

Resolution No.: 15-1369  
Introduced: March 21, 2006  
Adopted: March 21, 2006

**COUNTY COUNCIL  
FOR MONTGOMERY COUNTY, MARYLAND**

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By: County Council

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**SUBJECT:** Approval of Executive Regulation 3-06, Purchases from Minority Owned Businesses

**Background**

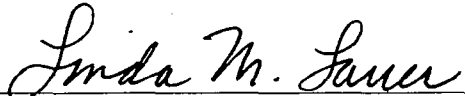
1. On February 7, 2006, the Council passed Bill 42-05, Minority Owned Business Purchasing Program—Extension, which became Chapter 3 of the Laws of Montgomery County 2006. The Executive submitted method (2) regulations to implement the changes in this law.
2. The Executive published Regulation 3-06 in the County Register, and received no comments by the January 31, 2006 deadline.
3. On February 9, 2006, the County Council received Executive Regulation 3-06, Purchases from Minority Owned Businesses, 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 3-06, Purchases from Minority Owned Businesses, on March 9, 2006 and (2-0) recommended approval.

**Action**

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

Executive Regulation 3-06, Purchases from Minority Owned Businesses, 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

<b>Subject</b> Purchases from Minority Owned Businesses	<b>Number</b> 3-06
<b>Originating Department</b> Office of Procurement	<b>Effective Date</b> March 21, 2006

Montgomery County Regulation on:

## PURCHASES FROM MINORITY OWNED BUSINESSES

### OFFICE OF PROCUREMENT

Issued by: County Executive  
Regulation No. 3-06

Authority: Code Section 11B-8  
Council Review: Method (2) under Code Section 2A-15  
Register Vol. 23, No. 1

Comment Deadline: January 31, 2006  
Effective Date: March 21, 2006  
Sunset Date: December 31, 2009

**Summary:** This regulation amends COMCOR 11B.00.01.07 which establishes the procedures for implementing the County's Minority Owned Business Purchasing Program.

**Address:** Written comments on this regulation should be sent to:

Walter Wilson  
Office of the County Attorney  
101 Monroe Street  
Rockville, Maryland 20850

**Staff Contact:** For further information or to obtain a copy of this regulation, contact Walter Wilson at (240) 777-6700.



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## 11B.00.01.07 Minority Owned Business Contracting

### 7.1 Purpose

The purpose of Section 7\* is to establish procedures to facilitate the goal of the County Government to remedy the effects of discrimination by awarding a percentage of the dollar value of County contracts, including contract modifications and renewals, over \$5,000 to minority owned businesses (MFD owned business or MFD) as defined in Chapter 11B of the County Code in proportion to the availability of MFD owned businesses to perform work under County contracts.

\*Editor's note—11B.00.01.07

### 7.2 Policy

7.2.1 The Director, with the assistance of Using Departments and employees involved in contracting and purchasing, must actively and aggressively recruit certified MFD owned businesses for whom a goal has been set to provide goods, construction, and services, including professional services, for the performance of governmental functions to facilitate the MFD goal of the County. Procurements under \$5,000, grants that are appropriated by the County Council to specific grantees, utilities, intragovernmental procurements, and certain intergovernmental procurements including certain bridge contracts identified by the Director are excluded from the base against which the goal is measured.

7.2.2 Businesses that are certified as a minority business enterprise under State procurement law and certain non-profit entities organized to promote the interests of persons with a disability are eligible to be certified as an MFD business in accordance with these regulations. Certification is subject to the graduation provisions of Section 7.4.5.

7.2.3 These regulations are the County's exclusive procedure for the certification, recertification and decertification of MFD owned businesses.

7.2.4 Using Department Heads should seek the advice and concurrence of the Director in the development of internal operating procedures to implement the provisions of this procedure.

### 7.3 General



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7.3.1 In Section 7\* the term “relevant geographic market area” has the same meaning as it has in Chapter 11B. The term “MFD group” or “group of MFD owned businesses” has the same definition as “socially or economically disadvantaged group” in Chapter 11B.

\*Editor’s note—11B.00.01.07

7.3.2 To qualify to participate in the MFD subcontracting program under Section 7.3.3, an MFD owned business must:

7.3.2.1 belong to an MFD group for which a goal has been set under Section 7.3.4 in the purchasing category and source selection method covering the work that is the subject of the subcontract; and

7.3.2.2 be certified as an MFD owned business under Section 7.4.

7.3.3 MFD Subcontracting Program.

7.3.3.1 Unless the context indicates otherwise, in Section 7\*,

\*Editor’s note—11B.00.01.07

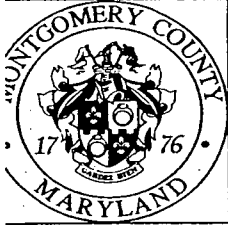
(a) contract means a contract identified by Using Departments or the Director as having an estimated dollar value of \$50,000 or more, including renewals; and

(b) contractor means a contractor that:

(1) is not a certified MFD owned business; or

(2) if the contractor is a certified MFD owned business, the contractor does not belong to an MFD group for which a goal had been set in the purchasing category covering significant work to be undertaken in the contract.

7.3.3.2 A contractor must subcontract a minimum percentage (as determined by the Director) of the contract price to certified MFD owned businesses that are eligible to participate in the subcontracting program. To be eligible, a certified MFD owned business must have a goal set under Section 7.3.4 in a purchasing category and under a source selection method covering the work to be performed under the subcontract. The Director applies the goals



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established by the CAO under Section 7.3.4.8(d) for each purchasing and source selection category covering a substantial amount of work to be done under the contract to set the minimum percentage of the contract which the contractor must subcontract to certified MFD owned businesses.

7.3.3.3 Each contractor must submit a Subcontractor Performance Plan prior to undertaking performance under the contract, or at such earlier time as required by the Director. An MFD Subcontractor Performance Plan must:

- (a) identify each MFD subcontractor;
- (b) identify the amount the contractor has agreed to pay each MFD subcontractor;
- (c) provide a copy of the language used in each MFD subcontract which requires the use of binding arbitration with a neutral arbitrator to resolve disputes between the contractor and the MFD subcontractor. The language must describe how the costs of dispute resolution will be apportioned; the apportionment must not, in the judgment of the Director, attempt to penalize an MFD subcontractor for filing an arbitration claim; and
- (d) be made a part of the contract between the contractor and the County. County approval of the Subcontractor Performance Plan must not establish a contractual relationship between the County and the MFD subcontractor.

7.3.3.4 The contract between the contractor and the County must require:

- (a) the contractor to notify the Director of any proposed change to the Subcontractor Performance Plan;
- (b) the contractor to provide in each subcontract with an MFD owned business a provision requiring the use of binding arbitration to resolve disputes between the contractor and the MFD owned business;
- (c) that failure to submit documentation showing compliance with the Subcontracting Performance Plan is grounds for imposing liquidated damages unless failure to comply with the Plan is the result of an arbitration decision in favor of the contractor or a waiver granted by the Director. Liquidated damages under this provision should equal the difference between all amounts the contractor has



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agreed under its plan to pay MFD subcontractors and all amounts actually paid MFD subcontractors considering any relevant waiver or arbitrator's decision; and

- (d) that failure to show compliance with a Subcontractor Performance Plan must result in finding the contractor nonresponsible for purposes of future procurements with the County during the next 3 years.

7.3.3.5 The Director may waive in whole or in part an MFD subcontracting requirement imposed under Section 7.3.3 if the Director finds that:

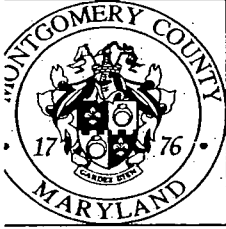
- (a) it is unusually difficult or impossible for the contractor to meet a subcontracting requirement because, for example, a qualified MFD owned business is not available for subcontracting or the contractor's good-faith efforts to subcontract with available MFD owned businesses have failed;
- (b) reasonable grounds exist to waive a subcontracting requirement because, for example, the subcontracting requirement would undermine the purpose of a contract for personal services, subcontracting would be inconsistent with the requirements for confidentiality, or the contract is awarded under an emergency procurement; or
- (c) the contractor belongs to a class of nonprofit entities for which the Director has determined that it would be impractical to require participation in the MFD Subcontracting Program.

7.3.3.6 The Director has sole discretion to determine the estimated value of a contract and may consider the value of any modifications or renewals.

7.3.4 The MFD subcontracting goal is set as follows:

7.3.4.1 By September 1 of each year the Director must determine for the previous fiscal year the availability of each group of MFD owned businesses with one or more employees. The Director must use the most recent report that the County Executive must submit under Section 11B-61(b) of the County Code to determine the availability of MFD owned businesses in the relevant geographic market area to perform work under County contracts

7.3.4.2 Fiscal year means July 1 through June 30.



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7.3.4.3 The Director must state the availability by source selection method for each group of MFD owned businesses as a percentage of all businesses available to perform work under County contracts awarded through formal solicitation in the purchasing categories of:

- (a) construction;
- (b) goods;
- (c) professional services; and
- (d) other services

7.3.4.4 The Director may set the availability of Disabled owned businesses at 0.75 percent in each purchasing category. Not for profit entities that are certified as MFD owned businesses are included in the Disabled owned business group.

7.3.4.5 The Director must determine by source selection method the percentage of contract dollars awarded to each group of MFD owned businesses as prime contractors and subcontractors in the purchasing categories of:

- (a) construction;
- (b) goods;
- (c) professional services; and
- (d) other services.

7.3.4.6 The Director must determine by source selection method the disparity between the dollar value of contracts and subcontracts awarded to each group of MFD owned businesses in each purchasing category identified in Section 7.3.4.5 with the availability of that group in each purchasing category by source selection method. The Director must use, to the extent practicable, a methodology compatible with the methodology used to determine disparity in the most recent report submitted under Section 11B-61(b) of the County Code.

7.3.4.7 By September 1 of each year the Director must submit to the CAO a report setting forth the determinations made under Sections 7.3.4.3 through 7.3.4.6.



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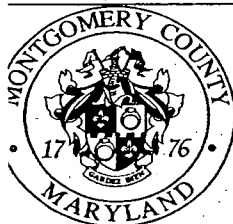
7.3.4.8 After receiving the Director's report, the CAO must set by September 30 of each year MFD subcontracting goals for the current fiscal year.

- (a) In setting MFD subcontracting goals the CAO must determine by source selection method if the County has significantly underutilized each group of MFD owned businesses in each purchasing category. The CAO makes this determination under each source selection method by considering the disparity between the availability of each group of MFD owned businesses in each purchasing category with the contract dollars awarded to each group of MFD owned businesses in each purchasing category.
- (b) If the CAO determines that a group of MFD owned businesses in a specific purchasing category under a particular source selection method has been significantly underutilized, the CAO must set an MFD goal for that group in the applicable purchasing category for that source selection method. The goal must be related to the availability by source selection method of the group of MFD owned businesses in the purchasing category.
- (c) If the CAO determines that a group of MFD owned businesses in a specific purchasing category under a particular source selection method has not been significantly underutilized, the CAO must not set an MFD goal in the applicable purchasing category for that source selection method. The CAO, nevertheless, may set a goal for an MFD group in a purchasing and source selection category (even though a finding of significant underutilization has not been found) if, in at least one out of the last 4 years, the CAO had determined the MFD group had been significantly underutilized and during that year a goal had not been set for the MFD group in the applicable purchasing and source selection category.
- (d) The CAO must set for each purchasing category for which an MFD goal has been set an overall MFD subcontracting goal that contractors must meet under Section 7.3.3. The overall MFD subcontracting goal for each purchasing category must be related to the availability of all groups of MFD owned businesses for which a goal is set in that purchasing category.

## 7.4 Certification of MFD Owned Businesses

7.4.1 The Director may certify an entity as an MFD owned business if the business is certified as a minority business enterprise under State procurement law except for a not for profit entity





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organized to promote the interests of physically and mentally disabled individuals. In the case of a not for profit entity, the Director must determine that:

7.4.1.1 the not for profit entity is certified as a minority business enterprise under State procurement law; and

7.4.1.2 at least 51% of the individuals used by the not for profit entity to perform the work or manufacture the goods contracted for by the County are individuals with a physical or mental disability.

7.4.2 The Director must conduct a review to determine whether a business may be certified as an MFD owned business. This review must include an evaluation of the documentation submitted by the business on an MFD Application form. The Director may also include a site visit to the offices of a not for profit entity. The Director may review any of the following:

7.4.2.1 Certifications issued by the State.

7.4.2.2 Employment records, health records, and/or educational records of the employees of a not for profit entity seeking MFD certification.

7.4.2.3 Other relevant information concerning the operation of a not for profit entity.

7.4.3 A request for certification or recertification as an MFD business may be denied by the Director for any of the following reasons:

7.4.3.1 Failure to demonstrate that the business is a certified minority business enterprise under State procurement law.

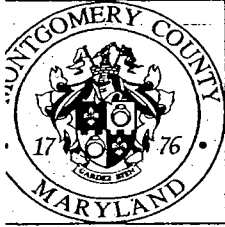
7.4.3.2 Failure to provide sufficient and timely information for the Director to make a certification or recertification determination.

7.4.3.3 Refusal to permit an on-site inspection by the Director.

7.4.3.4 Failure to comply with a request by the Director for information or access to records.

7.4.3.5 Graduation of the MFD owned business.

7.4.4 Certification as an MFD owned business by the County may be revoked for any one of the following reasons:



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7.4.4.1 Fraud, deceit or misrepresentation in obtaining certification.

7.4.4.2 Failure to report in writing to the Director within 30 days of the date of the occurrence of any changes in the status of the certified MFD owned business which are relevant to its certification.

7.4.4.3 Failure to demonstrate at the request of the Director that the entity continues to be an MFD owned business.

7.4.5 Certification is subject to the graduation provisions of this Section. The Director must not certify an entity as a MFD owned business for a period of time that exceeds 5 years. The Director, however, may certify a business as an MFD owned business for 8 years if during the first 5 years of certification, the MFD owned business:

7.4.5.1 has not received at least

- (a) 4 subcontracts awarded under Chapter 11B of the County Code; and
- (b) the cumulative value of the subcontracts has not exceeded \$120,000.

7.4.5.2 The MFD graduation requirement established under this subsection begins on December 1, 1993, and is only effective prospectively.

## 7.5 Responsibilities

### 7.5.1 Director

7.5.1.1 The Director is responsible for contacts with businesses to identify, encourage and coordinate participation of MFD owned businesses in the procurement process, including certification. This includes notification to all businesses of prospective procurement opportunities by electronic communication based on the most recently available business directories, encouragement of MFD owned business participation in procurement, as prime contractors or subcontractors, procurement system education and information for all businesses, and referrals to resources such as technical consultants, sureties and financing.



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- 7.5.1.2 The Director maintains up-to-date mailing lists, and other references of County certified MFD owned businesses for use by Using Departments, contractors, and for public information.
- 7.5.1.3 The Director provides Using Departments with a list of certified MFD owned businesses who have stated an interest in providing services required by the Using Department.
- 7.5.1.4 The Director assists Using Departments, as needed, in developing internal operating procedures to use certified MFD owned businesses in accordance with the provisions of this section.
- 7.5.1.5 The Director cooperates with other governments and governmental agencies in exchanging information regarding certified MFD owned businesses.
- 7.5.1.6 The Director distributes to potential prime contractors for whom a goal has not been set a current list of certified MFD owned businesses with a requirement that one or more be contacted if the work is being subcontracted.
- 7.5.1.7 The Director should ensure that contract administrators receive appropriate guidance in implementing the provisions of these regulations.

## 7.5.2 Using Departments

- 7.5.2.1 The Using Departments should request and use the most recent list of certified MFD owned businesses furnished by the Director to encourage certified MFD owned businesses for whom a goal has been set to respond to Requests for Proposals, Requests for Expressions of Interest, and all other procurements.
- 7.5.2.2 When inviting proposals for services with a dollar value of less than \$50,000, whether by RFP, REOI, Mini-Contract or any other source selection method of procurement, the Using Departments must ensure an effort is made to afford certified MFD owned businesses for whom a goal has been set an opportunity to participate in the award of the contract. Periodically, or at the request of the Director, Using Departments must provide to the Director written documentation including contract documents that indicate the results of efforts to provide an opportunity for certified MFD owned businesses for whom a goal has been set to submit proposals. The Using Departments should also cooperate with the Director in efforts to encourage MFD contractor participation by, among other things, establishing minority business procurement objectives consistent with Chapter



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11B of the County Code and by developing and implementing techniques to encourage greater MFD owned business participation.

7.5.2.3 The Using Departments must notify the Director when an Invitation for Bid, a Request for Proposal or a Request for Expression of Interest is expected to have a dollar value of \$50,000 or more. Notification should be as early as possible, but not later than the Using Department's official request to the Director to commence a procurement action.

7.5.2.4 The Using Departments should develop, with the advice and concurrence of the Director, internal operating procedures to implement the provisions of this section.

## 7.6 Procedures for Certification/Recertification of MFD Businesses

7.6.1 The Director, upon request from a business or at the Director's initiative, provides a MFD Application form to the business. To ensure timely recertification, the certified MFD owned businesses should file a MFD Application form at least 60 days prior to expiration of certification.

7.6.2 The business returns the MFD Application form to the Director in accordance with the form's instructions.

7.6.3 The Director reviews the MFD Application form submitted to determine, in accordance with this procedure, whether the business should be certified or recertified as an MFD owned business. Upon determination of eligibility as a MFD owned business, the Director certifies the business as an MFD owned business.

7.6.4 If a business is not certified or recertification is denied, the Director informs the applicant, in writing, of the denial, the reasons for denial and the right to request reconsideration of the decision to the Director within 5 days of the date of the decision. This notice of denial should indicate that the business may request a hearing.

7.6.5 The Director reviews the request for reconsideration and may conduct a hearing if appropriate. The Director makes a written determination and finding regarding the reconsideration request. The Director must then send a copy of the decision to the CAO who may approve, revise, or remand the decision. If the CAO takes no action within 5 working days, the decision of the Director becomes final.



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7.6.6 After the decision becomes final, the Director must inform the business making the reconsideration request, in writing, of the decision and the right to appeal to the Circuit Court for Montgomery County, Maryland, pursuant to Title 7 of the Maryland Rules of Procedure governing judicial review of decisions of administrative agencies.

## 7.7 Procedures for Decertification

7.7.1 The Director, based upon a written determination that there are grounds for concluding that the entity is no longer entitled to be certified as an MFD owned business, makes a proposal to revoke the certification. The entity must be notified, in writing, of this proposed decertification.

7.7.2 The entity may submit any written information to the Director within the time limits specified by the Director, which must not be less than 3 working days of receipt of notification of the proposed decertification.

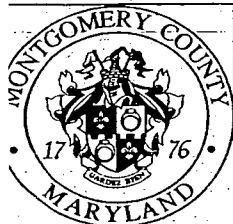
7.7.3 The Director must review the proposed decertification and any information submitted by the entity and decide whether to revoke the certification after the expiration of the time specified by the Director for submitting information. The Director must inform the entity of the decision, in writing, and the right to request a reconsideration of the decision within 5 days.

7.7.4 The entity must submit to the Director a written reconsideration request regarding the decertification within the 5 day limit or waives all rights of appeal.

7.7.5 If there is a reconsideration request, the Director may conduct a hearing, if appropriate, concerning the decertification. The Director makes a written determination and finding regarding the decertification request. The Director must then send a copy of the decision to the CAO who may approve, revise, or remand the decision. If the CAO takes no action within 5 working days, the decision of the Director becomes final.

7.7.6 After the decision becomes final, the Director must inform the entity making the reconsideration request, in writing, of the decision and the right to appeal to the Circuit Court for Montgomery County, Maryland, pursuant to Title 7 of the Maryland Rules of Procedure governing judicial review of decisions of administrative agencies.

## 7.8 Special Solicitation Requirements



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- 7.8.1 The Director must include in all formal competitive solicitations (and resulting contracts) with an estimated value of \$50,000 or greater MFD contracting conditions in a form created by the Director and approved by the Office of the County Attorney.
- 7.8.2 These conditions must include the following provisions.
- 7.8.2.1 Notice of the Montgomery County MFD contracting policy and associated contracting goals.
- 7.8.2.2 A requirement that the offeror subcontract with certified MFD owned businesses in a manner consistent with Section 7.3.3, and specification as to how the offeror may demonstrate the basis for the Director to grant, in whole or in part, a waiver of the MFD subcontracting goal.
- 7.8.2.3 Notice of the requirement to comply with the MFD Subcontractor Performance Plan, including binding arbitration to resolve disputes with MFD subcontracts and imposition of liquidated damages for failure to comply with the MFD Subcontractor Performance Plan.
- 7.8.2.4 A specification of all documentation required to be submitted by the contractor, including information required under Section 7.9 which the Director requires the contractor to submit, and time requirements for those submissions as determined by the Director.
- 7.8.2.5 Notice of non-eligibility and disqualification for award for failure to submit required documentation or meet MFD goals, unless waived.
- 7.8.2.6 Limitations on substitutions or other non-use of designated MFD subcontractors.
- 7.8.2.7 Notice of enforcement procedures, including penalties and actions which may result from non-compliance.
- 7.8.2.8 Statement of records requirements for contractors, including types of records required and length of time the records must be maintained.
- 7.8.3 The Director must review and evaluate procurement procedures and solicitation requirements to determine the effect those procedures and requirements may have on the ability of MFD owned businesses to be competitive. The Director may also take necessary action to remove any artificial barriers to competition found to exist. Those actions may include:



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- 7.8.3.1 Requiring Using Departments to take steps to assist contractors in making timely submissions of subcontracting plans.
- 7.8.3.2 Considering past compliance with the County minority business procurement program in determining contractor responsibility.
- 7.8.3.3 Adjusting evaluation criteria or method of award decisions and lowering or eliminating insurance, bonding and experience requirements.
- 7.8.3.4 Requiring the minority procurement officer to report in writing to the Director those solicitations and contracts which adversely affect MFD participation and those actions by existing contractors which do not comply in good faith with approved MFD subcontractor plans.

## 7.9 Reporting Requirements

The Director may require each contractor to provide the County with information concerning utilization by the contractor of MFD owned businesses in private and government contracts. The Director may also require each certified MFD owned business to provide the County with information concerning its utilization by non-MFD owned businesses in private and government contracts.

## 7.10 Monitoring Procedures

- 7.10.1 The contract administrator in conjunction with the minority procurement officer must monitor all contracts subject to MFD participation to ensure compliance by prime contractors with the requirements of these regulations. Monitoring may include site visits, audits of contractors' books and records relative to County contracts, the submission of copies of invoices from the minority subcontractor to the prime contractor, submission of Contract Monitoring Reports at scheduled intervals during the life of the contract, and other procedures that the Director may require.
- 7.10.2 The Director must notify certified MFD owned businesses of their responsibility to report to the minority procurement office in a timely manner any changes in status that affect the entity's eligibility for certification as an MFD owned business. The failure of the MFD owned business to report any relevant change in a timely manner constitutes sufficient grounds for decertification.



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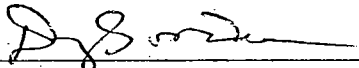
<b>Subject</b> Purchases from Minority Owned Businesses	<b>Number</b> 3-06
<b>Originating Department</b> Office of Procurement	<b>Effective Date</b>

### Sec. 2. Severability

If a court holds that a portion of this regulation is invalid, the other portions remain in effect.


### Sec. 3. Effective Date

This regulation takes effect upon approval by the County Council.

  
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 Douglas M. Duncan,  
 County Executive

### Distribution:

- Secretary, County Council
- County Executive
- Chief Administrative Officer
- County Attorney
- Director, Office of Procurement

**Approved as to Form and Legality**  
 Office of County Attorney  
 By   
 \_\_\_\_\_  
 Date 2/3/06  
 Walter E. Wilson