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

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Assigned to: Environmental Matters

Committee Report: Favorable
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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)

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36 3. Any relationship between a minority business enterprise
37 and a business which is not a minority business enterprise which has an interest in
38 the minority business enterprise is carefully reviewed to determine if the interest of
39 the nonminority business conflicts with the ownership and control requirements of
40 this section.

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

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

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

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

15 3-109.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30 (9) Provide for the WSSC to refuse to recognize the certification of any
31 business found to be in violation of the purposes of the program and to permanently
32 bar any active principals of a violating business from future participation in the
33 program; and

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

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

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

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

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

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

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

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

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

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