
By: Montgomery County and Prince George's County Delegations

Introduced and read first time: January 31, 1997

Assigned to: Commerce and Government Matters

Committee Report: Favorable with amendments

House action: Adopted

Read second time: March 31, 1997

CHAPTER ____

1 AN ACT concerning

2 **Washington Suburban Sanitary Commission - Minority Business Enterprise Programs**
3 **MC/PG 17-97**

4 FOR the purpose of extending the duration of the minority business enterprise programs
5 of the Washington Suburban Sanitary Commission (WSSC) for a specified period;
6 requiring the WSSC to make certain reports and recommendations to the
7 Montgomery County and Prince George's County Senate and House Delegations to
8 the General Assembly by a specified date; making provisions of this Act severable;
9 and generally relating to the WSSC minority business enterprise programs.

10 BY repealing and reenacting, with amendments,
11 Article 29 - Washington Suburban Sanitary District
12 Section 3-102(f) and 3-109
13 Annotated Code of Maryland
14 (1993 Replacement Volume and 1996 Supplement)

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

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

18 3-102.

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

21 (2) By resolution and by implementing rules and regulations, the WSSC
22 shall establish a mandatory minority business utilization program to facilitate the

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1 participation of responsible certified minority business enterprises in contracts awarded
2 by the WSSC in accordance with competitive bidding or proposal procedures.

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

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

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

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

11 (iv) Permit the waiver of all or part of the provisions of the program for
12 a specific contract if the WSSC determines that the application of the program to the
13 contract conflicts with the WSSC's overall objectives and responsibilities; and

14 (v) 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) Before accepting a certification program under paragraph (3)(ii) of this
18 subsection, the WSSC shall examine the program to ensure that it adheres to the
19 following guidelines:

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

24 (ii) An eligible minority business enterprise shall be an independent
25 business. The ownership and control by minorities shall be real, substantial, and
26 continuing and shall go beyond the pro forma ownership of the business as reflected in its
27 ownership documents. The minority owners shall enjoy the customary incidents of
28 ownership and shall share in the risks and profits commensurate with their ownership
29 interests as demonstrated by an examination of the substance rather than form of
30 arrangements. Recognition of the business as a separate entity for tax or corporate
31 purposes is not necessarily sufficient for recognition as a minority business enterprise. In
32 determining whether a potential minority business enterprise is an independent business,
33 the certifying agency shall consider all relevant factors, including the date the business
34 was established, the adequacy of its resources for the work of the contract, and the degree
35 to which financial, equipment leasing, and other relationships with nonminority
36 businesses vary from industry practice.

37 (iii) The minority owners shall also possess the power to direct or cause
38 the direction of the management and policies of the business and to make the day-to-day
39 as well as major decisions on matters of management, policy, and operations. The
40 business may not be subject to any formal or informal restrictions, through bylaw
41 provisions, partnership agreements, or charter requirements for cumulative voting rights

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1 or otherwise that prevent the minority owners, without the cooperation or vote of any
2 owner who is not a minority, from making a business decision of the business.

3 (iv) If the owners of the business who are not minorities are
4 disproportionately responsible for the operation of the firm, the firm is not controlled by
5 minorities and may not be considered a minority business enterprise within the meaning
6 of this section. Where the actual management of the business is contracted out to
7 individuals other than the owner, those persons who have the ultimate power to hire and
8 fire the managers may, for the purposes of this section, be considered as controlling the
9 business.

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

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

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

22 1. Newly formed businesses and businesses whose ownership or
23 control has changed since the date of the advertisement of the contract are closely
24 scrutinized to determine the reasons for the timing of the formation of or change in the
25 businesses;

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

30 3. Any relationship between a minority business enterprise and
31 a business which is not a minority business enterprise which has an interest in the
32 minority business enterprise is carefully reviewed to determine if the interest of the
33 nonminority business conflicts with the ownership and control requirements of this
34 section.

35 (5) (i) The WSSC may conduct any impartial fact-finding study in
36 connection with a minority business enterprise program for consistency with applicable
37 law.

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

41 (6) By September 15, [1996] ~~2000~~ 1998, the WSSC shall issue [an interim]
42 A report concerning the [progress] IMPLEMENTATION AND ADMINISTRATION of the

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1 minority business enterprise program THROUGH JUNE 30, ~~2000~~ 1998, AND APPROPRIATE
2 RECOMMENDATIONS CONCERNING THE PROGRAM, to the Montgomery County and
3 Prince George's County Senate and House Delegations TO THE MARYLAND GENERAL
4 ASSEMBLY.

5 (7) The provisions of this subsection shall be null and void and may not be
6 enforced after July 1, [1997] ~~2004~~ 1999.

7 3-109.

8 (a) In this section, "minority business enterprise" means any legal entity that is
9 organized to engage in commercial transactions and at least 51 percent owned and
10 controlled by 1 or more individuals who are members of a group that is:

11 (1) Disadvantaged socially or economically by the effects of past
12 discrimination, including discrimination as to certification; and

13 (2) Identified by a study conducted in accordance with this section or a
14 similar study previously conducted.

15 (b) By resolution and implementing rules and regulations, the WSSC shall
16 establish a minority business utilization program to facilitate the participation of
17 responsible certified minority business enterprises in contracts awarded by the WSSC for
18 goods and services not covered by § 3-102 of this article if:

19 (1) The WSSC determines that minority business enterprises are
20 underrepresented in the award of these contracts due to the effects of past
21 discrimination; and

22 (2) The WSSC determines that such a program is necessary to remedy the
23 effects of past discrimination against minority business enterprises in contracting with the
24 WSSC.

25 (c) The rules and regulations that establish the program under subsection (b) of
26 this section shall include provisions that:

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

30 (2) Recognize any other certification program that in the judgment of the
31 WSSC substantially duplicates the requirements of the State certification agency;

32 (3) Provide for minority business participation through subcontracting;

33 (4) Except as provided in paragraph (5) of this subsection, provide for a
34 system of granting a preference of up to the lesser of 5% or \$50,000 to minority business
35 enterprises in evaluating bids and proposals;

36 (5) (i) Subject to the provisions of subparagraphs (ii), (iii), and (iv) of this
37 paragraph, establish a sheltered market program in which bidding on procurement
38 contracts designated by the WSSC as appropriate is restricted to certified minority
39 business enterprises;

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1 (ii) The sheltered market program under this paragraph may not be
2 utilized until all less restrictive remedies under this subsection and race-neutral remedies
3 such as assistance with bonding requirements, financing, or bidding procedures for small
4 firms have been used and found to be ineffective;

5 (iii) Upon the bid of at least 3 certified minority business contractors, a
6 contract shall be awarded under this paragraph to the lowest of those bidders; and

7 (iv) If fewer than 3 certified minority business enterprises bid on a
8 contract under this paragraph, the contract shall be awarded under the general provisions
9 of paragraph (4) of this subsection;

10 (6) Provide for the graduation of a minority business enterprise from the
11 program after 5 years; however, if a minority business enterprise was not awarded at least
12 3 contracts or a total of \$50,000 in awarded contracts from the WSSC during the 5-year
13 period, the business may apply for and receive one 2-year extension of participation in
14 the program;

15 (7) Require the solicitation document accompanying each solicitation to set
16 forth the rules and regulations of the minority business utilization program;

17 (8) Require the geographic location and the principal place of business of
18 the minority business enterprise to be a consideration for participation in this program.
19 Montgomery County businesses and Prince George's County businesses shall each have a
20 targeted percentage of at least 40% of any contracts;

21 (9) Provide for the WSSC to refuse to recognize the certification of any
22 business found to be in violation of the purposes of the program and to permanently bar
23 any active principals of a violating business from future participation in the program; and

24 (10) Permit the waiver of all or part of the provisions of the program for a
25 specific contract if the WSSC determines that the application of the program to the
26 contract conflicts with the WSSC's overall objectives and responsibilities, and provide for
27 the WSSC to report annually to the Montgomery County and Prince George's County
28 House and Senate Delegations on those waivers.

29 (d) Before accepting a certification program under subsection (c)(2) of this
30 section, the WSSC shall examine the program to ensure that:

31 (1) It adheres to the guidelines set forth in § 3-102(f)(4) of this article; and

32 (2) The principal owner of an eligible minority business enterprise is in not
33 more than 1 certified business that is participating in the WSSC minority business
34 enterprise program under this section.

35 (e) (1) The WSSC may conduct any fact-finding study in connection with a
36 minority business enterprise program for consistency with applicable law.

37 (2) The WSSC shall report the findings of any review completed under this
38 paragraph to the Montgomery County and Prince George's County Delegations to the
39 General Assembly.

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1 (f) By September 15, [1996] ~~2000~~ 1998, the WSSC shall issue [an interim] A
2 report concerning the [progress] IMPLEMENTATION AND ADMINISTRATION of the
3 Minority Business Enterprise Program THROUGH JUNE 30, ~~2000~~ 1998, AND
4 APPROPRIATE RECOMMENDATIONS CONCERNING THE PROGRAM, to the
5 Montgomery County and Prince George's County Senate and House Delegations TO THE
6 MARYLAND GENERAL ASSEMBLY.

7 (g) The provisions of this section shall be void and may not be enforced after July
8 1, [1997] ~~2001~~ 1999.

9 SECTION 2. AND BE IT FURTHER ENACTED, That if any provision of this Act
10 or the application thereof to any person or circumstance is held invalid for any reason in
11 a court of competent jurisdiction, the invalidity does not affect other provisions or any
12 other application of this Act which can be given effect without the invalid provision or
13 application, and for this purpose the provisions of this Act are declared severable.

14 SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect
15 July 1, 1997.