

Chapter 326-40 WAC

AGENCY/EDUCATIONAL INSTITUTION OPERATING PROCEDURES

WAC

326-40-030 326-40-040	State agency and educational institution responsibilities. Contents of state agency and educational institution's plan.
326-40-050 326-40-060	Agency and educational institution reporting. Determining compliance and counting participation at time of bid opening.
326-40-070 326-40-080	Determination of commercially useful function. Substitutions in contracts requiring participation of certified businesses.
326-40-090 326-40-100	Timely certification. Joint venture approval.

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

326-40-010	Criteria for bid specifications—Monetary value. [Statutory Authority: RCW 39.19.030(7). 92-20-079 and 92-20-124, § 326-40-010, filed 10/6/92 and 10/7/92, effective 11/6/92 and 11/7/92. Statutory Authority: Chapter 39.19 RCW. 84-05-054 (Order 84-3), § 326-40-010, filed 2/22/84.] Repealed by 01-23-042, filed 11/15/01, effective 12/16/01. Statutory Authority: RCW 39.19-030.
326-40-020	Criteria for bid specifications—Averaging participation. [Statutory Authority: RCW 39.19.030(7). 92-20-079, § 326-40-020, filed 10/6/92, effective 11/6/92. Statutory Authority: Chapter 39.19 RCW. 85-07-006 (Order 85-2), § 326-40-020, filed 3/8/85; 84-05-054 (Order 84-3), § 326-40-020, filed 2/22/84.] Repealed by 01-23-042, filed 11/15/01, effective 12/16/01. Statutory Authority: RCW 39.19.030.

WAC 326-40-030 State agency and educational institution responsibilities. Each state agency and educational institution shall:

- (1) Adopt, update as necessary, and implement a plan for achieving the annual class of contract goals and ensuring that certified businesses are afforded the maximum practicable opportunity to directly and meaningfully participate in its contracts for public works and the procurement of goods, equipment, and services. The initial plan shall be filed with the office to be effective July 1, 1993.
- (2) Monitor its contractors and vendors at time of bid, proposal, or quote submittal, and after award, and take the appropriate action(s) as needed to enforce compliance with requirements set pursuant to chapter 39.19 RCW and the provisions of Title 326 WAC.
- (3) Waive the requirement for a performance bond on any public works project that does not exceed twenty-five thousand dollars awarded to a business certified by the office; Provided, That the agency or educational institution prequalifies the business using a limited questionnaire which assures:
 - (a) That the bidder has adequate financial resources or the ability to secure such resources;
 - (b) That the bidder can meet the performance schedule;
 - (c) That the bidder is experienced in the type of work to be performed; and

(11/15/01)

(d) That all equipment to be used is adequate and functioning and that all equipment operators are qualified to operate such equipment.

(4) Cooperate with the office and provide timely access to records and information as needed for the conduct of investigations or the preparation of reports.

(5) Make available to the office, expenditure data in such form and frequency as required in WAC 326-40-050.

[Statutory Authority: RCW 39.19.030. 94-11-118, § 326-40-030, filed 5/18/94, effective 6/18/94. Statutory Authority: RCW 39.19.030(7). 92-20-079 and 92-20-124, § 326-40-030, filed 10/6/92 and 10/7/92, effective 11/6/92 and 11/7/92.]

WAC 326-40-040 Contents of state agency and educational institution's plan. (1) Each plan shall include the following:

(a) A statement of commitment from the director or agency head to achieve the state's annual class of contract goals and to maximize opportunities for certified businesses to contract for public works and provide goods, equipment, and services;

(b) Identification of the person given the responsibility and authority to ensure implementation of the plan; and

(c) A listing of specific measures the agency or educational institution will take to increase participation of certified businesses.

(2) In addition to the requirements in paragraph (1) of this section, the plan for agencies with one hundred or more employees shall include detailed procedures for the following:

(a) Communicating the policy and appropriate procedures to all staff;

(b) Training of staff involved in implementation;

(c) Annual forecasting of contracting, procurement, other expenditure activity, and goalsetting by class of contract;

(d) Setting individual contract goals;

(e) Monitoring and ensuring compliance of contractors and vendors;

(f) Maintenance of records regarding contract awards, purchase orders, and other expenditures as required in this chapter;

(g) Regular provision of data to the office on all expenditures as required in WAC 326-40-050;

(h) Resolving disputes and investigating complaints; and

(i) Review and revision of contracting and procurement documents, policies, and practices which hinder or create barriers to successful implementation of the plan.

[Statutory Authority: RCW 39.19.030. 94-11-119, § 326-40-040, filed 5/18/94, effective 6/18/94. Statutory Authority: RCW 39.19.030(7). 92-20-079, § 326-40-040, filed 10/6/92, effective 11/6/92.]

WAC 326-40-050 Agency and educational institution reporting. (1) Each agency and educational institution is required to provide data to the office on all expenditures not specifically exempted or excluded by this chapter. The data shall be provided monthly on a schedule that corresponds to the schedule established by the office of financial management (OFM) for the transmission of data related to the state's financial statement.

(2) The format of the data shall be as follows:

- (a) Expenditure type identifier (1, 2, or 3).
- (b) Agency/educational institution number.
- (c) Contractor/vendor name.
- (d) Contractor/vendor federal tax number.
- (e) OFM-defined subobject code.
- (f) Dollar amount to contractor/vendor.
- (g) Contract number (when applicable).
- (h) Date.
- (i) Biennium.

(3) Statutory exemptions. In accordance with RCW 39.19.060, agencies and educational institutions will not be required to provide data on expenditures in the following object codes:

- A - SALARIES AND WAGES
- B - EMPLOYEE BENEFITS
- P - DEBT SERVICE
- S - INTERAGENCY REIMBURSEMENTS
- T - INTRA-AGENCY REIMBURSEMENTS
- W - DEPRECIATION, AMORTIZATION, AND BAD DEBTS (Proprietary Funds Only)
- X - OFM ADJUSTMENTS TO AGENCY DATA

(4) General exclusions. Agencies and educational institutions shall provide data on expenditures in certain subobjects for goods and services which are generally not obtained from the private, for-profit sector. Expenditures of this type will be excluded from the participation base in the calculation of goal attainment.

(5) Exceptions. Certain additional subobjects contain expenditures that legitimately should not be included in the formula for calculating goal attainment. The office shall provide specific guidance annually on the affected subobjects and the procedure to be followed by agencies and educational institutions for crediting such expenditures.

(6) The OFM-defined chart of accounts will be the source of definitions for objects and subobjects. The office shall provide specific guidance annually on the subobjects of expenditures required to be included in the data provided to the office.

[Statutory Authority: RCW 39.19.030(7), 92-20-079, § 326-40-050, filed 10/6/92, effective 11/6/92.]

WAC 326-40-060 Determining compliance and counting participation at time of bid opening.

(1) When a contract is to be awarded to a certified business that performs a commercially useful function as the prime contractor/consultant/vendor, the total contract value may be counted toward the contract goal according to the certification status of the business as follows:

- (a) Minority business enterprise (MBE): One hundred percent toward the MBE goal;
- (b) Women's business enterprise (WBE): One hundred percent toward the WBE goal;

(c) Minority woman business enterprise (MWBE): One hundred percent toward the MBE goal or the WBE goal, but not both;

(d) Combination business enterprise (CBE): Fifty percent toward the MBE goal and fifty percent toward the WBE goal. This procedure is to be used when the contract contains an either/or goal or separate goal requirements. When the contract contains only an MBE requirement or a WBE requirement, only one-half of the dollar value of the CBE's total participation may be counted toward the single goal. A state agency or educational institution will receive credit for the remaining fifty percent toward its annual goal attainment.

(2) When a contract is to be awarded to a joint venture that is approved pursuant to WAC 326-40-100, the dollar value of the portion of the work performed by the certified business may be counted, on a percentage basis, toward the contract goal as set forth in subparagraphs (1)(a-d) of this section; provided, the certified business performs a commercially useful function in the work of the contract.

(3) Subcontractors and subconsultants.

(a) When a certified business performs a commercially useful function as a subcontractor or subconsultant, the dollar value of the work performed by the certified business may be counted toward the contract goal as set forth in subparagraphs (1)(a-d) of this section.

(b) When a certified business is awarded a subcontract on a heavy construction, highway, or street construction project, expenditures to the certified business shall not be counted toward the contract goal if the business subcontracts more than twenty-five percent of the total amount of its own subcontract to a noncertified business.

(4) Suppliers.

Where a certified business is the manufacturer or a regular dealer of materials or supplies required under a contract, one hundred percent of the dollar value of the materials or supplies to be provided may be counted toward the contract goal according to the certification status of the business.

(5) Brokers.

Where a certified business is a broker of goods, materials or supplies required under a contract, effective June 6, 1996, the value of the goods, materials, or supplies will not be counted. Only the dollar value of the fee or commission charged or twenty percent of the total dollar value (five percent for food brokers) of the goods, materials, or supplies required for performance of the contract, whichever is greater, may be counted toward the contract goal according to the certification status of the business.

(6) Where a certified business is a hauler, trucker, or delivery service, but not also a regular dealer or the manufacturer of the materials or supplies required on the job site, only the dollar value of the fees charged to deliver the materials or supplies required may be counted toward the contract goal according to the certification status of the business.

(7) Where a certified business is a travel agency, or other business performing similar functions, twenty percent of the dollar value charged for providing a bona fide service in the procurement of transportation may be counted toward the contract goal according to the certification status of the business.

(8) Where a certified business provides bonds or insurance specifically required for the performance of a contract,

the dollar value charged for providing the bonds or insurance may be counted toward the contract goal according to the certification status of the business.

[Statutory Authority: RCW 39.19.030(7), 96-24-085, § 326-40-060, filed 12/3/96, effective 1/3/97; 94-07-064, § 326-40-060, filed 3/14/94, effective 4/14/94; 92-20-079 and 92-20-124, § 326-40-060, filed 10/6/92 and 10/7/92, effective 11/6/92 and 11/7/92.]

WAC 326-40-070 Determination of commercially useful function. Whether the work to be performed by a certified business listed in a bid or proposal to a state agency or educational institution is a commercially useful function, as defined in WAC 326-02-030(5), shall be determined by the state agency or educational institution making the award.

[Statutory Authority: RCW 39.19.030(7), 92-20-079, § 326-40-070, filed 10/6/92, effective 11/6/92.]

WAC 326-40-080 Substitutions in contracts requiring participation of certified businesses. (1) PRIME CONTRACTOR, VENDOR, OR CONSULTANT SUBSTITUTION.

(a) Prior to award of the contract: Where a certified business that is the apparent low bidder is decertified or indicates it is unable or unwilling to perform the contract prior to the award of the contract, the state agency or educational institution may follow its usual procedures for awarding to the next apparent low bidder, require the contractor to meet goals by obtaining other certified businesses, or rebid.

(b) After award of the contract to a certified prime contractor, vendor, or consultant, but prior to the start of the work: Where the business is decertified or indicates that it is unable or unwilling to perform the work after award of the contract, the agency or educational institution may follow its usual procedures for awarding to the next apparent low bidder, require the contractor to meet goals by obtaining other certified businesses, or rebid. The agency or educational institution, may, in its discretion, determine whether an increase in the amount of the contract will be allowed based on the substitution.

(c) After start of work by a certified prime contractor, vendor, or consultant, but prior to completion:

(i) Where the business is decertified after commencing the work and the agency or educational institution determines that substitution is impractical, the decertified contractor may continue to perform the work.

(ii) Where a certified prime contractor is unable or unwilling to complete the work, the agency or educational institution shall follow its usual procedures to seek performance of the contract, including the imposition of penalties or sanctions authorized by the contract and may pursue all other remedies allowed by law.

(2) SUBCONTRACTOR OR SUBCONSULTANT SUBSTITUTION.

(a) Prior to award of the contract: Where a certified business, selected as a subcontractor or subconsultant to meet the bid specifications, is decertified or indicates it is unable or unwilling to perform the work, the agency or educational institution shall require the contractor or consultant to substitute another certified business in the appropriate category, to meet the contract specifications. The replacement firm may perform the same work or a different part of the work.

(b) After award of the contract but prior to start of work by the prime contractor or consultant: Where a certified business, selected as a subcontractor or subconsultant to meet the bid specifications, is decertified or indicates it is unable or unwilling to perform the work, the agency or educational institution may require the contractor or consultant to substitute another certified business in the appropriate category to meet the contract specifications as stated in the original bid. The replacement firm may perform the same work or a different part of the work. The agency or educational institution, may, in its discretion, determine whether an increase in the amount of the contract will be allowed based on the substitution.

(c) After start of the work but prior to completion by the prime contractor or consultant: Where a certified business, selected as a subcontractor or subconsultant to meet the bid specifications, is decertified or indicates it is unable or unwilling to complete the work after the work has been started by the prime contractor or consultant, and the agency or educational institution determines it to be impractical to substitute another certified business to perform that work or any other portion of the work at that point, then the contractor or consultant shall not be required to substitute.

(3) REMEDIES. In the event of default by a bidder or contractor, the educational institutions and agencies retain the right to pursue appropriate legal remedies. Nothing herein shall be construed to give any business the right to unilaterally withdraw its bid or terminate the contract.

[Statutory Authority: RCW 39.19.030(7), 92-20-079, § 326-40-080, filed 10/6/92, effective 11/6/92.]

WAC 326-40-090 Timely certification. Where competitive bidding is utilized, only businesses certified at the time of the submission of bids or proposals may be counted toward individual contract goals. Where competitive bidding is not utilized, only businesses certified at the time of award may be counted: Provided, That businesses participating under the provisions in WAC 326-40-080 may also be counted.

[Statutory Authority: RCW 39.19.030(7), 92-20-079, § 326-40-090, filed 10/6/92, effective 11/6/92.]

WAC 326-40-100 Joint venture approval. (1) Requests for approval. Any joint venture involving a certified business which is to be counted toward contract participation goals shall request approval from the awarding state agency or educational institution. The request must:

(a) Be in writing;

(b) Be accompanied by a written joint venture agreement that conforms to the requirements of subsection (2) of this section; and

(c) Contain a statement that gives the approving agency or educational institution authority to audit the joint venture.

(2) Contents of joint venture agreement.

(a) The joint venture agreement must be signed under oath by each of the joint venturers. It shall specify the capital contribution made by each joint venturer, the control each will exercise, and the distribution of profit and loss. Each of these elements must be allocated in proportion to their contribution.

(b) The joint venture agreement must also identify the part of the work each joint venturer will do, which participant(s) are certified businesses, and their certification status. The work to be performed by the certified participant must be a commercially useful function.

(3) Time of request. A request for approval of a joint venture must be submitted and approved before the time fixed for bid opening for all contracts. If the joint venture is not approved, the agency shall award to the lowest responsive bidder or rebid.

(4) Effect of approval. An approved joint venture is approved only for one specific contract. Disbursement of funds to a certified business that is participating in an approved joint venture shall be counted toward contract goals in accordance with the provisions of WAC 326-40-060 (1)(e).

(5) Investigation. The agency or educational institution may request additional information from any enterprise seeking approval as a joint venture. Failure to provide the requested information shall result in the denial of the requested approval.

(6) Complaints. Complaints regarding the composition or validity of an approved joint venture shall be written and shall be made to the approving agency or educational institution and to the office. The agency or educational institution shall fully investigate each complaint and issue a written report of its findings. The report will be provided to the complainant and to the office. Concurrently, the office may investigate complaints pursuant to its rules and chapter 39.19 RCW.

[Statutory Authority: RCW 39.19.030(7), 92-20-079 and 92-20-124, § 326-40-100, filed 10/6/92 and 10/7/92, effective 11/6/92 and 11/7/92. Statutory Authority: Chapter 39.19 RCW, 84-09-002 (Order 84-5), § 326-40-100, filed 4/5/84.]