

ENROLLED BILL

-- *Environmental Matters/Education, Health, and Environmental Affairs* --

Introduced by **Montgomery County Delegation and Prince George's County Delegation**

Read and Examined by Proofreaders:

Proofreader.

Proofreader.

Sealed with the Great Seal and presented to the Governor, for his approval this
____ day of _____ at _____ o'clock, ____ M.

Speaker.

CHAPTER _____

1 AN ACT concerning

2 **Washington Suburban Sanitary Commission - Minority Business Enterprise**
3 **Programs - Sunset Extension**
4 **MC/PG 112-05**

5 FOR the purpose of altering the termination date of the minority business enterprise
6 programs of the Washington Suburban Sanitary Commission (WSSC); making
7 provisions of this Act severable; and generally relating to the WSSC minority
8 business enterprise programs.

9 BY repealing and reenacting, with amendments,
10 Article 29 - Washington Suburban Sanitary District
11 Section 3-102(f) and 3-109
12 Annotated Code of Maryland
13 (2003 Replacement Volume and 2004 Supplement)

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

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

4 3-102.

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

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

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

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

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

19 (iii) Provide for an increase in minority business participation as
20 prime contractors and subcontractors;

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

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

27 (4) Before accepting a certification program under paragraph (3)(ii) of
28 this subsection, the WSSC shall examine the program to ensure that it adheres to the
29 following guidelines:

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

34 (ii) An eligible minority business enterprise shall be an
35 independent business. The ownership and control by minorities shall be real,
36 substantial, and continuing and shall go beyond the pro forma ownership of the
37 business as reflected in its ownership documents. The minority owners shall enjoy the

1 customary incidents of ownership and shall share in the risks and profits
2 commensurate with their ownership interests as demonstrated by an examination of
3 the substance rather than form of arrangements. Recognition of the business as a
4 separate entity for tax or corporate purposes is not necessarily sufficient for
5 recognition as a minority business enterprise. In determining whether a potential
6 minority business enterprise is an independent business, the certifying agency shall
7 consider all relevant factors, including the date the business was established, the
8 adequacy of its resources for the work of the contract, and the degree to which
9 financial, equipment leasing, and other relationships with nonminority businesses
10 vary from industry practice.

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

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

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

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

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

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

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

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

6 (1) Recognize the certification of minority business enterprises by the
7 State certification agency designated under § 14-303(b) of the State Finance and
8 Procurement Article;

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

11 (3) Provide for minority business participation through subcontracting;

12 (4) Except as provided in paragraph (5) of this subsection, provide for a
13 system of granting a preference of up to the lesser of 5% or \$50,000 to minority
14 business enterprises in evaluating bids and proposals;

15 (5) (i) Subject to the provisions of subparagraphs (ii), (iii), and (iv) of
16 this paragraph, establish a sheltered market program in which bidding on
17 procurement contracts designated by the WSSC as appropriate is restricted to
18 certified minority business enterprises;

19 (ii) The sheltered market program under this paragraph may not
20 be utilized until all less restrictive remedies under this subsection and race-neutral
21 remedies such as assistance with bonding requirements, financing, or bidding
22 procedures for small firms have been used and found to be ineffective;

23 (iii) Upon the bid of at least 3 certified minority business
24 contractors, a contract shall be awarded under this paragraph to the lowest of those
25 bidders; and

26 (iv) If fewer than 3 certified minority business enterprises bid on a
27 contract under this paragraph, the contract shall be awarded under the general
28 provisions of paragraph (4) of this subsection;

29 (6) Provide for the graduation of a minority business enterprise from the
30 program if the WSSC determines that the minority business enterprise no longer
31 requires the assistance or benefits offered by the program;

32 (7) Require the solicitation document accompanying each solicitation to
33 set forth the rules and regulations of the minority business utilization program;

34 (8) Require the geographic location and the principal place of business of
35 the minority business enterprise to be a consideration for participation in this
36 program. Montgomery County businesses and Prince George's County businesses
37 shall each have a targeted percentage of at least 40% of any contracts;

1 (9) Provide for the WSSC to refuse to recognize the certification of any
2 business found to be in violation of the purposes of the program and to permanently
3 bar any active principals of a violating business from future participation in the
4 program; and

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

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

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

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

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

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

22 (f) By September 15 of each year, the WSSC shall issue a report concerning
23 the implementation and administration of the minority business enterprise program
24 for the fiscal year ending on the preceding June 30, and appropriate
25 recommendations concerning the program, to the Montgomery County and Prince
26 George's County Senate and House Delegations to the Maryland General Assembly.

27 (g) The provisions of this section shall be void and may not be enforced after
28 July 1, [2005] ~~2010~~ 2006.

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

35 SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect
36 July 1, 2005.

