

WORKSHOP

Workshop Providing an Overview of the Minority, Women, and Small Business Enterprise Programs

Tuesday, October 27, 2015

1:30 – 3:00 p.m.

**Leon County Board of County Commissioners' Chambers
Leon County Courthouse, 5th Floor**

Leon County Board of County Commissioners

Notes for Workshop

Leon County Board of County Commissioners Workshop Cover Sheet

October 27, 2015

To: Honorable Chairman and Members of the Board

From: Vincent S. Long, County Administrator 

Title: Workshop Providing an Overview of the Minority, Women, and Small Business Enterprise Programs and Board Consideration of Funding a Disparity Study

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| County Administrator Review and Approval: | Vincent S. Long, County Administrator |
| Department/ Division Review: | Alan Rosenzweig, Deputy County Administrator Ken Morris, Assistant County Administrator Cristina Paredes, Director of the Office of Economic Development |
| Lead Staff/ Project Team: | Shanea Wilks, Director of Minority, Women, and Small Business Enterprise |

Fiscal Impact:

This item has been budgeted within the FY 2016 Budget in the amount of \$250,000.

Staff Recommendation:

- Option #1: Authorize the County Administrator to issue a Request for Proposals to conduct the quantitative disparity study.
- Option #2: Authorize the County Administrator to initiate discussions with the City of Tallahassee to explore collaboration efforts on a single disparity study.
- Option #3: Direct staff to bring back an agenda item for the Board's consideration on policy enhancements to the County's SBE program.

Report and Discussion

Background:

During the March 10, 2015 meeting, staff presented the Board with a status report of Minority and Women-Owned Business Enterprise Expenditures (Attachment #1). Within the report, staff indicated a budget discussion item would be brought forth during the development of the FY 2016 budget relative to a new disparity study update to the one presented in 2009 by MGT of America and County staff.

During the June 23, 2015 FY 2016 Budget Workshop, the Board provided direction to include \$250,000 for a disparity study update for the Minority Women Business Enterprise (MWBE) Program; however, prior to initiating the study, the Board directed staff to schedule a workshop in the fall (Attachment #2). The Board expressed interest in reviewing information on the certification process for the County's MWSBE Program and comparative information to other local jurisdictions and their models. Subsequently, the Board approved the scheduling of a workshop on MWSBE Programs for October 27, 2015.

Analysis:

This workshop item provides an analysis on the following:

- I. Leon County's MWSBE Program
- II. Comparative Analysis of Other Jurisdictions Programs
- III. Programmatic Options Regarding the County's MWSBE Program

I. Leon County's Minority, Women, and Small Business Enterprise Program

Currently, Leon County operates the MWBE and SBE Programs through the MWSBE Division. The MWBE program is race/gender specific meaning that the program either directly or through partners enhances participation in County procurements to achieve parity for MBEs and WBEs. Both programs have certification processes, which, if successfully completed, allow certified vendors to participate within the County's procurement opportunities. Both are currently administered based upon the 2009 MGT Disparity Study, which is the latest study to review the MWBE Program.

Co-located with the Purchasing Division for operational efficiencies, the MWSBE Division operates separately based upon the recommendation of the 2000 Disparity Study, an earlier study conducted by MGT of America. The Study commended the County for elevating the MWBE Program to division level to improve the internal and external perception of the County's commitment to the Program's success; and for the co-location of the Divisions facilitating greater interaction and creating synergies of operations. The MWSBE Program is composed of two, separate program areas:

1. The MWBE component focuses on firms owned and operated by minorities and women; and,
2. The SBE component focuses on businesses that meet the small business criteria in terms of their size and net worth, regardless of the owner's gender or ethnicity.

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This section provides the Board with the following:

- Historical Background
- Certification Process
- Aspirational Targets
- Policy Coordination with City of Tallahassee

Historical Background

The County adopted an MWBE policy in 1987. The program has been successful in providing opportunities for minority/women owned businesses to secure business with the County that may not have occurred without the program. Through certification, training and outreach, the program continues to have a positive impact on the targeted community. The MWBE Program is a race/gender specific program whereby utilization of certified minority and women owned businesses is achieved through the identification of procurement opportunities for MWBEs within Leon County projects. The MWBE Program's overall objective is to promote parity of MWBE firms in Leon County procurement activities through the utilization of aspirational targets.

The 2009 Disparity Study Update, prepared by MGT of America (the "MGT Study"), was accepted by the Board during its October 27, 2009 meeting, subsequent to its October 13, 2009 workshop regarding the draft report (Attachment #3). Disparity studies are performed to serve as the evidentiary basis for continued race/gender based programs. The overall objective for the disparity study update in 2009 was to determine if data supported a "compelling interest" for the County to maintain a program to provide minority- and woman-owned business enterprises greater opportunities to participate in County procurement activities as goods and services providers. To meet the requirements of the U.S. Supreme Court's ruling in *City of Richmond v. J.A. Croson Co.*; narrow tailoring under the *Croson* standard requires that remedial goals be in line with measure availability. The Supreme Court in *Croson* recognized statistical measures of disparity that compared the number of qualified and available MWBEs with the rate of municipal construction dollars actually awarded to MWBEs in order to demonstrate disparity. MWBE programs must be limited in their geographical scope to the boundaries of the enacting government's market place.

In order for the County to comply with the U.S. Supreme Court's ruling, the County must demonstrate a compelling governmental interest for minority and gender-based goals, which would include evidence of prior discrimination in the field/industry, and the goals must be narrowly tailored to remedy the effects of the prior discrimination. The MGT Study states that, generally, utilization ratios of "80 percent or higher – indicating close to full participation" is not significant demonstration of discrimination, noting the court referenced the Equal Employment Opportunity Commission's (EEOC) "80 percent rule", which establishes this rule as the threshold for determining a prima facie (at first look) case of discrimination. In other words, the EEOC's "80 percent" rule assists in determining whether a company's selection system was having an "adverse impact" on a minority group. The "80 percent" rule is not intended as a legal definition, but is a practical means of keeping the attention of the enforcement agencies on serious discrepancies in rates of hiring, promotion and other selection decisions.

The MGT Study further noted there is no standard measurement to evaluate levels of utilization within a procurement context; however, in the context of employment discrimination, an employment disparity ratio below 80 percent indicates a “substantial disparity” meaning that overall selection process has an adverse impact, the adverse impact of the individual selection procedure should be analyzed.

The 2009 MGT Disparity Study Update identified the number of available MWBEs within the market area, and categorized these firms by business category, race, and gender. Businesses classified as MWBEs were firms that were at least 51% owned and controlled by members of one of the following race/gender groups, whether or not they were county-certified MWBEs (African Americans, Hispanic Americans, Asian Americans, Native Americans, and Nonminority Women). Based on statistical disparities between the percentage of funds expended with MWBEs in the market area and the number of available MWBEs, the MGT Study provided evidence to support a narrowly tailored program to promote the County’s utilization of MWBEs. The 2009 Disparity Study Update included proposed MWBE aspirational targets, which the Board incorporated in Policy No. 96-1, “Purchasing and Minority/Women Business Enterprise Policy” (Attachment #4).

MWBE Program Overview

The County utilizes aspirational targets, not requirements, in order to establish levels of participation by certified M/WBEs in procurement of goods and services. As prescribed in the recommendations by MGT of America, aspirational targets should vary by project, reflect realistic MWBE availability and vendors should demonstrate a good faith effort to meet these aspirational targets. Procurement categories, rather than population, establish aspirational targets in order to remedy the areas of underutilization and substantial underutilization among MWBE businesses and to reflect the market. When aspirational targets are present in solicitations, staff encourages prime contractors/consultants to utilize MWBE businesses to reach the parity levels as recommended by MGT of America and demonstrate a good faith effort to include MWBE businesses. The use of aspirational targets promotes relationship development between larger (primes) and smaller (subcontractors) businesses in the local market area (Leon, Gadsden, Jefferson, and Wakulla Counties); therefore, providing mentoring opportunities for smaller companies can provide an opportunity to enhance their business practices. Table #1 lists the County’s MWBE Aspirational Targets based on the most recent 2009 Disparity Study Update.

Table #1: Aspirational Targets – Policy No. 96-1

| <i>Procurement Category</i> | <i>Aspirational MBE Target</i> | <i>Aspirational WBE Target</i> |
|--------------------------------|--------------------------------|--------------------------------|
| Construction Prime Contractors | 8% | 5% |
| Construction Subcontractors | 17% | 9% |
| Architecture & Engineering | 12% | 14% |
| Professional Services | 7% | 15% |
| Other Services | 10% | 8% |
| Materials and Supplies | 1% | 6% |

Aspirational targets are considered to be the minimum level of MWBE participation expected for a particular procurement/project with consideration given to subcontracting opportunities and the availability of MWBEs in the market area that are capable of performing the work. Aspirational targets for individual bids/request for proposals (RFPs) may be lower than the participation level identified in Table #1 depending upon scope of work, which allows staff to identify the associated procurement category and the number of certified firms within the market area available to perform the services identified. Non-certified firms, even if owned by minority or woman, do not count towards participation. It must be noted, projects that receive state and federal funding the County's aspirational targets are superseded for state and federal procurement policies. Therefore, the aspirational targets identified within Table #1 cannot apply.

Tables #2 and #3 reflect the expenditure activity associated with MBE and WBE vendors for the previous five fiscal years. As part of the County's regular reporting process, the MWBE expenditure activity for these fiscal was presented in agenda items to the Board on March 10, 2015 (FY 2014 and 2013), January 21, 2014 (FY 2012 and 2011), and August 23, 2011 (FY 2010). The reported expenditures consist of expenditures from the County's Annual Operating Budget and Capital Improvement Program (CIP). There is a variation between FY 2012 and 2013, due to major construction projects being completed such as the Public Safety Complex, library construction/renovation projects, and jail renovations. The average MBE percentage of total expenditures for the period is 10.5%; WBE's is 9.6%; and, 79.9% expended with Non-MWBEs. For FY 2010 – 2014 the average MBE aspirational target for FY was 9.2% and the average WBE aspirational target was 9.5%. More detailed information regarding the MBE and WBE expenditures for the six procurement categories and the aspiration targets for the past five fiscal years can be found in Attachment #1 and Attachment #5.

Table #2
FY 2010 - FY 2014 MBE Expenditures

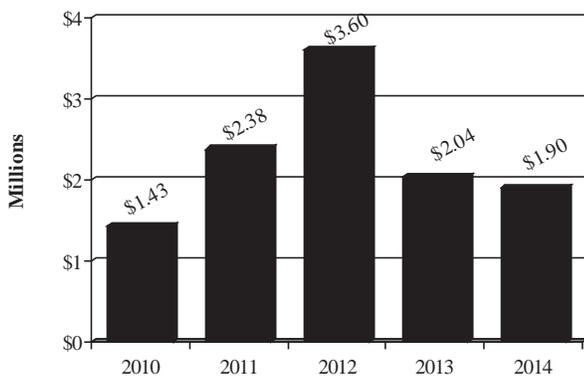
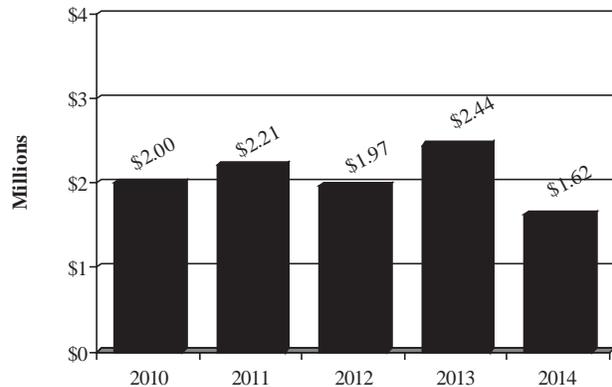


Table #3
FY 2010 - FY 2014 WBE Expenditures



In addition, County funded projects often utilize FDOT Prequalification and is another factor in limiting MWBE opportunities. This standard is mainly applied to County-funded projects involving road construction, bridge construction, and stormwater improvements and limits the opportunities for MWBE's, which are not prequalified, to bid as a prime contractor or potentially participate as a subcontractor. Contractor prequalification is the annual certification process, utilized by FDOT for construction contractors, which establishes the approved work classes and maximum capacity rating for which they are approved to bid and perform on any contract in excess of \$250,000.

FDOT does not require prequalification to bid on projects funded at \$250,000 or less, to bid as a subcontractor in any amount, to bid on building projects (general contractor licensure is required), nor to bid on maintenance contracts. The County utilizes the FDOT Prequalification Certification and other licensures issued by the State of Florida, as Contractor Qualification standards due to the State of Florida being the regulatory authority for the provision of services requiring state licensure and/or certifications. Currently, one WBE is FDOT prequalified and no MBEs.

According to County policy, aspirational targets should reflect realistic MWBE availability and capability of performing the work for a particular project; and, for where there are opportunities for exemptions based upon Good Faith Efforts. The MWSBE Director, Purchasing representative, and an appropriate division or department representative shall review each proposed project or bid to determine the potential for subcontracting and for MWSBE utilization considering the scope of work, available and capable MWSBEs to potentially perform the work and opportunities for multiple bids. Based upon these and other reasonable factors, the MWSBE Director shall determine the recommended aspirational targets. If the recommended aspirational targets are lower than the applicable participation levels, the County Administrator is notified of the recommended modified aspirational targets and reasoning for such recommendations. The County Administrator then advises the Board, via email, and Commissioners have five business days to request a delay for the issuance of the bid/RFP and an agenda item regarding the recommended aspirational targets. This request for delay and further discussion can be effectuated by an individual Commissioner. If no Commissioner requests an agenda item within the five business days, staff is authorized to release the bid/RFP. During FY 2015, two requests were made by staff to lower the recommended aspirational targets due to the specialized nature of the work and vendor availability.

Leon County's Small Business Enterprise

During June 2006, the Board approved the establishment of the Small Business Enterprise (SBE) Program. The County currently operates a limited SBE Program. The purpose of the SBE Program is foster growth in Leon County's economy by affording small businesses an opportunity to gain experience, knowledge, and training to compete and secure contracts with Leon County. Unlike the MWBE Program, the SBE Program is race and gender neutral. To qualify as an SBE business must have a net worth of no more than \$2 million, employ 50 or fewer full/part-time employees, and the majority owner and the business must reside in Leon, Gadsden, Jefferson or Wakulla Counties. The SBE Program is structured to reserve procurement opportunities for exclusive competition among SBE's when at least three SBE's are certified in the relevant procurement category and are available to compete for the procurement opportunity. According to County policy, the projects that are released through the SBE program have an estimated contract cost of \$100,000 or less which varies across business categories as shown in Table #2.

Table #2: SBE Contract Cost Thresholds

| Business Category | Estimated Contract Cost |
|--------------------------------|--------------------------------|
| Construction: Prime Contractor | \$100,000 or less |
| Professional Services | \$50,000 or less |
| Other Services | \$25,000 or less |
| Materials & Supplies | \$25,000 or less |

Through the SBE Program, RFPs and Bids will be reserved only for certified SBE's when at least three SBE's are certified in the commodity or service requested in the RFP and/or Bid. Small businesses participating in this program will be given the opportunity to develop and enhance their business; therefore increasing their ability to compete effectively in procurement arenas. It should be noted that a limited number of projects are currently being identified for the SBE Program, which results in limited opportunities for these certified businesses. Increasing the threshold categories within the SBE Program policy may address the limited number of projects being identified for the program. Staff recommends prepare a future agenda item on policy enhancements to the County's SBE program.

Certification Process

The County's certification process provides vendors with the opportunity to participate or compete for projects that have been identified as feasible for MWBE or SBE participation. Currently, applicants may obtain MBE, WBE, and SBE certifications. In addition, MWBE vendors may also receive dual certification for an SBE when applicable. Staff has worked diligently to provide a streamline process for certifications and provide dual certification when applicable. Applicants interested in certification have the capability of applying via paper application or through the County's online Contract Compliance Monitoring System. Supporting documentation must also be provided for determination of certification eligibility by all MBE, WBE, and SBE applicants (Attachment #5). Finally, site visits are conducted for final certification determination. The certifications are good for a period of two years before a vendor must file for recertification.

Leon County and the City of Tallahassee share an Interlocal Agreement (February 2010), which encourages full participation by local MWBE's in the County's procurement processes and fosters more economic development throughout the community. The Agreement enables the County and the City to streamline the certification process for the MWBE applicants in the local market area, which consists of Leon, Gadsden, Jefferson, and Wakulla counties. Leon County and the City MWBE Offices act as a one-stop shop, thus eliminating the need for multiple certifications. In addition, both jurisdictions mutually recognize the MWBE certifications of the other for the purposes of procurement opportunities.

Currently, SBE's are not included within the Interlocal Agreement; however, staff continues discussions with City staff to ensure all programs align. County and City staff continue to meet to ensure, as much as possible, continuity and consistency exists between the two programs. These meetings continue to explore opportunities relative to the City's SBE Program, its implementation, and inclusion within the Interlocal Agreement.

MWSBE Program Summary

The MWSBE Program provides access and opportunities to certified vendors to compete for projects identified as feasible for MWBE or SBE participation. Two factors often provide challenges for MWSBE opportunities within the Program: 1) projects that receive federal and state funding resulting in the County's aspirational targets being superseded by federal and state regulations and 2) the availability of large capital improvement projects (CIP). CIP Projects provide a significant number of opportunities for MWBE and SBE vendors versus other County procurement opportunities (i.e. professional services, materials and supplies, and other services).

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Based upon the aforementioned narrative, there have been opportunities provided for all vendors engaging in Leon County's procurement processes. However, a disparity study update may identify areas that are recommended for modification and efficiency improvements. A disparity study update may also provide a review of the MWSBE Program and information as to how the County can continue to support all vendors participating within its procurement processes.

As stated previously, procurement categories, rather than population, establish aspirational targets in order to remedy the areas of underutilization and substantial underutilization among MWBE businesses and to reflect the market. In order to continue the MWBE program and minimize the threat of litigation, the Board may wish to conduct a quantitative disparity study that focuses on the factual data analysis associated with the program that is the basis for determining the aspirational targets by industry, which is included in the FY 2016 budget. The need to conduct a disparity study arises from a Supreme Court ruling that applied to federal agencies in *Adarand v. Peña*, the U.S. Commission on Civil Rights issued a report in May 2006 (Disparity Studies as Evidence of Discrimination) recommending that localities discard disparity studies conducted using data that is more than five years old, as the "results are too outdated to justify preferential awards given today." This guidance is utilized to withstand the legal challenges that may arise due to race/gender based programs that must satisfy strict scrutiny tests by showing a compelling governmental interest for maintaining such programs. This option is further discussed in Section III Programmatic Options Regarding the County's MWBE program on page 10 of the workshop.

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II. Comparative Analysis of Other Jurisdiction Programs

This section provides information and analysis on programs currently being administered in other jurisdictions including MWBE (race/gender based aspirational goals), SBE (race/gender neutral goals), and DBE (social and economically disadvantaged goals).

Table #3: Comparative Analysis of Other Jurisdictional Programs

| Entity | Population | Program Type | | | Stand Alone Office | FTE |
|-------------------------|------------|--|------------------------------------|---|--------------------|------|
| | | MWBE (Race/Gender Based Aspirational Goals) | SBE (Race/Gender Neutral Goals) | DBE (Social/Econ. Disadvantaged Goals) | | |
| Alachua | 256,309 | | X | | Y | 6 |
| Atlanta, GA | 447,841 | X | X | X ¹ | Y | 15 |
| Broward ² | 1,838,844 | | X | X | Y | 11 |
| Charlotte, NC | 792,862 | X | | X ¹ | Y | 9 |
| Columbia, SC | 133,358 | | X | | N | 2 |
| Escambia* | 305,817 | | | | NA | |
| Federal/State DOT | NA | | | X | NA | NA |
| Hillsborough | 1,316,298 | X | X | | N | 3 |
| Leon | 283,988 | X | X | | Y | 1.75 |
| Manatee* | 342,106 | | | | NA | NA |
| Miami-Dade ³ | 2,617,176 | | X | X | Y | 38 |
| Orlando | 255,483 | X | | | Y | 6 |
| Palm Beach | 1,372,171 | | X | | Y | 7 |
| Pinellas | 938,098 | | X | | N | 16 |
| Sarasota | 396,962 | | | | NA | NA |
| St. Lucie | 291,028 | | | X ¹ | N | 7 |
| St. Petersburg | 249,688 | | X | | Y | 1.5 |
| Tallahassee | 186,411 | X | X | X | Y | 3 |
| Tampa | 352,957 | X | X | | Y | 5.5 |

Notes:

*Escambia and Manatee Counties do not administer an MBE, WBE, SBE, or DBE Program.

1) This DBE program operates only through the Aviation Department.

2) Broward County also utilizes a County Business Enterprise program and for businesses that have less than the maximum gross receipts (averaged over 3 years) of \$5 million, regardless of their industry.

3) Miami Dade County utilizes a Local Developing Business Program that is gender and race neutral for small businesses that have non-exclusive permits to provide general aeronautical services to commercial airlines and aircraft operators at Miami International Airport.

The programs identified as MWBE in Table #3 are race/gender based that utilize a goal setting process to enhance the opportunities for a race or gender class that has been identified to have experienced disparity in receiving procurement or contracting opportunities. The Atlanta, Charlotte, Hillsborough, Leon, Orlando, Tallahassee and Tampa jurisdictions all operate programs that are race/gender based similar to Leon County.

The programs identified as SBE in Table #3 are race/gender neutral and may be sole programs that provide small business assistance or components of larger programs that include MWBEs. Business assistance may include bonding assistance; and outreach activities such business education workshops and networking opportunities. Some jurisdiction administered the SBE Program as a sheltered market program in which projects are set aside in various procurement categories with an identified maximum project value, to allow certified SBE vendors (MWBE and non-MWBE) to bid or compete within a sheltered market. Sheltered market means certified businesses are bidding or competing against other businesses of a like size and capacity. Some jurisdictions administer their SBE Program as a sheltered market program the same as Leon County. For example, Alachua County's SBE Program does not include a sheltered market; however, bidders are awarded points for SBE utilization; Palm Beach County's SBE Program currently does not include a sheltered market. However, there is a provision within their County ordinance to utilize the sheltered market, when their 15% participation goals for SBE's are not being met on their projects; Pinellas County administers an SBE Program that is a Sheltered Market Program only; and, St. Petersburg administers an SBE Program, which includes a Sheltered Market for construction set asides on goods and services. Whereas, Columbia, South Carolina administers a SBE program without a sheltered market that provides opportunities to their local market only.

Finally, the programs identified as DBE in Table #3 are for-profit small business concerns where socially and economically disadvantaged individuals own at least a 51% interest and control management and daily business operations. African Americans, Hispanics, Native Americans, Asian-Pacific and Subcontinent Asian Americans, and women are presumed to be socially and economically disadvantaged. Other individuals can also qualify as socially and economically disadvantaged on a case-by-case basis. To be certified as a DBE, a firm must be a small business owned and controlled by socially and economically disadvantaged individuals. Certifiers make the determinations based upon on-site visits, personal interviews, reviews of licenses, stock ownership, equipment, bonding capacity, work completed, resume of principal owners and financial capacity. Federal law recognizes the USDOT to provide uniform criteria for certification, and establishes a ten percent goal at the national goal that is utilized as a tool in evaluating DBE opportunities to participate in DOT assisted contracts. The national ten percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent. In addition, when a DBE goal is established the contract must be awarded to only those who make good faith efforts to meet it. State and local transportation agencies that receive DOT financial assistance are required to establish goals for the participation of DBEs. Each DOT-assisted State and local transportation agency is required to establish annual DBE goals, and review the scopes of anticipated large prime contracts throughout the year and establish contract-specific DBE subcontracting goals. The overall goal for the Florida Department of Transportation's (FDOT) Disadvantaged Business Enterprise (DBE) program for FHWA assisted contracts and for FTA assisted contracts are established on a triennial basis. The overall goal for federal fiscal years 2015 -2017 has been set at 9.91% for Federal Highway Administration (FHWA) assisted contracts and 8.72% for Federal Transit Authority (FTA) assisted contracts.

As shown in Table #3, Atlanta, Broward, Charlotte, Miami-Dade, and St. Lucie operate DBE programs. It should be noted that these DBE programs are primarily utilized for airport and transportation related projects that often receive state and federal funding. The City of Tallahassee's DBE program is broader in the sense that it targets manufacturing, agriculture, state government, and educational facilities projects. While conducting a comparative analysis, staff inquired whether a program had transitioned from a race/gender specific to a race/gender neutral program. Miami Dade, Palm Beach, and St. Petersburg all indicated that their respective programs all transitioned to a race/gender neutral program. Both St. Petersburg (1999) and Palm Beach (2003) programs faced sunset provisions and transitioned into a SBE program whereas Miami Dade transitioned due to a lawsuit 10 years ago.

In addition to a traditional SBE program, Broward and Miami Dade County also utilize other local certification programs in order to increase participation of small businesses in projects as both prime contractors and subcontractors. Broward County utilizes a program referred to as County Business Enterprise (CBE) and has a cumulative goal of at least 25% participation by CBE certified firms in all County procurement contracts. All firms seeking CBE certification must have less than the maximum gross receipts (averaged over three years) of \$5 million, regardless of their industry, must be independent, have a continuing operation presence in Broward County for at one year prior, and have personal net worth under \$750,000. In Miami Dade County, Local Developing Business Program (LDB) is race/gender neutral for small businesses that have non-exclusive permits to provide general aeronautical services to commercial airlines and aircraft operators at Miami International Airport. The LDB program is designed to provide opportunities to businesses located and performing a commercially useful function in Miami-Dade County or be at least 51% owned by person(s) who reside in the County, cannot exceed a three year gross receipts of \$22.4 million, and possess required licenses to do business in the County. The certification must also be renewed annually.

III. Programmatic Options Regarding the County's MWSBE Program

This section discusses the options before the Board regarding the County's MWSBE Program including: A) maintaining a race/gender specific program and proceeding forward with the disparity study update, B) transitioning to a SBE or race gender neutral program or C) other options to consider such as a DBE program.

A. Disparity Study Update for the MWBE Program

The County must demonstrate a compelling governmental interest for minority and gender-based goals in order to comply with the U.S. Supreme Court's ruling in *City of Richmond v. J.A. Croson*. Disparities studies are performed to serve as the evidentiary basis for continued race/gender based programs and the goals must be narrowly tailored to remedy the effects of the prior discrimination. Currently, the County MWBE program operates under the recommendations made in the MGT October 15, 2009 Disparity Study Update, which includes statistical analysis of the differences between expenditures with MWBEs (utilization) and the proportionate share of qualified contractors within the market area which are qualified, willing and able to perform a particular service for the County and provides the legal basis for the program.

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Following *Richmond v. Croson* and a similar Supreme Court ruling that applied to federal agencies in *Adarand v. Peña*, the U.S. Commission on Civil Rights issued a report in May 2006 (Disparity Studies as Evidence of Discrimination) recommending that localities discard disparity studies conducted using data that is more than five years old, as the “results are too outdated to justify preferential awards given today.” This guidance is utilized to withstand the legal challenges that may arise due to race/gender based programs that must satisfy strict scrutiny tests by showing a compelling governmental interest for maintaining such programs.

The findings and recommendations by the U.S. Commission on Civil Rights does not legally compel the County to perform a disparity study update but it will ensure that the County’s MWBE program is based on timely and legally sufficient market information. An updated study may also serve as a deterrent to unnecessary procurement litigation. In order to continue the MWBE program and minimize the threat of litigation, the Board may wish to conduct a quantitative disparity study that focuses on the factual data analysis associated with the program that is the basis for determining the aspirational targets by industry, which is included in the FY 2016 budget. The following narrative details the components of a quantitative disparity study, should the Board wish to continue with a race gender specific program.

Quantitative Disparity Study

A quantitative disparity study is statistically focused in nature and designed to establish or maintain the legal validity of an MWBE program. In September 2008, the Board directed staff to engage MGT of America to prepare an update to the County’s aspirational targets related to minority and women-owned businesses. The overall objective of the disparity study was to determine if data supports a “compelling interest” for the County to maintain a program to provide minority and women-owned business enterprises greater opportunities to participate in County procurement activities as goods and services providers. The study was based upon MGT’s review of the County’s contractual and procurement data for the period of October 1, 2004 through September 30, 2008. The final report was completed and presented to the Board on October 15, 2009 and is referred to as the 2009 Disparity Study Update.

The 2009 Disparity Study Update focused primarily on statistical analysis (utilization and availability, disparity, and private sector utilization and disparity analyses); and, included a legal and programmatic review. It was conducted for a total cost of \$110,000. The FY 2016 budget includes \$250,000 for a quantitative disparity study.

Considerations

If the Board wishes to continue with a race gender specific program, staff recommends moving forward with funding of a quantitative disparity study update. The FY 2016 Budget includes \$250,000 toward conducting a disparity study. This recommendation is based upon a 2006 U.S. Commission on Civil Rights report recommends that localities discard disparity studies conducted using data that is more than five years old. It must be noted, projects that receive state and federal funding the County’s aspirational targets are superseded for state and federal procurement policies as stated previously.

The City of Tallahassee has also included funding for a disparity study within its FY 2016 Budget. If the Board approves the proceeding with a quantitative disparity study, it may also wish to consider exploring collaboration efforts with the City of Tallahassee for a joint study.

The Board has funded a joint disparity previously. In 1994, a final report of a joint study was distributed to Leon County and Leon County Schools by MGT of America.

B. Small Business Enterprise (SBE) Program

Another option for the Board's consideration is transitioning from the MWSBE program to a race/gender neutral program or SBE program. As mentioned previously, the purpose of the County's SBE program is to foster growth in Leon County's economy by affording small businesses an opportunity to gain experience, knowledge, and training to compete and secure contracts. Unlike the MWBE Program, the SBE Program is race and gender neutral so it is not required to be supported by a disparity study. SBE programs offered by state and local governments focus on small businesses interested in maximizing their procurement opportunities with those governmental entities.

Previously, the Board contemplated transitioning to an SBE Program during the development of the FY 2012 budget (Attachment #6). The Board was presented with a report that contained information relative to the MWSBE Program, the differences between MWSBE goals and SBE goals, a listing of the few jurisdictions in the state that continue to use race and gender specific goals, and recommended policy revisions if the Board wished to transition to an SBE Program. While most urbanized Florida counties and cities offer race and gender neutral small business programs, very few jurisdictions have continued to utilize race and gender specific programs like the County's MWBE Program.

Ultimately, the Board accepted staff's report as presented. Should the Board choose to consider transitioning to an SBE-only program, staff will bring forth an agenda item analyzing components and best practices of SBE programs across the state as well as revisions to the SBE policy. In addition, the Board may wish to consider hiring a consultant to ensure the program functionality is consistent with SBE trends; and, to address the revisions to Policy 96-1, Purchasing and Minority, Women, and Small Business Enterprise Policy that will be necessary. However, if the Board wishes to continue with a race gender specific program, staff recommends that an agenda item be brought to the Board for consideration on policy enhancements to the County's SBE program.

C. Other Options for Consideration

As demonstrated in the Section II, several other programs are utilized by cities and counties to provide opportunities for minority, women-owned, and small businesses. Most notability is the federal and state disadvantaged business enterprise program.

As previously stated, a DBE Program is a race-conscious program in which DBEs are for-profit small business concerns where socially and economically disadvantaged individuals own at least a 51% interest and control management and daily business operations. African Americans, Hispanics, Native Americans, Asian-Pacific and Subcontinent Asian Americans, and women are presumed to be socially and economically disadvantaged. Other individuals can also qualify as socially and economically disadvantaged on a case-by-case basis. To be certified as a DBE, a firm must be a small business owned and controlled by socially and economically disadvantaged individuals. Certifiers make the determinations based upon on-site visits, personal interviews, reviews of licenses, stock ownership, equipment, bonding capacity, work completed, resume of principal owners and financial capacity.

It should be noted that a majority of DBE programs are primarily utilized for airport and transportation related projects that often receive state and federal funding. Leon County's MWBE Program only allows for certification (participation) of minorities and non-minority women. Should the Board choose to consider transitioning, staff recommends hiring a consultant to ensure the program functionality is consistent with DBE trends by examining best practices; and, to address the revisions to Policy 96-1, Purchasing and Minority, Women, and Small Business Enterprise Policy that will be necessary.

Conclusion

In summary, the County continues to demonstrate its support of the local business community, including the minority, women-owned, and small business owners interested in participating in the organization's procurement opportunities, through the MWSBE Division. Due to the importance that the Board places on supporting small business, organizational support is demonstrated throughout the County's 2015 Strategic Plan.

Should the Board wish to continue the race and gender specific program, then staff would recommend that the Board continue with the current MWBE program and proceed with issuing an RFP for a quantitative disparity study in coordination with the City (Options #1 & #2). Currently, the FY 2016 budget includes \$250,000 for this purpose; however, this amount could be less if it is determined that the County and the City can collaborate on a single disparity study for our community. The Board has the option to issue a RFP to conduct the disparity study or to waive the formal bid process and direct staff to come back with an Agreement with MGT of America for a disparity study update as it has done in the past. It must be noted, projects that receive state and federal funding the County's aspirational targets are superseded for state and federal procurement policies as stated previously. If the Board agrees to continue with the current County program, staff recommends that an agenda item be brought to the Board for consideration on policy enhancements to the County's SBE program.

Should the Board choose to consider transitioning to a race/gender neutral program or DBE program, the Board may wish to consider hiring a consultant to ensure the program functionality is consistent with SBE trends by examining best practices; and, to address the revisions to Policy 96-1, Purchasing and Minority, Women, and Small Business Enterprise Policy that will be necessary.

Options:

1. Authorize the County Administrator to issue a Request for Proposals to conduct the quantitative disparity study.
2. Authorize the County Administrator to initiate discussions with the City of Tallahassee to explore collaboration efforts on a single disparity study.
3. Direct staff to bring back an agenda item for the Board's consideration on policy enhancements to the County's SBE program.
4. Waive the formal bid process and bring back to the Board an agreement with MGT of America for the recommended disparity study.
5. Approve the transition to a race and gender neutral program and direct staff to bring back an agenda item to consider hiring a consultant to recommend SBE best practices, policy revisions, and to ensure that the program is consistent with current SBE trends.
6. Board direction.

Recommendation:

Options #1, #2, and #3.

Attachments:

1. Agenda Item: March 10, 2015 Status Report on FY 2013 and FY 2014 MWBE Program Expenditures Agenda Item #15
2. June 23, 2015 Budget Workshop Item: Consideration of Conducting a Disparity Study Update for the Minority, Women, and Small Business Enterprise Program
3. 2009 Disparity Study Update
4. Policy 96-1 Purchasing and Minority, Women and Small Business Enterprise Policy Adopted January 27, 2015
5. Agenda Item: January 21, 2014 Status Report on MWBE Expenditures and August 23, 2011 Status Report on MWBE Expenditures
6. MWSBE Program Certification Criteria
7. March 17, 2011 Budget Discussion Item #4