

MEMORANDUM

December 15, 2017

TO: Tonya Johnson Davis, Director
Office of Small Business Assistance, Palm Beach County

FROM: Franklin M. Lee, Esq., Tydings & Rosenberg LLP

CC:

RE: Summary Review of Palm Beach County Disparity Study Final Report
(November 2017)

I. INTRODUCTION

Palm Beach County (“the County”) has retained the legal services of Tydings & Rosenberg LLP to provide a detailed review and independent professional critique of its Disparity Study Final Report (“Study”) that was submitted to the District by Mason Tillman Associates, LTD (“MTA”) in November 2017. This memorandum is a summary report reflecting our analysis of that Disparity Study Final Report. Our detailed review and analysis includes an overview of data sources and methodologies used by MTA, as well as our independent assessment of whether the data and methodologies are consistent with industry best practices and the current relevant legal framework for disparity studies. In addition, this summary report addresses the legal defensibility of findings and policy recommendations made by the disparity study consultant.

Most, if not all, disparity studies present unique challenges and limitations based upon the availability of preferred data sources and/or the application of various methodologies to such alternative or limited data sources. The County’s Study that is the subject of this memorandum is no exception. In recognition of this fact, many court decisions have concluded that the “strict scrutiny” standard’s requirement for a “strong basis” in evidence in support of disparity study findings and M/WBE program policy is not some bright-line quantifiable test, but rather requires a case-by-case determination by the courts that is to be based upon the totality of the best available evidence obtained through reasonable, competent, and diligent efforts on the part of the study consultants. Moreover, the courts’ determinations regarding whether the quantity and quality of the evidence presented by disparity studies are “strong” enough to satisfy the strict scrutiny standard may vary depending upon the nature of the race- and gender-conscious policies that are subject to legal challenge. Generally, the stronger, the more burdensome, and the more aggressive that such race-conscious remedies are, the stronger the basis in evidence must be in support of such remedies.

Taking into account such real-world limitations, this review represents an independent assessment that identifies relative strengths and weaknesses of various components of the County's Study, as well as the resultant findings produced by application of legally defensible methodologies to the best available sources of data. Subject to these qualifications, an opinion is rendered in this memorandum as to whether any identified limitations or weaknesses in available data or methodologies viewed in the context of the totality of all factual predicate evidence have risen to the level of fatal flaws that preclude attainment of the "strong basis in evidence" standard necessary to support the County's consideration of narrowly-tailored race- and gender-conscious remedies. Legal defensibility of policy recommendations as supported by Study findings are discussed, as well as "next steps" we recommend for the County to take in the course of its policy deliberation phase prior to adoption of any proposed amendments to the County's Small Business Enterprise ("SBE") Program as established in Palm Beach County¹, and/or to the County's Local Preference Program and the Glades Local Preference Program.² Those "next steps" in this policy deliberation phase include a process for development and consideration of a range of narrowly tailored, legally defensible, and effective race/gender-neutral and race/gender-conscious procurement policies and administrative reforms.

II. STUDY DATA SOURCES

MTA consulted a variety of data sources in calculating its estimates of availability, utilization, and disparity in the award of prime and subcontract dollars to small, minority, and women-owned businesses. Among these were contract records and files extracted from the County's financial system (Advantage Financial System), bidder and subcontractor award and payment information subject to 100% attempted verification through both prime contractor and subcontractor surveys, government SMWBE certification directories and lists, internet research on firm ownership status, business owners who attended the County's Disparity Study business community meetings, and surveys of identified firms within the relevant geographic market for Palm Beach County to determine their willingness to perform contracts with the County. A number of business association membership lists were also consulted to identify unique prospective bidders, vendors, contractors and subcontractors that may have been ready, willing, and able to sell the types of goods and services purchased by the County. Each of these types of data sources have been recognized in court decisions as being legitimate for purposes of undertaking disparity analysis.

MTA performed regression analyses to examine private sector discrimination impacting the relevant marketplace, including business formation and business earnings. In doing so, MTA relied upon PUMS data (Public Use Microdata Sample) to control for a number of economic and demographic variables affecting business formation and business earnings as another indication as to whether race and/or gender of business ownership affects market outcomes in the relevant markets.

¹ See Palm Beach County Purchasing Code, FL Ordinance 05-062 (2005), Palm Beach County Purchasing Code, Sec. 2-80.20 through 2-80.35, and PPM CW-O-043: Small Business Enterprise Program Policies and Procedures Manual of Palm Beach County (January 1, 2011). The application of the County's SBE Program to Consultants Competitive Negotiations Act ("CCNA) design contracts is governed by Section 287.055 of the Florida Statutes pursuant to County Code Sec. 2-80.29

² See Palm Beach County Purchasing Code, Secs. 2-80.41 through 2-80.47.

To MTA's credit, the data sources that were used for its strongest measure of availability are somewhat broader than just the actual County bidder data and payment data. By consulting numerous other certification and business directories and sources of firms within the relevant geographic market and then surveying such firms to independently verify their interest in bidding on County contracts, their ownership status, and their industry classifications, MTA has essentially developed a custom census of the firms that are ready, willing, and able to sell the kinds of goods and services that are routinely purchased by the County. This enhances the legal defensibility of MTA's availability measures. Moreover, the dollar threshold analysis and median contract award analysis conducted by MTA on the firms included within these availability numbers ensures that these firms have adequate capacity to be truly "available" to compete for County purchases at a reasonable level. This approach is a little less conservative, but more realistic, in estimating availability by race and gender category within each industry segment than is the limited approach of only looking at actual bidders. (Particularly in instances such as this Study wherein anecdotal evidence reflects a fairly pervasive perception among small and M/WBE firms of good old boy networks impeding market access for non-incumbent firms, there is a likely chilling effect that may artificially restrict the numbers of ready, willing, and able small and minority firms that appear in the County's actual bidder lists.) Unfortunately, weaknesses in the data captured by the County's financial systems (particularly related to subcontractor utilization on County contracts) resulted in MTA's attempted collection, compilation, and analysis of hard copy contract files from nine County agencies. MTA's persistent efforts ultimately yielded significant production of such files from those nine County departments. These reconstructed subcontracting files yielded considerably more (although admittedly incomplete) subcontractor utilization data. However, when combined with survey verification of subcontract utilization by the County's prime contractors and subcontractors, the resulting availability, utilization, and disparity analysis likely represents the "best available" evidence for this Study.

III. METHODOLOGY ASSESSMENT

While the Supreme Court decisions in J. A. Croson v. City of Richmond and Adarand v. Peña are controlling precedents for Palm Beach County, and provide the broad outlines for satisfying the strict scrutiny standard through disparity studies, there are a number of subtleties and complexities in this area of the law that have not yet been directly addressed by the Supreme Court. For these unresolved issues, it is necessary to sort through a thicket of federal and state lower court opinions to glean appropriate guidance. Those legal precedents that are controlling or most instructive for the County include those arising from the Eleventh Circuit Court of Appeals, federal district courts within the Eleventh Circuit, and Florida State courts. There have been a few post-Croson / Adarand court decisions that have addressed the constitutionality of MBE / WBE programs or methodological issues arising from disparity studies conducted in the State of Florida and in the Southern District of Florida where the County resides. A summary of some of these key controlling or influential local precedents follows.

A. Legal Framework for Study Methodology: Eleventh Circuit Appellate Decisions

Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir., 1997). In this case, several construction trade associations whose members regularly performed work for Dade County challenged the constitutionality of the County's affirmative action programs that provided various forms of preferences on the basis of race and gender in the awarding of county construction projects. All three preferential programs for black, Hispanic, and women-owned businesses were held at trial to be unconstitutional due to violations of the Equal Protection Clause of the 14th Amendment. *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 943 F. Supp 1546 (S.D. Fla., 1996). These holdings were subsequently affirmed by the 11th Circuit Court of Appeals on the basis that: (1) strict scrutiny applied to the racial preferences given to black- and Hispanic-owned businesses; (2) intermediate scrutiny applied to the gender preferences given to women-owned businesses; (3) the trial court's findings that the County's post-enactment evidence failed to provide a 'strong basis in evidence' sufficient establish a compelling interest for race-conscious remedies were not clearly erroneous; (4) the trial court's findings that the County failed to provide a 'sufficient probative basis in evidence' for finding that the WBE preference served an important governmental interest were not clearly erroneous; (5) the County's strong anecdotal evidence was insufficient to overcome the deficiencies in statistical evidence; (6) the County's race-based remedies were not narrowly tailored to the goal of remedying effects of alleged past and present discrimination; and (7) although the trial court erred in not finding that the County's gender-based remedies were substantially related to an important governmental purpose, because there was an insufficient factual predicate establishing the need for those gender-based remedies, those gender-based preferences were nevertheless unconstitutional.

Viridi v. DeKalb County School District, 135 Fed. Appx. 262 (11th Cir., 2005)(unpublished opinion per 11th Cir. Rule 36-2). An architect of Asian-American descent brought claims against the DeKalb County School District in Georgia under §§1981 and 1983 of the Civil Rights Restoration Act of 1991, and under the Equal Protection Clause of the Fourteenth Amendment. The architect claimed that the members of the School Board discriminated against him on the basis of race when awarding architectural contracts and that the Board's Minority Vendor Involvement Program (MVP) was facially unconstitutional. The MVP provided for targeted outreach efforts to minority and women-owned businesses to encourage them to bid on District contracts. In addition, it set non-mandatory aspirational goals for contract participation of 15 percent for black-owned businesses, 5 percent for women-owned businesses, and 5 percent for other minority-owned businesses. The District Court granted defendants motion for summary judgment on all claims. However, the Court of Appeals reversed in part, vacated in part, and remanded the case. On remand, the Federal District Court of the Northern District of Georgia again granted defendants' motion for partial summary judgment on the facial challenge to the Minority Vendor Involvement Program. On appeal, the 11th Circuit Court of Appeals held that the program was facially unconstitutional because its non-mandatory race-conscious goals were based upon racial classifications, and as such, were subject to strict scrutiny. In this instance, even assuming that the School District's asserted state interest for the program was compelling, the court found that the program was not narrowly tailored to serve that interest as the District failed to consider the use of race-neutral remedies, and the program was of unlimited duration.

B. Legal Framework: Eleventh Circuit Federal District Court Decisions

Aside from the federal district court decisions discussed above in the context of the Eleventh Circuit Appellate opinions in *Engineering Contractors Association* and *Viridi Architects*, there is one other recent federal district court opinion from within the Eleventh Circuit that may provide some useful guidance.

In *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, FL*, 333 F. Supp. 2d 1305 (S.D. Fla., Aug. 24, 2004), a federal district court held that Miami-Dade County's MWBE Program as applied to architectural and engineering contracts was unconstitutional. (The same MWBE program was previously held unconstitutional as applied to construction contracts in *Engineering Contractors Ass'n v. Metropolitan Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996), aff'd, 122 F.3d 895 (11th Cir. 1997) ("*ECA*"). The County subsequently adopted a Community Small Business Enterprise program for construction contracts, but continued to apply racial, ethnic, and gender criteria to other types of purchases, including procurement of A&E services. Despite the prior adverse decision, Miami-Dade County did not amend, modify, or repeal the remaining sections of its MWBE program, even in the face of staff recommendations that the remaining portions of the program lacked legal justification. Further litigation ensued and resulted in the above-referenced decision in the *Hershell Gill* case.

At issue in this case were three sections of the MWBE programs for Miami Dade County: (1) the Black Business Enterprise (BBE) program; (2) the Hispanic Business Enterprise (HBE) program; and (3) the Women Business Enterprise ("WBE") program. These programs applied to certain classes of contracts for which MWBE participation goals were set. Under these MWBE programs, the County was required to use every effort in attempting to reach the participation goals. There were five contracting measures available to the County for doing so, including set-asides, subcontractor goals, project goals, bid preferences, and selection factor preferences.

This Complaint was brought by two white-male-owned engineering firms under Title VII of the Civil Rights Act of 1964, under the Equal Protection Clause of the Fourteenth Amendment, and under 42 U.S.C. §1983. The plaintiffs sued the County, the County Manager, and various County Commissioners in their official and individual capacities, and sought both compensatory and punitive damages.

In many respects, the Court's decision maintains the legal status quo as established by the U.S. Supreme Court in *City of Richmond v. J.A. Croson*, *Adarand Constructors, Inc. v. Pena*, and by the 11th Circuit in the *ECA v. Metro-Dade County* case. However, there are six topics covered by the *Hershell Gill* decision wherein the Court's holdings may represent a departure from prior law. These holdings may have significant bearing on a local government's efforts in evaluating its need for revised MWBE policies and practices. These topics are:

1. Methodological Issues
2. Data Issues
3. Burdens of Proof
4. Narrow Tailoring of Remedies
5. Damages

6. Liability and Qualified Immunity of Public Officials

1. Methodological Issues

Under the *Hershell Gill* precedent, the use of a racial classification and / or preference by a governmental body in the award of public contracts invokes a “strict scrutiny” standard of review under the 14th Amendment’s Equal Protection Clause. Strict scrutiny analysis requires the government to present a ‘strong basis’ in evidence to demonstrate that it has a “compelling interest” for use of such a classification or preference to remedy the ongoing effects of discrimination. A ‘strong basis’ in evidence cannot rest on a mere claim of societal discrimination or on simple legislative assurances of good intentions. *See ECA v. Metropolitan Dade County*, 122 F.3d at 907. Disparity studies that measure gross statistical disparities between the proportion of minorities awarded contracts and the proportion of minorities willing and able to do the work, and that are further buttressed by anecdotal evidence, are permissible means for establishing such a strong basis in evidence.

In the event a governmental body invokes a gender-based classification favoring women, ‘intermediate scrutiny’ is the appropriate test to apply. Under ‘intermediate scrutiny,’ the government must show that the gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective. The constitutionality of such provisions similarly turn upon sufficiency of evidence of discrimination against women, and the “fit” of the remedy as being substantially related to achievement of the remedial objective directed at the effects of the identified discrimination. A combination of evidence of statistical disparities and anecdotal evidence of discrimination is again required to meet the intermediate scrutiny standard.

In the *Hershell Gill* case, Dade County and interveners presented both statistical and anecdotal evidence in an attempt to provide the requisite “strong basis in evidence” of discrimination in the architectural and engineering (“A&E”) industry. In the course of litigation, the County developed post-enactment evidence of such discrimination using several methodologies. Judge Jordan commented at length about the strengths and major weaknesses of the evidence produced through econometrician Dr. Carvajal’s study.

a. Strengths

Judge Jordan favorably commented upon the following methodological features of the Carvajal Study:

- As the study focused upon the firms’ annual volume of business rather than solely looking at the relatively few A&E County contracts awarded where the MBE program was applied, the potential for masking of the effects of discrimination due to the remedy was limited.
- Carvajal’s telephone survey to obtain information about each firm’s gender / ethnic classification, capacity / experience input variables, and annual sales volume in the

relevant market obtained a 65% response rate. This survey data was augmented by firm data collected by the County as part of its prequalification review of A&E firms (e.g., firm characteristics such as length of time in business, number of technical employees, architects, and engineers).

b. Weaknesses

Judge Jordan criticized the following methodological features of the Carvajal Study:

- The definitions of various ethnic / gender group classifications by the County Department of Business Development did not necessarily coincide with the identifications of gender and ethnicity contained in the survey.
- The geographic market definition was over-inclusive in that it failed to exclude annual sales earned in markets outside Miami-Dade County by the surveyed firms, and it is under-inclusive in that it failed to include some firms from neighboring counties which provided A&E services in Dade County. [Note: This requirement for market definition may be overly rigid and inconsistent with other 11th Circuit precedents in that it implicitly fails to recognize the purpose behind the definition of a relevant geographic market; all such market definitions are imprecise, but are designed to provide a useful and meaningful context for statistical analysis that captures important market dynamics.]
- The aggregation of annual sales volumes for architectural and engineering work leads to double-counting of sales and can distort disparity results for each of those two industries. Moreover, each of the product markets has distinct sub-markets that should be treated separately. The aggregation of such sales figures renders the volume of sales figures unreliable and inaccurate.
- The definition of “annual volume of sales” in the survey question was unclear (i.e., there is ambiguity as to whether respondents were reporting gross volume, net volume, Miami-Dade County sales volume, construction volume).
- The use of the number of employees as a proxy for firm capacity was erroneous due to the enormous variations in sales per employees ranging from \$248 to \$19,230,769.
- Anecdotal evidence of discrimination against WBE firms was not sufficiently probative because it was inconsistent with statistical evidence that reflected no disparity in business sales to WBE firms in the industry.

2. Data Issues

The Court identified numerous deficiencies in the reliability of the County’s data as follows:

- Enormous variances in business volume for eleven engineering firms that each reported having two structural and two civil engineers (i.e., ranging from \$250,000 to \$423 million) could not likely be attributed to discrimination as similar variances were reported among non-minority firms, and therefore cast serious doubts on the accuracy of the survey data.
- Seven surveyed architectural firms reported having no architects, yet reported significant annual sales volume.
- The survey data on business sales is over- and under-inclusive as Dr. Carvajal failed to properly define the relevant geographic market.
- The study fails to properly measure aspects of sub-markets and product markets because overall business volume for a firm is not segmented by product market, but is applied multiple times for each product market.
- Unexplained cavernous variances in the numbers for similarly situated firms cast grave doubts on the entire process of gathering and analyzing the data.

3. Burden of Proof

The Court specifically rejected the notion advanced by the 10th Circuit Court of Appeals that the plaintiff challenging the affirmative action program retains the ultimate burden of proving the program's constitutionality. Instead, Judge Jordan embraced Supreme Court Justice Scalia's dissent in the denial of certiorari in the Concrete Works v. City and County of Denver decision, and then cited the 11th Circuit precedent of Johnson v. Bd. Of Regents of the University of Georgia, 263 F.3d 1234 at 1244 (11th Cir. 2001) for the proposition that the burden of proof under a strict scrutiny standard is on the defendant. Under this interpretation, the 11th Circuit would be the only jurisdiction in the country where a defendant has the ultimate burden of proof in defending against a constitutional challenge to an affirmative action program. [Note: This opinion regarding the burden of proof appears to be at odds with the 11th Circuit precedent in *Engineering Contractors Association* which clearly imposes a duty on plaintiffs to rebut inferences of discrimination raised by defendants through a strong basis in evidence. This aspect of this opinion is also at odds with the overwhelming body of American jurisprudence on the issue of burdens of proof.]

4. Narrow Tailoring

The Court found that Dade County's MBE program as applied to A&E contracts was not narrowly tailored for the following reasons:

- Because the Study did not identify who was engaging in discrimination, what form the discrimination might take, at what stage of the procurement process it was taking place, and how the discrimination is accomplished, it is virtually impossible to narrowly tailor a remedy.

- Although “narrow tailoring” does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of workable race-neutral alternatives, and the County failed to show the necessity of the relief chosen because the efficacy of alternative remedies had not been sufficiently explored.
- The County failed to show that its use of a small business program for construction had been ineffective, and / or that such a race-neutral approach would have been ineffective if applied to A&E contracts.
- The County’s application of its goal waiver provisions was utterly inflexible in practice. Despite requirements in the Ordinance that the Commission must adjust participation goals on an annual basis based upon study results, the goals were never adjusted since 1994.
- The County program contained no sunset provision to limit its duration.

5. Damages

Hershell Gill Plaintiffs sought compensatory damages and punitive damages. Judge Jordan rejected the award of compensatory damages because the Plaintiffs utterly failed to prove they suffered any actual losses from the existence of the MBE program. There was no evidence in the record indicating how many jobs Hershell Gill submitted proposals for, the value of those jobs, or its relative rate of success in being awarded County projects. Without such evidence, the Court concluded it was very difficult to determine the actual losses suffered. Moreover, there was no expert or lay testimony regarding lost profits, and all plaintiff could offer was mere speculation. Plaintiffs Brill and Rodriguez even failed to present probative evidence of interest, let alone success, in obtaining County work. [Note: Under 11th Circuit precedents, these two plaintiffs could have been dismissed for lack of standing since they were not shown to be “ready and willing” participants in bidding for County contracts.] There was no probative evidence showing what percentage of A&E contracts plaintiffs would have successfully or likely obtained absent the M/WBE programs.

Plaintiffs also sought “presumed damages” in lieu of compensatory damages due to the difficulty in quantifying the nature of its harm from reverse discrimination. The Court also rejected this argument because it could find no legal precedent for awarding presumed damages to a corporation whose constitutional rights have been violated, and there was insufficient evidence introduced to substantiate claims of lost profits or lost opportunity costs. Instead the Court awarded each Plaintiff \$100 in nominal damages for the constitutional violation.

The court further rejected the Plaintiff’s exorbitant request for \$225 million in punitive damages that was based upon 5% of the County’s gross revenues. The Court reasoned that the purpose of the punitive damages is to punish the defendant for outrageous conduct and to deter similar conduct in the future. However, in this case, Judge Jordan stated that he did not believe punitive damages were needed for deterrence, but threatened that punitive damages would be a virtual certainty in the event that the County’s next case was brought to trial for this same MBE program on a

constitutionally deficient record. Finally, Judge Jordan indicated that punitive damage awards require an individualized and highly contextualized analysis of each defendant, including a state of mind, which was not in evidence in this case. Moreover, punitive damages are not available against a municipality under 42 U.S.C. §1983.

6. Liability and Qualified Immunity of Public Officials

The Court found that the Dade County Commissioners were absolutely immune from liability in their individual capacities for their votes in favor of the M/WBE programs and their subsequent decisions not to repeal or amend the programs. However, with respect to their votes to apply the M/WBE measures to A&E contracts that were presented to them, they were acting in their administrative capacities, and as such, were not entitled to absolute immunity. Because the law was clearly established, at least since the *ECA v. Miami Dade County* case, that the County's M/WBE programs were unconstitutional absent the requisite evidentiary support, the Commissioners were also not entitled to qualified immunity because they had repeatedly been advised by the County Manager that there was insufficient evidence to warrant continued application of the program, and the County's construction M/WBE program had been invalidated by the 11th Circuit based upon the identical evidentiary record. As such, the Commissioners were liable individually and jointly with the County for any compensatory and punitive damages awarded. However, in this case, only nominal damages of \$100 for each defendant were awarded.

C. Assessment of Palm Beach County Disparity Study Methodology

MTA included a very extensive chapter in its Study that accurately summarized the legal framework for disparity studies within the 11th Circuit and federal district courts of Southern Florida. However, a few aspects of the methodologies employed by MTA in this 2017 Disparity Study Final Report were apparently inconsistent with best industry practices and guidance provided within that relevant legal framework, such as the following:

1. The industry definition used for Professional Services is overly broad as it aggregated architectural, engineering, and other Consultants Competitive Negotiations Act ("CCNA") professional services with other professional services (e.g., legal services, accounting, and lab testing) altogether in a single industry category in clear contravention of the guidance of the *Hershell Gill* decision;
2. Other Services contracts are aggregated with Goods contracts in a single industry category ("Services and Goods"), even though these two industry segments typically have little in common, often have very different kinds of procurement methods, and differing availability of commercially useful subcontract opportunities. (However, MTA observed in this Study that many of the County's contracts for goods also had service components to them, such as installation or assembly. MTA observed further that few, if any, of these contracts had commercially useful subcontract opportunities. Moreover, persistent significant disparities in the utilization of M/WBEs across each of these industry categories further mitigate against the likelihood of inappropriate masking or exaggeration of disparities due to over- or under-aggregation of industry definitions. In addition, despite the County's successful administration of a fairly strong SBE program since 2002,

statistically significant disparities in the utilization of available M/WBE firms in these industry segments persist, further buttressing the conclusion that race and/or gender status of business ownership continue to adversely affect market outcomes in these industry segments.);

3. The geographic market definition for construction industry contracts as Palm Beach County is narrower and oddly inconsistent with that found in similar disparity studies recently conducted by Palm Beach County School District, Broward County Public Schools, and Miami-Dade County Public Schools wherein that geographic market definition for construction more broadly included Palm Beach County, Broward County, and Miami-Dade County instead of just Palm Beach County. (On the other hand, it is possible that the nature of the County's Small Business and Local Preference Programs have contributed to MTA's observed purchasing patterns in Construction that support this narrower geographic market definition.); and
4. There was no private sector disparity analysis undertaken based upon building permit or similar data that captures patterns of exclusion of M/WBE subcontractors on private sector contracts by some of the same prime contractors that perform contracts on behalf of the County. Accordingly, the requisite "nexus" between the expenditure of County contract funds with discriminatory prime contractors could not be established for purposes of examining the possible existence of "passive participation" by the County in private sector discrimination in the absence of race/gender-conscious remedial efforts. (However, this weakness was largely mitigated by an extensive analysis by MTA of the efficacy and effectiveness of the well-administered race-neutral SBE program that the County adopted as a replacement for its prior M/WBE Program since 2002, combined with identification of persistent significant disparities in the utilization of M/WBE prime contractors and subcontractors. In addition, MTA performed Logistic and OLS regression analyses on PUMS datasets containing numerous variables known to affect business ownership and earnings. These regression analyses revealed disparities in Palm Beach County's overall marketplace dynamics, such as lower business formation rates and lower business earnings for minorities and women as compared to non-minority male business owners when controlling for other relevant characteristics of business ownership; two additional indications that the variables of race and gender do have statistically significant adverse effects in un-remediated markets in Palm Beach County.³)

While the data limitations and methodological weaknesses identified above are somewhat less than ideal as compared to the disparity study industry "best practices," they are far from fatal flaws in this case due, in no small measure, to a number of strengths in other data sources and methodologies that more than make up for these shortcomings. Again, the definition of the term "strong basis in evidence" is a relative one based upon the totality of evidence that constitutes the County's factual predicate. Statistically significant disparities in M/WBE utilization have been identified by MTA in each of the industry segments at both the prime and subcontract levels. Moreover, these disparities were consistently found even after performing a dollar threshold analysis on smaller contracts that significantly eliminated differences in capacity or size as a plausible explanation for the identified disparities, as well as a comparison of M/WBE

³ See Study at pp. 9-1 to 9-20.

participation in informal contracts versus that obtained in formal contracts. The Study's analysis of the efficacy of race-neutral SBE program remedies wherein M/WBE disparities persisted despite the fact that 15% SBE program goals were consistently attained further strengthens the evidentiary basis for MTA's ultimate conclusion that neutral remedies, in and of themselves, will likely be insufficient to remedy the effects of marketplace discrimination.⁴

Extensive anecdotal evidence of various forms of marketplace discrimination⁵ (e.g., good old boy networks, stereotypical attitudes on the part of some prime contractors and County personnel, bias by the County in favor of the use of incumbent firms, active and passive participation by the County in commercial discrimination, disparate treatment in the award of contracts, unequal access to capital, cost differentials in credit, and unfair denial of contract awards in the JOC program) further buttress the strong basis in evidence demanded by the strict scrutiny standard.

Accordingly, the evidence gathered by MTA in this Study provides a strong basis for concluding that the County has a compelling interest to consider the use of narrowly-tailored race- and gender-conscious programs as remedies for identified marketplace disparities. Moreover, this factual predicate is sufficiently detailed to identify specific barriers to be addressed through the recommended race- and gender-neutral and race- and gender-conscious remedies. This will similarly aid the crafting of remedies that can satisfy the "narrow tailoring" prong of the strict scrutiny standard.

IV. LEGAL DEFENSIBILITY OF FINDINGS

As stated above, consistent with the legal framework provided in relevant court decisions, the identified data limitations encountered by MTA, and any apparent shortcomings in methodology, when measured against the totality of the evidence that the Study's methodologies produced for the County's factual predicate, should be viewed as relatively minor weaknesses, not fatal flaws. Overall, the Study provides the requisite "strong basis" in evidence required as a prerequisite to development of narrowly tailored race- and gender-conscious remedies for marketplace discrimination. The following strengths and weaknesses of the data sources and methodologies used by MTA should therefore be taken into account in charting a course of action for amendments to policies and procedures for the City's SBE and Local Preference Programs, and for the establishment of an effective, narrowly tailored, and legally defensible M/WBE Program.

V. STUDY STRENGTHS & WEAKNESSES

A. Strengths

The policy recommendations for race- and gender-neutral amendments to the SBE and Local Preference Programs, as well as the recommendations made by MTA to adopt a narrowly tailored race- and gender-conscious M/WBE program are adequately supported by the Study findings. In

⁴ See Study at pp. 6-7 through 6-18, and pp. 12-2 through 12-10.

⁵ See Study at pp. 10-1 to 10-23, for summary of anecdotal evidence collected from 35 in-depth one-on-one interviews of business owners and testimony from two additional business owners obtained in public meetings.

making this determination, we have also taken into consideration the strengths and weaknesses of the overall factual predicate. Those strengths are as follows:

1. Legal analysis re: controlling legal precedents provided in Study on the “burden of proof” issue is thorough and sound. Identification of available firms, as well as M/WBE utilization at prime and subcontract levels through award and payment data, have been adequately verified. Significant disparities in utilization have been identified in each and every industry segment. Notwithstanding any potential flaws in industry categorization in light of the *Hershell Gill* decision, given the magnitude of identified disparities and the strong inferences to be drawn from those widespread significant disparities as corroborated by ample anecdotal evidence, it is unlikely such weaknesses will materially affect MTA’s findings and preclude consideration of race- and gender-conscious remedies at this time. Moreover, because of thorough analysis of the inadequacies of the current SBE and Local Preference Programs, there is more than the requisite “rational basis” provided in the Study to support extension and improvements to the SBE Program (e.g., modifying the procurement process for small informal contracts to maximize M/WBE utilization, and enhancing automated bidder registration systems and financial systems to accommodate more precise and appropriate future industry definition, utilization, and disparity analysis);⁶
2. Availability methodology is sound for identifying ownership status for race and gender, and for verifying utilization as measured by payments at the prime and subcontract levels. MTA has essentially developed a custom census of the firms that are ready, willing, and able to sell the kinds of goods and services that are routinely purchased by the County. This enhances the legal defensibility of MTA’s availability measures. Moreover, the dollar threshold analysis and median contract award analysis conducted by MTA on the firms included within these availability numbers ensures that these firms have adequate capacity to be truly “available” to compete for County purchases at a reasonable level. This approach is a little less conservative, but more realistic, in estimating availability by race and gender category within each industry segment than is the limited approach of only looking at actual bidders.;⁷
3. Subcontractor capacity has been successfully eliminated as a plausible explanation for disparities based upon threshold analysis;⁸
4. MTA policy recommendations for enhancing SBE Program with prompt payment provisions, de-bundling of contracts, website enhancements, targeted outreach, and modification of financial systems to enhance subcontract payment verification procedures are all “best practices” are all race / gender-neutral remedies that are adequately supported by Study’s evidence under a “rational basis” standard.⁹

⁶ See Study at pp. 12-23 to 12-27.

⁷ See Study at pp. 6-1 to 6-33; see also discussion on availability *infra* at p. 3.

⁸ See Study at pp. 6-7 to 6-18.

⁹ See Study at pp. 12-21 to 12-30.

B. Limitations and Weaknesses

The relative weaknesses in the factual predicate established in this Study are summarized as follows:

1. The industry definition for Professional Services contracts aggregates Architectural and Engineering and other CCNA contracts with other professional services in contradiction to guidance from *Hershell Gill* case, and therefore is overly broad. However, due to the magnitude and breadth of identified disparities, these weaknesses are unlikely to materially affect fundamental findings.¹⁰
2. Services contract data is also aggregated with goods contract data. Although not a “best practice,” this particular over-aggregation of industry segments into a single category may also not be a material flaw since both categories of goods or commodities and non-professional services tend not to have commercially useful subcontract opportunities that are typically the subject of M/WBE subcontract goals, and therefore there have been far fewer legal challenges to M/WBE programs in these industry segments. Moreover, as with Professional Services, due to the magnitude and breadth of identified disparities in this industry category, this weakness is unlikely to materially affect fundamental findings.
3. The geographic market definition for Construction as Palm Beach County is more narrow than that established in recent disparity studies for Broward County Public Schools, Palm Beach County School District, and Miami-Dade County Public Schools, all of which defined the relevant geographic market for Construction more broadly to include the counties of Palm Beach, Broward, and Miami-Dade. Nevertheless, it is possible that the local vendor status requirements for participation in the County’s Local Preference and SBE Programs have contributed to the purchasing patterns identified in the Study that justify this narrower geographic market definition that is limited to Palm Beach County.

C. Factual Predicate as a Basis for Proposed Policy Amendments

MTA’s proposed policy recommendations for amendments to the SBE Program, consideration of narrowly tailored M/WBE program elements, and administrative reforms regarding bidding, website enhancements, and financial systems, are all adequately supported by a strong basis in evidence.¹¹

VI. FINAL ASSESSMENT AND RECOMMENDATIONS: NEXT STEPS

Given the totality of the evidence gathered and analysis undertaken by MTA in this Study, and given further the relative strengths and weaknesses of the data sources and methodologies ultimately relied upon by MTA, this Disparity Study provides an adequately strong basis in evidence to support consideration of narrowly tailored race- and gender-conscious remedies, in addition to improvements to the County’s SBE and Local Preference programs and to

¹⁰ See Study at pp.7-1 through 7-27, and pp. 8-1 through 8-9.

¹¹ See Study at pp. 12-11 through 12-30.

administrative systems that can support targeted solicitation, and greater transparency in the availability and utilization of M/WBE firms by industry segment.

Therefore, we recommend that Palm Beach County's Commissioners formally accept the findings and recommendations of this Study for purposes of further policy deliberation. Proposed race / gender-neutral and race / gender-conscious amendments to the current Small Business and Local Preference Program Policies should be developed and narrowly tailored to effectively address those barriers identified by the Study that appear to be undermining economic inclusion of small, minority, and women-owned contractors, subcontractors, and vendors in County contracts. Moreover, administrative "best practices" should be adopted to remedy barriers in the procurement process that are contributing to substantial persistent disparities in M/WBE utilization in certain industry segments. As part of this policy deliberation phase, we also recommend that the County provide a reasonable opportunity for business stakeholders in the relevant marketplace to present the County with additional evidence that either corroborates, refutes, or supplements the findings of this Study, and legally defensible policy recommendations that address persistent disparities in M/WBE participation in County prime contract and subcontracts despite the use of numerous race- and gender-neutral remedies. (This may take the form of a 30-day public comment period on the Study's findings and recommendations.)

Based upon the totality of the resultant factual predicate, the County should then craft narrowly-tailored policies, policy amendments, and administrative reforms that are legally defensible, effective, and appropriate given the County's resource constraints. After an additional opportunity for public comment on proposed draft policies and reforms, the County Board of Commissioners should take action to formally adopt, amend, and implement proposed policies and administrative reforms.

Respectfully submitted,

A handwritten signature in cursive script that reads "Franklin M. Lee". The signature is written in black ink and is positioned below the "Respectfully submitted," text.

Franklin M. Lee
Partner, Tydings & Rosenberg LLP

