

HOUSE BILL 611

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1999 Regular Session
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By: **Montgomery County and Prince George's County Delegations**

Introduced and read first time: February 11, 1999

Assigned to: Commerce and Government Matters

Committee Report: Favorable with amendments

House action: Adopted

Read second time: March 28, 1999

CHAPTER_____

1 AN ACT concerning

2 **Washington Suburban Sanitary Commission - Minority Business Enterprise**
3 **Programs**
4 **MC/PG 3-99**

5 FOR the purpose of extending the duration of the minority business enterprise
6 programs of the Washington Suburban Sanitary Commission (WSSC) for a
7 specified period; altering a provision that must be included in the minority
8 business enterprise program; requiring the WSSC to make certain reports and
9 recommendations to the Montgomery County and Prince George's County
10 Senate and House legislative delegations to the General Assembly by a specified
11 date; making provisions of this Act severable; and generally relating to the
12 WSSC minority business enterprise programs.

13 BY repealing and reenacting, with amendments,
14 Article 29 - Washington Suburban Sanitary District
15 Section 3-102(f) and 3-109
16 Annotated Code of Maryland
17 (1997 Replacement Volume and 1998 Supplement)

18 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
19 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 AN INCREASE IN minority business participation
18 ~~through subcontracting~~ AS PRIME CONTRACTORS AND SUBCONTRACTORS;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; and22 (v) Provide for the graduation of a minority business enterprise
23 from the program if the WSSC determines that the minority business enterprise no
24 longer requires the assistance or benefits offered by the program.25 (4) Before accepting a certification program under paragraph (3)(ii) of
26 this subsection, the WSSC shall examine the program to ensure that it adheres to the
27 following guidelines:28 (i) Bona fide minority group membership shall be established on
29 the basis of the individual's claim that the individual is a member of a minority group
30 and is so regarded by that particular minority community. However, the certifying
31 agency is not required to accept this claim if it determines that the claim is invalid.32 (ii) An eligible minority business enterprise shall be an
33 independent business. The ownership and control by minorities shall be real,
34 substantial, and continuing and shall go beyond the pro forma ownership of the
35 business as reflected in its ownership documents. The minority owners shall enjoy the
36 customary incidents of ownership and shall share in the risks and profits
37 commensurate with their ownership interests as demonstrated by an examination of
38 the substance rather than form of arrangements. Recognition of the business as a

1 separate entity for tax or corporate purposes is not necessarily sufficient for
2 recognition as a minority business enterprise. In determining whether a potential
3 minority business enterprise is an independent business, the certifying agency shall
4 consider all relevant factors, including the date the business was established, the
5 adequacy of its resources for the work of the contract, and the degree to which
6 financial, equipment leasing, and other relationships with nonminority businesses
7 vary from industry practice.

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

16 (iv) If the owners of the business who are not minorities are
17 disproportionately responsible for the operation of the firm, the firm is not controlled
18 by minorities and may not be considered a minority business enterprise within the
19 meaning of this section. Where the actual management of the business is contracted
20 out to individuals other than the owner, those persons who have the ultimate power to
21 hire and fire the managers may, for the purposes of this section, be considered as
22 controlling the business.

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

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

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

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

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

1 3. Any relationship between a minority business enterprise
2 and a business which is not a minority business enterprise which has an interest in
3 the minority business enterprise is carefully reviewed to determine if the interest of
4 the nonminority business conflicts with the ownership and control requirements of
5 this section.

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

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

12 (6) By September 15, [1998] 2001, the WSSC shall issue a report
13 concerning the implementation and administration of the minority business
14 enterprise program through June 30, [1998] 2001, and appropriate recommendations
15 concerning the program, to the Montgomery County and Prince George's County
16 Senate and House Delegations to the Maryland General Assembly.

17 (7) The provisions of this subsection shall be null and void and may not
18 be enforced after July 1, [1999] 2002.

19 3-109.

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

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

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

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

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

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

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

- 1 (1) Recognize the certification of minority business enterprises by the
2 State certification agency designated under § 14-303(b) of the State Finance and
3 Procurement Article;
- 4 (2) Recognize any other certification program that in the judgment of the
5 WSSC substantially duplicates the requirements of the State certification agency;
- 6 (3) Provide for minority business participation through subcontracting;
- 7 (4) Except as provided in paragraph (5) of this subsection, provide for a
8 system of granting a preference of up to the lesser of 5% or \$50,000 to minority
9 business enterprises in evaluating bids and proposals;
- 10 (5) (i) Subject to the provisions of subparagraphs (ii), (iii), and (iv) of
11 this paragraph, establish a sheltered market program in which bidding on
12 procurement contracts designated by the WSSC as appropriate is restricted to
13 certified minority business enterprises;
- 14 (ii) The sheltered market program under this paragraph may not
15 be utilized until all less restrictive remedies under this subsection and race-neutral
16 remedies such as assistance with bonding requirements, financing, or bidding
17 procedures for small firms have been used and found to be ineffective;
- 18 (iii) Upon the bid of at least 3 certified minority business
19 contractors, a contract shall be awarded under this paragraph to the lowest of those
20 bidders; and
- 21 (iv) If fewer than 3 certified minority business enterprises bid on a
22 contract under this paragraph, the contract shall be awarded under the general
23 provisions of paragraph (4) of this subsection;
- 24 (6) Provide for the graduation of a minority business enterprise from the
25 program after 5 years; however, if a minority business enterprise was not awarded at
26 least 3 contracts or a total of \$50,000 in awarded contracts from the WSSC during the
27 5-year period, the business may apply for and receive one 2-year extension of
28 participation in the program;
- 29 (7) Require the solicitation document accompanying each solicitation to
30 set forth the rules and regulations of the minority business utilization program;
- 31 (8) Require the geographic location and the principal place of business of
32 the minority business enterprise to be a consideration for participation in this
33 program. Montgomery County businesses and Prince George's County businesses
34 shall each have a targeted percentage of at least 40% of any contracts;
- 35 (9) Provide for the WSSC to refuse to recognize the certification of any
36 business found to be in violation of the purposes of the program and to permanently
37 bar any active principals of a violating business from future participation in the
38 program; and

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

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

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

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

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

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

18 (f) By September 15; [1998] ~~2004~~ OF EACH YEAR, the WSSC shall issue a
19 report concerning the implementation and administration of the Minority Business
20 Enterprise Program through June 30; [1998] ~~2004~~ OF EACH YEAR, and appropriate
21 recommendations concerning the program, to the Montgomery County and Prince
22 George's County Senate and House Delegations to the Maryland General Assembly.

23 (g) The provisions of this section shall be void and may not be enforced after
24 July 1, [1999] 2002.

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

31 SECTION 3. AND BE IT FURTHER ENACTED, That, within 30 days after the
32 effective date of this Act, the Washington Suburban Sanitary Commission shall
33 establish a timetable for implementing recommendations 1 through 22 itemized in
34 the Executive Summary of the "Minority Business Enterprise Disparity Study for the
35 Washington Suburban Sanitary Commission", dated March 12, 1999, and submitted
36 by MGT of America, Inc. The Commission, by a vote of its members taken at a
37 regularly scheduled meeting, may decide not to implement a recommendation that it
38 finds to be inappropriate.

39 SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect
40 July 1, 1999.

