

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 <input type="checkbox"/>	No <input checked="" type="checkbox"/>		
Budget Account No.:	Fund <input type="checkbox"/>	Agency <input type="checkbox"/>	Org <input type="checkbox"/>	Object <input type="checkbox"/>
Reporting Category				

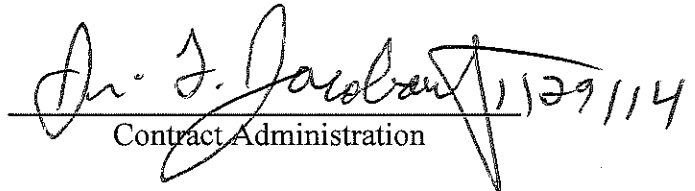
B. Recommended Sources of Funds/Summary of Fiscal Impact:

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Administration Comments:



 AK 1/29/13 OFMB KW 1/29



 Contract Administration 1/29/14

B. Legal Sufficiency:



 Assistant County Attorney 1/29/14

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 Croson 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

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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 re-evaluate its M/WBE Program after the Croson 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.

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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 governmental 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