



Committee GO
Staff: Robert H. Drummer, Senior Legislative Attorney
Purpose: To receive testimony – no vote expected
Keywords: #LocalBusinesses, #MoCo4Growth

AGENDA ITEM #5
October 15, 2019
Public Hearing

SUBJECT

Expedited Bill 25-19, Contracts and Procurement – Local Business Preference Program - Established
Lead Sponsor: Council President Navarro at the request of the County Executive

EXPECTED ATTENDEES

None

COUNCIL DECISION POINTS & COMMITTEE RECOMMENDATION

Public Hearing – to receive testimony – no vote expected

DESCRIPTION/ISSUE

Bill 25-19 would provide a 10% price preference in evaluating a bid or proposal from a local business on a contract awarded by the County.

SUMMARY OF KEY DISCUSSION POINTS

- How would this affect the competition and bid prices on County contracts?
- How would this affect awards to minority owned businesses?
- How would this enhance the local economy and employment for County residents?
- What is the significant governmental purpose to be served by the legislation and how is the proposed program closely related to that significant purpose?

This report contains:


Staff Report	Page 1
Bill 25-19	©1
Legislative Request Report	©6
Fiscal and Economic Impact statement	©7
County Attorney Issue Memorandum	©11

Alternative format requests for people with disabilities. If you need assistance accessing this report you may submit alternative format requests to the ADA Compliance Manager. The ADA Compliance Manager can also be reached at 240-777-6197 (TTY 240-777-6196) or at adacompliance@montgomerycountymd.gov

MEMORANDUM

October 10, 2019

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: Expedited Bill 25-19, Contracts and Procurement – Local Business Preference Program - Established

PURPOSE: Public Hearing – to receive testimony – no vote expected

Expedited Bill 25-19, Contracts and Procurement – Local Business Preference Program - Established, sponsored by Lead Sponsor Council President Navarro at the request of the County Executive, was introduced on September 17, 2019. A Government Operations and Fiscal Policy Committee worksession is tentatively scheduled for December 5 at 2:00 p.m.¹

Bill 25-19 would require a 10% price preference for a local business bidding on a contract or submitting a proposal under an RFP for a contract awarded by the County. The Director of the Office of Procurement would be required to certify a business as a local business if it has its principal place of business in the County. The definition of a local business would be established by a Method 2 regulation. The Procurement Regulations, COMCOR §11B.00.01.02.4.72, define a principal place of business in the County as:

2.4.72 Principal Place of Business in the County: A regular course of business commerce in the County by a business, along with any of the following:

- (1) The business has its physical business location(s) only in the County; or
- (2) 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.

The County Attorney's Issue Manager Memorandum raises some legal issues related to the local preference in Bill 25-19. See ©11-28. The County Attorney's Office recommended that the legislative record "clearly identify a significant governmental purpose to be served by the legislation and explain how the proposed program is closely related to that significant purpose."

¹#LocalBusinesses, #MoCo4Growth

This packet contains:

Expedited Bill 25-19
Legislative Request Report
Fiscal Impact Statement
Economic Impact Statement
County Attorney Issue Manager Memorandum

Circle #

1
6
7
9
11

F:\LAW\BILLS\1925 Contracts - Local Business Preference\PH Memo.Docx

Expedited Bill No. 25-19
Concerning: Contracts and Procurement
- Local business Preference
Program - Established
Revised: July 29, 2019 Draft No. 2
Introduced: September 17, 2019
Expires: March 17, 2021
Enacted: [date]
Executive: [date signed]
Effective: January 1, 2020
Sunset Date: None
Ch. [#], Laws of Mont. Co. [year]

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Council President at the Request of the County Executive

AN EXPEDITED ACT to:

- (1) increase the number of local businesses awarded County contracts;
- (2) establish a Local Business Preference Program for certain County contracts; and
- (3) generally amend the law governing County procurement.

By adding

Montgomery County Code
Chapter 11B, Contracts and Procurement
Article XXI. Local Preference Program
Sections 11B-92, 11B-93, 11B-94, 11B-95, 11B-96, 11B-97, and 11B-98

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

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

1 **Sec. 1. Sections 11B-92, 11B-93, 11B-94, 11B-95, 11B-96, 11B-97, and**
 2 **11B-98 are added as follows:**

3 **ARTICLE XXI. Local Business Preference Program.**

4 **11B-92. Purpose.**

5 This Article is intended to bolster the County's economic growth and support the
 6 creation and retention of employment opportunities within the County by establishing a
 7 ten percent (10%) preference for the award of a County contract to a County-based
 8 business.

9 **11B-93. Definitions.**

10 In this Article, the following words have the meanings indicated.

11 Broker means a person that provides goods or services (other than real estate,
 12 investment, or insurance sales) on a pass-through basis as:

13 (a) a supplier of goods who:

14 (1) does not own, operate, or maintain a place of business in which
 15 goods of the general character required under the contract are kept in
 16 stock in the regular course of business;

17 (2) does not regularly assume physical custody or possession of goods
 18 of comparable character to those offered to the County; or

19 (3) exclusively acts as a middleman in the sale of goods to the County;

20 or

21 (b) a supplier of services who does not regularly maintain the capability,
 22 capacity, training, experience, and applicable regulatory licensing to
 23 directly perform the principal tasks of a contract with the County and must
 24 provide the principal tasks through a subcontract with a third party.

25 Director means the Director of the Office of Procurement or the Director's
 26 designee.

27 Local Business means a business, other than a broker, that:

28 (a) has its principal place of business in the County;

29 (b) meets criteria established by method 2 regulations; and

(c) is certified by the Director as a Local Business under the provisions of this Article.

11B-94. Applicability.

This Article applies to all procurement purchases solicited under Sections 11B-9 or 11B-10.

11B-95. Procedures.

(a) Eligibility. To be eligible for local business preference points, a business must affirm and provide supporting documentation to the Director to show that it is a local business as defined in Section 11B-93. The Director may investigate and verify the information provided on the application, as necessary, and must certify a business as a local business for the purposes of this Article.

(b) Certification. Preference points must be applied only to a business:

(1) that has a valid local business certification when the business submits a bid or proposal; or

(2) who has applied for local business certification before the time to submit a bid or proposal has passed.

(c) Notice. The Director must publicly notify businesses of prospective procurement opportunities.

(d) Competitive sealed bids. The Director must adjust the bid of a Local Business who submits a bid in response to an Invitation for Bid issued under Section 11B-9:

(1) by reducing the bid price(s) by a factor of 10%, for the purposes of evaluation and award only; or

(2) if a Local Business is eligible for a reciprocal preference pursuant to Section 11B-9(j), the bid of the Local Business must be adjusted by that reciprocal preference if it exceeds the 10% preference factor.

The Local Business preference points authorized under this Article must not be combined with reciprocal preference points authorized under Section 11B-9(j).

(e) Competitive sealed proposals. The Director must include an evaluation factor awarding additional points for a proposal from a Local Business worth 10% of the total available points in a Request for Proposals issued under Section 11B-10.

(f) Waiver. The Director may waive a bid or proposal preference under this Section in a solicitation if the Director finds that a preference would result in the loss to the County of Federal or State funds.

11B-96. Regulations.

The Executive must adopt regulations, by Method 2, to implement this Article. The regulations must include:

- (a) Certification requirements for a business to qualify as a Local Business;
- (b) Procedures to certify, re-certify, or decertify a Local Business; and
- (c) Procedures that will enable the Director to monitor compliance with the Local Business Preference Program.

11B-97. Reports.

By October 31st of each year, the Director must report to the Council on the Local Business Preference Program. This report must include the number, solicitation type and dollar amount of contracts that were awarded pursuant to the Program.

11B-98. Penalty.

(a) A person must not:

- (1) fraudulently obtain or retain, attempt to obtain or retain, or aid another person in fraudulently obtaining or retaining, or attempting to obtain or retain, certification as a Local Business;
- (2) willfully make a false statement to a County official or employee for the purpose of influencing the certification of an entity as a Local Business; or

(3) fraudulently obtain, attempt to obtain, or aid another person in fraudulently obtaining, or attempting to obtain, public monies to which the person is not entitled under this Article.

(b) A violation of this Article:

(1) is a class A violation; and

(2) may disqualify the violator from doing business with the County for up to 2 years.

Sec. 2. Expedited Effective Date

The Council declares that this legislation is necessary for the immediate protection of the public interest. This Act takes effect on January 1, 2020 and must apply to a solicitation issued under Section 11B-9 or Section 11B-10 on or after January 1, 2020.

Approved:

Nancy Navarro, President, County Council

Date

Approved:

Marc Elrich, County Executive

Date

This is a correct copy of Council action.

Mary Anne Paradise, Acting Clerk of the Council

Date

LEGISLATIVE REQUEST REPORT

Expedited Bill 25-19

Contracts and Procurement – Local business Preference Program - Established

DESCRIPTION:	The Bill would amend Chapter 11B of the County Code by establishing a local business preference program for all procurement purchases solicited under Sections 11B-9 and 11B-10.
PROBLEM:	Local businesses are often at a disadvantage when competing for County procurement contracts due to the cost of operating a business in the County. This Bill seeks to offset some of that cost.
GOALS AND OBJECTIVES:	The Bill will establish a ten percent (10%) preference for County-based businesses.
COORDINATION:	Office of Procurement and Office of the County Attorney
FISCAL IMPACT:	May impact contract award values
ECONOMIC IMPACT:	Could have a positive economic effect on the growth in local businesses by means of County contract awards and increase employment and incomes for both local businesses and their employees.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	Local preference programs have been enacted in Prince George's County and Howard County
SOURCE OF INFORMATION:	Office of Procurement
APPLICATION WITHIN MUNICIPALITIES:	NA
PENALTIES:	Class A violation; Debarment

Fiscal Impact Statement
Bill XX-19 - Contracts and Procurement – Local Business Preference Program

1. Legislative Summary

The purpose of this legislation is to increase the participation of local businesses in the County procurement process by establishing a Local Business Preference Program for certain County procurement contracts. The legislation adds Sections 11B-92 through 98 to the County Code.

Section 11B-95 provides that, “(d) The Office of Procurement must adjust the bid of a Local Business who submits a bid in response to an Invitation for Bid issued under Section 11B-9 by reducing the bid price(s) by a factor of 10%, for the purposes of evaluation and award only. And (e) the Office of Procurement must include an evaluation factor with a value of 10% of the total available points in a Request for Proposals issued under Section 11B-10, awarding additional points for a proposal from a Local Business.”

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

The County’s total procurements are currently valued at approximately \$1.0 billion. Using data on Invitation for Bids (IFBs) provided from the Office of Procurement, the following table summarizes the fiscal impact to the County if this preference was in place for the last two fiscal years.

<u>Fiscal Year</u>	<u>Number of Low Bidders</u>	<u>Number of Local Low Bidders</u>	<u>Increase if Local Low Bidder Selected</u>
2018	35	13	\$655,340
2019	28	13	\$58,942

Of the \$1.0 billion in annual procurements, the selection of the local low bidder would have resulted in an increase of approximately \$655,340 in FY18 and \$58,942 in FY19.

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

It is difficult to project expenditure estimates for the next 6 fiscal years as the value of bids varies from each fiscal year.

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

Not applicable.

5. An estimate of expenditures related to County’s information technology (IT) systems, including Enterprise Resource Planning (ERP) systems.

Not applicable.

- 6. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.**

Not applicable.

- 7. An estimate of the staff time needed to implement the bill.**

An existing Local Small Business Program Manager ("Program Manager") will absorb the staff time to implement and administer this program.

- 8. An explanation of how the addition of new staff responsibilities would affect other duties.**

The Program Manager will absorb the added responsibilities.

- 9. An estimate of costs when an additional appropriation is needed.**

Not applicable.

- 10. A description of any variable that could affect revenue and cost estimates.**

The intention of the Bill is to increase the participation of local businesses in the County procurement process. This increased competition in turn may bring cost savings to the County. Or in other scenarios, if the local business that is given preference points wins the contract, there may be an increase in the contract award values.

- 11. Ranges of revenue or expenditures that are uncertain or difficult to project.**

The range of cost increases or cost savings are difficult to project. If a local low bidder is selected under the local preference program, there may be a cost increase (as would have been the case in FY18 and FY19) or a cost savings (if it triggers increased competition for County contracts or encourages non-local vendors to be more aggressive with their pricing).

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

The bill may result in cost savings or cost increases in contract award values as stated above.

- 13. Other fiscal impacts or comments.**

Not applicable.

- 14. The following contributed to and concurred with this analysis:**

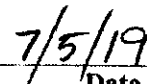
Avinash G. Shetty, Office of Procurement

Grace Denno, Office of Procurement

Jane Mukira, Office of Management and Budget

Nacem Mia, Office of Management and Budget


Richard S. Madaleno, Director
Office of Management and Budget


Date

**Economic Impact Statement
Expedited Bill #-19, Contracts and Procurement –
Local Business Preference Program**

Background:

The purpose of this legislation is to increase the participation of local businesses in the County procurement process by establishing a Local Business Preference Program for certain County procurement contracts. The legislation adds Sections 11B-92 through 98 to the County Code. Section 11B-95 states that for IFBs, “(d) The Office of Procurement must adjust the bid of a Local Business who submits a bid in response to an Invitation for Bid issued under Section 11B-9 by reducing the bid price(s) by a factor of 10%, for purposes of evaluation and award only, and (e) the Office of Procurement must include an evaluation factor with a value of 10% of the total available points in a request for proposals issued under Section 11B-10, awarding additional points for a proposal from a Local Business”.

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

The source of information is the Office of Procurement. There are no assumptions or methodologies used by the Department of Finance in the preparation of the economic impact statement.

According to the Office of Procurement, the goal of the bill is to provide incentives for local contractors to bid on Montgomery County government contracts by reducing the bid prices by a factor of 10% for local contractors thereby minimizing the contract price differential for IFBs; or by giving an evaluation factor with a value of 10% of the total available points for RFPs.

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

The variables that could affect the economic impact estimates are the number of businesses that would benefit by reducing the contract price or evaluation points differential

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

The legislation could have a positive economic effect on the growth in local businesses by means of County contract awards, and increase employment and incomes for both local businesses and their employees. The legislation may also attract more businesses to move to the County and set up their principal place of business in Montgomery County.


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

The legislation could have an economic impact. Please see paragraph 3.

**Economic Impact Statement
Expedited Bill ##-19, Contracts and Procurement –
Local Business Preference Program**

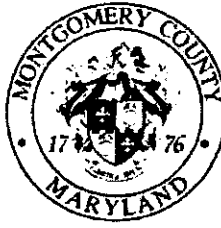
5. The following contributed to or concurred with this analysis:

David Platt and Rob Hagedoorn, Finance;
Grace Denno, Office of Procurement.



Michael Coveyou, Acting Director
Department of Finance

7/3/19
Date



Marc Elrich
County Executive

OFFICE OF THE COUNTY ATTORNEY

Marc P. Hansen
County Attorney

MEMORANDUM

TO: Avinash G. Shetty
Director, Office of Procurement

FROM: Megan B. Greene
Associate County Attorney

VIA: Edward B. Lattner
Chief, Division of Government Operations
Office of the County Attorney

DATE: October 3, 2019

RE: AMENDED - Issue Manager Memo ~ Expedited Bill 25-19- Contracts and Procurement – Local Business Preference Program - Established

Expedited Bill 25-19 – Contracts and Procurement – Local Business Preference Program, was introduced to the County Council on September 17, 2019, at the request of the County Executive. At the time of the Bill's introduction, no modifications were proposed. A public hearing on the Bill is scheduled for October 15, 2019.

When the County Council undertook consideration of legislation to establish the Local Business Subcontracting Program in 2004, this Office conducted an in-depth analysis of the legal landscape regarding government purchasing preference programs. See OCA Memorandum Opinions dated September 8, 2004, September 29, 2004, and April 7, 2005, attached hereto. In short, it is our opinion that the legislative record establishing such a program must: (1) identify a significant governmental purpose justifying the implementation of a local preference; and (2) demonstrate that the means proposed to achieve the significant purpose are closely related to achieving that end.

With those words of caution, we note that local business preference programs have been established in many jurisdictions, including Washington, D.C, Prince George's County, Maryland, Boston, MA, Cleveland, OH, and Madison, WI, to name a few. The specific details of the programs often vary from one jurisdiction to another, and few have been subjected to legal scrutiny. The constitutionality of one such program was challenged in *J.F. Shea Co. v. Chicago*, 992 F.2d 745 (7th Cir. 1993). At issue was a City of Chicago ordinance providing a bid advantage of 4 to 8 percent to local businesses for all contracts exceeding \$100,000 in value. Municipal Code of

Avinash G. Shetty
October 3, 2019
Page 2

Chicago §2-92-412. The 7th Circuit upheld the program, relying on the market participant exception to the Commerce Clause. Please note, however, that the legality of a local preference program under Maryland law has not been challenged in court.

In conclusion, it is our recommendation that the legislative record for Expedited Bill 25-19 clearly identify a significant governmental purpose to be served by the legislation and explain how the proposed program is closely related to that significant purpose.

cc: Marc Hansen
Robert Drummer
Dale Tibbetts
Tammy Seymour



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

MEMORANDUM

September 8, 2004

TO: Joseph Beach
Assistant Chief Administrative Officer

VIA: Marc Hansen, Chief *MPH*
General Counsel Division

FROM: Clifford L. Royalty *CLR*
Associate County Attorney

RE: *Bill 23-04, Contracts and Procurement - Local Small Business Reserve Program*

Bill 23-04 proposes several amendments to Chapter 11B, Contracts and Procurement. The Bill would require County departments to "post . . . on a County website" certain planned purchases "valued at \$1,000 to \$25,000." (See § 11B-17A, lines 3-6). The Bill would also create a "Local Small Business Reserve Program" ("Program") whereby each County department would allot to "small businesses" 10% of the "combined total dollar value" of the department's contracts. (See § 11B-66, lines 70-74). A "small business" is defined to include "a minority owned business as defined in § 11B-58(a)" or a business that meets a litany of criteria, including a requirement that "[a]t least 50%" of a business' employees "work in the County."¹ (See § 11B-65, lines 29-64). The Bill is intended to rectify the "competitive disadvantage" that local small businesses encounter, when bidding on County contracts, by creating a "separate defined market in which small businesses will compete against each other, not against larger firms for County contracts." (See Memorandum dated July 9, 2004, from Sonya E. Healy to County Council).

Summary of Opinion

The local preference created by the Bill raises serious legal concerns. To respond to these concerns, we recommend that the legislative record be supplemented with credible evidence, including expert analysis, that identifies the evils that a local preference is meant to

¹ We understand that the Bill is not intended to allow all "minority owned" businesses to participate in the Local Small Business Reserve Program, only those that qualify as a "small business." We also understand that the Bill will be amended to clarify its intended scope. We note that such an amendment is more than a technical matter; if the Program were to include all minority businesses it might violate the United States Constitution under the reasoning adopted by the Supreme Court in *Richmond v. J.A. Croson Co.* 488 U.S. 469 (1989).

remedy and that demonstrates that the degree of local preference employed bears a close relation to the evils identified.

We also recommend that the definition of small business be amended to eliminate the criterion that a small business must not be "dominant" in its field of operation. (See, § 11B-65, line 35). As we discuss below, that criteria will be difficult to apply.

Analysis

The Bill is modeled after a recently adopted State law that creates its own small business reserve program, although there are significant differences between the Bill and the State law. (See Senate Bill 904). Foremost among these is the scope of each. All small businesses may participate in the State program, whereas only "local" small businesses may avail themselves of the County program. The Bill's proposed Program, with its locality restrictions, necessitates a more involved legal analysis.

As is evidenced by the State program, the County's proposed Program is a variation on a not uncommon theme. Vendor preference laws are frequently enacted and just as frequently challenged. The success of those challenges often turns on the facts, rather than bright-line legal principles. Subtle factual distinctions sometimes yield disparate results. Nevertheless, we will endeavor to lay down some guiding principles that can be ferreted out of the case law.

Insofar as it affects commerce and advantages a subset of the business community (to wit, local businesses), the Program touches upon provisions of both the United States and Maryland constitutions. Vendor preference laws have been challenged in the federal courts under the Commerce Clause, the Equal Protection Clause, and the Privileges and Immunities Clause. While there have not been comparable challenges to vendor preference laws in the Maryland courts, there have been analogous challenges to regulatory acts under Article 24 of the Maryland Declaration of Rights. We will address each constitutional provision in turn.

Commerce Clause challenges to vendor preference laws have not met with success. The Commerce Clause vests in the United States Congress the power to regulate interstate commerce. The courts have read the Clause as impliedly limiting the authority of state and local governments to regulate commerce. *Hughes v. Oklahoma*, 441 U.S. 322 (1979). The Supreme Court has emphasized that the Clause applies to state and local governments only when they act in their regulatory capacity. In contracting for goods and services, the Supreme Court has reasoned, a government acts as a market participant, not a market regulator. See *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983). Therefore, the Commerce Clause is no impediment to vendor preference laws in general, or Bill 23-04 in particular.

The Equal Protection Clause of the 14th Amendment prohibits state and local governments from denying to any person "the equal protection of the laws." The provision ensures that like persons will be treated in a like manner. By favoring some vendors more than

others, vendor preference laws create a statutory classification that must satisfy the Equal Protection Clause. Insofar as a vendor preference law does not impinge upon a fundamental right or impact a suspect class, it will be subject to rational basis review, meaning that if a rational purpose can be articulated in support of the law and the law furthers that purpose, the law will be upheld. *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (1994). The federal courts (but not necessarily the Maryland courts) have accepted, as rational, a local government's desire to promote local businesses or alleviate tax or other burdens that impact local businesses. See *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (1994); *Associated Gen. Contractors of California, Inc. v. San Francisco*, 813 F.2d 922 (9th Cir. 1987). The Bill does just that and should survive the rational basis scrutiny to which it would be subject in the federal courts under a 14th Amendment challenge.

The Privileges and Immunities Clause contained in Article IV of the United States Constitution presents a more formidable impediment to vendor preference laws. The Privileges and Immunities Clause entitles "[t]he Citizens of each State to all Privileges and Immunities of Citizens in the several States." Its purpose is to "foster a national union by discouraging discrimination against residents of another state on the basis of [their state] citizenship." *Salem Blue Collar Workers Association v. Salem*, 33 F.3d 265, 267 (1994). The Clause protects "fundamental interests that promote 'interstate harmony.'" *United Building & Construction Trades Council v. Mayor and Council of Camden*, 465 U.S. 208 (1984) (internal citations omitted). That protection extends to the acts of local governments. The Supreme Court so held in *United Building & Construction Trades Council v. Mayor and Council of Camden*, a case that is particularly pertinent to our review of the Bill.

In *Camden*, a municipality enacted an ordinance requiring "40% of the employees of contractors and subcontractors working on city construction projects be Camden residents." *Id.* at 210. The Supreme Court was called upon to decide whether an "out-of-state resident's interest in employment on public works contracts" in Camden was protected by the Clause. *Id.* at 219. The Court found that it was. The "pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause." *Id.* And, insofar as the Camden ordinance infringed upon a nonresident's ability to seek employment with a private contractor, even one working on a public project, it was found to be discriminatory within the meaning of the Privileges and Immunities Clause. But the Court also found that the Clause "is not absolute" and, thus, that discrimination against nonresidents will be upheld if there is a "substantial reason" for it. *Id.* at 222. "The inquiry in each case must be concerned with whether such [substantial] reasons do exist and whether the degree of discrimination bears a close relation to them." *Id.* (internal citations omitted). The Court remanded the case to allow the state court to "decide . . . on the best method for making the necessary findings." *Id.* at 223.² By so doing, the Court implied that

² The City of Camden contended that the ordinance was "necessary to counteract grave economic and social ills . . .," including "[s]piraling unemployment, a sharp decline in population, and a dramatic reduction in the number of businesses located in the city . . ." *Id.* at 222.

it may not be giving the usual deference to legislative rationale that is afforded under the rational basis test.

Camden creates a measure of uncertainty as to the legality of the local preference created by the Bill. While the Bill contains no residency requirement, it does require that "at least 50 percent" of the employees of a small business "work in the County." (See lines 38-39). Further, in order to qualify as a small business, the Bill requires that a business have "a principal place of business in the County" and pay "personal property taxes to the County . . ." (See lines 36-37, 40-43). If the courts were to equate the Bill's location requirements with a residency requirement, then the County would be charged with demonstrating a substantial problem justifying the discriminatory impact of the Bill.

However, insofar as the courts view a residency requirement as qualitatively different than a work location requirement, the *Camden* decision may be distinguishable. Choosing one's residence may be viewed as more personal, therefore more fundamental, than choosing one's workplace. If the location requirements do not infringe a fundamental right, such as pursuing one's livelihood, then the Bill's legislative rationale may be adequate to repel a challenge under the Privileges and Immunities Clause.

Maryland law further complicates our analysis of the Bill, particularly Article 24 of the Maryland Declaration of Rights. While Article 24 is the State analog to the 14th Amendment to the United States Constitution, the Maryland courts have long reserved the right to read protections in Article 24 that are not contained in the 14th Amendment. See *Attorney General of Maryland v. Waldron*, 289 Md. 683, 426 A.2d 929 (1981). Thus federal decisions upholding vendor preference laws under the 14th Amendment are persuasive, but not controlling authority. Unlike the federal courts, the Maryland courts have not had occasion to squarely address the validity of vendor preference laws. The closest Maryland cases involve local regulations that discriminate against nonresident persons or entities; these cases address the role of government as market regulator, rather than market participant. See *Frankel v. Board of Regents of the University of Maryland System*, 361 Md. 298, 761 A.2d 324 (2000); *Verzi v. Baltimore County*, 333 Md. 411, 635 A.2d 967 (1994); *Bruce v. Director, Department of Chesapeake Bay Affairs*, 261 Md. 585, 276 A.2d 200 (1971). Nevertheless, the Maryland courts may apply a more rigorous form of equal protection review to the Bill than the deferential form applied by the federal courts. In fact, review by the Maryland courts is likely to be analogous to that of the federal courts under the Privileges and Immunities Clause. See *Verzi v. Baltimore County*, 333 Md. 411, 635 A.2d 967 (1994). The Maryland courts are not likely to summarily approve a procurement program that discriminates against nonresident businesses or employees, especially those located within Maryland. The Maryland courts will probably demand substantial justification for such a program, as did the Supreme Court in *Camden*. The Maryland courts have harbored a long-standing antipathy toward discriminatory local laws. See, e.g. *Bradshaw v. Lanford*, 73 Md. 428, 21 A. 66 (1891); *Havre de Grace v. Johnson*, 143 Md. 601, 123 A. 65 (1923); *Dasch v. Jackson*, 170 Md. 251, 183 A. 534 (1936).

Conclusion

Unfortunately, the existing legislative record does not precisely define the scope of the problem that the Bill's local preference is meant to address or substantiate the existence of that problem. In order to ensure that the Bill survives a challenge in the courts, we recommend that the legislative record be supplemented with information, data, findings, expert analysis, or the like, that identifies the social and economic evils that the local preference is meant to remedy and that describes how the Program will remedy those evils. The record should also show that the Program does not unnecessarily burden those who do not benefit from it. Without that supplementation of the record, the Bill's legal fate is precarious.

In addition to the need for supporting data, the Bill is in need of a minor clarifying amendment. The Bill provides that a small business must be not be "dominant in its field of operation." (See line 35). Lacking a definition of the term "dominant" or standards by which that dominance can be adjudged, the provision will be difficult to implement. And we question whether this criterion is needed; it seems unlikely that a small business will be "dominant in its field of operation." Therefore, we recommend that this criterion be stricken.

Lastly, on an admittedly nonlegal note, we feel constrained to discuss a potential policy implication of the Bill. We are aware that Virginia and Pennsylvania have adopted laws that authorize the imposition of a penalty on a business seeking a government contract if the business is located in a jurisdiction that awards a preference to local businesses.³ In competing for government contracts from Virginia and Pennsylvania, County businesses may be disadvantaged by such laws, even if the County businesses have never benefitted (or could not benefit) from the County's proposed Program. Passage of the Bill, with the local preference provision intact, might have the unintended effect of dissuading businesses from locating in the County.

If you have any questions or concerns regarding this memorandum, please feel free to contact us.

cc: Charles W. Thompson, Jr., County Attorney
Edward Stockdale, Office of Procurement

I:\RS\ROYALC\Documents & Opinions\Opinion II-0-Bill 23-04.wpd

³ The State of Maryland has enacted a similar law. See *Md. Ann. Code art. 24, § 8-102* (2003).



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

MEMORANDUM

September 29, 2004

TO: Joseph Beach,
Assistant Chief Administrative Officer

Via: Marc Hansen *Marc Hansen*
Division of General Counsel

From: Vickie L. Gaul *V. L. Gaul*
Associate County Attorney

RE: Bill No. 23-04: Local Small Business Reserve Program – Supplemental Analysis¹

Federal regulations generally prohibit the County from implementing a procurement under the proposed Local Small Business Reserve Program if the procurement is funded by federal grant money. There are at least 29 federal regulations (all of which concern procurement and contain identical language) prohibiting local procurement practices that use geographical preferences. A listing of these 29 federal regulations is attached and marked as Attachment 1. All of these regulations set out the procurement requirements for grantees and subgrantees of federal grant programs. These requirements contain the following pertinent language:

Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided that its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.²

¹ This advice should be considered as supplementary to our earlier analysis of Bill 23-04 dated September 8, 2004.

² See, for example, 24 CFR 85.36(c)(2). A copy of this HUD regulation, "Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments, Subpart C – Post-Award Requirements Changes, Property, and Subawards" is attached as Attachment 2.

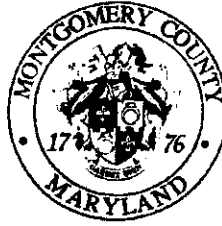
Memo to Joseph Beach
RE: Bill No. 23-04
September 29, 2004
Page Two

Accordingly, if the Council enacts a local preference under Bill 23-04, the bill's current provision, or something similar, requiring that the value of contracts subject to federal and State grant requirements which conflict with the provision of Bill 23-04 be excluded from the total dollar value of procurements undertaken by each using department, should be retained.

If you would like to discuss this matter further, please feel free to call me at x76716.

Attachments

cc: Sonya Healy, Legislative Analyst
Jerry Pasternak, Special Assistant to the County Executive
Clifford Royalty, Associate County Attorney
Beatrice Tignor, Director, Office of Procurement



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

MEMORANDUM

TO: Thomas Perez, President
Montgomery County Council

FROM: Marc P. Hansen, Chief
Division of General Counsel

Clifford L. Royalty
Associate County Attorney

DATE: April 7, 2005

RE: Bill 23-04, Contracts and Procurement-Local Small Business Reserve Program

The full council has conducted two work sessions on Bill 23-04. Out of these sessions three legal issues have arisen.

1. Professor Raskin, in a letter dated March 21, 2005, advised the Council that our legal analysis of Bill 23-04 was unduly pessimistic. The Council asked for our response to Professor Raskin's advice.

We continue to believe that the legislative record for Bill 23-04 should be supplemented in order to identify a significant governmental purpose justifying the implementation of a local preference, and to support that the legislative means selected to accomplish this significant purpose are closely related to achieving that end. We appreciate Professor Raskin's agreement that a strengthened legislative record would "thicken the bill's constitutional armor." *See Raskin letter, p. 1.* But we also believe that Professor Raskin's lack of Maryland experience led him to

Memorandum – Bill 23-04

April 7, 2005

Page 2

express unduly optimistic views about the likelihood of the Maryland Court of Appeals rejecting long held precedent in order to sustain a local preference.

2. The Virginia General Assembly enacted House Bill 2151 while the Council considered Bill 23-04. Bill 2151 provides in relevant part:

Whenever the lowest responsive and responsible bidder is a resident of any other state, **and such state under its laws** allows a resident contractor of that state a percentage preference, a like preference shall be allowed to the lowest responsive and responsible bidder who is a resident of Virginia and is the next lowest bidder. If the lowest bidder is a resident contractor of a state with an absolute preference, the bid shall not be considered. (emphasis added).

Noting the phrase “and such state under its laws allows a ... [local] preference”, the Council has sought our advice as to whether the enactment of Bill 23-04 would cause this Virginia statute to be applied to businesses from Montgomery County, a political subdivision of a state. We conclude that it is more likely than not that the Virginia Attorney General, if faced with a challenge made by a Virginia business to a proposed contract award to a Montgomery County business, is likely to advise that House Bill 2151 precludes a contract award to the Montgomery County business.

3. Councilmember Silverman has asked about the meaning of “principal place of business” (see lines 46-47 of Bill 23-04), one of the criteria for determining whether a local business qualifies for the proposed small business set aside program. We have broadened Councilmember Silverman’s inquiry to comment on all of the proposed criteria for identifying local businesses. We conclude that the criteria proposed for defining a local business will be difficult to implement. We recommend that, if the Council restores the local preference

Memorandum – Bill 23-04

April 7, 2005

Page 3

provisions to Bill 23-04, it provide a general definition for a local business, and require the Executive Branch to develop regulations to flesh out this general definition.

Reply to Professor Raskin

Professor Raskin has taken issue with our conclusion that, without further supplementation of the legislative record, the “legal fate” of Bill 23-04 “is precarious.” Professor Raskin charges us with “a misreading of legal precedent” and with arriving at a conclusion that is “unduly pessimistic”. *See Raskin letter, p. 1*. The former charge is refuted by an examination of the relevant case law; the latter charge, based on our recent experience before the Court of Appeals, is without merit.

Professor Raskin does not substantially differ with our analysis of the applicable federal law. As you will recall, in our Memorandum opinion, we discussed the implications of the Supreme Court’s decision in *United Building and Construction Trades Council v. Mayor and Council of Camden*, 465 U.S. 208 (1984). In the *Camden* case, the Supreme Court addressed the constitutionality of a municipal ordinance that required “40% of the employees of contractors and subcontractors working on City construction projects to be Camden residents” *Id.* at 210. The Supreme Court found that an “out-of-state resident’s interest in employment on public works contracts” was protected by the Privileges and Immunities Clause of Article IV of the United States Constitution. *Id.* at 219. The Court ruled that a local preference, at least in so far as it includes a residency requirement, must be supported by a “substantial reason.” *Id.* at 222.

We pointed out in our Memorandum that the residency requirement, as addressed in *Camden*, is distinguishable from the work place requirement contained in the Bill, but that a Court might apply the Privileges and Immunities Clause to the work place requirement. Professor Raskin seems to discount that possibility, although he provides no legal support for

Memorandum – Bill 23-04

April 7, 2005

Page 4

doing so. The breadth of rights protected by the Privileges and Immunities Clause is more expansive than Professor Raskin seems to recognize. The purpose of the Clause is to foster a national union by discouraging discrimination against residents of another state on the basis of state citizenship; one of the fundamental rights sheltered by the Clause's umbrella is the pursuit of a common calling, without regard to the state from which the individual hails. In light of the policy goals of the Privileges and Immunities Clause, we continue to believe that there is a strong possibility that the federal courts would construe a work place requirement as a functional equivalent of a residency requirement. Both impede, on the basis of political or jurisdictional association, the ability of an individual to pursue a livelihood, potentially turning our nation into a Balkanized association of competing principalities.

Therefore, our concern is well-founded. However, we apparently agree with Professor Raskin that, with a better record identifying substantial problems that would be rectified by a local preference, Bill 23-04 would be sustainable under a Privileges and Immunities Clause challenge.

We reject Professor Raskin's reliance on the purported "gentle bite" of the Bill's 10% set aside. You will recall that Professor Raskin expressed the view that the Bill's set aside is defensible because, at 10%, it is smaller than the set aside at issue in *Camden*. Professor Raskin states that, with respect to "minority business contracts set asides" the Supreme Court has "paid close attention to the actual size of preferences, upholding small ones...while invalidating large ones as an overly blunt instrument." *See Raskin letter, p. 3*. In support of that proposition, Professor Raskin compares *Richmond v. Croson*, 488 U.S. 469 (1989), in which the Supreme Court struck down a 30% minority business preference, with *Fullilove v. Klutznick*, 448 U.S. 448 (1980), in which the Supreme Court upheld a 10% preference. This comparison, indeed Professor Raskin's entire discussion in this regard, is flawed. *Fullilove* is of dubious persuasive

Memorandum – Bill 23-04

April 7, 2005

Page 5

value, having been gutted by the Supreme Court in *Croson* and *Adarand v. Peña*, 515 U.S. 200 (1995). More importantly, in *Croson*, the Court did not strike down the minority business enterprise participation requirement because of its size. The Court struck down the preference primarily because it was not justified by the legislative record. If the preference in *Croson* had been 1%, it would have met the same fate. A “bite” does not have to break the skin to be unconstitutional. If the local preference impinges upon a fundamental right and if the record is insufficient to support that impingement, then the Bill is unconstitutional, regardless of the amount of the set aside in the Bill.¹

As you will recall, we expressed particular misgivings about how the Maryland Courts would receive Bill 23-04. We rightly cited Maryland cases that expressed hostility to discriminatory local laws. As evidence of the Maryland Courts’ longstanding hostility to such laws, we cited three Maryland cases, *Bradshaw v. Lankford*, (a 1891 case), *Havre de Grace v. Johnson* (a 1923 case), and *Dasch v. Jackson*, (a 1936 case). Professor Raskin completely ignores the modern cases that we cited and dismisses the older cases as “antique.” Professor Raskin neglects to mention that these “antique” cases, and the principles for which they stand, have been cited and relied on by the Maryland Courts in the modern era, indeed, as recently as 2003. See *Holiday Universal v. Montgomery County*, 377 Md. 305 (2003); *Tyma v. Montgomery County*, 369 Md. 497 (2002); *Frankel v. Board of Regents of the University of Maryland System*, 361 Md. 298 (2000). We cited these “antique” cases because we recognized that the Maryland Court’s distrust of discriminatory local laws has been long standing, although we recognize that the Maryland Courts have expressed this hostility in the context of cases involving economic regulations. *Verzi v. Baltimore County*, 333 Md. 411 (1994). Considering this case law in its

¹ The size of the bite becomes relevant in the context of determining if the means the legislature chooses to address a demonstrated problem justifying the program is narrowly tailored to remediate the problem being solved. In short, a

Memorandum – Bill 23-04

April 7, 2005

Page 6

entirety, we believe that the Maryland Courts may well subject Bill 23-04 to the same level of scrutiny as the economic regulations addressed in much of the case law. Our collective experience before Maryland's Appellant Courts buttresses our concern.

Professor Raskin downplays our concerns, but he does not dispute that bolstering the legislative record would be prudent. We continue to urge that the legislative record be bolstered in order to identify a significant reason justifying the enactment of a local preference and that demonstrates that the means selected to remedy this significant problem are closely related to achieving that end.

Virginia Legislation-House Bill 2151

As the Council is aware the Virginia General Assembly has enacted House Bill 2151, which provides in pertinent part,

Whenever the lowest responsive and responsible bidder is a resident of any other state and **such state under its laws** allows a resident contractor of that state a percentage preference, a like preference shall be allowed to the lowest responsive and responsible bidder who is a resident of Virginia and is the next lowest bidder. If the lowest bidder is a resident contractor of a state with an absolute preference, the bid shall not be considered.

Councilmembers have asked if this Virginia statute only applies to a preference enacted by a state government and would, therefore, not be triggered by a local preference enacted by a political subdivision like Montgomery County. We cannot provide a conclusive answer, but we believe that the Virginia statute would be applied to a business from Montgomery County if the County enacts a local preference law.

We begin by noting that the Virginia Supreme Court determines the intent of the General Assembly based on the words contained in the statute. *Vaughn, Inc. v. Beck*, 262 Va. 673, 677 (2001). A narrow interpretation of the phrase "under its [State's] laws" could lead to the

Memorandum – Bill 23-04

April 7, 2005

Page 7

conclusion that a preference law enacted by Montgomery County would not trigger the retaliatory provisions of House Bill 2151.

But there is another view, one advanced by a representative of the Office of the Virginia Attorney General. An Assistant Attorney General argued to us that a Montgomery County local preference law would trigger the retaliation provisions of House Bill 2151, because Montgomery County derives its powers under state law and, therefore, the provision “under its [’State’s] laws” would be satisfied. Clearly, at this point, we cannot conclude with certainty how Virginia will decide to implement House Bill 2151. But it seems more likely than not that, if faced with a challenge made by a Virginia business to a proposed contract award or to a Montgomery County business, Virginia is likely to side with the Virginia business.

Developing Appropriate Criteria for Identifying Local Businesses

If Council elects to restore the local preference provisions to Bill 23-04, then the Council should fashion a clear and workable definition of local business. At this stage, we understand that the Council is considering requiring that a local business meet three criteria.

1. The business must pay personal property tax to the County for the fiscal year in which the business receives a contract award under the program and continue to pay personal property taxes for the term of the contract.

Comments:

The personal property tax is imposed on a fiscal year basis (July 1 through June 30 of the following year). The tax is imposed on property located in the County as of the preceding January 1 (the Date of Finality). Therefore, a business that locates taxable property in Montgomery County, for example on April 12, 2005, will not be required to pay tax until the following July 1st, for example July 1, 2006. Thus, this provision as currently proposed will prevent start-up businesses from qualifying for the program, in some cases for more than a year.

Memorandum – Bill 23-04

April 7, 2005

Page 8

We also note that locating a filing cabinet in a shared office generates personal property tax liability and would therefore satisfy the requirements, as currently drafted.

2. At least 50% of the business' employees must work in the County.

Comment: This criteria will be difficult to implement. For example, does an employee who delivers goods on an average of 5 hours per week in Montgomery County count as working in the County? Should a Montgomery County business that adds temporary employees for a project outside Montgomery County be removed from the program if the additional temporary employees reduce the business' total employees working in the County below 50%?

3. The business must have a principal place of business in the County.

Comment: The term "principal" is unclear in this context. In the corporate law context, "principal place of business" means wherever the corporate charter designates as the principal place of business. This may not necessarily have any relationship to the economic activity that is directly generated at the principal place of business; in fact, another site may generate more income for the business than the site designated in the corporate charter as the principal place of business.

On the other hand, principal may mean more than half. If the intent of Bill 23-04 is to require that the business must generate more than half of its economic activity from sites in the County, how will this activity be measured?

We recommend that Bill 23-04, if a local preference is to be included, provide that a local business must generate significant economic activity in the County and require the Executive Branch to develop regulations to flesh out this general criterion.

cc: Charles W. Thompson, Jr.
County Attorney

Memorandum – Bill 23-04

April 7, 2005

Page 9

Beatrice B. Tignor, Director
Office of Procurement

David Edgerley, Director
Department of Economic Development

Joseph Beach, Assistant Chief
Administrative Officer

Jerry Pasternak Special Assistant to
The County Executive

Andrew Thompson
Assistant County Attorney

MH/maf

I:/GJ/Hansem/Bill 23-04 4-4-05 Memo.doc