

**MEMORANDUM**

TO: County Council

FROM: Robert H. Drummer, Legislative Attorney 

SUBJECT: **Action:** Expedited Bill 25-09, Contracts and Procurement - Minority-owned Businesses – Amendments

**Transportation, Infrastructure, Energy and Environment Committee recommendation (2-0, Councilmember Berliner absent): approve the Bill as introduced.**

Expedited Bill 25-09, Contracts and Procurement - Minority-owned Businesses – Amendments, sponsored by the Council President at the request of the County Executive, was introduced on May 5, 2009. A public hearing was held on June 9. The Transportation, Infrastructure, Energy and Environment Committee reviewed the Bill at a worksession on June 25.

**Background**

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

County Code §11B-61(b) requires the Executive to submit a report to the Council evaluating the need to extend the minority-owned business purchasing program by July 1, 2009. The law creating the program sunsets on December 31, 2009. Bill 25-09 would extend the deadline for the Executive to submit this report to the Council from July 1, 2009 to July 1, 2012. In addition, the Bill would extend the sunset date for the minority-owned business purchasing program from December 31, 2009 to December 31, 2012.

## Issues

### **1. What is the purpose of the Executive's Report to the Council?**

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

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

The Executive's report to the Council required by Code §11B-61(b) must evaluate "the need to extend the minority-owned business purchasing program." This evaluation must include a review of the evidence of discrimination affecting minority and women-owned businesses and whether the MFD program is a narrowly tailored remedy for the discrimination found. Since the MFD program must be a temporary remedy for discrimination, the law sunsets on December 31, 2009 unless the Council determines that the MFD program is still necessary to remedy the effects of past discrimination. The Executive's disparity report is designed to assist the Council in making this decision.

### **2. What were the findings of the County's most recent disparity report?**

The County retained the law firm of Griffin & Strong, P.C. (G & S) to conduct its most recent disparity study in 2005. A summary of the 2005 G & S disparity analysis findings is at ©7-11. G & S found statistically significant underutilization for some groups on some categories of contracts coupled with overutilization for some groups in the same category of contracts. The G & S recommendations and conclusions are at ©12-16.

### **3. What was the County's utilization of minority and women-owned businesses in FY08?**

The County's overall MFD utilization for FY08 is at 17%. The complete FY08 report prepared by the Department of General Services can be viewed at [http://www.montgomerycountymd.gov/content/DGS/Dir/OBRC/Resources/MFD/MFDAnnual\\_FY\\_08.pdf](http://www.montgomerycountymd.gov/content/DGS/Dir/OBRC/Resources/MFD/MFDAnnual_FY_08.pdf). In FY08, the County awarded 6627 contracts with a total value of \$499,970,514 subject to the MFD program. Minority and women-owned businesses received a total of \$90,117,613 or 18.02% of the dollars awarded. This represents a decrease in MFD utilization from the \$103,000,692 or 22.25% awarded in FY07. Final MFD utilization statistics for FY09 are expected to be available this fall.

### **4. How does the MFD program operate?**

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

The County MFD program is administered by the Office of Business Relations and Compliance (OBRC) of the Department of General Services (DGS). Each prospective successful contractor must meet with OBRC and provide a subcontracting plan listing MFD firms that the contractor plans to use, along with the type of work and value of work to be performed. The contractor may ask the Director of DGS to grant a full or partial waiver of the MFD subcontracting requirement for good cause. The dollar value of eligible contracts receiving a waiver in FY08 was \$133,360,726. A contractor must document compliance with its MFD subcontracting plan before receiving final payment. A contractor may modify its MFD plan only after approval by the Director of DGS.

### **5. What is the estimated cost and time to obtain an updated disparity report?**

The Director of DGS estimated that the cost to retain a consultant to complete an updated disparity report would be \$600,000. The Director also estimated that it would require 12 to 18 months to issue a request for proposals (RFP), select a consultant, and complete the disparity study. The County Attorney's Office (OCA) is responsible for hiring and overseeing contractors to conduct a disparity study. An RFP has not been issued because OCA did not receive an appropriation to conduct a disparity study in FY09. See the DGS Director's answers to questions from the MFP Chair at 18.

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

**6. Should the law and the time for the Executive's report to the Council be extended?**

It is not possible to begin and complete a disparity study before July 1, 2009. It is also unlikely that a valid disparity study can be completed before December 31, 2009. The logical alternative to extending the time period for the report and the sunset for the MFD program is to allow the MFD program to sunset on December 31, 2009. However, this sunset would not be based on an analysis that the MFD program is no longer necessary. **Committee recommendation:** extend the time for the Executive's report and the sunset of the law for 3 years.

This packet contains:	<u>Circle #</u>
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Expedited Bill No. 25-09  
Concerning: Contracts and Procurement  
- Minority owned businesses-  
Amendments  
Revised: April 29, 2009 Draft No. 1  
Introduced: May 5, 2009  
Expires: November 5, 2010  
Enacted: \_\_\_\_\_  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Sunset Date: December 31, 2012  
Ch.     , Laws of Mont. Co.     

## COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

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By: Council President at the Request of the County Executive

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**AN EXPEDITED ACT to:**

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

By amending

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

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

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



## LEGISLATIVE REQUEST REPORT

Expedited Bill 25-09

*Contracts and Procurement – Minority Owned Businesses – Amendments*

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

BILL



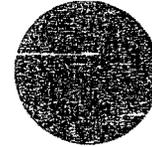
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Isiah Leggett  
County Executive

OFFICE OF THE COUNTY EXECUTIVE  
ROCKVILLE, MARYLAND 20850

MEMORANDUM



April 2, 2009

TO: Phil Andrews, President  
Montgomery County Council

FROM: Isiah Leggett, County Executive 

SUBJECT: Proposed Legislation – Minority-owned Business Purchasing Program

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

Thank you for your prompt consideration of this legislation. I look forward to working with the Council as it considers this proposal

Attachments (2)

cc: Joseph Beach, Director, OMB  
David Dise, Director, DGS

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OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett  
County Executive

Joseph F. Beach  
Director

Memorandum

041870

April 20, 2009



TO: Phil Andrews, President, County Council  
FROM: Joseph F. Beach, Director  
SUBJECT: Bill XX - Minority-Owned Business Purchasing Program

The purpose of this memorandum is to transmit a fiscal impact statement to the Council on the subject legislation.

**LEGISLATION SUMMARY**

The proposed legislation extends the sunset date for the Minority-Owned Business Purchasing Program.

**FISCAL SUMMARY**

The proposed legislation continues the current level of administrative effort that the Department of General Services provides within existing resources to administer this program. The proposed legislation also extends the date for the completion of the Disparity Study from FY10 to FY12. The Disparity Study could cost in excess of \$500,000 to prepare.

The following contributed to and concurred with this analysis: Kenneth Taylor with the Department of General Services and Adam Damin of the Office of Management and Budget.

JFB:ad

- cc: Kathleen Boucher, Assistant Chief Administrative Officer
- David Dise, Director, Department of General Services
- Harold Adams, Department of General Services
- Pam Jones, Department of General Services
- Ed Piesen, Office of Management and Budget
- Adam Damin, Office of Management and Budget
- Dee Gonzalez, Offices of the County Executive
- Marc Hansen, Office of the County Attorney

Office of the Director

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GRIFFIN &  
STRONG, P.C.

ATTORNEYS AT LAW  
PUBLIC POLICY CONSULTANTS

MONTGOMERY COUNTY, MARYLAND

DISPARITY STUDY

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EXECUTIVE SUMMARY

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APRIL 28, 2005

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404.584.9777 • 404.584.9730 • FACSIMILE

## B. SUMMARY OF DISPARITY ANALYSIS FINDINGS

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

### 1. IFB Contracts

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

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

#### Summary of IFB Contracts Disparity Indices

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

(\*) Indicates statistically significant under-utilization

(\*\*) Indicates statistically significant over-utilization

(-) Indicates no utilization and no availability

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

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

## 2. RFP Contracts

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

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

### Summary of RFP Contracts Disparity Indices

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

(\*) Indicates statistically significant under-utilization

(\*\*) Indicates statistically significant over-utilization

(-) Indicates no utilization and no availability

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

### 3. Mini-contracts

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

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

#### Summary of Mini-contracts Disparity Indices

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

(\*) Indicates statistically significant under-utilization

(\*\*) Indicates statistically significant over-utilization

(-) Indicates no utilization and no availability

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

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

#### 4. Small Purchase Contracts

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

<b>Goods</b>	<b>Other Services</b>
African American	African American
Asian American	Asian American
Hispanic American	Native American
Native American	
Disabled	

**Summary of Small Purchase Disparity Indices**

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

(\*) Indicates statistically significant under-utilization

(\*\*) Indicates statistically significant over-utilization

(-) Indicates no utilization and no availability

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

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

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

## 5. Direct Purchases Contracts

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

<b>Construction</b>	<b>Goods</b>	<b>Professional Services</b>	<b>Other Services</b>
African American	African American	African American	African American
Asian American	Asian American	Asian American	Asian American
Hispanic American	Hispanic American	Hispanic American	Hispanic American
Native American	Native American	Native American	Native American
Female	Female	Female	
Disabled	Disabled		

Summary of Direct Purchases Disparity Indices

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

(\*) Indicates statistically significant under-utilization

(\*\*) Indicates statistically significant over-utilization

(-) Indicates no utilization and no availability

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

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

advertising opportunities to bid. Neutral measures also include initiating efforts to assist all small business through general economic development efforts. Outreach efforts to educate small businesses on how to execute commerce with local governments would apply as well. In each of these examples, the jurisdiction would extend no explicit preference or benefit to MFD firms, thus excluding majority-owned firms.

To be effective, race and gender-neutral remedies must address the particular disadvantages which businesses face in commercial activity with a jurisdiction. For this analysis, race and gender-neutral disadvantages are grouped into the five categories listed below.

1. Lack of information about bid opportunities and the bidding process.
2. Unnecessarily restrictive contract specifications.
3. Slow payment of vendors, contractors and/or subcontractors.
4. Difficulty obtaining financing, bonding and insurance.
5. Lack of experience or skills in critical areas.

The researchers conducting this study have found evidence of each of the above barriers, all of which are important in understanding the under-utilization of MFDs by Montgomery County. To address these barriers, the Griffin & Strong team evaluated a variety of race and gender-neutral remedies.

## **RECOMMENDED EFFORTS**

Montgomery County might consider several initiatives that would assist small businesses, including MFDs, across all areas of County procurement.

1. Montgomery County should review all contract specifications and identify barriers for the utilization of small businesses including and specifying many minority and women business enterprises. This review would ensure that there were no built in preferences for certain companies, which have traditionally done business with

Montgomery County and which would exclude other businesses from participating in the market place. In addition to opening up opportunities for a wide range of businesses, these types of efforts have led to lower costs for local government entities. There is substantial evidence that Montgomery County, utilizes certain bid specifications which make it difficult for small businesses in general and minority and women business enterprises in particular to compete. Therefore a comprehensive review of all bid specifications should be conducted by Montgomery County.

2. Montgomery County should also consider the implementation of an aggressive program to speed up the payment of vendors, contractors and subcontractors. This program, while race neutral, would have a very beneficial effect for small businesses in general and minority and women business enterprises in particular, because many of these firms lack capital. Therefore, a quick pay program should be instituted by the County as part of any overall effort to address the difficulties involved in small business ownership, as well as minority and women business enterprises.
3. Montgomery County should additionally consider the implementation of an aggressive program to assist all small businesses in obtaining bonding and insurance. An example of this type of program would be an owner controlled or "wrap up" insurance program on all large construction projects. Also, the County should require that the insurance firm, which provides the wrap up, or owner controlled insurance program provides a bonding program for small and minority and women owned enterprises. This type of race neutral approach could have substantial effect.
  - A. Montgomery County should also investigate whether it is possible to raise the limit for bonding requirements on some of its projects.
  - B. Also, Montgomery County should consider programs in which contracts can be aggregated in such a way that it would allow a small firm, many of which would be minority and women owned firms, to break a large contract into segments so that bonding could be obtained. Hence, we recommend a comprehensive review of all insurance, and bonding requirements.
  - C. Additionally, we believe that Montgomery County should establish a financing program. This program could be accomplished by the creation of a Small Business

Investment Corporation; A financial assistance program in the form of a working capital loan program or a contract financing program. This program would theoretically be created with assistance from a consortium of local banks, thereby lending it credibility to pass muster under the County's scrutiny.

4. Montgomery County should establish a technical assistance program for small and minority and women owned businesses. This program could be developed in conjunction with the local, federal, small business development center or other minority supplier development entity.
5. The direct result of implementing the above recommendations is the subsequent need for additional skilled professionals and workers. Without this pivotal addition to Montgomery County's infrastructure, the goals of any implemented program will meet with certain marginalization.

### **Race Neutral Structural Changes**

Specifically, the study team believes that certain structural changes should be made in the way that Montgomery County conducts its business. Our investigation determined that there is a substantial amount of centralization in the contracting and procurement process at Montgomery County. We believe that a centralized system makes it easier to utilize small businesses in general, and minority and women business enterprises in particular; however, there are certain components that should be reworked to obtain optimal results. It is our recommendation that a system be which dictates accountability, in terms of making the effort to do business with small business in general and minority and women firms in particular. We specifically recommend four race neutral approaches to improving the contracting and procurement system at Montgomery County:

1. **Management information system.** Montgomery County must implement a management information system which can offer accurate and timely information about contract activity at every stage; from the original solicitation to the finalization of the contract. These management information systems should reflect the purchasing profiles of each individual procurement agent. Accurate information regarding the utilization of small businesses, minority businesses and

women business enterprises should be maintained. Moreover, each purchasing agent's record should be reviewed regarding utilization of minority and women business enterprises. In addition, we recommend that Montgomery County gather specific information on a continuing basis on prime contractors, subcontractors, bidders and vendors that should be maintained electronically in anticipation of a future disparity study. Such information should include the contract/bid/project number, contractor/bidder name, address and contact information, award amount, actual amount paid, procurement category, MFD status and applicable dates.

2. **Procurement officer reviews.** All personnel involved in the purchasing and contracting process should be subject to quarterly performance reviews to ensure that they understand the objectives of Montgomery County as they regard the utilization of small businesses in general and minority and women business enterprises in particular. The evaluations of purchasing agents should hinge on their personal effectiveness in reaching out to, and utilizing these businesses.
3. **Procurement officer training.** Procurement officers at Montgomery County should be trained to deal with small businesses and minority and women business enterprises. Training is necessary, for these individuals to understand the problems of the businesses that they are dealing with so that they are best able to find solutions to those problems at the purchasing and contracting level.
4. **Investigatory oversight.** To ensure that Montgomery County is not an active participant in discriminatory practices or bid irregularities, there should be an investigatory body, which should have the ability to receive complaints from contractors about problems that they have encountered in the purchasing and contracting process. Careful records should be kept of these investigations in order for it to be determined whether or not Montgomery County is participating in discriminatory activity.

## CONCLUSION

It is the consensus of the Griffin & Strong, P.C. research team that the recommendations set forth above will allow Montgomery County to ensure that it is operating in a nondiscriminatory manner and not participating in or unwittingly assisting any private schemes of discrimination. The current MFD program has several race and gender conscious elements. The fact that the documented under-utilization of MFD firms is not universal, but extends to some MFD groups in some vendor categories and is coupled with instances of over-utilization of some groups in some categories, indicates that the current program must be modified. The research presented herein will support certain carefully crafted race and gender conscious elements in a new program if those elements are "narrowly tailored" to address the identified discrimination. As an example, there is statistically significant under-utilization of African American firms that respond to requests for proposals in construction. The County might choose to develop a race conscious outreach and training component or a carefully developed race conscious goal to target African American owned businesses in this specific procurement category, when using this particular source selection method. It is our consensus opinion that while the evidence uncovered in this study indicates that public and private sector discrimination continue to be a problem in Montgomery County, and certainly justify affirmative action to ensure nondiscrimination, the program as currently written is not the most narrowly tailored or effective means to address the identified problems. We believe that if carefully drafted and effectively administered, the non-discrimination program we recommend can successfully address the identified disparities and discriminatory barriers to MFD participation. Therefore, we recommend that the current Montgomery County MFD program be allowed to sunset and that Montgomery County adopt a non-discrimination program that ensures the utilization of minority, female and disabled firms. We believe that implementing a new non-discrimination program along the lines we suggest above will be more effective and more narrowly tailored to address the findings of this study.

FY '08 MFD UTILIZATION And FY '09 Goals

	Prime Contractor				Sub-contractor				Total		County Utilization	FY'08 Availability	FY'08 Difference	FY'09 Goals
	A	B	A	B	A	B	A	B						
<b>Professional Services</b>	Subject to MFD procurement goal:													
	\$		203,900,507		1708									
African American	\$	1,708,432	27	\$	1,716,727	67	\$	3,425,158	94	1.68%	1.01%	0.67%	0	
Hispanic American	\$	201,907	9	\$	226,965	9	\$	428,871	18	0.21%	0.29%	-0.08%	0	
Asian American	\$	6,813,270	86	\$	1,003,489	400	\$	7,816,759	486	3.83%	0.75%	3.08%	0	
Native American	\$	240,577	4	\$	-	0	\$	240,577	4	0.12%	0.08%	0.04%	0	
Women	\$	4,102,041	73	\$	2,304,699	53	\$	6,406,739	126	3.14%	9.63%	-6.49%	10.00%	
Disabled	\$	6,386	2	\$	-	0	\$	6,386	2	0.00%	0.75%	-0.75%	0.75%	
Sub total	\$	13,072,612	201	\$	5,251,879	529	\$	18,324,489	730	8.99%	12.51%	-3.52%		
<b>Non-professional Services</b>	Subject to MFD procurement goal:													
	\$		139,342,425		2855									
African American	\$	5,220,178	35	\$	2,762,905	240	\$	7,983,083	275	5.73%	2.90%	2.83%	0	
Hispanic American	\$	6,466,451	128	\$	439,661	30	\$	6,906,111	158	4.96%	0.98%	3.98%	0	
Asian American	\$	1,936,570	13	\$	843,619	375	\$	2,780,188	388	2.00%	2.00%	0.00%	0	
Native American	\$	-	0	\$	1,310	0	\$	1,310	0	0.00%	0.83%	-0.83%	1.00%	
Women	\$	9,934,756	104	\$	2,561,953	100	\$	12,496,709	204	8.97%	11.94%	-2.97%	12.00%	
Disabled	\$	120,500	5	\$	112,232	3	\$	232,732	8	0.17%	0.75%	-0.58%	0.75%	
Sub total	\$	23,678,454	285	\$	6,721,680	748	\$	30,400,133	1033	21.82%	19.40%	2.42%		
<b>Goods</b>	Subject to MFD procurement goal:													
	\$		67,925,491		1833									
African American	\$	314,034	19	\$	3,208,813	69	\$	3,522,847	88	5.19%	1.29%	3.90%	0	
Hispanic American	\$	65,000	3	\$	602,973	24	\$	667,973	27	0.98%	0.57%	0.41%	0	
Asian American	\$	414,430	5	\$	2,388,093	127	\$	2,802,523	132	4.13%	3.00%	1.13%	3.00%	
Native American	\$	-	1	\$	-	1	\$	-	2	0.00%	0.86%	-0.86%	1.00%	
Women	\$	1,306,969	50	\$	2,088,052	113	\$	3,395,021	163	5.00%	11.09%	-6.09%	11.00%	
Disabled	\$	-	0	\$	-	0	\$	-	0	0.00%	0.75%	-0.75%	0.75%	
Sub total	\$	2,100,433	78	\$	6,287,931	334	\$	10,388,364	412	15.29%	17.56%	-2.27%		
<b>Construction</b>	Subject to MFD procurement goal:													
	\$		88,802,092		231									
African American	\$	-	0	\$	195,323	6	\$	195,322	6	0.22%	2.23%	-2.01%		
Hispanic American	\$	24,497,283	69	\$	708,540	5	\$	25,205,823	74	28.38%	2.09%	26.29%	3.00%	
Asian American	\$	657,564	2	\$	2,029,355	5	\$	2,686,918	7	3.03%	3.00%	0.03%	0	
Native American	\$	116,336	1	\$	44,379	1	\$	160,714	2	0.18%	0.54%	-0.36%	3.00%	
Women	\$	2,365,132	27	\$	390,718	10	\$	2,755,850	37	3.10%	9.98%	-6.88%	0	
Disabled	\$	-	0	\$	-	0	\$	-	0	0.00%	0.75%	-0.75%	0	
Sub total	\$	27,636,315	99	\$	3,368,314	27	\$	31,004,627	126	34.91%	18.59%	16.32%	0.75%	
Total subject to MFD procurement goal:							\$		499,970,514		6627			
Total MFD procurement:							\$		90,117,613		2,301		18.02%	



DEPARTMENT OF GENERAL SERVICES

Isiah Leggett  
County Executive

David E. Dise  
Director

MEMORANDUM

June 18, 2009

**TO:** Duchy Trachtenberg, Chair, Management and Fiscal Policy Committee  
Montgomery County Council

**FROM:** David E. Dise, Director <sup>DZ</sup>  
Department of General Services

**SUBJECT:** Expedited Bill 25-09, Contracts and Procurement - Minority Owned Businesses  
— Amendments

In a recent memorandum to Chief Administrative Officer Tim Firestine you posed several questions concerning Expedited Bill 25-09, Contracts and Procurement – Minority-Owned Businesses — Amendments, sponsored by the Council President at the request of the County Executive. Your questions and my corresponding answers follow:

**1. Did the Office of Procurement prepare an RFP to hire a consultant to perform a new disparity study since we received the last one in 2005?**

No.

**2. If so, please provide a copy and the status of the RFP?**

N/A (see above response)

**3. If not, why not? When do you plan to do this?**

The Office of the County Attorney (OCA), rather than the Office of Procurement (now, the Department of General Services), is the County department responsible for hiring and overseeing contractors to perform the disparity studies required under Sec. 11B-61(b) of the Montgomery

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County Code. OCA did not receive an appropriation to undertake a disparity study in FY09 or FY10. Thus, there is no RFP in the works.

By way of general information, a disparity study estimates an expected or potential level of public expenditures with minority-owned businesses (MBE) and women-owned businesses (WBE). The estimated potential level of minority business is based on the proportion of all "qualified, willing, and able" vendors designated as MBE or WBE and is known as *availability*. Once the potential or expected share of MBE and WBE business is estimated, it is then compared with the public agency's actual MBE and WBE expenditures. The actual expenditures are commonly referred to as *utilization*. The difference between the expected and actual expenditures is the *disparity*. Disparity alone, however, is not a sufficient legal predicate to justify a racially conscious procurement program. A jurisdiction adopting a procurement program, like the County's MFD procurement program, must also demonstrate that the disparity arises because of racial animus.

**4. What is your budget estimate to hire a consultant to perform a new disparity study? What is your time estimate to hire a consultant and complete a study?**

OCA estimated a budget of \$600,000 and approximately six months to hire a consultant (considering the time to prepare the request for proposals, evaluate the offerors, and negotiate the contract to retain the offeror's services). Depending on the scope of the contract, we should allocate six months to a year to complete the study.

**5. What feedback have you received from the business community about this Bill and the need to continue the MFD program?**

Department of General Services staff regularly appears at business and association meetings, conferences, seminars and Chambers of Commerce meetings throughout the year. Responses received from the business community have been positive because of the County's ongoing efforts to increase opportunities and promote increase utilization of MFD businesses. Comments and evaluations speak to the strength of the County's business outreach programs. The business community supports the MFD program and is interested in its continuation.

**6. Has the County received any legal challenges to the MFD program? If so, what was the result?**

No, the County has not received any legal challenges.

DED/sa

cc: Tim Firestine, CAO  
Kathleen Boucher, ACAO  
Leon Rodriguez, County Attorney  
Marc Hansen, Deputy County Attorney