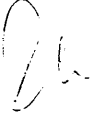


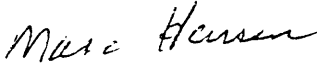
Office of the County Attorney  
Montgomery County, Maryland

MEMORANDUM

April 15, 1999

TO: Norman Butts  
Inspector General

VIA: Charles W. Thompson, Jr.   
County Attorney

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

RE: Police Facilitator Report - Authority of Chief Administrative Officer to Make Sole Source Award

We are forwarding to you an opinion from Judson P. Garrett, Jr., counsel to the Contract Review Committee, and principal counsel for opinions and advice, regarding the authority of the Chief Administrative Officer to make a sole source award. We concur in Mr. Garrett's conclusion that the Chief Administrative Officer is authorized to make a sole source contract award without obtaining the consent of the Director of Procurement or the Contract Review Committee, if the Chief Administrative Officer makes a written determination that the contract award serves a public purpose.

We trust that you and the readers of your report will find this opinion helpful.

Enclosure

cc: Isiah Leggett, President, County Council  
Bruce Romer, Chief Administrative Officer  
Beatrice P. Tignor, Director, Office of Procurement

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OFFICE OF THE COUNTY ATTORNEY

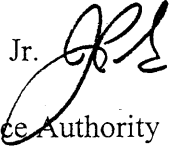
Douglas M. Duncan  
County Executive

Charles W. Thompson, Jr.  
County Attorney

**MEMORANDUM**

April 13, 1999

To: Marc P. Hansen, Chief  
General Counsel Division

From: Judson P. Garrett, Jr. 

Re: CAO's Sole-Source Authority

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I am responding to your request for my opinion on the question of whether the Chief Administrative Officer ("CAO") may make a sole-source award in excess of \$25,000 without either waiving the procurement regulations or referring the proposed award to the Contract Review Committee ("CRC") for approval.

I understand that the Office of Procurement and the Office of the Inspector General differ on this question. The Inspector General has concluded that "the CAO is, or should be, bound by the same procurement controls as every other department--whether buying paper clips or consulting services." The Procurement Office has expressed the view that the CAO's authority to award a sole-source agreement is unfettered by any requirement for the consent of any other individual or entity. Procurement's position is founded upon the following analysis:

Under the Montgomery County Charter, the Chief Administrative Officer supervises the County's purchasing system (§313) all County departments and offices (§211), and the County's personnel system (§402). Chapter 11B of the County Code implements Charter §313. Section 11B-14 states that the CAO may award a sole source contract if the award serves a public purpose. The Procurement Regulations, which implement Chapter 11B, provide that the authority to acquire goods and services is vested in the CAO and by the Procurement Regulations is delegated, subject to revision by the CAO, to the Director of Procurement. Regulation §1.4.1. Regulation §1.4.3. provides, "The CAO delegates, **subject to revision by the CAO**, all necessary authority to the CRC [Contract Review Committee] to carry out all responsibilities assigned that committee pursuant to law or regulations." (emphasis added.) Regulation §4.1.12.2 authorizes the Director of Procurement to make a sole source award if the value of the award is \$25,000 or less. The CRC is authorized to

make a sole source award with an estimated value of more than \$25,000 after receiving a recommendation from the Director of Procurement.

Accordingly, a sole source award may be made by: (1) the CAO; or (2) the Director of Procurement if the value of the award is \$25,000 or less and the CRC, if the estimated value of the award is over \$25,000. Moreover, the CAO's authority to award a sole source contract is unfettered by any requirement to obtain the consent of any other individual or entity.

... [T]he CAO is authorized by the County Charter and Code to make a sole source award directly and does not need to waive the regulations to do so.

(Emphasis in original.)

### ADVICE

This matter is not entirely free from doubt. There is merit to both the position of the Inspector General and that of the Office of Procurement. Nevertheless, I conclude that the Sole-Source Regulation was not intended to require that the CAO obtain the approval of either the Director or the CRC when making a sole-source award. My advice is founded upon the following legal analysis.

### THE PROCUREMENT ORGANIZATION

Montgomery County's procurement system arises under the Express Powers Act of the General Assembly, the Charter of Montgomery County, the Montgomery County Procurement Law, and the Procurement Regulations. This body of law vests various levels of authority and responsibility in the County Council, the County Executive, the Chief Administrative Officer, the Director of Procurement, the Contract Review Committee, and the Using Departments.

#### A. The CAO and the Director.

##### 1. *The Express Powers Act.*

The Express Powers Act generally authorizes a charter county, such as Montgomery County, to enact local laws "[t]o provide for competitive bidding for any county work . . . ." <sup>1</sup> Because this state law is merely general enabling legislation for all charter counties, it does not address the structure or division of authority in a particular county procurement system.

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<sup>1</sup> Md. Ann. Code, art. 25A, § 5 (F).

## 2. *The Charter.*

The Charter of Montgomery County is the organic law by which the County provides for the organization and structure of its government. It instructs the County Council to "prescribe by law a centralized system of purchasing and contracting for all goods and services used by the County,"<sup>2</sup> requires that the "system . . . be *administered* under the professional supervision of the Chief Administrative Officer subject to the direction of the County Executive,"<sup>3</sup> and mandates that the Council "prescribe by law for competitive procurement for purchases by or contracts with the County in excess of an amount or amounts established by law."<sup>4</sup> (Emphasis supplied.) The Charter also provides generally for the CAO, subject to the direction of the County Executive, to "supervise all departments, offices, and agencies of the Executive Branch, advise the County Executive on all administrative matters and perform such other duties as may be assigned by the County Executive, or by this Charter."<sup>5</sup> The Charter, therefore, gives the CAO broad administrative control over the County's procurement system, but does not expressly authorize the CAO's authority to make contract awards.

## 3. *The Procurement Law and Regulations.*

The County Council has exercised its procurement-lawmaking power and implemented the Charter's procurement requirements by enacting a comprehensive Procurement Law, codified as Chapter 11B of the County Code, that applies "to every expenditure of public funds . . . by the County . . . to acquire goods, services, or construction, except as otherwise provided by County, State or federal law."<sup>6</sup> This statute authorizes the County Executive to adopt regulations to implement it,<sup>7</sup> and the County Executive has promulgated comprehensive regulations that have been approved by the County Council.<sup>8</sup> Indeed, when the Council most recently revised the Procurement Law in 1994, it also considered corresponding amendments to the procurement regulations, and the two were adopted and took effect simultaneously.<sup>9</sup>

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<sup>2</sup> Sec. 313.

<sup>3</sup> *Id.*

<sup>4</sup> Sec. 314.

<sup>5</sup> Sec. 211.

<sup>6</sup> § 11B-3.

<sup>7</sup> § 11B-8.

<sup>8</sup> Executive Regulation 15-94AM, Montgomery County Procurement Regulations, approved by County Council Resolution 12-1954 (November 1, 1894).

<sup>9</sup> 1994 L.M.C., ch. 30, § 1.

The Procurement Law gives the CAO, among other things, "the *authority and responsibility* for the procurement of goods, services, and construction,"<sup>10</sup> and "[a]ll rights, powers, duties and authority to *administer* the procurement system . . . ." (Emphasis supplied.) This is the broadest possible procurement authority.

As you know, a statute is the written will of the legislative body that enacted it. Thus, the cardinal rule for interpreting a statute enacted by the County Council is to ascertain and carry out the intent of the Council,<sup>12</sup> and the beginning point is the language of the law itself.<sup>13</sup> Indeed, "[t]he language of the statute itself is the primary source of this intent; and the words used are to be given 'their ordinary and popularly understood meaning,' absent a manifest contrary legislative intention."<sup>14</sup> Consequently, based solely on the language of that part of the Procurement Law, the CAO's procurement authority and responsibility is broad enough to include the award and execution of a procurement contract, including a sole-source award, and is not subject to the approval of any other person or entity.

As you also know, however, "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry."<sup>15</sup> The Court of Appeals has told us to "look to the context surrounding the enactment of a statute to determine the intention of the [legislative body]."<sup>16</sup> Thus, we may and often must consider other external manifestations or persuasive evidence: a bill's title<sup>17</sup> and function paragraphs;<sup>18</sup> the cause or necessity of the law;<sup>19</sup> its objectives and purposes;<sup>20</sup> its

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<sup>10</sup> § 11B-5 (a) (1).

<sup>11</sup> § 11B-5 (b).

<sup>12</sup> *Tucker v. Fireman's Fund Ins. Co.*, 308 Md. 69, 73 (1986).

<sup>13</sup> *Morris v. Prince George's County*, 319 Md. 597, 603 (1990).

<sup>14</sup> *Privette v. State*, 320 Md. 738, 744, 580 A.2d 188 (1990), quoting *In re Arnold M.*, 298 Md. 515, 520 *Williams v. State*, 329 Md. 1, 15 (1992).

<sup>15</sup> *Kaczorowski v. Baltimore*, 309 Md. 505, 514 (1987).

<sup>16</sup> *Comptroller v. Jameson*, 332 Md. 723, 733 (1993).

<sup>17</sup> *Truitt v. Board of Public Works*, 243 Md. 375, 394 (1966)

<sup>18</sup> *Kaczorowski*, 309 Md. at 514.

<sup>19</sup> *Smith v. Higinbotham*, 187 Md. 115, 125 (1946).

<sup>20</sup> *Clark v. State*, 2 Md. App. 756, 761 (1968).

history;<sup>21</sup> applicable reports;<sup>22</sup> amendments that occurred as it passed through the legislature;<sup>23</sup> its relationship to earlier and subsequent legislation;<sup>24</sup> the statute read as a whole;<sup>25</sup> prior and contemporaneous statutes;<sup>26</sup> and other material that fairly bears on the fundamental issue of legislative purpose or goal.<sup>27</sup> This is the context within which particular statutory language is to be read in a given case.<sup>28</sup>

The "context" of the provisions of the current Procurement Law that deal with the CAO's authority therefore includes, at a minimum, the Charter, other relevant provisions of the current statute, and the prior procurement law. Moreover, because the County Council considered the procurement regulations at the same time it considered the legislation and approved the regulations on the very same day it passed the current Procurement Law, the regulations fairly bear on the fundamental issue of the statute's purpose or goals, are part of the context of the statute, and serve as valuable aids in ascertaining the intention of the Council in enacting the current Procurement Law.

(i) The Charter as legislative context. As noted earlier, the Charter requires that the County's procurement system "be *administered* under the professional *supervision* of the Chief Administrative Officer subject to the direction of the County Executive."<sup>29</sup> (Emphasis supplied.) The Charter, therefore, characterizes the CAO's procurement function as administrative and supervisory.

(ii) Other Provisions of the Procurement Law. The CAO's statutory-procurement "authority and responsibility"<sup>30</sup> must be read *in pari materia* with the rest of the Procurement Law, the very next section of which provides for a Procurement Director (the "Director") who, *under the supervision of the CAO*: (1) is "the central procurement officer of the County;" and (2) "*must, under regulations, procure or supervise the procurement of all goods, services and construction . . .*,"

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<sup>21</sup> *Welsh v. Kuntz*, 196 Md. 86, 93 (1950).

<sup>22</sup> *Allers v. Tittsworth*, 269 Md. 677, 683 (1973).

<sup>23</sup> *Kaczorowski*, 309 Md. at 514.

<sup>24</sup> *Welsh*, 196 Md. at 86.

<sup>25</sup> *Barnes v. State*, 186 Md. 287, 291 (1946), *cert. den.* 329 U.S. 754.

<sup>26</sup> *Department of Tidewater Fisheries v. Sollers*, 201 Md. 603, 611 (1953).

<sup>27</sup> *Kaczorowski*, 309 Md. at 514-15.

<sup>28</sup> *Id.*

<sup>29</sup> Sec. 313.

<sup>30</sup> § 11B-5 (b).

except "as otherwise specifically provided in the Procurement Law."<sup>31</sup> (Emphasis supplied.) This provision supports the view that, although the CAO has the ultimate authority and supervisory responsibility for the administration of the procurement system, the power to actually procure goods, services or construction is vested in the Director, under regulations, and the CAO's "*authority and responsibility*" is administrative and supervisory only.

(iii) *Prior Law*. Prior to the enactment of the current statute in 1994, the County's Procurement Law clearly vested award authority in the CAO and other officials to whom the CAO delegated that authority:

The Chief Administrative Officer, and such other employees of the executive branch as specified by delegation from the chief administrative officer, shall have the powers and duties to:

(a) *Purchase or contract for all goods and services* required by using agencies in accordance with purchasing procedures as prescribed by this chapter and such rules and regulations as may be adopted for the internal management of the purchasing function.

(b) *Negotiate and contract for professional services*.

(Emphasis supplied.)<sup>32</sup>

Twenty-four years ago, this Office construed the 1972 version of this provision,<sup>33</sup> together with Section 313 of the Charter, to give the CAO "the authority to sign contracts, although he in turn can delegate his contract authority to others." Op. Co. Atty., No. 75.028 (April 3, 1975). I am advised that between 1972 and 1994 there was a longstanding practice under which sole-source contracts were awarded by the CAO on some occasions and at other times by other officers to whom the CAO had delegated award authority.

In 1994, however, the CAO's clear authority to award procurement contracts was amended and replaced with the language of the current statute,<sup>34</sup> which, as noted earlier, arguably vests that authority only in the Director, although it gives the CAO "the *authority and responsibility* for the procurement of goods, services, and construction,"<sup>35</sup> and "all rights, powers, duties and authority to

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<sup>31</sup> § 11B-6 (a) and (b).

<sup>32</sup> Montgomery County Code 1984, § 11B-24.

<sup>33</sup> Montgomery County Code 1972, § 20-25.

<sup>34</sup> 1994 L.M.C. Ch. 30, pp. 37 and 38.

<sup>35</sup> § 11B-5 (a) (1).

*administer* the procurement system . . . ."36 (Emphasis supplied.) The difference in the language of the prior law and the current law, therefore, may be read to support the view that, in enacting the 1994 legislation, the Council decided to reduce the CAO's procurement role to one that is administrative and supervisory only. This, of course, would have constituted a major change in procurement policy. Indeed, given the significance of such a policy change—and assuming, *arguendo*, that it would not offend Section 313 of the Charter—legislative intent to make such a change should not be inferred absent a most compelling legislative history. It is, therefore, exceedingly significant that nothing in the legislative history of the 1994 amendments even suggests an intention to limit the CAO's authority to award procurement contracts.

*(iv) The Procurement Regulations as statutory context.* In spite of the change in the statutory language concerning the awarding of procurement contracts changed in 1994, the corresponding procurement regulation continued to provide:

*Authority to acquire goods, services, and construction is vested in the CAO and, by this regulation, is delegated, subject to revision by the CAO, to the Director. These contracting officers, and only these contracting officers, may delegate, or redelegate, in writing, this authority, subject to limits stated in the delegation. Contracts and orders may be executed on behalf of the County by these contracting officers only, except as otherwise provided in these regulations."*37

(Emphasis supplied.) Council staff, moreover, did not view the regulation as inconsistent with the amended language of the pending legislation.<sup>38</sup>

Therefore, in spite of the change in the language of the Procurement Law, the regulation supports the view that this 1994 legislation was not intended to divest the CAO of the authority to acquire goods, services, etc. On the contrary, by expressly acknowledging the authority of both the CAO and the Director to execute contracts, this regulation expressly recognizes the CAO's continuing authority and merely provides for the Director to *share* that authority.

Given the County Council's simultaneous consideration of the Procurement Law and the implementing regulations, the continuation of this regulation in 1994 demonstrates the understanding

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<sup>36</sup> § 11B-5 (b).

<sup>37</sup> ¶ 1.4.1. (The 1994 amendments made only one change in this regulation: "Chief, Procurement and Material Management" was changed to "Director.")

<sup>38</sup> See AGENDA ITEM #10, November 1, 1994, Memorandum from Linda A. Mc Millan, Legislative Analyst to the County Council ("Council Staff has reviewed the proposed regulation and finds that it complies with the requirements of Emergency Bill 23-94 as amended by the MFP Committee. Staff recommends that if the Council approves Emergency Bill 23-94 as recommended by the MFP Committee, the Council approve Executive Regulation 15-94AM").



of both the Council and the County Executive that the amendments to the statute did not effect the CAO's longstanding authority to make procurement awards. Otherwise, the regulation would have directly conflicted with a major policy change in the statute, and council staff would not have viewed the regulation as consistent with the legislation.

### **B. The Contract Review Committee.**

Although the Procurement Law authorizes the creation of a contract review committee, the CRC is a creature of the procurement regulations, and it is the regulations that prescribe the Committee's composition, authority and duties.<sup>39</sup> In general, the regulations have delegated to the CRC, "subject to *revision* by the CAO, all necessary authority . . . to carry out all [the] responsibilities assigned [to it] pursuant to law or these regulations."<sup>40</sup> (Emphasis supplied.) Those responsibilities include, among other things, the authority to approve "sole-source procurements valued above the threshold for an IFB or RFP."<sup>41</sup> Thus, the question comes down to whether the regulations merely share the CAO's sole-source approval authority with the CRC, or divest the CAO of that authority and place it in the CRC.

## **THE SOLE-SOURCE AWARD REQUIREMENTS**

The most quintessential provision of the Procurement Law is its requirement that every County contract for goods, services, or construction be awarded by competitive sealed bidding, except as otherwise authorized in the statute or regulations.<sup>42</sup> The exceptions include non-competitive contract awards.<sup>43</sup>

A non-competitive procurement "is the acquisition by contract of a valid County requirement without prior public notice and without competition."<sup>44</sup> The Procurement Law permits the awarding of a non-competitive contract if the Chief Administrative Officer makes a written determination that the contract award serves a public purpose and:

- (1) there is only one source for the required goods, service, or construction which can meet the minimum valid needs of the County, including timeliness of performance;

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<sup>39</sup>5 Montgomery County Code, § 11B-7; M.P.R. ¶ 15.

<sup>40</sup> ¶ 1.4.3.

<sup>41</sup> ¶ 15.5.1.1. (This threshold is \$25,000. See ¶¶ 4.1.1.2 and 4.1.2.2 (b). See also ¶ 4.1.12.2)

<sup>42</sup> § 11B-9 (a).

<sup>43</sup> § 11B-14.

<sup>44</sup> ¶ 4.1.12.1.

- (2) the contract is in connection with potential or pending litigation, condemnation, or collective bargaining;
- (3) a proposed contractor or subcontractor has been specifically identified in a grant accepted by the County; or
- (4) a proposed contractor has been identified in a grant or appropriation resolution approved by the Council.<sup>45</sup>

A sole-source procurement, therefore, is one of four kinds of non-competitive awards permitted by the Procurement Law. Unlike the other three, a sole-source award is subject to an extraordinary requirement. If the value of the award exceeds the monetary threshold for an informal solicitation (\$25,000), the Procurement Law requires that a non-competitive award be *approved* by the CAO.<sup>46</sup> The statute does not, however, expressly address the *award* of a sole-source contract by the CAO.

Amplifying the statutory standard, the regulations permit the use of a non-competitive award if it serves a public purpose and one or more of the statutory factors exists.<sup>47</sup> The regulation also sets forth the following bases for identifying a sole source:

- (1) Proprietary, patented, or copyrighted items or information are available from only one source;
- (2) The valid performance or delivery due dates required by the County can be met by only one source;
- (3) The required compatibility of equipment, accessories, software, or replacement parts can be met by only one source;
- (4) The County requires for trial use or testing an item or service available from only one source;
- (5) Required public utility services are available from only one source; or
- (6) A continuous series of procurements from a single source over a period of time is advantageous as demonstrated by a cost benefit analysis demonstrating that considerations of training, replacement parts, and compatibility which existing

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<sup>45</sup> § 11B-14 (a).

<sup>46</sup> § 11B-14 (b).

<sup>47</sup> ¶ 4.1.12.3.

capital investments justify the use of a sole source."<sup>48</sup>

The CAO's authority to approve non-competitive awards based on a sole-source justification is delegated by the regulations::

The Director may make a non-competitive award unless the non-competitive award is based on a sole source justification and the estimated value of the award is above \$25,000. If the estimated value of the non-competitive award based on a sole source justification exceeds the threshold for an IFB or RFP [*i.e.*, \$25,000], the CRC may make a non-competitive award after reviewing a recommendation from the Director. A non-competitive award must be based on a determination and finding.<sup>49</sup>

Under this regulation, therefore, if the value of a non-competitive award based on a sole-source justification is \$25,000 or less, the Director has been delegated the authority to make the award without the CAO's approval. If, however, the value of the award exceeds \$25,000, the authority to make the award is shared with the CRC, not the Director.

Given the breadth of the procurement authority vested in the CAO by the Charter and the Procurement Law, and the history of the CAO's independent authority to award procurement contracts, it would have been an extraordinary change in substance and practice—one that should not be inferred—for the County Executive, with the approval of the County Council, to have intended that the regulation's delegation of the CAO's sole-source authority deprive the CAO of that authority, rather than merely share that authority with the Director and the CRC. Therefore, although there is merit to the Inspector General's concern and the matter is not entirely free from doubt, in the absence of any specific intention to the contrary on the face of this sole-source regulation or in its history, the regulation should be construed to intend to share, not remove, the CAO's sole-source approval authority. Consequently, the CAO continues to have the authority to make such awards independent of the CRC or the Director.<sup>50</sup>

## CONCLUSION

The Procurement Law generally grants the CAO the authority and responsibility for the procurement of goods, services, and construction, and vests in the CAO all rights, powers, duties and authority to administer the procurement system. The Procurement Law does not, however, specifically address the authority of the CAO to make a sole-source award. Rather, the sole-source provisions of the statute generally permit a sole-source award only if the CAO makes a "written

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<sup>48</sup> ¶ 4.1.12.3 (a).

<sup>49</sup> ¶ 4.1.12.2.

<sup>50</sup> Whether this policy should be changed, *i.e.*, whether the CAO "should" be subject to this requirement is a policy question that is, of course, beyond the scope of this memorandum of law.

determination" that the award serves a public purpose, there is only one source of the required goods, service, or construction that can meet the minimum valid needs of the County, and the CAO approves the award if it exceeds \$25,000. The statute, thus, clearly gives the CAO the authority to approve a sole-source award without the consent or approval of any other entity.

In spite of the broad, general-procurement authority it vests in the CAO, the statute does not, however, clearly authorize the CAO to *make* a sole-source award. Indeed, a fair reading of the language of the statute as amended in 1994, and in the light of the different wording of its predecessor, suggests that awards are to be made by the Director, not the CAO. Nevertheless, implementing regulations that were amended and approved by the Council at the same time it amended the statute expressly recognize the CAO's continuing authority to make awards, and do not, contrary to established practice, subordinate, either directly or by necessary implication, the CAO's sole-source authority to that of the Director or the CRC.

Against this background, given the CAO's broad, independent procurement authority, the history of the use of that authority, and the extraordinary significance of restraining that authority, the procurement law should not read to subordinate the CAO's contract-award authority to the Director or the CRC.

Therefore, although the concern raised by the Inspector General is not without merit, in the total absence of any legislative history suggesting that either the Council or the County Executive intended such an extraordinary change, the CRC sole-source regulation should not be construed to apply to an award by the CAO, and the CAO's authority to award a sole-source agreement is unfettered by any requirement for the consent of any other individual or entity.