

Expedited Bill No. 42-05
Concerning: Minority Owned Business
Purchasing Program –Extension
Revised: January 25, 2006 Draft No. 2
Introduced: December 6, 2005
Enacted: February 7, 2006
Executive: February 17, 2006
Effective: February 17, 2006
Sunset Date: December 31, 2009
Ch. 3, Laws of Mont. Co. 2006

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the request of the County Executive.

AN EXPEDITED ACT to:

- (1) extend the sunset date for the minority owned business purchasing program;
- (2) narrowly tailor the County's minority owned business purchasing program to ensure continued compliance with constitutional requirements; and
- (3) generally amend the County's minority owned business purchasing program.

By amending

Montgomery County Code
Chapter 11B, Contracts and Procurement
Sections 11B-57 through 11B-64

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-57 through 11B-64 of the County Code are amended**
2 **as follows:**

3 **11B-57. Legislative findings and policy.**

4 (a) **Minority owned businesses** have experienced the effects of
5 discrimination in the awarding of County contracts and subcontracts.

6 The effect has been to:

- 7 (1) make a smaller percentage of contract and subcontract awards to
8 **minority owned businesses** than the percentage of qualified
9 **minority owned businesses** in the [Washington, D.C. -
10 Baltimore Consolidated Metropolitan Statistical Area] County's
11 **relevant geographic market area** would indicate as reasonable;
12 (2) impede the economic development and expansion of **minority**
13 **owned businesses** in the [Washington, D.C. - Baltimore
14 Consolidated Metropolitan Statistical Area] County's **relevant**
15 **geographic market area;**
16 (3) impair the competitive position of minority owned businesses;
17 and
18 (4) generally harm minority owned businesses.

19 (b) Adoption of the **minority owned business** purchasing program is
 20 intended to remedy the effects of discrimination on **minority owned**
 21 **businesses.**

22 (c) A goal of awarding [a] an appropriate percentage of the dollar value of
 23 County contracts to **minority owned businesses** in proportion to their
 24 availability to perform work under County contracts is a reasonable and
 25 appropriate means to remedy discrimination against **minority owned**
 26 **businesses.**

27 [(d) The County draws a majority of its contractors from the Washington,
 28 D.C. - Baltimore Consolidated Metropolitan Statistical Area.]

29 [(e)](d) The County should actively recruit all **minority owned businesses** to
 30 provide goods, construction, and services to the County. To help
 31 achieve this goal, the County should:

- 32 (1) notify [minority owned] all businesses of procurement
 33 opportunities;
- 34 (2) provide information to [minority] all business owners about the
 35 procurement system;
- 36 (3) provide referrals for technical assistance, sureties, and financing;
 37 and

38 (4) review procurement procedures to remove artificial barriers to
 39 competition [by minority owned businesses].

40 ~~[(f)](e)~~A four-year period is a reasonable time to continue the **minority owned**
 41 **business** purchasing program before evaluating it.

42 ~~[(g)](f)~~This article does not give any person, including a **minority owned**
 43 **business**, any right or status, including standing, to challenge the award
 44 of a contract or subcontract under the County procurement system. The
 45 provisions of this article are enforceable only through the oversight
 46 function of the Chief Administrative Officer and the County Council.

47 **11B-58. Definitions.**

48 (a) **Minority owned business** means, unless the context indicates
 49 otherwise, any legal entity that:

50 (1) Is a minority business enterprise as defined under the State
 51 procurement law; and

52 (2) Does not exceed a ceiling set by regulation on the number and
 53 value of contracts or subcontracts awarded during the first 5 years
 54 after it is certified under this article, or during the next 3 years if
 55 it did not exceed the ceiling during the first 5 years after it is
 56 certified.

57 However, a not-for-profit entity organized to promote the interests of
 58 persons with a disability is a **minority owned business** only if at least
 59 51 percent of the individuals used by the nonprofit entity to perform the
 60 services or manufacture the goods contracted for by the County are
 61 persons with a disability.

62 (b) **Relevant geographic market area** means the geographic market area
 63 identified by the County Executive in a report dated July 1, 2005 that
 64 evaluates the need to continue the program and is issued in accordance
 65 with Section 11B-61(b).

66 [(b)](c) **Socially or economically disadvantaged group** means a group
 67 expressly identified as eligible to control a minority business enterprise
 68 under the State procurement law. For purposes of this Article, disabled
 69 owned businesses and not-for-profit entities organized to promote the
 70 interests of persons with a disability are a single group.

71 [(c) Washington, D.C. - Baltimore Consolidated Metropolitan Statistical
 72 Area means the metropolitan areas of Washington, D.C. and Baltimore
 73 as used in the Economic Census by the U.S. Department of Commerce,
 74 Bureau of the Census.]

75 **11B-59. Goals; applicability.**

76 (a) The Chief Administrative Officer must structure the County's
 77 purchasing program to attempt to achieve the goal so that the
 78 percentages of the dollar value of purchases identified in subsection (b)
 79 from **minority owned businesses** who have been discriminated against
 80 [is]are proportional to the availability of those businesses to perform
 81 work under County contracts in the [Washington, D.C. - Baltimore
 82 Consolidated Metropolitan Statistical Area] County's relevant
 83 **geographic market area** as determined by the most recent report that
 84 the County Executive must submit to the County Council under Section
 85 11B-61(b).

86 (b) The purchases subject to the **minority owned business** goals are any
 87 formal or informal procurement, including any contract modification or
 88 renewal, valued over \$[3,000]5,000.

89 (c) The **minority owned business** goals do[es] not apply to:
 90 (1) grants that are appropriated by the County Council to specific
 91 grantees;
 92 (2) utilities;
 93 (3) intragovernmental procurements; or
 94 (4) intergovernmental procurements, including a bridge contract,
 95 under Sections 11B-41 and 11B-42 if the Director determines in

96 writing that compliance with this [article] Article is impractical or
97 is outweighed by the benefits to the County of entering into the
98 intergovernmental procurement.

99 **11B-60. Procedures.**

100 (a) By September 30 of each year, the Chief Administrative Officer must
101 set for the following calendar year [a] percentage goals of the dollar
102 value of purchases subject to this Article for each **socially or**
103 **economically disadvantaged group**. The goals must correspond to the
104 availability of that group by source selection method and purchasing
105 category in the [Washington D.C. - Baltimore Consolidated
106 Metropolitan Statistical Area] **relevant geographic market area** as
107 determined by the most recent report that the County Executive must
108 submit to the County Council under Section 11B-61(b) to perform work
109 under County contracts. The Chief Administrative Officer must set [a]
110 separate goals for each **socially or economically disadvantaged group**
111 in the County's purchases of goods, construction, professional services,
112 and other services. The Chief Administrative Officer must not set [a]
113 goals for a **socially or economically disadvantaged group** unless the
114 Chief Administrative Officer determines that the value of purchases
115 made during the previous fiscal year from that group in each category of

116 purchases under a particular source selection method, compared with
 117 the availability of that group to perform work in that category, shows a
 118 significant under-utilization of the group.

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

121 (c) The Office of Procurement must publicly notify [minority owned]
 122 businesses of prospective procurement opportunities.

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

127 (1) distribution to [non-minority owned business] potential
 128 contractors for whom a goal has not been set of a list of potential
 129 **minority owned business** contractors for whom a goal has been
 130 set with a requirement that one or more be contacted if any work
 131 subject to a goal is being subcontracted;

132 (2) a provision in all solicitations for procurements in excess of
 133 \$[65,000]50,000 that requires, subject to the waiver provisions of
 134 subsection (h), [non-minority owned] businesses for whom a goal
 135 has not been set acting as prime contractors to subcontract to

- 136 **minority owned businesses** for whom a goal has been set a
137 percentage of the total dollar value of the contract that is
138 consistent with the numerical goals established under [Section
139 11B-59] subsection (a);
- 140 (3) a requirement that a [non-minority owned business] contractor
141 for whom a goal has not been set:
- 142 (A) agree to a plan showing how the contractor proposes to
143 meet its **minority owned business** procurement
144 subcontracting goal; and
- 145 (B) identify, before a notice to proceed is issued or
146 performance of a contract begins, whichever occurs first,
147 each **minority owned business** that the contractor intends
148 to subcontract with and the projected dollar amount of
149 each subcontract, and promptly notify the [contracting
150 agency] using department of any change in either item; and
- 151 (4) contract requirements that **minority owned business**
152 participation goals be maintained by prime contractors
153 throughout the life of the contract, including modifications and
154 renewals, subject to the waiver provisions of subsection (h).
- 155 Contract requirements:

- 156 (A) may include obligating contractors subject to the **minority**
157 **owned business** procurement goals to provide in each
158 subcontract with a **minority owned business** a provision
159 requiring the use of binding arbitration to resolve disputes
160 between the contractor and the **minority owned business**
161 subcontractor; and
- 162 (B) must make failure to submit documentation showing
163 compliance with a **minority owned business**
164 subcontracting plan under paragraph (3) grounds for
165 withholding any remaining payment or imposing
166 liquidated damages unless failure to comply with the plan
167 is the result of an arbitration decision under subparagraph
168 (A) or a waiver granted under subsection (h). Liquidated
169 damages under this provision must equal the difference
170 between all amounts the contractor has agreed under its
171 plan to pay **minority owned business** subcontractors and
172 all amounts actually paid **minority owned business**
173 subcontractors under the contract, considering any relevant
174 waiver or arbitrator's decision. Failure to show compliance
175 with a **minority owned business** subcontracting plan must

176 also result in finding the contractor non-responsible for
 177 purposes of future procurements with the County during
 178 the next 3 years.

179 (e) The Office of Procurement must offer procurement system
 180 education and information to **minority owned businesses** for
 181 whom a goal has been set under subsection (a).

182 (f) The Office of Procurement must offer referrals to resources such
 183 as technical consultants, sureties, and financing sources.

184 (g) The Director must review procurement requirements to remove
 185 artificial barriers to competition [by minority owned businesses].

186 (h) The Director may waive, or exempt a business from, **minority**
 187 **owned business** contracting requirements under appropriate
 188 circumstances described in regulations.

189 (i) The Director may require each contractor and **minority owned**
 190 **business** that participates in the **minority owned business**
 191 purchasing program to provide information concerning utilization
 192 by the contractor of **minority owned businesses** in private and
 193 government contracts.

194 (j) The Chief Administrative Officer must ensure that all contract
195 administrators receive appropriate guidance in implementing this
196 article.

197 **11B-61. Reports.**

198 (a) The Chief Administrative Officer must report to the County Council, by
199 September 30 of each year for the previous fiscal year:

200 * * *

201 (6) the percentage of availability that each **socially or economically**
202 **disadvantaged group** represents in each category of purchases in
203 the [Washington, D.C. - Baltimore Consolidated Metropolitan
204 Statistical Area] County's relevant geographic market area;

205 * * *

206 (9) the total number and value of all procurements excluded from the
207 **minority owned business goals** by [section] Section 11B-59(c);

208 * * *

209 (b) By July 1, [2005] 2009, the County Executive must submit a report to
210 the County Council evaluating the need to extend the **minority owned**
211 **business purchasing program.**

212 * * *

213 **11B-63. Penalty.**

214 * * *

215 (b) A violation of this Section:

216 * * *

217 (2) [disqualified] disqualifies the violator from doing business with
218 the County for 3 years.

219 **11B-64. Sunset date.**

220 This Article is not effective after December 31, [2005] 2009.

221 **Sec. 2. Expedited Effective Date.**

222 The Council declares that this legislation is necessary for the immediate
223 protection of the public interest. This Act takes effect on the date on which it
224 becomes law.

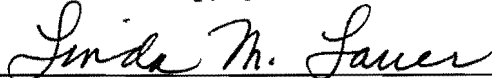
225 *Approved:*

226  2/8/2006
George L. Leventhal, President, County Council Date

227 *Approved:*

228  2/17/06
Douglas M. Duncan, County Executive Date

229 *This is a correct copy of Council action.*

230  2/21/06
Linda M. Lauer, Clerk of the Council Date