AN EXPEDITED ACT to:

(1) extend the sunset date for the minority owned business purchasing program;
(2) narrowly tailor the County's minority owned business purchasing program to ensure continued compliance with constitutional requirements; and
(3) generally amend the County's minority owned business purchasing program.

By amending
Montgomery County Code
Chapter 11B, Contracts and Procurement
Sections 11B-57 through 11B-64

The County Council for Montgomery County, Maryland approves the following Act:
Sec. 1. Sections 11B-57 through 11B-64 of the County Code are amended as follows:

11B-57. Legislative findings and policy.

(a) Minority owned businesses have experienced the effects of discrimination in the awarding of County contracts and subcontracts. The effect has been to:

(1) make a smaller percentage of contract and subcontract awards to minority owned businesses than the percentage of qualified minority owned businesses in the [Washington, D.C. - Baltimore Consolidated Metropolitan Statistical Area] County’s relevant geographic market area would indicate as reasonable;

(2) impede the economic development and expansion of minority owned businesses in the [Washington, D.C. - Baltimore Consolidated Metropolitan Statistical Area] County’s relevant geographic market area;

(3) impair the competitive position of minority owned businesses;

and

(4) generally harm minority owned businesses.
(b) Adoption of the *minority owned business* purchasing program is intended to remedy the effects of discrimination on *minority owned businesses*.

(c) A goal of awarding \[a\] 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 is a reasonable and appropriate means to remedy discrimination against *minority owned businesses*.

[(d) The County draws a majority of its contractors from the Washington, D.C. - Baltimore Consolidated Metropolitan Statistical Area.]

[(e)](d) The County should actively recruit all *minority owned businesses* to provide goods, construction, and services to the County. To help achieve this goal, the County should:

(1) notify [minority owned] all businesses of procurement opportunities;

(2) provide information to [minority] all business owners about the procurement system;

(3) provide referrals for technical assistance, sureties, and financing;
(4) review procurement procedures to remove artificial barriers to
competition [by minority owned businesses].

[(f)](e) A four-year period is a reasonable time to continue the minority owned
business purchasing program before evaluating it.

[(g)](f) This article does not give any person, including a minority owned
business, any right or status, including standing, to challenge the award
of a contract or subcontract under the County procurement system. The
provisions of this article are enforceable only through the oversight
function of the Chief Administrative Officer and the County Council.

11B-58. Definitions.

(a) Minority owned business means, unless the context indicates
otherwise, any legal entity that:

(1) Is a minority business enterprise as defined under the State
procurement law; and

(2) Does not exceed a ceiling set by regulation on the number and
value of contracts or subcontracts awarded during the first 5 years
after it is certified under this article, or during the next 3 years if
it did not exceed the ceiling during the first 5 years after it is
certified.
However, a not-for-profit entity organized to promote the interests of persons with a disability is a **minority owned business** only if at least 51 percent of the individuals used by the nonprofit entity to perform the services or manufacture the goods contracted for by the County are persons with a disability.

**(b)** **Relevant geographic market area** means the geographic market area identified by the County Executive in a report dated July 1, 2005 that evaluates the need to continue the program and is issued in accordance with Section 11B-61(b).

**[(b)](c)** **Socially or economically disadvantaged group** means a group expressly identified as eligible to control a minority business enterprise under the State procurement law. For purposes of this Article, disabled owned businesses and not-for-profit entities organized to promote the interests of persons with a disability are a single group.

**[(c)]** **Washington, D.C. - Baltimore Consolidated Metropolitan Statistical Area** means the metropolitan areas of Washington, D.C. and Baltimore as used in the Economic Census by the U.S. Department of Commerce, Bureau of the Census.]

**11B-59. Goals; applicability.**
(a) The Chief Administrative Officer must structure the County's purchasing program to attempt to achieve the goal so that the percentages of the dollar value of purchases identified in subsection (b) from minority owned businesses who have been discriminated against [is]are proportional to the availability of those businesses to perform work under County contracts in the [Washington, D.C. - Baltimore Consolidated Metropolitan Statistical Area] County's relevant geographic market area as determined by the most recent report that the County Executive must submit to the County Council under Section 11B-6Hb).

(b) The purchases subject to the minority owned business goals are any formal or informal procurement, including any contract modification or renewal, valued over $[3,000]$5,000.

(c) The minority owned business goals do[es] not apply to:

(1) grants that are appropriated by the County Council to specific grantees;

(2) utilities;

(3) intragovernmental procurements; or

(4) intergovernmental procurements, including a bridge contract, under Sections 11B-41 and 11B-42 if the Director determines in
writing that compliance with this [article] Article is impractical or is outweighed by the benefits to the County of entering into the intergovernmental procurement.

11B-60. Procedures.

(a) By September 30 of each year, the Chief Administrative Officer must set for the following calendar year [a] percentage goals of the dollar value of purchases subject to this Article for each socially or economically disadvantaged group. The goals must correspond to the availability of that group by source selection method and purchasing category in the [Washington D.C. - Baltimore Consolidated Metropolitan Statistical Area] relevant geographic market area as determined by the most recent report that the County Executive must submit to the County Council under Section 11B-61(b) to perform work under County contracts. The Chief Administrative Officer must set [a] separate goals for each socially or economically disadvantaged group in the County’s purchases of goods, construction, professional services, and other services. The Chief Administrative Officer must not set [a] goals for a socially or economically disadvantaged group unless the Chief Administrative Officer determines that the value of purchases made during the previous fiscal year from that group in each category of
purchases under a particular source selection method, compared with the availability of that group to perform work in that category, shows a significant under-utilization of the group.

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

(c) The Office of Procurement must publicly notify [minority owned] businesses of prospective procurement opportunities.

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

(1) distribution to [non-minority owned business] potential contractors for whom a goal has not been set of a list of potential minority owned business contractors for whom a goal has been set with a requirement that one or more be contacted if any work subject to a goal is being subcontracted;

(2) a provision in all solicitations for procurements in excess of $[65,000]50,000 that requires, subject to the waiver provisions of subsection (h), [non-minority owned] businesses for whom a goal has not been set acting as prime contractors to subcontract to
minority owned businesses for whom a goal has been set a percentage of the total dollar value of the contract that is consistent with the numerical goals established under [Section 11B-59] subsection (a);

(3) a requirement that a [non-minority owned business] contractor for whom a goal has not been set:

(A) agree to a plan showing how the contractor proposes to meet its minority owned business procurement subcontracting goal; and

(B) identify, before a notice to proceed is issued or performance of a contract begins, whichever occurs first, each minority owned business that the contractor intends to subcontract with and the projected dollar amount of each subcontract, and promptly notify the [contracting agency] using department of any change in either item; and

(4) contract requirements that minority owned business participation goals be maintained by prime contractors throughout the life of the contract, including modifications and renewals, subject to the waiver provisions of subsection (h).
(A) may include obligating contractors subject to the minority owned business procurement goals to provide in each subcontract with a minority owned business a provision requiring the use of binding arbitration to resolve disputes between the contractor and the minority owned business subcontractor; and

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

(e) The Office of Procurement must offer procurement system education and information to minority owned businesses for whom a goal has been set under subsection (a).

(f) The Office of Procurement must offer referrals to resources such as technical consultants, sureties, and financing sources.

(g) The Director must review procurement requirements to remove artificial barriers to competition [by minority owned businesses].

(h) The Director may waive, or exempt a business from, minority owned business contracting requirements under appropriate circumstances described in regulations.

(i) The Director may require each contractor and minority owned business that participates in the minority owned business purchasing program to provide information concerning utilization by the contractor of minority owned businesses in private and government contracts.
(j) The Chief Administrative Officer must ensure that all contract administrators receive appropriate guidance in implementing this article.

11B-61. Reports.

(a) The Chief Administrative Officer must report to the County Council, by September 30 of each year for the previous fiscal year:

* * *

(6) the percentage of availability that each socially or economically disadvantaged group represents in each category of purchases in the [Washington, D.C. - Baltimore Consolidated Metropolitan Statistical Area] County's relevant geographic market area;

* * *

(9) the total number and value of all procurements excluded from the minority owned business goals by [section]Section 11B-59(c);

* * *

(b) By July 1, [2005] 2009, the County Executive must submit a report to the County Council evaluating the need to extend the minority owned business purchasing program.

* * *

11B-63. Penalty.
A violation of this Section:

(2) [disqualified] disqualifies the violator from doing business with the County for 3 years.

11B-64. Sunset date.

This Article is not effective after December 31, [2005] 2009.

Sec. 2. Expedited Effective Date.

The Council declares that this legislation is necessary for the immediate protection of the public interest. This Act takes effect on the date on which it becomes law.

Approved:

George L. Leventhal, President, County Council

Date

Approved:

Douglas M. Duncan, County Executive

Date

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council

Date