

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE
Revised

House Bill 691 (Montgomery County Delegation and Prince George's County
Delegation)

Health and Government Operations

Education, Health, and Environmental Affairs

**Washington Suburban Sanitary Commission - Minority and Local Small
Business Enterprise Programs**
MC/PG 104-07

This bill reauthorizes the Washington Suburban Sanitary Commission's (WSSC) prior minority business utilization programs until July 2012. It also codifies the existing Office of Small, Local, and Minority Business Enterprise (OSLMBE) within WSSC and charges it with administering programs that promote the growth or participation of minority business enterprises in WSSC procurements.

The bill takes effect June 1, 2007.

Fiscal Summary

State Effect: None.

Local Effect: None. OSLMBE already exists and is fully staffed and funded.

Small Business Effect: Meaningful. WSSC's minority business utilization programs foster minority business enterprise (MBE) participation in WSSC procurements.

Analysis

Bill Summary: To facilitate the participation of responsible certified MBEs, WSSC must establish a minority business utilization program for design/build construction contracts. Solicitations for design/build contracts must include the expected degree of

participation by MBEs in the contract. Regulations establishing the minority business utilization program for design/build contracts must:

- recognize MBEs certified by the State and any other certification program that duplicates the requirements of State certification as an MBE;
- provide for an increase in MBE participation as prime contractors and subcontractors;
- allow some contracts to waive the program's requirements if they conflict with WSSC's overall objectives and responsibilities;
- allow for the graduation from the program of MBEs that no longer require special assistance;
- for solicitations that have an expected degree of MBE participation, require bids and proposals to include proof of involvement by an MBE;
- require contractors to adhere to certain reporting requirements specified in the bill.

WSSC is also authorized to operate a minority business utilization program for goods and services procurements if it determines that MBEs are underrepresented in those contracts and that such a program is necessary to remedy past discrimination against MBEs. In addition to including most of the requirements for the design/build MBE program, regulations for this program must:

- authorize MBE participation only through subcontracting;
- grant bidding preferences for MBEs of up to the lesser of 5% of the contract value or \$50,000;
- create a sheltered market program that restricts bidding on certain contracts only to MBEs; and
- establish targets that 40% of contracts be awarded to both Montgomery County-based and Prince George's County-based businesses.

OSLMBE is charged with:

- promoting and coordinating WSSC's plans, programs, and operations that promote or otherwise affect the establishment, preservation, and strengthening of minority business enterprises (MBEs);
- promoting activities and use of resources by WSSC, local governments, and private entities for the growth of MBEs;
- providing technical and managerial assistance to MBEs;

- scheduling seminars and workshops to educate MBEs about the how WSSC conducts business; and
- ensuring compliance with MBE subcontract participation goals.

OSLMBE is charged with confirming that prime contractors honor their commitments to their MBEs and maintain the promised level of participation by MBE contractors, subject to corrective actions, contract termination, or other remedy identified in the contract. By September 15 of each year, WSSC is required to submit annual reports to the Montgomery and Prince George's counties General Assembly delegations regarding the implementation and administration of its MBE programs.

OSLMBE will also administer WSSC's optional Local Small Business Enterprise Program. The bill clarifies a requirement for being certified as a local small business under this program. It specifies that in order to be certified as having a significant employment presence in Montgomery or Prince George's counties, a firm must have at least 25% of its employees living in those counties.

If a court rules that any portion of the bill is invalid, the bill's remaining provisions are still valid.

Current Law: Statutory authorization for WSSC's minority business enterprise programs expired in July 2006.

Background: The minority business utilization program for construction contracts was first authorized by the General Assembly in 1979, and the goods and services program was added in 1992. Prior to their expiration, both programs operated under the same terms required by this bill. After the General Assembly failed to act during the 2006 session on proposed legislation to extend the MBE program through fiscal 2010, WSSC proposed implementing a Stop Gap MBE Program that would have extended the program absent legislative authorization. However, the Attorney General advised that WSSC could not implement the Stop Gap program or any other program based on race and gender conscious policies without explicit authorization from the General Assembly.

Under State procurement law, an MBE is a legal entity, other than a joint venture, that is:

- organized to engage in commercial transactions;
- at least 51% owned and controlled by one or more individuals who are socially and economically disadvantaged; and
- managed by, and the daily business operations of which are controlled by, one or more of the socially and economically disadvantaged individuals who own it.

MBEs include not-for-profit entities organized to promote the interests of physically or mentally disabled individuals.

A socially and economically disadvantaged individual is defined as a citizen or legal U.S. resident who is African American, Native American, Asian, Hispanic, physically or mentally disabled, a woman, or otherwise found by the State's MBE certification agency to be socially and economically disadvantaged.

A socially disadvantaged individual is someone who has been subject to racial or ethnic prejudice or cultural bias within American society because of their membership in a group and without regard to individual qualities. An economically disadvantaged individual is someone who is socially disadvantaged whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities compared with those who are not socially disadvantaged. An individual with a personal net worth in excess of \$1.5 million is not considered economically disadvantaged.

WSSC is authorized to operate a local small business enterprise program, which has not expired. The program allows WSSC to establish sheltered market or other preferences and assistance for local small businesses. Businesses may qualify as a small business under the program if they have:

- a net worth not exceeding \$250,000;
- an average net income after federal income taxes for the preceding two years not exceeding \$100,000; and
- a principal place of business or significant employee presence in Montgomery County or Prince George's County.

WSSC is among the 10 largest water and sewer utilities in the country, providing water and sewer services to 1.6 million residents in Montgomery and Prince George's counties. It has a total budget of \$757.1 million (\$502.1 operating budget and \$255.0 capital budget) in fiscal 2007, over 400,000 customer accounts, and serves an area of around 1,000 square miles. It operates three reservoirs, two water filtration plants, and six wastewater treatment plants.

Local Fiscal Effect: Since the expiration of the WSSC MBE programs, OSLMBE has continued its outreach and education programs for small and minority businesses. It has not experienced any budgetary or staff reductions, so no new expenditures will be necessary to resume its full operation.

Small Business Effect: Prior to their expiration, WSSC's MBE programs had been successful in fostering small business participation in WSSC procurements and are expected to continue to have a positive effect if they are reauthorized. Since the programs' inception, 212 firms had applied for MBE or small business status, and 139 had been accepted. Although it was not required by statute to establish MBE contracting goals, WSSC had established such goals for each of its contracting divisions; the construction division goal was voluntary. The goals were:

- Architectural and Engineering: 24%
- Procurement: 28%
- Professional Services: 20%
- Construction (voluntary): 20%

In fiscal 2005, 26% of all WSSC contracting, or \$37.6 million, was awarded to MBEs. All three mandatory goals were met, while the construction division fell short of its voluntary goal, achieving a 10.5% MBE share for its contracting.

Additional Information

Prior Introductions: HB 1087 of 2006, a similar bill, passed the House and was heard by the Senate Education, Health, and Environmental Affairs Committee, but no further action was taken.

Cross File: None.

Information Source(s): Montgomery County, Prince George's County, Washington Suburban Sanitary Commission, Department of Legislative Services

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