

MEMORANDUM

May 13, 2016

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney



SUBJECT: **Introduction:** Bill 20-16, Purchases from Minority Owned Businesses – Enforcement of Subcontracting Plan - Request for Proposals - Amendments

Bill 20-16, Purchases from Minority Owned Businesses – Enforcement of Subcontracting Plan – Request for Proposals - Amendments, sponsored by Lead Sponsor Councilmember Rice and Co-Sponsor Councilmember Leventhal, is scheduled to be introduced on May 17, 2016. A public hearing is tentatively scheduled for June 21, at 1:30 p.m.

Background

Bill 20-16 would clarify the method of awarding points for an evaluation factor in a request for proposals to increase the participation of minority owned firms in certain procurement contracts and require a liquidated damages clause for failing to comply with a minority owned business subcontracting plan.

Bill 48-14, Purchases from Minority Owned Businesses – Procedures – Request for Proposals, was enacted on April 14, 2015 and signed into law on April 22, 2015. Bill 48-14 authorized the addition of an evaluation factor in a request for proposals to increase the participation of minority owned firms in certain procurement contracts. The Director of the Office of Procurement is authorized to establish an evaluation factor in a request for proposals that would award additional points for a proposal from:

- (1) a contractor for whom a goal has been set under the MFD program; and
- (2) a contractor for whom a goal has not been set who proposes to exceed the minority owned business procurement subcontracting goal established for the contract.

The implementation of Bill 48-14 by the Executive has resulted in situations where a non-MFD prime contractor who agrees to subcontract more than the minimum MFD subcontracting goal can earn more points under this evaluation factor than an MFD prime contractor. This interpretation of the law by the Executive conflicts with the underlying purpose of Bill 48-14 – to increase the number of MFD primes awarded these contracts. Bill 20-16 would clarify the intent of this provision by requiring an MFD prime to be awarded the maximum number of points for this evaluation factor and a non-MFD prime who agrees to subcontract more than the minimum MFD subcontracting goal less than the maximum points.

Bill 20-16 would also require a contract with an MFD subcontracting goal to also include a liquidated damages clause for a contractor who fails to comply with an approved MFD subcontracting plan without a waiver. Under current law, a liquidated damages clause is optional.

The Purpose of Bill 48-14

Montgomery County has operated a voluntary affirmative action plan in its procurement policies based upon the race and gender of the owners of the business for more than 20 years (MFD Program). During this time, the MFD Program has included a requirement that a prime contractor on certain County contracts subcontract a certain percentage of the work to MFD firms. Since the United States Supreme Court decided *City of Richmond v. Croson*, 488 US 469 (1989), a state or local government preference in contracting based upon race or gender must satisfy the Court's *strict scrutiny* test to survive a challenge under the Equal Protection Clause of the 14th Amendment. Under the strict scrutiny test, the government must show that the affirmative action program is based upon a compelling governmental interest and is narrowly tailored to achieve this interest. Eliminating the effects of past discrimination based upon race and gender in government contracting is a compelling governmental interest.

In May 2013, the County hired Giffin & Strong, PC (GSPC) to conduct a comprehensive disparity study. The goal of the study was to determine if there exists a statistically significant disparity between the number of available MFD firms in the relevant market and the number of MFD firms that have received work on County contracts. GSPC conducted a quantitative analysis of the County's contracting history between July 1, 2007 and June 30, 2012. This analysis started with a determination of the relevant geographic market area for each of the 4 categories of procurement contracts - Construction, Professional Services, Services, and Goods. GSPC concluded that the relevant market was the geographic area where 75-85% of the firms contracting with the County are located. Within each relevant market, GSPC compared the percentage of firms in each race, ethnicity, gender, and disability group that are qualified, willing and able to perform services used by the County with the percentage of dollars spent by the County on firms in each MFD group. GSPC used this analysis to determine if each MFD group was underutilized or overutilized in each relevant market. GSPC looked at both prime contractor utilization and subcontractor utilization.

GSPC further analyzed the results to determine if the underutilization observed was statistically significant and if the underutilization could be attributed to the MFD status of the firms through both a regression analysis that controlled for other possible explanations, such as business size or experience, and anecdotal evidence. The complete report can be found at: <http://www.montgomerycountymd.gov/cat/services/disparitystudy.html>.

GSPC found a statistically significant underutilization of some MFD groups in each procurement category that can be attributed to discrimination in the marketplace. Although GSPC did not find a statistically significant underutilization for all MFD groups in each category, they did find that African American owned firms were underutilized in each procurement category each year of the study. GSPC concluded that the "evidence suggests that absent affirmative measures the County would be a passive participant in a pattern of exclusion of MFD firms." See Report, page 235.

The principal component of the County's MFD Program for the past 20 years has been a subcontracting requirement. The County operates a Local Small Business Reserve Program that results in awards of prime contracts to local small businesses¹, but the MFD program has concentrated on mandatory subcontracting. DGS found that in FY14, MFD firms submitted only 32% of the bids, but received an award 57% of the time they bid. In contrast, non-MFD firms submitted 68% of the bids, but received an award only 42% of the time they bid. Here are the FY14 statistics from DGS:

FY14 prime minority contractors responses and awards

| | # of bids/proposals submitted | % of bids/proposals submitted | # of Awards | % of awards resulting from submitted |
|---------------------------|-------------------------------|-------------------------------|-------------|--------------------------------------|
| Non-MFD | 208 | 68% (208/305) | 88 | 42% (88/208) |
| African American | 25 | 8% | 7 | 28% |
| Hispanic American | 28 | 9% | 19 | 68% |
| Asian American | 8 | 3% | 5 | 63% |
| Native American | 0 | 0% | 0 | 0% |
| Female | 27 | 9% | 16 | 59% |
| Persons with Disabilities | 9 | 3% | 4 | 44% |
| Total MFD | 97 | 32% | 51 | 57% (51/97) |
| Total | 305 | 100% | 139 | 47% |

Therefore, part of the remedy for the statistical underutilization may be increasing the number of MFD firms that bid on County contracts. Bill 48-14 was enacted as an additional tool that could be used to directly increase the number of MFD firms bidding and ultimately winning awards of County contracts.

This packet contains:

Bill 20-16

Legislative Request Report

Circle #

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¹ Many local small businesses are also MFD firms. A small business reserve program based only on the size of the firm is often considered a race and gender neutral program that can increase the utilization of MFD businesses without satisfying the strict scrutiny test.

Bill No. 20-16
Concerning: Purchases from Minority Owned Businesses – Enforcement of Subcontracting Plan - Request for Proposals - Amendments
Revised: May 12, 2016 Draft No. 2
Introduced: May 17, 2016
Enacted: November 17, 2017
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Councilmember Rice
Co-Sponsor: Councilmember Leventhal

AN ACT to:

- (1) clarify the method of awarding points for an evaluation factor in a request for proposals to increase the participation of minority owned firms in certain procurement contracts;
- (2) require a liquidated damages clause for failing to comply with an approved minority owned subcontracting plan; and
- (3) generally amend the County's minority owned business purchasing program.

By amending

Montgomery County Code
Chapter 11B, Contracts and Procurement
Section 11B-60

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

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

1 **Sec. 1. Section 11B-60 is amended as follows:**

2 **11B-60. Procedures.**

3 (a) By September 30 of each year, the Chief Administrative Officer must set
4 for the following calendar year percentage goals of the dollar value of
5 purchases subject to this Article for each socially or economically
6 disadvantaged group. The goals must correspond to the availability of
7 that group by source selection method and purchasing category in the
8 relevant geographic market area as determined by the most recent report
9 that the County Executive must submit to the County Council under
10 Section 11B-61(b) to perform work under County contracts. The Chief
11 Administrative Officer must set separate goals for each socially or
12 economically disadvantaged group in the County's purchases of goods,
13 construction, professional services, and other services. The Chief
14 Administrative Officer must not set goals for a socially or economically
15 disadvantaged group unless the Chief Administrative Officer determines
16 that the value of purchases made during the previous fiscal year from that
17 group in each category of purchases under a particular source selection
18 method, compared with the availability of that group to perform work in
19 that category, shows a significant under-utilization of the group.

20 (b) The Chief Administrative Officer must adopt procedures to certify and
21 decertify minority owned businesses.

22 (c) The Office of Procurement must publicly notify businesses of prospective
23 procurement opportunities.

24 (d) For those procurements where a goal has been set under subsection (a),
25 the Office of Procurement must encourage minority owned business
26 participation in procurement. These activities should include:

- 27 (1) distribution to potential contractors for whom a goal has not been
28 set of a list of potential minority owned business contractors for
29 whom a goal has been set with a requirement that one or more be
30 contacted if any work subject to a goal is being subcontracted;
- 31 (2) a provision in all solicitations for procurements in excess of
32 \$50,000 that requires, subject to the waiver provisions of
33 subsection (h), businesses for whom a goal has not been set acting
34 as prime contractors to subcontract to minority owned businesses
35 for whom a goal has been set a percentage of the total dollar value
36 of the contract that is consistent with the numerical goals
37 established under subsection (a);
- 38 (3) a requirement that a contractor for whom a goal has not been set:
- 39 (A) agree to a plan showing how the contractor proposes to meet
40 its minority owned business procurement subcontracting
41 goal; and
- 42 (B) identify, before a notice to proceed is issued or performance
43 of a contract begins, whichever occurs first, each minority
44 owned business that the contractor intends to subcontract
45 with and the projected dollar amount of each subcontract,
46 and promptly notify the using department of any change in
47 either item;
- 48 (4) contract requirements that minority owned business participation
49 goals be maintained by prime contractors throughout the life of the
50 contract, including modifications and renewals, subject to the
51 waiver provisions of subsection (h). Contract requirements:
- 52 (A) may include obligating contractors subject to the minority
53 owned business procurement goals to provide in each

54 subcontract with a minority owned business a provision
 55 requiring the use of binding arbitration to resolve disputes
 56 between the contractor and the minority owned business
 57 subcontractor; and

58 (B) must make failure to submit documentation showing
 59 compliance with a minority owned business subcontracting
 60 plan under paragraph (3) grounds for withholding any
 61 remaining payment [or] and imposing liquidated damages
 62 unless failure to comply with the plan is the result of an
 63 arbitration decision under subparagraph (A) or a waiver
 64 granted under subsection (h). Liquidated damages under
 65 this provision must equal the difference between all
 66 amounts the contractor has agreed under its plan to pay
 67 minority owned business subcontractors and all amounts
 68 actually paid minority owned business subcontractors under
 69 the contract, considering any relevant waiver or arbitrator's
 70 decision. Failure to show compliance with a minority
 71 owned business subcontracting plan must also result in
 72 finding the contractor non-responsible for purposes of
 73 future procurements with the County during the next 3
 74 years; and

75 (5) an evaluation factor with a value of no more than 10% of the total
 76 available points in a request for proposals issued under Section
 77 11B-10 awarding [additional points for a proposal from]:

78 (A) the maximum points for a contractor for whom a goal has
 79 been set under subsection (a); and

80 (B) less than the maximum points for a contractor for whom a
81 goal has not been set who proposes to exceed the minority
82 owned business procurement subcontracting goal
83 established for the contract.

84 * * *

85 **Sec. 2. Transition.**

86 The amendments in Section 1 apply to any contract awarded after the date this
87 Act takes effect.

88 *Approved:*

89

Nancy Floreen, President, County Council

Date

90 *Approved:*

91

Isiah Leggett, County Executive

Date

92 *This is a correct copy of Council action.*

93

Linda M. Lauer, Clerk of the Council

Date



LEGISLATIVE REQUEST REPORT

Bill 20-16

Purchases from Minority Owned Businesses – Enforcement of Subcontracting Plan - Request for Proposals - Amendments

DESCRIPTION: Bill 20-16 would clarify the method of awarding points for an evaluation factor in a request for proposals to increase the participation of minority owned firms in certain procurement contracts and require a liquidated damages clause for failing to comply with a minority owned business subcontracting plan.

PROBLEM: The implementation of Bill 48-14 by the Executive has resulted in situations where a non-MFD prime contractor who agrees to subcontract more than the minimum MFD subcontracting goal can earn more points under this evaluation factor than an MFD prime contractor. This interpretation of the law by the Executive conflicts with the underlying purpose of Bill 48-14 – to increase the number of MFD primes awarded these contracts.

GOALS AND OBJECTIVES: The goal is to increase the number of contracts awarded to MFD primes to remedy the effects of past discrimination.

COORDINATION: Procurement, County Attorney

FISCAL IMPACT: To be requested.

ECONOMIC IMPACT: To be requested.

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: To be researched.

SOURCE OF INFORMATION: Robert H. Drummer, Senior Legislative Attorney

APPLICATION WITHIN MUNICIPALITIES: Not applicable.

PENALTIES: Contractual penalties.