T & E ITEM 3 & 4
February 4, 2010
Worksession 2

MEMORANDUM

TO: Transportation, Infrastructure, Energy, and Environment Committee

FROM: Robert H. Drummer, Senior Legislative Attorney

SUBJECT: **Worksession 2**: Expedited Bill 45-09, Contracts and Procurement – Amendments and Executive Regulation 19-09

Expedited Bill 45-09, Contracts and Procurement - Amendments, sponsored by the Council President at the request of the County Executive was introduced on December 1. A public hearing was held on January 19, 2010, and a T & E worksession was held on January 21.

Background

Expedited Bill 45-09 would:

- exempt contracts for media advertisement from the Procurement Law;
- exempt contracts for experts, consultants, and investigators for use in anticipation of litigation or preparation for trial from the Procurement Law;
- expand the coverage of the Wage Requirements Law;
- amend the time for contractors to submit information under the Wage Requirements Law;
- permit the Director to investigate and verify information provided by businesses under the Local Small Business Reserve Program;
- repeal a section restricting the use of County funds by contractors and grantees to influence union organizing;
- amend the Prevailing Wage Law to require contractors to pay the prevailing wage in effect when the solicitation is published;
- permit a using department to file a dispute under the administrative dispute resolution process; and
- generally amend the County Procurement Law.

An explanation of the changes to the Procurement law that this Bill would make is at ©13-14. After the Bill was forwarded to the Council by the Executive, Assistant Chief Administrative Officer, Kathleen Boucher, on behalf of the Executive, sent a request to Council staff that an amendment to the Prevailing Wage Law be added to the Bill that would require a contractor to pay the prevailing wage in effect when the solicitation is published. See ©15. Ms. Boucher's memorandum explains this amendment. The amendment to the Prevailing Wage Law is on lines 138-144 of the Bill at ©7.

The Executive transmitted a proposed regulation to implement the changes that would be made by this Bill, Executive Regulation 19-09, to the Council on January 22, 2010 under Method 1. See ©24-25. A redline copy of Executive Regulation 19-09 is at ©26-57 and a clean copy is at ©58-88. The Executive's explanation of the changes to the Procurement Regulation made by 19-09 is at ©89-91.

Public hearing

The sole speaker at the public hearing on January 19, Department of General Services (DGS) Director David Dise, testified in support of the Bill on behalf of the Executive. See ©23. Mr. Dise recommended that the effective date of the Bill be changed from January 1, 2010 to April 1, 2010.

January 21 Worksession

The Committee reviewed the Bill with Executive Branch representatives and Council staff, but did not vote on it. The Committee requested Council staff to obtain additional comments from members of the local small business community on the proposed increase in the dollar limits for direct purchases and informal solicitation.

Issues

1. What is the fiscal and economic impact of the Bill?

The OMB fiscal impact statement (©16-17) concludes that the Bill would have neither fiscal impact on County expenditures nor any material financial or economic impact on the County.

The Bill contains several different amendments to the Procurement Law that must be looked at separately to determine the Bill's fiscal or economic impact. Exempting contracts retaining expert witnesses for litigation or for media advertising from the Procurement Law should not have a fiscal impact on the County or an economic impact on local business since the Chief Administrative Officer has already approved written waivers from competition for these contracts. Requiring a surety company to be licensed to do business in Maryland would similarly have no fiscal impact on the County or economic impact on local business. Code §11B-33B, which prohibits the use of County funds to either promote or oppose union activity, is unenforceable under a recent Supreme Court decision. The repeal of the law would therefore have no fiscal impact on the County or economic impact on local business. Permitting a using department to bring a dispute with a contractor to the administrative process is also unlikely to have a significant fiscal impact on the County or an economic impact on local business.

Increasing the dollar limits for informal solicitations from between $5000 and $25,000 to between $10,000 and $100,000 would increase the number of contracts that are awarded without competition or without formal solicitation, but is unlikely to result in significantly higher prices for these small contracts. The expansion of the contracts that would be subject to the Wage Requirements Law could have a fiscal impact on the County due to higher bid prices if the County's living wage is greater than the wages normally paid by contractors who are now

exempt from this requirement. However, we do not have any information to determine this. Finally, the change in the Prevailing Wage Law to freeze the prevailing wage rates on a contract at the time of bid would either have little effect or reduce bid prices on large construction contracts.

The OMB fiscal impact statement for Executive Regulation 19-09 concludes that the adoption of the regulation would have no fiscal impact on County expenditures at ©92-93.

2. What is the appropriate effective date?

The Bill contains an expedited effective date of January 1, 2010. However, the Bill was not introduced until December 1, 2009 and a public hearing was held on January 19. If the Committee recommends approval of the Bill at the worksession on February 4, the Bill can be scheduled for Council action on February 9 at the earliest. DGS Director David Dise, at the public hearing, requested that the effective date be changed to April 1 to give them time to implement these changes. **Council staff recommendation:** amend the effective date to April 1.

3. Should contracts for expert witnesses and media advertising be exempt from the Procurement Law?

The Chief Administrative Officer (CAO) has waived competition for these contracts pursuant to §11B-14(a)(2). Exempting these contracts from the Procurement Law would simply eliminate the need for the using department to request, and the CAO to approve, a waiver from competition for these contracts.

The retention of an expert witness for litigation must normally be done quickly to comply with Court discovery deadlines. In addition, it is often counter-productive to advertise a solicitation for an expert witness in litigation because it is likely to be prematurely revealed to the opposing parties in the case. A contract for media advertising is often on a strict time deadline. The potential market for these contracts is small and constantly dwindling. **Council staff recommendation:** approve the exemption for these contracts.

4. Should the coverage of the Wage Requirements Law be expanded to cover small businesses with 10 or fewer employees?

The Bill would expand the Wage Requirements Law to cover contractors with 10 or fewer employees. The Wage Requirements Law requires a covered contractor to pay all employees working on the contract a minimum of the County's living wage, currently set at $12.95 per hour. The Department of General Services, in response to questions from Council staff, indicated that it does not have statistics on the number and dollar value of County service contracts awarded to contractors in recent years with 10 or less employees. See January 18 email from David Dise at ©18-19. These contractors would be required to pay the living wage under the Bill. These small businesses may be able to build any increase in wage rates required by the Wage Requirements Law into their bid price. Although this extension of the Wage Requirements Law is consistent with the underlying policy of the law, it may eliminate a competitive edge currently enjoyed by some small businesses. However, absent statistics on the number and dollar value of service contracts awarded to contractors with less than 10 employees, it is difficult to determine what, if any, effect this Bill would have on these contractors. Despite

this lack of information, the County does have a strong interest in requiring a living wage for all employees working on a County service contract without regard to the size of the contractor. **Council staff recommendation:** approve the amendment as introduced.

5. Should the law restricting the use of County funds by contractors and grantees to influence union activity be repealed?

The United States Supreme Court held that a California law restricting the use of State funds to influence union activity was preempted by the National Labor Relations Act (NLRA) in *Chamber of Commerce v. Brown,* 128 S. Ct. 2408 (2008). The County Attorney has issued an opinion that Code §11B-33B is similarly preempted by the NLRA. See ©20-22. Council staff agrees with this opinion. **Council staff recommendation:** approve the repeal of §11B-33B.

6. Should the Prevailing Wage Law be amended to establish the prevailing wage rates for the entire contract at the time of the solicitation?

The County Attorney's Office has interpreted Code §11B-33C(c) to require a contractor to pay the current prevailing wage rates throughout the contract term even if the State changes the rates during contract performance. Since large construction contracts often require several years to complete, a contractor may be unable to anticipate future changes in the prevailing wage rates throughout contract performance. This uncertainty could require contractors to put unnecessary contingencies in their bids and ultimately raise bid prices. **Council staff recommendation:** approve the amendment to the Prevailing Wage Law in the Bill.

7. Should the using department be able to submit a dispute with the contractor to the administrative process?

Code §11B-35 establishes an administrative process for a contractor to submit a dispute arising under the contract to the Director of DGS. The contractor can appeal the Director's decision to the CAO. The CAO may hold a hearing and must issue a decision within a time certain. The contractor may appeal the CAO's decision to the Circuit Court and the Court of Special Appeals. Section 11B-35 does not permit the using department to file this type of dispute. The Bill would permit the using department to file a dispute arising under the contract in the same manner as the contractor and appeal to the CAO. The using department would not be authorized to appeal the CAO's decision to the Circuit Court, but could appeal an adverse decision of the Circuit Court to the Court of Special Appeals.

David Dise provided some examples of the types of disputes that a using department could submit to the Director in a January 18 email at ©18-19. **Council staff recommendation:** approve the amendment as introduced.

8. Should the maximum amount for a direct purchase be increased from $5000 to $10,000 and the maximum amount for an informal solicitation increased from $25,000 to $100,000?

Expedited Bill 45-09 and Executive Regulation 19-09 would increase the maximum amount for a direct purchase from $5000 to $10,000 and increase the maximum amount of a contract awarded through an informal solicitation from $25,000 to $100,000. The Bill, at lines 13-19 reflects these changes for posting informal solicitations. Executive Regulation 19-09, in

§11B-00.01.04.1 would make these changes in the Procurement Regulation and also raise the maximum amount for an abbreviated formal solicitation from $100,000 to $200,000. See ©30-40. The current exemption for direct purchases from the base used to calculate Minority, Female, and Disabled (MFD) goals would also be increased from $5000 to $10,000 by §11B-00.01.07.1 at ©40.

According to the Executive, these increases reflect the gradual increase in contract values in the marketplace over time due to inflation. The Committee, during the January 21 worksession, requested Council staff to solicit comments from local small business owners on these proposed changes. Council staff solicited comments from 16 representatives of different local businesses who attended the December 2009 Montgomery County Chamber of Commerce Small Business Meeting by email on January 26. All 8 business representatives who responded believed that this change would help local small businesses win County contracts. The responses from Judy Stephenson of OfficePro, Inc. (©94-95) and Nick Brown of Affinity Network Solutions (©96-97) explain the reasons for this position. **Council staff recommendation:** approve the increase in these dollar thresholds as introduced.

9. Should Proposed Executive Regulation 19-09 be approved?

The Executive transmitted a proposed regulation to implement the changes that would be made by Expedited Bill 45-09, Executive Regulation 19-09, to the Council on January 22, 2010 under Method 1. See ©98. A redline copy of Executive Regulation 19-09 is at ©26-57 and a clean copy is at ©58-88. Under Method 1, the regulation is not adopted until the Council approves it by resolution. The Regulation would make the following changes to the Procurement Regulation in addition to implementing the amendments to the Procurement Law created by Bill 45-09:

1. Permit the DGS Director to authorize negotiations with more than one offeror simultaneously or successively after considering the recommendation and evaluation of the Using Department on formal solicitations;

2. Permit the DGS Director to add members to the Qualification and Selection Committee (QSC) established by the Using Department to evaluate proposals;

3. Permit the DGS Director to make a non-competitive award for maintenance or support of software when the software was purchased through competition if there is only one source;

4. Permit the DGS Director to approve alternative Federal, State, and local agencies to certify MFD businesses in addition to the Maryland Department of Transportation; and

5. Revise the requirements for surety bonds and letters of credit.

All of these changes are intended to strengthen or streamline the procurement process. Council staff does have two suggested changes to Regulation 19-09.

A. The following language in §11B.00.01.14.2.2.10(g) at ©56 is confusing:

> The final decision of the CAO is subject to judicial review under §11B-35[D] (d) of the Code. Either party may appeal that decision to the appellate courts of Maryland.

Council staff recommends the following clarifying language:

> The contractor may appeal the final decision of the CAO to the Circuit Court [is subject to judicial review] under §11B-35[D] (d) of the Code. Either the contractor or the using department may appeal the decision of the Circuit Court to the Maryland Court of Special Appeals.

B. The Regulation should have a delayed effective date to coincide with the April 1 effective date of Expedited Bill 45-09. Under Method 1, the regulation is effective on the day it is approved by the Council unless a later effective date is set forth in the regulation. There is no effective date established in Regulation 19-09. The Committee can either request the Executive to make this change and resubmit the regulation for approval or the Committee can recommend that the effective date of Expedited Bill 45-09 be amended to require that the "initial regulation implementing this Act be effective on April 1, 2010."

This packet contains:

	Circle #
Expedited Bill 45-09	1
Legislative Request Report	10
Memo from Executive	11
Summary of Key Changes in Bill	13
Boucher Memorandum dated November 23, 2009	15
OMB Fiscal and Economic Impact Statement	16
DGS Response to Council staff questions	18
County Attorney Opinion dated September 3, 2008	20
Testimony of David Dise	23
Executive Transmittal Memorandum dated January 22	24
Proposed Executive Regulation 19-09	26
Explanation of Proposed Executive Regulation 19-09	89
OMB Fiscal Impact Statement for Executive Regulation 19-09	92
OfficePro email comments	94
Affinity Network Solutions email comments	96
Draft Resolution Approving Executive Regulation 19-09	98

F:\LAW\BILLS\0945 Contracts And Procurement-Amendments\T & E Memo.Doc

Expedited Bill No. 45-09
Concerning: Contracts and Procurement - Amendments
Revised: January 19, 2010 Draft No. 5
Introduced: December 1, 2009
Expires: June 1, 2011
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the request of the County Executive

AN EXPEDITED ACT to:

(1) exempt contracts for media advertisement from the Procurement Law;
(2) exempt contracts for experts, consultants, and investigators for use in anticipation of litigation or preparation for trial from the Procurement Law;
(3) expand the coverage of the Wage Requirements Law;
(4) amend the time for contractors to submit information under the Wage Requirements Law;
(5) permit the Director to investigate and verify information provided by businesses under the Local Small Business Reserve Program;
(6) repeal a section restricting the use of County funds by contractors and grantees to influence union organizing;
(7) amend the Prevailing Wage Law to require contractors to pay the prevailing wage in effect when the solicitation is published;
(8) permit a using department to file a dispute under the administrative dispute resolution process; and
(9) generally amend the County Procurement Law.

By amending
Montgomery County Code
Chapter 11B. Contracts and Procurement
Sections 11B-4, 11B-17A, 11B-18, 11B-33A, 11B-33C, 11B-35, and 11B-67.

By repealing
Montgomery County Code
Chapter 11B. Contracts and Procurement
Section 11B-33B

Boldface	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets]	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets]]	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Sections 11B-4, 11B-17A, 11B-18, 11B-33A, 11B-33C, 11B-35, 11B-64, and 11B-67 are amended and Section 11B-33B is repealed as follows:

11B-4. Exemptions.

(a) This Chapter, other than Article XII, does not apply to:

* * *

(9) obtaining the services of experts, consultants, and investigators by the County Attorney, whether in anticipation of litigation or in preparation for trial;

(10) obtaining advertising services from media sources; and

(11) any other procurement exempted from this Chapter by another law.

* * *

11B-17A. Internet Posting Requirements.

(a) Each using department must post each [planed] planned informal solicitation to purchase [of] goods, services, and construction, [valued at $5,000 to $25,000], with a value greater than $10,000 and less than $100,000, on a County web site for 5 business days before making a purchase or entering into a contract. Each purchase must be made as provided under Section 11B-13.

* * *

11B-18. Bid security.

The Director may require bid security as a condition of submitting a competitive sealed bid. The Director [determines] must determine the amount of bid security. Bid security must be:

(a) a bond provided by a surety company authorized and licensed to do business in this State;

27 * * *

28 **11B-33A. Wage requirements.**

29 * * *

30 (b) *Exceptions to coverage.* This Section does not apply to:

31 (1) [a contractor who:

32 (A) employs fewer than 10 employees when the contractor
33 submits a bid or proposal, and

34 (B) does not employ 10 or more employees at any time the
35 contract is in effect as a result of performing the contract;]

36 [(2)] a contractor who, at the time a contract is signed:

37 (A) has received less than $50,000 from the County in the most
38 recent 12-month period; and

39 (B) will be entitled to receive less than $50,000 from the
40 County under that contract in the next 12-month period;

41 [(3)](2) a contract with a public entity;

42 [(4)](3) a contract with a nonprofit organization that has qualified
43 for an exemption from federal income taxes under Section
44 501(c)(3) of the Internal Revenue Code;

45 [(5)](4) a non-competitive contract awarded under Section 11B-14
46 if the Chief Administrative Officer finds that the performance of
47 the contract would be significantly impaired if the wage
48 requirements of this Section applied;

49 [(6)](5) a contract for electricity, telephone, cable television, water,
50 sewer, or similar service delivered by a regulated public utility;

51 [(7)](6) a contract for services needed immediately to prevent or
52 respond to an imminent threat to public health or safety;

53 [(8)](7) an employer to the extent that the employer is expressly
54 precluded from complying with this Section by the terms of any
55 federal or state law, contract, or grant;
56 [(9)](8) a bridge contract entered into under Section 11B-42; or
57 [(10)](9) a contract entered into under a cooperative procurement
58 under Section 11B-40.
59 The Executive by regulation may increase the amount in subsection
60 (b)[[(2)]] (1) to reflect increases in the cost of living.
61 (c) *Solicitation requirements.*
62 (1) Each bid or proposal to provide services to the County must
63 specify how the contractor and each subcontractor will comply
64 with these wage requirements, and must include sufficient funds
65 to meet these requirements. The Director, for good cause shown,
66 may permit a bidder or proposer to provide this information after
67 the bid or proposal is submitted if:
68 (A) the information is provided before the time for evaluation
69 of the bid or proposal and no later than contract award;
70 (B) the original bid or proposal price does not change; and
71 (C) the Director approves the later submission in writing.
72 (2) Each bid or proposal to provide services to the County which is
73 submitted by an organization that is exempt from coverage under
74 subsection (b)[[(4)]] (3) must specify the wage the organization
75 intends to pay to those employees who will perform direct,
76 measurable work under the contract, and any health insurance the
77 organization intends to provide to those employees. In evaluating
78 the cost of a bid or proposal the County must disregard any
79 additional cost attributable to payment of the wage requirements

80 of this Section by any organization that is exempt from coverage
81 under subsection (b)[[(4)]] (3) when compared to a bid or
82 proposal submitted by another organization that is also exempt
83 from coverage under subsection (b)[[(4)]] (3).
84 (3) A contractor must not split or subdivide a contract, pay an
85 employee through a third party, or treat an employee as a
86 subcontractor or independent contractor, to avoid the imposition
87 of any requirement under this Section.
88 * * *
89 **11B-33B. [Use of County Funds] Reserved.**
90 [(a) Purpose. Sound fiscal management requires vigilance to ensure that
91 County funds appropriated for a service contract or a grant award to
92 participate in a County-funded program are expended solely for the
93 public purpose for which they are appropriated. If County funds are
94 appropriated for a service contract or a grant award to participate in a
95 County-funded program, and those funds are instead used to encourage,
96 discourage, or otherwise influence union activity or organization, the
97 proprietary interests of the County are adversely affected. The use of
98 County funds to encourage, discourage, or otherwise influence
99 employees from union activity or organizing constitutes a misuse of
100 County resources.
101 (b) Use of Funds. County funds appropriated for a service contract or a
102 grant award to participate in a County-funded program must not be
103 encumbered or used to assist, promote, deter, or otherwise influence
104 union activity or organizing. Nothing in this Section shall be construed
105 to prohibit the expenditure of County funds appropriated for a service

106 contract or a grant award from being used to perform another act
107 required by law.
108 (c) Specific Restrictions. County funds for a service contract or a grant
109 award to participate in a County-funded program must not be used to:
110 (1) prepare, mail, or otherwise distribute materials related to union
111 activity or organizing;
112 (2) hire an attorney or a consultant to assist, promote, deter, or
113 otherwise influence union activity or organizing;
114 (3) encourage, discourage, or otherwise influence an employee from
115 taking a position on union organizing in the workplace;
116 (4) prevent or facilitate access to an employer's facilities or property
117 by a labor organization or its representatives;
118 (5) encourage or discourage a program manager, policy council,
119 committee, or community or parent group from assisting or
120 participating in a union activity or organizing.
121 (d) Enforcement.
122 (1) The Chief Administrative Officer must require each contractor or
123 grantee to:
124 (A) Certify that the contractor or grantee will not expend
125 County funds to assist, promote, deter, or otherwise
126 influence union activity or organizing and will comply
127 with the requirements of this Section.
128 (B) Keep and submit any records associated with County funds
129 received for a service contract or a grant award to
130 participate in a County-program necessary to show
131 compliance. A contractor or grantee must provide these
132 records to the County upon request.

133 (2) The Chief Administrative Officer must enforce this Section and
134 investigate any complaint of a violation.
135 (e) Penalty. A contractor or grantee must pay the County the amount of
136 funds expended in violation of this Section.]
137 * * *
138 **11B-33C. Prevailing Wage Requirements — Construction Contracts.**
139 * * *
140 (c) Payment of prevailing wage. Any contractor and subcontractor that
141 performs direct and measurable construction work on a County financed
142 construction contract must pay each employee at a rate equal to or more
143 than the prevailing wage [currently] in effect when the solicitation is
144 published for the type of work performed.
145 * * *
146 **11B-35. Contract dispute resolution.**
147 (a) *Dispute submitted.* A contractor must submit any dispute arising under
148 a contract to the Director. The using department may submit a dispute
149 arising under the contract to the Director.
150 (b) *Decision by Director.* The Director must give the contractor and the
151 using department a written decision approving or denying the dispute in
152 whole or in part within 45 days after receiving the dispute. If the
153 Director does not resolve the dispute within 45 days, the dispute is
154 denied.
155 (c) *Appeal to Chief Administrative Officer.*
156 (1) The contractor or the using department may appeal the Director's
157 [denial of] decision resolving a dispute in writing to the Chief
158 Administrative Officer within 30 days after receiving the

159 Director's decision, or if no decision is rendered, within 75 days
160 after submitting the dispute.
161 (2) The Chief Administrative Officer must decide the appeal after
162 considering any written information submitted by the Director,
163 using department, and the contractor.
164 (3) The Chief Administrative Officer may hold a hearing on the
165 appeal. The Chief Administrative Officer must complete any
166 hearing on the appeal within:
167 (A) 60 days after receiving the appeal for disputes involving
168 [under $10,000] less than $50,000;
169 (B) 90 days after receiving the appeal for disputes involving
170 between [$10,000] $50,000 and $100,000; and
171 (C) 135 days after receiving the appeal for disputes involving
172 more than $100,000.
173 (4) The Chief Administrative Officer may require the contractor and
174 the using department to [produce] provide additional information
175 about the dispute.
176 (5) The Chief Administrative Officer must give the contractor and
177 the using department a written decision approving or denying the
178 dispute in whole or in part within 30 days after receiving the
179 appeal or, if a hearing is held, within 30 days after receiving the
180 hearing officer's report. If the Chief Administrative Officer does
181 not give the contractor and using department a written decision
182 on the appeal within the applicable period, the dispute is denied.
183 (d) *Appeal to court.*
184 (1) The contractor may appeal the Chief Administrative Officer's
185 decision to the Circuit Court under the Maryland Rules.

186 (2) The contractor or the County may appeal the decision of the
187 Circuit Court to the Court of Special Appeals under State law.
188 (3) In the event of a statutory denial under subsection (b), the
189 contractor or the County may file a legal action in a court of
190 appropriate jurisdiction. That court must hear the case *de novo*.
191 (e) *Consolidation of disputes.* The Director or the Chief Administrative
192 Officer may consolidate [a contractor's] multiple disputes if:
193 (1) the disputes have common questions of law or fact; and
194 (2) the contractor or using department requests consolidation.
195 The time limits in this Section for the last dispute filed apply to any
196 consolidated dispute.
197 * * *
198 **11B-67. Procedures.**
199 * * *
200 (d) A business must affirm and provide supporting documentation to the
201 Director to show that it is a local small business as defined in Section
202 11B-65(c). The Director may investigate and verify the information
203 provided on the application.
204 * * *
205 **Sec. 2. Expedited Effective Date.**
206 The Council declares that this legislation is necessary for the immediate
207 protection of the public interest. This Act takes effect on January 1, 2010.

208 *Approved:*

209

Nancy Floreen, President, County Council Date

LEGISLATIVE REQUEST REPORT

Bill 45-09

Contracts and Procurement – Amendments

DESCRIPTION: Amends the County procurement law to add advertising and expert witnesses to the list of transactions that are exempt from the law. Expands the coverage of the County Wage Requirements Law. Authorizes the DGS Director to investigate and verify information supplied by contractors under the Local Small Business Reserve Program. Imposes additional requirements on bid security bond entities. Repeals Section 11B-33B based on a recent Supreme Court decision which held that a similar law was preempted by federal law. Raises certain dollar thresholds, permits the County to initiate the administrative process for dispute resolution, and amends the Prevailing Wage Law.

PROBLEM: The Office of Procurement now exists as a division of the Department of General Services, necessitating some general changes to the County procurement law. During recent years, issues involving advertising and expert witnesses have shown a need for these items to be exempt from the procurement law to facilitate timely and effective acquisitions of these services. In addition, the administrative dispute resolution process is currently available only to the contractors. For the County to raise similar issues, it must file suit in court. The bill gives the County the option of using the existing administrative dispute resolution process.

GOALS AND OBJECTIVES: Update the County procurement law to meet the changing needs of the County and to enhance the effectiveness of the procurement process.

COORDINATION: Department of General Services and Office of the County Attorney.

FISCAL IMPACT: To be requested.

ECONOMIC IMPACT: To be requested.

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: Not applicable.

SOURCE OF INFORMATION: David E. Dise, Director, Department of General Services
Karen L. Federman Henry, Office of the County Attorney

APPLICATION WITHIN MUNICIPALITIES: Not applicable.

PENALTIES: Not Applicable.

BILL

BD
cc
SBF
LL
CT
MF

052310

OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

ENCL. IN FILE

November 3, 2009

RECEIVED
MONTGOMERY COUNTY
COUNCIL
2009 NOV -4 AM 9:30

TO: Phil Andrews, President
Montgomery County Council

FROM: Isiah Leggett
County Executive

SUBJECT: Legislation to Amend the County Procurement Law

I am transmitting for Council's consideration a bill which amends the County procurement law (Chapter 11B – Contracts and Procurement) to meet the changing needs of the County and enhance the effectiveness of the procurement process. I am also submitting copies of proposed Executive Regulations governing the procurement process which were published in the October 2009 County Register and will be transmitted to Council soon. The bill and proposed Executive Regulations reflect a joint effort of the Department of General Services (DGS) and the Office of the County Attorney (OCA). A Legislative Request Report for the bill and a Summary of Key Changes proposed in both the bill and regulations are also attached.

The bill creates two new exemptions from the procurement process for: (1) services provided by experts, consultants, and investigators; and (2) advertising services. Both types of transactions typically involve short acquisition timeframes and often are not amenable to a formal competition. The bill imposes more stringent requirements on entities that provide a bond to the County so that available remedies may be obtained more expeditiously when necessary. The bill allows the County to use the administrative dispute resolution process which is currently available only to contractors. This will expedite the process and minimize the expense for both parties when the County has a dispute with one of its contractors.

The proposed regulations would implement the changes in the bill and also make a number of other changes to the current regulations governing the procurement process. Most significantly, the proposed regulations would modify the dollar thresholds for the various types of procurement methods. These modifications are long overdue and reflect the reality of the cost of goods, services, and construction in today's marketplace. The proposed regulations would also: (1) allow negotiations to occur concurrently with more than one vendor in an effort to obtain the best goods and services for the County; (2) give authority to the DGS Director to

11

obtain the best goods and services for the County; (2) give authority to the DGS Director to approve non-competitive contracts for maintenance and support of software under certain circumstances, without needing approval from the Contract Review Committee, which can be a timely process for the using departments; and (3) expand the ability of the County to use alternate methods to certify minority-owned businesses, rather than relying solely on the State certifications.

I look forward to working with Council as it considers this package. If you have any questions or require additional information, please do not hesitate to contact DGS Director David Dise at 240-777-9910.

Attachments (5)

cc: David Dise, DGS Director
Pam Jones, Procurement Director
Karen Federman-Henry, Associate County Attorney
Kathleen Boucher, Assistant Chief Administrative Officer

Summary of Key Changes
(Montgomery County Code, Chapter 11B,
Contracts and Procurement and related Executive Regulations)

The proposed revisions to Chapter 11B of the County Code and the related Executive Regulations reflect a joint effort of the Department of General Services and the Office of the County Attorney. In the following list, a parenthetical follows the items to show which agency requested the proposed change.

Proposed Amendments to Montgomery County Code, Chapter 11B, Contracts and Procurement

Section 11B-4

Add expert witnesses and advertising to the items that are exempt from the procurement law. Currently, both items are addressed through other mechanisms—the County Attorney has a written delegation of authority from the Director of the Department of General Services to retain expert witnesses, consultants, and investigators; and the Director of the Department of General Services has issued a written waiver for departments to purchase advertising services without using the competitive procurement methods. (County Attorney and Department of General Services)

Section 11B-17A

Modify the internet posting requirements to conform to the new threshold dollar amounts for informal solicitations established in the proposed Executive Regulations. (Department of General Services)

Section 11B-18

Require a surety company that provides bid security for a competitive sealed bid to be licensed to do business in Maryland. This change facilitates enforcement in the event that the bond needs to be called and ensures that the company has a registered agent in Maryland. (County Attorney)

Section 11B-33A

Repeal language that exempts contractors with fewer than 10 employees from the Wage Law. Allow a contractor to submit wage requirement information after submitting the bid, but before consideration of the bids, and only with written approval of the Director of the Department of General Services. (Department of General Services)

Section 11B-33B

Repeal this section based on the United States Supreme Court decision (*Chamber of Commerce v. Brown*, 128 S.Ct. 2408 (2008)), in which the Court reviewed a California law that prohibited the use of state funds either to promote or oppose union activities. The Court ruled that California could not legislate a general labor policy that did not have a clear purpose of ensuring the efficient procurement of goods and services. In enacting the law under review, California had interfered with the "congressional intent to encourage free debate on issues dividing labor and management." The Supreme Court

recognized the ability to provide similar restrictions if specifically tailored to a particular job or as a legitimate response to procurement constraints or local economic needs, but the global provision did not include those limitations. As a result of the case, the draft amendment to Chapter 11B of the Montgomery County Code includes the deletion of § 11B-33B, which contains a prohibition regarding use of County funds similar to that in the California law. [A copy of the opinion is attached.] (County Attorney)

Section 11B-35

Authorize the using department to proceed through the administrative process. Currently, the using department must file a suit in court if it cannot resolve a problem with a contractor—only the contractor may initiate the administrative process under the existing law. The administrative process provides a less expensive and more timely option for resolving claims and disputes than proceeding to court each time. (County Attorney)

Section 11B-67

Authorize the Director of the Department of General Services to investigate and verify the information received in a local small business application.

OFFICE OF THE COUNTY EXECUTIVE

Isiah Leggett
County Executive

Timothy L. Firestine
Chief Administrative Officer

MEMORANDUM

November 23, 2009

TO: Bob Drummer, Senior Legislative Attorney

FROM: Kathleen Boucher, Assistant Chief Administrative Officer KWB

SUBJECT: Introduction of Legislation to Amend the Procurement Law

The County Executive recently forwarded a proposed bill to the County Council for introduction. The bill would amend various provisions of the County's procurement law (Chapter 11B of the County Code) to address changes in the marketplace. I would like to request an additional change to the bill on behalf of the County Executive before it is introduced.

The County's Prevailing Wage law needs a minor change in order to correct an oversight that was not addressed during initial deliberations on the bill. Section 11B-33C(c) currently reads as follows:

> (c) *Payment of prevailing wage.* Any contractor and subcontractor that performs direct and measurable construction work on a County financed construction contract must pay each employee at a rate equal to or more than the prevailing wage *currently* (emphasis added) in effect for the type of work performed.

The word "currently" can be interpreted to mean that, as the State changes its rates (the rates under the County law are those set by the State), the rates in County contracts would change accordingly.

In an effort to avoid confusion about the rate that must be used for particular contracts, we request that you include the following amendment to Section 11B-33C(c) in the proposed bill:

> (c) *Payment of prevailing wage.* Any contractor and subcontractor that performs direct and measurable construction work on a County financed construction contract must pay each employee at a rate equal to or more than the prevailing wage [currently] in effect <u>at the time public notice of the solicitation is given</u> for the type of work performed.

If you have any questions or require additional information, please do not hesitate to contact David Dise, Director, Department of General Services, at 240-777-6191, or Karen L. Federman Henry, Division Chief, Office of the County Attorney, at 240-777-6761.

cc: David Dise
Karen Federman-Henry

OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

January 15, 2010

RECEIVED
MONTGOMERY COUNTY
COUNCIL
2010 JAN 19 PM 2:13

TO: Nancy Floreen, President, County Council

FROM: Joseph F. Beach, Director

SUBJECT: Council Bill 45-09, Contracts and Procurement - Amendments

The purpose of this memorandum is to transmit a fiscal and economic impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

The proposed bill, Expedited Bill 45-09, would:

- exempt contracts for media advertisement from the Procurement Law;
- exempt contracts for experts, consultants, and investigators for use in anticipation of litigation or preparation for trial from the Procurement Law;
- expand the coverage of the Wage Requirements Law;
- amend the time for contractors to submit information under the Wage Requirements Law;
- permit the Director to investigate and verify information provided by businesses under the Local Small Business Reserve Program;
- repeal a section restricting the use of County funds by contractors and grantees to influence union organizing;
- amend the Prevailing Wage Law to require contractors to pay the prevailing wage in effect when the solicitation is published;
- permit a using department to file a dispute under the administrative dispute resolution process; and
- generally amend the County Procurement Law.

FISCAL AND ECONOMIC SUMMARY

There will be no fiscal impact on County expenditures. There is no additional administrative burden anticipated from these changes, and it should expedite the procurement process.

(16)

The bill will not have any material financial or economic impact on the County.

The following contributed to and concurred with this analysis: Bruce Meier, Office of Management and Budget, David Platt, Department of Finance, and Mary Ellen Davis-Martin, Office of Procurement.

JFB:bm

c: Kathleen Boucher, Assistant Chief Administrative Officer
John Cuff, Office of Management and Budget
David Dise, Director, Department of General Services
Mary Ellen Davis-Martin, Department of General Services
David Platt, Department of Finance

Drummer, Bob

From: Dise, David E.
Sent: Monday, January 18, 2010 2:35 PM
To: Drummer, Bob
Cc: Boucher, Kathleen; Jones, Pam; Davis-Martin, Mary Ellen; Federman-Henry, Karen
Subject: FW: answers to Council questions

Bob,

Here are answers to your questions. Karen Federman-Henry provided input and while I am unfamiliar with the Heery case I assumed you are...figured this was one lawyer talking to another. I expect Karen will address questions pertaining to this during the committee hearing.

David

1. **Sec. 11B-4**. How many contracts were awarded in the last 2 years that would now be exempted from competition? What is the total dollar amount of these contracts?

No contracts were awarded in the last 2 years that would now be exempted from competition. Currently a contract for goods/services related to potential or pending litigation, condemnation, or collective bargaining, may be awarded on a non-competitive basis, under Section 11B-14(a)(2), so there should not be a change in the number of contracts that are exempt from competition as it relates to services in anticipation of litigation or in preparation for trial.

In most instances a waiver from competitive requirements is sought since the need for advertising is typically in response to an immediate need and has a focused audience. An informal competition may be issued for advertising but this is an unusual measure and has not been recently exercised. Advertising services are required by many County departments to further their client or service outreach, or to meet other requirements. This includes the need under Federal, State, and County law for public posting or public notice. The County usually meets its requirements through the case-by-case purchase of advertising space from multiple media sources, including newspapers, magazines, professional journals, periodicals, other publications, radio, Internet, etc.; and its advertising needs are usually immediate in nature. While many advertising needs fall under the direct purchase ceiling amount of $5,000, there are also advertising needs that exceed the direct purchase ceiling amount. The selection of an advertising source is generally by necessity, determined by the target audience, and the type of ad the County needs to place to achieve its legal or operational objectives. As a result, the purchase of advertising does not lend itself to the normal procurement processes. Furthermore, due to the necessary time involved, the use of a formal or informal solicitation method is impractical, and would not be an appropriate means for best meeting the County's minimum needs for advertising.

2. **Sec. 11B-33A.** How many contracts were awarded in the last 2 years that would no longer be exempt from the Wage Requirements law? What is the total dollar amount of the contracts?

The proposed amendment removes an existing exemption for small businesses and would now require that all contractors awarded wage-eligible contracts pay their employees, at a minimum, the hourly wage stipulated by the County. Therefore, instead of decreasing the number of contracts covered under the wage law, this amendment will result in an increase in eligible contracts. Accurate figures are not available on how many more contracts this would be.

Most businesses contracting with the County under wage contracts adjust their accounting systems to provide for the increase in wage for effected employees. Since businesses build this rate into their contract pricing and pass it through to the County, there is no reason why employees of small businesses should be excluded from receiving this benefit.

3. **Sec. 11B-35.** Can you give some examples of the types of disputes the Using Department is likely to bring under the administrative process? How many of these cases have been filed in court in the last 2 years by the County since it could not use the administrative process?

(18)

As you may know, the County Attorney's Office requested the change to the Code based on its experience with the construction of the Detention Center during the early 2000's. The County had engaged in contracts with two vendors to provide project and construction management services. After the County had paid the vendors, a number of subcontractors filed claims with the County for payments they did not receive for their work. The County had no ability to use the administrative process to resolve the claims, and instead asserted its arguments as a defense to Heery's attempts to assert claims for payment. Heery challenged the County's ability to assert a counterclaim, and the case traveled through the court system to the Court of Appeals of Maryland, where the Court ruled that the administrative hearing officer had the authority to decide whether it had jurisdiction to hear the issue in the first instance. The simpler approach would have been to use the administrative process--it would have saved time and expenses.

More recently, the County could have used the administrative process with A&M Concrete regarding the Forest Glen Pedestrian Path and Bridge. In that matter, the contractor had filed a dispute regarding a concrete abutment and it alleged that it had additional claims under the contract. The County had claims for overpayment related to borrow and fill used on the project in addition to the repair of the path and bridge concrete surfaces. The parties stayed the administrative proceeding initiated by the contractor to allow for negotiations. Had the negotiations been unsuccessful, the County would have had to wait until the completion of the administrative proceeding to bring its claims and do so in court.

Allowing the County to pursue its claims in the administrative proceeding is very good idea because it allows the County to assert a counterclaim and offset its claims against the contractor's claim without having to file a separate lawsuit that most likely would be stayed until the resolution of the administrative proceeding. The amendment is drafted as permissive so that the County still has the ability to go straight to court in appropriate cases, but the ability to use the more informal process provides a valuable resource that encourages more amicable resolutions of disputes without the enormous expense that accompanies litigation in the court system.

The change in the law to permit the County to use the administrative process for disputes also would allow the County to bring an affirmative 3rd party claim against another contractor involved in the project like the construction manager (e.g., Heery). In Heery, the County was able to assert a counterclaim, but that still required initiation of the process by the contractor.

4. What are the fiscal impact and the economic impact of this Bill?

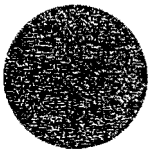
There is no negative fiscal impact of this bill. Staff in Using Departments that have administered informal procurement at the current thresholds ($5,000-$25,000) would continue to do so under new thresholds ($10,000-$100,000). While this may result in some increased workload in the departments, it will be offset by more expeditious purchasing in these lower dollar procurements. This will enable Procurement staff to apply greater effort to formal procurements and consolidating more requirements into contracts that will result in savings to the County.

With the implementation of the new ERP system, departments will execute purchases off existing contracts directly without requiring support from Procurement staff. Procurement will be able to monitor compliance with purchasing laws and regulations through the ERP reporting and controls to ensure competition is sought and LSBRP and MFD policies are enforced.

Govt

NAN
CC
SOF
LL
MF
BD

037703



Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

OFFICE OF THE COUNTY ATTORNEY

MEMORANDUM

TO: Timothy L. Firestine
Chief Administrative Officer

David Dise, Director
Department of General Services

VIA: Leon Rodriguez
County Attorney

VIA: Marc P. Hansen Marc Hansen
Deputy County Attorney

FROM: Karen L. Federman Henry Karen L. Federman Henry
Chief, Division of Finance and Procurement

DATE: September 3, 2008

RE: Recent decision of the Supreme Court—Impact on use of County funds for union activities

In June of this year, the United States Supreme Court issued a decision in which the Court invalidated a California law that prohibited the use of State money by employers to promote or deter union activities. *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008). A similar provision appears in the Montgomery County Code at § 11B-33B. This Office has reviewed the County law in relation to the Supreme Court decision, and it is our opinion that §11B-33B has become unenforceable.

Issue Presented

Does federal law mandating that certain zones of labor activity be unregulated preempt a local law that prohibits the use of public funds to assist, promote, or deter union organizing?

(20)

101 Monroe Street, Third Floor, Rockville, Maryland 20850-2540
(240) 777-6700 • TTD (240) 777-2545 • FAX (240) 777-6705

Short Answer

In light of the reasoning presented in the recent Supreme Court decision, a local government cannot restrict the use of its funds in a manner that affects free debate regarding union organization.

Summary of Supreme Court Decision

California enacted a detailed law that prohibited employers from using state funds "to assist, promote, or deter union organizing." *See* Cal. Gov't Code Ann. §§ 16645-16649 (2007). Several organizations challenged the law as regulating employer speech about union organizing, which conflicts with the intent of Congress that free debate be permitted under the National Labor Relations Act. The Supreme Court focused on two sections of the California law—one section addressing grants and another involving private employers who receive more than $10,000 in State funds. *See* Cal. Gov't Code Ann. § 16645.2 and § 16645.7, respectively.

The Court acknowledged that the NLRA does not expressly preempt the law enacted by California, but that two types of implicit preemption exist. First, States must not "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Chamber of Commerce v. Brown*, 128 S. Ct. at 2412. Second, neither a State nor the National Labor Relations Board may regulate conduct that Congress intended to be unregulated and left to the control of the "free play of economic forces." *Id.* The Court found the California law to be preempted under these principles, because the provisions regulate within a zone protected and reserved for market freedom. *Id.* In doing so, the Court emphasized the policy of the NLRA to favor open debate regarding unionization, making any restriction on that discussion preempted, regardless of whether it promoted or deterred union activities. 128 S. Ct. at 2413-2414.

Comparison of California Law and Montgomery County Code

The provisions in the California law that the Supreme Court held to be unconstitutional are analogous to Montgomery County Code § 11B-33B. Where California law prohibits all recipients of state grants from using the funds "to assist, promote, or deter union organizing," the County's law states that "funds appropriated for . . . a grant award to participate in a County-funded program must not be . . . used to assist, promote, deter, or otherwise influence union activity or organizing." *Compare* Cal. Gov't Code Ann. § 16645.2(a) *with* Montg. Co. Code §11B-33B(b). Although the County law limits the scope of the prohibition to grants awarded "to participate in a County-funded program," the law also expands the prohibition to include a use of funds to "influence union activity." *Id.*

The other section of California law prohibits private employers who receive "state funds in excess of ten thousand dollars in any calendar year on account of participating in a state program" from using the funds in connection with union organizing. Cal. Gov't Code Ann. §16645.7(a). The County does not have a specific provision for private employers, nor does it identify a minimum amount of funds received to trigger application of the law. Montg. Co. Code § 11B-33B. This suggests that the County law may apply to more situations than the California law, which does not protect it from the same preemption analysis used by the Court.

The California and County statutes are sufficiently similar that the Supreme Court's analysis would almost certainly find the County's law to be preempted. The Court noted that "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *See Chamber of Commerce v. Brown*, 128 S. Ct. at 2414 (citing *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 614 n. 5 (1986)). Even though California did "not directly regulate noncoercive speech about unionization," the law "indirectly regulated such conduct by imposing spending restrictions on the use of state funds." *Id.* at 2414-2415. The real effect of California's law regulated noncoercive speech about unionization, which the NLRA pre-empts. *Id.* The same could be said of Montg. Co. Code § 11B-33B.

To survive the level of scrutiny that the Supreme Court recently applied, the law would need to find a safe harbor within those Supreme Court cases that have afforded latitude to laws that impinge upon free expression. Unfortunately, the law cannot do so, because it does not regulate in a field that has traditionally been subject to government control. Nor does the law seek to ensure the coherence or consistency of government speech. More importantly, the law is not narrowly tailored, but prohibits the use of County funds for a broad range of speech and speech-related activities regardless of the reason that the funds were granted or appropriated.

Conclusion

In light of the recent Supreme Court decision and the related constitutional issues, we conclude that the County law cannot survive legal scrutiny. The law is not narrowly tailored to serve a compelling, or documented, government interest. And the law cannot be justified as a mere exercise of the County's spending authority. As a result, we recommend that the County Code be amended to remove Montg. Co. Code § 11B-33B. In the meantime, §11B-33B should not be enforced.

If you have any questions or would like to discuss this matter, please do not hesitate to contact us.

Montgomery County Council Public Hearing on Bill 45-09,
Contracts and Procurement, Amendments

January 19, 2010

Good afternoon. I am David Dise, Director of Montgomery County's Department of General Services and I am here to present testimony on behalf of County Executive Isiah Leggett in support of Bill 45-09, Contracts and Procurement, Amendments.

Bill 45-09 amends the County procurement law (Chapter 11B Contracts and Procurement) to meet the changing needs of the County and enhance the effectiveness of the procurement process. The bill and related proposed Executive Regulations reflect a joint effort of the Department of General Services (DGS) and the Office of the County Attorney (OCA).

The bill creates two new exemptions from the formal procurement process for: (l) services provided by experts, consultants, and investigators; and (2) advertising services. Both types of transactions typically involve short acquisition timeframes and often are not amenable to formal competition. The bill imposes more stringent requirements on entities that provide a bond to the County so that available remedies may be obtained more expeditiously when necessary. The bill also allows the County to use the administrative dispute resolution process which is currently available only to contractors. This will expedite the process and minimize the expense for both parties when the County has a dispute with one of its contractors.

The proposed regulations would implement the changes in the bill and also make a number of other changes to the current regulations governing the procurement process. Most significantly, the proposed regulations would modify the dollar thresholds for the various types of procurement methods. These modifications are long overdue and reflect the reality of the cost of goods, services, and construction in today's marketplace. The proposed regulations would also: (1) allow negotiations to occur concurrently with more than one vendor in an effort to obtain the best goods and services for the County; (2) give authority to the DGS Director to approve non-competitive contracts for maintenance and support of software under certain circumstances, without needing approval from the Contract Review Committee, which can be a timely process for the using departments; and (3) expand the ability of the County to use alternate methods to certify minority-owned businesses, rather than relying solely on the State certifications.

The importance of Bill 45-09 and the related regulations warrant enactment at the earliest possible opportunity. However, as the Council will fully appreciate, procurement laws and regulations have an impact on numerous other county processes. For this reason, we request that the effective date of the bill be changed from January 1 to April 1. This timeframe provides for sufficient time to test and implement the changes in the County's systems and for training and communication to affected users.

The changes reflected in this procurement reform package represent a fundamental commitment by the County Executive to improve Montgomery County procurement by streamlining the processes followed to purchase goods and services, expand opportunities to and remove hurdles previously encountered by minority, female, disabled and locally owned businesses, and enable the County to operate with more efficiency and minimize expense. County Executive Leggett urges your prompt and favorable consideration.

Exec Reg.

BD
CC
SGF
LL
CT
JG

053706

Method 1

Isiah Leggett
County Executive

OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

MEMORANDUM

January 22, 2010

RECEIVED
MONTGOMERY COUNTY
COUNCIL
2010 JAN 22 PM 1:41

TO: Nancy Floreen, President
Montgomery County Council

FROM: Isiah Leggett, County Executive

SUBJECT: Introduction of Executive Regulation No. 19-09 to Revise the Procurement Regulations

Recently, I transmitted proposed legislation to the County Council to amend the County procurement law (Chapter 11B of the County Code) to streamline the procurement process and make changes that reflect the reality of the marketplace. I am now forwarding for Council approval Executive Regulation No. 19-09 which revises the Montgomery County Procurement Regulation to achieve the same goals. Notice of the proposed regulation was published in the October 2009 Montgomery County Register and no comments were received.

Summary of Proposed Revisions:

Executive Regulation No. 19-09 amends the policies and procedures governing the County procurement process. More specifically, the proposed regulation makes the following changes:

(1) Permits completion of negotiations prior to posting an award. [11B.00.01.02.4]

(2) Revises the contract award process to permit the Director of the Department of General Services (DGS) to negotiate with more than one vendor before posting notice of the contract award. The current method limits the negotiation possible before selection of the awardee and potentially limits the ability of the County to obtain the best outcome. This promotes competition and enables the County to ensure that it acquires the best result and keeps the negotiations on a level playing field until the selection of a vendor is made. Currently, a waiver from the Chief Administrative Officer is needed to pursue this approach. [11B.00.01.03.2]

(3) Increases the threshold dollar amounts for each category of solicitation. Over the

years, the expense associated with various purchases has increased, making it logical to raise the levels at which the informal methods should yield to more formal solicitations. The changes in the thresholds will enable departments to use informal methods for purchases under $100,000 and then the more formal methods for purchases that exceed $100,000. In addition, the maximum amount for a direct purchase will be increased from $5,000 to $10,000. [11B.00.01.04.1]

(4) Permits the DGS Director to add members to the Qualification and Selection Committee (QSC) when appropriate to enhance the ability of the QSC to fairly and objectively evaluate proposals. [11B.00.01.04.1.2.4]

(5) Permits the DGS Director to make a non-competitive award for maintenance or support of software when: the software was purchased through the procurement process, there is only one source for the maintenance and support, and that source meets the County's minimum needs. This amendment would streamline the process for these services, as many currently must seek sole source approval from the Contract Review Committee. [11B.00.01.04.1.12.2]

(6) Increases dollar amounts for minority-owned business contracts. As with the other threshold changes, this change reflects the reality of the marketplace. [11B.00.01.07.1]

(7) Amends certification requirements for minority owned businesses to permit alternative non-self-certifying programs in addition to Federal and State programs. Currently, the regulations rely solely on the State certification process. The amendment recognizes that other methods may yield appropriate certifications as well. [11B.00.01.07.4]

(8) Revises requirements governing bonds and letters of credit. The current law omits key requirements for accepting bonds and letters of credit. The additional requirements will facilitate enforcement if the County must seek the remedies available through a bond or letter of credit. The new requirements are consistent with the jurisdictional requirements in the general terms and conditions. [11B.00.01.09.1]

(9) Expands the disputes process to include the ability of the Using Department to initiate the administrative process to resolve disputes and claims. The regulation also clarifies that the Chief Administrative Officer may resolve an appeal through a summary disposition rather than always requiring an evidentiary hearing. [11B.00.01.14.2.2]

I would appreciate your approval of this regulation once the bill amending Chapter 11B of the Montgomery County Code has taken effect. If you have any questions or require additional information, please do not hesitate to contact David Dise, Director, Department of General Services, at 240-777-6191, or Karen L. Federman Henry, Division Chief, Office of the County Attorney, at 240-777-6761.

MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject	Number
PROCUREMENT REGULATIONS	**19-09**
Originating Department	**Effective Date**
Office of the County Executive	

Montgomery County regulation on:

MONTGOMERY COUNTY PROCUREMENT REGULATIONS

Issued by: County Executive

Regulation No. 19-09

Authority: Chapter 11B, Montgomery County Code
Amends: Regulations 27-03AM and 3-06
Council Review: Method (1) under Code Section 2A-15
Register Vol. 26, Issue 10

Comment deadline: October 31, 2009

Sunset Date: None, except regulations concerning minority-owned business purchasing program, which sunset on 12/31/2012.

Summary: This regulation amends the policies and procedures for regulating the County procurement process. These regulations include rules regarding the solicitation process, source selection, contract types, using department responsibilities, contractor qualifications, payments, claims, solicitation protests, contract disputes, ethics in public contracting, and the minority-owned business purchasing program.

Address for comments: Karen L. Federman Henry
Executive Office Building
Third Floor
101 Monroe Street
Rockville, Maryland 20850

Staff contact: Karen L. Federman Henry
(240) 777-6700

Background Information: This regulation implements Chapter 11B, Montgomery County Code.

MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject Procurement Regulations	**Number** 19-09
Originating Department Department of General Services	**Effective Date**

1. County Procurement System — General

* * *

1.6 Rules of Construction

* * *

1.6.4 Where these regulations refer to "11B-#", the reference is to Chapter 11B of the Montgomery County Code. References to these regulations will include decimal-style numbers and not the hyphenated 11B-style reference used in the Code.

* * *

2. Definitions

* * *

2.4 Terms and Definitions

* * *

[2.4.6 Award: The delivery of a fully executed contract to an offeror. This delivery may be accomplished by depositing the contract in the mail, with a common carrier, courier service, or delivering it by hand to the offeror, or notifying the offeror by phone, telegram or other means which communicates the award to the offeror and place for obtaining the contract.]

2.4.[7]6 Bid: * * *

2.4.[8]7 Bid Bond: * * *

2.4.[9]8 Bid Security: * * *

2.4.[10]9 Bidder: * * *

2.4.[11]10 Bidder's List: * * *

27

2.4.[12]11 CAO: * * *.

2.4.[13]12 Certification of Funds: * * *

2.4.[14]13 Change Order: * * *

2.4.[15]14 Competition: * * *

2.4.[16]15 Competitive Negotiation: * * *

2.4.[17]16 Confidential Information: * * *

2.4.[18]17 Construction: * * *

2.4.[19]18 Contract: * * *

2.4.19 Contract Award: The delivery by the County of a fully executed contract to an offeror.

* * *

2.4.37 Director: Director of the [Office of Procurement] Department of General Services or the Director's designee.

* * *

2.4.75 Proposed Award: A decision of the Director that a specific offeror is the successful offeror after the evaluation of offers and the completion of any negotiations. This decision must be made in accordance with these regulations and initiates the process by which [an] a contract award may be made to the offeror. A proposed award is not binding on the County.

* * *

2.4.79 Qualification and Selection Committee (QSC): A committee established by a Using Department for the purpose of evaluating responses submitted by offerors in connection with an RFP or an REOI. [Each member of the QSC must be an employee of a public entity, unless specific authorization is obtained from the

CAO for another to serve on the committee. Unless otherwise provided in these regulations, the committee must be composed of an odd number of members and must have at least three members.]

* * *

3. Administrative Process — Procurement

* * *

3.2 Contract Awards

3.2.1 Upon receipt of responses to a formal solicitation and the Using Department's evaluation of the recommendations regarding the [evaluated] offers [and recommendations for proposed award from the Using Department], the Director may independently review and evaluate the solicitation responses. After consideration of the evaluation and recommendation of the Using Department, the Director may authorize negotiations simultaneously or successively with one or more offerors prior to [makes] making a proposed award to a specific offeror. Until a proposed award is posted by the Director, all information concerning the evaluation and [recommendations] recommendation is confidential.

3.2.2 After the Director's approval of a recommendation of proposed award, the Using Department or the Director conducts appropriate negotiations as provided by these regulations. Upon completion of the negotiations and determination of a proposed contract awardee [for] resulting from a formal solicitation, the Director must [place] post a public notice showing the number of the solicitation and the name of the proposed contract awardee [on a public list]. The [list] notice must be available for inspection by any offeror. The date of each [proposed] award decision must also be indicated on the [list] public notice. [This list applies to formal solicitations.] It is the responsibility of offerors to keep informed of the current status of [any proposed award] the solicitation process. [Placement] Public posting of a proposed [awardee on the public list] award constitutes notice to all offerors of the proposed [awards] award. The Director may make such other communications with respect to a proposed [awards] award given the particular circumstances of the solicitation.

3.2.3 After the posting of a proposed award, the Director initiates the process which

leads to the execution of a contract for the solicited services, goods, or construction. After all necessary approvals and clearances have been obtained, the contracting officer may execute the contract with a signature on behalf of the County. The intentional release of the fully executed contract constitutes [an] a contract award.

* * *

4. Source Selection Methods and Contract Types

4.1 Description of Source Selection Methods

4.1.1 Formal Solicitations — Invitation for Bid (IFB)

* * *

4.1.1.2 Use

IFBs are normally used when the procurement is for construction, goods, or non-professional services. An IFB is used for procurements valued at [$25,000] $100,000 or more. An IFB may be used for professional services if the Director determines that:

* * *

4.1.1.4 Procedure

* * *

(e) In the case of tie bids, the Director resolves a tie by application of the following criteria in the order stated:

* * *

(g) The name of the proposed contract awardee or notice of IFB cancellation is [placed] posted on a public [list] notice by the Director.

* * *

30

MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject Procurement Regulations	**Number** 19-09
Originating Department Department of General Services	**Effective Date**

4.1.2 Formal Solicitation — Best Value Procurement — Request for Proposals (RFP)

* * *

4.1.2.2 Use

(a) An RFP is used for the procurement of professional services [or a system that includes professional services].

(b) An RFP is utilized when (1) a Using Department can generally formulate the scope of work or specifications for the services or system to be acquired; (2) there are known sources of supply; (3) competition is anticipated; and (4) the procurement is valued at [$25,000] $100,000 or more.

(c) An RFP is used when other considerations as well as cost are valid criteria in the evaluation of offers.

(d) An RFP may also be used for the procurement of construction, goods, or nonprofessional services when the County [judges] determines that the use of evaluation criteria authorized for use in an RFP would promote the best interests of the [Government] County. Approval to use an RFP instead of an IFB for the procurement of construction, goods, or nonprofessional services must be obtained from the Director.

4.1.2.3 Contents

An RFP should include the following information:

* * *

(c) The identity and telephone number of a contact person within the Using Department for technical information pertaining to the solicitation. The identity and telephone number of a contact person in the Department of General Services, Office of Procurement, for administrative information relating to the

solicitation.

* * *

(e) A concise explanation of the method of award[,] that includes identification of all criteria and relative weights for each criterion.

* * *

(3) If the Using Department determines that guidelines would assist the QSC in evaluating an award criterion, the Using Department must develop [for use by the QSC] scoring guidelines for that criterion <u>for use by the QSC</u>. Normally the Using Department should develop guidelines for a cost criterion. If the Director requests, the Using Department must send the Director a copy of the scoring guidelines with the QSC evaluation. These guidelines are confidential until a proposed award is posted.

* * *

4.1.2.4 Procedure

(a) RFPs are issued and public notice given under the direction of the Director.

(b) [The Director forwards, without] <u>Without</u> public opening, <u>the Director forwards</u> timely <u>received</u> proposals [that are received by the Director] to the Using Department for evaluation.

<u>(c)</u> <u>The Using Department establishes the QSC members, with the written approval of the Director. Each member of the QSC must be an employee of a public entity, unless specific authorization is obtained from the CAO for another to serve on the QSC. Unless otherwise provided in these regulations, the committee must be composed of an odd number of members and must have at least three members.</u>

(d) The Director may add members to the QSC when appropriate to enhance the ability of the QSC to fairly and objectively evaluate the proposals. When the Director adds members to the QSC, the composition of the QSC does not need to remain an odd number.

[(c)](e) The QSC evaluates all proposals received from the Director, in accordance with the evaluation criteria, and reviews offerors for responsibility.

* * *

[(d)](f) In the case of a tie in the numerical [score tie] QSC scores, the Director resolves the tie by application of the following criteria in the order stated:

(1) [Making a proposed award of the contract to] the offeror who has its principal place of business in Montgomery County;

(2) [Making a proposed award of the contract to] the offeror who is a certified MFD business prior to submitting a proposal;

(3) Drawing of lots with representatives of the firms involved invited to be present.

[(e)](g) After the QSC ranks the offerors, the QSC must forward the recommended ranking to the Using Department Head [the recommended ranking], including a recommendation of the responsibility of the recommended proposed awardee.

[(f)](h) The Using Department Head reviews and forwards the QSC recommendation with concurrence, objection, or amendment to the Director. The Using Department Head may also recommend cancellation of the procurement. These recommendations must be accompanied by QSC conflict of interest certifications and a score sheet summarizing the scores awarded by the QSC to each offeror.

[(g)](i) The Director approves, approves with conditions, or rejects the recommendations and supporting documentation. If the Director agrees with the [QSC recommendation and the] recommendation of the Using Department Head, the Director may proceed immediately to [place the recommended offerors on a public list] authorize negotiations. If the Director approves the Using Department Head's recommendation for proposed award with conditions, the Using Department must satisfy the conditions and provide appropriate documentation of compliance to the Director, prior to commencing contract negotiations. If the Director rejects [a] the Using Department Head's recommendation for proposed award, the RFP package is returned to the Using Department Head for further action as indicated by the Director.

[(h) The Director places the names of each proposed awardee or notice of cancellation on a public list.]

[(i)](j) After the Director's approval of a recommendation for proposed award, the Director or the Using Department negotiates the contract with the proposed awardee prior to making a proposed award. The Using Department is responsible for coordination of MFD compliance review with the Director. If a contract cannot be successfully negotiated with the proposed awardee, the Using Department will [proceeds] proceed to negotiate with the next highest ranked offeror after obtaining approval from the Director. [In this event the Director must designate the next highest ranked offeror as a proposed awardee and place the name on a public list.]

[(j)](k) If the Director approves, negotiations may be held simultaneously or successively with one or more offerors prior to making an award. [both the proposed awardee and the next highest ranked offeror. In this event, the Director must also designate the next highest ranked offeror as a proposed awardee.]

(l) The Director must post public notice of the name(s) of the proposed awardee(s). Public notice also is required in the event of solicitation cancellation.

[(k)](m)[Once the contract has been negotiated to the Director's satisfaction, and] After the Director has posted the proposed award and has ensured the encumbrance of required funds, the Director may execute the contract on behalf of the County. The [director] Director provides for distribution of copies of the contract to the Using Department and the contractor.

[(l)](n) A Notice to Proceed, if necessary, is issued by the authorized government official, pursuant to provisions of the contract.

4.1.3 Abbreviated Formal Solicitations.

* * *

4.1.3.2 Use

An abbreviated formal solicitation may be used if the Director finds:

(a) the estimated value of the procurement, including any extension, is [$100,000] $200,000 or less; and

(b) the abbreviated formal solicitation process is in the best interest of the County.

4.1.3.3 Procedure

(a) If the solicitation would normally be accomplished under an IFB, the following changes are made to the IFB process:

(1) The Department of General Services, Office of Procurement, issues notice of the IFB to at least 25 randomly selected potential bidders on the bidder's list or all of those on the bidders list, whichever is smaller. The Department of General Services, Office of Procurement, may also issue notice to additional potential bidders. At least 20%, if available, of those who are sent notice of the IFB should be minority owned businesses. The previous supplier of the goods, services, or construction being

acquired should also receive notice of the IFB.

(2) The IFB should allow a bidder a minimum of 10 days in which to submit a bid.

(b) If the procurement would normally be accomplished under an RFP, the following changes are made to the RFP process:

(1) The Department of General Services, Office of Procurement, issues notice of the RFP to at least 25 randomly selected potential offerors on the bidder's list or all potential offerors on the bidder's list, whichever is smaller. The Department of General Services, Office of Procurement, may also issue notice to additional potential offerors. At least 20%, if available, of those who are sent notice of the RFP should be minority owned businesses. The previous contractor who supplied the goods, services, or construction being purchased should receive notice of the RFP.

* * *

4.1.4 Formal Solicitations — Request for Expressions of Interest (REOI)

* * *

4.1.4.3 Contents

* * *

(c) The identity and telephone number of a contact person within the Using Department for technical information pertaining to the solicitation. The identity and telephone number of a contact person in the Department of General Services, Office of Procurement, for administrative information relating to the solicitation.

* * *

4.1.7 Informal Solicitation — Mini-Contract

4.1.7.1 General

A mini-contract is a contract for professional and, under special circumstances, non-professional services valued above [$5,000] $10,000 and under [$25,000] $100,000 which is the result of an informal solicitation process. [This process does not require any type of public notice; however, informal competition is maintained in order to obtain the most advantageous responsible offeror.] Each informal solicitation notice must be posted on a County website in accordance with §11B-17A. The solicitation process requires, at a minimum, documented oral or written contact with prospective offerors, documentation of MFD efforts, and documentation of the results of that contact. A mini-contract is not subject to renewal [nor] or amendment [which would increase] for the purpose of increasing its value beyond the maximum limit.

4.1.7.2 Use

(a) A professional services mini-contract is used for the procurement of professional services.

(b) A mini-contract may be used for non-professional services, goods, or construction valued above [$5,000] $10,000 and [less than $25,000] under $100,000 if the Director determines that the use of evaluation criteria other than price would promote the best interests of the County.

(c) This [contract procedure] source selection method may not be used when the total expenditure (including all extensions) for the project or services to be procured is expected to equal or exceed [$25,000] $100,000. Using Departments may not divide contracts (splitting) for the purpose of avoiding the [$25,000] $100,000 limit.

* * *

4.1.8 Informal Solicitation — Small Purchases

4.1.8.1 General

A small purchase is an informal solicitation for goods, construction or services valued above [$5,000] $10,000 but [less than $25,000] under $100,000. The small purchase is a solicitation initiated by the Using Department, which [and handled solely by the Director who] is responsible for ensuring appropriate informal competition and appropriate documentation. This [procurement] source selection method should preserve competition on an informal basis and an award must be based on price, responsiveness, and responsibility. The [Director] Using Department must contact at least 5 randomly selected potential offerors selected from the bidder's list or all potential offerors from the bidder's list whichever is smaller. At least one of the potential offerors to be selected should be a minority owned business. The [Director] Using Department should include among those contacted the previous supplier of the goods, construction or services being acquired. Each informal solicitation notices must be posted on a County website in accordance with §11B-17A. This source selection method may not be used when the total expenditure (including all extensions) for the goods, construction, or services to be procured is expected to exceed $100,000. Using Departments may not divide contracts (splitting) for the purpose of avoiding the $100,000 limit.

* * *

4.1.9 Direct Purchases

4.1.9.1 General

A direct purchase is an informal procurement of construction, goods or services with a total value of no more than [$5,000] $10,000. Competition should be preserved with this method to the extent practicable. Procurements with MFD and LSBRP firms are encouraged. Subject to revision by the CAO, the direct purchase is handled pursuant to the direct authority of a Using Department Head who is solely responsible for making a proper purchase under these procedures. The Using Department Head must seek fair and reasonable prices for all construction, goods and services obtained under this method.

4.1.9.2 Use

Direct purchases are used to secure goods, construction, or services, when the value of the purchase is not greater than [$5,000] $10,000. Direct purchase procedures may [not] be used [when] even if the construction, goods and services to be obtained are covered by any existing requirements contract with the County[, unless expressly authorized by the Director]. The Using Department should consult with the Director to ascertain the existence of relevant alternative sources. Purchases which in the aggregate would exceed the limit on this type of procurement may not be subdivided or split to procure within the direct purchase limitations. When the need for a particular product or service occurs within a reasonable time frame and can be consolidated, the purchase must be consolidated and not subdivided.

* * *

4.1.12 Non-Competitive Procurements

4.1.12.1 General

A non-competitive procurement is the acquisition by contract of a valid County requirement without prior public notice and without competition.

4.1.12.2 Authority

(a) The Director may make a non-competitive award unless the non-competitive award is based on a sole source justification and the estimated value of the award is above [$25,000] $100,000. If the estimated value of the non-competitive award based on a sole source justification exceeds the threshold for an IFB or RFP, the CRC may approve a non-competitive award after [reviewing] considering the justification from the Using Department [and review from the Office of Procurement]. A non-competitive award must be based on a determination and finding.

(b) The Director may make a non-competitive award for maintenance or support of software during the useful life of the software originally

purchased, if there is only one source for the required maintenance or support for the software. The one source must meet the minimum valid needs of the County.

* * *

6. Contractor Qualifications

* * *

6.3 Responsibility

* * *

6.3.4 Solicitations in which Using Departments make recommendations for awards to the Director must include a written recommendation with respect to the responsibility of the potential awardee. The Using Department should specify in detail the factual basis for its recommending a finding of responsibility of the potential awardee. In connection with this recommendation, the Using Department should review its files and the central performance file of the Department of General Services, Office of Procurement, with respect to the performance of the prospective awardee in previous contracts in the Using Department and the County, investigate performance of the prospective awardee in other contracts with the County and other entities to the extent practical, and ensure that the recommended awardee is not on a current Montgomery County suspension or debarment list.

* * *

[11B.00.01.07] 7. Minority Owned Business Contracting

7.1 Purpose

The purpose of Section 7 is to establish procedures to facilitate the goal of the County Government to remedy the effects of discrimination by awarding a percentage [of the dollar value] of County contracts, including contract modifications and renewals, [over $5,000] with a dollar value of $10,000 or more to minority owned businesses (MFD owned business or MFD), as defined in Chapter 11B of the County Code, in proportion to the availability of MFD owned

businesses to perform work under County contracts.

7.2 Policy

7.2.1 The Director, with the assistance of Using Departments and employees involved in contracting and purchasing, must actively and aggressively recruit certified MFD owned businesses for [whom] which a goal has been set to provide goods, construction, and services, including professional services, for the performance of governmental functions to facilitate the MFD goal of the County. Procurements [under $5,000] less than or equal to $10,000, grants that are appropriated by the County Council to specific grantees, utilities, intragovernmental procurements, and certain intergovernmental procurements including certain bridge contracts identified by the Director are excluded from the base against which the goal is measured.

* * *

7.4 Certification of MFD Owned Businesses

7.4.1 The Director may certify an entity as an MFD owned business if the business is certified as a minority business enterprise under Federal or State procurement law, or other non-self-certifying public entity certification program, as determined to be acceptable by the Director.

7.4.2 If the business is [except for] a [not for profit] not-for-profit entity organized to promote the interests of physically and mentally disabled individuals, [. In the case of a not for profit entity,] the Director must determine [that] whether:

7.4.[1]2.1 the not for profit entity is certified as a minority business enterprise under Federal or State procurement law, or other non-self-certifying public entity certification program that the Director has determined to be acceptable; and

7.4.[1]2.2 at least 51% of the individuals used by the not for profit entity to perform the work or manufacture the goods contracted for by the County are individuals with a physical or mental disability.

7.4.[2]3 The Director must conduct a review to determine whether a business may be

certified as an MFD owned business. This review must include an evaluation of the documentation submitted by the business on an MFD Application form. The Director may also include a site visit to the offices of a not for profit entity. The Director may review any of the following:

7.4.[2]3.1 Certifications issued by the Federal or State governments, or by another public entity, provided that the public entity's program is not based on vendor self-certification.

7.4.[2]3.2 Employment records, health records, and/or educational records of the employees of a not for profit entity seeking MFD certification.

7.4.[2]3.3 Other relevant information concerning the operation of a not for profit entity.

7.4.[3]4 A request for certification or recertification as an MFD business may be denied by the Director for any of the following reasons:

7.4.[3]4.1 Failure to demonstrate that the business is a certified minority business enterprise under Federal or State procurement law, or through another non-self-certifying public entity certification program determined to be acceptable by the Director.

7.4.[3]4.2 Failure to provide sufficient and timely information for the Director to make a certification or recertification determination.

7.4.[3]4.3 Refusal to permit an on-site inspection by the Director.

7.4.[3]4.4 Failure to comply with a request by the Director for information or access to records.

7.4.[3]4.5 Graduation of the MFD owned business.

7.4.[4]5 Certification as an MFD owned business by the County may be revoked for any one of the following reasons:

7.4.[4]5.1 Fraud, deceit or misrepresentation in obtaining certification.

7.4.[4]5.2 Failure to report in writing to the Director within 30 days of the date of the occurrence of any changes in the status of the certified MFD owned business [which] that are relevant to its certification.

7.4.[4]5.3 Failure to demonstrate at the request of the Director that the entity continues to be an MFD owned business.

7.4.[5]6 Certification is subject to the graduation provisions of this Section. The Director must not certify an entity as a MFD owned business for a period of time that exceeds 5 years. The Director, however, may certify a business as an MFD owned business for 8 years if during the first 5 years of certification, the MFD owned business:

7.4.[5]6.1 * * *

7.4.[5]6.2 * * *

* * *

9. Bonds and Insurance

9.1 Bonds

* * *

9.1.2 Director Review

* * *

9.1.2.2 In reviewing bonds and bond requirements, [The] the Director [in reviewing bond requirements should] must consider the [impact] impacts on competition and costs, particularly impacts on MFD firms. The impacts must be balanced with the needs served by the bond requirements, which include appropriate security for performance and other assurances of responsibility.

9.1.2.3 The Director has the right to approve, disapprove, or require changes to any instrument offered as a bond.

9.1.3 Minimum Requirements

9.1.3.1 All bonds must meet the following minimum requirements:

(a) The surety company issuing the bond must be qualified and licensed to do business in the State of Maryland.

(b) The attorney-in-fact on the bond document must be properly authorized to bind the surety, which authorization may be documented by a power of attorney submitted with the bond, or the attorney-in-fact must be registered with the Circuit Court for Montgomery County, Maryland.

(c) The obligee of the bond must be "Montgomery County, Maryland", or any additional or other obligee required by the County.

(d) Any surety or insurance company that issues a bond in favor of the County consents to personal jurisdiction in the State of Maryland and, in the event that any legal action is filed upon the bond, venue shall lie exclusively in the Circuit Court for Montgomery County, Maryland.

(e) The bond must be governed by, and construed in accordance with, the laws of the State of Maryland.

9.1.3.2 Under State law, a construction contract that exceeds $100,000 must require the contractor to provide payment security in an amount equal to at least 50 percent of the total amount payable under the contract and for performance security in an appropriate amount. For construction contracts that [exceed $25,000, but] do not exceed $100,000, the Director may require payment security or performance security.

9.1.4 Substitutions

Substitutions for bonds may be permitted only with permission of the County Attorney or pursuant to guidelines issued by the County Attorney. Substitutions

may include letters of credit, cash deposits and other forms of security. Personal sureties are [generally] not acceptable substitutes for bond requirements. Any letter of credit accepted by the County Attorney must contain at least the following terms:

9.1.4.1 The letter of credit must be presentable to an institution located within the State of Maryland;

9.1.4.2 The issuer of the letter of credit must consent to the letter of credit being governed by, and construed in accordance with, the laws of the State of Maryland;

9.1.4.3 The issuer of the letter of credit must consent to personal jurisdiction in the State of Maryland; and

9.1.4.4 In the event that any legal action is filed upon the bond, venue shall lie exclusively in the Circuit Court for Montgomery County, Maryland.

* * *

10. Contract Cost and Pricing Principles

* * *

10.[3]2 Requirements for Certified Cost or Pricing Data

10.[3]2.1 An offeror or contractor must submit cost or pricing data, or both, in a form prescribed by the Director prior to approval of:

10.[3]2.1.1 A competitively negotiated contract valued at more than $100,000;

10.[3]2.1.2 A non-competitively negotiated contract valued at more than $50,000;

10.[3]2.1.3 Any contract modification for which the price adjustment is expected to exceed $50,000 except contract modifications that are fully in accordance with the terms and conditions of the contract; or

10.[3]2.1.4 Any other contract or contract modification, as may be required by the

CAO or Director.

10.[3]2.2 When Cost or Pricing Data is required:

10.[3]2.2.1 Each contractor or offeror must at the request of the Director submit, in a form required by the Director, a certificate showing the data for the proposed work to be done, including work to be done by a subcontractor. The offeror or contractor must submit a certification that the data submitted are accurate, complete and current.

10.[3]2.2.2 The contract or contract modification document must state that the price to the County, including profit or fee, may be adjusted by the Director to exclude from the price any sums determined by the Director to be allocable to inaccurate, incomplete or outdated cost or pricing data.

10.[3]2.3 When a prime contractor is authorized to expend appropriated funds through subcontractors in the performance of a County contract, Subsections 10.[3]2.1 and 10.[3]2.2 are also applicable to subcontracts and subcontract modifications.

10.[3]2.4 Before executing a contract or contract modification, the Director must make a determination as to the reasonableness of the cost or pricing data. The contract cost principles and procedures in the Federal Acquisition Regulations may be used as general guidelines when developing price determinations, if they are not at variance with County laws and regulations.

10.[3]2.5 The requirements of section 10.[3]2 do not apply to a contract or contract modification that is based on:

10.[3]2.5.1 Adequate competition as determined by the Director;

10.[3]2.5.2 Established catalog or market prices of commercial items sold in substantial quantities to the general public;

10.[3]2.5.3 Prices set by laws or regulations;

10.[3]2.5.4 A noncompetitive contract awarded under a resolution or appropriation

approved by the County Council, if the Using Department has made the certification required by Section 17.3.2.; or

10.[3]2.5.5 The Contractor has been specifically identified in a grant accepted by the County.

10.[3]2.6 In exceptional cases, or for contracts or contract modifications with public entities, the Director may waive the requirement for cost or pricing data by making a written determination that explains why the waiver is in the best interest of the County.

* * *

13. Claims

* * *

13.4 Procedures for Approval

13.4.1 A Using Department must submit the information required in [section] Section 13.3.2 to the County Attorney for review and action.

13.4.1.1 If the claim outside a contract is [$5,000] $10,000 or less, the County Attorney may approve the claim outside a contract in writing and return it to the Using Department which is responsible for processing the claim outside a contract approval for payment.

13.4.1.2 If the claim outside a contract is in excess of [$5,000] $10,000, the County Attorney may approve the claim outside a contract subject to approval of the CAO. If the County Attorney approves the claim, the County Attorney must submit a recommendation for approval to the CAO, in writing, together with documentation received from the Using Department.

13.4.1.3 If the County Attorney rejects a claim outside a contract, the County Attorney must state the reasons for the rejection in writing and return the documentation to the Using Department. The Using Department may resubmit the claim outside a contract to the County Attorney with additional information as requested or other information the Using

Department may elect to submit.

13.4.1.4 If the County Attorney requests further information, the Using Department must furnish the requested information as expeditiously as possible.

* * *

14. Solicitation Protests; Contract Disputes

14.1 Solicitation Protests

* * *

14.1.2 Protest

Only an offeror who is aggrieved may file a protest. An offeror is aggrieved only if the offeror can demonstrate that [should], if the protest [be] is sustained, the offeror may be eligible for the remedies allowed under [section] Section 14.1.3.6 (a) or (c).

14.1.2.1 Any offeror who is aggrieved in connection with a formal solicitation must file and deliver a written protest to the Director as follows:

(a) If the bidder or offeror seeks as a remedy the award of the contract or costs under Section 11B-36(h) and Section 14.1.3.6(c), then the bidder or offeror must file and deliver a written protest within 10 days after the Director publicly posts the proposed [contract] award [if the bidder or offeror seeks as a remedy the award of the contract or costs under 11B-36(h) of the Montgomery County Code; and].

(b) [before the submission date for bids or proposals if the bidder or offeror seeks as a remedy the cancellation or amendment of the solicitation.] If the bidder or offeror seeks as a remedy the cancellation or amendment of the solicitation under Section 14.1.3.6(a), then the bidder or offeror must file and deliver a written protest before the submission date and time for bids or proposals.

(c) If the bidder or offeror files and delivers a written protest under subsection (b) of this Section, but does not submit a bid or proposal by the submission date, and the solicitation is not cancelled or amended, the bidder or offeror will not be eligible for the remedies allowed under subsection (a) of this Section.

The Director must dismiss any protest not timely received.

* * *

14.1.2.4 After a protest is filed, the Director may give appropriate notice to other known offerors who may be affected by the protest. Other affected offerors may submit written comments or documents regarding the protest. All offerors are required to keep [apprized] apprised of the current status of solicitations, proposed awards, and protests; an offeror may not rely on notice of a protest from the Director. Notice by the Director is discretionary and need not be given. The burden of staying informed about the filing of a protest and the timely submission of comments by affected offerors is on the offerors.

* * *

14.1.3 Appeal

* * *

14.1.3.5 The CRC (with the Director not participating) must review the appeal.

* * *

(b) If the CRC finds there is a genuine dispute as to a material fact and the appeal cannot be decided as a matter of law, it must notify the appealing offeror, the proposed awardee, the Director, and the Using Department, and the CRC must conduct further proceedings, which [. These proceedings] may include a hearing. If a hearing officer is designated by the CRC, the hearing officer must conduct the hearing and make proposed findings and a recommendation to

the CRC. After the hearing (if any) and based on the record, the CRC may accept, reject, or modify the hearing officer's proposed findings of fact and recommendation, and must, in turn, submit a recommended decision on the appeal to the CAO.

* * *

14.1.5 Contract Awards

14.1.5.1 Generally, [contracts are not awarded] performance under a contract does not commence until the later of 10 days from the date of posting of the proposed awardee or, in the case of a protest, the final administrative decision has been made by the County.

14.1.5.2 The Director may award a contract and authorize performance under a contract before the 10 days has elapsed or a final administrative decision made with regard to a protest after making a determination and finding that awarding the contract without delay is necessary to protect the interests of the County. The Director should consider the following:

* * *

(d) The unwillingness of the proposed awardee to delay performance under the contract or to extend its offer; or

* * *

14.2 Contract Disputes

14.2.1 Definitions

14.2.1.1 In this section claim means:

(a) a demand by a contractor or the County that seeks the payment of money, an adjustment of time, an adjustment or interpretation of a contract provision, or other relief arising under or relating to a contract; or

(b) a disagreement arising from a decision by the Director regarding a

contract termination under Section 12 of these regulations.

14.2.1.2 In this section a dispute means an unresolved claim.

14.2.2 General

14.2.2.1 Administrative Process.

(a) A contractor must use the process set out in this section to file and resolve a [contract] claim or dispute under a contract.

(b) The County may use the process set forth in this section to resolve an affirmative claim or dispute under a Contract.

14.2.2.2 Procedure.

[(b)](a)Contractor: Except with respect to a claim arising from a decision of the Director terminating a contract, a contractor must notify the contract administrator in writing [the contract administrator] of the claim, and must attempt to resolve the claim with the contract administrator prior to filing a dispute with the Director. A contractor must file a dispute with the Director within 30 days of the event giving rise to the claim (unless the contract provides otherwise), whether or not the contract administrator has responded to the written notice of claim or resolved the claim. The contractor waives any dispute not timely filed. The Director and the CAO must dismiss a dispute that is not timely filed. If the dispute arises from a decision of the Director terminating a contract, the Director must treat the dispute as a request for reconsideration.

(b) County/Using Department: In addition to any other remedies the County may have, the Using Department may use the administrative process established by these regulations. To use this process, the Using Department may notify the contractor or contractor's agent of the claim in writing within 30 days of the event giving rise to the claim and may attempt to resolve the claim with the contractor prior to filing a dispute with the Director. The Using Department may file a dispute regarding a setoff or payment

with the Director at any time before final payment occurs. The Using Department may file a dispute regarding a latent defect within 60 days of discovery of the defect.

(c) When the Director has delegated the authority to consider a dispute to the Using Department, the party filing the dispute must file it with the Director of the Using Department, followed by an appeal to the CAO.

14.2.2.[2]3 When first filing a dispute, the party that files a dispute (a contractor or the Using Department, whichever initiates the dispute) must provide the following information to the Director [the following] as part of the filing:

(a) The name and identification number of the contract with the County;

(b) The name, address and telephone number of the contractor, if the contractor files the dispute. If the Using Department files the dispute, the name, address and telephone number of the contract administrator of the Using Department must be provided;

(c) All grounds supporting the contractor's or Using Department's requested relief, including:

(1) The detailed facts and all relevant documents;

(2) The relevant language in the contract, regulations, or law relied upon;

(3) All other matters which the contractor or Using Department contends [supports] support the claim; and

(4) The relief requested.

(d) The factual allegations contained in the dispute must be supported by one or more affidavits based on personal knowledge.

(e) The non-filing or responding party may submit a response to the

allegations contained in the dispute within 30 days after the filing of the dispute. The response must include any documented information that addresses the information supplied with the dispute in the manner described in subsection (c) of this Section.

14.2.2.[3]4 (a) The Director, after consulting with or obtaining written information from the [Using Department] non-filing party, must decide a dispute within 45 days after receiving the [dispute] documents and information specified in Section 14.2.2.3 unless the [contractor] filing party agrees to extend the time for a decision.

(b) If the Director denies a dispute, in whole or in part, the contractor or Using Department may file a contract dispute appeal with the CAO. The [contractor must file a] dispute appeal must be filed within 30 days after [receiving] the party receives the Director's decision[,]. [or if] If no decision is rendered by the Director within 45 days[,] of the Director's receipt of the documents and information specified in Section 14.2.2.3, then the dispute appeal must be filed within 75 days after [submitting] the party filed the dispute.

(c) Unless the Director and the [contractor] filing party agree, a dispute may not be resolved by mediation or binding arbitration.

14.2.2.[4]5 The CAO may hold a conference with all interested parties if the CAO believes a conference would contribute to a resolution of the dispute.

14.2.2.[5]6 The [contractor] filing party bears the burden of proof and the burden of persuasion to support the relief requested.

14.2.2.[6]7 Pending final resolution of a dispute, the contractor must proceed diligently with contract performance unless the County has terminated the contract.

14.2.2.[7]8 The CAO may consolidate [a contractor's] disputes if the disputes have common questions of law or fact. The time limits in Section 14.2 for the last dispute filed apply to the consolidated dispute.

14.2.2.[8]9 The CAO or the Director may order a contractor that is not a party to the appeal or the contract under which the dispute has been filed to become a party to the proceeding if the dispute on appeal may be based, in whole or in part, on the performance of the other contractor. The Director or CAO may order the other contractor to compensate another party to the dispute appeal, including the County, for damages incurred as a result of the other contractor's failure to perform a contract obligation.

14.2.2.[9]10 Upon receipt of the contract dispute appeal, the CAO must review the dispute de novo, but the CAO must not consider any grounds except those presented [to the Director] by the filing party under 14.2.2.[2]3.

(a) The [contractor] appealing party must file a dispute appeal with the CAO. The dispute appeal must identify the relief sought [by the contractor] and all grounds and materials supporting the [contractor's] request for relief. The [contractor] appealing party must provide a copy of the dispute appeal to the opposing party, the Director, and the County Attorney.

(1) At the time of filing a dispute appeal involving [$10,000] $25,000 or more with the CAO, the appealing [contractor] party must provide to the other parties to the dispute a written notice which contains:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information regarding facts concerning the dispute;

(B) a computation of each category of damages or other specific relief sought; and

(C) the name, address, and telephone number of each individual from whom the contractor expects to obtain expert testimony. The notice must include a written statement that contains:

(i) a complete statement of each opinion to be

expressed;

(ii) the basis and reason for each opinion;

(iii) the data or other information considered by the expert in forming each opinion;

(iv) the qualifications of the expert, including a list of all publications authored by the expert; and

(v) a list of each case in which the expert has testified as an expert within the preceding 4 years.

(D) the parties have a continuing obligation to promptly supplement any change in information contained in the written notice required in this subjection.

(2) The other parties must provide the notice required under paragraph (1) to the appealing contractor and any other party:

(A) within 90 days after being served with the notice required under paragraph (1) if the dispute involves more than $100,000; or

(B) within 60 days after being served with the notice required under paragraph (1) if the dispute involves $100,000 or less.

(b) The Director must file a response with the CAO [a response] to the dispute appeal within 15 days after the dispute is filed. The Director must include a complete copy of the contract in the response unless the [contractor] appealing party has provided it in the dispute appeal. The Director must send a copy of the response to the [contractor] parties.

(c) The CAO may require the contractor or the Using Department and the Director to submit additional information.

(d) Summary disposition. If the CAO finds, based on the record, that the [Contractor] appealing party failed to comply with the requirements of section 14.2.2, the CAO must summarily deny the appeal within 30 days after receiving the appeal. If the CAO finds, based on the record, that the [contractor] appealing party complied with the requirements of section 14.2.2, and there are no genuine disputes of material fact, the CAO must decide the appeal without a hearing within 30 days after receiving the appeal. The CAO must state in writing the reasons that support the decision. The CAO may request supplemental memoranda from the parties and extend the time for issuing a decision, with the parties' consent.

(e) If the CAO determines that the appeal cannot be decided under section (d) above, the CAO must order a hearing. The CAO may designate a hearing officer to conduct the hearing, and may limit the issues to be heard. If a hearing officer is designated by the CAO, the hearing officer must conduct the hearing in accordance with section 14.2.4 and make proposed findings of fact and recommendation to the CAO. The hearing must be completed in conformance with the time requirements imposed by Chapter 11B of the Code. After the hearing and based on the record, the CAO must make a written decision on the appeal, including proposed findings of fact and recommendation within 30 days after receiving the hearing officer's report. The CAO may adopt, modify or reject the findings of fact and recommendation of the hearing officer's report.

(f) The County/Using Department may file a contract dispute appeal under this Section. When filing a dispute appeal, the same filing requirements and timelines delineated in Section 14.2.2.10 (a) through (e) apply to the appeal.

[(f)](g) The final decision of the CAO is subject to judicial review under § 11B-35[D](d) of the Code. Either party may appeal that decision to the appellate courts of Maryland.

MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject Procurement Regulations	**Number** 19-09
Originating Department Department of General Services	**Effective Date**

14.2.2.[10|11 Unless the CAO and the [contractor] appealing party agree, a contract dispute appeal may not be resolved by mediation or binding arbitration.

* * *

15. Contract Review Committee (CRC)

* * *

15.5 Duties and Responsibilities.

15.5.1 The CRC has the following [responsibilites] responsibilities.

15.5.1.1 Approving sole source procurements valued above the threshold for an IFB or RFP. This provision does not apply to software maintenance or support approved by the Director in accordance with §4.1.12.2(b) as a non-competitive procurement.

* * *

Effective Date.

This Executive Regulation takes effect upon enactment of Bill No. 45-09[, and has no expiration date]. Section 7, Minority Owned Business Contracting, sunsets on December 31, 2012.

Isiah Leggett, County Executive

Approved as to form and legality by the
Office of the County Attorney:

Karen L. Federman Henry 1/12/10
Date

MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject **PROCUREMENT REGULATIONS**	Number **19-09**
Originating Department **Office of the County Executive**	Effective Date

Montgomery County regulation on:

MONTGOMERY COUNTY PROCUREMENT REGULATIONS

Issued by: County Executive

Regulation No. 19-09

Authority: Chapter 11B, Montgomery County Code
Amends: Regulations 27-03AM and 3-06
Council Review: Method (1) under Code Section 2A-15
Register Vol. 26, Issue 10

Comment deadline: October 31, 2009

Sunset Date: None, except regulations concerning minority-owned business purchasing program, which sunset on 12/31/2012.

Summary: This regulation amends the policies and procedures for regulating the County procurement process. These regulations include rules regarding the solicitation process, source selection, contract types, using department responsibilities, contractor qualifications, payments, claims, solicitation protests, contract disputes, ethics in public contracting, and the minority-owned business purchasing program.

Address for comments: Karen L. Federman Henry
Executive Office Building
Third Floor
101 Monroe Street
Rockville, Maryland 20850

Staff contact: Karen L. Federman Henry
(240) 777-6700

Background Information: This regulation implements Chapter 11B, Montgomery County Code.

MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject Procurement Regulations	**Number** 19-09
Originating Department Department of General Services	**Effective Date**

1. County Procurement System — General

* * *

1.6 Rules of Construction

* * *

1.6.4 Where these regulations refer to "11B-#", the reference is to Chapter 11B of the Montgomery County Code. References to these regulations will include decimal-style numbers and not the hyphenated 11B-style reference used in the Code.

* * *

2. Definitions

* * *

2.4 Terms and Definitions

* * *

2.4.6 Bid: * * *

2.4.7 Bid Bond: * * *

2.4.8 Bid Security: * * *

2.4.9 Bidder: * * *

2.4.10 Bidder's List: * * *

2.4.11 CAO: * * *.

2.4.12 Certification of Funds: * * *

2.4.13 Change Order: * * *

2.4.14 Competition: * * *

2.4.15 Competitive Negotiation: * * *

2.4.16 Confidential Information: * * *

2.4.17 Construction: * * *

2.4.18 Contract: * * *

2.4.19 Contract Award: The delivery by the County of a fully executed contract to an offeror.

* * *

2.4.37 Director: Director of the Department of General Services or the Director's designee.

* * *

2.4.75 Proposed Award: A decision of the Director that a specific offeror is the successful offeror after the evaluation of offers and the completion of any negotiations. This decision must be made in accordance with these regulations and initiates the process by which a contract award may be made to the offeror. A proposed award is not binding on the County.

* * *

2.4.79 Qualification and Selection Committee (QSC): A committee established by a Using Department for the purpose of evaluating responses submitted by offerors in connection with an RFP or an REOI.

* * *

3. Administrative Process — Procurement

* * *

3.2 Contract Awards

3.2.1 Upon receipt of responses to a formal solicitation and the Using Department's evaluation of the recommendations regarding the offers, the Director may independently review and evaluate the solicitation responses. After consideration of the evaluation and recommendation of the Using Department, the Director may authorize negotiations simultaneously or successively with one or more offerors prior to making a proposed award to a specific offeror. Until a proposed award is posted by the Director, all information concerning the evaluation and recommendation is confidential.

3.2.2 After the Director's approval of a recommendation of proposed award, the Using Department or the Director conducts appropriate negotiations as provided by these regulations. Upon completion of the negotiations and determination of a proposed contract awardee resulting from a formal solicitation, the Director must post a public notice showing the number of the solicitation and the name of the proposed contract awardee. The notice must be available for inspection by any offeror. The date of each award decision must also be indicated on the public notice. It is the responsibility of offerors to keep informed of the current status of the solicitation process. Public posting of a proposed award constitutes notice to all offerors of the proposed award. The Director may make such other communications with respect to a proposed award given the particular circumstances of the solicitation.

3.2.3 After the posting of a proposed award, the Director initiates the process which leads to the execution of a contract for the solicited services, goods, or construction. After all necessary approvals and clearances have been obtained, the contracting officer may execute the contract with a signature on behalf of the County. The intentional release of the fully executed contract constitutes a contract award.

* * *

4. Source Selection Methods and Contract Types

4.1 Description of Source Selection Methods

4.1.1 Formal Solicitations — Invitation for Bid (IFB)

* * *

4.1.1.2 Use

IFBs are normally used when the procurement is for construction, goods, or non-professional services. An IFB is used for procurements valued at $100,000 or more. An IFB may be used for professional services if the Director determines that:

* * *

4.1.1.4 Procedure

* * *

(e) In the case of tie bids, the Director resolves a tie by application of the following criteria in the order stated:

* * *

(g) The name of the proposed contract awardee or notice of IFB cancellation is posted on a public notice by the Director.

* * *

4.1.2 Formal Solicitation — Best Value Procurement — Request for Proposals (RFP)

* * *

4.1.2.2 Use

(a) An RFP is used for the procurement of professional services.

(b) An RFP is utilized when (1) a Using Department can generally formulate the scope of work or specifications for the services or system to be acquired; (2) there are known sources of supply; (3) competition is anticipated; and (4) the procurement is valued at

$100,000 or more.

(c) An RFP is used when other considerations as well as cost are valid criteria in the evaluation of offers.

(d) An RFP may also be used for the procurement of construction, goods, or nonprofessional services when the County determines that the use of evaluation criteria authorized for use in an RFP would promote the best interests of the County. Approval to use an RFP instead of an IFB for the procurement of construction, goods, or nonprofessional services must be obtained from the Director.

4.1.2.3 Contents

An RFP should include the following information:

* * *

(c) The identity and telephone number of a contact person within the Using Department for technical information pertaining to the solicitation. The identity and telephone number of a contact person in the Department of General Services, Office of Procurement, for administrative information relating to the solicitation.

* * *

(e) A concise explanation of the method of award that includes identification of all criteria and relative weights for each criterion.

* * *

(3) If the Using Department determines that guidelines would assist the QSC in evaluating an award criterion, the Using Department must develop scoring guidelines for that criterion for use by the QSC. Normally the Using Department should develop guidelines for a cost criterion.

If the Director requests, the Using Department must send the Director a copy of the scoring guidelines with the QSC evaluation. These guidelines are confidential until a proposed award is posted.

* * *

4.1.2.4 Procedure

(a) RFPs are issued and public notice given under the direction of the Director.

(b) Without public opening, the Director forwards timely received proposals to the Using Department for evaluation.

(c) The Using Department establishes the QSC members, with the written approval of the Director. Each member of the QSC must be an employee of a public entity, unless specific authorization is obtained from the CAO for another to serve on the QSC. Unless otherwise provided in these regulations, the committee must be composed of an odd number of members and must have at least three members.

(d) The Director may add members to the QSC when appropriate to enhance the ability of the QSC to fairly and objectively evaluate the proposals. When the Director adds members to the QSC, the composition of the QSC does not need to remain an odd number.

(e) The QSC evaluates all proposals received from the Director, in accordance with the evaluation criteria, and reviews offerors for responsibility.

* * *

(f) In the case of a tie in the numerical QSC scores, the Director resolves the tie by application of the following criteria in the order stated:

(1) the offeror who has its principal place of business in Montgomery County;

(2) the offeror who is a certified MFD business prior to submitting a proposal;

(3) Drawing of lots with representatives of the firms involved invited to be present.

(g) After the QSC ranks the offerors, the QSC must forward the recommended ranking to the Using Department Head, including a recommendation of the responsibility of the recommended proposed awardee.

(h) The Using Department Head reviews and forwards the QSC recommendation with concurrence, objection, or amendment to the Director. The Using Department Head may also recommend cancellation of the procurement. These recommendations must be accompanied by QSC conflict of interest certifications and a score sheet summarizing the scores awarded by the QSC to each offeror.

(i) The Director approves, approves with conditions, or rejects the recommendations and supporting documentation. If the Director agrees with the recommendation of the Using Department Head, the Director may proceed immediately to authorize negotiations. If the Director approves the Using Department Head's recommendation for proposed award with conditions, the Using Department must satisfy the conditions and provide appropriate documentation of compliance to the Director, prior to commencing contract negotiations. If the Director rejects the Using Department Head's recommendation for proposed award, the RFP package is returned to the Using Department Head for further action as indicated by the Director.

(j) After the Director's approval of a recommendation for proposed award, the Director or the Using Department negotiates the contract with the proposed awardee prior to making a proposed award. The Using Department is responsible for coordination of

MFD compliance review with the Director. If a contract cannot be successfully negotiated with the proposed awardee, the Using Department will proceed to negotiate with the next highest ranked offeror after obtaining approval from the Director.

(k) If the Director approves, negotiations may be held simultaneously or successively with one or more offerors prior to making an award.

(l) The Director must post public notice of the name(s) of the proposed awardee(s). Public notice also is required in the event of solicitation cancellation.

(m) After the Director has posted the proposed award and has ensured the encumbrance of required funds, the Director may execute the contract on behalf of the County. The Director provides for distribution of copies of the contract to the Using Department and the contractor.

(n) A Notice to Proceed, if necessary, is issued by the authorized government official, pursuant to provisions of the contract.

4.1.3 Abbreviated Formal Solicitations.

* * *

4.1.3.2 Use

An abbreviated formal solicitation may be used if the Director finds:

(a) the estimated value of the procurement, including any extension, is $200,000 or less; and

(b) the abbreviated formal solicitation process is in the best interest of the County.

4.1.3.3 Procedure

(a) If the solicitation would normally be accomplished under an IFB, the following changes are made to the IFB process:

(1) The Department of General Services, Office of Procurement, issues notice of the IFB to at least 25 randomly selected potential bidders on the bidder's list or all of those on the bidders list, whichever is smaller. The Department of General Services, Office of Procurement, may also issue notice to additional potential bidders. At least 20%, if available, of those who are sent notice of the IFB should be minority owned businesses. The previous supplier of the goods, services, or construction being acquired should also receive notice of the IFB.

(2) The IFB should allow a bidder a minimum of 10 days in which to submit a bid.

(b) If the procurement would normally be accomplished under an RFP, the following changes are made to the RFP process:

(1) The Department of General Services, Office of Procurement, issues notice of the RFP to at least 25 randomly selected potential offerors on the bidder's list or all potential offerors on the bidder's list, whichever is smaller. The Department of General Services, Office of Procurement, may also issue notice to additional potential offerors. At least 20%, if available, of those who are sent notice of the RFP should be minority owned businesses. The previous contractor who supplied the goods, services, or construction being purchased should receive notice of the RFP.

* * *

4.1.4 Formal Solicitations — Request for Expressions of Interest (REOI)

* * *

4.1.4.3 Contents

* * *

(c) The identity and telephone number of a contact person within the Using Department for technical information pertaining to the solicitation. The identity and telephone number of a contact person in the Department of General Services, Office of Procurement, for administrative information relating to the solicitation.

* * *

4.1.7 Informal Solicitation — Mini-Contract

4.1.7.1 General

A mini-contract is a contract for professional and, under special circumstances, non-professional services valued above $10,000 and under $100,000 which is the result of an informal solicitation process. Each informal solicitation notice must be posted on a County website in accordance with §11B-17A. The solicitation process requires, at a minimum, documented oral or written contact with prospective offerors, documentation of MFD efforts, and documentation of the results of that contact. A mini-contract is not subject to renewal or amendment for the purpose of increasing its value beyond the maximum limit.

4.1.7.2 Use

(a) A professional services mini-contract is used for the procurement of professional services.

(b) A mini-contract may be used for non-professional services, goods, or construction valued above $10,000 and under $100,000 if the Director determines that the use of evaluation criteria other than price would promote the best interests of the County.

(c) This source selection method may not be used when the total

expenditure (including all extensions) for the project or services to be procured is expected to equal or exceed $100,000. Using Departments may not divide contracts (splitting) for the purpose of avoiding the $100,000 limit.

* * *

4.1.8 Informal Solicitation — Small Purchases

4.1.8.1 General

A small purchase is an informal solicitation for goods, construction or services valued above $10,000 but under $100,000. The small purchase is a solicitation initiated by the Using Department, which is responsible for ensuring appropriate informal competition and appropriate documentation. This source selection method should preserve competition on an informal basis and an award must be based on price, responsiveness, and responsibility. The Using Department must contact at least 5 randomly selected potential offerors selected from the bidder's list or all potential offerors from the bidder's list whichever is smaller. At least one of the potential offerors to be selected should be a minority owned business. The Using Department should include among those contacted the previous supplier of the goods, construction or services being acquired. Each informal solicitation notices must be posted on a County website in accordance with §11B-17A. This source selection method may not be used when the total expenditure (including all extensions) for the goods, construction, or services to be procured is expected to exceed $100,000. Using Departments may not divide contracts (splitting) for the purpose of avoiding the $100,000 limit.

* * *

4.1.9 Direct Purchases

4.1.9.1 General

A direct purchase is an informal procurement of construction, goods or services with a total value of no more than $10,000. Competition should

be preserved with this method to the extent practicable. Procurements with MFD and LSBRP firms are encouraged. Subject to revision by the CAO, the direct purchase is handled pursuant to the direct authority of a Using Department Head who is solely responsible for making a proper purchase under these procedures. The Using Department Head must seek fair and reasonable prices for all construction, goods and services obtained under this method.

4.1.9.2 Use

Direct purchases are used to secure goods, construction, or services, when the value of the purchase is not greater than $10,000. Direct purchase procedures may be used even if the construction, goods and services to be obtained are covered by any existing requirements contract with the County. The Using Department should consult with the Director to ascertain the existence of relevant alternative sources. Purchases which in the aggregate would exceed the limit on this type of procurement may not be subdivided or split to procure within the direct purchase limitations. When the need for a particular product or service occurs within a reasonable time frame and can be consolidated, the purchase must be consolidated and not subdivided.

* * *

4.1.12 Non-Competitive Procurements

4.1.12.1 General

A non-competitive procurement is the acquisition by contract of a valid County requirement without prior public notice and without competition.

4.1.12.2 Authority

(a) The Director may make a non-competitive award unless the non-competitive award is based on a sole source justification and the estimated value of the award is above $100,000. If the estimated value of the non-competitive award based on a sole source justification exceeds the threshold for an IFB or RFP, the CRC

may approve a non-competitive award after considering the justification from the Using Department. A non-competitive award must be based on a determination and finding.

(b) The Director may make a non-competitive award for maintenance or support of software during the useful life of the software originally purchased, if there is only one source for the required maintenance or support for the software. The one source must meet the minimum valid needs of the County.

* * *

6. Contractor Qualifications

* * *

6.3 Responsibility

* * *

6.3.4 Solicitations in which Using Departments make recommendations for awards to the Director must include a written recommendation with respect to the responsibility of the potential awardee. The Using Department should specify in detail the factual basis for its recommending a finding of responsibility of the potential awardee. In connection with this recommendation, the Using Department should review its files and the central performance file of the Department of General Services, Office of Procurement, with respect to the performance of the prospective awardee in previous contracts in the Using Department and the County, investigate performance of the prospective awardee in other contracts with the County and other entities to the extent practical, and ensure that the recommended awardee is not on a current Montgomery County suspension or debarment list.

* * *

7. Minority Owned Business Contracting

7.1 Purpose

The purpose of Section 7 is to establish procedures to facilitate the goal of the County Government to remedy the effects of discrimination by awarding a percentage of County contracts, including contract modifications and renewals, with a dollar value of $10,000 or more to minority owned businesses (MFD owned business or MFD), as defined in Chapter 11B of the County Code, in proportion to the availability of MFD owned businesses to perform work under County contracts.

7.2 Policy

7.2.1 The Director, with the assistance of Using Departments and employees involved in contracting and purchasing, must actively and aggressively recruit certified MFD owned businesses for which a goal has been set to provide goods, construction, and services, including professional services, for the performance of governmental functions to facilitate the MFD goal of the County. Procurements less than or equal to $10,000, grants that are appropriated by the County Council to specific grantees, utilities, intragovernmental procurements, and certain intergovernmental procurements including certain bridge contracts identified by the Director are excluded from the base against which the goal is measured.

* * *

7.4 Certification of MFD Owned Businesses

7.4.1 The Director may certify an entity as an MFD owned business if the business is certified as a minority business enterprise under Federal or State procurement law, or other non-self-certifying public entity certification program, as determined to be acceptable by the Director.

7.4.2 If the business is a not-for-profit entity organized to promote the interests of physically and mentally disabled individuals, the Director must determine whether:

7.4.2.1 the not for profit entity is certified as a minority business enterprise under Federal or State procurement law, or other non-self-certifying public entity certification program that the Director has determined to be acceptable; and

7.4.2.2 at least 51% of the individuals used by the not for profit entity to perform the work or manufacture the goods contracted for by the County are individuals with a physical or mental disability.

7.4.3 The Director must conduct a review to determine whether a business may be certified as an MFD owned business. This review must include an evaluation of the documentation submitted by the business on an MFD Application form. The Director may also include a site visit to the offices of a not for profit entity. The Director may review any of the following:

7.4.3.1 Certifications issued by the Federal or State governments, or by another public entity, provided that the public entity's program is not based on vendor self-certification.

7.4.3.2 Employment records, health records, and/or educational records of the employees of a not for profit entity seeking MFD certification.

7.4.3.3 Other relevant information concerning the operation of a not for profit entity.

7.4.4 A request for certification or recertification as an MFD business may be denied by the Director for any of the following reasons:

7.4.4.1 Failure to demonstrate that the business is a certified minority business enterprise under Federal or State procurement law, or through another non-self-certifying public entity certification program determined to be acceptable by the Director.

7.4.4.2 Failure to provide sufficient and timely information for the Director to make a certification or recertification determination.

7.4.4.3 Refusal to permit an on-site inspection by the Director.

7.4.4.4 Failure to comply with a request by the Director for information or access to records.

7.4.4.5 Graduation of the MFD owned business.

7.4.5 Certification as an MFD owned business by the County may be revoked for any one of the following reasons:

7.4.5.1 Fraud, deceit or misrepresentation in obtaining certification.

7.4.5.2 Failure to report in writing to the Director within 30 days of the date of the occurrence of any changes in the status of the certified MFD owned business that are relevant to its certification.

7.4.5.3 Failure to demonstrate at the request of the Director that the entity continues to be an MFD owned business.

7.4.6 Certification is subject to the graduation provisions of this Section. The Director must not certify an entity as a MFD owned business for a period of time that exceeds 5 years. The Director, however, may certify a business as an MFD owned business for 8 years if during the first 5 years of certification, the MFD owned business:

7.4.6.1 * * *

7.4.6.2 * * *

* * *

9. Bonds and Insurance

9.1 Bonds

* * *

9.1.2 Director Review

* * *

9.1.2.2 In reviewing bonds and bond requirements, the Director must consider the impacts on competition and costs, particularly impacts on MFD firms. The impacts must be balanced with the needs served by the bond

requirements, which include appropriate security for performance and other assurances of responsibility.

9.1.2.3 The Director has the right to approve, disapprove, or require changes to any instrument offered as a bond.

9.1.3 Minimum Requirements

9.1.3.1 All bonds must meet the following minimum requirements:

(a) The surety company issuing the bond must be qualified and licensed to do business in the State of Maryland.

(b) The attorney-in-fact on the bond document must be properly authorized to bind the surety, which authorization may be documented by a power of attorney submitted with the bond, or the attorney-in-fact must be registered with the Circuit Court for Montgomery County, Maryland.

(c) The obligee of the bond must be "Montgomery County, Maryland", or any additional or other obligee required by the County.

(d) Any surety or insurance company that issues a bond in favor of the County consents to personal jurisdiction in the State of Maryland and, in the event that any legal action is filed upon the bond, venue shall lie exclusively in the Circuit Court for Montgomery County, Maryland.

(e) The bond must be governed by, and construed in accordance with, the laws of the State of Maryland.

9.1.3.2 Under State law, a construction contract that exceeds $100,000 must require the contractor to provide payment security in an amount equal to at least 50 percent of the total amount payable under the contract and for performance security in an appropriate amount. For construction contracts that do not exceed $100,000, the Director may require payment security or performance security.

9.1.4 Substitutions

Substitutions for bonds may be permitted only with permission of the County Attorney or pursuant to guidelines issued by the County Attorney. Substitutions may include letters of credit, cash deposits and other forms of security. Personal sureties are not acceptable substitutes for bond requirements. Any letter of credit accepted by the County Attorney must contain at least the following terms:

9.1.4.1 The letter of credit must be presentable to an institution located within the State of Maryland;

9.1.4.2 The issuer of the letter of credit must consent to the letter of credit being governed by, and construed in accordance with, the laws of the State of Maryland;

9.1.4.3 The issuer of the letter of credit must consent to personal jurisdiction in the State of Maryland; and

9.1.4.4 In the event that any legal action is filed upon the bond, venue shall lie exclusively in the Circuit Court for Montgomery County, Maryland.

* * *

10. Contract Cost and Pricing Principles

* * *

10.2 Requirements for Certified Cost or Pricing Data

10.2.1 An offeror or contractor must submit cost or pricing data, or both, in a form prescribed by the Director prior to approval of:

10.2.1.1 A competitively negotiated contract valued at more than $100,000;

10.2.1.2 A non-competitively negotiated contract valued at more than $50,000;

10.2.1.3 Any contract modification for which the price adjustment is expected to

exceed $50,000 except contract modifications that are fully in accordance with the terms and conditions of the contract; or

10. 2.1.4 Any other contract or contract modification, as may be required by the CAO or Director.

10.2.2 When Cost or Pricing Data is required:

10.2.2.1 Each contractor or offeror must at the request of the Director submit, in a form required by the Director, a certificate showing the data for the proposed work to be done, including work to be done by a subcontractor. The offeror or contractor must submit a certification that the data submitted are accurate, complete and current.

10.2.2.2 The contract or contract modification document must state that the price to the County, including profit or fee, may be adjusted by the Director to exclude from the price any sums determined by the Director to be allocable to inaccurate, incomplete or outdated cost or pricing data.

10.2.3 When a prime contractor is authorized to expend appropriated funds through subcontractors in the performance of a County contract, Subsections 10.2.1 and 10.2.2 are also applicable to subcontracts and subcontract modifications.

10.2.4 Before executing a contract or contract modification, the Director must make a determination as to the reasonableness of the cost or pricing data. The contract cost principles and procedures in the Federal Acquisition Regulations may be used as general guidelines when developing price determinations, if they are not at variance with County laws and regulations.

10.2.5 The requirements of section 10.2 do not apply to a contract or contract modification that is based on:

10.2.5.1 Adequate competition as determined by the Director;

10.2.5.2 Established catalog or market prices of commercial items sold in substantial quantities to the general public;

10.2.5.3 Prices set by laws or regulations;

10.2.5.4 A noncompetitive contract awarded under a resolution or appropriation approved by the County Council, if the Using Department has made the certification required by Section 17.3.2.; or

10.2.5.5 The Contractor has been specifically identified in a grant accepted by the County.

10.2.6 In exceptional cases, or for contracts or contract modifications with public entities, the Director may waive the requirement for cost or pricing data by making a written determination that explains why the waiver is in the best interest of the County.

* * *

13. Claims

* * *

13.4 Procedures for Approval

13.4.1 A Using Department must submit the information required in Section 13.3.2 to the County Attorney for review and action.

13.4.1.1 If the claim outside a contract is $10,000 or less, the County Attorney may approve the claim outside a contract in writing and return it to the Using Department which is responsible for processing the claim outside a contract approval for payment.

13.4.1.2 If the claim outside a contract is in excess of $10,000, the County Attorney may approve the claim outside a contract subject to approval of the CAO. If the County Attorney approves the claim, the County Attorney must submit a recommendation for approval to the CAO, in writing, together with documentation received from the Using Department.

13.4.1.3 If the County Attorney rejects a claim outside a contract, the County Attorney must state the reasons for the rejection in writing and return the documentation to the Using Department. The Using Department may

resubmit the claim outside a contract to the County Attorney with additional information as requested or other information the Using Department may elect to submit.

13.4.1.4 If the County Attorney requests further information, the Using Department must furnish the requested information as expeditiously as possible.

* * *

14. Solicitation Protests; Contract Disputes

14.1 Solicitation Protests

* * *

14.1.2 Protest

Only an offeror who is aggrieved may file a protest. An offeror is aggrieved only if the offeror can demonstrate that, if the protest is sustained, the offeror may be eligible for the remedies allowed under Section 14.1.3.6 (a) or (c).

14.1.2.1 Any offeror who is aggrieved in connection with a formal solicitation must file and deliver a written protest to the Director as follows:

(a) If the bidder or offeror seeks as a remedy the award of the contract or costs under Section 11B-36(h) and Section 14.1.3.6(c), then the bidder or offeror must file and deliver a written protest within 10 days after the Director publicly posts the proposed award.

(b) If the bidder or offeror seeks as a remedy the cancellation or amendment of the solicitation under Section 14.1.3.6(a), then the bidder or offeror must file and deliver a written protest before the submission date and time for bids or proposals.

(c) If the bidder or offeror files and delivers a written protest under subsection (b) of this Section, but does not submit a bid or proposal by the submission date, and the solicitation is not cancelled or amended, the bidder or offeror will not be eligible for

the remedies allowed under subsection (a) of this Section.

The Director must dismiss any protest not timely received.

* * *

14.1.2.4 After a protest is filed, the Director may give appropriate notice to other known offerors who may be affected by the protest. Other affected offerors may submit written comments or documents regarding the protest. All offerors are required to keep apprised of the current status of solicitations, proposed awards, and protests; an offeror may not rely on notice of a protest from the Director. Notice by the Director is discretionary and need not be given. The burden of staying informed about the filing of a protest and the timely submission of comments by affected offerors is on the offerors.

* * *

14.1.3 Appeal

* * *

14.1.3.5 The CRC (with the Director not participating) must review the appeal.

* * *

(b) If the CRC finds there is a genuine dispute as to a material fact and the appeal cannot be decided as a matter of law, it must notify the appealing offeror, the proposed awardee, the Director, and the Using Department, and the CRC must conduct further proceedings, which may include a hearing. If a hearing officer is designated by the CRC, the hearing officer must conduct the hearing and make proposed findings and a recommendation to the CRC. After the hearing (if any) and based on the record, the CRC may accept, reject, or modify the hearing officer's proposed findings of fact and recommendation, and must, in turn, submit a recommended decision on the appeal to the CAO.

MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject Procurement Regulations	**Number** 19-09
Originating Department Department of General Services	**Effective Date**

* * *

14.1.5 Contract Awards

14.1.5.1 Generally, performance under a contract does not commence until the later of 10 days from the date of posting of the proposed awardee or, in the case of a protest, the final administrative decision has been made by the County.

14.1.5.2 The Director may award a contract and authorize performance under a contract before the 10 days has elapsed or a final administrative decision made with regard to a protest after making a determination and finding that awarding the contract without delay is necessary to protect the interests of the County. The Director should consider the following:

* * *

(d) The unwillingness of the proposed awardee to delay performance under the contract or to extend its offer; or

* * *

14.2 Contract Disputes

14.2.1 Definitions

14.2.1.1 In this section claim means:

(a) a demand by a contractor or the County that seeks the payment of money, an adjustment of time, an adjustment or interpretation of a contract provision, or other relief arising under or relating to a contract; or

(b) a disagreement arising from a decision by the Director regarding a contract termination under Section 12 of these regulations.

14.2.1.2 In this section a dispute means an unresolved claim.

14.2.2 General

14.2.2.1 Administrative Process.

(a) A contractor must use the process set out in this section to file and resolve a claim or dispute under a contract.

(b) The County may use the process set forth in this section to resolve an affirmative claim or dispute under a Contract.

14.2.2.2 Procedure.

(a) Contractor: Except with respect to a claim arising from a decision of the Director terminating a contract, a contractor must notify the contract administrator in writing of the claim, and must attempt to resolve the claim with the contract administrator prior to filing a dispute with the Director. A contractor must file a dispute with the Director within 30 days of the event giving rise to the claim (unless the contract provides otherwise), whether or not the contract administrator has responded to the written notice of claim or resolved the claim. The contractor waives any dispute not timely filed. The Director and the CAO must dismiss a dispute that is not timely filed. If the dispute arises from a decision of the Director terminating a contract, the Director must treat the dispute as a request for reconsideration.

(b) County/Using Department: In addition to any other remedies the County may have, the Using Department may use the administrative process established by these regulations. To use this process, the Using Department may notify the contractor or contractor's agent of the claim in writing within 30 days of the event giving rise to the claim and may attempt to resolve the claim with the contractor prior to filing a dispute with the Director. The Using Department may file a dispute regarding a setoff or payment with the Director at any time before final payment occurs. The Using Department may file a dispute regarding a latent defect within 60 days of discovery of the defect.

(c) When the Director has delegated the authority to consider a dispute

to the Using Department, the party filing the dispute must file it with the Director of the Using Department, followed by an appeal to the CAO.

14.2.2.3 When first filing a dispute, the party that files a dispute (a contractor or the Using Department, whichever initiates the dispute) must provide the following information to the Director as part of the filing:

(a) The name and identification number of the contract with the County;

(b) The name, address and telephone number of the contractor, if the contractor files the dispute. If the Using Department files the dispute, the name, address and telephone number of the contract administrator of the Using Department must be provided;

(c) All grounds supporting the contractor's or Using Department's requested relief, including:

(1) The detailed facts and all relevant documents;

(2) The relevant language in the contract, regulations, or law relied upon;

(3) All other matters which the contractor or Using Department contends support the claim; and

(4) The relief requested.

(d) The factual allegations contained in the dispute must be supported by one or more affidavits based on personal knowledge.

(e) The non-filing or responding party may submit a response to the allegations contained in the dispute within 30 days after the filing of the dispute. The response must include any documented information that addresses the information supplied with the dispute in the manner described in subsection (c) of this Section.

14.2.2.4 (a) The Director, after consulting with or obtaining written information from the non-filing party, must decide a dispute within 45 days after receiving the documents and information specified in Section 14.2.2.3 unless the filing party agrees to extend the time for a decision.

(b) If the Director denies a dispute, in whole or in part, the contractor or Using Department may file a contract dispute appeal with the CAO. The dispute appeal must be filed within 30 days after the party receives the Director's decision. If no decision is rendered by the Director within 45 days of the Director's receipt of the documents and information specified in Section 14.2.2.3, then the dispute appeal must be filed within 75 days after the party filed the dispute.

(c) Unless the Director and the filing party agree, a dispute may not be resolved by mediation or binding arbitration.

14.2.2.5 The CAO may hold a conference with all interested parties if the CAO believes a conference would contribute to a resolution of the dispute.

14.2.2.6 The filing party bears the burden of proof and the burden of persuasion to support the relief requested.

14.2.2.7 Pending final resolution of a dispute, the contractor must proceed diligently with contract performance unless the County has terminated the contract.

14.2.2.8 The CAO may consolidate disputes if the disputes have common questions of law or fact. The time limits in Section 14.2 for the last dispute filed apply to the consolidated dispute.

14.2.2.9 The CAO or the Director may order a contractor that is not a party to the appeal or the contract under which the dispute has been filed to become a party to the proceeding if the dispute on appeal may be based, in whole or in part, on the performance of the other contractor. The Director or CAO may order the other contractor to compensate another party to the dispute appeal, including the County, for damages incurred as a result of the other

contractor's failure to perform a contract obligation.

14.2.2.10 Upon receipt of the contract dispute appeal, the CAO must review the dispute de novo, but the CAO must not consider any grounds except those presented by the filing party under 14.2.2.3.

(a) The appealing party must file a dispute appeal with the CAO. The dispute appeal must identify the relief sought and all grounds and materials supporting the request for relief. The appealing party must provide a copy of the dispute appeal to the opposing party, the Director, and the County Attorney.

(1) At the time of filing a dispute appeal involving $25,000 or more with the CAO, the appealing party must provide to the other parties to the dispute a written notice which contains:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information regarding facts concerning the dispute;

(B) a computation of each category of damages or other specific relief sought; and

(C) the name, address, and telephone number of each individual from whom the contractor expects to obtain expert testimony. The notice must include a written statement that contains:

(i) a complete statement of each opinion to be expressed;

(ii) the basis and reason for each opinion;

(iii) the data or other information considered by the expert in forming each opinion;

(iv) the qualifications of the expert, including a list of all publications authored by the expert; and

(v) a list of each case in which the expert has testified as an expert within the preceding 4 years.

(D) the parties have a continuing obligation to promptly supplement any change in information contained in the written notice required in this subjection.

(2) The other parties must provide the notice required under paragraph (1) to the appealing contractor and any other party:

(A) within 90 days after being served with the notice required under paragraph (1) if the dispute involves more than $100,000; or

(B) within 60 days after being served with the notice required under paragraph (1) if the dispute involves $100,000 or less.

(b) The Director must file a response with the CAO to the dispute appeal within 15 days after the dispute is filed. The Director must include a complete copy of the contract in the response unless the appealing party has provided it in the dispute appeal. The Director must send a copy of the response to the parties.

(c) The CAO may require the contractor or the Using Department and the Director to submit additional information.

(d) Summary disposition. If the CAO finds, based on the record, that the appealing party failed to comply with the requirements of section 14.2.2, the CAO must summarily deny the appeal within 30 days after receiving the appeal. If the CAO finds, based on the record, that the appealing party complied with the requirements of

section 14.2.2, and there are no genuine disputes of material fact, the CAO must decide the appeal without a hearing within 30 days after receiving the appeal. The CAO must state in writing the reasons that support the decision. The CAO may request supplemental memoranda from the parties and extend the time for issuing a decision, with the parties' consent.

(e) If the CAO determines that the appeal cannot be decided under section (d) above, the CAO must order a hearing. The CAO may designate a hearing officer to conduct the hearing, and may limit the issues to be heard. If a hearing officer is designated by the CAO, the hearing officer must conduct the hearing in accordance with section 14.2.4 and make proposed findings of fact and recommendation to the CAO. The hearing must be completed in conformance with the time requirements imposed by Chapter 11B of the Code. After the hearing and based on the record, the CAO must make a written decision on the appeal, including proposed findings of fact and recommendation within 30 days after receiving the hearing officer's report. The CAO may adopt, modify or reject the findings of fact and recommendation of the hearing officer's report.

(f) The County/Using Department may file a contract dispute appeal under this Section. When filing a dispute appeal, the same filing requirements and timelines delineated in Section 14.2.2.10 (a) through (e) apply to the appeal.

(g) The final decision of the CAO is subject to judicial review under § 11B-35(d) of the Code. Either party may appeal that decision to the appellate courts of Maryland.

14.2.2.11 Unless the CAO and the appealing party agree, a contract dispute appeal may not be resolved by mediation or binding arbitration.

* * *

15. Contract Review Committee (CRC)

* * *

MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject Procurement Regulations	**Number** 19-09
Originating Department Department of General Services	**Effective Date**

15.5 Duties and Responsibilities.

15.5.1 The CRC has the following responsibilities.

15.5.1.1 Approving sole source procurements valued above the threshold for an IFB or RFP. This provision does not apply to software maintenance or support approved by the Director in accordance with §4.1.12.2(b) as a non-competitive procurement.

* * *

Effective Date.

This Executive Regulation takes effect upon enactment of Bill No. 45-09. Section 7, Minority Owned Business Contracting, sunsets on December 31, 2012.

Isiah Leggett, County Executive

Approved as to form and legality by the
Office of the County Attorney:

Karen R. Federman Henry 1/12/10
Date

Proposed Amendments to Executive Regulations

Procurement Regulations:

11B.00.01.02.4

Delete the defined term "award" and add the defined term "contract award". Also, modify the definition of "proposed award" to permit completion of negotiations prior to posting an award and to accommodate other changes to the procurement process and selection of contractors. Revise the definition of "Director" to refer to the Director of the Department of General Services, rather than the Office of Procurement. This is consistent with other changes made throughout the proposed regulations where references to the Department of General Services are substituted for the Office of Procurement where appropriate. Revise the defined term "Qualification and Selection Committee" to move non-definitional composition elements to the substantive section of the regulation. (Department of General Services)

11B.00.01.03.2

Revise the contract award process to permit the Director of the Department of General Services to negotiate with more than one vendor before posting notice of the contract award. The current method limits the negotiation possible before selection of the awardee and potentially limits the ability of the County to obtain the best outcome. (Department of General Services)

11B.00.01.04.1

Increase the threshold dollar amounts for each category of solicitation. Over a period of years, the expense associated with various purchases has increased, making it logical to raise the levels at which the informal methods should yield to more formal

solicitations. The changes in the thresholds will enable departments to use informal methods for purchases under $100,000 and then the more formal methods for purchases that exceed $100,000. In addition, the maximum amount for a direct purchase will be increased from $5,000 to $10,000. (Department of General Services)

11B.00.01.04.1.2.4

Permit the Director of the Department of General Services to add members to the QSC when appropriate to enhance the ability of the QSC to fairly and objectively evaluate proposals. Also, permit the Director of the Department of General Services to negotiate with more than one vendor simultaneously or successively. This promotes competition and enables the County to ensure that it acquires the best result and keeps the negotiations on a level playing field until the selection of a vendor is made. Currently, a waiver from the Chief Administrative Officer is needed to pursue this approach. (Department of General Services)

11B.00.01.04.1.12.2

Permit the Director of the Department of General Services to make a non-competitive award for maintenance or support of software when: the software was purchased through the procurement process, there is only one source for the maintenance and support, and that source meets the County's minimum needs. This amendment would streamline the process for these services, as many currently must seek sole source approval from the Contract Review Committee. (Department of General Services)

11B.00.01.07.1

Increase dollar amounts for minority-owned business contracts. As with the other threshold changes, this change reflects the reality of the marketplace. (Department of General Services)

11B.00.01.07.4

Amend certification of MFD businesses to permit alternative non-self-certifying programs in addition to Federal and State programs. Currently, the regulations rely solely on the State certification process. The amendment recognizes that other methods may yield appropriate certifications as well. (Department of General Services)

11B.00.01.09.1

Revise bond requirements and issuing entities for letters of credit. The current provision omits key requirements for accepting bonds and letters of credit. The additional requirements will facilitate enforcement if the County must seek the remedies available through a bond or letter of credit. The requirements are consistent with the jurisdictional requirements in the general terms and conditions. (County Attorney)

11B.00.01.10

Technical change to correct the numbering of the section—currently the numbers include 10.1 and 10.3, with no intervening 10.2. (County Attorney)

11B.00.01.14.2.2

Clarify the timing for filing a protest. Expand the disputes process to include the ability of the Using Department to initiate the administrative process to resolve disputes and claims. Also, clarify that the Chief Administrative Officer may resolve an appeal through a summary disposition rather than always requiring an evidentiary hearing. (County Attorney)

11B.00.01.15.5

Recognize the authority granted to the Director of the Department of General Services to approve maintenance or support for software in certain circumstances under 11B.00.01.04.1.12.2(b). The Contract Review Committee would not have to review the Director's approval. (Department of General Services)

On-Line Procurement Subscription Fee:

Repeal in its entirety. (Department of General Services)

Formal Solicitation Copy Fees:

Revise to eliminate the minimum copy fee for electronic copies of non-construction solicitations and to change Department name. This is mostly a housekeeping revision. (Department of General Services)

OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

September 17, 2009

TO: Joseph F. Beach, Director
Office of Management and Budget

VIA: Beryl Feinberg, Management and Budget Manager

FROM: Bruce R. Meier, Senior Management and Budget Specialist

SUBJECT: Executive Regulation 19-09, Procurement Regulations
Executive Regulation 20-09, Formal Solicitation Copy Fees
Executive Regulation 21-09, On-Line Subscription Fee

Regulation Summary

These regulations amend the policies and procedures for regulating the County procurement process. The Procurement Regulations include rules regarding the solicitation process, source selection, contract types, using department responsibilities, contractor qualifications, payments, claims, solicitation protests, contract disputes, ethics in public contracting, and the minority-owned business purchasing program. Specific changes include raising the dollar threshold for various types of solicitations and including the County within the disputes process.

The Formal Solicitation Copy Fees Regulation is being revised to eliminate the fee for certain copies. And the On-Line Subscription Fee Regulation is being repealed in its entirety as it is no longer needed due to the current status of technological services.

Fiscal Summary

There will be no fiscal impact on County expenditures as a result of the proposed regulations. This is because no additional staff or other resources are required to implement these regulations. In addition, there is no additional administrative burden anticipated from these changes and, in fact, it should expedite the procurement process. There will be a loss of $3,210 with the elimination of the On-Line Subscription Fee.

BM/BF/sa

c: Kathleen Boucher, Assistant Chief Administrative Officer
Karen Federman-Henry, Office of the County Attorney
David Dise, Director, Department of General Services
Pam Jones, Department of General Services
John Cuff, Office of Management and Budget

Office of the Director
101 Monroe Street, 14th Floor • Rockville, Maryland 20850 • 240-777-2800
www.montgomerycountymd.gov

OMB REVIEW

✓ Fiscal Impact Statement approved _____
OMB Director

_____ Fiscal Impact Statement not approved, OMB will contact department to remedy.

Drummer, Bob

From: Judy Stephenson [judy.stephenson@officeproinc.com]
Sent: Thursday, January 28, 2010 1:31 PM
To: Drummer, Bob
Subject: RE: Expedited Bill 45-09, Contracts and Procurement - Amendments

Thank you for including OFFICEPRO in your request for comment on behalf of the County Council's T&E Committee.

OFFICEPRO, Inc., is a software training company that has been a local small business in Montgomery County for 25 years. We feel that the County has made positive strides in encouraging the use of local small businesses in the County procurement process. We encourage the County Council to continue to expand opportunities for small businesses to provide valuable goods and services to County departments.

We feel that the proposed legislation would have a positive impact on the small business community by increasing the number of opportunities available for small businesses. In addition, decisions on these procurements are made more quickly than formal solicitations, which would have the effect of getting business moving more quickly. Intuitively, we would also expect that the requesting office would have more of an influence on the vendor selection and would hopefully exhibit less resistance to using local small businesses than is evident at the Department level.

One reason we feel comfortable with these changes is the dedication of the General Services staff in making opportunities available to local small businesses. If attention on this critical priority wavers, and if there is less oversight on how county departments are spending, the positive impacts of this change would be diminished.

Again, I appreciate the opportunity to provide input on this issue. Don't hesitate to contact me if additional information is required.

Judy Stephenson
OFFICEPRO, Inc.
8 Granite Place #26
Gaithersburg, MD 20878
301-468-3312 * 301-263-6879 (fax)

From: Drummer, Bob [mailto:Bob.Drummer@montgomerycountymd.gov]
Sent: Tuesday, January 26, 2010 11:31 AM
To: Naomi@worksitehealthandsafety.com; nick.brown@affinity-networks.com; jachirico@chevychasebank.net; dcoffey@therrienwaddell.com; teddy@herronprinting.com; info@dja-inc.com; afraser@sandglass.com; lfadden@mcccmd.com; ggodwin@mcccmd.com; Sylvia@springboardtraining.com; skramer@kramerfirmllc.com; info@digitalindustry.com; lnowak@pdr-usa.net; solomon.raphael@prudential.com; bobrodman@aol.com; ssimon@mcccmd.com; Judy Stephenson; david@membercar.com; rdyile@imageconsultinggroup.com
Cc: Dise, David E.; Taylor, Kenneth
Subject: Expedited Bill 45-09, Contracts and Procurement - Amendments

I am sending this request for comment on behalf of the Council's Transportation, Infrastructure, Energy, and Environment (T & E) Committee to each of you as an attendee of the County Chamber's December Small Business Committee meeting. Please feel free to share this email with other members of the small business community.

The attached Bill is currently pending before the County Council. The Bill would make a series of amendments to the County Procurement Law. The Council's T & E Committee reviewed this Bill at a worksession on January 21. The Committee would like to hear additional feedback on the Bill from members of the County's local small business community. Specifically, the Committee was interested in hearing comments about the potential positive or negative impact on local small businesses if the County increases the maximum amount for a direct purchase from $5000 to $10,000 and increases the maximum amount of a contract awarded through an informal solicitation from $25,000 to $100,000. The Bill, at lines 13-19 reflects these changes for posting informal solicitations. The Procurement regulation that would follow the Bill would formally make this change.

The T & E Committee has scheduled a second worksession on Bill 45-09 for February 4 at 2 pm in the Council's 7th Floor Hearing Room. The Committee would appreciate receiving your comments in writing on or before Monday, February 1. You may send your comments by replying to this email message. You may, of course, attend the T & E worksession on February 4.

If you have any questions, please do not hesitate to contact me.

Robert H. Drummer
Senior Legislative Attorney
Montgomery County Council
100 Maryland Ave.
Rockville, MD 20850
240-777-7895

Drummer, Bob

From: Nick Brown [Nick.Brown@affinity-networks.com]
Sent: Monday, February 01, 2010 5:30 PM
To: Drummer, Bob
Cc: Taylor, Kenneth; Dise, David E.
Subject: RE: Expedited Bill 45-09, Contracts and Procurement - Amendments

Hello Bob,

Thank you for taking the time to speak with me a short while ago, concerning my comments on the pending Bill. I appreciate you taking the time and your follow-up. As I shared with you on the telephone, I applaud the County for this effort. The increase in direct purchase from $5,000 to $10,000 and contract maximum for an informal solicitation from $25,000 to $100,000 is a tremendous win for the small businesses of the County.

I also believe that having this increase will create a more competitive environment, which is a positive, but could also possible generate some interests from the larger businesses; which may not be a positive for the smaller businesses. I don't believe that contracts should be awarded strictly based on the size of a company, but more so on the company's capabilities and ability to perform the work. But one inhibitor that I would like to caution on is that of the procurement process itself. What I mean by this is that most small businesses have very limited sales and marketing resources and therefore, one often find that the business owner is also the sales executive, the proposal writer, the researcher, the pricing analysts, etc. And on the contrary, a large business would typically have multiple teams, departments or divisions who would be involved in the solicitation response. So if the solicitation process is not streamlined, many small businesses are then faced with the challenge of wearing a thousand and one hats and the need to juggle all of them without incident. So when a solicitation comes out and if it requires us to jump through hoops just to respond, you often find that many small business owners will defer on responding, not because we do not have the capabilities to perform the work, but simply because we could not find enough time in the 24 hour day, to fulfill the enormous pre-procurement requirements.

So if we can also find a way to streamline the solicitation response process, that will aide us tremendously, and allow for a more level playing field; which I believe is one of the overall objectives.

Please let me know if you have any additional questions; I would be more than willing to discuss them with you further.

Thanks.

PLEASE NOTE: - We have recently moved our office. Please update my new telephone and fax numbers below.

Nick Brown
Affinity Network Solutions

www.affinity-networks.com
301-562-7840 - Main
240-292-1122 - Direct
888-856-2589 - eFax

Providing Quality IT Solutions to Growing Businesses!!!

From: Drummer, Bob [mailto:Bob.Drummer@montgomerycountymd.gov]
Sent: Tuesday, January 26, 2010 11:31 AM
To: Naomi@worksitehealthandsafety.com; nick.brown@affinity-networks.com; jachirico@chevychasebank.net; dcoffey@therrienwaddell.com; teddy@herronprinting.com; info@dja-inc.com; afraser@sandglass.com; lfadden@mcccmd.com; ggodwin@mcccmd.com; Sylvia@springboardtraining.com; skramer@kramerfirmllc.com; info@digitalindustry.com; lnowak@pdr-usa.net; solomon.raphael@prudential.com; bobrodman@aol.com; ssimon@mcccmd.com; judy.stephenson@officeproinc.com; david@membercar.com; rdyile@imageconsultinggroup.com
Cc: Dise, David E.; Taylor, Kenneth
Subject: Expedited Bill 45-09, Contracts and Procurement - Amendments

I am sending this request for comment on behalf of the Council's Transportation, Infrastructure, Energy, and Environment (T & E) Committee to each of you as an attendee of the County Chamber's December Small Business Committee meeting. Please feel free to share this email with other members of the small business community.

The attached Bill is currently pending before the County Council. The Bill would make a series of amendments to the County Procurement Law. The Council's T & E Committee reviewed this Bill at a worksession on January 21. The Committee would like to hear additional feedback on the Bill from members of the County's local small business community. Specifically, the Committee was interested in hearing comments about the potential positive or negative impact on local small businesses if the County increases the maximum amount for a direct purchase from $5000 to $10,000 and increases the maximum amount of a contract awarded through an informal solicitation from $25,000 to $100,000. The Bill, at lines 13-19 reflects these changes for posting informal solicitations. The Procurement regulation that would follow the Bill would formally make this change.

The T & E Committee has scheduled a second worksession on Bill 45-09 for February 4 at 2 pm in the Council's 7th Floor Hearing Room. The Committee would appreciate receiving your comments in writing on or before Monday, February 1. You may send your comments by replying to this email message. You may, of course, attend the T & E worksession on February 4.

If you have any questions, please do not hesitate to contact me.

Robert H. Drummer
Senior Legislative Attorney
Montgomery County Council
100 Maryland Ave.
Rockville, MD 20850
240-777-7895

Resolution No. _____
Introduced: _____
Adopted _____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: County Council

Subject: Executive Regulation 19-09, Procurement Regulations

Background

1. The Council enacted Expedited Bill 45-09, Contracts and Procurement – Amendments on __, effective April 1, 2010.
2. Executive Regulation 19-09 would amend the Procurement Regulations to implement changes to the Procurement Law made by Expedited Bill 45-09 and to generally amend the policies and procedures regulating the County procurement process.
3. On January 22, 2010, the County Council received Executive Regulation 19-09, Procurement Regulations from the Executive.
4. Notice of the proposed regulation was published in the October 2009 Montgomery County Register and no comments were received.
5. Under Method (1), a regulation is not adopted until the Council approves it. If approved, the resolution takes effect the day it is approved or a later date specified in the regulation.
6. The Transportation, Infrastructure, Energy & Environment Committee reviewed Executive Regulation 19-09 on February 4, 2010. The Committee recommended approval of Executive Regulation 19-09.

Action

The County Council for Montgomery County, Maryland, approves the following resolution:

Executive Regulation 19-09, Procurement Regulations, is approved and takes effect on April 1, 2010.

This is a correct copy of Council action.

_____
Linda M. Lauer, Clerk of the Council