

Resolution No. 15-1261
Introduced: December 13, 2005
Adopted December 13, 2005

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND**

By: County Council

SUBJECT: Approval of Executive Regulation 21-05AM, Local Small Business Reserve Program

Background

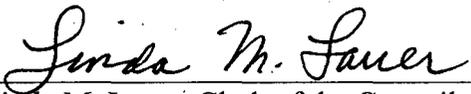
1. On July 13, 2004, then-Council President Silverman and Councilmembers Leventhal, Perez, and Floreen introduced Bill 23-04, Contracts and Procurement—Local Small Business Reserve Program. On April 12, 2005, the Council enacted this bill, which became Chapter 3 of the Laws of Montgomery County and required the Executive to establish method (2) regulations to implement this law by January 1, 2006.
2. The Executive published Regulation 21-05 in the County Register, and received comments from using departments, organizations, and the public by the September 30, 2005 deadline.
3. On November 29, 2005, the County Council received Executive Regulation 21-05, Local Small Business Reserve Program from the County Executive.
4. The Council reviewed the regulation under method (2) of § 2A-15 of the County Code. Under method (2), if the Council does not approve or disapprove a regulation within 60 days after the Council receives the regulation, the regulation automatically takes effect.
5. The Management and Fiscal Policy Committee reviewed Executive Regulation 21-05, Local Small Business Reserve Program on December 5, 2005 and (3-0) recommended approval with amendments.
6. On December 9, 2005, the Executive reissued the subject regulation incorporating the recommended amendments, and renumbered it Executive Regulation 21-05AM to indicate that it was amended after transmittal to the Council.

Action

The County Council for Montgomery County, Maryland, approves the following resolution:

Executive Regulation 21-05AM, Local Small Business Reserve Program is approved.

This is a correct copy of Council action.


Linda M. Lauer, Clerk of the Council



MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject LOCAL SMALL BUSINESS RESERVE PROGRAM	Number 21-05AM.
Originating Department DEPARTMENT OF ECONOMIC DEVELOPMENT	Effective Date January 1, 2006

Montgomery County Regulation on:

LOCAL SMALL BUSINESS RESERVE PROGRAM

Department of Economic Development
 Issued By: County Executive
 Regulation Number. 21-05

Authority: Montgomery County Code, Sections 11B-17A; 11B-65 through 11B-70
 Council Review: Montgomery County Code Section 2A-15, Method (2),
 Register Vol. 22, Issue 9

Effective Date: January 1, 2006
 Sunset Date: December 31, 2009

SUMMARY:

The regulation defines terms related to the Local Small Business Reserve Program ("Program"), and designates: the types of procurements subject to the requirements of the Program; requirements of the using departments to achieve a certain percentage of local small business procurement contracts under the Program; the reporting process from a Using Department to the Department of Economic Development, and then from the Department of Economic Development to the County Council; and the Internet posting requirements for certain procurements.

ADDRESS:

Department of Economic Development
 111 Rockville Pike, Suite 800
 Rockville, Maryland 20850

STAFF CONTACT:

Peter B. Bang: (240) 777-2008, or
 Robert Klein: (240) 777-2036

BACKGROUND INFORMATION:

The Local Small Business Reserve Program was created to enhance the competitiveness of County-based small businesses by creating separately-defined County procurement opportunities for local small businesses. Beginning January 1, 2006 local small businesses will be able to bid for County contracts without competing with larger, more established businesses. The Program does not apply to: pre-existing County contracts; a non-competitive, public entity, or emergency procurement; any waiver made under County Code Section 11B-67(f); any procurement where no local small business is qualified or able to perform the contract; any single procurement that is estimated to exceed \$10 million; or, a procurement where compliance with this Program would represent a violation of State or federal law.



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Section 1. AUTHORITY:

In accordance with the requirements of Montgomery County Code §11B-17A, and the Program authorized under Chapter 11B, Article XV of the County Code, as codified at §§11B-65 through 70, this Executive Regulation establishes definitions, processes, and procedures to administer and implement the Local Small Business Reserve Program.

Section 2. DEFINITIONS: The Definitions noted in the County Procurement Law and related Regulation apply to this Regulation, unless stated otherwise.

- (a) Broker- A person that conducts business (other than real estate, investment, or insurance sales) on a pass-through basis and with respect to:
- (i) Supplies:
- Does not own, operate, or maintain a place of business in which supplies of the general character required under the contract are kept in stock in the regular course of business,
 - Does not regularly assume physical custody or possession of supplies of comparable character to those offered to the County, or
 - Exclusively acts as a middleman in the provision of supplies offered to the County;
- or
- (ii) Services, does not regularly maintain the capability, capacity, training, experience, and applicable regulatory licensing to directly perform the principal tasks of a contract with the County, and acquires the services elsewhere, for the benefit of the County.
- (b) Combined Dollar Value of Contracts – A Using Department’s total, combined dollar value of procurement contracts for goods, services, or construction during a given particular fiscal year. This has the same meaning as “total dollar value of procurements” as that term is used in County Code §11B-66 (b) & (c).
- (c) Director – For purposes of this Regulation related to the Local Small Business Reserve Program, the term “Director” means the Director of the Office of the Procurement.
- (d) DED Director – For purposes of this Regulation related to the Local Small Business Reserve Program, the term “DED Director” means the Director of the Department of Economic Development (DED).
- (e) Department – For purposes of this Regulation related to the Local Small Business Reserve Program, the term “Department” means the Department of Economic Development (DED).
- (f) Employment or Employ – The measurement of the number of people a business did or did not employ is calculated on a “Full-Time Equivalent” (FTE) basis. Any full-time, part-time, temporary, or contractual employee, who is not a broker, including an employee of a temporary help firm or a subcontractor, working for and receiving



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compensation from the business, will be included in determining the number of people a business did or did not employ for a particular period. The averaged sum of the specific FTE employment levels for a business at the end of each calendar quarter (i.e. March 31, June 30, September 30 and December 31) will determine the business's annual FTE employment level.

- (g) Gross Sales –The total documented value of sales, before deducting for expenses, customer discounts, allowances, or returns.
- (h) Independently Owned and Operated- Where those in possession of a controlling interest and those directing and managing the affairs of a business are free from the influence, control, and determination of others.
- (i) Local Small Business - A for-profit business, other than a broker, that meets the following elements:
 - (i) The business is independently owned and operated.
 - (ii) The business is not a subsidiary of another business.
 - (iii) The business generates a significant amount of economic activity in the County.
 - (iv) The criteria, size, and gross sales amounts noted in this Regulation, including those in Section 3 below.
- (j) Local Small Business Reserve – Any procurement that is limited to responses from Local Small Businesses.
- (k) Local Small Business Reserve Application – An on-line based application system that resides in the County's web site, by which a Contractor provides self-certification, by affidavit or otherwise, demonstrating that the Contractor meets all of the requirements of the definition of Local Small Business.
- (l) Local Small Business Reserve Database – A database that resides in the County web site that stores the list of self-certified Local Small Businesses, and enables search by the business name, industry sector, and the County commodity code.
- (m) Regular Course of Business Commerce- The on-going and continuous exchange of goods or services for money between two or more businesses or between a business and consumers.
- (n) Significant Amount of Economic Activity in the County - A regular course of business commerce in the County by a business, along with any of the following:
 - (i) The business has its physical business location(s) only in the County; or
 - (ii) The business has physical business locations both in and outside of the County, and the County-based location(s) account for over 50% of the business's total number of employees, or over 50% of the business's gross sales.
- (o) Subsidiary of Another Business - A business controlled by another business that owns all or a majority of its shares or interest.



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Section 3. SIZE AND SALES CRITERIA. To qualify as a "Local Small Business," a business must meet the definition in Section 2 above and the following size or gross sales criteria:

- (a) The **wholesale** operations (sale of goods in large quantities usually for resale) of the business, if any, did not employ more than 15 persons, or the gross sales of these business operations did not exceed an average of \$2,000,000 in its most recently completed 3 fiscal years.
- (b) The **retail** (sale of goods in small quantities directly to the ultimate consumer) operations of the business, if any, did not employ more than 15 persons, or the gross sales of these business operations did not exceed an average of \$2,500,000 in its most recently completed 3 fiscal years.
- (c) The **manufacturing** (producing goods from raw materials by hand or by machinery) operations of the business, if any, did not employ more than 20 persons, or the gross sales of these business operations did not exceed an average of \$7,000,000 in its most recently completed 3 fiscal years.
- (d) The **services** operations of the business, if any, did not employ more than 25 persons, or the gross sales of these business operations did not exceed an average of \$2,500,000 in its most recently completed 3 fiscal years.
- (e) The **construction** operations of the business, if any, did not employ more than 25 persons, or the gross sales of these business operations did not exceed an average of \$7,000,000 in its most recently completed 3 fiscal years.
- (f) Gross sales for a business that has been in operation long enough to file a Federal income tax statement, shall be determined by the average of gross sales amounts contained on the tax form(s) for the most recently completed 3 fiscal years. In the absence of a federal income tax statement, the business must provide verification that it meets the definition of a Local Small Business, including the above size and sales criteria, through audited financial statements. If a business has not existed for three years, the employment and gross sales average(s) shall be the average for each year or part of a year during which the business has been in existence. For a newly formed business, the determinations regarding size and sales criteria will be based upon then-current employment levels as of the time of the Local Small Business Reserve application, and projected gross sales for that fiscal year.
- (g) If a business operates in more than one of the above-noted business operations classifications (i.e. wholesale, retail, manufacturing, service, and construction), its combined business operations must meet the above-stated limitation of the more liberal size and sales criteria. For instance, regarding gross sales, for any type of wholesale and service operations, the average annual gross sales limit is \$2 million and \$2.5 million respectively. Therefore, the combined operation cannot exceed \$2.5 million annually in average gross sales. Further, regarding size, the employment limit for a wholesale operation is 15 persons versus 25 for a service operation. Accordingly, a business with both wholesale and service classifications can have up to 25 employees.



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Section 4. CONTRACT UNDER LOCAL SMALL BUSINESS RESERVE PROGRAM.

- (a) Except as provided in Subsection (c) of this Section 4, this Regulation applies to all procurements by a Using Department. Any procurement under this Program is subject to all requirements and procedures otherwise applicable to the procurement under the Procurement Regulations. Except as otherwise provided by law, the provisions of this Regulation supplement, but do not replace, other provisions of, and definitions in, the County's Procurement Regulations and Procurement Law.
- (b) A Using Department must award a minimum of 10 percent of the Using Department's combined dollar value of contracts issued for goods, services, or construction to a Local Small Business. A Using Department need not designate a contract or a solicitation as a Local Small Business Reserve in order for it to count towards the immediately preceding requirement to award a minimum of 10 percent of the Using Department's combined dollar value of contracts awarded for goods services or construction to a Local Small Business. The dollar amount of a contract that is solicited through the regular Procurement process that is awarded to a certified Local Small Business shall count toward the 10 percent requirement.
- (c) The combined dollar value of procurements by a Using Department under this section does not include:
- (1) the value of any contract to which this Regulation does not apply because of a conflict with a State, federal, or local law or a grant requirement;
 - (2) a preexisting contract or extension(s) of a preexisting, multi-year, contract executed by the County;
 - (3) a non-competitive contract,
 - (4) a public entity or emergency procurement;
 - (5) any waiver made under Montgomery County Code §11B-67(f);
 - (6) any procurement where no Local Small Business is qualified or able to perform the contract as determined by the head of the Using Department; or
 - (7) any single procurement that is estimated to exceed \$10 million.
- (d) In determining whether a Contractor is "qualified or able to perform the contract" under Section 4(c)(6), the Using Department must make a recommendation as of the time of a business's offer in response to a solicitation based on a Contractor's reputation, past performance, business and financial capability and other factors that demonstrate the Contractor is capable of satisfying the County's needs and requirements for a specific contract. This requirement is in addition to those stated in Section 6.3 of the Procurement Regulations regarding responsibility.
- (e) In order for a business to be eligible to respond to a solicitation under the Local Small Business Reserve Program, a business has to be registered and certified in the County web site prior to the applicable solicitation due date (closing date).



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Section 5. PROCEDURES AND PROGRAM OPERATIONS.

- (a) Any procurement of goods, services, or construction by a Using Department is eligible for designation for the Local Small Business Reserve Program by the Using Department director, or designee, except any procurement that is excluded under County Code §11B-66(c), the items of which are reiterated in Section 4(c) above.
- (b) A solicitation for a procurement that has been designated under the Local Small Business Reserve Program must be published in the same manner as required for other solicitations under County Code, Chapter 11B, Article III.
- (c) The Director will award a procurement contract designated as a Local Small Business Reserve in accordance with County law and Procurement Regulations, except to the extent stated otherwise in this Regulation.
- (d) A business must affirm and provide supporting documentation to the DED Director to show that it is a Local Small Business as defined in County Code §11B-65(c) when required or requested by the DED Director. The Local Small Business must complete any required Local Small Business Reserve Application and any supporting affidavit required by DED to demonstrate to the DED Director that it is a Local Small Business. DED will post this requirement and any required affidavit on the Local Small Business Reserve web site.
- (e) A Local Small Business is no longer eligible for a procurement under the Program if the business has been awarded \$10 million in County contracts and at least 10 separate contracts, as either a prime contractor or a subcontractor, from January 1, 2006. The DED Director will provide written notice to the Local Small Business when the Local Small Business is no longer eligible for the Program and the DED Director will remove the Local Small Business from the Local Small Business Reserve Database.
- (f) The Chief Administrative Officer may waive the application of Montgomery County Code, Chapter 11B, Article XV, to a specific procurement if the Chief Administrative Officer finds that the application of that Article conflicts with the overall objectives and responsibilities of the Chapter. The Chief Administrative Officer must keep records on the number of waivers issued and the reason for each waiver. This information must be reported to the Council by the Department in the annual report on the Program under Code §11B-69(b).
- (g) Montgomery County Code, Chapter 11B, Article XV, does not give any person, including a Local Small Business, any right or status, including standing, to challenge the award of a contract or subcontract under the County procurement system. That Article is enforceable only through the oversight function of the Chief Administrative Officer and the County Council.
- (h) Administration and Implementation: The following delineates the departmental responsibilities to administer and implement the Program:



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- (i) The Department of Economic Development administers and implements the Program. It must compile and maintain a comprehensive bidder's list of self-certified Local Small Businesses, and post that list on the County's Internet site. To accomplish these objectives, the Department will:
- (a) With cooperation from the Department of Technology Services (DTS), develop an Internet-based Local Small Business Reserve Database (Database) housed in the County's web site that will, at a minimum, have the following features:
1. Local Small Business Reserve Program description;
 2. Local Small Business Reserve Program Application and Contractor self-certification module;
 3. Self-Certified Local Small Business database that can be sorted according to the commodity code used by the County procurement process;
 4. Self-Certified Local Small Business profile update module; and
 5. Self-Certified Local Small Business annual renewal module.
- (b) Maintain the Database by:
1. Enhancing the efficiency of the database by incorporating advancements in database technology;
 2. Requiring each self-certified Local Small Business, before being awarded a County contract designated as for this Program, to submit documentation to the Department that satisfactorily demonstrates that it meets all of the requirements of a Local Small Business as of the bid closing date for that procurement.
 3. Tracking the number and the dollar amount of County contracts awarded to each Local Small Business in the Database, in coordination with other Using Departments.
 4. Removing a Local Small Business from the Local Small Business Reserve Database when the Local Small Business has received \$10 million dollars in County contracts and at least 10 separate contracts, as specified in this Section 5, Paragraph (e).
 5. Removing a Local Small Businesses from the Local Small Business Reserve Database when the Local Small Business fails to meet the definition of Local Small Business as defined in this Regulation. A removed Local Small Business will subsequently be added to the Local Small Business Reserve Database by the DED Director only after the business submits an appeal letter and sufficient supporting documents to the DED Director within fifteen (15) days after removal from the list by the Department. The business's letter must evidence that the business meets the definition of Local Small Business



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as defined in Section 2(h) of this Regulation. The review and approval of the appeal letter is within the sole discretion of the DED Director.

6. Assigning a unique County Vendor Identification number to each Local Small Business in the Database.

- (c) Market the Program and Provide Outreach Efforts to Local Small Businesses by:

1. Advertising the Program in the media, as deemed necessary by the DED Director, to increase the public awareness of the Program.
2. Preparing a Program brochure and other necessary collateral material, and distributing these materials in strategic locations, as determined by the DED Director, to enable easy and timely access by businesses in the County.
3. Participating in County business events, at least three times a year, to market the Program.
4. Working with small business resource groups in the County such as the Chambers of Commerce, Small Business Development Centers, Women's Business Organization, etc., to disseminate Program information to the member businesses.
5. Preparing a press release once a year to publicize the Program results.

- (d) **Reporting:** By November 30 each year, the DED Director must report to the Council on the Local Small Business Reserve Program. This report must include: the number, type, and dollar amount of contracts awarded under this Regulation during the preceding fiscal year; the number, type, and dollar amount of each waiver from the Internet posting requirement granted by the Director; the number, type, and dollar amount of each waiver pertaining to the Program that is granted by the Chief Administrative Officer; information about how these numbers have changed from the preceding fiscal year; and, the extent of outreach efforts by DED. DED and the Office of Procurement will work with the Office of Legislative Oversight to ensure that the data needed to conduct a comprehensive evaluation of the program are collected.

- (e) Take any other action necessary to administer or implement this Program.

- (ii) The Using Department: The Using Department will:

- (a) Award a minimum of 10 percent of the Using Department's combined dollar value of contracts issued for goods, services, or construction to Local Small Businesses, except as noted in Section 4 (c), above.
- (b) Notify the Office of Procurement upon designating a procurement as a Local Small Business Reserve.



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- (c) Search the Local Small Business Reserve Database before conducting a solicitation process and before recommending a vendor for award, in a contract that has been designated for this Program. If the vendor is self-certified in the Local Small Business Reserve Database, the Using Department must obtain verification from DED, prior to recommending the vendor for award, that the vendor is an eligible Local Small Business.
- (d) Post on a County web site each planned purchase of goods, services, or construction valued at \$5,000 to \$25,000, regardless of whether the solicitation is designated as a Local Small Business Reserve or not, for 5 business days in the manner described in County Code Section 11B-17A, before the County enters into a contract.
- (e) Track and report to the DED Director, by September 30 of each year, the procurement activities under the Program during the previous fiscal year, in accordance with County Code Section 11B-69(a) and (b), including:
1. Number, type, and combined dollar value of contracts awarded;
 2. Number, type, and combined dollar value of contracts that are not included under this Regulation, in accordance with County Code Section 11B-66(c);
 3. Number, type, and combined dollar value of contracts awarded to Local Small Businesses.
 4. Number, type, and combined dollar value of contracts that were initially designated under the Program but were not awarded to a Local Small Business, and the reason they were not awarded to a Local Small Business.
 5. Procedural changes and other related administrative efforts made to comply with this Regulation, and the associated fiscal impact of such changes.
- (f) Take any other action necessary to comply with this Regulation.
- (iii) The Office of Procurement will:
- (a) Develop procedures and processes to enable a Using Department to post each planned purchase of goods, services, or construction valued at \$5,000 to \$25,000, on a County web site. The Using Department must clearly identify, on the County web site, a Procurement that is designated as Local Small Business Reserve.
 - (b) Develop a process to ensure that in any Informal Solicitation, the vendor selection process used by the Office of Procurement to generate the five random vendor selections required under the Procurement Regulations includes vendors from the Local Small Business Reserve Database.



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- (c) The Director must keep records on the number of waivers of a Using Department's Internet posting requirement issued in accordance with County Code Section 11B-17A(c), during a given fiscal year, and the reason for each waiver. The Director must report this information to the DED Director by September 30 of each year.
- (iv) Department of Technology Services – The Department of Technology Services will assist the Department in administering and implementing the Program, including that which is indicated in (h)(i) of this Section 5.
- (v) The Chief Administrative Officer will:
 - (a) Have the authority to waive the application of this Regulation to a specific contract if the Chief Administrative Officer finds that the application of this Regulation conflicts with the overall objectives and responsibilities of Article XV of Chapter 11B of the County Code. The Chief Administrative Officer must keep records on the number of waivers the Chief Administrative Officer issues and the reason for each waiver. This information must be reported to DED Director so this information can be included in the annual report to the County Council on the Program, as required under Section 11B-69(b).
 - (b) Provide the oversight function to enforce the Regulation.



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Section 6. PENALTY; ENFORCEMENT.

In addition to that stated under County Law, or a particular contract, any person who willfully makes a false statement to a County official or employee for the purpose of influencing participation in the Program; or fraudulently obtains, attempts to obtain, or aid another person in fraudulently obtaining or attempting to obtain public monies to which the person is not entitled under this Regulation constitutes a material breach of the contract. Accordingly the County may then exercise any available remedy, including, terminating the contract for default.

Section 7. EFFECTIVE DATE.

This Executive Regulation takes effect on January 1, 2006 and expires on December 31, 2009, unless extended by the County Council.

Douglas M. Duncan
County Executive

12/1/05
Date

APPROVED AS TO FORM AND LEGALITY
OFFICE OF THE COUNTY ATTORNEY

BY: Richard H. Moore
Associate County Attorney

DATE: 12/8/05