
By: Montgomery County and Prince George's County Delegations

Introduced and read first time: January 31, 1997

Assigned to: Commerce and Government Matters

A BILL ENTITLED

1 AN ACT concerning

2 **Washington Suburban Sanitary Commission - Construction Contracts - Minority**
3 **Business Enterprise Set-Aside Program**
4 **MC/PG 36-97**

5 FOR the purpose of requiring the Washington Suburban Sanitary Commission (WSSC) to
6 establish a sheltered market program under the WSSC minority business enterprise
7 program applicable to construction; restricting the use of the sheltered market
8 program; requiring that certain contracts be awarded in accordance with specified
9 procedures, dependent upon the number of bids or proposals received from
10 certified minority business contractors; requiring a certain report; extending the
11 WSSC minority business enterprise program applicable to construction through a
12 specified date; and generally relating to the WSSC minority business enterprise
13 program for construction contracts.

14 BY repealing and reenacting, with amendments,
15 Article 29 - Washington Suburban Sanitary District
16 Section 3-102(f)
17 Annotated Code of Maryland
18 (1993 Replacement Volume and 1996 Supplement)

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

21 **Article 29 - Washington Suburban Sanitary District**

22 3-102.

23 (f) (1) In this subsection "minority business enterprise" has the meaning stated
24 in § 14-301 of the State Finance and Procurement Article.

25 (2) By resolution and by implementing rules and regulations, the WSSC
26 shall establish a mandatory minority business utilization program to facilitate the
27 participation of responsible certified minority business enterprises in contracts awarded
28 by the WSSC in accordance with competitive bidding or proposal procedures.

29 (3) The rules and regulations that establish the program under paragraph
30 (2) of this subsection shall include, but not be limited to, provisions that:

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1 (i) Recognize the certification of minority business enterprises by the
2 State certification agency designated under § 14-303(b) of the State Finance and
3 Procurement Article;

4 (ii) Recognize any other certification program that in the judgment of
5 the WSSC substantially duplicates the requirements of the State certification agency;

6 (iii) Provide for minority business participation through subcontracting;

7 (iv) Permit the waiver of all or part of the provisions of the program for
8 a specific contract if the WSSC determines that the application of the program to the
9 contract conflicts with the WSSC's overall objectives and responsibilities; [and]

10 (v) ESTABLISH, IN ACCORDANCE WITH PARAGRAPH (4) OF THIS
11 SECTION, A SHELTERED MARKET PROGRAM IN WHICH BIDDING OR PROPOSALS ON
12 CONTRACTS DESIGNATED BY THE WSSC IS RESTRICTED TO CERTIFIED MINORITY
13 BUSINESS ENTERPRISES; AND

14 (VI) Provide for the graduation of a minority business enterprise from
15 the program if the WSSC determines that the minority business enterprise no longer
16 requires the assistance or benefits offered by the program.

17 (4) (I) A SHELTERED MARKET PROGRAM ESTABLISHED UNDER
18 PARAGRAPH (3)(V) OF THIS SUBSECTION MAY NOT BE USED UNTIL ALL LESS
19 RESTRICTIVE REMEDIES UNDER THIS SUBSECTION AND RACE-NEUTRAL REMEDIES
20 SUCH AS ASSISTANCE WITH BONDING REQUIREMENTS, FINANCING, OR BIDDING OR
21 PROPOSAL PROCEDURES FOR SMALL FIRMS HAVE BEEN USED AND FOUND TO BE
22 INEFFECTIVE.

23 (II) UPON THE BID OR PROPOSAL OF AT LEAST THREE CERTIFIED
24 MINORITY BUSINESS CONTRACTORS, THE CONTRACT SHALL BE AWARDED UNDER
25 THIS PARAGRAPH TO THE CERTIFIED MINORITY BUSINESS CONTRACTOR THAT
26 SUBMITS THE LOWEST RESPONSIBLE BID OR THE RESPONSIBLE PROPOSAL THAT IS
27 MOST ADVANTAGEOUS TO THE WSSC.

28 (III) IF FEWER THAN THREE CERTIFIED MINORITY BUSINESS
29 CONTRACTORS SUBMIT A BID OR PROPOSAL ON A CONTRACT DESIGNED BY THE
30 WSSC FOR AWARDED UNDER THE SHELTERED MARKET PROGRAM, THE CONTRACT
31 SHALL BE AWARDED AS OTHERWISE PROVIDED UNDER THIS SECTION.

32 (5) Before accepting a certification program under paragraph (3)(ii) of this
33 subsection, the WSSC shall examine the program to ensure that it adheres to the
34 following guidelines:

35 (i) Bona fide minority group membership shall be established on the
36 basis of the individual's claim that the individual is a member of a minority group and is
37 so regarded by that particular minority community. However, the certifying agency is not
38 required to accept this claim if it determines that the claim is invalid.

39 (ii) An eligible minority business enterprise shall be an independent
40 business. The ownership and control by minorities shall be real, substantial, and
41 continuing and shall go beyond the pro forma ownership of the business as reflected in its

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1 ownership documents. The minority owners shall enjoy the customary incidents of
2 ownership and shall share in the risks and profits commensurate with their ownership
3 interests as demonstrated by an examination of the substance rather than form of
4 arrangements. Recognition of the business as a separate entity for tax or corporate
5 purposes is not necessarily sufficient for recognition as a minority business enterprise. In
6 determining whether a potential minority business enterprise is an independent business,
7 the certifying agency shall consider all relevant factors, including the date the business
8 was established, the adequacy of its resources for the work of the contract, and the degree
9 to which financial, equipment leasing, and other relationships with nonminority
10 businesses vary from industry practice.

11 (iii) The minority owners shall also possess the power to direct or cause
12 the direction of the management and policies of the business and to make the day-to-day
13 as well as major decisions on matters of management, policy, and operations. The
14 business may not be subject to any formal or informal restrictions, through bylaw
15 provisions, partnership agreements, or charter requirements for cumulative voting rights
16 or otherwise that prevent the minority owners, without the cooperation or vote of any
17 owner who is not a minority, from making a business decision of the business.

18 (iv) If the owners of the business who are not minorities are
19 disproportionately responsible for the operation of the firm, the firm is not controlled by
20 minorities and may not be considered a minority business enterprise within the meaning
21 of this section. Where the actual management of the business is contracted out to
22 individuals other than the owner, those persons who have the ultimate power to hire and
23 fire the managers may, for the purposes of this section, be considered as controlling the
24 business.

25 (v) All securities which constitute ownership or control of a
26 corporation for purposes of establishing it as a minority business enterprise under this
27 section shall be held directly by minorities. No securities held in trust, or by any guardian
28 for a minor, shall be considered as held by minorities in determining the ownership or
29 control of a corporation.

30 (vi) The contributions of capital or expertise by the minority owners to
31 acquire their interests in the business shall be real and substantial. Insufficient
32 contributions include a promise to contribute capital, a note payable to the business or its
33 owners who are not socially and economically disadvantaged, or the mere participation as
34 an employee, rather than as a manager.

35 (vii) The certifying agency shall give special consideration to the
36 following additional circumstances in determining eligibility:

37 1. Newly formed businesses and businesses whose ownership or
38 control has changed since the date of the advertisement of the contract are closely
39 scrutinized to determine the reasons for the timing of the formation of or change in the
40 businesses;

41 2. A previous or continuing employer-employee relationship
42 between or among present owners is carefully reviewed to ensure that the
43 employee-owner has management responsibilities and capabilities discussed in this
44 section; and

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1 3. Any relationship between a minority business enterprise and
2 a business which is not a minority business enterprise which has an interest in the
3 minority business enterprise is carefully reviewed to determine if the interest of the
4 nonminority business conflicts with the ownership and control requirements of this
5 section.

6 [(5)] (6) (i) The WSSC may conduct any impartial fact-finding study in
7 connection with a minority business enterprise program for consistency with applicable
8 law.

9 (ii) The WSSC shall report the findings of any review completed under
10 this paragraph to the Montgomery County and Prince George's County Delegations to
11 the General Assembly.

12 [(6)] (7) By September 15, [1996] 2000, the WSSC shall issue [an interim]
13 A report concerning the [progress] IMPLEMENTATION AND ADMINISTRATION of the
14 minority business enterprise program THROUGH JUNE 30, 2000, INCLUDING THE USE OF
15 THE SHELTERED MARKET PROGRAM, AND SHALL INCLUDE APPROPRIATE
16 RECOMMENDATIONS CONCERNING THE PROGRAM, to the Montgomery County and
17 Prince George's County Senate and House Delegations.

18 [(7)] (8) The provisions of this subsection shall be null and void and may
19 not be enforced after July 1, [1997] 2001.

20 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
21 July 1, 1997.