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

Introduced and read first time: February 12, 1998

Assigned to: Commerce and Government Matters

A BILL ENTITLED

1 AN ACT concerning

2 **Washington Suburban Sanitary Commission - Construction Contracts -**
3 **Minority Business Enterprise Set-Aside Program**
4 **PG/MC 7-98**

5 FOR the purpose of requiring the Washington Suburban Sanitary Commission
6 (WSSC) to establish a sheltered market program under the WSSC minority
7 business enterprise program applicable to construction; restricting the use of
8 the sheltered market program; requiring that certain contracts be awarded in
9 accordance with specified procedures, dependent upon the number of bids or
10 proposals received from certified minority business contractors; requiring a
11 certain report; extending the WSSC minority business enterprise program
12 applicable to construction through a specified date; and generally relating to the
13 WSSC minority business enterprise 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 (1997 Replacement Volume and 1997 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
24 stated 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
28 awarded by the WSSC in accordance with competitive bidding or proposal procedures.

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

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

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

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

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

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

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

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

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

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

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

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

5 (ii) An eligible minority business enterprise shall be an
6 independent business. The ownership and control by minorities shall be real,
7 substantial, and continuing and shall go beyond the pro forma ownership of the
8 business as reflected in its ownership documents. The minority owners shall enjoy the
9 customary incidents of ownership and shall share in the risks and profits
10 commensurate with their ownership interests as demonstrated by an examination of
11 the substance rather than form of arrangements. Recognition of the business as a
12 separate entity for tax or corporate purposes is not necessarily sufficient for
13 recognition as a minority business enterprise. In determining whether a potential
14 minority business enterprise is an independent business, the certifying agency shall
15 consider all relevant factors, including the date the business was established, the
16 adequacy of its resources for the work of the contract, and the degree to which
17 financial, equipment leasing, and other relationships with nonminority businesses
18 vary from industry practice.

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

27 (iv) If the owners of the business who are not minorities are
28 disproportionately responsible for the operation of the firm, the firm is not controlled
29 by minorities and may not be considered a minority business enterprise within the
30 meaning of this section. Where the actual management of the business is contracted
31 out to individuals other than the owner, those persons who have the ultimate power to
32 hire and fire the managers may, for the purposes of this section, be considered as
33 controlling the business.

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

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

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

3 1. Newly formed businesses and businesses whose ownership
4 or control has changed since the date of the advertisement of the contract are closely
5 scrutinized to determine the reasons for the timing of the formation of or change in
6 the businesses;

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

11 3. Any relationship between a minority business enterprise
12 and a business which is not a minority business enterprise which has an interest in
13 the minority business enterprise is carefully reviewed to determine if the interest of
14 the nonminority business conflicts with the ownership and control requirements of
15 this section.

16 [(5)] (6) (i) The WSSC may conduct any impartial fact-finding study
17 in connection with a minority business enterprise program for consistency with
18 applicable law.

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

22 [(6)] (7) By September 15, [1998] 2000, the WSSC shall issue a report
23 concerning the implementation and administration of the minority business
24 enterprise program through June 30, [1998] 2000, INCLUDING THE USE OF THE
25 SHELTERED MARKET PROGRAM, and SHALL INCLUDE appropriate recommendations
26 concerning the program, to the Montgomery County and Prince George's County
27 Senate and House Delegations to the Maryland General Assembly.

28 [(7)] (8) The provisions of this subsection shall be null and void and may
29 not be enforced after July 1, [1999] 2001.

30 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
31 July 1, 1998.