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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 with amendments House action: Adopted Read second time: April 7, 1998 CHAPTER 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 the Washington Suburban Sanitary Commission (WSSC); prohibiting certain 5 discrimination against contractors by the WSSC; and generally relating to 6 WSSC nondiscrimination policies. 7 8 BY repealing and reenacting, with amendments, Article 29 - Washington Suburban Sanitary District 9 10 Section 3-102(f) 11 Annotated Code of Maryland (1997 Replacement Volume and 1997 Supplement) 12 13 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF 14 MARYLAND, That the Laws of Maryland read as follows: Article 29 - Washington Suburban Sanitary District 15 16 3-102. 17 In this subsection "minority business enterprise" has the meaning (f) (1) 18 stated in § 14-301 of the State Finance and Procurement Article. 19 By resolution and by implementing rules and regulations, the WSSC 20 shall establish a mandatory minority business utilization program to facilitate the

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	participation of responsible certified minority business enterprises in contracts awarded by the WSSC in accordance with competitive bidding or proposal procedures.
3	(3) The rules and regulations that establish the program under paragraph (2) of this subsection shall include, but not be limited to, provisions that:
	(i) Recognize the certification of minority business enterprises by the State certification agency designated under § 14-303(b) of the State Finance and Procurement Article;
	(ii) Recognize any other certification program that in the judgment of the WSSC substantially duplicates the requirements of the State certification agency;
11 12	(iii) Provide for minority business participation through subcontracting;
15 16	(iv) Permit the waiver of all or part of the provisions of the program for a specific contract if the WSSC determines that the application of the program to the contract conflicts with the WSSC's overall objectives and responsibilities AS LONG AS THE WAIVER DOES NOT CONFLICT WITH THE PROVISIONS OF PARAGRAPH (4) OF THIS SUBSECTION; and
	(v) Provide for the graduation of a minority business enterprise from the program if the WSSC determines that the minority business enterprise no longer requires the assistance or benefits offered by the program.
23 24	(4) (I) EXCEPT AS PROVIDED UNDER § 14-303(B) OF THE STATE FINANCE AND PROCUREMENT ARTICLE REGARDING MINORITY BUSINESS ENTERPRISES, THE WSSC MAY NOT DISCRIMINATE AGAINST ANY CONTRACTOR PERSON ON THE BASIS OF SEX, RACE, CREED, COLOR, AGE, MENTAL OR PHYSICAL HANDICAP, SEXUAL ORIENTATION, OR NATIONAL ORIGIN.
26 27	(II) THE WSSC MAY NOT AWARD A CONTRACT TO ANY CONTRACTOR UNLESS THE CONTRACT CONTAINS PROVISIONS OBLIGATING THE CONTRACTOR:
30	1. NOT TO DISCRIMINATE IN ANY MANNER AGAINST ANY EMPLOYEE OR APPLICANT FOR EMPLOYMENT ON THE BASIS OF SEX, RACE, CREED, COLOR, AGE, MENTAL OR PHYSICAL HANDICAP, SEXUAL ORIENTATION, OR NATIONAL ORIGIN; AND
32 33	2. TO INCLUDE A SIMILAR NONDISCRIMINATION CLAUSE IN ALL SUBCONTRACTS.
34 35	(III) IF THE NONDISCRIMINATION CLAUSE IS OMITTED FROM A CONTRACT OR SUBCONTRACT SUBJECT TO THE PROVISIONS OF THIS SECTION:
36 37	1. WSSC <u>SHALL MAY</u> DECLARE THE CONTRACT TO BE VOID; AND

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THE CONTRACTOR IS ENTITLED TO THE REASONABLE

	VALUE OF WORK THAT HAS BEEN PERFORMED AND MATERIALS THAT HAVE BEEN PROVIDED.
	(5) Before accepting a certification program under paragraph (3)(ii) of this subsection, the WSSC shall examine the program to ensure that it adheres to the following guidelines:
9	(i) Bona fide minority group membership shall be established on the basis of the individual's claim that the individual is a member of a minority group and is so regarded by that particular minority community. However, the certifying agency is not required to accept this claim if it determines that the claim is invalid.
13 14 15 16 17 18 19 20 21 22 23	(ii) An eligible minority business enterprise shall be an independent business. The ownership and control by minorities shall be real, substantial, and continuing and shall go beyond the pro forma ownership of the business as reflected in its ownership documents. The minority owners shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests as demonstrated by an examination of the substance rather than form of arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as a minority business enterprise. In determining whether a potential minority business enterprise is an independent business, the certifying agency shall consider all relevant factors, including the date the business was established, the adequacy of its resources for the work of the contract, and the degree to which financial, equipment leasing, and other relationships with nonminority businesses vary from industry practice.
27 28 29 30 31	(iii) The minority owners shall also possess the power to direct or cause the direction of the management and policies of the business and to make the day-to-day as well as major decisions on matters of management, policy, and operations. The business may not be subject to any formal or informal restrictions, through bylaw provisions, partnership agreements, or charter requirements for cumulative voting rights or otherwise that prevent the minority owners, without the cooperation or vote of any owner who is not a minority, from making a business decision of the business.
35 36 37 38	(iv) If the owners of the business who are not minorities are disproportionately responsible for the operation of the firm, the firm is not controlled by minorities and may not be considered a minority business enterprise within the meaning of this section. Where the actual management of the business is contracted out to individuals other than the owner, those persons who have the ultimate power to hire and fire the managers may, for the purposes of this section, be considered as controlling the business.
	(v) All securities which constitute ownership or control of a corporation for purposes of establishing it as a minority business enterprise under this section shall be held directly by minorities. No securities held in trust, or by any

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	guardian for a minor, shall be considered as held by minorities in determining the ownership or control of a corporation.
5 6	(vi) The contributions of capital or expertise by the minority owners to acquire their interests in the business shall be real and substantial. Insufficient contributions include a promise to contribute capital, a note payable to the business or its owners who are not socially and economically disadvantaged, or the mere participation as an employee, rather than as a manager.
8 9	(vii) The certifying agency shall give special consideration to the following additional circumstances in determining eligibility:
12	1. Newly formed businesses and businesses whose ownership or control has changed since the date of the advertisement of the contract are closely scrutinized to determine the reasons for the timing of the formation of or change in the businesses;
16	2. A previous or continuing employer-employee relationship between or among present owners is carefully reviewed to ensure that the employee-owner has management responsibilities and capabilities discussed in this section; and
20 21	3. Any relationship between a minority business enterprise and a business which is not a minority business enterprise which has an interest in the minority business enterprise is carefully reviewed to determine if the interest of the nonminority business conflicts with the ownership and control requirements of this section.
	[(5)] (6) (i) The WSSC may conduct any impartial fact-finding study in connection with a minority business enterprise program for consistency with applicable law.
	(ii) The WSSC shall report the findings of any review completed under this paragraph to the Montgomery County and Prince George's County Delegations to the General Assembly.
31 32	[(6)] (7) By September 15, 1998, the WSSC shall issue a report concerning the implementation and administration of the minority business enterprise program through June 30, 1998, and appropriate recommendations concerning the program, to the Montgomery County and Prince George's County Senate and House Delegations to the Maryland General Assembly.
	[(7)] (8) [The] EXCEPT FOR PARAGRAPH (4) OF THIS SUBSECTION, THE provisions of this subsection shall be [null and] void and may not be enforced after July 1, 1999.
37 38	SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 1998.