelerate electronic payment of undisputed invoices to within 48 hours of receipt of invoice. This resulted in reduction in school construction costs of 20% as primes and subs no longer had to finance payroll, material, and supplies purchases.</p>	<p>Small contractors are particularly susceptible to slow payment. (Study at p. 8-10). Accelerated payments will disproportionately benefit S/M/WBE firms that have unequal access to working capital. (See Study at pp. 8-8 to 8-10 and 11-22 to 11-30)</p>	<p><i>Pros: Streamlined payment process benefits, contractors, small and large, improves local economy, and ultimately leads to lower prices for goods and services purchased by SBBC.</i></p> <p><i>Cons: None. Either way, the taxpayer money will be spent, but by spending it more quickly, costs to taxpayers and vendor community alike will ultimately be reduced. (Does not include retainage for latent defects.)</i></p>

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<p>All Industries (R/N-18)</p> <p><i>Disputed Invoice Five Day Notice Requirement</i></p>	<p>Invoice disputes are a source of slow payment problems. Establish a requirement that SBBC must notify a prime of a disputed invoice within five days of receipt. Require that primes similarly notify subcontractors of disputes with invoices within five days. Failure to comply with prompt payment provisions may result in withholding of funds by SBBC. (Study at p. 12-42)</p>	<p>FML concurs, and suggests requirement that contract flow-down provisions be inserted in subcontractor contracts by primes. One sanction for unjustified slow payment by prime is that prime authorizes SBBC in its contract to pay subcontractor directly where there is no legitimate dispute, and to deduct those subcontractor payments from future invoice total for prime.</p>	<p>Small contractors are particularly susceptible to slow payment. (Study at p. 8-10). Accelerated payments will disproportionately benefit S/M/WBE firms that have unequal access to working capital. (See Study at pp. 8-8 to 8-10 and 11-22 to 11-30)</p>	<p><i>Pros: Streamlined payment process benefits, contractors, small and large, improves local economy, and ultimately leads to lower prices for goods and services purchased by SBBC.</i></p> <p><i>Cons: None. Either way, the taxpayer money will be spent, but by spending it more quickly, costs to taxpayers and vendor community alike will ultimately be reduced. (Does not include retainage for latent defects.)</i></p>

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<p>All Industries (R/N-19)</p> <p><i>Annual Contracting Trend Forecast</i></p>	<p>SBBC should establish a 12-month to 24-month procurement / contracting forecast identifying upcoming bid solicitations. (Study at p. 12-44)</p>	<p>FML concurs. Advance forecasting affords greater opportunity for smaller contractors to seek out and team with others and to bid on larger contracts.</p>	<p>Competition is enhanced when advance notice of upcoming bid opportunities is provided. In addition, SDOP has greater opportunity for aggressive outreach and encouragement of teaming arrangements among smaller and larger contractors and vendors.</p>	<p><i>Pros: Enhances likelihood of achieving diversity on larger and repetitive contracts; also, longer lead times for bid submittals likely boosts bidding volume and enhances competition for SBBC goods and services.</i></p> <p><i>Cons: Requires additional advance work by SBBC staff to analyze procurement trends and needs.</i></p>

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<p>All Industries (R/C-8)</p> <p><i>Penalties and Sanctions for Non-compliance with M/WBE Requirements</i></p>	<p>Include contractual provisions authorizing SDOP administrative counsel to investigate allegations of non-compliance with M/WBE participation requirements. Sanctions for violation of M/WBE program requirements should include withholding of payments, termination of suspension of contracts, contract breach damages equal to dollar value of shortage under M/WBE participation commitment, rejection of bids as a non-responsible bidder, and debarment. (Study at p. 12-40)</p>	<p>FML concurs. Also establish an M/WBE hotline to SDOP administrative for reporting of alleged fraud and non-compliance; however, there must also be provisions for sanctions to discourage frivolous claims of fraud and non-compliance being filed by competitors.</p>	<p>Penalties and sanctions for such violations are absolutely essential for maintaining integrity of SDOP. If participation requirements are not treated as a material deliverable under the terms of the contract, program will become meaningless.</p>	<p><i>Pros: Establishes accountability and means for independent investigation of false reporting of M/WBE participation and non-compliance with contractual commitments;</i></p> <p><i>Cons: Requires increased vigilance to avoid and discourage filing of frivolous claims of non-compliance by competitors and non-performing subcontractors.</i></p>

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<p>All Industries (R/C-9)</p> <p><i>Penalties and Sanctions for Fraud (Certification and M/WBE Compliance)</i></p>	<p>To safeguard the interests of bona fide S/M/WBE firms, certification applications should require executed sworn statements as to truth and veracity of information provided in application under penalty of perjury. SDOP Administrative Counsel should be granted authority to investigate and impose penalties for fraud. (Study at p. 12-40)</p>	<p>FML concurs. There also needs to be an administrative hearing process and appeals process to ensure fairness in imposition of sanctions. Consider also routine audits by SDOP or other department of documentation submitted in support of certification applications to identify and discourage fraud.</p>	<p>Penalties and sanctions for such violations are absolutely essential for maintaining integrity of SDOP. If certification eligibility standards are not enforced, program will become meaningless and may lose its legal defensibility as a tool to remedy legitimate marketplace discrimination.</p>	<p><i>Pros: Reinforces importance of eligibility standards and integrity of program as a tool to remedy the effects of marketplace discrimination on M/WBE firms.</i></p> <p><i>Cons: None. Expense of review and enforcement of eligibility standards is essential cost for satisfying the “narrow tailoring” requirements under the U.S. Constitution for race- and gender-conscious remedies.</i></p>

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<p>All Industries (R/C-10)</p> <p><i>SDOP Prior Approval of M/WBE Subcontractor Substitutions</i></p>	<p>Establish procedure to require SDOP's prior approval of any substitution of M/WBE subcontractors by a prime contractor. (Study at p. 12-45)</p>	<p>FML concurs.</p>	<p>Unchecked substitutions of M/WBE subcontractors following contract award are a significant vulnerability in achievement of meaningful M/WBE participation. Without such checks and balances, good old boy networks will operate to get rid of disfavored M/WBE subcontractors for other favored subcontractors without any legitimate business justification. (Study at pp. 8-4 to 8-7)</p>	

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<p>All Industries (R/C-11)</p> <p><i>Establish M/WBE Ombudsman Position</i></p>	<p>Establish position of SDOP Ombudsman to mediate disputes between S/M/WBEs and SDOP staff and other SBBC departments. (Study at p. 12-46)</p>	<p>FML concurs. Alternatively, consider assigning someone from Superintendent's office to serve in that capacity. This should not be a full-time job and may be better served by assignment of Superintendent's existing staff in role of Ombudsman.</p>	<p>By having Superintendent as ultimate arbiter of such disputes, parties will be incentivized to resolve such disputes in advance.</p>	<p><i>Pros: It is difficult for SDOP to provide adequate oversight and to obtain compliance with program requirements when confronted by internal resistance from departments that have other priorities and don't view the SDOP as their responsibility.</i></p> <p><i>Cons: Additional cost of hiring another person newly created position.</i></p>

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<p>All Industries (R/C-12)</p> <p><i>SBBC Staff Training (S/M/WBE Program Procedures and Responsibilities)</i></p>	<p>A SDOP procedures manual should be developed and distributed to all affected SBBC staff; moreover, training should be conducted for all SBBC personnel that have some functions or responsibilities under the S/M/WBE program. (Study at p. 12-46)</p>	<p>FML concurs.</p>	<p>The most effective M/WBE programs are those wherein each department that is involved in the bidding, procurement, and contract compliance processes takes ownership of the program and willingly and effectively fulfills its responsibilities under the program.</p>	<p><i>Pros: The SDOP Office can be far more effective in implementing the program if the S/M/WBE program is embraced by all departments within the SBBC; it would be prohibitively expensive to hire redundant personnel within the SDOP Office to monitor contract compliance. Economic inclusion requirements must be viewed as an equal deliverable under all contracts.</i></p> <p><i>Cons: None.</i></p>

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