

HOUSE BILL 834

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HB 880/97 - CGM

1998 Regular Session
8lr0181

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

Introduced and read first time: February 12, 1998

Assigned to: Commerce and Government Matters

Committee Report: Favorable

House action: Adopted

Read second time: April 4, 1998

CHAPTER _____

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:

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

2 3-102.

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

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

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

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

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

17 (iii) Provide for minority business participation through
18 subcontracting;

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

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

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

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

35 (II) UPON THE BID OR PROPOSAL OF AT LEAST THREE CERTIFIED
36 MINORITY BUSINESS CONTRACTORS, THE CONTRACT SHALL BE AWARDED UNDER
37 THIS PARAGRAPH TO THE CERTIFIED MINORITY BUSINESS CONTRACTOR THAT

1 SUBMITS THE LOWEST RESPONSIBLE BID OR THE RESPONSIBLE PROPOSAL THAT IS
2 MOST ADVANTAGEOUS TO THE WSSC.

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

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

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

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

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

36 (iv) If the owners of the business who are not minorities are
37 disproportionately responsible for the operation of the firm, the firm is not controlled
38 by minorities and may not be considered a minority business enterprise within the
39 meaning of this section. Where the actual management of the business is contracted
40 out to individuals other than the owner, those persons who have the ultimate power to
41 hire and fire the managers may, for the purposes of this section, be considered as
42 controlling the business.

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

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

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

13 1. Newly formed businesses and businesses whose ownership
14 or control has changed since the date of the advertisement of the contract are closely
15 scrutinized to determine the reasons for the timing of the formation of or change in
16 the businesses;

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

21 3. Any relationship between a minority business enterprise
22 and a business which is not a minority business enterprise which has an interest in
23 the minority business enterprise is carefully reviewed to determine if the interest of
24 the nonminority business conflicts with the ownership and control requirements of
25 this section.

26 [(5)] (6) (i) The WSSC may conduct any impartial fact-finding study
27 in connection with a minority business enterprise program for consistency with
28 applicable law.

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

32 [(6)] (7) By September 15, [1998] 2000, the WSSC shall issue a report
33 concerning the implementation and administration of the minority business
34 enterprise program through June 30, [1998] 2000, INCLUDING THE USE OF THE
35 SHELTERED MARKET PROGRAM, and SHALL INCLUDE appropriate recommendations
36 concerning the program, to the Montgomery County and Prince George's County
37 Senate and House Delegations to the Maryland General Assembly.

38 [(7)] (8) The provisions of this subsection shall be null and void and may
39 not be enforced after July 1, [1999] 2001.

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