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

Introduced and read first time: February 4, 2005
Assigned to: Environmental Matters

A BILL ENTITLED

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)

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

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

17 3-102.

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

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

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

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

4 (ii) Recognize any other certification program that in the judgment
5 of the WSSC substantially duplicates the requirements of the State certification
6 agency;

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

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

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

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

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

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

36 (iii) The minority owners shall also possess the power to direct or
37 cause the direction of the management and policies of the business and to make the
38 day-to-day as well as major decisions on matters of management, policy, and
39 operations. The business may not be subject to any formal or informal restrictions,
40 through bylaw provisions, partnership agreements, or charter requirements for
41 cumulative voting rights or otherwise that prevent the minority owners, without the

1 cooperation or vote of any owner who is not a minority, from making a business
2 decision of the business.

3 (iv) If the owners of the business who are not minorities are
4 disproportionately responsible for the operation of the firm, the firm is not controlled
5 by minorities and may not be considered a minority business enterprise within the
6 meaning of this section. Where the actual management of the business is contracted
7 out to individuals other than the owner, those persons who have the ultimate power to
8 hire and fire the managers may, for the purposes of this section, be considered as
9 controlling the business.

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

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

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

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

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

30 3. Any relationship between a minority business enterprise
31 and a business which is not a minority business enterprise which has an interest in
32 the minority business enterprise is carefully reviewed to determine if the interest of
33 the nonminority business conflicts with the ownership and control requirements of
34 this section.

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

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

1 (6) By September 15 of each year, the WSSC shall issue a report
2 concerning the implementation and administration of the minority business
3 enterprise program for the fiscal year ending on the preceding June 30, and
4 appropriate recommendations concerning the program, to the Montgomery County
5 and Prince George's County Senate and House Delegations to the Maryland General
6 Assembly.

7 (7) The provisions of this subsection shall be null and void and may not
8 be enforced after July 1, [2005] 2010.

9 3-109.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 (9) Provide for the WSSC to refuse to recognize the certification of any
25 business found to be in violation of the purposes of the program and to permanently
26 bar any active principals of a violating business from future participation in the
27 program; and

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

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

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

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

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

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

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

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

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

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