

Department of Legislative Services
Maryland General Assembly
2012 Session

FISCAL AND POLICY NOTE

Senate Bill 727 (Senator Muse)
Education, Health, and Environmental Affairs

**Washington Suburban Sanitary Commission Procurement Oversight Committee
and Minority Business Enterprise Utilization Program - Termination Extension**

This bill establishes the Washington Suburban Sanitary Commission (WSSC) Procurement Oversight Committee to review any procurement made by WSSC for compliance with the minority business utilization program. If the committee determines that WSSC has not achieved compliance with the minority business utilization program, the committee will have sole authority over any procurement activities of WSSC. By December 1, 2012, WSSC must submit a written report to the committee demonstrating compliance with the minority business utilization program. The committee must submit a report to the Montgomery County and Prince George's County legislative delegations on the status of minority business enterprise (MBE) participation in procurements for WSSC by January 1, 2014. The bill also extends, from July 1, 2012, to July 1, 2017, the authorization of WSSC's minority business utilization program.

The bill takes effect June 1, 2012.

Fiscal Summary

State Effect: None.

Local Effect: Potential significant increase in WSSC expenditures relating to expense reimbursements for committee members and staffing costs. The bill may result in an indeterminate impact on WSSC procurement practices.

Small Business Effect: Meaningful. WSSC's minority business utilization program fosters MBE participation in WSSC procurements.

Analysis

Current Law: Chapter 621 of 2007 reauthorized WSSC's minority business utilization program until July 1, 2012, and codified the existence of the Office of Small, Local, and Minority Business Enterprise (OSLMBE).

The minority business utilization program within WSSC helps facilitate the participation of responsible certified MBEs 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.

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 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 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 County and Prince George's County legislative delegations regarding the implementation and administration of its MBE programs. OSLMBE also administers WSSC's optional Local Small Business Enterprise Program.

Background: On July 20, 2011, WSSC voted unanimously to adopt Resolution 2012-1933 which (1) authorized a new Small Local Business Enterprise Program; and (2) authorized WSSC's General Manager/CEO to make changes to related WSSC regulations so that these regulations reflect adoption of SP SLBE 12-01, which reflect both the race and gender-neutral remedies included in WSSC's recently adopted Minority Business Enterprise Program, and the modifications to the small business regulations adopted by the Department of General Services.

Disparity Study

On December 1, 2009, WSSC announced the extension of its interim MBE program until April 30, 2011. It was also announced that during this period WSSC would conduct a disparity study to establish a basis for a long-term MBE program.

During 2010, a disparity study was conducted by Mason Tillman Associates, Ltd., on behalf of WSSC. The study examined WSSC's record in awarding contracts to women-owned and minority-owned prime contractors and subcontractors for fiscal 2004 through 2009. This examination included bids, awards, invoices, and payments to minority-owned businesses that bid for WSSC contracts over this period. The study also examined WSSC's MBE practices and the local business market to determine if a statistical disparity exists in the awarding of contracts by WSSC to women-owned and minority firms and the availability of such firms in the area.

Based on an analysis of WSSC data, the report indicated that there is a statistically significant underutilization of women- and minority-owned business enterprises in the awarding of WSSC prime contracts in the four broad contracting areas of construction, architecture and engineering, goods and services, and professional services. With regards to subcontracts, the study indicated that a statistically significant underutilization of specific racial-ethnic groups occurred in these same contracting areas except for the area of professional services.

MBE Performance Measures

In fiscal 2011, WSSC awarded total contracts of \$427.5 million in four contracting areas – architecture and engineering (A/E); construction; professional services; and goods and services. Of this amount, \$133.2 million or 31% was awarded to certified MBE firms. In fiscal 2011, WSSC’s total contract payments were \$270.0 million, including \$66.9 million (27%) to MBE firms, which was in excess of the payment goal of 25%, as shown in **Exhibit 1**. WSSC indicates in fiscal 2011, 1,335 contracts were awarded and that SLMBE program initiatives resulted in 210 contracts being awarded to certified MBE firms and 98 contracts being awarded to approved SLBE firms.

Exhibit 1
WSSC MBE Performance Measures
Fiscal 2011

<u>Contracting Area</u>	<u>Goal</u>	<u>M/WBE¹</u>	<u>M/WBE¹ %</u>	<u>MBE</u>	<u>WBE</u>
A/E Services	24%	\$9,339,065	30%	\$7,475,261	\$1,863,804
Construction Services	20%	13,330,216	14%	8,449,700	4,880,516
Goods and Services	28%	42,646,219	36%	20,679,468	21,966,751
Professional Services	20%	1,538,078	23%	985,133	552,945
Total	25%	\$66,853,578	27%	\$37,589,562	\$29,264,016

¹Minority/Women Business Enterprise
Source: Washington Suburban Sanitary Commission

MBE Criteria

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 Service Area

WSSC is the eighth largest water and wastewater utility in the country, providing water and sewer services to 1.8 million residents in Montgomery and Prince George's counties. It has over 460,000 customer accounts, serves an area of around 1,000 square miles, and currently employs more than 1,500 people. The agency operates four reservoirs, two water filtration plants, and six wastewater treatment plants. Additionally, the Blue Plains Water Pollution Control Plant handles approximately 169 million gallons per day under a cost sharing agreement with WSSC. The commission maintains nearly 5,500 miles of water main lines and over 5,400 miles of sewer main lines.

State Fiscal Effect: The bill does not designate an entity to provide staff support for the committee, nor does it indicate how the members of the committee appointed by the Speaker of the House and the President of the Senate are to be reimbursed. For purposes of this fiscal and policy note, it is assumed that expense reimbursements for committee members and staffing costs will be paid by WSSC.

Local Fiscal Effect: Potential administrative expenditures for the oversight committee may include expense reimbursements for members, staffing costs for at least two positions (an attorney and secretarial support), and miscellaneous office expenses. These costs may total approximately \$245,000 in fiscal 2013. Salaries and fringe

benefits for the two positions may total \$200,000 in fiscal 2013, which reflects a salary of \$90,000 for the attorney position and \$50,000 for the secretarial position. Expense reimbursements for committee members and miscellaneous office expenses may total \$45,000 in fiscal 2013. This estimate reflects current salary levels for comparable WSSC positions and commission member expenses. Actual administrative expenditures under the bill may vary depending on how the oversight committee is created and staffed.

The additional procurement oversight required by the bill could result in procurement delays which could impact WSSC as well as bidders for WSSC contracts.

Additional Information

Prior Introductions: SB 944 of 2011, a similar bill, received a hearing in the Senate Education, Health, and Environmental Affairs Committee, but no further action was taken. Its cross file, HB 641, was assigned to the House Environmental Matters Committee, but no further action was taken.

Cross File: None.

Information Source(s): Governor's Office, Washington Suburban Sanitary Commission, Department of Legislative Services

Fiscal Note History: First Reader - March 5, 2012
mc/hlb

Analysis by: Michael Sanelli

Direct Inquiries to:
(410) 946-5510
(301) 970-5510