Agenda Item 7D
April 14, 2015
Action

MEMORANDUM

April 10, 2015

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney

SUBJECT: **Action:** Bill 48-14, Purchases from Minority Owned Businesses – Procedures – Request for Proposals

Government Operations and Fiscal Policy Committee recommendation (3-0): enact the Bill with amendments.

Bill 48-14, Purchases from Minority Owned Businesses – Procedures – Request for Proposals, sponsored by then Council President Rice, then Council Vice President Leventhal, and Councilmembers Elrich and Branson, was introduced on October 21, 2014. A public hearing was held on December 2 and a Government Operations and Fiscal Policy Committee worksession was held on March 19.

Background

The 2014 Disparity Study found a statistically significant underutilization of some Minority, Female, and Disabled (MFD) groups in each procurement category that can be attributed to discrimination in the marketplace. Although the County's current MFD subcontracting requirement has increased the utilization of MFD firms, new ideas and remedies are necessary. The goal of this Bill is to authorize an additional tool to remedy the significant underutilization of some MFD groups in County procurement.

Bill 48-14 would permit an evaluation factor in a request for proposals to increase the participation of minority owned firms in certain procurement contracts. The Department of General Services Director[1] would be authorized to establish an evaluation factor in a request for proposals that would award additional points for a proposal from:

(1) a contractor for whom a goal has been set under the MFD program; and
(2) a contractor for whom a goal has not been set who proposes to exceed the minority owned business procurement subcontracting goal established for the contract.

[1] Bill 7-15 reorganized the Executive Branch and established the Office of Procurement as a principal office of the Executive Branch. Therefore, implementation would be the responsibility of the new Office of Procurement.

For example, an RFP that includes a total of 100 points could add an evaluation factor for MFD participation worth 10 points. An MFD offeror would receive 10 points. A non-MFD offeror who submits an MFD subcontracting plan that meets the contract goal of 20% would receive 5 points for MFD participation. A non-MFD offeror who submits an MFD subcontracting plan that includes at least 30% MFD participation would receive 7 points for MFD participation.

Public Hearing

Herman Taylor, representing the Minority Business Economic Council, supported the Bill to address the underutilization of MFD businesses in County contracts. (©13) Timothy Fay opposed the Bill arguing that it would violate the Equal Protection Clause of the 14th Amendment to the United States Constitution and was unnecessary to address the underutilization of MFD businesses in County contracts. (©14-18)

GO Committee Worksession

Council President Leventhal and Councilmember Rice attended the meeting in addition to the GO Committee members. DGS Director David Dise and Grace Denno, DGS, represented the Executive Branch. Linda Price, Legislative Analyst and Robert Drummer, Senior Legislative Attorney, represented the Council Staff. Linda Price explained the comments from the MFD Task Force. The Committee discussed the Bill with the Executive Branch representatives. The Committee amended the Bill to limit the evaluation points from 10-20% to up to 10% of the total points. The Committee approved (3-0) the Bill with the amendments.

Issues

1. What is the fiscal and economic impact of the Bill?

OMB estimated that the MFD Program Manager would need to spend an additional 6 hours per week reviewing RFPs for compliance with this program. OMB indicated that this increased staff time can be absorbed by existing personnel. OMB pointed out that this program would require the offerors to submit their MFD plans with the proposal instead of later in the procurement process. This change may increase the offeror's upfront costs and would be reflected in the price of the offer.

Finance was unable to estimate the economic impact of the Bill. In FY 2014, DGS received 143 proposals responding to an RFP. If the intended goal of remedying underutilization of MFD firms in County contracts is realized, it could have a positive impact on certain MFD businesses in the County.

2. What is the problem the Bill is designed to address?

Montgomery County has operated a voluntary affirmative action plan in its procurement policies based upon the race and gender of the owners of the business for more than 20 years (MFD Program). During this time, the MFD Program has included a requirement that a prime contractor on certain County contracts subcontract a certain percentage of the work to MFD firms. Since the

United States Supreme Court decided *City of Richmond v. Croson,* 488 US 469 (1989), a state or local government preference in contracting based upon race or gender must satisfy the Court's *strict scrutiny* test to survive a challenge under the Equal Protection Clause of the 14th Amendment. Under the strict scrutiny test, the government must show that the affirmative action program is based upon a compelling governmental interest and is narrowly tailored to achieve this interest. Eliminating the effects of past discrimination based upon race and gender in government contracting is a compelling governmental interest.

In May 2013, the County hired Giffin & Strong, PC (GSPC) to conduct a comprehensive disparity study. The goal of the study was to determine if there exists a statistically significant disparity between the number of available MFD firms in the relevant market and the number of MFD firms that have received work on County contracts. GSPC conducted a quantitative analysis of the County's contracting history between July 1, 2007 and June 30, 2012. This analysis started with a determination of the relevant geographic market area for each of the 4 categories of procurement contracts - Construction, Professional Services, Services, and Goods. GSPC concluded that the relevant market was the geographic area where 75-85% of the firms contracting with the County are located. Within each relevant market, GSPC compared the percentage of firms in each race, ethnicity, gender, and disability group that are qualified, willing and able to perform services used by the County with the percentage of dollars spent by the County on firms in each MFD group. GSPC used this analysis to determine if each MFD group was underutilized or overutilized in each relevant market. GSPC looked at both prime contractor utilization and subcontractor utilization.

GSPC further analyzed the results to determine if the underutilization observed was statistically significant and if the underutilization could be attributed to the MFD status of the firms through both a regression analysis that controlled for other possible explanations, such as business size or experience, and anecdotal evidence. The complete report can be found at: http://www.montgomerycountymd.gov/cat/services/disparitystudy.html.

GSPC found a statistically significant underutilization of some MFD groups in each procurement category that can be attributed to discrimination in the marketplace. Although GSPC did not find a statistically significant underutilization for all MFD groups in each category, they did find that African American owned firms were underutilized in each procurement category each year of the study. GSPC concluded that the "evidence suggests that absent affirmative measures the County would be a passive participant in a pattern of exclusion of MFD firms." See Report, page 235.

The principal component of the County's MFD Program for the past 20 years has been a subcontracting requirement. The County operates a Local Small Business Reserve Program that results in awards of prime contracts to local small businesses[2], but the MFD program has concentrated on mandatory subcontracting. DGS found that in FY2014, MFD firms submitted only 32% of the bids, but received an award 57% of the time they bid. In contrast, non-MFD firms

[2] Many local small businesses are also MFD firms. A small business reserve program based only on the size of the firm is often considered a race and gender neutral program that can increase the utilization of MFD businesses without satisfying the strict scrutiny test.

submitted 68% of the bids, but received an award only 42% of the time they bid. Here are the FY2014 statistics from DGS:

FY14 prime minority contractors responses and awards

	# of bids/proposals submitted	% of bids/proposals submitted	# of Awards	% of awards resulting from submitted
Non-MFD	**208**	**68% (208/305)**	**88**	**42% (88/208)**
African American	25	8%	7	28%
Hispanic American	28	9%	19	68%
Asian American	8	3%	5	63%
Native American	0	0%	0	0%
Female	27	9%	16	59%
Persons with Disabilities	9	3%	4	44%
Total MFD	**97**	**32%**	**51**	**57% (51/97)**
Total	**305**	**100%**	**139**	**47%**

Therefore, part of the remedy for the statistical underutilization may be increasing the number of MFD firms that bid on County contracts. Bill 48-14 would be an additional tool that could be used to directly increase the number of MFD firms bidding and ultimately winning awards of County contracts.

3. Is the Bill supported by the 2014 Disparity Study?

The Bill would authorize the addition of a new evaluation factor based upon MFD participation in appropriate contracts awarded through the RFP process. It would only be one of the evaluation factors. Under the Bill, the evaluation factor must be worth between 10% and 20% of the total number of points. Under the current MFD Program, the County reviews the utilization of each MFD group in each contract category against the availability found by GSPC each year to determine if there should be a goal for the following year for that MFD group in that category of contract. The FY 2013 and FY 2014 MFD utilization and availability is shown at ©19-20. An MFD firm must have an MFD goal in order to receive points as an MFD under Bill 48-14. In addition, a subcontract to an MFD firm that does not have a goal for that year is not counted toward meeting the mandatory MFD subcontracting goal. Therefore, Bill 48-14 is designed to limit the preference to MFD firms in a group that has been underutilized in the prior year.

In order to be narrowly tailored, an MFD Program must also consider the effect of the plan on third parties – non-MFD firms. A program that creates a sheltered market by limiting bids to only MFD firms is difficult to defend because it does not permit a bid from a non-MFD firm. A subcontracting program, like the current MFD Program, does not eliminate a bid by a non-MFD firm. Bill 48-14 does not eliminate an offer by a non-MFD firm as long as the percentage of points devoted to MFD participation is not so great to make it almost impossible to win the contract as a non-MFD firm. Twenty percent of the points may be too much. **Committee recommendation**

(3-0): amend lines 76-79 of the Bill to limit the MFD participation evaluation factor to no more than 10%. See ©4.

4. What are the policy considerations for the Bill?

An award to an MFD firm under this new tool may result in a higher price or the award of a contract to a firm that would not have been the best value under the normal factors established to judge value to the County. MFD participation is unrelated to price or performance. It also may result in a non-MFD firm losing an award solely based upon the race or gender of the owners of the firm. It is also difficult to predict if it would result in more MFD firms placing offers on RFP contracts or more MFD firms receiving more of these RFP contracts.

Another consideration is the added complexity and delay in award that inevitably results from new requirements for firms bidding on County contracts. This Bill would require an offeror to submit an MFD subcontracting plan along with the offer. This would require an offeror to find qualified subcontractors before the offeror has any evidence that the offeror is likely to receive an award. This could complicate negotiations between the offeror and prospective subcontractors and make submitting an offer more costly and time-consuming. Would this reduce the number of offerors who submit offers? Would it increase the time between solicitation and award?

However, the Bill does not require this new tool to be used on every RFP contract. The Director of Procurement would have discretion to use it in appropriate circumstances. The Procurement Regulations could identify the circumstances where it would be used. Finally, it would only assist an MFD firm that is a member of a group that has a statistically significant underutilization for that category of contract in the prior year. **Committee recommendation (3-0):** enact the Bill with the amendment described above.

This packet contains:

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Bill No. 48-14
Concerning: Purchases from Minority Owned Businesses – Procedures – Request for Proposals
Revised: March 19, 2015 Draft No. 5
Introduced: October 21, 2014
Expires: April 21, 2016
Enacted: ____
Executive: ____
Effective: ____
Sunset Date: ____
Ch. ____, Laws of Mont. Co. ____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Council President Rice, Council Vice President Leventhal, and Councilmembers Elrich, Branson, Navarro, and Riemer

AN ACT to:

(1) establish an evaluation factor in a request for proposals to increase the participation of minority owned firms in certain procurement contracts;
(2) add additional tools for increasing the participation of minority owned firms in certain procurement contracts; and
(3) generally amend the County's minority owned business purchasing program.

By amending
Montgomery County Code
Chapter 11B, Contracts and Procurement
Section 11B-60

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

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

Sec. 1. Section 11B-60 is amended as follows:

11B-60. Procedures.

(a) By September 30 of each year, the Chief Administrative Officer must set for the following calendar year percentage goals of the dollar value of purchases subject to this Article for each socially or economically disadvantaged group. The goals must correspond to the availability of that group by source selection method and purchasing category in the relevant geographic market area as determined by the most recent report that the County Executive must submit to the County Council under Section 11B-61(b) to perform work under County contracts. The Chief Administrative Officer must set separate goals for each socially or economically disadvantaged group in the County's purchases of goods, construction, professional services, and other services. The Chief Administrative Officer must not set goals for a socially or economically disadvantaged group unless the Chief Administrative Officer determines that the value of purchases made during the previous fiscal year from that group in each category of purchases under a particular source selection method, compared with the availability of that group to perform work in that category, shows a significant under-utilization of the group.

(b) The Chief Administrative Officer must adopt procedures to certify and decertify minority owned businesses.

(c) The Office of Procurement must publicly notify businesses of prospective procurement opportunities.

(d) For those procurements where a goal has been set under subsection (a), the Office of Procurement must encourage minority owned business participation in procurement. These activities should include:

(1). distribution to potential contractors for whom a goal has not been set of a list of potential minority owned business contractors for whom a goal has been set with a requirement that one or more be contacted if any work subject to a goal is being subcontracted;

(2) a provision in all solicitations for procurements in excess of $50,000 that requires, subject to the waiver provisions of subsection (h), businesses for whom a goal has not been set acting as prime contractors to subcontract to minority owned businesses for whom a goal has been set a percentage of the total dollar value of the contract that is consistent with the numerical goals established under subsection (a);

(3) a requirement that a contractor for whom a goal has not been set:

(A) agree to a plan showing how the contractor proposes to meet its minority owned business procurement subcontracting goal; and

(B) identify, before a notice to proceed is issued or performance of a contract begins, whichever occurs first, each minority owned business that the contractor intends to subcontract with and the projected dollar amount of each subcontract, and promptly notify the using department of any change in either item; [and]

(4) contract requirements that minority owned business participation goals be maintained by prime contractors throughout the life of the contract, including modifications and renewals, subject to the waiver provisions of subsection (h). Contract requirements:

(A) may include obligating contractors subject to the minority owned business procurement goals to provide in each subcontract with a minority owned business a provision requiring the use of binding arbitration to resolve disputes between the contractor and the minority owned business subcontractor; and

(B) must make failure to submit documentation showing compliance with a minority owned business subcontracting plan under paragraph (3) grounds for withholding any remaining payment or imposing liquidated damages unless failure to comply with the plan is the result of an arbitration decision under subparagraph (A) or a waiver granted under subsection (h). Liquidated damages under this provision must equal the difference between all amounts the contractor has agreed under its plan to pay minority owned business subcontractors and all amounts actually paid minority owned business subcontractors under the contract, considering any relevant waiver or arbitrator's decision. Failure to show compliance with a minority owned business subcontracting plan must also result in finding the contractor non-responsible for purposes of future procurements with the County during the next 3 years; and

(5) an evaluation factor with a value of [[at least 10%, but]] no more than [[20%,]] 10% of the total available points in a request for proposals issued under Section 11B-10 awarding additional points for a proposal from:

(A) a contractor for whom a goal has been set under subsection (a); and

(B) a contractor for whom a goal has not been set who proposes to exceed the minority owned business procurement subcontracting goal established for the contract.

*   *   *

Approved:

George Leventhal, President, County Council — Date

Approved:

Isiah Leggett, County Executive — Date

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council — Date

LEGISLATIVE REQUEST REPORT

Bill 48-14
Purchases from Minority Owned Businesses-Procedures-Request for Proposals

DESCRIPTION:	Bill 48-14 would establish an evaluation factor in a request for proposals to increase the participation of minority owned firms in certain procurement contracts. The Department of General Services Director would be authorized to establish an evaluation factor in a request for proposals that would award additional points for a proposal from: (1) a contractor for whom a goal has been set under the MFD program; and (2) a contractor for whom a goal has not been set who proposes to exceed the minority owned business procurement subcontracting goal established for the contract.
PROBLEM:	The 2014 Disparity Study found a statistically significant underutilization of some MFD groups in each procurement category that can be attributed to discrimination in the marketplace. Although the County's current MFD subcontracting requirement has increased the utilization of MFD firms, new ideas and remedies are necessary.
GOALS AND OBJECTIVES:	The goal is to authorize an additional tool to remedy the significant underutilization of some MFD groups in County procurement.
COORDINATION:	County Attorney, Department of General Services
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	To be researched.
SOURCE OF INFORMATION:	Robert H. Drummer, Senior Legislative Attorney
APPLICATION WITHIN MUNICIPALITIES:	Not applicable.
PENALTIES:	None

ROCKVILLE, MARYLAND

MEMORANDUM

November 24, 2014

TO: Craig Rice, President, County Council

FROM: Jennifer A. Hughes, Director, Office of Management and Budget
Joseph F. Beach, Director, Department of Finance

SUBJECT: FEIS for Bill 48-14, Purchases from Minority Owned Businesses - Procedures - Request for Proposals

Please find attached the fiscal and economic impact statements for the above-referenced legislation.

JAH:fz

cc: Bonnie Kirkland, Assistant Chief Administrative Officer
Lisa Austin, Offices of the County Executive
Joy Nurmi, Special Assistant to the County Executive
Patrick Lacefield, Director, Public Information Office
Joseph F. Beach, Director, Department of Finance
David Platt, Department of Finance
Robert Hagedoorn, Department of Finance
David Dise, Director, Department of General Services
Erika lopez-Finn, Office of Management and Budget
Alex Espinosa, Office of Management and Budget
Naeem Mia, Office of Management and Budget

Fiscal Impact Statement
Council Bill 48-14, Purchases from Minority Owned Businesses
Procedures -Request for Proposals

1. Legislative Summary.

   The legislation establishes an evaluation factor in a request for proposals (RPFs) to increase participation of minority owned firms in certain procurement contracts and adds additional tools, such as an evaluation factor of at least 10% but no more than 20% of total available points to requests for proposals for increasing the participation of minority owned firms in certain procurement contracts.

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 proposed legislation will not impact revenues and expenditures.

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

   The proposed legislation will not impact revenues. Expenditures will only be affected if contract prices are affected.

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

   The proposed legislation will not affect retiree pension or group insurance costs.

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

   The proposed legislation will not impact expenditures related to IT systems

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

   The proposed legislation does not authorize future spending.

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

   The Minority Female Disabled (MFD) program manager will develop baseline instructions on how to rate the MFD participation in the evaluation criteria for the department Qualifications and Selection Committee (QSCs). DGS anticipates that at the beginning of rolling out this requirement, the department QSCs will consult with the MFD program manager on each solicitation.

DGS received 143 proposals responding to RFPs in FY14. Assuming an average of 3 proposals per week, the MDF program manager expects to spend 2 hours per proposal (or six hours per week) in reviewing RFPs.

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

   The availability of existing staff for these additional procurement related efforts would entail a lengthier process and delays of other types of procurement actions while these are being researched and resolved.

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.

    Not applicable.

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

    Not applicable.

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

    This bill results in increased staff time which can be absorbed.

13. Other fiscal impacts or comments.

    Currently, offerors submit MFD plans by the time the contract is signed. The proposed legislation would require offerors to submit their MFD plans when they submit their proposals. Submitting MFD proposals earlier may limit the vendors' ability to obtain more competitive pricing compared to later submitting in the procurement process. This may increase the upfront cost for the vendors, which may be passed on to the County in the form of higher bid prices.

    Procurement and OBRC will need to further investigate whether a vendor was evaluated and assigned points for later changes during negotiations or before the award. There may be changes to the subcontractors' availability and costs, but the County's flexibility would be limited since availability and costs would have to be finalized prior to submissions since evaluations are at stake.

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

    Grace Denno, Department of General Services
    Angela Dizelos, Department of General Services
    Beryl Feinberg, Department of General Services

Pam Jones, Department of General Services
Erika Lopez-Finn, Office of Management and Budget

Jennifer A. Hughes

Jennifer A. Hughes, Director
Office of Management and Budget

11/18/14

Date

Economic Impact Statement
Bill 48-14, Purchases for Minority Owned Businesses – Procedures – Request for Proposal

Background:

This legislation would establish an evaluation factor in a request for proposals to increase participation of minority owned firms in certain procurement contracts and adds additional tools, such as an evaluation factor of at least 10 percent but no more than 20 percent of total available points to requests for proposals for increasing the participation of minority owned firms in certain procurement contracts.

According to a County Council staff memorandum dated October 17, 2014, the 2014 Disparity Study found a statistically significant underutilization of some Minority, Female, and Disabled (MFD) groups in each procurement category attributed to discrimination in the marketplace. The County's current subcontracting requirement increased MFD utilization and Bill 48-14 authorizes an additional tool to remedy the statistically significant underutilization of some MFD groups in County procurement.

The Director of the Department of General Services (DGS) would establish an evaluation factor in a request for proposal.

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

   The Department of General Services is the source of information. According to DGS, the Department received 143 proposals responding to Request for Proposal (RFP) in fiscal year 2014. The economic impact is based on the increase in the number of proposals and awards to MFD groups attributed to the enactment of Bill 48-14. However, since the evaluation factor has yet to be established by the Director of DGS and without specificity of data, the actual economic impact of Bill 48-14 cannot be estimated at this time. Regardless of the lack of specificity, the intended goal of the legislation is to remedy the underutilization of some MFD groups which would have a positive effect on employment and business income by some MFD groups.

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

   The variable that could affect the economic impact is the evaluation factor in a request for proposals.

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

   As stated in paragraph #1, Bill 48-14 could have a positive effect on employment and business income.

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

   See paragraph #3.

Economic Impact Statement
Bill 48-14, Purchases for Minority Owned Businesses – Procedures – Request for Proposal

5. **The following contributed to or concurred with this analysis**: David Platt and Rob Hagedoorn, Finance.

Joseph F. Beach, Director
Department of Finance

11/12/14
Date

WRITTEN TESTIMONY

SUPPORT BILL 48-14

HERMAN L. TAYLOR, JR

December 2, 2014

Dear Council President Leventhal and members of the County Council,

Thank you for the opportunity to testify in support of Bill 48-14, Purchases from Minority Owned Businesses Procedures – Request for Proposals.

I am the President/CEO of DeskmateUSA a company that was founded 25 years ago by me and my late mother Mrs. Dorothy J. Taylor; however, today I come before you representing the Minority Business Economic Council.

The Minority Business Economic Council consist of small and mid tier minority owned businesses from all across the county. We have come together to take collective action and provide leadership and advocacy on the following core areas which include; economic development, employment and education.

On July 30th the MBEC hosted over 400 companies interested in doing business with Montgomery County in a town hall format. We have procurement officials as well as Councilmember Leventhal and former councilmember Branson. As you would expect, the attendees had a lot to say about the inequities that exist within contracting in this county. But, they came away very impressed with the dedication of Councilmember's Leventhal and Branson who stayed until the last person spoke.

Bill 48-14, would provide an important evaluation factor in the determination of successful county prime contractors in order to achieve acceptable levels of Minority Businesses participation.

The Minority Business Economic Council strongly encourages the passage of this legislation in order to address the county's underutilization of MFD's.

Testimony about Montgomery County Bill 48-14
Concerning Procedures for Purchases from
Minority Owned Businesses and Requests for Proposals
December 2, 2014

Presented by Timothy J. Fay
802 Argyle Road
Silver Spring, MD 20901

Phone: (301) 588-0778
Fax: (301) 589-0324
Email: tim@faycomm.com

Good afternoon.

I want to thank you for the opportunity to testify about Bill 48-14.

My name is Timothy Fay and I operated a small business in Montgomery County from 1984 to 2008.

From 2008 to 2013 I served as Special Assistant to the Vice Chair of the U.S. Commission on Civil Rights.

My testimony today reflects only my views and not those of any other person or entity.

I wish to express my concern that in Bill 48-14 the County is proposing contracting practices which do not offer all County businesses an equal opportunity to bid on County contracts or subcontracts without regard to the race, gender, or ethnicity of the business owner.

For example, I note that bill 48-14 "would permit an ***evaluation factor*** in a request for proposals to increase the participation of minority owned firms in certain procurement contracts."[1] The bill would authorize the use of an "evaluation factor ... that would award additional points" for contractors who have a minority subcontracting goal and/or who promise to "exceed the minority business procurement subcontracting goal established for the contract."[2]

Thus, bill 48-14 enshrines the use of racial targets and goals in the awarding of County contracts or subcontracts for the purpose of "increasing the participation of minority owned firms in certain procurement contracts."[3]

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[1] Memorandum to the Council from Robert H. Drummer, Senior Legislative Attorney, Oct. 17, 2014
[2] Same citation
[3] Same citation

This practice will inevitably lead to awarding contracts or subcontracts that are neither of the lowest cost nor the highest quality.

The two "evaluation factors" that are of most concern to your constituents and tax payers, especially in this time of economic stagnation, are *cost* and *quality.*

Other Ways of Addressing Underutilization:

There are nondiscriminatory measures that the County can undertake to ensure that all qualified bidders have an equal opportunity to compete without regard to the race, gender, or ethnicity of the business owner. In particular, I recommend to you a report the U.S. Commission on Civil Rights published in 2005 that presented an excellent discussion of race-neutral alternatives to using racial preferences:

- Enforce nondiscrimination and subcontractor compliance;
- Increase knowledge about opportunities to contract with the ... government;
- Provide education or technical assistance to improve business skills and knowledge of [government] procurement and how to win contracts;
- Give financial assistance or adjustments to offset the difficulties struggling firms encounter; and
- Expand contracting opportunities and promote business development in underutilized geographic regions.

These strategies are available to all businesses meeting size and income criteria, and are therefore race-neutral.[4]

The aim of race-neutral contracting alternatives is to correct and end discrimination -- and not to achieve a particular percentage of contracting by any particular racial group. Numerous judicial decisions make very clear that the desire to achieve a particular racial mix for its own sake is not itself a compelling or important government interest; that would be "discrimination for its own sake. This the Constitution forbids." University of California Regents v. Bakke, 438 U.S. 265, 307 (Powell, J.); see also Fisher, 133 S.Ct. at 2419 ("[O]utright racial balancing . . . is patently unconstitutional.") (quotation marks omitted).

Rather, the use of preferences can be justified only if there is an interest beyond such racial, gender and ethnic head-counting -- and that compelling interest in the contracting context is ending racial discrimination. It is very unlikely that in 2014 the only avenue open to Montgomery County to end presumed race discrimination (or mere

[4] U.S. COMMISSION ON CIVIL RIGHTS, FEDERAL PROCUREMENT AFTER ADARAND 31 (Sept. 2005), available at http://www.usccr.gov/pubs/080505_fedprocadarand.pdf.

disparities) in contracting is through "remedial" race discrimination. As Chief Justice Roberts wrote in 2007, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Community Schools v. Seattle School District No. 1,* 551 U.S. 701, 748 (2007).

Constitutional issues aside, any system that awards contracts on the basis of race, ethnicity, or sex and to those other than the lowest cost, qualified bidder, will likely cost Montgomery County and its taxpayers money, both in higher contract costs and legal liability. A case-in-point is *Cleveland Construction, Inc. v. Cincinnati*, in which the city awarded the contract for $1,246,022 *more* than Cleveland Construction's bid simply because the other bid included more minority subcontractors. The trial court held that the city's race- and gender-based classifications violated the Equal Protection Clause of the Fourteenth Amendment. The appellate court upheld the trial court's ruling, also pointing out that:

> In determining whether strict scrutiny must be applied ... we must look behind its ostensibly neutral labels such as "outreach program" and "participation goals." The program's rules and guidelines are not immunized from scrutiny because they purport to establish "goals" rather than "quotas." [Courts] look to the economic realities of the program rather than the label attached to it.[5]

In other words, "soft quotas," i.e., impermissible consideration of the race, ethnicity or gender of bidders to meet an "aspirational goal," are just as problematic as "hard quotas," i.e., mandating contract awards to business owned by particular groups. Other significant cases from other jurisdictions show that Montgomery County will want to think twice before using, or continuing to use, race and gender in awarding contracts.[6]

Discouraging Sham Pass-Through Companies:

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[5] *Cleveland Constr., Inc. v. Cincinnati,* 864 N.E.2d 116, 127 (Ohio App. 1 Dist. 2006) (quoting *Bras v. California Pub. Utils. Comm'n*, 59 F.3d 869, 874 (9th Cir. 1995)), *rev'd on other grounds*, 888 N.E.2d 1068 (Ohio 2008), *cert. denied*, 555 U.S. 1100 (2009).

[6] *See Associated General Contractors of Ohio v. Drabik*, 214 F.3d 730 (6th Cir. 2000) (awarding public construction contracts which gave preferences to bidders owned by racial or ethnic minorities violated the Equal Protection Clause); *see also W.H. Scott Construction Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999); *Webster v. Fulton County*, 51 F.Supp.2d 1354 (N.D. Ga. 1999). In 1998, Cuyahoga Community College trustees were held not to be immune from personal liability for damages resulting from their decision to impose an unconstitutional racial set-aside policy in contracting. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College Dist.*, 31 F. Supp.2d 584 (N.D. Ohio 1998). Also in 1998, Cincinnati settled a lawsuit by the Ohio Contractors Association over Cincinnati's Minority Business Enterprise (MBE) set-aside program. As part of the settlement, the city agreed to cut the 30% set-aside for MBE firms to 5%. *See* Dohoney Memorandum at 3. In another 1998 lawsuit, this time brought by Ray Prius & Sons, Inc., over the constitutionality of Cincinnati's Equal Business Opportunity Program, the city agreed to halt the program pending its evaluation and adopted an interim race- and gender-neutral program. *See id.*

Other legal and constitutional issues aside, Bill 48-14 also provides powerful incentives for prime contractors to find minority subcontractors at any cost. This often results in the creation of "minority owned pass-through companies."

Here's how it works.

Let's say the prime contractor needs to purchase a quantity of drywall for the contract. The prime already has a reliable and reasonably priced supplier of drywall who is not minority owned. But the prime needs to add a minority subcontractor to its bid.

Therefore, the prime hires a minority firm to supply the drywall. The minority firm buys the drywall from the same supplier the prime had previously used. The minority firm purchases the drywall from the original drywall supplier and resells it to the prime contractor at a 15% markup.

The prime could have purchased it directly from the old supplier for 15% less, but the prime knows this is the cost of doing business in Montgomery County. The prime's contract bid will receive "bonus points" or "evaluation points" from the County because it hired a minority owned firm. The "evaluation points" the prime receives from the County for inclusion of a minority subcontractor in its contract bid will offset the increased cost of the minority pass-through company's 15% markup during evaluation of the prime's bid.

The result is the prime pays 15% more for the material and passes the cost on to the County which passes the additional cost on to the tax payer.

The reseller, i.e., the minority-owned pass-through company, does no useful work but earns 15% on reselling the drywall to the prime contractor.

The pass through company also gains no useful business experience from the transaction other than how to scam the County's minority preference program.

It is my hope the County has, or will have, a mechanism in place to strongly discourage this deceitful practice and to penalize or even disbar firms engaging in it.

Conclusion:

Montgomery County's web site, as well as numerous documents and brochures from the County, contain many declarations about equal opportunity. But guaranteeing equal opportunity does *not* mean guaranteeing equal results or proportional representation.

I sincerely hope that Montgomery County will take to heart its professed commitment to equal opportunity regardless of the race, gender or ethnicity of contract bidders and subcontractors. It is my hope that you will vigorously pursue obtaining the best value for the County's contracting dollar in a fair, competitive and race-neutral manner.

Sincerely,
Timothy J. Fay

FY13 MFD Utilization and Availability

	Prime Contractor		Sub-Contractor		Total Contractor		County Utilization (%)	FY13 Availability*(%)	FY14 Goal (%)
Professional Services	**Dollars Subject to MFD Requirements:**				**$318,335,658**	**2,298**			
African American	1,171,960	21	2,583,804	200	3,755,764	221	1.18	1.01	--
Hispanic American	437,869	10	2,204,642	65	2,642,511	75	0.83	0.29	--
Asian American	20,650,659	130	2,132,077	92	22,782,736	222	7.16	0.75	--
Native American	0	0	108,800	1	108,800	1	0.03	0.08	0.10
Female	4,603,606	286	4,281,110	106	8,884,716	392	2.79	9.63	10.00
Person with Disability	249,098	9	0	0	249,098	9	0.08	0.75	1.00
Sub Total	**$27,113,192**	**456**	**$11,310,433**	**464**	**$38,423,625**	**920**	**12.07%**	**12.51%**	
Non-professional Services	**Dollars Subject to MFD Requirements:**				**$175,693,500**	**2,023**			
African American	12,296,994	27	7,538,945	212	19,835,939	239	11.29	2.90	--
Hispanic American	12,908,254	110	3,075,227	55	15,983,481	165	9.10	0.98	--
Asian American	1,473,854	24	67,853	18	1,541,707	42	0.88	2.00	2.00
Native American	0	1	0	0	0	1	0.00	0.83	1.00
Female	10,689,340	115	2,406,460	117	13,095,800	232	7.45	11.94	12.00
Person with Disability	107,950	3	128,059	8	236,009	11	0.13	0.75	1.00
Sub Total	**$37,476,392**	**280**	**$13,216,544**	**410**	**$50,692,936**	**690**	**28.85%**	**19.40%**	
Goods	**Dollars Subject to MFD Requirements:**				**$120,685,214**	**1,781**			
African American	419,662	9	6,315,440	104	6,735,102	113	5.58	1.29	--
Hispanic American	34,020	4	248,429	13	282,449	17	0.23	0.57	1.00
Asian American	0	0	6,834,218	93	6,834,218	93	5.66	3.00	--
Native American	0	0	0	0	0	0	0.00	0.86	1.00
Female	1,296,070	62	3,585,974	304	4,882,044	366	4.05	11.09	11.00
Person with Disability	0	0	1,200	1	1,200	1	0.00	0.75	1.00
Sub Total	**$1,749,752**	**75**	**$16,985,261**	**515**	**$18,735,013**	**590**	**15.52%**	**17.56%**	
Construction	**Dollars Subject to MFD Requirements:**				**$123,693,485**	**262**			
African American	0	1	260,293	9	260,293	10	0.21	2.23	2.00
Hispanic American	35,905,807	78	2,053,641	26	37,959,448	104	30.69	2.09	--
Asian American	0	0	455,129	2	455,129	2	0.37	3.00	3.00
Native American	0	0	0	0	0	0	0.00	0.54	1.00
Female	1,670,197	16	88,877	2	1,759,074	18	1.42	9.98	10.00
Person with Disability	0	0	0	0	0	0	0.00	0.75	1.00
Sub Total	**$37,576,004**	**95**	**$2,857,940**	**39**	**$40,433,944**	**134**	**32.69%**	**18.59%**	
	Total Dollars Subject to MFD Requirements				**$738,407,857**	**6,364**			
	Total MFD Encumbrance				**$148,285,518**	**2,334**	**20.08%**		

* The availability of minority businesses is based on the 2005 Disparity Study conducted by Griffin & Strong, Inc.

FY14 MFD Utilization and Availability

	Prime Contractor		Sub-Contractor		Total Contractor		FY14 Utilization	FY14 Availability*	FY15 Goal
Professional Services		Subject to MFD Requirements:			$323,247,482	2,074			
African American	$2,589,714	20	$3,464,500	162	$6,054,214	182	1.87%	1.01%	-
Hispanic American	$1,254,225	24	$1,356,904	67	$2,611,129	91	0.81%	0.29%	-
Asian American	$20,866,721	144	$4,519,541	89	$25,386,262	233	7.85%	0.75%	-
Native American	$0	0	$130,032	2	$130,032	2	0.04%	0.08%	0.1%
Female	$4,689,185	212	$2,377,190	82	$7,066,375	294	2.19%	9.63%	10.0%
Person with Disability	$210,175	13	$109,141	29	$319,316	42	0.10%	0.75%	1.0%
Sub Total	$29,610,020	413	$11,957,308	431	$41,567,328	844	12.86%	12.51%	
Nonprofessional Services		Subject to MFD Requirements:			$200,022,029	2,336			
African American	$7,308,449	36	$9,522,284	184	$16,830,733	220	8.41%	2.90%	-
Hispanic American	$18,555,952	152	$4,743,893	55	$23,299,845	207	11.65%	0.98%	-
Asian American	$3,981,207	50	$1,381	16	$3,982,588	66	1.99%	2.00%	2.0%
Native American	$0	1	$0	0	$0	1	0.00%	0.83%	1.0%
Female	$15,060,683	175	$2,761,143	112	$17,821,826	287	8.91%	11.94%	12.0%
Person with Disability	$10,000	2	$84,004	6	$94,004	8	0.05%	0.75%	1.0%
Sub Total	$44,916,291	416	$17,112,705	373	$62,028,996	789	31.01%	19.40%	
Goods		Subject to MFD Requirements:			$100,109,908	1,690			
African American	$562,915	10	$2,171,262	71	$2,734,177	81	2.73%	1.29%	-
Hispanic American	$1,633,556	15	$386,667	13	$2,020,223	28	2.02%	0.57%	-
Asian American	$52,000	2	$2,285,860	92	$2,337,860	94	2.34%	3.00%	3.0%
Native American	$0	0	$0	0	$0	0	0.00%	0.86%	1.0%
Female	$3,947,614	72	$2,627,980	234	$6,575,593	306	6.57%	11.09%	11.0%
Person with Disability	$350,000	3	$2,041	2	$352,041	5	0.35%	0.75%	1.0%
Sub Total	$6,546,085	102	$7,473,809	412	$14,019,894	514	14.01%	17.56%	
Construction		Subject to MFD Requirements:			$132,286,890	230			
African American	$41,301	2	$71,149	6	$112,450	8	0.09%	2.23%	2.0%
Hispanic American	$24,177,753	55	$847,017	5	$25,024,770	60	18.92%	2.09%	-
Asian American	$965,133	2	$0	0	$965,133	2	0.73%	3.00%	3.0%
Native American	$0	0	$0	0	$0	0	0.00%	0.54%	1.0%
Female	$4,076,504	15	$23,637	5	$4,100,141	20	3.10%	9.98%	10.0%
Person with Disability	$0	0	$0	0	$0	0	0.00%	0.75%	1.0%
Sub Total	$29,260,691	74	$941,803	16	$30,202,494	90	22.84%	18.59%	
Total Subject to MFD Requirements					$755,666,309	6,330		19.56%	
Total MFD Procurement					$147,818,712	2,237			

* The availability of minority businesses is based on the 2005 Disparity Study conducted by Griffin & Strong, Inc.

* FY14's new disparity study data will update the availability numbers for the FY15 annual report.