Agenda Item #: 5B-1

PALM BEACH COUNTY BOARD OF COUNTY COMMISSIONERS AGENDA ITEM SUMMARY

Meeting Date: February	1, 2014	[] Consent [] Ordinance	[X] Regular [] Public Hearing		
Department: Administration					
Submitted By:	Administr	ation			
Submitted For:	Office of S	mall Business Assistan	ce		

I. EXECUTIVE BRIEF

Motion and Title: Staff requests Board direction regarding: (1) The commissioning of a disparity study to assess whether there is disparity in the utilization of Minority and Woman-Owned Business Enterprises (M/WBE) in contracting in the areas of construction, professional services and goods and services with Palm Beach County and whether any identified disparity is a result of discrimination; (2) if a study is directed, determine if the study should be multi-jurisdictional to include the Solid Waste Authority; and (3) if a study is directed, determine whether the county should define the market area as Palm Beach County or allow the consultant to expand the geographical market area.

Summary: On December 3, 2013, the Board directed staff to prepare an agenda item to facilitate discussion regarding the commissioning of a Disparity Study in order to assess whether there is disparity in the utilization in Palm Beach County contracting with Minority/Woman-Owned Business Enterprises (M/WBEs), and if so, whether any disparity is a result of discrimination. <u>Countywide</u> (TKF).

Background and Policy Issues: In 1989 the Supreme Court ruled in <u>City of Richmond vs. Croson</u> that local governments may not enact programs favoring minorities and women until it had sufficient evidence that it was acting to eliminate the effects of past discrimination. The Board directed the staff of the Office of Equal Opportunity to prepare an RFP which would be used to select a firm to conduct a study of County procurement to determine if present effects of past discrimination existed. On October 3, 1989, the Board directed staff to negotiate a contract with MGT of America, the highest scored respondent to the RFP.

On January 17, 1991, MGT of America, Inc. submitted the final report of the disparity study which addressed the four major issues within the context and guidelines as set forth in the <u>Croson</u> decision. MGT of America, Inc., concluded the following: (1) the market area industry practices were discriminatory towards M/WBEs; (2) the county had been a passive participant in discrimination against M/WBEs and (3) there was disparity between the number of M/WBEs who were qualified to perform construction, professional services and provide goods and services contracts with the county and the percentage of M/WBE firms actually participating in contracts.

Based upon the results of the study, Palm Beach County developed an M/WBE program that met the parameters, recommendations and goals as established by the consultant's findings that ran for approximately ten years and included all M/WBEs regardless of whether they were domiciled in Palm Beach County. Upon meeting the goals, as outlined in the study, Palm Beach County transitioned to the Small Business Enterprise Program to meet the needs of all small businesses that experienced similar challenges when participating in government contracting. This program varied from the M/WBE program because a domicile requirement prevents vendors from outside of Palm Beach County to qualify as certifying businesses and it allows white males to participate in the program.

program.		
Attachments:		
1. Legal Stand	ards for Race-Conscious Government Contracting Programs	
Recommended by:	Large Davis Johnson, Director	1/27/2014 Date
Approved By:	Verdenia Baker, Deputy County Administrator	1/30/14 Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2014	2015	2016	2017
Capital Expenditures _				
Operating Costs				
External Revenues				
Program Income (County)				
In-Kind March (County)				
Net Fiscal Impact				
# Additional FTE				

Is Item Included in Current Budget?	Yes	No <u>X</u>		
Budget Account No.:	Fund	Agency	Org	Object
Reporting Category				

B. Recommended Sources of Funds/Summary of Fiscal Impact:

III. REVIEW COMMENTS

A.	OFMB Fiscal and/or Contract Administr	ration Comments:
	appliff of	An. J. Jacobrent 1129
,	OFMB KN	Contract Administration \
D D	Logal Sufficients	4

B. Legal Sufficiency:

Assistant County Attorney

C. Other Department Review:

Department Director	

(THIS SUMMARY IS NOT TO BE USED AS A BASIS FOR PAYMENT)

MEMORANDUM

DATE:

January 14, 2014

TO:

Tonya Johnson, Director,

Office of Small Business Assistance

FROM:

Tammy K. Fields, Chief Assistant County Attorney

RE:

Legal Standards for Race-Conscious Government

Contracting Programs

Pursuant to your request, the following is an analysis of the legal standards that must be kept in mind when a race conscious government contracting program is considered.

A race-conscious government contracting program must meet a strict scrutiny test in order to be considered constitutional. This standard is addressed in great detail in the United States Supreme Court decision of City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Strict scrutiny requires that a government entity (1) prove a compelling governmental interest in remedying identified discrimination based upon a strong basis in evidence, and (2) any measures adopted to remediate the discrimination are narrowly tailored to the established evidence. (Note: The Croson decision only addressed race-conscious government contracting and did not address gender-conscious programs. Gender based government decisions generally are subject to an intermediate level of scrutiny, but there are no specific cases addressing a gender-based government contracting program. For the purpose of this memo, the stricter level of scrutiny will be addressed.)

Based on the <u>Croson</u> Court's guidance on the need for evidence to support a race-conscious program, state and local government across the country began conducting disparity studies. The purpose of a disparity study is to determine the number of minority and women owned businesses (broken down by race and ethnicity) ready, willing and able to do government contracting as compared to the number of minority and women businesses who actually receive government contracts in a jurisdiction. If a disparity

Page 2

exists, an examination is done to determine the reasons for the disparity. Statistical and anecdotal data analysis is a necessary component of any disparity study. A review of whether race and gender neutral measures would address the disparity is also necessary. If a disparity is established that could be attributed to active or passive discrimination by the government entity, the first prong of the strict scrutiny test is met, and the compelling governmental interest in establishing a race-conscious program is established.

Based upon the results of disparity studies, many state and local governments determined that a race-conscious government contracting program was necessary, and programs were developed to meet the second prong of the strict scrutiny test – that the program was narrowly tailored. In order to establish that a program was narrowly tailored, five components need to be addressed: 1. race neutral programs such as loan programs, bond waivers, and bidding simplification are considered to address impediments which are faced by most small businesses; 2. duration of the race conscious program (it should only be as long as needed to address the past discrimination); 3. waivers and flexibility (there should be no absolute mandates); 4. the definition of a minority business should be limited to businesses that exist in the market area; and 5. the least burdensome means of accomplishing the goal of minority participation should be utilized.

Like many jurisdiction across the country, Palm Beach County had to reevaluate its M/WBE Program after the <u>Croson</u> decision was rendered. Palm Beach County commissioned MGT of America, Inc. to perform a disparity study which was completed on January 17, 1991. The study found that there was discrimination against M/WBEs in the market industry, and by virtue of the County's utilization of market businesses, the County was a passive participant in the discrimination. The County revised its M/WBE Program to make it narrowly tailored to remediate the discrimination identified in the study. One aspect of the narrowly tailored program was a requirement that the program results be reviewed to determine whether the program needed to continue.

Page 3

On February 28, 2002, a report was received from G.L. Jackson Consulting, Inc., reviewing the successes and failures of the M/WBE program from 1991-2001. Most of the race, ethnic, and gender goals were met during this period. Based on the utilization information alone, the County could not establish the necessary compelling governmental interest to continue a race/gender conscious program.

The Board of County Commissioners elected to transition the M/WBE Program into a race and gender neutral small business program. Eligible businesses could retain their M/WBE certification, but preferences were not awarded on this basis. Tracking of M/WBE participation continues in the SBE Program. (Note: The definition of M/WBE changed during the implementation of the SBE Program to only include M/WBEs domiciled in Palm Beach County. This means that a true comparison between past participation and current participation will not provide a clear picture of any disparity that may exist since the M/WBE Program was sunset.)

The question has been raised as to what would be necessary for the County to again implement a race and gender conscious contracting program. The first step would be to determine whether a compelling government interest exists. This requires an examination of evidence to determine whether there has been discrimination against M/WBEs that needs to be remediated. The best way to gather any such evidence is by commissioning a new disparity study. If any disparity is discovered and can be attributed to discrimination, either active or passive, the Board of County Commissioners could consider implementing a race or gender conscious program that is narrowly tailored to address the identified discrimination.

Please let me know if you need any further information.

cc: Denise M. Nieman, County Attorney Verdenia Baker, Deputy County Administrator