

MEMORANDUM

June 9, 2011

TO: Government Operations and Fiscal Policy Committee

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Worksession:** Bill 9-11, Contracts and Procurement – Minority Owned Businesses - Amendments

Bill 9-11, Contracts and Procurement – Minority Owned Businesses - Amendments, sponsored by the Council President at the request of the County Executive, was introduced on April 5, 2011. A public hearing was held on April 26.

Background

The Minority, Female, and Disabled Owned Businesses (MFD) Program is a remedial program designed to eliminate discrimination against minority-owned businesses. The program is operated by the Office of Business Relations and Compliance in the Department of General Services. The Fiscal Year 2010 Annual Report provides the statistical breakdown of contract awards to businesses owned by minority, female, and disabled persons. The report is available at <http://www.montgomerycountymd.gov/content/DGS/Dir/OBRC/Resources/MFD/MFDAnnualFY10.pdf>.

The goal of the program is to award an appropriate percentage of the dollar value of County contracts to minority-owned businesses in proportion to their availability to perform work under County contracts. The Chief Administrative Officer must annually set percentage goals of the dollar value of eligible contracts for certified minority-owned businesses. The Office of Procurement must encourage participation by minority-owned businesses in County contracts by outreach and by setting appropriate subcontracting goals for certified minority-owned businesses. The Director of the Department of General Services may waive minority-owned business participation on a specific contract under appropriate circumstances.

County Code §11B-61 requires the Executive to submit a report to the Council by July 1, 2012 evaluating the need to continue the program. Bill 9-11 would extend the deadline for submission of this report by the Executive to July 1, 2014. The Bill would also extend the sunset date for the program from December 31, 2012 to December 31, 2014.

Public Hearing

There were no speakers at the April 26, 2011 public hearing.

Issues

1. How does the MFD program operate?

Eligible contracts valued at \$50,000 or more are subject to the MFD program.¹ Solicitations for eligible contracts require the contractor to subcontract a portion of the work to one or more certified minority or women-owned businesses (MFD firms). MFD firms must be 51% owned, controlled, and managed by one or more members of a socially or economically disadvantaged minority group. County Code §11B-58(c) incorporates the definition of “socially or economically disadvantaged group” from the State procurement law. African Americans, Hispanic Americans, Native Americans, Asian Americans, women, and mentally or physically disabled persons are considered socially or economically disadvantaged minority groups. MFD firms must be certified by the Maryland Department of Transportation to be eligible to participate.

The County MFD program is administered by the Office of Business Relations and Compliance (OBRC) of the Department of General Services (DGS). Each prospective successful contractor must meet with OBRC and provide a subcontracting plan listing MFD firms that the contractor plans to use, along with the type of work and value of work to be performed. The contractor may ask the Director of DGS to grant a full or partial waiver of the MFD subcontracting requirement for good cause. The dollar value of eligible contracts receiving a waiver in FY10 was \$45,773,895. A contractor must document compliance with its MFD subcontracting plan before receiving final payment. A contractor may modify its MFD plan only after approval by the Director of DGS. The dollar value of contracts awarded to MFD firms in FY10 was \$90,735,536 or 15.6% of the \$581,711,209 subject to MFD goals. This represents an increase from the 12.56% of total dollars subject to MFD goals awarded to MFD firms in FY09.

2. What is the purpose of the Executive’s Report to the Council?

The MFD Program authorizes a preference for certain minority and women-owned businesses, based on race and gender of the owners of the business as a remedy for the effects of past discrimination. The United States Supreme Court, in *City of Richmond v. J.A. Croson Co.*, 488 US 469 (1989), held that a government must demonstrate that a race conscious remedy for past discrimination against minority-owned businesses is based on a compelling state interest and is narrowly tailored to achieve this compelling state interest. Under *Croson* and the numerous decisions following it, a government has a compelling state interest in providing a remedy for discrimination if it can show evidence of discrimination. In other words, a remedy may only be established if there is evidence of a problem. If there is evidence of discrimination, the government must show that the program is narrowly tailored to remedy the discrimination without unnecessarily burdening the rights of non-minority businesses. Finally, the remedy must be used only until there is no longer evidence of discrimination.

¹ Code §11B-59(b) exempts Council grants, utilities, and contracts with government agencies from the MFD Program.

Evidence of discrimination against minority or women-owned businesses can be either statistical or anecdotal. A significant statistical disparity between the number of qualified minority and women-owned businesses and the number of such businesses qualified and available to perform the work required can be used to show discrimination. Underutilization occurs when the percent of contracts awarded to minority and women-owned businesses is significantly less than the percent of minority and women-owned businesses qualified and available in the relevant labor market. Overutilization is just the opposite. A disparity study would conduct this type of statistical analysis for each category of minority or women-owned business for each type of contract. Anecdotal evidence of discrimination can be used to supplement statistical evidence, but is usually insufficient by itself.

The Executive's report to the Council required by Code §11B-61(b) must evaluate "the need to extend the minority-owned business purchasing program." This evaluation must include a review of the evidence of discrimination affecting minority and women-owned businesses and whether the MFD program is a narrowly tailored remedy for the discrimination found. Since the MFD program must be a temporary remedy for discrimination, the law sunsets on December 31, 2012 unless the Council determines that the MFD program is still necessary to remedy the effects of past discrimination. The Executive's disparity report is designed to assist the Council in making this decision.

3. What is the cost to prepare a disparity report?

The County retained the law firm of Griffin & Strong, P.C. (G & S) to conduct its most recent disparity study in 2005. G & S found statistically significant underutilization for some groups on some categories of contracts coupled with overutilization for some groups in the same category of contracts. The G & S Summary of Disparity Analysis Findings is at ©5-10. The cost to retain a consultant to complete an updated disparity report is estimated to be \$500,000 to \$600,000. It would require 12 to 18 months to issue a request for proposals (RFP), select a consultant, and complete the disparity study. The County Attorney's Office (OCA) is responsible for hiring and overseeing contractors to conduct a disparity study. The approved FY12 Budget does not contain an appropriation for this study. **Council staff recommendation:** approve the Bill as introduced.

This packet contains:	<u>Circle #</u>
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Bill No. 9-11
Concerning: Contracts and Procurement
- Minority Owned Businesses -
Amendments
Revised: March 30, 2011 Draft No. 1
Introduced: April 5, 2011
Expires: October 5, 2012
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: December 31, 2014
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the Request of the County Executive

AN ACT to:

- 1) extend the deadline for submission to the Council by the Executive of a report that evaluates the minority owned business purchasing program; and
- 2) extend the sunset date for the County's minority owned business purchasing program.

By amending

Montgomery County Code
Chapter 11B, Contracts and Procurement
Sections 11B-61 and 11B-64

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:

LEGISLATIVE REQUEST REPORT

Bill 9 -11

Contracts and Procurement – Minority Owned Businesses - Amendments

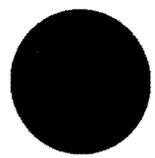
- DESCRIPTION:** This Bill would extend the time the County Executive has to submit a report evaluating the need to continue the minority owned business purchasing program. In addition, the Bill extends the sunset date for the minority owned business purchasing program.
- PROBLEM:** Additional time is required for the County Executive to submit a report to the Council evaluating the need to continue the minority owned business purchasing program.
- GOALS AND OBJECTIVES:** To extend the time the County Executive has to submit a report to the County Council evaluating the need to continue the minority owned business purchasing program and to extend the sunset date for the minority owned business purchasing program.
- COORDINATION:** Department of General Services and the Office of the County Attorney.
- FISCAL IMPACT:** To be requested.
- ECONOMIC IMPACT:** None expected.
- EVALUATION:** Subject to the general oversight of the County Executive and the County Council.
- EXPERIENCE ELSEWHERE:** Not applicable.
- SOURCE OF INFORMATION:** Marc P. Hansen, County Attorney.
- APPLICATION WITHIN MUNICIPALITIES:** None.
- PENALTIES:** None.

BILL



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OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

MEMORANDUM

March 15, 2011

Isiah Leggett
County Executive

RECEIVED
MONTGOMERY COUNTY
COMMUNITY

2011 MAR 16 PM 12:33

TO: Valerie Ervin, President
Montgomery County Council

FROM: Isiah Leggett, County Executive 

SUBJECT: Proposed Legislation – Minority Owned Business Purchasing Program

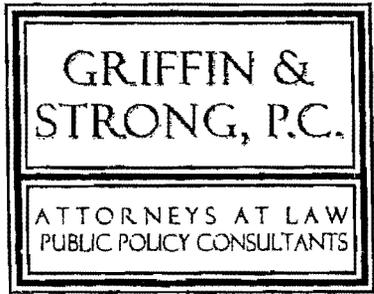
I am attaching for the Council's consideration a bill that would extend the time the County Executive has to submit a report evaluating the need to extend the minority owned business purchasing program. In addition, the bill extends the sunset date for the minority owned business purchasing program. This bill is needed because additional time is required for the County Executive to submit a report to the Council evaluating the need to extend the minority owned business purchasing program.

I am also attaching a Legislative Request Report and Fiscal and Economic Impact Statement for the bill. Thank you for your prompt consideration of this legislation. I look forward to working with the Council as it considers this proposal.

IL:tjs

Attachments

cc: Joseph Beach, Director, Office of Management and Budget
 Kathleen Boucher, Assistant Chief Administrative Officer
 David Dise, Director, Department of General Services
 Marc Hansen, County Attorney



MONTGOMERY COUNTY, MARYLAND

DISPARITY STUDY

EXECUTIVE SUMMARY

APRIL 28, 2005

235 PEACHTREE STREET, N.E. • SUITE 400 • ATLANTA, GEORGIA 30303-1400
404.584.9777 • 404.584.9730 • FACSIMILE

B. SUMMARY OF DISPARITY ANALYSIS FINDINGS

The findings revealed the existence of disparities between utilization and availability for the MFD groups analyzed for each procurement category and for each source selection method included in the disparity study. The disparity analysis was conducted for the total utilization (prime contracting and subcontracting combined). A listing of *underutilized* MFDs, by procurement category and source selection method, is provided below.

1. IFB Contracts

The minorities listed in the chart below for each business category were *under-utilized* without regard to statistical significance. For details regarding *statistically significant under-utilization or over utilization*, please refer to the summary chart.

Construction	Goods	Professional Services	Other Services
African American Asian American	Asian American Hispanic American	African American Asian American	African American Asian American Native American

Summary of IFB Contracts Disparity Indices

MFD Group	Construction	Goods	Professional Services	Other Services
African American	0.42*	16.52**	0.26	0.53*
Asian American	0.60*	0.53	0.00	0.82
Hispanic American	2.92**	0.50	-	4.17**
Native American	-	-	-	0.52*
Female	3.71**	4.23**	22.92**	3.11**
Disabled	-	-	-	1.39**
All Groups	1.79**	3.97**	47.38**	2.25**

(*) Indicates statistically significant under-utilization

(**) Indicates statistically significant over-utilization

(-) Indicates no utilization and no availability

Note: The statistical test was not performed for Native American and Disabled in Construction, Goods (Utilization and Availability are both zero and division of zero by zero is not defined). The test was not performed for Hispanic American, Native American and Disabled in Professional Services for the same reason.

We could not tell whether or not the under utilization of Asian American in Professional Services was significant or not because the number of contract was zero (no utilization) and technically, the test cannot be performed.

2. RFP Contracts

The minorities listed in the chart below for each business category were *under-utilized* without regard to statistical significance. For details regarding *statistically significant under-utilization or over utilization*, please refer to the summary chart.

Construction	Goods	Professional Services	Other Services
African American Female	Female	African American Asian American Hispanic American Native American Female	Disabled

Summary of RFP Contracts Disparity Indices

MFD Group	Construction	Goods	Professional Services	Other Services
African American	0.002*	2.48**	0.66*	2.59**
Asian American	1.13	4.10**	0.85*	1.50**
Hispanic American	-	2.41**	0.45*	1.52**
Native American	-	-	0.12*	-
Female	0.05*	0.69	0.56*	3.35**
Disabled	-	-	1.57**	0.22*
All Groups	0.31*	1.82**	0.70*	2.21**

(*) Indicates statistically significant under-utilization

(**) Indicates statistically significant over-utilization

(-) Indicates no utilization and no availability

Note: Whenever the utilization and the availability are equal to zero, the disparity index is not computed (DI is designated by a dash) because the division of zero by zero is not defined, hence the statistical test is not performed.

3. Mini-contracts

The minorities listed in this chart for each business category were *under-utilized* without regard to statistical significance. For details regarding *statistically significant under-utilization* or *over utilization*, please refer to the summary chart.

Professional Services	Other Services
African American	Asian American
Asian American	Hispanic American
Hispanic American	Native American
Native American	Female
Female	

Summary of Mini-contracts Disparity Indices

MFD Group	Professional Services	Other Services
African American	0.15*	2.69**
Asian American	0.70*	0.43*
Hispanic American	0.70*	0.44*
Native American	0.00	0.00
Female	0.00	0.00
Disabled	15.36**	9.25**
All Groups	0.58*	1.49**

(*) Indicates statistically significant under-utilization

(**) Indicates statistically significant over-utilization

(-) Indicates no utilization and no availability

Note: We could not tell whether or not the under utilization of Native American and Female in Professional Services and Other Services was significant or not because the number of contract was zero (no utilization) and technically, the test cannot be performed.

The number of Construction and Goods awards was too small for this source selection method to warrant a meaningful analysis.

4. Small Purchase Contracts

The minorities listed in this chart for each business category were *under-utilized* without regard to statistical significance. For details regarding *statistically significant under-utilization or over utilization*, please refer to the summary chart.

Goods	Other Services
African American	African American
Asian American	Asian American
Hispanic American	Native American
Native American	
Disabled	

Summary of Small Purchase Disparity Indices

MFD Group	Goods	Other Services
African American	0.00	0.00
Asian American	0.51*	0.00
Hispanic American	0.00	3.90**
Native American	0.00	0.00
Female	2.15**	1.83**
Disabled	0.00	5.05**
All Groups	0.18*	1.10

(*) Indicates statistically significant under-utilization

(**) Indicates statistically significant over-utilization

(-) Indicates no utilization and no availability

Note: The disparity index for all groups in Other Services indicate almost parity

We could not tell whether or not the under utilization of African American and Asian American in Other Services, and (African American, Hispanic American, Native American and Disabled in Goods) was significant or not, because the number of contract was zero (no utilization) and technically, the test cannot be performed.

The number of Construction and Professional Services awards was too small for this source selection method to warrant a meaningful analysis.

5. Direct Purchases Contracts

The minorities listed in this chart for each business category were *under-utilized* without regard to statistical significance. For details regarding *statistically significant under-utilization* or *over utilization*, please refer to the summary chart.

Construction	Goods	Professional Services	Other Services
African American	African American	African American	African American
Asian American	Asian American	Asian American	Asian American
Hispanic American	Hispanic American	Hispanic American	Hispanic American
Native American	Native American	Native American	Native American
Female	Female	Female	
Disabled	Disabled		

Summary of Direct Purchases Disparity Indices

MFD Group	Construction	Goods	Professional Services	Other Services
African American	0.03*	0.11*	0.19*	0.09*
Asian American	0.07*	0.15*	0.39*	0.47*
Hispanic American	0.63*	0.71*	0.33*	0.58*
Native American	0.00	0.00	0.00	0.06*
Female	0.40*	0.83*	0.67*	0.94
Disabled	0.18*	0.31*	1.39**	2.30**
All Groups	0.26*	0.38*	0.39*	0.48*

(*) Indicates statistically significant under-utilization

(**) Indicates statistically significant over-utilization

(-) Indicates no utilization and no availability

Note: We could not tell whether or not the under utilization of Native American in Construction, Goods and Professional Services was significant or not, because the number of contract was zero (no utilization) and technically, the test cannot be performed.

The Female disparity index (0.94) indicates that it is "getting close to parity" and we choose not to perform the statistical test.