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EMERGENCY BILL

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HB 1240/06 - HGO

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By: **Delegate Taylor**

Introduced and read first time: June 14, 2006

Assigned to: Rules and Executive Nominations

A BILL ENTITLED

1 AN ACT concerning

2 **Washington Suburban Sanitary Commission - Minority Business Enterprise**
3 **Programs - Sunset Extension**

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

8 BY repealing and reenacting, with amendments,
9 Article 29 - Washington Suburban Sanitary District
10 Section 3-102(f) and 3-109
11 Annotated Code of Maryland
12 (2003 Replacement Volume and 2005 Supplement)

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

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

16 3-102.

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

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

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

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

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

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

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

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

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

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

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

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

41 (iv) If the owners of the business who are not minorities are
42 disproportionately responsible for the operation of the firm, the firm is not controlled

1 by minorities and may not be considered a minority business enterprise within the
2 meaning of this section. Where the actual management of the business is contracted
3 out to individuals other than the owner, those persons who have the ultimate power to
4 hire and fire the managers may, for the purposes of this section, be considered as
5 controlling the business.

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

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

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

18 1. Newly formed businesses and businesses whose ownership
19 or control has changed since the date of the advertisement of the contract are closely
20 scrutinized to determine the reasons for the timing of the formation of or change in
21 the businesses;

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

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

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

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

37 (6) By September 15 of each year, the WSSC shall issue a report
38 concerning the implementation and administration of the minority business
39 enterprise program for the fiscal year ending on the preceding June 30, and
40 appropriate recommendations concerning the program, to the Montgomery County

1 and Prince George's County Senate and House Delegations to the Maryland General
2 Assembly.

3 (7) The provisions of this subsection shall be null and void and may not
4 be enforced after July 1, [2006] 2007.

5 3-109.

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

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

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

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

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

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

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

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

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

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

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

34 (5) (i) Subject to the provisions of subparagraphs (ii), (iii), and (iv) of
35 this paragraph, establish a sheltered market program in which bidding on

1 procurement contracts designated by the WSSC as appropriate is restricted to
2 certified minority business enterprises;

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

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

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

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

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

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

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

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

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

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

35 (2) The principal owner of an eligible minority business enterprise is in
36 not more than 1 certified business that is participating in the WSSC minority
37 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, [2006] 2007.

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 is an emergency
20 measure, is necessary for the immediate preservation of the public health or safety,
21 has been passed by a ye and nay vote supported by three-fifths of all the members
22 elected to each of the two Houses of the General Assembly, and shall take effect from
23 the date it is enacted.