

MEMORANDUM

October 3, 2014

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney



SUBJECT: **Public Hearing:** Expedited Bill 42-14, Contracts and Procurement – Minority-Owned Businesses – Sunset Date - Amendments

Expedited Bill 42-14, Contracts and Procurement – Minority-Owned Businesses – Sunset Date - Amendments, sponsored by the Council President at the request of the County Executive, was introduced on September 16, 2014. A Government Operations and Fiscal Policy Committee worksession was held on September 29. Action is tentatively scheduled for October 14.

Bill 42-14 would establish the deadline for submission to the Council by the Executive of a report that evaluates the minority owned business purchasing program. The Bill would also extend the sunset date for the program until December 31, 2019.

Background

The Supreme Court in *City of Richmond v. J. A. Croson Company*, 488 U.S. 469 (1989), established a framework for a local government to implement a program that provides a preference for minority owned businesses. The Court held that there must be substantial evidence of past or ongoing discrimination in order to show a compelling government interest to justify the program. The Program must be narrowly tailored to remedy the past or ongoing discrimination. For this reason, local governments that have this type of program must evaluate the continuing need for it every few years. The County Executive submitted a Disparity Study to the Council on July 1, 2014 prepared by Griffin and Strong that supports the continuation of the program.

2014 Disparity Study

In May 2013, the County retained Griffin & Strong, P.C. (GSPC) to conduct a comprehensive disparity study. GSPC examined and analyzed the procurement policies and practices of the County and its prime contractors regarding the use of Minority, Female, and Disabled owned businesses (MFD) on County contracts for goods and services. The goal was to determine if there was a statistically significant disparity between the number of MFD firms in the relevant market and the dollars awarded to MFD firms through County contracts. GSPC divided County contracts into 4 categories – Construction, Professional Services, Services, and Goods.

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. 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. A summary of the statistically significant underutilization found by GSPC is at ©9-10. The complete report can be found at: <http://www.montgomerycountymd.gov/cat/services/disparitystudy.html>.

GO Committee Worksession

The Committee discussed Expedited Bill 42-14 at a September 29 worksession. Councilmember Navarro suggested that the Council create 2 task forces, by resolution, to study the procurement system and the MFD/Local Small Business Reserve Program and make recommendations for improvements. Councilmember Navarro also moved to amend the Bill to reduce the extension of the MFD Program from 5 years to 1 year in order to permit the Council to consider possible amendments to the MFD and Procurement laws based upon the Task Force recommendations. See Councilmember Navarro's memorandum at ©11-12.

The Committee (3-0) approved the Navarro amendment to reduce the extension to 1 year along with 2 technical amendments subject to the upcoming public hearing.

Issues

1. How does the MFD program work?

Section 11B-60 provides:

- (a) By September 30 of each year, the Chief Administrative Officer must set for the following calendar year 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 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 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 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.

A prime contractor awarded a contract subject to the MFD program must subcontract a defined percentage of the work to an MFD firm. The prime contractor must use one or more MFD firms belonging to an MFD group for which the CAO has established a percentage goal for that year. For example, if the CAO determines that Hispanic-American firms were not underutilized in the past year, the CAO will not set a goal for Hispanic-American firms and a prime contractor will not get credit for using a Hispanic-American firm toward the MFD goal for that contract. The DGS Director may waive all or part of the MFD goals for a contract upon a finding that the prime contractor was unable to find sufficient MFD firms after making a good faith effort to do so.

2. Does the Disparity Study support the extension of the law?

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 Study, page 235.

The Disparity Study supports the extension of the MFD program because GSPC found a statistically significant underutilization due to the MFD status of the owner for some MFD groups in each procurement category. The MFD program requires the CAO to compare the prior year utilization for each MFD group in each procurement category each year with the availability found in the Study before setting a goal for an MFD group. **Committee recommendation (3-0):** subject to testimony at the public hearing, approve the extension of the program for one year.

3. Technical amendments.

(a) Relevant Geographic Market.

The definition of *relevant geographic market area* in the law refers to the 2005 Disparity Study. The definition should refer to the most recent Disparity Study, which is now the 2014 Disparity Study described above. **Committee recommendation (3-0):** amend the definition of relevant geographic market as follows:

11B-58. Definitions.

* * *

- (b) *Relevant geographic market area* means the geographic market area identified by the County Executive in [[a]] the most recent report [[dated July 1, 2005]] that

evaluates the need to continue the program and is issued in accordance with Section 11B-61(b).

(b) Time Period Between Evaluations.

Section 11B-57(e) states that a 4-year period is reasonable to continue the Program before evaluating it. This is inconsistent with the provision in the Bill that would require the next Disparity Study to be completed in 5 years. To be consistent, §11B-57(e) should be amended to require a 5-year period. **Committee recommendation (3-0):** approve the change in §11B-57(e) to a 5-year period. See line 5 at ©2.

This packet contains:

| | <u>Circle #</u> |
|--------------------------------------|-----------------|
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| Legislative Request Report | 3 |
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Expedited Bill No. 42-14
Concerning: Contracts and Procurement
- Minority-Owned Businesses -
Sunset Date - Amendments
Revised: October 1, 2014 Draft No. 2
Introduced: September 16, 2014
Expires: March 16, 2016
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: December 31, ~~[[2019]]2015~~
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) establish the deadline for submission to the Council by the Executive of a report that evaluates the minority owned business purchasing program;
- 2) extend the sunset date for the County's minority owned business purchasing program;
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, 11B-58, 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

Expedited Bill 42-14

Contracts and Procurement – Minority-Owned Businesses – Sunset Date - Amendments

DESCRIPTION: Establishes the deadline for submission to the County Council of a report that evaluates the minority owned business purchasing program and extends the sunset date for the program.

PROBLEM: The Supreme Court in *City of Richmond v. J. A. Croson Company*, 488 U.S. 469 (1989), established a framework for a local government to implement a program that provides a preference for minority owned businesses. According to the Court, there must be substantial evidence of past or ongoing discrimination in order to justify the program. For this reason, local governments that have this type of program must evaluate the continuing need for it every few years. The County Executive submitted a Disparity Study to the Council on July 1, 2014, that supports the continuation of the program.

GOALS AND OBJECTIVES: Fair opportunities for minority owned businesses to obtain County contracts and business.

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

FISCAL IMPACT: To be requested.

ECONOMIC IMPACT: To be requested.

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: Not applicable.

SOURCE OF INFORMATION: Marc P. Hansen, County Attorney
240-777-6700

APPLICATION WITHIN MUNICIPALITIES: Not applicable.

PENALTIES: Not Applicable.



OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

August 12, 2014

TO: Craig Rice, President
Montgomery County Council

FROM: Isiah Leggett, County Executive 

SUBJECT: Extension of Minority-Owned Business Purchasing Program

In accordance with Section 11B-61(b) of the County Code, I transmitted to the County Council the Montgomery County Disparity Study, which evaluated the need to extend Montgomery County's Minority-Owned Business Purchasing Program.

The Disparity Study concluded that Montgomery County has "made great efforts to establish a fine-tuned procurement process that is set up to provide equal access to all firms." Nevertheless, the Disparity Study concluded that there is a "significant basis for an inference of passive participation and discrimination and/or evidence of past discrimination against minority, female, and disabled-owned businesses in Montgomery County." Therefore, work remains to be done to eradicate the under-utilization of minority-owned businesses in Montgomery County's procurement program.

Consequently, I am transmitting to the Council legislation to extend the County's Minority-Owned Business Purchasing Program. In addition, I have asked Executive staff to review other recommendations made by Griffin & Strong, the consultants who prepared the study to increase the effectiveness of the County's Minority-Owned Business Purchasing Program.

I look forward to working with the Council to pass this important legislation

cc: Timothy Firestine, Chief Administrative Officer
Marc Hansen, County Attorney
David Dise, Director, Department of General Services
Bonnie Kirkland, Assistant Chief Administrative Officer

Fiscal Impact Statement

Bill ##, Contracts and Procurement – Minority-Owned Business - Amendments

1. Legislative Summary

The proposed legislation establishes the deadline of July 1, 2019, for submission to the County Council by the County Executive of a report that evaluates the minority-owned business purchasing program. The legislation would also extend the sunset date from December 31, 2004, to December 31, 2019, for the County's minority-owned business purchasing program.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

No revenues or expenditures are expected from the proposed legislation.

The Department of General Services does not require any additional resources to extend this program for another 5 years. The current cost of this program to the County is \$251,883 per year.

3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

See item #2.

4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.

The legislation does not affect retiree pension or group insurance costs.

5. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.

The legislation does not authorize future spending.

6. An estimate of the staff time needed to implement the bill.

Not applicable.

7. An explanation of how the addition of new staff responsibilities would affect other duties.

Not applicable.

8. An estimate of costs when an additional appropriation is needed.

Not applicable.

9. A description of any variable that could affect revenue and cost estimates.

Not applicable.

10. Ranges of revenue or expenditures that are uncertain or difficult to project.

Not applicable.

11. If a bill is likely to have no fiscal impact, why that is the case.

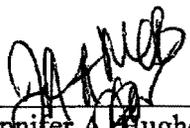
The Department of General Services does not require any additional resources to extend this program for another 5 years. The current cost of this program to the County is \$ 251,883 per year.

12. Other fiscal impacts or comments.

None

13. The following contributed to and concurred with this analysis:

Grace Denno, Office of Business Relations and Compliance, Department of General Services
Pam Jones, Office of Procurement, Department of General Services
Erika Lopez-Finn, Office of Management and Budget
Naeem Mia, Office of Management and Budget



Jennifer A. Hughes, Director
Office of Management and Budget

8/8/14

Date

Economic Impact Statement
Bill #-#, Contracts and Procurement – Minority-Owned Business - Amendments

Background:

This legislation would establish the deadline of July 1, 2019, for submission to the County Council by the County Executive of a report that evaluates the minority-owned business purchasing program. The legislation would also extend the sunset date from December 31, 2014, to December 31, 2019, for the County's minority-owned business purchasing program.

1. The sources of information, assumptions, and methodologies used.

Source of information is the Office of Business Relations and Compliance, Department of General Services. Information and data in the preparation of the economic impact statement come from various annual reports from the Office of Business Relations and Compliance.

2. A description of any variable that could affect the economic impact estimates.

The variables that could affect the economic impact estimates are the total revenues/dollars subject to the Minority, Female, and Disabled Person Owned Business Program (MFD) and the revenues/dollars spent to certified MFD contractors.

Based on data provided in the MFD annual reports from fiscal year 2011 to fiscal year 2013, the average total dollars subject to MFD requirements was slightly above \$746.5 million and the average total dollars for MFD procurement was slightly above \$144.7 million or 19.4 percent.

3. The Bill's positive or negative effect, if any on employment, spending, saving, investment, incomes, and property values in the County.

The extension of the minority-owned business purchasing program (MFD) would have a positive economic effect of business income to minority-owned businesses. Based on data for the past three fiscal years through FY2013, the average number of contractors was nearly 1,900 (including both prime and sub-contractors) with an average contract award over \$77,000 per contractor. The bill could also have an effect on employment by minority-owned contractors.

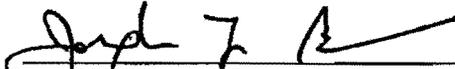
4. If a Bill is likely to have no economic impact, why is that the case?

The bill would have a positive economic impact on minority-owned businesses – see paragraph #3.

Economic Impact Statement

Bill #, Contracts and Procurement – Minority-Owned Business - Amendments

5. **The following contributed to or concurred with this analysis:** David Platt and Rob Hagedoorn, Finance; Grace Denno and Alvin Boss, Office of Business Relations and Compliance, DGS; Naeem Mia, Office of Management and Budget.



Joseph F. Beach, Director
Department of Finance

7-25-14
Date

II. SUMMARY OF FINDINGS

The Study found a statistically significant disparity between the number of available MFDs in the relevant markets in each work category throughout the term and the utilization, measured by dollars awarded by the County, of those same MFD groups. GSPC also determined that when the disparity was broken down by each race/gender/ethnicity group, on average, over the entire Study, the following significant underutilizations were found.

Table 1: Summary of Statistically Significant Underutilization in Prime Contracting

Montgomery County, Maryland
Disparity Study
(Over Entire Study Period – July 1, 2007 through June 30, 2012)
From P.O., DPO, and P-Card Purchases

Griffin & Strong, P.C. 2014

| Construction | Professional Services | Services | Goods |
|---|---|---|-------------------|
| African American | African American | African American | African American |
| Asian American | Asian American | Asian American (DPO and P-card purchases only) | Asian American |
| Hispanic American (DPO and P-card purchases only) | Hispanic American (DPO and P-card purchases only) | Hispanic American (DPO and P-card purchases only) | Hispanic American |
| Native American | Native American | Native American (DPO and P-card purchases only) | Native American |
| Female (PO and P-Card purchases only) | Female | Female | Female |
| Disabled | Disabled | Disabled (PO and P-card only) | Disabled |

With regard to subcontractors, GSPC found that the following MFD groups in the following business categories showed significant underutilization:

Table 2: Summary of Statistically Significant Underutilization in Subcontracting

Montgomery County, Maryland
Disparity Study
(Over Entire Study Period – July 1, 2007 through June 30, 2012)
From Prime Vendor Questionnaire

| <i>Construction</i> | <i>Professional Services</i> | <i>Services</i> | <i>Goods</i> |
|---------------------|------------------------------|-------------------|-------------------|
| African American | African American | African American | |
| Asian American | | Asian American | Asian American |
| Hispanic American | Hispanic American | Hispanic American | Hispanic American |
| Native American | Native American | Native American | Native American |
| Female | | | |
| Disabled | Disabled | Disabled | Disabled |

Griffin & Strong, P.C. 2014

GSPC then tested the disparities for likely cause through a regression analysis and determined that Montgomery County, Maryland may be an active or passive participant in past or present discrimination in its vendor marketplace. Notwithstanding this general finding, the County has made some improvements in the inclusion of MFDs in its procurement process since the last, 2005 Disparity Study and the enactment of the Local Small Business Reserve Program in all areas except Construction which decrease by a minimal .1%.

Table 3: Summary of MFD Prime Utilization Comparison Between 2001-03 and 2007-12

Montgomery County, Maryland
Disparity Study
From P.O.s

Griffin & Strong, P.C. 2014

| | 2001-2003 % | 2007-2012 % | % Change |
|-----------------------|------------------------|------------------------|---------------------|
| Construction | 26.11 | 26.01 | - .10 |
| Professional Services | 7.08 | 8.94 | +1.86 |
| Services | 19.61 | 31.95 | +12.34 ¹ |
| Goods | 6.19 | 7.13 | + .94 |

Detailed findings are included in Section VIII of this report.

¹ Substantial increase is primarily due to jump in Asian American utilization from .68 in 2001-3 to 14.69 in 2007-2012.



MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

NANCY NAVARRO
COUNCILMEMBER, DISTRICT 4
CHAIR, GOVERNMENT OPERATIONS & FISCAL POLICY COMMITTEE

MEMORANDUM

September 26, 2014

TO: Councilmembers

FROM: Nancy Navarro, Chair 
Government Operations & Fiscal Policy Committee

SUBJECT: Procurement Process & Disparity Study

On Monday, the Government Operations & Fiscal Policy Committee will discuss three items related to the County's procurement process. We will receive a briefing from the Office of Legislative Oversight (OLO) regarding a survey of businesses, hear from Griffin & Strong, P.C. and the County Attorney regarding the 2014 Disparity Study, and review legislation proposed by the County Executive to extend the sunset date of the Minority, Female, and Disabled-owned business program (MFD).

The overall theme of the OLO survey and Disparity Study is that the current procurement process is not working for businesses. In general, businesses feel the procurement process in Montgomery County is difficult to navigate, confusing, and lacks clear communication between the County and prospective bidders. In particular, minority, female, and disabled owned businesses are not bidding on contracts, in part, because they are not familiar with procurement opportunities with the County.

OLO offers three recommendations based on the survey findings:

1. Ask the County Executive to strengthen and expand current outreach efforts—particularly to Local Small Business Reserve Program (LSBRP) and MFD businesses—to increase businesses' awareness of County contracting opportunities.
2. Ask the County Executive to develop a consistent set of follow-up procures for all bid submissions for County contracts to inform businesses about the status of their bid.

3. Ask the County Executive to closely examine the promotion and administration of the Minority, Female, and Disabled-Owned Program.

Based on the 2014 Disparity Study, the County Executive is recommending Expedited Bill 42-14. This legislation would extend the sunset of the current MFD program until December 31, 2019 and require the County Executive to submit a new disparity study to the Council by July 1, 2019.

While I agree that the Council should extend the current MFD program temporarily so it does not expire at the end of the year, I strongly oppose simply maintaining the status quo. Montgomery County has had an MFD program for more than three decades, yet the 2014 Disparity Study found “statistically significant underutilization of some MFD groups in each procurement category that can be attributed to discrimination in the marketplace.”¹

In light of the OLO survey and 2014 Disparity Study, I propose establishing two Task Forces by Council Resolution.

First, the Procurement Reform Task Force would be comprised of business owners, procurement experts, and County officials. The objectives of the Task Force would be to:

- Review and evaluate current procurement practices, office structure, and funding; offer recommendations to increase outreach, streamlining and improved processes;
- Review national industry standards and best practices for procurement; offer recommendations to align County practices with best practices.

Second, the MFD Program Task Force would be comprised of minority, women, and disabled-owned business owners and County officials, such as representatives from the Department of General Services and the Office of the County Attorney. The objective of this Task Force would be to:

- Review and evaluate the current MFD program; offer recommendations for improvement;

Both task forces would work in parallel tracks during a similar time period. After they complete their work, Council Staff will integrate the reports into a single set of recommendations for the GO Committee to consider in a comprehensive way.

On Monday, I propose the GO Committee recommends the appointment of these task forces to the full Council. In addition, I support approving Expedited Bill 42-14, but amending it to sunset the MFD program after one year—on December 31, 2015. This will provide the task forces with a full year to offer recommendations to the Council that will enhance the current MFD program and improve the procurement process more generally.

¹http://www.montgomerycountymd.gov/council/Resources/Files/agenda/cm/2014/140929/2014_0929_G03.pdf