
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 - Nondiscrimination Policy**
3 **PG/MC 11-98**

4 FOR the purpose of requiring a nondiscrimination policy for contracts entered into by
5 the Washington Suburban Sanitary Commission (WSSC); prohibiting certain
6 discrimination against contractors by the WSSC; and generally relating to
7 WSSC nondiscrimination policies.

8 BY repealing and reenacting, with amendments,
9 Article 29 - Washington Suburban Sanitary District
10 Section 3-102(f)
11 Annotated Code of Maryland
12 (1997 Replacement Volume and 1997 Supplement)

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

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

16 3-102.

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

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

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

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

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

4 (iii) Provide for minority business participation through
5 subcontracting;

6 (iv) Permit the waiver of all or part of the provisions of the program
7 for a specific contract if the WSSC determines that the application of the program to
8 the contract conflicts with the WSSC's overall objectives and responsibilities AS LONG
9 AS THE WAIVER DOES NOT CONFLICT WITH THE PROVISIONS OF PARAGRAPH (4) OF
10 THIS SUBSECTION; and

11 (v) Provide for the graduation of a minority business enterprise
12 from the program if the WSSC determines that the minority business enterprise no
13 longer requires the assistance or benefits offered by the program.

14 (4) (I) EXCEPT AS PROVIDED UNDER § 14-303(B) OF THE STATE
15 FINANCE AND PROCUREMENT ARTICLE REGARDING MINORITY BUSINESS
16 ENTERPRISES, THE WSSC MAY NOT DISCRIMINATE AGAINST ANY CONTRACTOR ON
17 THE BASIS OF SEX, RACE, CREED, COLOR, AGE, MENTAL OR PHYSICAL HANDICAP,
18 SEXUAL ORIENTATION, OR NATIONAL ORIGIN.

19 (II) THE WSSC MAY NOT AWARD A CONTRACT TO ANY CONTRACTOR
20 UNLESS THE CONTRACT CONTAINS PROVISIONS OBLIGATING THE CONTRACTOR:

21 1. NOT TO DISCRIMINATE IN ANY MANNER AGAINST ANY
22 EMPLOYEE OR APPLICANT FOR EMPLOYMENT ON THE BASIS OF SEX, RACE, CREED,
23 COLOR, AGE, MENTAL OR PHYSICAL HANDICAP, SEXUAL ORIENTATION, OR NATIONAL
24 ORIGIN; AND

25 2. TO INCLUDE A SIMILAR NONDISCRIMINATION CLAUSE IN
26 ALL SUBCONTRACTS.

27 (III) IF THE NONDISCRIMINATION CLAUSE IS OMITTED FROM A
28 CONTRACT OR SUBCONTRACT SUBJECT TO THE PROVISIONS OF THIS SECTION:

29 1. WSSC SHALL DECLARE THE CONTRACT TO BE VOID; AND

30 2. THE CONTRACTOR IS ENTITLED TO THE REASONABLE
31 VALUE OF WORK THAT HAS BEEN PERFORMED AND MATERIALS THAT HAVE BEEN
32 PROVIDED.

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

36 (i) Bona fide minority group membership shall be established on
37 the basis of the individual's claim that the individual is a member of a minority group

1 and is so regarded by that particular minority community. However, the certifying
2 agency is not required to accept this claim if it determines that the claim is invalid.

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

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

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

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

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

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

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

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

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

14 [(5)] (6) (i) The WSSC may conduct any impartial fact-finding study
15 in connection with a minority business enterprise program for consistency with
16 applicable law.

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

20 [(6)] (7) By September 15, 1998, the WSSC shall issue a report
21 concerning the implementation and administration of the minority business
22 enterprise program through June 30, 1998, and appropriate recommendations
23 concerning the program, to the Montgomery County and Prince George's County
24 Senate and House Delegations to the Maryland General Assembly.

25 [(7)] (8) [The] EXCEPT FOR PARAGRAPH (4) OF THIS SUBSECTION, THE
26 provisions of this subsection shall be [null and] void and may not be enforced after
27 July 1, 1999.

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