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Title

A DESCRIPTION AND EVALUATION OF THE COUNTY AND BI-COUNTY
MINORITY PROCUREMENT UTILIZATION PROGRAMS

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I. SUMMARY AND MAJOR RECOMMENDATIONS

1. Summary

In the past decade, all six major County and bi-County public agencies have implemented minority business procurement utilization programs to increase the participation of minority, female, and disabled-owned businesses in government contracting and purchases. Three of the agencies, Montgomery College, the Montgomery County Public Schools (MCPS) and the Washington Suburban Sanitary Commission (WSSC) are primarily subject to State minority procurement laws. The other three agencies, the County Government, the Maryland-National Capital Park and Planning Commission (M-NCPPC) and the Housing Opportunities Commission (HOC) are either subject to the County's minority procurement law or have voluntarily complied with portions of the County's minority procurement law.

The minority procurement utilization programs of the six agencies are fundamentally similar. They define minority businesses and a minority person essentially in the same terms; the basic ownership and control requirements to qualify as a minority business are also the same; their programs are directed at benefiting businesses owned by the same socially or economically disadvantaged groups, women and the handicapped; and all six agencies draw from the same pool of regional minority, female, and disabled-owned businesses for their purchasing and contracting needs.

Despite these fundamental similarities, the minority procurement utilization programs of the individual agencies differ in many aspects. These differences include:

- Minority participation goals. The minority participation goals of the individual agencies vary from no goal at all to 25% of the total dollar value of all agency procurements.
- Preferences to minority businesses. Two agencies, the M-NCPPC and WSSC, provide for preferences to minority businesses in the form of bonus points and special procurement procedures. The other four agencies do not provide any preferences. (However, the County government is authorized to institute preferences under certain circumstances when the minority participation goal is not being met).
- Minority subcontracting. All agencies, except Montgomery College, the M-NCPPC and HOC, have provisions that require, under certain circumstances, subcontracting to minority businesses by non-minority prime contractors. The M-NCPPC does have a preference that encourages minority subcontracting.
- Procurements excluded from the program. Each agency has its own special mix of procurements which are excluded from that agency's minority participation goal.

- Minority business solicitation. Each agency has designated a minimum procurement dollar "floor" below which solicitation of minority businesses is not required. This "floor" varies from \$500 to \$75,000.
- Minority business certification. Each agency differs also as to whether it performs its own certification of minority businesses or accepts the certification of another agency/jurisdiction.

2. Recommendations. The report recommends that:

- The County Council establish an interagency coordinating committee for minority procurement matters to provide a forum for the exchange of information and initiatives, and to serve as a clearinghouse for the promotion and coordination of simplified and standardized minority procurement regulations and procedures among the various agencies;
- The County Council extend the sunset date of the County Code's minority procurement provisions and amend as appropriate to eliminate language which presently excludes a significant number of procurements from the County government's minority participation goal;
- The County Council and County Executive, in coordination with other agency heads, propose State legislation to give those agencies subject to the State procurement laws authority to adopt minority procurement preferences when necessary to meet an agency's reasonable minority procurement participation goals;
- All County and bi-County agencies report annually to the Council on their MFD/MBE procurement programs;
- The County Executive establish a minority business council to advise the County Executive and County Council on all matters relating to the County government's minority procurement utilization program; and
- The County Executive direct a review for possible revision of the current minority procurement provisions of the Procurement Regulations to strengthen the minority solicitation provisions and increase the opportunities for minority businesses to compete for County procurement contracts.

II. AUTHORITY, SCOPE, AND METHODOLOGY

1. Authority. Council Resolution 11-174, adopted March 31, 1987, subject: Authorization for Independent Studies of Contract Administration and MFD Procurement by the Office of Legislative Oversight.

2. Scope. The purpose of this study is to review and evaluate the policies programs and procedures to promote contracting with minority, female, and disabled-owned businesses of the six major County and bi-County public agencies.

Included in this examination are the minority procurement programs of the following six public agencies: the County Government; the Montgomery County Public Schools (MCPS); Montgomery College; the Maryland-National Capital Park and Planning Commission (M-NCPPC); the Washington Suburban Sanitary Commission (WSSC); and the Housing Opportunities Commission (HOC).

In addition, the report briefly describes the minority procurement programs of the following jurisdictions: the State of Maryland; Baltimore County and Prince George's County, Maryland; Fairfax County, Virginia; and the District of Columbia.

3. Methodology. The study was conducted from late 1987 through February 1988, using a variety of fact-finding techniques to include:

- Reviewing applicable State and County laws and regulations;
- Reviewing agency policies and procedures relating to contracting and procurement from minority, female, and disabled-owned (MFD) business;
- Interviewing representatives of County and bi-County public agencies concerning their respected minority procurement programs; and
- Interviewing representatives of other jurisdictions on policies, regulations and operating procedures relating to their minority procurement programs.

III. DEFINITIONS

Public agencies use different terms, definitions and abbreviations to identify and describe their respective minority procurement programs. The following specific terms are used extensively in the report, and have the meanings indicated:

1. Minority Business Enterprise (MBE). Any legal entity, other than a joint venture, organized to engage in commercial transactions, that is at least 51% owned and controlled by one or more minority persons, or a non-profit entity organized to promote the interests of the physically or mentally disabled.

Minority Business Enterprise (MBE) is the term (abbreviation) used by the State of Maryland, the WSSC, the MCPS and Montgomery College when referring to their minority procurement programs and when referring to a business which is owned and controlled by a minority person, a woman or one who is mentally or physically disabled.

2. Minority, Female, Disabled-Owned Business (MFD). Any legal entity:

- (a) organized to engage in commercial transactions and which is at least 51% owned, controlled, and managed by one or more minority persons [see definition below], or a non-profit entity organized to promote the interests of persons who have a handicap; and
- (b) that did not exceed \$15 million in average gross receipts for the past three years.

Minority, female, disabled (MFD) is the term (abbreviation) used by the County government, the M-NCPPC and the HOC when referring to their minority procurement programs and when referring to a minority, female or disabled-owned business.

3. Minority Person. Any member of a socially or economically disadvantaged minority group, which includes blacks (not of hispanic origin), Hispanics, American Indians, Alaskan natives, Asians, Pacific islanders, women, and the mentally or physically disabled.

The State of Maryland and all six County and bi-County agencies use this same definition.

4. MBE Preference. The various State, County and District of Columbia laws and agency policies and procedures refer to a variety of preferences to facilitate the participation of MFD/MBE businesses in public contracting and procurement. The distinction between these preferences are not exact, with even the courts not agreeing on precise definitions. The following four types of preferences are referred to in this report:

- Sheltered Market. A procedure whereby contracts/purchases are designated, before solicitation of bids, for limited competition from only minority business enterprises in either a negotiated or competitive bid process. Currently, the District of Columbia has a major sheltered market program, with a 35% mandatory MBE

participation requirement. In addition, Prince George's County has a small sheltered market program for negotiated procurements under \$5,000. At the time of this writing, there are bills in Annapolis and in Prince George's County which would permit the Washington Suburban Sanitary Commission (WSSC) and Prince George's County to set up sheltered market programs.

- Set-asides. A procedure whereby contracts/purchases can be bid on by both MFD/MBE and non-minority businesses; however, for a non-minority business to qualify for the award as the prime contractor, a specific percentage of the total dollar value of the contract/purchase must be subcontracted to a MFD/MBE subcontractor. In addition to sheltered markets, the District of Columbia also uses set-asides.
- Bonus percentage points. A process of applying bonus percentage points to the low bid of an MFD/MBE firm which results in the MFD/MBE bid being adjusted to a "new low bid" before competing with the low bid of any non-minority business. This type of preference is used by the Maryland-National Capital Park and Planning Commission and by Prince George's County.
- Special procedures. Special "tools" available to management to assist MFD/MBE firms in competing with non-minority businesses. These procedures may include awarding of additional points when evaluating RFPs, waiving or reducing required bonds, imposing mandatory MFD/MBE subcontracting requirements on non-minority businesses, and restricting competitive bid contracts to MFD/MBE firms. The Washington Suburban Sanitary Commission uses this type of minority preference.

IV. BACKGROUND

1. Federal programs. Active Federal programs to increase the number of procurement actions awarded to minority, female, and disabled-owned businesses, and to establish numerical goals for such participation, are relatively recent initiatives. In 1976, the Congress enacted legislation which required that for any local public works project funded by a Federal grant, at least 10% of the amount of each grant had to be expended for minority business enterprises (MBEs). Originally, minority business enterprises applied only to minorities, and not to females or the handicapped.

In the ensuing years, the Federal MBE programs expanded in number and included females, albeit with a lesser numerical goal than minorities. More recently, female-owned businesses have been included in the overall minority business enterprise category and in the overall MBE participation goal. The extension of the program to disabled/handicapped-owned businesses has been a slower process; however, recently there have been Executive Orders and legislation directing that MBE programs include the handicapped.

2. State programs. Maryland enacted its first MBE law in 1978. As with the Federal example, the law initially applied only to public works projects, such as highway and building construction. In 1983, the MBE law was

amended to require most State procurement agencies to implement MBE programs relating to the purchase of goods and services so as to achieve a goal of at least 10% MBE participation.

3. County government programs. The Montgomery County Council enacted the first minority procurement law in June 1982. The County law closely paralleled the State law in direction, goals, and application. However, the County law used the term minority, female, and disabled-owned (MFD) business rather than the State's term, minority business enterprise (MBE). Notwithstanding this difference, the County's MFD and the State's MBE programs included the same minority groups, women and the mentally and physically disabled.

In 1985, the County Council amended the 1982 law to incorporate the following major changes:

- Clarified the legislative intent of the MFD program;
- Increased the MFD business procurement goal from 10% to 15%;
- Removed the prohibition against joint ventures;
- Required MFD businesses to be responsive and responsible rather than just competent;
- Required that MFD business be managed by the minority person(s) in addition to being at least 51 percent owned and controlled by one or more minority persons;
- Introduced a limit or "cap" of \$15 million average annual gross receipts on MFD businesses;
- Restricted purchases subject to the 15% MFD business procurement goal to original procurements over \$500;
- Excluded grants, utilities and intergovernmental or intragovernmental procurements from the MFD business procurement goal;
- Included procedural requirements (certification of MFDs, waivers, outreach, etc.), and a penalty section for fraudulent activities; and
- Extended the sunset date of the law to July 1, 1988.

4. Other County and Bi-County public agencies. The other County and bi-County public agencies developed MFD/MBE programs during the same period. The programs in the Montgomery County Public Schools and Montgomery College paralleled the State programs, while the programs at the Washington Suburban Sanitary Commission and the Maryland-National Capital Park and Planning Commission were designed to complement their particular individual purchasing activities. Finally, the Housing Opportunities Commission designed its MFD program around the requirements of the Department of Housing and Urban Development for procurements using Federal funds and the County government's MFD program for HOC funded procurements.

V. SUMMARY DESCRIPTION AND EVALUATION OF THE MFD/MBE PROCUREMENT PROGRAMS OF SIX COUNTY AND BI-COUNTY PUBLIC AGENCIES

1. Overview. This section of the report discusses the MFD/MBE programs in the six County and bi-County public agencies, and highlights their major similarities and differences. A more detailed description of the MFD/MBE policies, programs and goals of each individual agency can be found at the following exhibits to this report:

<u>Exhibit</u>	<u>Agency</u>
A	Montgomery County Government
B	Montgomery County Public Schools
C	Montgomery College
D	Maryland-National Capital Park & Planning Commission
E	Washington Suburban Sanitary Commission
F	Housing Opportunities Commission

2. Montgomery County Government (Exhibit A)

By law (Sections 11B-23A thru 11B-23G, Montgomery County Code), the County government requires that, with some exceptions, all contracts and purchases be subject to an MFD business participation goal of at least 15% of the total dollar value of those procurement actions. The program does not include any preferences to MFD businesses so long as the 15% goal is being met; however, if the goal is not being met, the statute includes provisions for initiating an MFD business preference program. Since the law was enacted, the County government has met its legislated goal (initially 10%, currently 15%), as a result, no preference programs have been initiated.

The County government's MFD procurement program specifically excludes from the MFD business participation goal two broad categories of procurement activities:

- Grants, utilities, and intergovernmental and intragovernmental (public entity) procurements (Section 11B-23C(c)). In FY 87, the County spent \$4,419,185 for public entity procurements and grants, and approximately \$8.6 million for utilities (electricity, water/sewer, fuel oil, natural gas and propane).
- Procurements over \$500 which are not "original" procurements (11B-23C(b)). Procurements considered non-original, and therefore excluded by the Division of Procurement and Materiel Management from the MFD business participation goal, are contract modifications (amendments, change orders, field orders), contract renewals, delivery orders and administrative actions. The total amount of those exclusions in FY 87 is reflected at Table 1.

Table 1
County Government
FY 87 Procurement Activities
Over \$500

(Source: Division of Purchasing and Material Management)

Original procurements (subject to MFD participation goal)		\$102,690,203(64%)
Non-Original Procurements (not subject to MFD participation goal)		
Contract Modifications (Amendments, change orders, field orders)	\$27,768,085	
Contract renewals	7,301,925	
Delivery orders	21,146,625*	
Administrative actions	321,207*	
		\$ 56,537,842 (36%)
Total FY 87 Procurements over \$500:		<u>\$159,228,045 (100%)</u>

* Note: These figures represent possible duplicate reporting because of the method that delivery orders and administrative actions are recorded.

As reflected at Table 2 (next page), and also at Exhibit A, the County government reported that MFD participation in FY 87 was 23.6%, calculated on the basis that \$24,282,123 in procurement actions was awarded to MFD businesses out of a total dollar value of "original" procurements of \$102.7 million. Had the MFD procurements (\$24,282,123) been calculated against the total FY 87 procurements over \$500 (\$159.2 million), the MFD business participation percentage would have been 15.2%, still above the County government's MFD participation goal of 15%. It should be noted that MFD businesses may have been awarded some of the contracts and purchases included in the \$56.6 million in non-original procurements; however, the extent of such MFD business participation is not recorded.

The County government's MFD procurement program is one of two agency programs (the other is the M-NCPPC's program) which provides for a limit or "cap" on the earnings that an MFD business can earn and still retain its MFD business classification. The County government's program excludes MFD businesses whose average gross annual receipts over a three-year period exceed \$15 million. The rationale behind the cap is that the purpose of the County government's MFD procurement program is to encourage economic development and increase the business opportunities of economically and socially disadvantaged groups. In practice the cap does not place large successful MFD businesses at any competitive disadvantage, because the County government currently does not give any preferences to MFD businesses.

Until recently, the County government's Division of Procurement and Materiel Management (DPMM) was responsible for administering all aspects of the MFD procurement program to include education, outreach, certification, publication of an MFD vendor directory, and solicitation. A specific staff position, Minority Procurement Officer, was created within DPMM to carry out those responsibilities. In FY 88, the Council appropriated funds to create an additional staff position in the Office of Economic Development (OED) with responsibility for MFD education and outreach. The specific division of responsibilities between DPMM and OED is still being worked out, but it appears OED's outreach activities will be directed at increasing the economic development of MFD businesses, improving the MFD business data base and increasing the participation of MFD businesses in all procurement activities, not just those of the County government.

Evaluation. The County government has had an MFD procurement program since 1982. The original MFD business participation goal of 10% was increased to 15% in December 1985, and the types of procurement activities subject to the MFD business goal were clarified. Since its inception in 1982, and especially since the 1985 revisions to the law, the County government has placed emphasis on identifying MFD businesses, increasing the number of procurements available to MFD businesses, and increasing the dollar value of procurements awarded to MFD businesses. The results of these efforts is reflected at Table 2.

Table 2

County Government Procurement/MFD Activities
FY 83 - FY 87

(Source: Division of Purchasing and Materiel Management.)

<u>FY</u>	<u>Goal</u>	<u>Total \$ Value of Awards Available to MFDs</u>	<u>Total \$ Value of Awards to MFDs</u>	<u>% Participation by MFDs</u>
83	10%	\$ 46,858,137	\$ 5,908,229	12.6%
84	10%	75,623,209	9,865,350	13.0%
85	10%	57,848,737	10,359,694	17.9%
86	15%	83,131,589	17,371,162	20.9%
87	15%	102,690,203	24,282,123	23.6%

The progress of the County government's MFD procurement program is the direct result of the revisions to the MFD procurement law and of a continuing emphasis by the Executive branch on making the program successful. The changes to the MFD procurement statute adopted by the Council in 1985 strengthened the program by clarifying the legislative intent and emphasizing the finding of past discrimination, increasing the MFD business participation goal from 10% to 15%, removing the prohibition against joint ventures, more narrowly defining minority ownership requirements, and redirecting the program to developing MFD businesses by imposing a cap on the size of MFD businesses participating in the program. At the same time, the 1985 extension of the statute retained those provisions which assure a fair procurement process for non-minority businesses, specifically, the waiver provisions and the requirement that MFD businesses be certified in order to participate in the program.

Because of the increase in MFD business participation since the 1985 revisions, there is almost universal agreement that the MFD procurement law should be extended beyond the July 1, 1988, sunset date. A bill to extend the law until July 1992 was recently introduced (Bill 13-88). In addition, the Executive branch has indicated that it will also propose legislation to extend the MFD law and add language which will respond to the recent legal challenges to local and state MFD laws and the resulting court decisions. In addition, when extending the law, the provision in the current law which excludes a large category of procurements from the MFD participation goal should be reviewed and revised.

The current legislation specifically excludes grants, utilities, intergovernmental and intragovernmental procurements, and all procurements with a value of under \$500. These exclusions appear reasonable. However, when the legislation was reenacted in 1985, a new provision was added which has resulted in the exclusion of a significant volume of purchases from the MFD business procurement goal. The 1985 reenacted law limited procurements subject to the goal to "original" formal or informal procurements. The result of that provision has been the exclusion of contract modifications, delivery orders, and contract renewals, which in FY 87 amounted to over \$56 million in procurements not considered when calculating MFD business participation (see Table 1). Almost half (49%) of that \$56 million in procurements were contract modifications.

3. Montgomery County Public Schools (MCPS) (Exhibit B)

Montgomery County Public Schools (MCPS) has two programs designed to facilitate minority business participation in contracts awarded by the Board of Education (BOE). Because both programs have their authority in State Code, they use the term minority business enterprise (MBE) rather than minority, female, disabled (MFD) of the County Code. Regardless, the schools' MBE programs are directed at the same minority groups, women and the disabled as is the County government's.

The first MBE program applies to the procurement of all goods and services. Excluded from the program are the purchase of instructional books and materials and emergency repairs. Initially established in 1983, the current program reflects amending legislation enacted by the General Assembly in 1987. That legislation required the BOE to establish a Minority Business Utilization Program to facilitate the participation of responsible certified MBEs in contracts awarded in accordance with competitive bidding procedures. Although the legislation did not specify any goal, MCPS has established an "informal" goal of 10% MBE participation for all procurements over \$7,500.

The second program, initiated in late 1979, has a goal of 10% MBE participation in school construction projects funded by either the State or the County. For construction projects of \$50,000 or more, MBE participation is mandatory; for construction projects under \$50,000, MBE participation is "encouraged".

A bill before the 1987 Montgomery County Delegation (MC 709-87) would have authorized the Montgomery County BOE to establish procedures to permit the selection of an MBE bid over a lower responsive and responsible non-minority bid. Withdrawal of this MBE preference bill by the Delegation and passage of a bill directing the BOE to set up a Mandatory Business Utilization Program with no preferences or goals reinforced the State-mandated requirement that, contracts for "school buildings, improvements, supplies, or other equipment shall be awarded to the lowest responsible bidder" (Section 5-110, Education Article).

There are no MCPS staff positions exclusively dedicated to either MBE program. Outreach is accomplished by procurement and construction staff through notices in bid packages and requests for proposals (RFPs), newspaper advertisements and, for construction projects, direct mailings to several minority associations alerting them to the projects. Also, the same staff assists MBEs in bid preparation and processing when requested. Finally, MCPS neither certifies MBEs, nor publishes an MBE vendor directory; and financial assistance is not available.

The record of MBE participation in the procurement of goods and services and for school construction is reflected at Table 3 (page 12).

Table 3

MCPS Procurement/MBE Activities
FY 85 - FY 88

(Source: MCPS Divisions of Purchasing and Construction)

<u>Activity</u>	<u>FY</u>	<u>Total \$ Value Awards^a</u>	<u>Total \$ Value of Awards to MBEs</u>	<u>% Participation by MBEs</u>
Procurement of Goods and Services	87	\$33,003,296 ^b	\$1,518,437	4.6%
	88	\$ 9,521,552 ^b	\$ 804,225	8.4%
School Construction	85	\$15,400,000 ^c	\$1,386,000	9.0%
	86	\$ 7,800,000 ^c	\$ 156,000	2.0%
	87	\$74,000,000 ^c	\$4,810,000	6.5%

^a Awards over \$7500.

^b FY 87 was the first year that statistics were available. FY 88, 1st and 2nd quarters only.

^c Only construction contracts over \$50,000.

Evaluation. The record of MBE participation in MCPS procurement activities reflect that MCPS has achieved neither the informal goal of 10% for purchases of goods and services nor the State mandated goal of 10% for construction projects. Staff personnel responsible for MCPS procurement activities emphasize that opportunities for MBE participation are severely limited because of the following: instructional books and materials are purchased from national firms through catalogs; a significant volume of goods is purchased through intergovernmental contracts (fuel, food items); and the State Code requirement that all awards be made to the lowest responsive and responsible bidder. The MCPS staff also point out that an attempt in 1987 to amend the State Code to give the BOE authority to establish procedures to select an MBE over a lower bidder failed to win the support of the Montgomery County Delegation.

Solicitation efforts by the MCPS Division of Construction include notifying several minority associations when each construction project is up for bid and placing a notice in each bid request that MBEs are encouraged to respond. Despite these efforts, MBE participation in school construction projects has been less than the mandated 10% goal. Solicitation efforts in the purchase of goods and services follow the same pattern of notices in bid requests and occasional advertisements in newspapers. These efforts appear to be minimal and not too successful as reflected in statistics that MBE participation in the purchase of goods and services has been below the informal goal of 10% for the past two years.

4. Montgomery College (Exhibit C)

The Montgomery College's program to encourage participation by minority business enterprises (MBEs) in procurements is similar to the MCPS' programs in several respects:

- The same State Code definitions of an MBE and a minority person apply.
- The Board of Trustees of the College, in response to legislation enacted by the 1987 General Assembly, also established a Mandatory Minority Business Utilization Program to facilitate the participation of responsible certified MBEs.
- The Minority Business Utilization Program applies to contracts for building, improvements, equipment and supplies over \$7,500, but not to the purchase of books, instructional materials, or emergency repairs.
- The College separates the purchase of goods and services from a second procurement program. In the case of the College, this second program is called Facilities, and includes CIP construction projects, plant operations, telephone and mail services, and support of the Performing Arts Center.
- As in the case of the MCPS, the State Code does not specify a goal for the College's Mandatory Business Utilization Program; however, the College has set a minority business participation target of 15% of the total dollars awarded for the purchase of goods and services. The College has set no goal for procurement activities in the Facilities category.
- Also like MCPS, the College has no staff exclusively dedicated to the MBE Utilization Program; the College does not certify MBEs, accepting the certifications of other public agencies; and the College does not publish a MBE vendor directory. Solicitation is primarily by procurement staff contacting MBE vendors and publishing a notice in each bid invitation over \$7,500 that, "minority firms are encouraged to bid".

The record of MBE participation in the purchase of goods and services for FY 86 and FY 87 is at Table 4. Although contracts and procurements in the Facilities category, especially CIP projects, would seem to qualify as being part of the "procurement process", the College currently does not maintain any record of MBE participation in contracts and purchases in that category which, in both FY 86 and FY 87, had expenditures in excess of \$9 million (see Exhibit C).

Table 4

Montgomery College Purchases of Goods and Services/MBE Participation
FY 86 - FY 87

(Source: Montgomery College Director of Procurement)

<u>FY</u>	<u>Total \$ Value of Awards over \$7500</u>	<u>Total \$ Value of Awards to MBEs</u>	<u>% Participation by MBEs</u>
86	\$2,288,453	\$182,495	8.0%
87	\$1,643,304	\$139,573	8.5%

Evaluation. As was the case for the Board of Education, the College Board of Trustees supported a bill (MC 711-87) in the 1987 General Assembly which would have permitted the College to develop preference procedures to facilitate greater MBE participation in the procurement process. That bill was not favorably considered by the Montgomery County Delegation, substituting instead a bill directing the creation of a Minority Business Enterprise Utilization Program with no MBE preferences or goals. Participation by MBEs in the procurement of goods and services for FY 86 and FY 87 was 8.0% and 8.5%, respectively, considerably less than the College's self-imposed target of 15% MBE participation. In the case of \$9 million procurement activities under the category of Facilities in both FY 86 and FY 87, the College does not maintain a record of MBE participation.

Not unlike MCPS, the College procurement staff cite two primary reasons for the low participation by MBEs in the College's procurement process. First, that State law requires that awards be made to the lowest responsive and responsible bidder; and second, exclusions. Excluded from the MBE Utilization Program are all procurement activities under \$7,500; the purchase of books and other instructional materials; emergency repairs; purchases on other governmental agency contracts; contract modifications and renewals; and sole source contracts. While not cited specifically, another reason for the minimal MBE participation appears to be the exclusion from the MBE procurement program of over \$9 million in contracts and purchases in the Facilities category.

5. Maryland-National Capital Park and Planning Commission (M-NCPPC)
(Exhibit D)

The Maryland-National Capital Park and Planning Commission minority, female, and disabled-owned business procurement program dates from late 1978. (Note: Like the County Government, the M-NCPPC uses the term minority, female, and disabled (MFD) rather than MBE.) The MFD procurement program has a minimum goal of MFD business participation equal to 15% of the total dollar value of all M-NCPPC, except real estate. This 15% applies to all procurements irrespective of whether MFD business are available to compete. (Note: On February 10, 1988, the Commission voted to raise the goal to 25%.)

The M-NCPPC is one of only two public agencies in the County (the other is WSSC) with a procurement program that includes selective preferences for MFD business. The M-NCPPC's preference policy allows the awarding of a contract to permit awarding a bid to an MFD business whose bid is no more than a specified percentage higher than the lowest bid of a non-MFD firm. The policy provides for a descending sliding scale of preferences from 10% to 3% depending on the amount of the bid. A detailed explanation of the preference policy and an example of how it is preference is calculated are at Exhibit D.

Another unique aspect of M-NCPPC's policy is that a non-MFD firm can qualify for the MFD preference if the non-MFD firm agrees in writing to subcontract a minimum of 15% of the total dollar value of the contract to a certified MFD business.

Finally, M-NCPPC's program includes a provision which is also found in the County government's: MFD businesses which have reached a specified level of gross annual receipts are not eligible for the MFD preference. See Exhibit D for details on M-NCPPC's limit or "cap" on MFD business earnings.

The Commission has staff dedicated to carrying out all aspects of the MFD business program: education, solicitation and outreach, certification, technical assistance, financial assistance in the form of special accelerated progress payments and adjusted insurance requirements, and publication of an MFD vendor directory. All these activities have contributed to the Commission surpassing its MFD business participation goal in FY 87, as reflected at Table 5.

Table 5

M-NCPPC Procurement/MFD Activities
FY 86 - FY 87

(Source: M-NCPPC Reports)

<u>FY</u>	<u>Total \$ Value of Awards</u>	<u>Total \$ Value of Awards to MBEs</u>	<u>% Participation by MBEs</u>
86	\$24,310,000	\$3,209,000	13.2%
87	\$34,640,000	\$6,389,000	18.4%

Evaluation. The M-NCPPC program to award annually at least 15% of all expenditures for procurements to MFD businesses differs in many respects from the programs of the other County agencies. The major differences include:

- **Preferences.** The M-NCPPC procurement programs are not subject to State Code purchasing requirements. Thus, the Commission is able to establish an MFD preference system to facilitate the selection of MFD firms and assist those firms with additional help in the form of adjusted insurance requirements and accelerated progress payments.
- **Heavy emphasis on solicitation.** The M-NCPPC requires mandatory solicitation of MFD businesses for all purchases over \$3,000, except for purchases of land. The M-NCPPC also requires mandatory follow-up at least once when no MFD firms respond to an initial oral solicitation. In addition, M-NCPPC advertises consistently in a minority-oriented metropolitan Washington newspaper.
- **Subcontracting.** The M-NCPPC in its formal bidding procedure requires that non-MFD prime contractors make a specific MFD subcontracting commitment prior to bid opening and award.

Except for the purchase of land, M-NCPPC does not exclude from the MFD business participation program a number of procurement actions that other agencies exclude: grants, contract modifications and renewals, sole source contracts, and intergovernmental purchases. Accordingly, to reach the 15% goal, M-NCPPC requires a greater emphasis on MFD business solicitation and awards to compensate for those procurement activities for which MFD firms are not available to compete.

6. Washington Suburban Sanitary Commission (WSSC) (Exhibit E)

Under the Commission's Minority Business Enterprise Program, the Washington Suburban Sanitary Commission (WSSC) has established three sub-programs, each designed to increase the number of MBEs responding to procurement contracts and to increase the number of MBEs awarded procurement contracts:

- Program A: Mandatory Minority Business Enterprise (MMBE) Program. Applies to negotiated architectural/engineering professional service contracts (10% goal), and competitively bid construction contracts (0% to 15% goal);
- Program B: Minority Procurement Policy. Applies primarily to competitively bid contracts for goods and services (non-professional, non-construction contracts) (25% goal)
- Program C: Other Professional Services. Applies to professional services contracts other than architectural/engineering (legal, financial, consulting, etc.)(20% goal).

The Washington Suburban Sanitary Commission has established a number of preferences to assist in meeting their MBE participation goals. These preferences are only applicable to Program B and Program C, above, and include a number of procedures or "tools" which the WSSC staff can use to increase the participation and award of contracts to MBEs. The various preference procedures are explained in detail at Exhibit E. In general, the preference procedures or "tools" include a mandatory minority subcontracting clause; the discretionary award to an MBE bid that is within 10% of the low bid; the restriction of competitively bid contracts to MBEs; and waiving or reducing required bonds and insurance.

The WSSC is able to utilize preferences in awarding contracts for the procurement of goods and services and in selective professional service contracts because such procurement activities are not governed by State law. Program A, construction and professional architectural/engineering contracts, are subject to State law, and, therefore, does not include any preferences to MBEs. As in the case of contracting by Montgomery College and MCPS, the State Code requires that WSSC competitively bid construction contracts be awarded to the lowest bidder (Article 29, Section 3-102, WSSC.) However, WSSC has imposed a requirement that, for a construction contract over \$75,000 to be responsive, the bid must include a mandatory minimum MBE subcontractor participation of from 5% to 15% depending on the size of the contract.

During the 1987 legislative session, a joint Montgomery County/Prince George's County bill was introduced in both the Maryland House (HB 748) and Senate (SB 180) that would have authorized the WSSC to set aside certain contracts for minority business enterprises when the Commission determined the use of these sheltered markets were necessary to achieve its goals under the MBE program. However, neither bill passed in Committee. A similar sheltered market bill is before the current 1988 General Assembly.

Like the M-NCPPC, specific staff positions are dedicated to MBE activities. The WSSC Minority Business Enterprise Officer is involved in education, outreach, solicitation, and technical assistance. The WSSC neither certifies MBEs or publishes an MBE vendor directory; and WSSC accepts the certifications by the Maryland Department of Transportation (M-DOT) and, for its Minority Procurement Policy program, certification from the District of Columbia's Minority Business Opportunity Commission.

The WSSC is unique in that each of its MBE procurement programs are audited to measure actual results against program goals. These audit reports are reviewed by management and the Commission. Finally, WSSC is the only public agency that has created an MBE Advisory Committee, composed of personnel from the WSSC and representatives of both MBE and non-MBE firms.

The record of MBE participation in the three WSSC programs for FY 86 and FY 87 is at Table 6.

Table 6

WSSC Procurement/MBE Activities
FY 86-FY 87

(Source: WSSC Internal Auditor)

<u>Program</u>	<u>FY</u>	<u>Total \$ Value of Awards Available to MBEs</u>	<u>Total \$ Value of Awards to MBEs</u>	<u>% Participation by MBEs</u>
A - MMBE	86	\$33,609,801	\$6,982,230	20.8%
	87	\$58,502,870	\$8,106,661	13.9%
B - Minority Procurement Policy	86	\$38,190,892	\$11,799,233	31.0%
	87	\$64,129,118	\$16,173,884	25.2%
C - Other Professional Services	This program was just implemented in June 1987.			

Evaluation. Over the past two years, records indicate that the WSSC has met its MBE participation goals. It should be noted that the WSSC's goal of 25% MBE participation in the procurement of goods and services is the highest of all public agencies in the County.

The three current MBE programs of the WSSC are relatively new, with the program for procurement of professional services other than architectural/engineering less than a year old. In the past, the WSSC has failed in its attempt to convince the General Assembly to enact legislation to authorize the Commission to create sheltered markets for procurement categories that could be implemented when necessary to achieve its goals under the MBE program. The Commission is trying again in the 1988 General Assembly.

7. Housing Opportunities Commission (HOC) (Exhibit F)

The Housing Opportunities Commission has two programs directed at minority business participation. The first, implemented in the early 1980s, was in response to a Department of Housing and Urban Development (HUD) requirement that MBEs have an opportunity to participate in at least 20% of the dollar value of Federally-funded contracts. These HUD funded contracts are for the modernization of public housing, and purchases under the HUD Consolidated Supply Program.

The second program was established in 1982 at the time the County Council enacted a minority, female, disabled-owned (MFD) business participation law. This program applies to purchases of goods and services over \$1,000 with HOC funds. Although the Commission did not specify a goal, it has set an overall target of 20% MFD participation in HOC funded procurement activities. (Individual budgetary goals for the three categories of the HOC program are: operating budget - 15%; CIP budget - 20%; and development budget - 10%).

Neither HOC procurement program gives any preferences to MFD businesses. The HOC has no staff positions exclusively dedicated to the MFD participation programs. However, the HOC Equal Opportunity Officer and the Contracting/Purchasing Coordinator perform informal outreach functions and provide technical assistance to MFD vendors on request. There is no financial assistance available. Solicitation is accomplished by including a notice in each bid request that MFD firms are encouraged to bid. The HOC neither certifies MFD firms nor publishes an MFD vendor directory, relying on other agencies for these services.

In FY 86 and FY 87, the HOC surpassed its MFD business participation goal and target for both procurement programs as indicated at Table 7.

Table 7

HOC Procurement/MFD Activities
FY 86-FY 87

(Source: HOC Equal Employment Office)

FY	Program	Total \$ Value of Awards Available to MBEs	Total \$ Value of Awards to MBEs	% Participation by MBEs
86	HUD Funded CIAP	\$1,439,655	\$647,482	45.0%
	HOC Funded Proc	\$2,230,233	\$239,177	10.7%
	Total	\$3,669,888	\$886,659	24.2%
87	HUD Funded CIAP	\$ 213,358	\$124,189	58.2%
	HOC Funded Proc	\$1,263,169	\$335,449	26.6%
	Total	\$1,476,527	\$459,638	31.1%

Evaluation. The total dollar value of HOC's procurements that is available to MFD businesses is quite small. The HOC staff reports that the reason for the small base of procurements is that a large percentage of HOC procurement actions are through governmental cooperative purchasing contracts which HOC neither negotiates nor administers. The procurements available to MFD firms are usually relatively small service contracts (exterminating, plumbing, cleaning, etc.). However, in FY 86, a \$1.2 million HUD funded renovation contract with a non-MFD prime contractor included an MFD subcontracting provision of almost \$600,000 or 51% of the total value of the contract.

VI. SUMMARY DESCRIPTION OF THE MFD/MBE PROCUREMENT PROGRAMS IN OTHER JURISDICTIONS

1. Overview. In this section of the report, the MFD/MBE procurement programs of the following five jurisdictions are examined:

- State of Maryland
- Baltimore County, Maryland
- Prince George's County, Maryland
- Fairfax County, Virginia
- District of Columbia

This examination is not intended to be a thorough review of the MFD/MBE programs, but rather a general discussion of how the MFD/MBE procurement programs in these five jurisdictions compare to those of the County and bi-County public agencies. An overall comparison of these five jurisdictions with the six public agencies in Montgomery County is at Table 8 on next page.

2. State of Maryland. The State of Maryland has essentially three major programs concerning procurements from minority business enterprises (MBE). All three of these programs have their basis in State law and use the same definitions of a minority person and an MBE (minority, women, and physically/mentally disabled business enterprise). The three programs are:

- Maryland Department of Transportation (M-DOT) MBE Program. This program has a goal of 10% MBE participation in State-funded construction contracts in excess of \$100,000, to include supply and service contracts. For Federally-funded construction contracts, the goal is 13% MBE participation, a recent change from the Federal policy of 10% minority and 3% female participation.
- MBE Program for Other Departments. The MBE participation goal for State departments other than DOT is 10% of the total dollar value of procurements of supplies, services, maintenance and construction.
- MBE Program for Procurement Agencies. Finally, the State law directs each procurement agencies (of which there are over 1500) to structure their procedures for the procurement of supplies, services, maintenance and construction so as to encourage the participation of MBEs. Although no goal is prescribed, procurement agencies are directed to attempt to provide a "fair share" or "reasonable amount" of their contracts to MBEs.

Table 8

SUMMARY OF MINORITY PROCUREMENT PROGRAMS OF SELECTED AGENCIES/JURISDICTIONS

	COUNTY AND BI-COUNTY AGENCIES						OTHER JURISDICTIONS				
	County Government	MCPS	Montgomery College	M-NCPPC	WSSC	HOC	State of Maryland	Baltimore County	Prince George's County	Fairfax County	District of Columbia
• Have a minority procurement program?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
• Groups included in the program: M - Minorities F - Females D - Disabled (handicapped)	MFD	MFD	MFD	MFD	MFD	MFD	MFD	MFD	MF	MF	M
• Does the minority program include preferences?	(See Note)	No	No	Yes	Yes	No	No	No	Yes	No	Yes
• Type of preference provided?	(See Note)	--	--	Bonus to minority bid	Special procedures for MBEs	--	--	--	Bonus to minority bid	--	Sheltered Market
• Does program have a minority participation goal?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
• What is the goal?	15%	10%	15%	15%*	Varies-5% to 25%	20%	13% Fed; 10% State	Minority 10%-15%; Females 2-3%	30%	--	35%
• Program meet goal in FY 87?	Yes	No	No	Yes	Yes	Yes	M-DOT Yes Others-Unknown	Yes	No	--	Yes
• Perform own certification?	Yes	No	No	Yes	No	No	Yes	No	Yes	No	Yes
• Publish minority vendor directory?	Yes	No	No	Yes	No	No	Yes	Yes	Yes	No	Yes
• Program include waiver provision?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	--	Yes
• Program have special staff dedicated to program?	Yes	No	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes

Note: The County Code and procurement regulations provide that an MFD preference of up to 120% of the lowest bid may be implemented under certain conditions when the legislated MFD participation goal is not being met. Because the MFD participation goal has been met each year, an MFD preference has never been used.

* The M-NCPPC goal of 15% was raised by the Commission to 25% on February 10, 1988.

In addition to the above MBE programs, the State has two additional procurement-related programs that have MBE participation goals. The first mandates that the lease of property to business entities will attempt to achieve participation by MBEs equal to 10% of the total dollar amount of the leases and 10% of the total number of leases (Section 10-308, State Finance and Procurement Article, Annotated Code of Maryland). The other program impacts on the Maryland Industrial Development Financing Authority. The State law mandates that, when bonds are issued, the Authority will attempt to achieve a goal of 10% issuances to MBEs (Section 13-138, Financial Institutions Article).

Each department and procurement agency has authority to establish its own MBE procedures. As a result the procedures vary from highly detailed ones in M-DOT to no procedures at all in some procurement agencies. However, because the MBE programs have their basis in the State law, the procurement procedures that do exist have the following major common characteristics:

- None of the programs offers an MBE preference;
- All procurement awards must be to the lowest responsible bidder; and
- MBEs must be certified as to ownership and control. Within the State there are two certifying agencies: M-DOT and the Minority Business Enterprise Certification Council (MBECC). M-DOT certification is probably the most rigorous of all certification processes in the State. As a result, M-DOT certification is almost universally accepted by departments and agencies.

State law also mandates an Office of Minority Affairs with responsibility for outreach and coordination of MBE activities throughout the State; technical and management assistance to MBEs; and for operating a clearinghouse for all matters relating to the State's MBE procurement programs. In addition, each major department and procurement agency has staff positions specifically dedicated to MBE procurement activities such as outreach, solicitation, and technical assistance.

Overall statistics on the various State MBE procurement programs are sketchy. The Governor's Office of Minority Affairs attempts to compile an annual report on MBE participation, but the system is not automated and some departments and many procurement agencies simply do not submit data. The Office of Minority Affairs published statistics for FY 86 which indicated that, of the departments and procurement agencies reporting, a total of \$942.9 million dollars in procurements were available to MBEs. Of that total, \$95.5 million, or 10.1%, was awarded to MBEs. The Department of Transportation, which accounts for one of the largest expenditures for contracts, met its goals of 10% MBE participation in State-funded projects and 13% for Federally-funded projects in FY 86 and FY 87.

During the 1987 Maryland General Assembly, a bill was introduced (SB 1055) which would have increased to 15% (from 10%) the minimum dollar value of procurements from minority business enterprises and would have made that percentage a mandatory minimum. The bill was withdrawn after the first reading.

3. Baltimore County, Maryland. Since the early 1980s, Baltimore County has had four distinct minority business programs:

- Minority Business Enterprise (MBE) Program. Established by Executive Order in July 1983. The goals of this program are 10% minority-owned and 2% female-owned business participation in County funded construction projects over \$100,000.
- Minority Business and Female Participation Program. Established by Executive Order in September 1984. The goal of this program is to award annually \$750,000 in contracts for the purchase of equipment, goods and services to minority and female-owned businesses.
- Federal/State Highway Construction Program. Highway construction projects which are Federal or State-funded are subject to the Federal goal of 13% and the State goal of 10% MBE participation.
- Community Development Block Grant Program. The goals of this program is 15% minority-owned and 2% female-owned business participation.

Because Baltimore County uses the State's definition of an MBE and a minority person, women and the handicapped are included.

The Baltimore County programs have no provisions for giving preferences to MBE businesses. However, the County does have an MBE Officer with responsibility for outreach, solicitation and technical assistance. The County relies on other agencies, primarily M-DOT, for certification. The County recently issued a report which indicated that, as of December 31, 1986, the annual goals of each of the four programs have been achieved since each were initiated.

4. Prince George's County. Under the Prince George's County's MBE procurement program, the legislated MBE participation goal is 30% of the dollar value of all procurements of goods and services. Included in the Prince George's County definition of an MBE are females, but not the handicapped. The program is under a Minority Business Enterprise Office staffed by an MBE Officer and a staff of seven (three of whom are Federally-funded). The MBE Office performs the functions of certification, solicitation, outreach, technical assistance, and monitorship of MBE compliance by County departments and offices.

The Prince George's County MBE program has four distinct programs, three of which provide preferences to increase MBE participation:

- **Bonus System.** This preference program is applicable only to competitively bid projects. The program provides for the award of bonus points to MBEs depending on the size of the contract. The maximum bonus available is equivalent to 5% of the lowest non-MBE bid of \$10,000 or less. The available bonus point percentage decreases as the non-MBE bid increases until leveling off at 1% for non-MBE bids over \$500,000. (Note: Minority business enterprises with offices physically located in Prince George's County are eligible for additional bonus points ranging from 1% to 5%, depending on the dollar value of the contract.) The application of the earned MBE bonus points (and resident bonus points) to the original low bid of the MBE results in a calculated new "low bid" for the MBE. This new "low bid" is then compared to the bids of non-MBEs to determine the lowest bid for awarding the contract.
- **Sheltered Market Program.** This preference program applies to a narrow category of procurements. To be eligible for this program, four pre-conditions must be met: the procurement must be a negotiated contract; the contract must be for under \$5000; at least two MBEs must be willing to bid on the commodity or service contract; and the amount of the MBE bid cannot be an amount greater than 15% of the most recent low bid for the same commodity or service.
- **Professional Services Program.** This preference program which can award an MBE an additional 15% of the total points to be awarded for pre-qualified or negotiated professional service contracts.
- **Subcontracting.** This non-preference program applies only to public works construction contracts and requires that non-MBE prime contractors subcontract at least 20% of the dollar value of the prime contract to MBEs. However, an MBE which is a prime contractor is not required to subcontract.

Each fiscal year since the MBE procurement programs were established, the MBE participation percentage has increased (FY 85 - 12.4%; FY 86 - 13.7%; and FY 87 - 18.1%). However, the goal of 30% has as yet not been achieved. The Prince George's County government is currently examining other initiatives to increase minority/female business participation. At the time of this writing, the Prince George's Office of Audits and Investigations is completing an audit of the County's minority contracting activities and will make recommendations on how the programs may be improved so as to achieve the legislated 30% goal.

5. **Fairfax County.** The Commonwealth of Virginia has a statutory requirement that each jurisdiction establish a minority business participation program for the procurement of goods and services. However, the State policy has neither goals, targets or State enforcement regulations. In addition, the Commonwealth and all jurisdictions must meet MBE goals established by the various Federal agencies when using Federal funds.

Fairfax County has complied with the State's requirement since 1981. Fairfax County's program combines minority business and small business activities into a Small and Minority Business Enterprise Program. The program is directed at minority persons and females, with no provision for the handicapped. Finally, the Fairfax County minority program has no participation goals, certification procedures or a requirement that the minority person own the business. The only requirement is that the minority/female person operate and control the business. Solicitation is accomplished primarily through public notices, announcements in requests for proposals (RFPs) and invitations for bids (IFBs), and advertisements in business-oriented newspapers and publications oriented at minority and small businesses.

Fairfax County reports that in FY 87, out of total procurements of goods and services of \$143.7 million, minority businesses were awarded contracts totaling \$4.9 million, or 3.4%.

6. The District of Columbia. The Washington D.C. government's minority contracting program provides the most advantage to minority business enterprises of all the local jurisdictions. The highlights of the District of Columbia's program are:

- The legislated MBE participation goal is 35% of the total dollar value of all construction and procurement (goods and services) contracts.
- The program applies only to minorities. Female-owned and handicapped-owned businesses are not included in the definition of a minority business enterprise.
- The program uses a sheltered market approach, that is, a percentage of contracts are set aside and only certified minority business enterprises are eligible to bid.
- If the prime contractor subcontracts, 50% of the subcontracting effort (excluding the cost of materials and supplies) must be with minority business enterprises.
- Implementation of the minority business enterprise program is the responsibility of a seven-member Minority Business Opportunity Commission (MBOC), which has responsibility for all aspects of the program (certification, solicitation, waivers, technical assistance, reports, etc.).

The D.C. program heavily favors minority businesses physically located in the District of Columbia. Recently, the MBOC has started certifying minority businesses which are located outside the D.C., but inside the Washington Standard Metropolitan Statistical Area (SMSA). However, the certifying requirements that must be met by a minority firm whose principal office is located outside D.C. are quite rigorous: more than 30% of the assets

of the minority business must be located in D.C.; more than 50% of the firm's employees must be residents of D.C.; and the owner(s) of more than 50% of the minority firm's assets must reside in the District of Columbia.

Annual reports issued by the Minority Business Opportunity Commission indicate that the 35% goal has been met, and in some cases exceeded, in each of the last two fiscal years.

VII. RELATED MATTER - LEGAL CHALLENGES TO MFD/MBE PROGRAMS

During the past decade, there have been a number of legal challenges to the constitutionality of state and local laws designed to increase the participation of minorities, females and the disabled in public contracts and other procurement activities. Some of these legal challenges have resulted in Federal court decisions striking down some state or local MFD/MBE procurement programs.

One court decision, Croson versus City of Richmond, concerned the Richmond, Virginia, minority business enterprise utilization plan. The U.S. Court of Appeals, Fourth Circuit, struck down the city's plan, ruling that affirmative action must be based on evidence that the city itself has discriminated in the past. The Supreme Court has agreed to hear the Croson case and to decide whether the Constitution permits local governments to require a portion of their contracts be awarded to MFD/MBE businesses.

The issues involved in these cases are understandably complex; and it is not the purpose of this report to present even a general overview of the court cases or the specific legal issues. However, this matter is included to alert the reader that the constitutionality of the various County and bi-County agency MFD/MBE procurement programs could also be subject to legal challenge. The County and bi-County agencies are aware of these recent court cases, and some have initiated a review of their respective programs in light of the court decisions. In the case of the Montgomery County government's MFD law and program, the County Attorney has engaged an outside consultant to perform a legal analysis of the validity under Federal law of the County's MFD procurement program.

Finally, the MFD procurement provisions in the Montgomery County Code (Sections 11B-23A thru 11B-23G) are due to sunset on July 1, 1988. The Executive branch has indicated that legislation to extend the MFD law will include amendments to reflect the legal issues raised by the recent court decisions.

VIII. CONCLUSIONS

A. County and Bi-County Agencies

All six major County and bi-County agencies have implemented minority business procurement utilization programs to increase the participation of minority, female, and disabled-owned businesses in government contracting and procurement. The various agency programs have a number of similarities, to include: the definition of an MFD/MBE; the basic ownership and control requirements to qualify as an MFD/MBE; and the socially or economically disadvantaged groups which qualify as a minority. In addition, all six agencies draw from the same pool of regional minority, female, and disabled-owned businesses to meet their purchasing and contracting needs.

However, there are a number of significant differences and inconsistencies among the six agency MFD/MBE procurement programs. The major differences are in the following nine categories:

1. Minority participation goals. Despite the overall similarities in the procurement needs and procurement programs of the six public agencies, the individual agency MFD/MBE participation goals vary significantly, as indicated in Table 9.

Table 9

Agency MFD/MBE Participation Goals

(Source: Agency MFD/MBE program procedures)

<u>MFD/MBE Goal</u>	<u>Agency (Procurement Activity)</u>
None	Montgomery College: Procurements in the Facilities category (CIP, plant operations, etc.)
5%	WSSC: Construction contracts \$75,000-\$100,000
10%	MCPS: All procurements WSSC: Construction contracts \$100,001-\$200,000 WSSC: Architectural/Engineering contracts
15%	County Government: All procurements M-NCPPC: All procurements Montgomery College: Purchasing goods/services WSSC: Construction contracts over \$200,000
20%	WSSC: Other professional service contracts HOC: All procurements
25%	WSSC: Purchasing goods/services

2. Preferences to minority businesses. Only the WSSC and M-NCPPC procurement programs provide for MFD/MBE preferences. The County government authorizes an MFD preference in the Code and procurement regulations, but it can be implemented only when the legislated MFD goal is not being met. To date, no preference has been used. Montgomery College and the MCPS (also the WSSC for construction projects) are prohibited from using any MBE preferences because of the State statutory requirement that all contracts be awarded to the lowest bidder. Finally, HOC has no provision in its procedures for an MFD preference.
3. Mandatory MFD/MBE subcontracting. Three agencies (the County government, WSSC and MCPS) require that, for certain size contracts, an award to a non-MFD/MBE prime contractor must require that a percentage of the total dollar value of the contract be subcontracted to an MFD/MBE. The agencies are neither consistent in the percentage which must be subcontracted (MCPS - 10%, County government - 15%, WSSC - 5% to 15%), nor in the minimum value of the prime contract when subcontracting is required (MCPS - \$50,000, County government and WSSC - \$75,000).

Another difference in agency MFD/MBE subcontracting provisions concerns the time when the non-MFD/MBE prime contractor must identify the MFD/MBE subcontractor, the extent of the subcontracting effort, and the percentage of the contract that will be subcontracted. For example, M-NCPPC and WSSC (for Program A) require that information relating to MFD subcontracting be identified at the time the bid is submitted and prior to making an award. Other agencies require identification of the MFD/MBE subcontractor (or evidence of a good faith effort to fund an MFD subcontractor) after award of the prime contract.

Still another difference is that the WSSC requires that even MFD/MBE prime contractors subcontract a percentage of the prime contract to MFD/MBE firms.

4. Procurements excluded from the MFD/MBE procurement programs. Each agency has its own special mix of procurements which are excluded from the MFD/MBE procurement requirement. Examples include:
 - Many agencies exclude utilities and/or land purchases;
 - Most agencies exclude purchases made through intergovernment and intragovernment (public entity) arrangements;
 - Each agency, except M-NCPPC, has designated a minimum dollar "floor" below which procurements are not considered when calculating the MFD/MBE participation goals (County government - \$500; HOC - \$1,000, MCPS/Montgomery College - \$7,500, WSSC (Program A) - \$75,000).

- The County government excludes "non-original" formal and informal contracts (contract modifications, contract renewals, delivery orders, etc.) from its 15% MFD goal.
- 5. Minority business solicitation. Each agency has also designated a minimum procurement dollar "floor" below which MFD/MBE solicitations are not required, but only "encouraged" (County government - \$500, M-NCPPC - \$3,000, MCPS and Montgomery College - \$7,500, MCPS construction - \$50,000, and WSSC construction - \$75,000).
- 6. Exclusively dedicated staff. The County government, WSSC and M-NCPPC have staff specifically dedicated to outreach, solicitation, and other activities relating to MFD/MBE procurement. Montgomery College, MCPS and HOC utilize the staff responsible for procurement, construction and/or affirmative action programs to perform MFD/MBE procurement-related functions.
- 7. Minority business certification. Only the County government and M-NCPPC certify MFD/MBE businesses. The other agencies accept, usually after verification, certifications from selected State and County or other jurisdictions. For example, the County government's certification is accepted by Montgomery College, MCPS and HOC, but not accepted by WSSC and M-NCPPC.
- 8. Minority vendor directory. As is the case of certification, only the County government and M-NCPPC publish a minority vendor directory. The other agencies maintain MFD/MBE vendor files, but do not publish a directory.
- 9. Miscellaneous. Three other differences in agency MFD/MBE procurement programs are worthy of note: only the WSSC has MBE Advisory Committees composed of WSSC staff personnel and representatives of MFD/MBE and non-MFD/MBE firms to advise the Commission on MBE-related matters; M-NCPPC's procurement procedures require that, depending on the size of the project, a specified number of MFD/MBE firms must be contacted when conducting an oral solicitation; and the MBE procurement programs of WSSC contain an audit provision to measure and report to management and the Commission actual MBE participation as compared against goals of the programs.

There appear to be two major reasons for these many differences among County and bi-County agency MFD/MBE procurement programs:

- Some agencies are either totally or partially subject to the State Code in matters pertaining to purchasing and contracting (MCPS, Montgomery College, and WSSC for construction projects); other agencies, to the County Code (the County government and, voluntarily, HOC for purchases of goods and services); while

still other agencies are subject only to their own regulations (M-NCPPC and WSSC for procurement of goods and services). While the State and County Codes are almost identical in definitions and qualifications of MFD/MBEs and minority groups, the laws differ on the major issue of preferences. The State Code mandates that all procurement awards be to the lowest bidder; while the County Code permits an award to other than the lowest bidder under certain conditions when it is necessary to meet the MFD participation goal. Finally, M-NCPPC and WSSC are not subject to either State or County laws for the procurement of goods and services.

- Agencies differ on the degree of emphasis that is placed on their respective MFD/MBE procurement programs. Without attempting to issue a precise "report card" on each agency, it is evident from this review that some agencies have simply dedicated more effort and resources to their MFD/MBE procurement programs. This is evident when comparing the degree of emphasis an agency places on: MFD/MBE identification and outreach; the aggressive solicitation of identified MFD/MBE vendors; and the type and number of procurement activities which the agency includes in its MFD/MBE procurement program.

Finally, comments from staff of some of the agencies and from members of the MFD/MBE community, indicate a strong perception that agency solicitation efforts should be strengthened. The perception exists on the part of some MFD/MBE businesses that an "old boy" network operates in the solicitation process. The perception is that agency personnel responsible for contracting and purchasing, especially those within agency departments, repeatedly solicit the same non-minority firms and vendors which the procurement personnel have done business with in the past. This situation is not considered as a deliberate discriminatory process; rather it is primarily the result of "habit" and a feeling of being "comfortable" doing business with long-time vendors. The MFD/MBE business community feels that if there was more aggressive solicitation, the agencies would discover that there are many responsible MFD/MBE businesses who would qualify for awards.

B. County Government

In the five fiscal years that the County government has maintained statistics on the participation of minority, female, and disabled-owned businesses in County procurements, the dollar value of contracts and purchases awarded to MFD businesses as a percentage of total County procurements have steadily increased (see Table 2, page 9). This increase was especially noticeable after 1985 when the Council enacted several changes to the MFD business procurement law which clarified legislative intent, increased the MFD participation goal from 10% to 15%, strengthened procedural requirements relating to outreach and certification, and generally brought a renewed emphasis to the MFD procurement program.

Another 1985 change to the County's MFD procurement law was to extend the program an additional three years until July 1, 1988. With that date near, the Council has introduced a bill which would extend the MFD procurement law (Sections 11B-23A thru 11B-23G, Montgomery County Code) to mid-1992. While not included in the bill, there is evidence that at least one amendment should be enacted to assure that certified MFD businesses continue to be afforded an opportunity to receive a fair share of County government procurements. Specifically, that amendment should accomplish the following:

- Eliminate the exclusion from the MFD business participation goal those procurements which are not "original" (Section 11B-23C(d)). Included in the category of procurement actions considered non-original are contract modifications, delivery orders, and contract renewals. Eliminating this blanket exclusion would open a considerable volume of procurements to MFD business participation, provide a more accurate picture of the extent of MFD business involvement in County government procurements, and enable the County Council to set a reasonable MFD business participation goal.

IX. RECOMMENDATIONS

The following recommendations are based upon the Office of Legislative Oversight's (OLO) review and evaluation of the program policies, procedures and regulations of the six major County and bi-County public agencies to promote contracting with minority, female, and disabled-owned business, and the results of that program.

A. County Council. The County Council should:

1. Establish an interagency committee to provide a forum for the coordination of MFD/MBE procurement matters and the standardization of appropriate agency procedures.

This review by OLO indicates that there is considerable diversity among the MFD/MBE procurement program policies, procedures, regulations and attitudes of the six County and bi-County agencies. This diversity exists despite the fact that each agency's procurement program is based on the same policy objective of increasing procurements from minority, female, and disabled-owned businesses; and each agency's procurement program is targeted at the same socially and economically disadvantaged minority groups, women, and the physically and mentally disabled in the same general area (roughly the Washington Metropolitan Statistical Area).

It is recognized, too, that the County and bi-County agencies have developed different MFD/MBE procurement programs because of their individual and particular procurement needs. However, many aspects of the various agency MFD/MBE administrative procedures could be standardized to reduce the confusion and duplication which MFD/MBE businesses currently encounter.

Areas where standardization would help MFD/MBE businesses include:

- MFD/MBE certification requirements and procedures;
- Procedures for identifying and soliciting MFD/MBE firms;
- Methods and extent of public notification of bids and RFPs, especially in minority-oriented newspapers and periodicals; and
- Innovative ways to provide direct and indirect financial assistance from both public and private sources.

In addition, creation of an interagency coordinating committee for MFD/MBE procurement matters would provide a forum for the exchange of information and initiatives among the agencies, and between the agencies and the MFD/MBE community, on all aspects of the MFD/MBE procurement utilization program.

2. Extend the sunset date of the MFD business procurement law (Sections 11B-23A thru 11B-23G) and consider eliminating the blanket exclusion from the MFD business participation goal those procurements which are not "original".

Extending the sunset date of the MFD business procurement law at least three more years will continue the program, ensure active oversight by the Council, and provide for periodic evaluation of the program.

Elimination of the provision that only original contracts are subject to the MFD business participation goal would open a considerable volume of procurements to participation by MFD businesses.

3. In cooperation with the County Executive and other agency heads, propose State legislation which would authorize the Board of Trustees of Montgomery College, the Board of Education, and the Washington Suburban Sanitary Commission to adopt procedures whereby a contract preference may be awarded to minority business enterprises when the agency deems it necessary to meet its reasonable MFD/MBE participation goals.

(Note: Bills to accomplish the above have been introduced in the past, but all have failed.)

4. Request all County and bi-County public agencies provide the Council an annual report on their MFD/MBE procurement utilization programs.

As a minimum, each agency should report annually to the Council on the following:

- The total number and dollar value of all agency procurement transactions;

- The total number and dollar value of all agency procurement transactions which were subject to MFD/MBE participation goals;
- The total number and dollar value of all agency procurement transactions which were not subject to the agency's MFD/MBE participation goals, together with a general explanation on why they were excluded;
- The total number and dollar value of all agency procurement transactions with MFD/MBE businesses, categorized by minority group, females, and the disabled; and
- The total number and dollar value of each procurement transaction which was awarded to other than the lowest bidder in order to meet an MFD/MBE participation goal.

B. County Executive. The County Executive should:

1. Establish an MFD Business Advisory Council.

For a program that has appropriately received a high degree of attention from the County Executive and the County Council, it is unusual that a body has not been appointed to advise the County Executive and County Council on all matters relating to the County government's MFD business procurement program. The membership of the advisory council should include appropriate County government staff personnel (Procurement and Materiel Management, Economic Development, etc.), and representatives of MFD and non-MFD businesses.

2. Direct a review for possible revision of those sections of Executive Regulation No. 130-85, Procurement Regulations, which relate to the MFD business procurement program.

Although the procurement regulations have been in effect for over two years, some procedures pertaining to the MFD procurement program have not been adequately implemented. The following are examples where an Executive directed review could strengthen the MFD procurement process:

- Using departments¹ should develop written internal procedures to identify MFD businesses to compete for contracts and purchases of goods and services, including professional and construction services. (Responsibility of using departments concerning identification of MFD firms is referenced in Sections D.2.1.1e(3), D.2.2.1e(2), E.2.d and G.5.d(1), Executive Regulation No. 130-85.)

¹ Executive Regulation No. 130-85, Procurement Regulations, defines a using department as any department, office or agency using goods or services as provided for in the County's procurement law; and also includes departments responsible for administration of contracts.

- Using departments should develop written internal procedures to more actively and aggressively solicit MFD businesses to compete for contracts and purchases, especially those with a dollar value between \$500 and \$75,000. (Responsibilities of using departments concerning solicitation is referenced in Sections G.2 and G.5.d(2) & (4), Executive Regulation No. 130-85).
- Using departments should monitor and report on the level of participation of MFD subcontractors. (Currently, few if any contract administrators specifically monitor and report on whether MFD subcontractor participation is in compliance with the provisions of the County's contract with the prime contractor.
- The Division of Procurement and Materiel Management and using departments should require that non-MFD prime contractors submit the name and degree of effort of MFD subcontractors (or submit proof of a good faith effort to identify MFD subcontractors) at the time a bid or proposal is submitted to the County. (Currently, County government procedures require that such information on MFD subcontractors be submitted prior to actual award of the prime contract.)

X. AGENCY COMMENTS

Before submitting this report to the County Council, a draft copy was sent to the Chief Administrative Officer and the heads of the other five County and bi-County public agencies. All comments received from the six agencies have been incorporated into this final report.

MONTGOMERY COUNTY GOVERNMENT

I. POLICY:

To encourage the economic development and increase the business opportunity of minority, female, and disabled-owned businesses by requiring the Chief Administrative Officer to structure the contract procedures of County departments so as to facilitate and encourage the award of at least 15% of the total dollar value of all contracts and subcontracts to responsive and responsible minority businesses.

II. PROGRAMS/GOALS:

The County program requires all who are involved in contracting and purchasing to actively and aggressively recruit MFD businesses so as to award a minimum of 15% of the total dollar value of County contracts and subcontracts therefrom to minority, female and disabled-owned businesses, and to non-profit entities organized to promote the interests of handicapped persons.

III. MFD/MBE DEFINITIONS:

The County's legislation uses the term minority, female and disabled-owned (MFD) rather than minority business enterprise (MBE).

The County Code defines a minority business as any legal entity, organized to engage in commercial transactions, which is 51% owned, controlled, and managed by one or more minority persons, (a member of a socially or economically disadvantaged minority group, to include blacks, hispanics, American Indians, Alaska natives, Asians, Pacific Islanders, women and the mentally or physically disabled) or a non-profit entity organized to promote the interests of persons who have a handicap as defined in Montgomery County (M.C.) Code, Section 27-6A (physical, mental or emotional impairment). (Note: Unlike the State's definition of a minority business which are found in Sections 14-148 and 18-601, State Finance and Procurement Article, the County's definition does not exclude a joint venture).

To qualify as a minority business under the County's program, a minority business must not have exceeded \$15 million in average annual gross receipts for the immediate past three years.

IV. PROCEDURES:

1. Goals. 15% MFD participation of the total dollar value of all original procurements over \$500 except for those specifically excluded (see below).
2. Preferences. The County government's program has no active preference program. However, the program does provide for the use of a minority preference when it is determined that the County government is not making adequate progress in meeting the annual goal of 15% MFD contracting. The characteristics of the preference are as follows:
 - Applies only to competitively bid contracts between \$7,000-\$500,000 (or RFPs over \$10,000);
 - Allows for the selection of a minority bidder other than the lowest responsible bidder;
 - The minority preference must be determined by the County Executive and specified in the invitation for bids (or RFPs), and cannot exceed 120% of lowest responsible bid; and
 - Where a minority preference is to be used, the invitation for bids must state the intention to utilize minority preference procedures.
3. Exclusions from Program. The Code specifies that the 15% minority business goal does not apply to the following categories of procurement actions:
 - Grants that are appropriated by the Council to specific grantees;
 - Utilities; and
 - Intergovernmental or intragovernmental (public entity) procurements as defined in MC Code, Section 11B-42, Cooperative Purchasing.

Because the Code states that the purchases subject to the 15% minority business goal are "original" formal and informal procurements over \$500, in practice the following additional categories of procurement actions have been excluded from those subject to the 15% minority business goal:

- Contract modifications (amendments, change orders and field orders);
- Contract renewals;
- Delivery orders; and
- Administrative actions (actions which do not alter the terms, conditions, scope or value of a contract).

4. Solicitation/Outreach. Current Executive procurement regulations assign responsibility for solicitation and outreach activities to the Minority Procurement Officer in the Finance Department's Division of Purchasing and Materiel Management (DPMM). However, a recent internal reorganization within the Executive branch now places responsibility for outreach activities in the Office of Economic Development (OED). Retained in the Purchasing Division is responsibility for solicitation, certification, counseling, technical assistance and oversight of MFD procurement activities. In addition, each individual department of County government is responsible for MFD solicitation for contracts for which it is responsible.

The County government has been most active in sponsoring workshops and seminars on MFD business matters. The most recent was in November 1987, and included small businesses. In February 1988, the County Executive held a meeting with a large number of MFD business representatives. In late March 1988, another County government sponsored conference with MFD businesses will be held.

5. Technical/Financial Assistance. Technical assistance is provided on an individual basis and in group seminars and workshops conducted jointly by the DPMM and OED. There is no program for direct financial assistance; however, the County provides information, counseling and referrals to public and private financial resources.
6. Waivers. The law provides for a waiver of the minority business contracting requirement. The procurement regulations authorize the Chief, DPMM to waive the 15% MFD subcontracting requirement for a particular bid or proposal if the prime contractor, after a "good faith" effort, is unable to find an MFD subcontractor, or if subcontracting would not be appropriate for the particular project. In FY 87, the MFD subcontracting requirement for procurements totaling \$7,354,780 was waived.
7. Certification. The County does its own certification and accepts certification of other public agencies, to include WSSC, M-DOT, and the State of Maryland.
8. Vendor Directory. The County publishes its own minority business directory.
9. Miscellaneous
 - The County government is one of two public agencies (the other is M-NCPPC) which has a "cap" on the receipts of minority businesses.

- Another characteristic of the County's MFD business program is that a non-minority prime contractor is not required to identify the MFD subcontractor which will be used to satisfy the 15% MFD participation goal prior to awarding the contract. The non-minority prime contractor need only execute a letter of intent to use an MFD contractor to be responsive to the bid/proposal. However, actual identification of the MFD subcontractor must be accomplished prior to contract signing.

V. REFERENCES:

1. Article II, Division IV, Sections 11B-23A to 11B-23G, Montgomery County Code.
2. Executive Regulations No. 130-85, Procurement Regulations, Section G, Minority Contracting.

VI. STATISTICS:

	<u>FY 86</u>	<u>FY 87</u>
1. Total dollar value of all procurements (prime and sub) subject to MFD goal.	\$83,131,589	\$102,690,203
2. Total dollar value of all procurements (prime and sub) awarded to MFD firms.	\$17,371,162	\$24,282,123
3. Percent MFD participation (prime and sub) of procurements subject to MFD goal.	20.9%	23.6%

MONTGOMERY COUNTY PUBLIC SCHOOLS (MCPS)

I. POLICY:

State law (Section 5-110, Education Article) directs the Montgomery County Board of Education (BOE) to establish a minority business utilization program to facilitate the participation of responsible certified minority business enterprises (MBE) in contracts awarded by the BOE in accordance with competitive bidding procedures. (Note: In the same section of the Maryland Code is a requirement that a contract for school buildings, improvements, supplies or other equipment must be "awarded to the lowest responsible bidder."

II. PROGRAMS/GOALS:

The MCPS has two distinct MBE programs:

- Procurement Program. Applies to all procurements, including professional service contracts, over \$7,500. However, the program does not apply to procurements of books, other instructional materials, or emergency repairs. Also, the program does not include any provisions for subcontracting. The informal goal of the program is 10% participation by MBEs of the total dollar value of all non-excluded procurements over \$7,500. The MCPS procurement program originated in 1983; however, a system to track and report MBE participation was initiated in January 1986.
- Construction Program. Applies to the procurement of all construction materials, supplies, equipment and services. The program has a provision for subcontracting. The goal of the program is to contract or subcontract a minimum of 10% of the total dollar value of such procurements from minority business enterprises. The program originated in November 1979.

III. MFD/MBE DEFINITIONS:

The MCPS procurement programs use terms and definitions found in State law (Section 11-148, State Finance and Procurement Article).

IV. PROCEDURES:

1. Goals.

- Procurement Program. MBE participation of 10% of total dollar value of all MCPS procurements (bids and RFPs) over \$7,500.
- Construction Program. MBE participation of 10% of total dollar value of all construction contracts. Mandatory (unless waived) for construction contracts of \$50,000 or more; encouraged for construction contracts under \$50,000.

2. Preference Highlights. There are no MBE preference provisions in either the MBE procurement or construction programs.

3. Exclusions. Excluded from the minority business utilization program are procurements under \$7500, emergency repairs, and procurement of books and other instructional materials.

4. Solicitation/Outreach. MCPS has no staff positions specifically dedicated to MBE solicitation and outreach. However, the staff of the Purchasing Division provides technical assistance to MBEs, places notices in bid requests, and sends written quotations to at least five MBE firms, and for telephone quotations, at least two MBE firms. For formal bids, the Purchasing Division staff mails bids to all MBE firms which have indicated an interest. For construction projects, in addition to placing notices in bid requests that MBEs are encouraged to compete, approximately 12 minority associations are directly notified of each bid. Also, the Construction Division provides non-minority prime contractors with a list of MBE subcontractors to facilitate subcontracting.

5. Technical/Financial Assistance. The MCPS' purchasing and construction staff provide technical assistance to MBE firms on request; however, no financial assistance to MBEs is available.

6. Waivers. The Director of Procurement and the Director of Construction can grant a waiver in their respective programs under any of the following conditions:

- Lack of response from MBE firms to a bid on RFP;
- Absence of an MBE firm capable of providing the required product or service; or
- The MBE subcontractor's price is too high for the prime contractor to accept.

7. Certification. The MCPS does not do any certification. Certifications by the County government, M-DOT, and the District of Columbia are accepted. However, the MCPS does verify certification with all MBE submissions.
8. Vendor Directory. The MCPS does not publish a MBE vendor directory. For the procurement program, the MCPS uses an automated Bid Analysis and Generation System (BAGS) which establishes a commodity and vendor data base and also tracks minority procurement. For the construction program, MBE vendors on file are notified of construction projects over \$50,000.
9. Miscellaneous. For the construction program, there is a distinction between contracts under \$50,000 and those of \$50,000 or more.
 - Under \$50,000. Minority business enterprises are encouraged to respond; and non-minority firms are encouraged to subcontract a minimum of 10% of the total dollar value of the contract.
 - \$50,000 or more. Non-minority bidder must submit a Minority Business Enterprise Utilization Affidavit, acknowledging the MBE goal to subcontract 10% of the contract with a minority firm. The apparent non-minority low bidder then has 10 days to submit a Schedule of Participation of Minority Business Enterprises, naming each MBE which will be a subcontractor, or submit a Request for Exception, to obtain a waiver from the requirement.

V. REFERENCES:

1. Section 5-110(c), Education Article. Requires award be made to lowest responsible bidder for all procurements over \$7500 which are advertised by formal bid.
2. Section 5-110(d), Education Article. Requires the Montgomery County Board of Education to establish a Minority Business Utilization Program.
3. Section 11-148, State Finance and Procurement Article. Defines minority business enterprise and minority person.
4. MCPS Procedures: Minority Business Enterprise Procedures for State Public School Construction, May 14, 1985.

VI. STATISTICS:

Procurement Program

<u>Period</u>	<u>Total \$ Value of Awards over \$7500</u>	<u>Total \$ Value of Awards to MBEs</u>	<u>% Participation by MBEs</u>
1st Q FY 87	\$ 4,441,596	\$ 335,241	7.5%
2nd Q FY 87	10,716,735	165,532	1.5%
3rd Q FY 87	3,332,543	220,478	6.6%
4th Q FY 87	14,512,422	797,186	5.5%
Total FY 87*	\$33,003,296	\$1,518,437	4.6%
Total FY 88**	\$ 9,521,552	\$ 804,225	8.4%

* FY 87 was the first full fiscal year statistics were maintained.

** FY 88 July 1, 1987 - December 31, 1987 only.

Construction Program

<u>FY</u>	<u>Total \$ Value of Awards of \$50,000 or More*</u>	<u>Total \$ Value of Awards to MBEs</u>	<u>% Participation by MBEs</u>
85	\$15,400,000	\$1,386,000	9.0 %
86	\$ 7,800,000	\$ 156,000	2.0 %
87	\$74,000,000	\$4,810,000	6.5 %

* Note: Statistics on the total value of construction contracts under \$50,000 and the percentage of MBE participation are not maintained by MCPS.

MONTGOMERY COLLEGE (MC)

I. POLICY:

The College policy is to structure its procedures for purchasing goods and services so that minority businesses receive a fair share of College contracts and awards. However, the policy prohibits any awards that are financially disadvantageous to the College or that confer special privilege or status upon any minority business or group or individuals representing a minority business.

II. PROGRAMS/GOALS:

The College has two distinct programs:

- Procurement Program. The College has had an informal, non-automated program to "encourage by all reasonable and practical means" participation by minorities. There is no specified goal; however, the College has set a procurement target of 15% minority business participation of the total dollar value of all procurement contracts.
- Facilities Program. This program covers four categories of expenditures: CIP, plant operations, telephone/mail, and performing arts center. This program encourages minority participation by a statement in bid advertisements that "minority business enterprises are encouraged to respond to this solicitation". No goal is specified other than a statement that procedures be structured with the result that minority businesses are awarded a fair share of the awards. Statistics are not maintained on MFD participation in this program.

III. MFD/MBE DEFINITIONS:

Uses terms and definitions as found in State law (Section 11-148, State Finance and Procurement Article).

IV. PROCEDURES:

1. Goals.

- Procurement: A target of 15% of total dollar value of all contracts
- Facilities: None.

2. Preference Highlights. The College has no MBE preference provisions in either program.

3. Exclusions from Program. The College has no policy on exclusions; however, all procurements in the Facilities category are not subject to an MBE target or goal.

4. Solicitation/Outreach. No formal program of solicitation and outreach or dedicated staff. However, notices are included in each bid invitation that, "minority firms are encouraged to bid".

5. Technical/Financial Assistance. College staff provides technical assistance if requested; however, no financial assistance is available.

6. Waivers. Not applicable.

7. Certification. The College does no certification; but accepts certification by the County government and the State agencies.

8. Vendor Directory. The College does not publish an MBE vendor directory.

9. Miscellaneous. In 1987, the College supported a proposed amendment to the State Annotated Code which would have authorized the College to establish a preference program for minority businesses. The bill was modified, and when enacted simply directed the College Board of Trustees to establish a mandatory Minority Business Utilization Program to facilitate the participation of responsible certified MBEs in contracts awarded by the College in accordance with competitive bidding requirements. The program applies to contracts for buildings, improvements, equipment and supplies over \$7,500, but not to the purchase of books, instructional materials or emergency repairs.

V. REFERENCE:

1. Section 16-408, Education Article. Directs the College Board of Trustees to establish a mandatory Minority Business Utilization Program.

2. Section 11-148, State Finance and Procurement Article. Defines a minority business enterprise and a minority person.
3. College Procurement Policy 7-54, July 20, 1987 (latest modification).

VI. STATISTICS:

<u>Procurement Program</u>	<u>FY 86</u>	<u>FY 87</u>
a) Total dollar value of all procurements (approximately)	\$5,200,000	\$7,107,000
b) Total dollar value of all procurements awarded to minority businesses*	\$182,495	\$139,573
c) Minority business participation as a percentage of total procurements	3.5%	2.0%

Facilities Program

<u>Category</u>	<u>Expenditures**</u>	
	<u>FY 86</u>	<u>FY 87</u>
CIP	\$5,325,000	\$5,098,000
Plant Operations	3,374,690	3,543,000
Telephone/Mail	600,000	592,000
Performing Arts Center	150,000	180,000
	<u>\$9,449,690</u>	<u>\$9,413,000</u>

* The College attributes low participation by minority business to the following: large volume of purchases on other governmental contracts; contract modifications and renewals, sole source contracts and emergency purchases are not included in the Minority Business Utilization Program; and many contracts have a value of under \$7,500, and are thus excluded from the Minority Business Utilization Program.

** The College does not maintain a record of minority business participation in the procurement categories in the Facilities Program.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION (M-NCPPC)

I. POLICY:

To aggressively seek participation from contractors and vendors whose businesses are owned and operated by minorities, females, and the disabled (MFD).

II. PROGRAMS/GOALS:

The policy is carried out by the application of special rules pertaining to procurements from businesses owned and operated by minorities, females, and the disabled. The program uses preferences in the form of special procedures for the award of a contract/procurement action to other than the lowest bidder when all of the following four criteria are met:

Criteria #1: The selected MFD bid is no more than 10% higher than the lowest acceptable bid for the first \$25,000 of procurements; and no more than 5% higher than the lowest acceptable bid between \$25,001-\$100,000; and no more than 3% higher for any amount over \$100,000 of procurement than the lowest acceptable bid received.

(Note: An example of how the MFD preference under Criteria #1 is applied is on the next page.)

Criteria #2: The MFD firm is certified by the M-NCPPC and listed in the M-NCPPC published MFD Business Enterprise Directory.

Criteria #3: The MFD firm does not exceed the following limits (caps):

- Manufacture/Retail = \$5 million average gross annual receipts for past 3 years;
- Wholesale/services and Construction = \$2.5 million average gross annual receipts for past 3 years.

Criteria #4: The MFD bid is responsive and responsible.

A non-MFD firm can receive the preferences of an MFD firm if the non-MFD firm agrees in writing before the prime contract is signed to subcontract a minimum of 15% of the total dollar value of the contract to a certified MFD business.

An Example of the Application of the MFD Preference Under Criteria #1

1) Assume the low bid from a non-MFD firm for a project is \$103,000.

2) Apply the Commission's current MFD preference under Criteria #1, which is:

10% on the first \$25,000 of bid price, plus
5% on amounts between \$25,001 and \$100,000, plus
3% on any amount over \$100,000.

3) Calculate the preference for bids from MFD firms using the low non-MFD bid of \$103,000.

10% of first \$25,000	= \$2,500
5% of \$75,000 (\$100,000 less \$25,000)	= 3,750
3% of \$ 3,000 (\$103,000 less \$100,000)	= 90
Total MFD preference:	<u>\$6,340</u>

4) Thus, a bid from an MFD firm of \$109,340 or less would be the low bid, calculated as follows:

\$103,000	(non-MFD low bid)
+6,340	(MFD preference)
<u>\$109,340</u>	(MFD firm's low bid)

III. MFD/MBE DEFINITIONS:

Uses same terms and definitions as County government except the M-NCPPC requires that an MFD business be owned and controlled by minority person. County government definition requires an MFD business be owned, controlled and managed by a minority person.

To qualify as an MFD business in the M-NCPPC's program, the firm cannot exceed the limit on the average gross receipts as specified under Criteria #3 above.

IV. PROCEDURES:

1. Goal. A minimum of 15% of the total dollar value of all procurements. Although procurements under \$3,000 are not subject to the MFD procurement process, all procurement expenditures, except land purchases, are considered when computing the MFD goal. (Note: On February 10, 1988, the Commission raised the goal to 25%.)
2. Preferences. Preferences are available to MFD firms who meet four criteria (explained above). In addition, MFD firms can receive additional "helps" in the form of adjusted insurance requirements and accelerated progress payments.
3. Exclusions from Program. Purchase of and land are excluded.
4. Solicitation/Outreach. Provided by staff of the M-NCPPC's Employee Relations and Development Office and the Purchasing Office. Regulations require mandatory solicitation of MFD firms for all purchase orders and contracts over \$3,000, and mandatory follow-up at least once with MFD firms not responding when the solicitation is oral. In addition, the M-NCPPC advertises in a minority-oriented newspaper.

MFD solicitation requirements vary according to the dollar value of the bid:

<u>\$ Value of Bid</u>	<u>Mandatory MFD Solicitation Requirement</u>
\$0 - \$3,000	Not required.
\$3,001 - \$5,000	At least five MFD firms unless there are less than five listed on the certified MFD vendor list.
\$5,001 - \$15,000	At least ten MFD firms unless there are less than ten listed on the certified MFD vendor list.
\$15,001 and up	Advertised by written notice of MFD solicitation.

5. Technical/Financial Assistance. Technical assistance is provided on the request of the MFD vendor. Financial assistance in the form of special accelerated progress payments and adjusted insurance requirements are available to MFD firms.
6. Waivers. Can be granted by either the M-NCPPC's Executive Committee (Chairmen of Montgomery and Prince George's County Planning Boards and the Executive Director) or the full Commission.

7. Certification. The M-NCPPC does its own certification and also accepts M-DOT certification.
8. Vendor Directory. The M-NCPPC publishes its own MFD vendor directory.
9. Miscellaneous: Non-minority firms must identify minority subcontractors prior to award of a contract. The M-NCPPC attributes the strength and success of its MFD program to the mandatory solicitation requirements for all procurements of \$3,000 or more. The M-NCPPC program also includes mandatory monitoring for MFD subcontractor participation to assure compliance with the provisions of the awarded contract.

V. REFERENCE:

M-NCPPC Practice No. 4-10, Revised December 10, 1986.

VI. STATISTICS:

<u>FY</u>	<u>Total \$ Value of Procurements Available to MFDs</u>	<u>Total \$ Value of Awards to MFDs</u>	<u>% Participation by MFDs</u>
86	\$24,310,000	\$3,209,000	13.2%
87	\$34,640,000	\$6,389,000	18.4%

(Note: MFD participation in the three immediate prior years were as follows: FY 83-5.3%; FY 84-10.1%; and FY 85-11.5%)

WASHINGTON SUBURBAN SANITARY COMMISSION (WSSC)

I. POLICY:

To increase the number of minority-owned business enterprises (including female and handicapped persons) responding to Commission procurement contracts and to increase the number of minority-owned business enterprises awarded procurement contracts; and to establish a mandatory Minority Business Enterprise (MBE) program for competitively bid construction contracts and for negotiated contracts for architectural/engineering professional services.

II. PROGRAMS/GOALS:

WSSC has three distinct programs:

Program A. Mandatory Minority Business Enterprise Program: A non-preference program for competitively bid construction contracts and negotiated contracts for architectural/engineering professional services. MBE participation goals vary according to the value of the contract: 0% (under \$75,000) to 15% (over \$200,000). MBE prime contractors are also required to subcontract.

Program B. Minority Procurement Policy: A preference program utilizing a number of procedures to assist in awarding primarily non-construction and non-professional services contracts to minority-owned firms. (Some professional services and construction services are also procured under Program B.) The goal of the program is 25% MBE participation using any of the following procedures or "tools":

- A minority subcontracting clause equivalent to at least 10% of contract's total dollar value (however, cannot subcontract more than 40% of any contract to non-MBE subcontractors).
- Award to an MBE whose bid is within 10% of the low bid;
- Restricting competitive bid contracts to MBEs;
- Direct negotiation with an MBE firm on negotiated contracts;
- Waiving or reducing required bonds and insurance for MBEs;
- Reducing corporate experience requirements for MBE firms; and

- Awarding additional points up to 15% of total available when evaluating MBE submission to an RFP. The overall goal of the program is to award minority-owned firms at least 25% of the total dollar value of all procurement contracts.

Program C. Other Professional Services Contracts: Also a preference program which uses some of the above procedures or "tools" for professional services contracts such as legal, financial, medical, and consulting. The goal of this program is 20% MBE participation.

III. MFD/MBE DEFINITIONS:

Uses same terms and definitions as found in State law (Section 18-601, State Finance and Procurement Article).

IV. PROCEDURES:

1. Goals.

Program A. Mandatory Minority Business Enterprise Program.

(1) Negotiated Architectural/Engineering Contracts: Subcontract to MBE firms a minimum of 10% when negotiated contract is \$75,000 or more.

(2) Construction Contracts: Subcontract to MBE firms as follows:

<u>Type Contract</u>	<u>\$ Value of Contract</u>	<u>Subcontracting Goal</u>
a) All	Under \$75,000	0%
b) Pipelines up to 16"	\$ 75,000-100,000	5%
	\$100,001-200,000	10%
	over \$200,000	15%
c) Pipelines over 16" and non-pipeline contracts	Percentage participation determined for each contract.	

Program B. Minority Procurement Policy: MBE participation equal to 25% of total dollar value of all contracts.

Program C. Other Professional Services: MBE participation equal to 20% of total dollar value of all contracts.

2. Preference Highlights

Program A. Mandatory MBE Program: No preferences to MBE firms; however, all contracts over \$75,000 must include subcontracting with an MBE firm for the bid to be responsive.

Program B. Minority Procurement Policy: The following preferential procedures or "tools" are available to meet goal of 25% minority participation:

- (1) Ten percent MBE subcontracting.
- (2) Award if MBE bid within 10% of low bid.
- (3) Restricting competitive bid contracts to MBEs.
- (4) Direct negotiation with one or more MBEs.
- (5) Waiving or reducing bond and insurance for MBEs.
- (6) Reducing corporate experience requirements for MBEs.
- (7) Awarding additional points in evaluating MBE responses to RFPs of up to 15% of total points available.

Program C. Other Professional Services: Can use four of the above preferential procedures: Numbers (1), (3), (4), and (7) above.

3. Exclusions from Programs. Except for contracts under \$75,000 in construction and professional architectural/engineering contracts, there are no exclusions.
4. Solicitation/Outreach. An MBE officer on the WSSC staff does outreach and education; and the WSSC recently established an Office of Minority Affairs for MBE and EEO matters. Solicitation includes notice of MBE participation in bid requests and RFPs. The WSSC recently began advertising in a minority oriented newspaper.
5. Technical/Financial Assistance. Technical assistance offered by MBE Officer and other staff members. Financial assistance limited to waiving or reducing bonds and insurance.
6. Waivers. Except for Program B, waivers may be granted when MBE firms are not available to participate as either a prime or subcontractor.

7. Certification. The WSSC does not do its own certification; accepts M-DOT and the Maryland Minority Business Enterprise Certification Council (MBECC) certification. In addition, the Minority Procurement Policy program accepts certification from the District of Columbia's Minority Business Opportunity Commission.
8. Vendor Directory. The WSSC does not produce its own directory, but uses other agency directories. The WSSC does maintain an MBE vendor list.
9. Miscellaneous
 - Each of WSSC's MBE procurement programs contains an audit provision to measure actual results against program goals. These audit reports are reviewed by management and the Commission to evaluate the progress of the MBE participation programs.
 - The WSSC utilizes a Minority Business Enterprise Advisory Committee for the MMBE Program (Program A). The Committee is composed of WSSC personnel plus representatives of MBE and non-MBE firms. There is also an MBE Advisory Committee in Program B.
 - Does not have a "cap" on earnings of MBEs.
 - The Commission annually conducts a public hearing on the minority procurement programs.
 - An apparent low bidder must submit an MBE Participation Plan within seven days after the bid opening. Failure to do so disqualifies the bidder. Prior to executing the actual contract, the prime contractor must receive WSSC approval of the MBE Participation Plan and submit an MBE Execution Certificate.

V. REFERENCES:

General: Section 18-601, State Finance and Procurement Article.

Program A. Mandatory Minority Business Enterprise (MMBE) Program: WSSC Standard Procedures E86-04, January 1, 1987 (Art 29, Section 3-102, WSSC).

Program B. Minority Procurement Policy: WSSC Resolution No. 87-1086 (November 12, 1986).

Program C. Other Professional Services Contracts: WSSC Resolution No. 87-1087 (March 11, 1987).

VI. STATISTICS:

Program A. Mandatory Minority Business Enterprise (MMBE) Program.
Competitively bid construction contracts (5% to 15% goal) and negotiated architectural/engineering professional services contracts (10% goal).

<u>Category</u>	<u>FY 86</u>	<u>FY 87</u>
1. Total dollar value of contracts under the MMBE Program (over \$75,000).	\$33,609,801	\$58,502,870
2. Total dollar value of all contracts awarded to MBE (prime and sub) under MMBE Program.	\$ 6,982,230	\$ 8,106,661
3. Percent MBE participation (prime and sub) of contracts awarded under MMBE Program.	20.8%	13.9%

Program B. Minority Procurement Policy. Competitively bid contracts for goods and services (25% goal).

<u>Category</u>	<u>FY 86</u>	<u>FY 87</u>
1. Total dollar value of procurement contracts awarded.	\$38,190,892	\$64,129,118
2. Total dollar value of contracts awarded MBE firms.	\$11,799,233	\$16,173,884
3. Percent MBE participation of procurement contracts awarded.	31.0%	25.2%

Program C. Other Professional Service Contracts. (20% goal).

This new program was implemented in June 1987; therefore, no annual statistical data is available until after June 1988.

HOUSING OPPORTUNITIES COMMISSION (HOC)

I. POLICY:

When possible, the HOC Director of Finance will utilize, except for real estate matters, minority-owned enterprises when contracting, purchasing or disposing of surplus goods.

II. PROGRAMS/GOALS:

The HOC has two programs:

Program A: Comprehensive Improvement Assistance Program (CIAP). A Federal assistance program administered by HUD to finance renovation and modernization projects. The goal of 20% is specified in Federal directives.

Program B: The HOC funded purchase of goods and services. The majority of purchases under this program are through the various cooperative government programs: HUD Consolidated Supply, MCPS and State contracts, State Use Industries, etc. Although no goal is specified in HOC procedures, 20% MBE participation has traditionally been used.

III. MFD/MBE DEFINITION:

Uses the same terms and definitions as the County government: minority, female, and disabled (MFD).

IV. PROCEDURES:

1. Goals. Program A. Federally-funded CIAP. MFD participation equal to 20% of the total dollar value of all contracts.

Program B. HOC funded contracts for goods and services. MFD participation equal to 20% of the total dollar value of all transactions except the purchase of land.

2. Preferences. The HOC programs offer no preferences to MFD businesses.

3. Exclusions from Program. All land purchases are excluded. In addition, between 80% and 85% of HOC funded procurements of goods, supplies and commodities are through government cooperative purchasing programs which are excluded because HOC neither negotiates nor controls the contracts.
4. Solicitation/Outreach. The HOC has no special staff assigned to perform these activities. Although the HOC has no formal outreach program, the purchasing and EEO staff do respond to individual MFD vendor inquiries and requests for information. Solicitation is limited to a notice in each bid request encouraging MFD firms to bid.
5. Technical/Financial Assistance. The HOC purchasing staff provides minority vendors technical assistance on responding to bids and proposals when requested. No financial assistance is available.
6. Waivers. Not applicable.
7. Certification. HOC does not do its own certification. Accepts certification from all State and County certifying agencies.
8. Vendor Directory. HOC does not produce its own MFD directory. Uses the County's directory.
9. Miscellaneous. Procurements under \$1000 are not included in the program or recorded for MFD statistical purposes.

V. REFERENCES:

- 1) HOC Policy, Section III - Finance: Contract, Purchase and Sales Policy (undated).
- 2) HUD Federal Public Housing Comprehensive Improvement Assistance Program Handbook 7485.1 Rev-2 (1981).
- 3) Attachment 0 to OMB Circular A-102 (August 1981).

VI. STATISTICS:

<u>FY</u>	<u>Program</u>	<u>Total \$ Value of Awards Available to MBEs</u>	<u>Total \$ Value of Awards to MBEs</u>	<u>% Participation by MBEs</u>
86	HUD Funded CIAP	\$1,439,655	\$647,482	45.0%
	HOC Funded Proc	\$2,230,233	\$239,177	10.7%
	Total	\$3,669,888	\$886,659	24.2%
87	HUD Funded CIAP	\$ 213,358	\$124,189	58.2%
	HOC Funded Proc	\$1,263,169	\$335,449	26.6%
	Total	\$1,476,527	\$459,638	31.1%