AGENDA ITEM 9
January 19, 2010
Public Hearing

MEMORANDUM

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney

SUBJECT: **Public Hearing**: Expedited Bill 45-09, Contracts and Procurement - Amendments

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 Transportation, Infrastructure, Energy, and Environment Committee worksession is scheduled for January 21 at 2 p.m.

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.

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Expedited Bill No. 45-09
Concerning: Contracts and Procurement - Amendments
Revised: December 18, 2009 Draft No. 4
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 (b)(2) to
60 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) must specify the wage the organization intends
75 to pay to those employees who will perform direct, measurable
76 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) when compared to a bid or proposal
82 submitted by another organization that is also exempt from
83 coverage under subsection (b)(4).
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] <u>Reserved</u>.**
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

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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 KMB

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