

## Chapter 326-20 WAC CERTIFICATION

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### WAC

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### DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

326-20-020	Federally funded projects. [Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-020, filed 10/28/83.] Repealed by WSR 92-11-007, filed 5/11/92, effective 6/11/92. Statutory Authority: RCW 39.19.030(7).
326-20-030	Proof of minority status. [Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-030, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-030, filed 10/28/83.] Repealed by WSR 19-13-014, filed 6/7/19, effective 7/8/19. Statutory Authority: RCW 39.19.030 and 39.19.120.
326-20-040	Proof of woman's status. [Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-040, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-040, filed 10/28/83.] Repealed by WSR 19-13-014, filed 6/7/19, effective 7/8/19. Statutory Authority: RCW 39.19.030 and 39.19.120.
326-20-090	Size and length of time in business. [Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-090, filed 10/28/83.] Repealed by WSR 88-06-030 (Order 88-2), filed 2/26/88. Statutory Authority: Chapter 39.19 RCW.
326-20-091	Size standards—Purpose. [Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-091, filed 4/18/88.] Repealed by WSR 92-11-007, filed 5/11/92, effective 6/11/92. Statutory Authority: RCW 39.19.030(7).
326-20-092	Small business concern requirement. [Statutory Authority: RCW 39.19.030. WSR 04-08-075, § 326-20-092, filed 4/5/04, effective 5/6/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-092, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-092, filed 4/18/88.] Repealed by WSR 19-13-014, filed 6/7/19, effective 7/8/19. Statutory Authority: RCW 39.19.030 and 39.19.120.
326-20-093	Definitions. [Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-093, filed 4/18/88.] Repealed by WSR 92-11-007, filed 5/11/92, effective 6/11/92. Statutory Authority: RCW 39.19.030(7).
326-20-095	Determination of firm size. [Statutory Authority: RCW 39.19.030. WSR 04-08-075, § 326-20-095, filed 4/5/04, effective 5/6/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-095, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-095, filed 4/18/88.] Repealed by WSR 19-13-014, filed 6/7/19, effective 7/8/19. Statutory Authority: RCW 39.19.030 and 39.19.120.
326-20-096	Size standard. [Statutory Authority: RCW 39.19.030. WSR 04-08-075, § 326-20-096, filed 4/5/04, effective 5/6/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-096, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-096, filed 4/18/88.] Repealed by WSR 19-13-014, filed 6/7/19, effective 7/8/19. Statutory Authority: RCW 39.19.030 and 39.19.120.
326-20-097	Change in firm size. [Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-097, filed 4/18/88.] Repealed by WSR 92-11-007, filed 5/11/92, effective 6/11/92. Statutory Authority: RCW 39.19.030(7).

326-20-115 Signatures of applicant business owners. [Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-115, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 85-20-058 (Order 85-9), § 326-20-115, filed 9/26/85.] Repealed by WSR 19-13-014, filed 6/7/19, effective 7/8/19. Statutory Authority: RCW 39.19.030 and 39.19.120.

326-20-120 Submittal of forms. [Statutory Authority: RCW 39.19.030. WSR 11-11-030, § 326-20-120, filed 5/11/11, effective 6/11/11. Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 04-08-093, § 326-20-120, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030. WSR 94-11-114, § 326-20-120, filed 5/18/94, effective 6/18/94. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-120, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 85-14-101 (Order 85-6), § 326-20-120, filed 7/2/85. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-120, filed 10/28/83.] Repealed by WSR 17-13-020, filed 6/12/17, effective 8/1/17. Statutory Authority: RCW 39.19.030.

326-20-200 Complaints. [Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-200, filed 10/28/83.] Repealed by WSR 92-11-007, filed 5/11/92, effective 6/11/92. Statutory Authority: RCW 39.19.030(7).

326-20-210 Reconsideration of decision. [Statutory Authority: Chapter 39.19 RCW. WSR 84-09-002 (Order 84-5), § 326-20-210, filed 4/5/84. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-210, filed 10/28/83.] Repealed by WSR 85-07-006 (Order 85-2), filed 3/8/85. Statutory Authority: Chapter 39.19 RCW.

**WAC 326-20-010 In general.** (1) Any business which meets the definition of a minority business enterprise, a women's business enterprise, a minority woman's business enterprise, or a combination minority and women's business enterprise, or socially and economically disadvantaged business enterprise, or corporate-sponsored dealership as set forth in this title, is eligible to be certified by the state of Washington.

(2) It is not the intent of the program to encourage the participation of businesses owned and controlled by minorities, and/or women, and/or socially and economically disadvantaged individuals, who have not encountered practices which prohibited or limited their access to contract opportunities, markets, financing, and other resources, based on their race, ethnic origin, or sex, or disability.

(3) Notwithstanding the provisions in subsection (1) of this section, to be eligible for certification, any business applying for certification shall have obtained all licenses necessary to lawfully conduct business in the state of Washington.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 04-08-093, § 326-20-010, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-010, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 87-18-030 (Order 87-6), § 326-20-010, filed 8/27/87. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-010, filed 10/28/83.]

**WAC 326-20-035 Presumptive group membership.** (1) After reviewing an applicant's sworn declaration of membership in a presumptively disadvantaged group, the agency may ask the applicant to present additional evidence that the person is a member of the identified group, if the agency has a well-founded reason to question the applicant's claim of group membership.

(2) The agency will provide the applicant an explanation of the reason(s) for questioning the applicant's group membership. The agency will consider whether the person has held themselves out as a member of the group for an extended period of time prior to application for certification, and whether the relevant community regards the person as a member of that group. The agency may require the applicant to produce appropriate documentation of group membership.

(3) The agency will not impose a disproportionate burden on members of any particular designated group in violation of Title VI of the Civil Rights Act of 1964.

(4) If the agency determines an individual claiming membership of a presumed disadvantaged group is not a member, the individual must demonstrate social and economic disadvantage on an individual basis under WAC 326-20-045.

(5) The decisions concerning membership in a designated group are subject to the certification appeals process outlined in WAC 326-20-171.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 19-13-014, § 326-20-035, filed 6/7/19, effective 7/8/19.]

**WAC 326-20-045 Proof of socially and economically disadvantaged status.** The following guidance is adapted, with minor modifications, from the United States Small Business Administration's regulations concerning social and economic disadvantage determinations (see 13 C.F.R. 124.103(c) and 124.104) and 49 C.F.R. Part 26. Each nonpresumptive socially and economically disadvantaged owner of a business applying for certification shall submit with the application form the statement of personal net worth and social and economic disadvantage forms with documents which show that the owner is a socially and economically disadvantaged individual. The final determination will be in the sole discretion of the office.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 04-08-093, § 326-20-045, filed 4/6/04, effective 5/7/04.]

**WAC 326-20-046 Proof of social disadvantage.** (1) Evidence of individual social disadvantage must include the following elements:

(a) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(b) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(c) Negative impact on entry into or advancement in the business world because of the disadvantage. The office will consider any relevant evidence in assessing this element. In every case, however, the office will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(i) Education. The office will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(ii) Employment. The office will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or

labor union; and social patterns or pressures which have channeled the individual into nonprofessional or nonbusiness fields.

(iii) Business history. The office will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

(2) With respect to subsection (1) of this section, the office notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities—especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments)—may be socially and economically disadvantaged.

(3) Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, the office shall look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria of this section. Subject to Title II of the ADA, the office must also ensure its SEDBE programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to SEDBEs and applicants.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 04-08-093, § 326-20-046, filed 4/6/04, effective 5/7/04.]

**WAC 326-20-047 Proof of economic disadvantage.** Evidence of individual social disadvantage must include the following elements:

(1) Submission of narrative and financial information.

(a) Each individual claiming economic disadvantage must describe the conditions, which are the basis for the claim in a narrative statement, and must submit personal financial information.

(b) When married, an individual claiming economic disadvantage also must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.

(2) Factors to be considered. In considering diminished capital and credit opportunities, the office will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. The office will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The finan-

cial profiles that the office will compare include total assets, net sales, pretax profit, sales/working capital ratio, and net worth.

(3) Transfers within two years.

(a) Except as set forth in (b) of this subsection, the office will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(b) The office will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(c) In determining an individual's access to capital and credit, the office may consider any assets that the individual transferred within such two-year period described by (a) of this subsection that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 04-08-093, § 326-20-047, filed 4/6/04, effective 5/7/04.]

**WAC 326-20-048 Presumption of disadvantage.** (1) Social disadvantage. The agency rebuttably presumes the following persons are socially disadvantaged individuals for the purposes of certification, consistent with 49 C.F.R. Part 26.67: Women; persons who are black/African American, Hispanic/Latino, Native American, Asian, Pacific Islander, native Hawaiian, and Alaska native; and other minorities found disadvantaged by the small business association.

(2) Each presumptively socially disadvantaged applicant must submit a signed declaration that she or he is socially and economically disadvantaged.

(3)(a) Economic disadvantage. Each owner of a firm applying for state certification must sign a declaration that he or she has a personal net worth that does not exceed 1.32 million dollars, per WAC 326-20-049.

(b) Rebuttal of economic disadvantage. If the statement of personal net worth that an individual submits under this section shows that the individual's personal net worth exceeds 1.32 million dollars or shows that a person has been able to accumulate substantial wealth, the individual's economic disadvantage is rebutted, and the individual is not deemed to be economically disadvantaged. Such an individual is no longer eligible to participate in the program and cannot regain eligibility by making an individual showing of disadvantage. The office is not required to have a proceeding under this section in order to rebut the presumption of economic disadvantage in this case.

(4) Individual determinations of social and economic disadvantage. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged may apply for SEDBE certification. The office makes a case-by-case determination of whether each individual whose ownership and control are relied upon for SEDBE certification is socially and economically disadvantaged. In such a pro-

ceeding, the applicant firm has the burden of demonstrating to the office, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds 1.32 million dollars shall not be deemed to be economically disadvantaged. In making these determinations, the office uses WAC 326-20-046 and 326-20-047. The office requires that applicants provide sufficient information to permit determinations under WAC 326-20-046 and 326-20-047.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 19-13-014, § 326-20-048, filed 6/7/19, effective 7/8/19. Statutory Authority: RCW 39.19.030. WSR 17-13-020, § 326-20-048, filed 6/12/17, effective 8/1/17. Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 04-08-093, § 326-20-048, filed 4/6/04, effective 5/7/04.]

**WAC 326-20-049 Personal net worth.** (1) Each individual owner of a firm applying for state certification, whose ownership and control are relied on for certification, must fill out a personal net worth statement and sign a declaration that his or her personal net worth does not exceed 1.32 million dollars. If any individual's personal net worth exceeds 1.32 million dollars, the individual's presumption of economic disadvantage is rebutted and the individual does not meet the criteria for certification.

(2) The office may require additional financial information where necessary to accurately determine an individual's personal net worth.

(3) In determining an individual's personal net worth, the office will use the following criteria:

(a) Exclude the individual's ownership interest in the applicant firm;

(b) Exclude the individual's equity in his or her primary residence. The equity is the market value of the residence less any mortgages and home equity loan balances;

(c) Not use a contingent liability to reduce the individual's net worth;

(d) With respect to assets held in vested pension plans, individual retirement accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time;

(e) Include any assets the individual has transferred within two years prior to the application or renewal to:

(i) An immediate family member;

(ii) A trust where the beneficiary is an immediate family member;

or

(iii) The applicant firm for less than fair market value.

(f) The assets described in (e) of this subsection will not be counted toward an individual's personal net worth if:

(i) The applicant demonstrates that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support; or

(ii) The transfer is consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(g) For the purposes of this section, "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under state law.

(4) If an individual's personal net worth does not exceed 1.32 million dollars as described in this section, the office may rebut an individual's presumption of economic disadvantage if the statement of personal net worth and supporting documentation demonstrates that the individual is able to accumulate substantial wealth. In making this determination, the office may consider factors that include, but are not limited to:

(a) Whether the average adjusted gross income of the owner over the most recent three year period exceeds three hundred fifty thousand dollars;

(b) Whether the income was unusual and not likely to occur in the future;

(c) Whether the earnings were offset by losses;

(d) Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;

(e) Other evidence that income is not indicative of lack of economic disadvantage; and

(f) Whether the total fair market value of the owner's assets exceed six million dollars.

[Statutory Authority: RCW 39.19.030. WSR 17-13-020, § 326-20-049, filed 6/12/17, effective 8/1/17.]

**WAC 326-20-050 Proof of ownership of business.** (1) In determining whether a socially and economically disadvantaged participant(s) in a firm owns the business, the agency considers all facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership, or transfer of ownership, must be in the normal course of business.

(2) To be an eligible for certification, a firm must be at least fifty-one percent owned by a socially and economically disadvantaged individual(s).

(a) In the case of a sole proprietorship or other cases where documentary proof of ownership is not available, the agency may undertake further investigation and may require documents showing how and when the socially and economically disadvantaged owner(s) interest in the business was acquired.

(b) In the case of a corporation, a socially and economically disadvantaged individual(s) must own at least fifty-one percent of each class of voting stock outstanding and fifty-one percent of the aggregate of all stock outstanding.

(c) In the case of a partnership, a socially and economically disadvantaged individual(s) must own at least fifty-one percent of each class of partnership interest.

(d) In the case of a limited liability company, a socially and economically disadvantaged individual(s) must own at least fifty-one percent of each class of member interest.

(3) The socially and economically disadvantaged individual(s) ownership, including the individual's contribution of capital or expertise to acquire ownership interests, must be real, substantial, and

continuing, going beyond pro forma ownership of the firm. It may include ownership interest acquired:

(a) As the result of a final property settlement or court order in a divorce or legal separation, provided no term or condition of the agreement or divorce decree is inconsistent with this section;

(b) Through inheritance or because of the death of the former owner; and

(c) Through debt instruments from financial institutions or other organizations lending funds in the normal course of business, even when the debtor's ownership interest is security for the loan.

(4) The disadvantaged owner(s) must enjoy the customary incidents of ownership, share in the risks, and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form of arrangements.

(5) When expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership, the applicant must have a significant financial investment in the firm, and the applicant's expertise must be:

(a) In a specialized field;

(b) In areas critical to the firm's operations;

(c) Indispensable to the firm's potential success;

(d) Specific to the type of work the firm performs; and

(e) Documented in the records of the firm, which must show the contribution of expertise and value to the firm.

(6) The following are insufficient to be considered ownership in a firm by a socially and economically disadvantaged individual for the purposes of certification:

(a) A promise to contribute capital; an unsecured note payable to the firm or an owner who is not a disadvantaged individual; mere participation in a firm's activities as an employee; capitalization not commensurate with the value for the firm; and any terms or practices giving a nondisadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s).

(b) Except as allowed by this section, interests or assets obtained by an applicant in the form of a gift or transfer without adequate consideration from any nondisadvantaged individual or firm who is: Involved in the same firm or affiliate where the individual is seeking certification; involved in the same or a similar line of business; or engaged in an ongoing business relationship with the firm or an affiliate where the individual is seeking certification. To overcome this presumption and permit the interests or assets, the disadvantaged individual must demonstrate by clear and convincing evidence that: The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification; and the disadvantaged individual controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a nondisadvantaged individual who provided the gift or transfer.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 19-13-014, § 326-20-050, filed 6/7/19, effective 7/8/19; WSR 04-08-093, § 326-20-050, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-050, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 87-18-030 (Order 87-6), § 326-20-050, filed 8/27/87; WSR 84-09-002 (Order 84-5), § 326-20-050, filed 4/5/84. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-050, filed 10/28/83.]

**WAC 326-20-055 Subsidiaries.** An eligible firm must be owned by an individual(s) who is socially and economically disadvantaged, rather than owned by another firm, except as provided below:

(1) If a socially and economically disadvantaged individual(s) owns and controls a firm through a parent or holding company that is established for tax, capitalization, or other purposes consistent with industry practice; and the parent or holding company owns and controls the subsidiary.

(2) The agency may certify such a subsidiary if there is cumulatively fifty-one percent ownership of the subsidiary by a socially and economically disadvantaged individual(s). Examples of such subsidiaries include, but are not limited to:

(a) A socially and economically disadvantaged individual(s) owns one hundred percent of a holding company and has a wholly owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

(b) A socially and economically disadvantaged individual(s) owns one hundred percent of the holding company and owns fifty-one percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.

(c) A socially and economically disadvantaged individual(s) owns eighty percent of the holding company and the holding company in turn owns seventy percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is fifty-six percent (eighty percent of the seventy percent). This is more than fifty-one percent, so the agency may certify the subsidiary, if all other requirements are met.

(d) Same as the examples in (b) and (c) of this subsection, but someone other than the socially and economically disadvantaged owner(s) of the parent or holding company control the subsidiary. Even though the subsidiary is owned by disadvantaged individuals, through the holding or parent company, the agency cannot certify it because it fails to meet control requirements.

(e) A socially and economically disadvantaged individual(s) owns sixty percent of the holding company and fifty-one percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is approximately thirty-one percent. This is less than fifty-one percent, so the agency cannot certify the subsidiary.

(f) The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification or the gross receipts cap of WAC 326-20-096. Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 19-13-014, § 326-20-055, filed 6/7/19, effective 7/8/19.]

**WAC 326-20-060 Community ownership.** (1) When an ownership interest arises in a nonapplicant spouse or registered domestic partner solely because of community property laws, the agency will not disqualify the applicant if both parties certify that:

(a) Only the applicant spouse or registered domestic partner participates in the management of the business; and

(b) The nonparticipating spouse or registered domestic partner relinquishes control over his/her community interest in the business.

(2) When an ownership interest arising in a nonapplicant spouse or registered domestic partner solely because of community property laws, the agency will not disqualify the applicant because of a provision for the nonapplicant spouse or domestic partner to cosign a financing agreement, contract for the purchase or sale of real or personal property, bank signature card, or other document.

(3) The agency must give particular scrutiny to the ownership and control of a firm to ensure it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual, when the ownership of the firm or its assets is transferred from a spouse or registered domestic partner who is not a socially and economically disadvantaged individual.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 19-13-014, § 326-20-060, filed 6/7/19, effective 7/8/19. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-060, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 84-09-002 (Order 84-5), § 326-20-060, filed 4/5/84. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-060, filed 10/28/83.]

**WAC 326-20-070 Counting ownership held in trust.** In determining whether the fifty-one percent ownership requirement is met, no stock or ownership held in trust shall be counted, except in the following cases:

(1) Where both the trustee and the beneficiary are minorities, or both are women, or both are socially and economically disadvantaged individuals, and the trustee meets the control requirement; or

(2) Where the stock or ownership is held in an irrevocable trust for the benefit of a minority, a woman, or a socially and economically disadvantaged individual, and the minority, woman, or socially and economically disadvantaged beneficiary meets the control requirement.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 04-08-093, § 326-20-070, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-070, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-070, filed 10/28/83.]

**WAC 326-20-080 Factors considered in determining control.** (1) In determining whether disadvantaged owner(s) control a business, the office must consider all of the facts in the record, viewed as a whole.

(2) The disadvantaged owner(s) must demonstrate the ability to make independent and unilateral business decisions needed to guide the future and direction of the business.

(3) The certifiable business must not be subject to any formal or informal restrictions limiting the customary discretion of the disadvantaged owner(s). Restrictions through corporate charter provisions, bylaw requirements, contracts or any other formal or informal devices, such as cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by nondisadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, limitations on or assignments of

voting rights, preventing the disadvantaged owner(s), without the co-operation or vote of any nondisadvantaged individual, from making any business decision are prohibited. This subsection does not preclude a spouse or registered domestic partner cosignature on the office's spouse or domestic partner nonparticipation statement.

(4) Disadvantaged owner(s) must possess the power to direct or cause the direction of the management and policies of the business and make daily and long-term decisions on matters of management, policy, and operations.

(a) Disadvantaged owner(s) must hold the highest officer position in the company, such as chief executive officer or president.

(b) In a corporation, disadvantaged owners must control the board of directors.

(c) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions. In order for a partnership to be controlled by disadvantaged individuals, any nondisadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

(d) Nondisadvantaged or immediate family members may be involved in a certified business as owners, managers, employees, stockholders, officers, or directors. They must not possess or exercise the power to control the business or be disproportionately responsible for the operation of the business.

(e) Disadvantaged owner(s) of the business may delegate various areas of the management, policymaking, or daily operations of the business to other participants in the business, regardless of whether these participants are disadvantaged individuals. Such delegations of authority must be revocable, and the disadvantaged owner(s) must retain the power to hire and fire any person to whom such authority is delegated. The disadvantaged owner(s) managerial role in the business's overall affairs must be such that the recipient can reasonably conclude the disadvantaged owners actually exercise control over the business's operations, management, and policy.

(f) Disadvantaged owner(s) must demonstrate the ability to make basic decisions pertaining to the daily operations of the business independently and have an overall understanding of, managerial and technical competence and experience directly related to, the type of business in which the business is engaged and operating. The owner(s) are not required to have experience or expertise in every critical area of operations or given field than managers or key employees. They must have the ability to intelligently and critically evaluate information presented by other participants in the business's activities and to use this information to make independent decisions concerning the business's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principle business activities of the business is insufficient to demonstrate control.

(g) If state or local law requires the persons to have a particular license or other credential in order to own or control a certain type of business, then the disadvantaged person(s) who own and control a potential certifiable business of that type must possess the required license or credential. If state or local law does not require the applicant to possess such a license or credential to own or control a business, the office must not deny certification solely on the ground the person lacks the license or credential. However, the office

may take into account the absence of the license or credential as one factor in determining whether the disadvantaged owner(s) actually control the business.

(h) The office may consider differences in remuneration between the disadvantaged owner(s) and other business participants in determining whether to certify a business. Such consideration must be in the context of the duties of the persons involved, normal industry practices, the business's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the business. The office may determine a disadvantaged owner controls a business although that owner's remuneration is lower than that of some other participants in the business. In a case where a nondisadvantaged individual formerly controlled the business, and a disadvantaged individual now controls it, the office may consider a difference between the remuneration of the former and current controller of the business as a factor in determining who controls the business, particularly when the nondisadvantaged individual remains involved with the business and continues to receive greater compensation than the disadvantaged individual.

(i) In order to be viewed as controlling a business, a disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the business or prevent the individual from devoting sufficient time and attention to the affairs of the business to control its activities. For example, absentee ownership of a business and part-time work in a full-time business are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings or weekends, if the individual controls it all the time it is operating.

(j) A disadvantaged individual may control a business even though one or more of the individual's nondisadvantaged immediate family members, participate in the business as a manager, employee, owner, or in another capacity. Except as otherwise provided in this subsection, the office must make a judgment about the control the disadvantaged owner exercises vis-a-vis other persons involved in the business as the office does in other situations, without regard to whether or not the other persons are immediate family members. If the office cannot determine the disadvantaged owners, as distinct from the family as a whole, control the business, then the disadvantaged owners failed to carry their burden of proof concerning control, even though they may participate significantly in the business's activities.

(k) When a business was formerly owned or controlled by a nondisadvantaged individual, whether or not an immediate family member, and ownership or control was transferred to a disadvantaged individual, and the nondisadvantaged individual remains involved with the business in any capacity, there is a rebuttable presumption of control by the nondisadvantaged individual unless the disadvantaged individual now owning the business demonstrates to the office, by clear and convincing evidence, that:

(i) The transfer of ownership or control to the disadvantaged individual was made for reasons other than obtaining certification; and

(ii) The disadvantaged individual actually controls the management, policy, and operations of the business, notwithstanding the continuing participation of a nondisadvantaged individual who formerly owned or controlled the business.

(l) In determining whether its disadvantaged owner controls a business, the office may consider whether the business owns equipment

necessary to perform its work. However, the office must not determine a business is not controlled by disadvantaged individuals solely because the business leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the business.

(m) A business operating under a franchise or license agreement may be certified if it meets the standards in this paragraph and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the office should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

(n) The disadvantaged individual(s) controlling a business may use an employee leasing company. The use of such a company does not preclude the individual(s) from controlling their business if they continue to maintain an employer-employee relationship with the leased employees. This includes responsibility for hiring, firing, training, assigning, and otherwise controlling on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 19-13-014, § 326-20-080, filed 6/7/19, effective 7/8/19; WSR 04-08-093, § 326-20-080, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-080, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-12-060 (Order 88-5), § 326-20-080, filed 5/31/88; WSR 87-18-030 (Order 87-6), § 326-20-080, filed 8/27/87. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-080, filed 10/28/83.]

**WAC 326-20-081 Independence.** Only an independent business may be certified. An independent business is one the viability of which does not depend on its relationship with another business or businesses.

(1) In determining whether a potential certified business is an independent business, the office must scrutinize relationships with noncertified businesses in areas such as personnel, facilities, equipment, financial or bonding support, and other resources.

(2) The office must consider whether present or recent employer and employee relationships between the disadvantaged owner(s) of the potential certifiable business and noncertified business or persons associated with noncertified businesses compromise the independence of the potential certifiable business.

(3) The office must examine the business's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings compromises the independence of the potential certifiable business.

(4) In considering factors relating to the independence of a potential certifiable business, the office must consider the consistency of relationships between the potential certifiable business and non-certifiable businesses with normal industry practice.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 19-13-014, § 326-20-081, filed 6/7/19, effective 7/8/19. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-081, filed 5/11/92, effective 6/11/92; WSR 89-24-047, § 326-20-081, filed 12/1/89, effective 1/1/90.]

**WAC 326-20-086 Native Americans—Native Hawaiians—Alaska native corporations.** (1) A firm owned by a Native American tribe, native Hawaiian organization, or Alaska native corporation, rather than by individuals, may be eligible for certification. Such a firm must meet the size standards of WAC 326-20-096 and be controlled by a socially and economically disadvantaged individual(s) per WAC 326-20-080.

(2) A firm owned by a Native American tribe, native Hawaiian organization, or Alaska native corporation will not be considered affiliated with other businesses owned by the tribe, organization, or corporation if there is a firewall, such as a legally binding mechanism, in place to prevent firms from accessing the resources of the tribe's, organization's, or corporation's other businesses.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 19-13-014, § 326-20-086, filed 6/7/19, effective 7/8/19.]

**WAC 326-20-094 Assignment of North American Industrial Classification System (NAICS) code.** The office must grant certification to a business only for specific types of work the disadvantaged owner(s) have the ability to control. To become certified in an additional type of work, the business needs to demonstrate its owner(s) are able to control the business with respect to that type of work. The office must not require the business to recertify or submit a new certification application but verify the disadvantaged owner(s) control of the business in the additional type of work.

(1) The types of work a business can perform, whether at initial certification or when a new type is added, must be described in terms of the most specific available North American Industry Classification System (NAICS) code for that type of work. In addition to applying the appropriate NAICS code, the office may apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one describing, as specifically as possible, the principle goods or services the business would provide to the state. Multiple NAICS codes may be assigned when appropriate. The office must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a business's certification.

(2) Businesses and recipients must check carefully to make sure the NAICS codes cited in a certification are current and accurately reflect work the office has determined the business owners can control. The business bears the burden of providing detailed company information the office needs to make an appropriate NAICS code designation.

(3) If a business believes there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified, the business may request the office, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the business is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients must not rely on such a description in determining whether a business's participation can be counted toward goals.

(4) The office is not precluded from changing a certification classification or description if there is a factual basis in the record. However, the office must not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 19-13-014, § 326-20-094, filed 6/7/19, effective 7/8/19. Statutory Authority: RCW 39.19.030. WSR 04-08-075, § 326-20-094, filed 4/5/04, effective 5/6/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-094, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-094, filed 4/18/88.]

**WAC 326-20-098 Applicability of federal regulations.** Whenever issues arise regarding whether a business qualifies as a small business concern which cannot be resolved by reference to these regulations, 49 C.F.R. Part 26 shall provide guidance to resolve such issues.

[Statutory Authority: RCW 39.19.030. WSR 04-08-075, § 326-20-098, filed 4/5/04, effective 5/6/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-098, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-098, filed 4/18/88.]

**WAC 326-20-099 Small business concern requirement and size standards.** (1) In addition to meeting the ownership and control requirements of chapter 39.19 RCW, a business must qualify as a small business concern for certification eligibility or recertification.

(a) A small business concern is a business that is independently owned and operated, is not dominant in its field of operations, and does not exceed the size limitations as set forth in the current table of North American Industrial Classification System (NAICS) codes or corresponding industry size standards as set forth in 49 C.F.R. Part 26 and amendments or inflationary adjustments thereof.

(b) The number of employees or amount of annual receipts listed as the size standard for each NAICS code indicates the maximum allowed for a business, including its affiliates, to qualify as a small business concern.

(c) The office's determination of whether a business qualifies as a small business concern must be, whenever possible, based on criteria consistent with the small business requirements defined under section 3 of the Small Business Act, 15 U.S.C. 632, and its implementing regulations, taking into consideration statewide markets.

- (2) A business exceeding the small business size limits after certification by the office must be subject to graduation.
- (3) At the time of application for certification and recertification, a business must demonstrate to the office that it is a small business concern. The office may verify the business is still a small business concern at any time after certification. In verifying the business's size, the office will review such financial documentation made available to the office, such as annual financial statements, federal income tax returns, state and local excise tax reports, and other relevant information.
- (4) Except as otherwise provided in this chapter, affiliation occurs when either directly or indirectly:
- (a) One business controls or has power to control the other;
  - (b) A third party or parties controls or has power to control both; or
  - (c) An "identity of interest" exists among them so the presumption of affiliation exists.
- (5) When reference sets the maximum size standard to "annual receipts," a business exceeding the monetary figure in the standard is not eligible for certification. Annual receipts includes all revenue received or accrued from sources, such as sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. The term "receipts" excludes proceeds from any of the following:
- (a) Sales of capital assets and investments;
  - (b) Proceeds from transactions between a concern and its domestic and foreign affiliates;
  - (c) Proceeds from payments of notes receivable, accounts receivable, and amounts collected as an agent for another, such as gross bookings when a commission is earned, in which case only the commission earned constitutes revenue, and taxes collected for remittance to a taxing authority.
- (6) The measurement period must comply with the following:
- (a) The size of a business with three or more completed fiscal years will be determined by averaging the annual receipts of the business for the most recent three years;
  - (b) The size of a business with less than three fiscal years will be determined by computing the average of the annual receipts from the time the business formed, calculating total revenues compiled over the period divided by the number of weeks, including fractions of a week, multiplied by fifty-two;
  - (c) Method of determining annual receipts. Revenue may be taken from the regular books of account of the concern. If the office so elects or the business has not kept regular books of account or the Internal Revenue Service has found such records to be inadequate and has reconstructed income of the concern, then revenue as shown on the federal income tax return of the concern may be used in determining annual receipts along with other information the office deems relevant.
- (7) Where the size standard is "number of employees," size eligibility requires the concern may not exceed the number of employees in that standard.
- (a) "Number of employees" means that average employment of the concern, including domestic and foreign affiliate employees, based upon employment during each of the pay periods for the preceding completed twelve calendar months.

(b) In computing average employment, part-time and temporary employees count as full-time employees for each applicable pay period.

(c) If a concern has not been in business for twelve months, "number of employees" means the average employment of the concern, including its affiliates, during each of the pay periods during which it has been in business.

(8) No business, regardless of its primary NAICS code, is eligible for certification if it exceeds the largest annual revenue limit contained in 49 C.F.R. Part 26 and any amendments or inflationary adjustments thereof.

(9) In determining the business's primary industry, including its affiliates, the office must consider the distribution of receipts, employees, and costs in the differing industry areas the business operated during its most recently completed fiscal year. Other factors, such as patents, contract awards, and assets, may be considered.

(10) If the activities of the business encompass two or more NAICS codes, the first NAICS code listed in the directory is the primary industry classification of the business.

(11) A business exceeding the small business size limits after certification by the office must be subject to graduation.

(12) For purposes of utilization on projects funded by any operating modal of the U.S. Department of Transportation the maximum dollar size standard in 49 C.F.R. Part 26 as may be amended or adjusted for inflation, must apply, even if the size standard would otherwise be set by reference to number of employees. This standard is a maximum. Certified businesses are still subject to applicable lower limits on business size as established by the United States Small Business Administration and these regulations.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 19-13-014, § 326-20-099, filed 6/7/19, effective 7/8/19.]

**WAC 326-20-110 Application process.** (1) The office will develop and make available an application form for certification under chapter 39.19 RCW, and WAC 326-20-010. The application form may be modified at any time. The form will solicit enough information to determine whether the applicant is eligible for certification for state-funded projects and may include supplemental questions necessary to determine whether the applicant is eligible for certification for a specific federally funded project. As part of its investigation, the office may require minority, women, and socially and economically disadvantaged owners to provide information in addition to that requested on the application forms.

(2) Where additional information is required from the applicant business to complete the investigation, the office may request the information in writing and may impose a time limit of not more than twenty days in which the applicant must respond. The letter shall include notice to the applicant that, if the applicant fails to provide the information within the time requested, the file will be closed administratively. If all the requested information is not received by the office within the twenty days, the office may administratively close the file. The applicant will be notified in writing that the file has been administratively closed.

(3) Upon timely receipt of a written request for extension of the time to respond to the request for additional information, an extension of time to respond may be granted by the director. A showing of

extenuating circumstances may be required, and granting of such request for extension is in the sole discretion of the director.

(4) Administrative closure means that the file is placed in inactive status, and further processing of the application is suspended. An applicant may petition the office for reopening or reactivation of the application file, by written request to the director. Requests to reopen will be granted in the sole discretion of the director. The applicant will be notified in writing of the director's decision to grant or deny the request to reactivate the file. If the request is denied, the applicant may submit a new application: Provided, That an applicant may not file more than one additional application within a year from the date of the closure. If the file is administratively reopened and processing resumed, the application will be processed as if it had been received on the date the request to reopen the file is granted by the director.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 04-08-093, § 326-20-110, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-110, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 86-17-018 (Order 86-2), § 326-20-110, filed 8/11/86. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-110, filed 10/28/83.]

**WAC 326-20-125 Processing fee.** The office shall charge a nonrefundable fee for certification or recertification based upon the legal organizational structure of the business, as follows: Fifty dollars for a sole proprietorship, seventy-five dollars for a partnership (general or limited), and one hundred dollars for all other legal organizational structures; e.g., corporation or limited liability company: Provided, however, That the office shall only charge a twenty-five dollar fee when the application requests DBE-only certification or recertification for all business legal organizational structures. The office shall also charge a nonrefundable twenty-dollar fee for processing annual updates for all business legal organizational structures. The business must submit the fee with the application for certification, recertification, or annual update. The business applying for DBE-only certification may request a waiver of the fee. The request for fee waiver must be submitted to the office in writing. The office will review the request and make a determination in accordance with the Washington state department of transportation (WSDOT) DBE plan. An application is not deemed to be received by the office until the required fee is received by the office or the request of waiver of the fee has been approved by the office.

[Statutory Authority: RCW 39.19.210. WSR 04-08-074, § 326-20-125, filed 4/5/04, effective 5/6/04. Statutory Authority: RCW 39.19.030. WSR 94-11-115, § 326-20-125, filed 5/18/94, effective 6/18/94. Statutory Authority: 1993 c 195. WSR 93-16-080, § 326-20-125, filed 8/3/93, effective 9/3/93.]

**WAC 326-20-130 Processing applications—Time.** The office will process all applications as promptly as its resources permit. The office does not guarantee that any application will be processed within

any certain time period and the inability to process an application by a certain time shall not subject the office or the state to liability.

[Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-130, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-130, filed 10/28/83.]

**WAC 326-20-140 Duty to cooperate.** The owners shall have the duty to cooperate fully in the office's investigation of the application, including promptly submitting any additional information requested by the office. This duty shall continue after the business is certified. In addition to any other penalties provided by law, the submission of false information to the office in connection with an application for certification or renewal of certification shall be grounds for denial of certification, or decertification.

[Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-140, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-22-017 (Order 88-9), § 326-20-140, filed 10/24/88. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-140, filed 10/28/83.]

**WAC 326-20-150 On-site investigations.** The office may, whenever it deems necessary, conduct unannounced on-site investigations into the operations of a business. By submitting the certification application form, an applicant agrees that the office may conduct such investigations at any time.

[Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-150, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-150, filed 10/28/83.]

**WAC 326-20-160 Burden of proof.** The applicant has the burden of proving by a preponderance of the evidence that the applicant is eligible for certification or renewal of certification.

[Statutory Authority: RCW 39.19.030. WSR 17-13-020, § 326-20-160, filed 6/12/17, effective 8/1/17. Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 04-08-093, § 326-20-160, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-160, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-160, filed 10/28/83.]

**WAC 326-20-170 Decision.** The office shall notify the applicant business of its decision to grant or deny certification promptly after the decision has been made. The decision shall indicate whether the certification is for the state program, a federal program or both. Where the office has denied the application, the decision shall set forth the bases for denial. Where the office has denied certification because the business did not meet one or more of the eligibility criteria, this shall not preclude the office from later denying the application on additional bases after further review.

[Statutory Authority: RCW 39.19.030. WSR 17-13-020, § 326-20-170, filed 6/12/17, effective 8/1/17. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-170, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 85-07-006 (Order 85-2), § 326-20-170, filed 3/8/85. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-170, filed 10/28/83.]

**WAC 326-20-171 Denial of certification—Brief adjudicative proceeding.** (1) If the office has reached the conclusion that an application for certification should be denied, the office shall notify the applicant in writing of its denial of certification. Within twenty days of receipt of this notification, the applicant may request a brief adjudicative proceeding under WAC 326-08-012, Application for and conduct of brief adjudicative proceedings. The written request for a review of the decision must contain the information specified in subsection (2) of this section.

(2) A request for brief adjudicative proceeding must set forth in detail the reasons the applicant believes the office's decision to deny certification is in error and include any additional information and documentation the applicant has to offer.

(3) When an applicant requests a brief adjudicative proceeding, the finality of the denial for appeal purposes is stayed until the brief adjudicative proceeding is complete.

(4) Upon receipt of a timely request for a brief adjudicative proceeding the office will review any additional information provided by the applicant, and may conduct further investigation, and/or schedule a meeting with the applicant.

(5) The office will notify the applicant in writing of its decision either to affirm the denial or to grant certification.

[Statutory Authority: RCW 39.19.030. WSR 11-11-030, § 326-20-171, filed 5/11/11, effective 6/11/11. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-171, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-171, filed 4/18/88; WSR 86-17-018 (Order 86-2), § 326-20-171, filed 8/11/86.]

**WAC 326-20-172 Decertification of firms.** (1) A business may be decertified at any time the office determines that the business does not meet the current criteria for eligibility. A certified business shall notify the office, in writing, within thirty calendar days of any changes in its size, ownership, control, or operations. Failure to provide such notice in a timely manner may lead to decertification.

(2) When the office has determined that a certified business (a) no longer meets the certification criteria or (b) failed to supply additional information requested by the office in a timely manner, or (c) failed to give timely notice of changes, the office will provide the business with written notice of decertification.

(3) When a certified business notifies the office that it is no longer in business, has sold the business, or no longer wishes to remain certified, or when the certified business fails or refuses to return the renewal of certification form, the office will notify the business in writing of its decertification.

(4) Upon receipt of a notice of decertification letter, the business may request a brief adjudicative proceeding under WAC 326-08-012, Application for and conduct of brief adjudicative proceedings.

The request for brief adjudicative proceeding must be received by the office within twenty calendar days of receipt of the notice of decertification to the firm. The request for a brief adjudicative proceeding must set forth the reasons the business believes the office's decision to decertify is in error and must include any additional information and documentation the business has to offer.

(5) If the office has not received a request for a brief adjudicative proceeding nor any additional written documentation within twenty days of receipt of the notice of decertification letter, the decision to decertify becomes final, with no further rights to contest or appeal the decision.

(6) Upon receipt of the request for a brief adjudicative proceeding, the office will review the request and any additional information provided and may conduct further investigation and/or request that the owner(s) attend the brief adjudicative proceeding. The office will thereafter notify the business in writing of its decision to either affirm or reverse the firm's decertification.

(7) If the decision to decertify is appealed, the business shall remain certified until:

(a) The time provided by WAC 326-08-012 for appeal of the decision to decertify has expired without action by the business; or

(b) The entry of a final decertification order issued by the director pursuant to WAC 326-08-130.

(8) Decertification shall be effective immediately upon the occurrence of (a) or (b) of this subsection, and will not be stayed pending review by any court.

[Statutory Authority: RCW 39.19.030. WSR 11-11-030, § 326-20-172, filed 5/11/11, effective 6/11/11. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-172, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-172, filed 4/18/88; WSR 86-17-018 (Order 86-2), § 326-20-172, filed 8/11/86.]

**WAC 326-20-173 Expiration of certification upon death or disability of owner of certified business.** (1) Upon death or commencement of long-term disability of the minority, woman, or socially and economically disadvantaged owner of a certified business, the guardian of the disabled owner, the executor of the owner's estate, or other person shall notify the office in writing within thirty days of the death or documented disability. All notifications of long-term disability shall be documented by a statement from a qualified physician.

(2) "Long-term disability," for purposes of this section, shall mean the permanent inability to work, or inability to control the day-to-day operations of the business for a period of three consecutive months (ninety days or more), including both mental or physical incompetence.

(3) The certification of a business shall expire thirty days after receipt by the office of a notice of a death or documented disability of the owner of the business. Upon expiration of certification, the office shall notify the firm, in writing, that it has been decertified. The decertification decision will be considered final for purposes of WAC 326-08-015.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 04-08-093, § 326-20-173, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-173, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-22-017 (Order 88-9), § 326-20-173, filed 10/24/88.]

**WAC 326-20-180 Effect of certification.** Certification by OMWBE under the state program shall have the following effects:

(1) Certification shall entitle state agencies, educational institutions, and local government jurisdictions to count the business toward meeting their goals under this chapter, local legislation, and that require the participation of disadvantaged business enterprises. Certification shall be effective as of the date the decision is made in writing and will remain in effect for three years; except that the certification of DBEs shall be updated annually.

(2) Certification does not constitute compliance with any other laws or regulations, including contractor registration or prequalification, and does not relieve any business of its obligations under other laws or regulations. Certification does not constitute any determination by the office that the firm is responsible or capable of performing any work.]

(3) Certification as a minority business enterprise (MBE), minority woman [women's] business enterprise (MWBE), women's business enterprise (WBE), or combination business enterprise (CBE) satisfies the threshold requirement for a qualifying loan under RCW 43.86A.060 (2)(c).

[Statutory Authority: RCW 39.19.030, 43.86A.060, and 2007 c 500 §§ 1 and 2. WSR 08-03-116, § 326-20-180, filed 1/22/08, effective 2/22/08. Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 04-08-093, § 326-20-180, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-180, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-180, filed 4/18/88; WSR 84-09-002 (Order 84-5), § 326-20-180, filed 4/5/84. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-180, filed 10/28/83.]

**Reviser's note:** RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules, and deems ineffectual changes not filed by the agency in this manner. The bracketed material in the above section does not appear to conform to the statutory requirement.

**WAC 326-20-185 Renewal.** (1) State certification is valid for three years, unless:

(a) The office decertifies the firm; or

(b) The firm goes out of business or has a material change in ownership, which is considered more than a ten percent change in ownership.

(2) If the applicant submits a declaration of continued eligibility as outlined in subsection (5) of this section, the certification will remain valid during the time the office processes the affidavit and until the office notifies the firm of its decision.

(3) The office will generally renew the certification as long as the business continues to meet the eligibility criteria; the business provides evidence of some level of activity e.g., gross receipts or evidence of continuing efforts to promote the business; and there have

been no determinations that the business has violated chapter 39.19 RCW or its implementing rules in Title 326 WAC.

(4) Debarment of a business by the state or one or more federal agencies or local government jurisdictions may be grounds for nonrenewal of certification.

(5) Each certified business must submit a declaration of continued eligibility prior to the date of its three-year certification. The declaration form will be provided to the certified business at least sixty days before the date of its three-year certification. Failure to return the completed form within thirty days may lead to nonrenewal of certification.

(a) The office may ask for additional information or documentation on a case-by-case basis.

(b) For the first renewal after the enactment of this subsection, each eligible owner must submit a personal financial statement as outlined in WAC 326-20-049.

[Statutory Authority: RCW 39.19.030. WSR 17-13-020, § 326-20-185, filed 6/12/17, effective 8/1/17. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-185, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-185, filed 4/18/88; WSR 85-07-006 (Order 85-2), § 326-20-185, filed 3/8/85.]

**WAC 326-20-190 Directory of certified businesses.** The office will maintain a directory of businesses certified by the office for state projects and for federally funded projects.

[Statutory Authority: RCW 39.19.030. WSR 17-13-020, § 326-20-190, filed 6/12/17, effective 8/1/17. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-190, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 85-07-006 (Order 85-2), § 326-20-190, filed 3/8/85. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-190, filed 10/28/83.]

**WAC 326-20-220 Resubmission of applications.** (1) A business which withdraws its application and subsequently reapplies for certification within a year may be required to submit a new application and additional documentation at the discretion of the office. A business may not file more than two applications in any calendar year.

(2) A business which is denied certification, or has been decertified, will be required to submit a new application and may be asked to submit additional documentation. The office may waive the reapplication requirement for good cause.

(3) An applicant must wait one calendar year to reapply if denied certification.

(4) A business which makes a change in ownership, control, or organization of the business after denial or decertification is not entitled to appeal the denial or decertification on the basis of that change.

[Statutory Authority: RCW 39.19.030. WSR 17-13-020, § 326-20-220, filed 6/12/17, effective 8/1/17. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-220, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 86-17-018 (Order

86-2), § 326-20-220, filed 8/11/86. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-220, filed 10/28/83.]

**WAC 326-20-230 Factors considered in determining performance of commercially useful function.** (1) A business performs a commercially useful function when:

(a) The work to be performed by the business is within the scope of work included in the North American Industrial Classification System code(s) that the business is certified under or applying to be certified under.

(b) The business is or will be responsible for executing a distinct element of work in the performance of a contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved; and

(c) The business is responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (when applicable) and paying for the material itself.

(2) A business does not perform a commercially useful function when:

(a) Its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of participation. The agency will consider similar transactions in which certified firms do not participate to evaluate standard industry practice.

(b) It does not exercise responsibility for at least thirty percent of the total cost of its contract with its own workforce, or it subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved.

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 19-13-014, amended and recodified as § 326-20-230, filed 6/7/19, effective 7/8/19; WSR 04-08-093, § 326-02-045, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-02-045, filed 5/11/92, effective 6/11/92.]