

HOUSE BILL 1616

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CF SB 948

By: **Prince George's County Delegation and Montgomery County Delegation**

Introduced and read first time: February 9, 2018

Assigned to: Health and Government Operations

A BILL ENTITLED

1 AN ACT concerning

2 **Washington Suburban Sanitary Commission – Minority Business Enterprises –**
3 **Subcontracting**

4 **PG/MC 115-18**

5 FOR the purpose of altering certain requirements for certain bids or proposals for certain
6 procurement contracts, and certain contracts for goods and services, to be awarded
7 by the Washington Suburban Sanitary Commission having an expected degree of
8 minority business enterprise participation; requiring the adoption of regulations
9 requiring that certain bids or proposals include certain information on subcontract
10 opportunities in certain subcontracts and the number of minority business
11 enterprises that have certified certain matters under certain contracts and
12 subcontracts; authorizing a prime contractor to include certain subcontractors in a
13 certain calculation of a certain participation level; requiring certain regulations to
14 require certain periodic reports on the number of minority business enterprises
15 employed by certain contractors and subcontractors; requiring certain notification of
16 the termination of certain contracts or subcontracts; requiring certain regulations to
17 provide for an increase in minority business enterprise participation in certain
18 contracting and subcontracting in all tiers; extending certain required reporting to
19 include certain subcontracts; authorizing the Commission to require submission of a
20 certain report that includes certain payments made to or withheld from certain
21 minority business enterprise subcontractors; requiring the Commission to notify a
22 certain contractor of certain noncompliance and state certain corrective action;
23 authorizing the Commission to take certain corrective actions under certain
24 circumstances; and generally relating to the Washington Suburban Sanitary
25 Commission and minority business enterprise contracting.

26 BY repealing and reenacting, without amendments,
27 Article – Public Utilities
28 Section 20–201
29 Annotated Code of Maryland

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



(2010 Replacement Volume and 2017 Supplement)

BY repealing and reenacting, with amendments,
Article – Public Utilities
Section 20–203, 20–204, and 20–206
Annotated Code of Maryland
(2010 Replacement Volume and 2017 Supplement)

BY repealing and reenacting, without amendments,
Article – State Finance and Procurement
Section 14–301(a), (f), and (k)
Annotated Code of Maryland
(2015 Replacement Volume and 2017 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
That the Laws of Maryland read as follows:

Article – Public Utilities

20–201.

(a) In this subtitle the following words have the meanings indicated.

(b) Except as provided in § 20–203 of this subtitle, “minority business enterprise” means a legal entity that is:

(1) organized to engage in commercial transactions; and

(2) at least 51% owned and controlled by one or more individuals who are members of a group that is:

(i) disadvantaged socially or economically by the effects of past discrimination, including discrimination as to certification; and

(ii) identified by a study conducted in accordance with this subtitle or a similar, previously conducted study.

(c) “Office” means the Office of Supplier Diversity and Inclusion established under § 20–202 of this subtitle.

20–203.

(a) In this section, “minority business enterprise” has the meaning stated in § 14–301 of the State Finance and Procurement Article.

(b) (1) By resolution and adopting regulations, the Commission shall establish a mandatory minority business enterprise utilization program to facilitate the participation

1 of responsible certified minority business enterprises in contracts awarded by the
2 Commission in accordance with its competitive bidding or proposal procedures under
3 Subtitle 1 of this title.

4 (2) The Office shall administer the program established under this
5 subsection.

6 (c) Regulations that establish the program under subsection (b) of this section
7 shall include provisions that:

8 (1) recognize the certification of minority business enterprises by the State
9 certification agency designated under § 14–303(b) of the State Finance and Procurement
10 Article;

11 (2) recognize any other certification program that the Commission
12 determines substantially duplicates the requirements of the State certification agency;

13 (3) provide for the graduation of a minority business enterprise from the
14 program if the Commission determines that the minority business enterprise no longer
15 requires the assistance or benefits offered by the program;

16 (4) at the time of submission, require a bid or proposal based on a
17 solicitation with an expected degree of minority business enterprise participation, **IN BOTH**
18 **FIRST-TIER AND LOWER-TIER SUBCONTRACTS**, to include proof of a certified minority
19 business enterprise commitment by stating:

20 (i) the potential subcontract opportunities available in the prime
21 procurement contract, **PROCUREMENT SUBCONTRACTS, AND ANY LOWER-TIER**
22 **SUBCONTRACTS**; and

23 (ii) the number of minority business enterprises that have certified,
24 under the penalties for perjury, that the minority business enterprise has entered into an
25 agreement with the bidder or offeror to provide goods or services under specific terms
26 outlined in the certification, **UNDER THE PRIME PROCUREMENT CONTRACT AND ANY**
27 **PROCUREMENT AND OTHER SUBCONTRACTS**;

28 (5) **AUTHORIZE A PRIME CONTRACTOR, AND ANY HIGHER-TIER**
29 **SUBCONTRACTOR, TO INCLUDE LOWER-TIER SUBCONTRACTORS IN THE**
30 **CALCULATION OF THE EXPECTED DEGREE OF PARTICIPATION UNDER ITEM (4) OF**
31 **THIS SUBSECTION**;

32 (6) require each general contractor to submit to the Commission monthly
33 reports of the number of minority business enterprises employed by the general contractor
34 **AND EACH SUBCONTRACTOR, INCLUDING LOWER-TIER SUBCONTRACTORS**;

35 [(6)] (7) require each general contractor to provide prompt notification to

the Commission if a contract **OR SUBCONTRACT** with a minority business enterprise is terminated;

[(7)] (8) require each general contractor to:

(i) maintain a participation level from minority business enterprises that is consistent with the participation level referenced under item (4)(ii) of this subsection; or

(ii) provide justification for the inability of the general contractor to maintain the participation level;

[(8)] (9) provide for an increase in minority business enterprise participation as general contractors and subcontractors **IN ALL TIERS**; and

[(9)] (10) authorize the waiver of all or part of the program for a specific contract if the Commission determines that applying the program to the contract would conflict with the overall objectives and responsibilities of the Commission.

(d) Before accepting an alternative certification program under subsection (c)(2) of this section, the Commission shall examine the alternative program to ensure that the alternative program complies with the guidelines established under § 20–205 of this subtitle.

20–204.

(a) (1) By resolution and adopting regulations, the Commission shall establish a minority business enterprise utilization program to facilitate the participation of responsible certified minority business enterprises in contracts awarded by the Commission for goods and services that are not covered under § 20–203 of this subtitle, if the Commission determines that:

(i) minority business enterprises are underrepresented in the award of these contracts due to the effects of past discrimination; and

(ii) a program is necessary to remedy the effects of this past discrimination.

(2) The Office shall administer the program established under this subsection.

(b) Regulations that establish the program under subsection (a) of this section shall include provisions that:

(1) recognize the certification of minority business enterprises by the State certification agency designated under § 14–303(b) of the State Finance and Procurement Article;

(2) recognize any other certification program that the Commission determines substantially duplicates the requirements of the State certification agency;

(3) provide for the graduation of a minority business enterprise from the program if the Commission determines that the minority business enterprise no longer requires the assistance or benefits offered by the program;

(4) at the time of submission, require a bid or proposal based on a solicitation with an expected degree of minority business enterprise participation, **IN BOTH FIRST-TIER AND LOWER-TIER SUBCONTRACTS**, to include proof of a certified minority business enterprise commitment by stating:

(i) the potential subcontract opportunities available in the prime procurement contract, **PROCUREMENT SUBCONTRACTS, AND ANY LOWER-TIER SUBCONTRACTS**; and

(ii) the number of minority business enterprises that have certified, under the penalties for perjury, that the minority business enterprise has entered into an agreement with the bidder or offeror to provide goods or services under specific terms outlined in the certification, **UNDER THE PRIME PROCUREMENT CONTRACT AND ANY PROCUREMENT AND OTHER SUBCONTRACTS**;

(5) **AUTHORIZE A PRIME CONTRACTOR, AND ANY HIGHER-TIER SUBCONTRACTOR, TO INCLUDE LOWER-TIER SUBCONTRACTORS IN THE CALCULATION OF THE EXPECTED DEGREE OF PARTICIPATION UNDER ITEM (4) OF THIS SUBSECTION**;

(6) require each general contractor to submit to the Commission monthly reports of the number of minority business enterprises employed by the general contractor **AND EACH SUBCONTRACTOR, INCLUDING LOWER-TIER SUBCONTRACTORS**;

[(6)] (7) require each general contractor to provide prompt notification to the Commission if a contract **OR SUBCONTRACT** with a minority business enterprise is terminated;

[(7)] (8) require each general contractor to:

(i) maintain a participation level from minority business enterprises that is consistent with the participation level referenced under item (4)(ii) of this subsection; or

(ii) provide justification for the inability of the general contractor to maintain the participation level;

[(8)] (9) provide for minority business enterprise participation through

1 subcontracting **IN ALL TIERS**;

2 **[(9)] (10)** (i) authorize the waiver of all or part of the program for a
3 specific contract if the Commission determines that applying the program to the contract
4 would conflict with the overall objectives and responsibilities of the Commission; and

5 (ii) require the Commission to report annually to the Montgomery
6 County and Prince George's County Senate and House Delegations to the Maryland
7 General Assembly on any waivers granted under this subsection;

8 **[(10)] (11)** except as provided in item **[(11)] (12)** of this subsection, provide
9 for a system of granting a preference of up to the lesser of 5% or \$50,000 to minority
10 business enterprises in evaluating bids or proposals;

11 **[(11)] (12)** subject to subsection (d) of this section, establish a sheltered
12 market program in which bidding on procurement contracts designated by the Commission
13 as appropriate is restricted to certified minority business enterprises;

14 **[(12)] (13)** require the solicitation document accompanying each solicitation
15 to set forth the regulations that establish the program;

16 **[(13)] (14)** require the geographic location and the principal place of
17 business of the minority business enterprise to be a consideration for participation in the
18 program, including requiring Montgomery County businesses and Prince George's County
19 businesses to each have a targeted percentage of at least 40% of any contracts; and

20 **[(14)] (15)** authorize the Commission to:

21 (i) refuse to recognize the certification of a business found to be in
22 violation of the purposes of the program; and

23 (ii) permanently bar an active principal of a violating business from
24 future participation in the program.

25 (c) Before accepting an alternative certification program under subsection (b)(2)
26 of this section, the Commission shall examine the alternative program to ensure that:

27 (1) the alternative program complies with the guidelines established under
28 § 20–205 of this subtitle; and

29 (2) the principal owner of an eligible minority business enterprise is in not
30 more than one certified business that is participating in the Commission minority business
31 enterprise utilization program under this section.

32 (d) (1) The sheltered market program established in subsection **[(b)(11)]**
33 **(B)(12)** of this section may not be used until all less restrictive remedies under subsection

(b) of this section and race-neutral remedies, including assistance with bonding requirements, financing, or bidding procedures for small firms, have been used and determined to be ineffective.

(2) If at least three certified minority business enterprises bid on a contract under the sheltered market program, the Commission shall award the contract to the lowest bidder.

(3) If fewer than three certified minority business enterprises bid on a contract under the sheltered market program, the contract shall be awarded under subsection [(b)(10)] **(B)(11)** of this section.

20–206.

(a) The Office shall verify that a certified minority business enterprise listed in a schedule of participation is actually performing work and receiving compensation as established in the schedule.

(b) To facilitate the Office completing its duties under subsection (a) of this section, a contractor shall:

(1) allow the Office to inspect any relevant matter, including records and the job site;

(2) allow the Office to interview subcontractors and employees of the contractor;

(3) if performing a construction contract, ensure that subcontractors:

(i) are paid any undisputed amount to which the subcontractor is entitled as provided under § 15–226 of the State Finance and Procurement Article; and

(ii) comply with Commission regulations;

(4) include in the agreement with the certified minority business enterprise subcontractor a requirement that the subcontractor submit a monthly report to the Commission that:

(i) identifies the prime contract **AND ANY RELEVANT SUBCONTRACTS**; and

(ii) lists payments received from the contractor **OR HIGHER-TIER SUBCONTRACTOR** in the previous month and invoices sent to the contractor **OR HIGHER-TIER SUBCONTRACTOR** that have not been paid; and

(5) submit a monthly report to the Commission that lists:

(i) unpaid invoices that are more than 30 days old received from certified minority business enterprise subcontractors; and

(ii) the reason payments have not been made.

(c) (1) (i) On completion of a contract or before final payment or release of retainage, the Commission may require a general contractor on a contract having a minority business enterprise subcontracting goal to submit to the Commission a final report of all payments made to or withheld from minority business enterprise subcontractors, **EITHER DIRECTLY OR THROUGH A HIGHER-TIER SUBCONTRACTOR**.

(ii) The final report shall be in affidavit form and under the penalties for perjury.

(2) Each solicitation shall contain notice of the requirements of this subsection.

(d) (1) On a finding that a contractor is noncompliant, **DIRECTLY OR THROUGH A HIGHER-TIER SUBCONTRACTOR**, the Commission shall notify the contractor in writing of the findings and state the required corrective action.

(2) A noncompliant contractor shall:

(i) initiate the corrective action within 10 days after receiving the written notice; and

(ii) complete the corrective action within the time specified by the Commission.

(e) If the Commission finds that a general contractor is in material noncompliance with minority business enterprise contract provisions, **DIRECTLY OR THROUGH THE NONCOMPLIANCE OF A HIGHER-TIER SUBCONTRACTOR**, and the general contractor fails to take the corrective action required by the Commission, the Commission may:

(1) terminate the contract;

(2) refer the general contractor to the general manager of the Commission or the full Commission for appropriate action; or

(3) initiate any other specific remedy identified in the contract.

Article – State Finance and Procurement

14–301.

(a) In this subtitle the following words have the meanings indicated.

(f) “Minority business enterprise” means any legal entity, except a joint venture, that is:

(1) organized to engage in commercial transactions;

(2) at least 51% owned and controlled by 1 or more individuals who are socially and economically disadvantaged; and

(3) managed by, and the daily business operations of which are controlled by, one or more of the socially and economically disadvantaged individuals who own it.

(k) (1) Subject to paragraphs (2) and (3) of this subsection, and in accordance with the State’s most recent disparity study, “socially and economically disadvantaged individual” means a citizen or lawfully admitted permanent resident of the United States who is:

(i) in any of the following minority groups:

1. African American – an individual having origins in any of the black racial groups of Africa;

2. American Indian/Native American – an individual having origins in any of the original peoples of North America and who is a documented member of a North American tribe, band, or otherwise has a special relationship with the United States or a state through treaty, agreement, or some other form of recognition. This includes an individual who claims to be an American Indian/Native American and who is regarded as such by the American Indian/Native American community of which the individual claims to be a part, but does not include an individual of Eskimo or Aleutian origin;

3. Asian – an individual having origins in the Far East, Southeast Asia, or the Indian subcontinent, and who is regarded as such by the community of which the person claims to be a part;

4. Hispanic – an individual of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race, and who is regarded as such by the community of which the person claims to be a part;

5. physically or mentally disabled – notwithstanding the State’s most recent disparity study, an individual who has an impairment that substantially limits one or more major life activities, who is regarded generally by the community as having such a disability, and whose disability has substantially limited his or her ability to engage in competitive business; or

6. women – a woman, regardless of race or ethnicity; or

1 (ii) otherwise found by the certification agency to be a socially and
2 economically disadvantaged individual.

3 (2) There is a rebuttable presumption that an individual who is a member
4 of a minority group under paragraph (1)(i) of this subsection is socially and economically
5 disadvantaged.

6 (3) An individual whose personal net worth exceeds \$1,500,000, as
7 adjusted annually for inflation according to the Consumer Price Index, may not be found to
8 be economically disadvantaged.

9 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July
10 1, 2018.