OFFICE OF THE COUNTY ATTORNEY

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County Executive

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MEMORANDUM

September 8, 1998

TO: Fred C. Edwards, Chief
Division of Facilities and Services
Department of Public Works & Transportation

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

RE: Applicability of §11B-52(b) to Subcontractors

Question

You have asked for a legal opinion concerning the applicability of Montgomery County Code Section 11B-52(b). Section 11B-52(b) prohibits a County contractor that provides an analysis or recommendation to the County from seeking or obtaining an economic benefit from the matter in addition to the payment made by the County to the contractor. Specifically you seek to know if §11B-52(b) applies to a subcontractor.

Answer

Section 11B-52(b) does not apply to subcontractors.

Analysis

1. The Statute.

Section 11B-52(b) provides that, "A contractor providing an analysis or recommendation to the County concerning a particular matter must not, without first obtaining the written consent of the Chief Administrative Officer: . . . seek or obtain an economic benefit from the matter in addition to payment to the contractor by the County." Section 11B-1 provides that "contractor means any person that is a party to a contract with the County."

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2. Rules Governing Construction of a Statute.

The cardinal rule of statutory construction is to ascertain and give effect to the intention of the legislative body enacting the statute.[1] The Court of Appeals has noted,

> However fictional the notion of institutional intent may sometimes be, it is fair to say that legislation usually has some objective, goal, or purpose. It seeks to remedy some evil, to advance some interest, to attain some end. If we characterize the search for legislative intent as an effort to "seek to discern some general purpose, aim, or policy reflected in the statute," we state the concept more accurately and avoid the fiction.[2]

The Court of Appeals recently noted that, "The search for legislative intent begins, and ordinarily ends, with the words of the statute under review. Where, giving the words of the statute their ordinary and common meaning, the statute is clear and unambiguous, both in meaning and application, it usually is unnecessary to go further."[3] In construing a statute, the Court of Appeals will generally consider the language of a statute in context. The Court has stated,

> We may and often must consider other "external manifestations" or "persuasive evidence," including a bill's title and function paragraphs, amendments that occurred as it passed through the legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legislative purpose or goal, which becomes the context within which we read particular language before us in a given case.[4]

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[1] *Maryland State Police v. Warwick Supply & Equipment Co.*, 330 Md. 474, 483 (1993)

[2] *Kaczorowski v. City of Baltimore*, 309 Md. 505, 513 (1987)

[3] *Gordon Family v. Gar*, 348 Md. 129, 137-38 (1997)

[4] *Kaczorowski v. City of Baltimore*, 309 Md. at 515

3. The Context of §11B-52(b).

Section 11B-52(b) was added to the Code by Bill 25-97, which was enacted on December 2, 1997. Bill 25-97 was enacted to implement Charter §410, which was approved by the voters in November 1996. The Legislative Request Report accompanying Bill 25-97 states that §11B-52(b) is, "new and . . . [is] intended to implement the penultimate paragraph of Charter §410." The penultimate paragraph of Charter §410 provides:

> The Council by law shall prohibit corrupt practices by any individual or organization that attempts to obtain or is a party to a contract with the County, including kickbacks and the award of County contracts and using confidential information obtained in performing a contract with the County for personal gain or the gain of another without the approval of the County.

In a memorandum dated May 29, 1996, to the County Council, the Charter Review Commission recommended that Charter §410 be enacted to replace Charter §411. The Charter Review Commission explained that Charter §411 required revision to avoid certain draconian consequences produced by the literal application of the language of Charter §411. Charter §411 provided, in part, "No person whose compensation is paid in whole or in part by the County shall . . . receive compensation . . . from any person, firm or corporation transacting business of any kind with . . . the County . . . ." The Charter Review Commission appended to its report a memorandum from the Office of the County Attorney to the Ethics Commission in which the County Attorney's Office explained that the language of Charter §411 apparently prohibited one County contractor from doing business with another County contractor. For example, the memorandum explained that if Contractor A sells gravel to the County and Contractor B has a contract to build a road for the County, Contractor A could not sell gravel to Contractor B—even if the gravel was to be used by Contractor B on a project totally unrelated to the road being built for the County. Charter §410, therefore, was proposed, at least in part, to authorize the enactment of legislation to avoid the drastic consequences that resulted from the literal application of the language of Charter §411.

The context in which §11B-52(b) was enacted consequently shows that Charter §410 required the Council to prohibit "corrupt" practices of contractors.[5] Examples of corrupt practices by contractors include:

a) The County enters into a contract with a consultant to recommend specifications for a Request for Proposals. The consultant provides recommendations to the County, but then submits a proposal in response to the Request for Proposals. Did the contractor make recommendations that were in the County's best interests or were the recommendations designed to provide further work for the contractor? [6]

b) The County enters into a contract with an engineer to serve as a consultant to establish a program of requirements to build a detention center. The engineer pads the program of requirements with unnecessary requirements that the engineer would be particularly qualified to design in the hope that the engineer will then be retained to do the design work for the project, either as a prime contractor with the County or as a subcontractor for the County's design consultant.[7]

At the same time, Charter §410 provided the Council with the opportunity to avoid the overly restrictive language of old Charter §411.

4. Construction of §11B-52(b).

The language of §11B-52(b), on its face, unambiguously limits its applicability to contractors. The term "contractor"— a term defined by the statute—limits the applicability of

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[5]*Ballentine's Law Dictionary (Third Edition, 1969)* defines "corrupt" as "subverting the instrumentalities of government to personal profit."

[6]Section 11B-52(b) eliminates the temptation for a consultant to recommend specifications that the consultant would be uniquely qualified to fulfill by preventing the consultant from submitting a proposal under the Request for Proposals. Moreover, it is interesting to note that Md. State Gov't. Code Ann., §15-508, specifically prohibits an individual who assists state government in drafting specifications for a procurement from submitting a bid or proposal for that procurement.

[7]In order to eliminate an incentive for the engineer to pad the program of requirements, §11B-52(b) would prohibit the engineer from doing the design work for the project, either as a prime contractor with the County or as a subcontractor for the County's design consultant.

§11B-52(b) to a "party to a contract with the County." It is, of course, axiomatic that a subcontractor on a County contract is not a party to the contract with the County.

Although a subcontractor providing a recommendation or analysis to the prime contractor may be motivated by self-interest to obtain some future economic benefit, the fact remains that the County will normally look exclusively to the prime contractor for accountability for the work product provided to the County.[8] Thus, there is certainly a reasonable expectation that a prime contractor will police its subcontractors to ensure the receipt of recommendations untainted by self-interest. Accordingly, a literal interpretation of §11B-52(b) will advance the purpose of the statute—*i.e.* prohibiting corrupt practices of contractors.

The context under which §11B-52(b) was enacted does not compel an interpretation that would expand the applicability of §11B-52(b) subcontractors. Certainly the County Council could have concluded that the restrictions imposed by §11B-52(b) should be extended to subcontractors, but the fact remains that it chose to use language that did not. There is nothing in the legislative record to indicate that it even considered doing so.

Arguably the Council would want to consider if the complexity of the procurement process itself would be significantly increased if §11B-52(b) were made applicable to subcontractors. Furthermore, the economic implications of extending the prohibition of §11B-52(b) to subcontractors is unclear. For example, the ramifications to the County of restricting the ability of a subcontractor who provides a recommendation that is part of a much larger analytical undertaking by a prime contractor from competing for subsequent work on the project remain unexplored. There is reason to believe that a prime contractor may experience difficulty in obtaining necessary, specialized subcontractor assistance in an early phase of a project if the subcontractor would then be foreclosed from the opportunity to compete for subsequent work on the project.

Finally, it is important to remember that §11B-52(b) was enacted in the context of pulling away from extremely broad regulatory language that, when applied literally, led to presumably unintended and certainly draconian results. In this regard, it is significant that the Council's use of language limiting the applicability of §11B-52(b) to parties to a contract with the

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[8]A subcontractor may be liable under certain circumstances to the County. For example, an architect will be liable for the cost of correcting an unreasonably dangerous condition discovered before it causes personal injury. *Council of Co-owners v. Whiting Turner,* 308 Md. 18 (1986). Eight years later, the Court of Appeals extended tort liability protection to a party whose property has been injuries even if the party is not in privity of contract with the provider of the goods or services causing the property damage. *A. J. Decoster Co. v. Westinghouse Electric Corp.* 333 Md. 245 (1994).

County is congruent with the language of Charter §410 which requires the Council to prohibit corrupt practices by a "party to a contract with the County."

For all of these reasons, I advise that §11B-52(b) should be applied to County contractors, not subcontractors.

Conclusion

Although the conclusion that §11B-52(b) does not prohibit a subcontractor from seeking a future economic benefit from the County as a prime contractor or as a subcontractor to a prime contractor, the Office of Procurement could impose on a County contractor through the solicitation and subsequent contract a requirement that the contractor extend the prohibition of §11B-52(b) to its subcontractors. For example, if the County contracts with a consultant to prepare an RFP, the Office of Procurement should consider prohibiting all sub-consultants, in addition to the prime consultant, from submitting a proposal in response to the RFP.

I trust you will find this memorandum responsive to your inquiry. If you have further concerns or questions regarding this matter, please do not hesitate to contact me.

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c: Charles W. Thompson, Jr., County Attorney
Beatrice P. Tignor, Director/Office of Procurement
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