

WSR 24-13-121

PROPOSED RULES

DEPARTMENT OF TRANSPORTATION

[Filed June 20, 2024, 9:10 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 24-08-073.

Title of Rule and Other Identifying Information: Chapter 468-17 WAC, Small and veteran-owned business enforceable goals program.

Hearing Location(s): July 29, 2024, at 2:30 p.m., virtual hearing in Microsoft Teams https://bit.ly/WAC_468-17_07-29-24. To join the hearing, please use the web address shown for the location. For further details about joining a Microsoft Teams meeting, you can visit this web page <https://aka.ms/JoinTeamsMeeting?omkt=en-US>.

Date of Intended Adoption: August 5, 2024.

Submit Written Comments to: Jackie Bayne, P.O. Box 47314, 310 Maple Park Avenue S.E., Olympia, WA 98504-7314, email jackie.bayne@wsdot.wa.gov, fax 360-705-6801, 360-705-7090, beginning July 1, 2024, by July 22, 2024.

Assistance for Persons with Disabilities: Contact Jackie Bayne, phone 360-705-7084, fax 360-705-6801, TTY 711, email jackie.bayne@wsdot.wa.gov, by July 22, 2024.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The Washington state department of transportation (WSDOT) needs to adopt these rules to comply with the rules adopted by the office of minority and women's business enterprises (OMWBE) under chapter 39.19 RCW. These rules are intended to adopt the OMWBE public works small business certifications. These rules apply to WSDOT's contracting process to reduce and discourage discrimination in its contracting. In addition, WSDOT is increasing its small business goal from five percent up to 20 percent.

Reasons Supporting Proposal: The proposed changes are necessary to comply with the rules the OMWBE adopted which created a new certification, the public works small business enterprise (PWSBE) certification, and the phasing out of the small business enterprise certification. In addition, WSDOT is increasing its small business enterprise goal from five percent up to 20 percent to increase opportunities for PWSBE to participate in public works contracts.

Statutory Authority for Adoption: Chapter 39.19 RCW and RCW 47.28.030(3).

Statute Being Implemented: RCW 47.01.101 and 47.01.260.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: WSDOT, office of equity and civil rights, governmental.

Name of Agency Personnel Responsible for Drafting: Allison Spector, 310 Maple Park Avenue S.E., Olympia, WA 98501, 360-705-7091; Implementation and Enforcement: Jackie Bayne, 310 Maple Park Avenue S.E., Olympia, WA 98501, 360-705-7084.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. The proposed rule changes are exempt under RCW 34.05.328 (5)(b)(iii) as the proposed changes are being adopted to be in compliance with rules adopted by OMWBE under chapter 39.19 RCW. In addition, the proposed changes are exempt under RCW 34.05.328 (5)(b)(ii). The impact of these changes are limited to internal government operations as it only af-

fects goal setting and the certifications that are counted towards WSDOT's small business goals.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party; and rule content is explicitly and specifically dictated by statute.

Explanation of exemptions: The proposed rule changes are exempt as the proposed changes are being adopted to be in compliance with rules adopted by OMWBE under chapter 39.19 RCW. In addition, the impact of these changes are limited to internal government operations as it only affects goal setting and the certifications that are counted towards WSDOT's small business goals.

Scope of exemption for rule proposal:

Is fully exempt.

June 18, 2024
Sam Wilson, Director
Business Support Services

OTS-5512.2

AMENDATORY SECTION (Amending WSR 21-19-031, filed 9/10/21, effective 10/11/21)

WAC 468-17-030 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Award" means the formal decision by the department to accept a bid and the intent to enter into a contract with the bidder.

(2) "Commercially useful function" means the activity conducted by a firm responsible for the execution of the work of the contract and that is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the firm must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. Additional requirements are discussed in WAC 468-17-060.

(3) "Condition of award (COA)" means that a prime contractor or consultant, on a design-bid-build or consultant agreement, commits to subcontracting with a public works small business enterprise (~~((SBE))~~) (PWSBE) or veteran-owned business (VOB). On design-build or general contractor/construction manager contracts, all (~~((SBEs))~~) (PWSBEs) and VOBs in the quarterly small and veteran business plans are considered COA firms.

(4) "Consultant agreement" means a contract entered into by a public body for architectural and engineering services (performed pursuant to chapter 39.80 RCW) with another party, i.e., an independent individual or firm, in which the other party agrees to perform a service, render an opinion, or recommendations according to the consul-

tant's methods and without being subject to the control of the public body except as to the result of the work.

(5) "Contract goal" means a percentage of the contract amount the prime contractor or prime consultant must meet with (~~small, mini, micro~~) PWSBE and veteran-owned businesses.

(6) "Department" means the Washington state department of transportation (WSDOT).

(7) "Design-bid-build (DBB) contract" means a contract between a public body and another party in which the public body contracts separately with a designer and a contractor for the design and construction of a facility, portion of the facility, or other item specified in the contract. Designers and contractors bear no contractual obligation to one another under a DBB contract.

(8) "Design-build (DB) contract" means a contract between a public body and another party in which the party agrees to both design and build the facility, portion of the facility, or other item specified in the contract as defined in chapter 39.10 RCW.

(9) "General contractor/construction manager (GC/CM)" means a contract between a public body and another party in which the party agrees to both build and manage the construction of the facility, portion of the facility, or other item specified in the contract as defined in chapter 39.10 RCW.

(10) "Good faith efforts (GFE)" means efforts to achieve a goal or other requirement of this chapter which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement. GFE is not necessary when a contract goal has been met.

(11) (~~"Mini-business" means any business that:~~

~~(a) Is owned and operated independently from all other businesses;~~

~~(b) Has a gross revenue of less than three million dollars annually as reported on its federal tax return or on its return filed with the department of revenue;~~

~~(c) Is self-certified as a "mini-business" through the Washington state department of enterprise services (DES); and~~

~~(d) Is listed as a "mini-business" on the Washington electronic business service (WEBS).~~

~~(12) "Micro-business" means any business that:~~

~~(a) Is owned and operated independently from all other businesses;~~

~~(b) Has a gross revenue of less than one million dollars annually as reported on its federal tax return or on its return filed with the department of revenue;~~

~~(c) Is self-certified as a "micro-business" through the Washington state department of enterprise services (DES); and~~

~~(d) Is listed as a "micro-business" on the WEBS.~~

~~(13))~~ "Public works small business enterprise (PWSBE)" means a business certified by the office of minority and women's business enterprises, pursuant to WAC 326-20-087.

(12) "Quarterly small and veteran business plans" means documents design-builders are required to submit which outline the strategies the organization will be utilizing to meet the established contract goals.

~~((14) "Small business enterprise (SBE)" means an in-state business that:~~

~~(a) Is owned and operated independently from all other businesses and has either:~~

~~(i) Fifty or fewer employees; or
(ii) A gross revenue of less than seven million dollars annually as reported on its federal income tax return or its return filed with the department of revenue over the previous three consecutive years; or~~

~~(b) Is self-certified as a "small business enterprise (SBE)" through the Washington state department of enterprise services and is listed as a SBE on the WEBS.~~

~~(15))~~ (13) "Tiered participation" means the amount of additional contract goal credit the prime contractor or prime consultant may receive for using ((SBE)) PWSBE and VOBs of different designations, as detailed in WAC 468-17-080.

~~((16))~~ (14) "Veteran-owned businesses (VOB)" means a business certified by the Washington state department of veterans affairs, pursuant to RCW 43.60A.190.

AMENDATORY SECTION (Amending WSR 21-19-031, filed 9/10/21, effective 10/11/21)

WAC 468-17-050 Goals. On solely state-funded projects, the small and veteran business goals for participation of public works small and veteran-owned enterprises shall be as directed by the department or other state agencies conducting disparity studies. Presently these goals are set as follows:

- (1) Veteran business goal of five percent; and
- (2) Public works small business enterprise goal of ~~((five))~~ up to 20 percent.

AMENDATORY SECTION (Amending WSR 21-19-031, filed 9/10/21, effective 10/11/21)

WAC 468-17-060 Commercially useful function. Under the enforceable goals program, commercially useful function (CUF) restrictions apply to all ~~((SBEs, mini-businesses, micro-businesses))~~ PWSBEs and VOBs. These businesses must perform a CUF in order for their participation to be counted against any goal. A business performs a CUF when it is both responsible for the execution of the work of the contract and it meets its responsibility under the contract by actually performing, managing, and supervising the work involved. If any materials or supplies are needed to perform the contract, the business must negotiate price, determine quality and quantity, order the material, install (if applicable), and pay for those materials or supplies itself.

Additional considerations when making a determination on a CUF are as follows:

(1) A ~~((SBE, VOB, micro-business or mini-business))~~ PWSBE or VOB does not perform a CUF if its role is limited to that of an extra participant in a transaction or contract or it is involved in a project for the purposes of creating a semblance of ~~((SBE, VOB, micro-business or mini-business participation))~~ PWSBE or VOB.

(2) Other relevant factors that may be considered when evaluating whether a ~~((SBE, VOB, micro-business or mini-business))~~ PWSBE or VOB is performing a CUF include industry practices, the amount of work

subcontracted and whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing.

(3) In addition, a business that functions as a supplier shall:

(a) Be the manufacturer of the goods or materials or assume the actual and contractual responsibility for furnishing the goods or materials and executing material changes in the configuration of those goods or materials; or

(b) Secure a contract or distributor agreement with a manufacturer to act as an independent authorized representative capable of passing on product warranties to the purchaser.

(4) Factors which may indicate that a supplier is not performing a commercially useful function include, but are not limited to, the following:

(a) A minimum amount of inventory is not maintained;

(b) Billing and shipping arrangements are performed by nonowners or staff of nonowners;

(c) A significant amount of deliveries are shipped directly from the producer or manufacturer to the end user;

(d) The firm does not take ownership of the product.

AMENDATORY SECTION (Amending WSR 19-12-026, filed 5/29/19, effective 6/29/19)

WAC 468-17-070 Mandatory small and veterans' business program.

Public works small business enterprises and veteran-owned businesses intending to benefit from the small and veteran-owned business enforceable goals program must attain a ((SBE)) PWSBE certification from OMWBE, or a VOB certification from the Washington department of veteran's affairs (~~(, or be self-certified as a SBE, mini-business, or micro-business through the WEBS)~~).

AMENDATORY SECTION (Amending WSR 19-12-026, filed 5/29/19, effective 6/29/19)

WAC 468-17-080 Tiered participation in state goals.

(1) When WSDOT has determined tiered participation will be available on a contract, a prime contractor, design-builder, general contractor/construction manager or consultant may meet the small and veteran business goals by using any combination of qualified contractors or consultants (i.e., VOB or small business contractors including ((~~SBEs, mini-businesses and micro-businesses~~)) PWSBEs). Prime contractors may receive a multiplied credit for utilizing businesses that fall into certain categories. The categories and respective multipliers are as follows:

(a) Category A. ((~~SBEs, mini-businesses, micro-businesses~~)) PWSBEs and VOBs that have not worked with WSDOT in the past five years may be credited at four times the actual dollars paid.

(b) ((~~Category B. A micro-business not eligible for credit as defined in category A may be credited at three times the actual dollars paid.~~

(c) ~~Category C. A mini-business not eligible for credit as defined in category A or B may be credited at two times the actual dollars paid.~~

~~(d))~~ Category ~~((D. SBEs))~~ B. PWSBEs and VOBs that are not eligible for a credit as defined in categories A, B or C will be credited at the actual dollars paid with no additional multiplier.

(2) Prime and subcontractors are responsible for verifying their eligibility for tiered credit participation. Eligible firms submitting multiple quotes as categories A, B, C, and D firms, on multiple projects with bids due on the same week, shall be regarded as such on all projects that receive awards from quotes entered on that week.

AMENDATORY SECTION (Amending WSR 21-19-031, filed 9/10/21, effective 10/11/21)

WAC 468-17-090 Small and veteran business plans. (1) Prime contractors, design-builders, general contractors/construction managers and consultants must submit a small and veterans' business plan that specifies how the contractor will meet ~~((SBE))~~ PWSBE and VOB participation goals, prior to the award of any contract. The small and veteran business plan for design-bid-build and consultant contracts must list all of the ~~((SBEs, VOBs, micro-businesses or mini-businesses))~~ PWSBEs or VOBs that will participate in the contract; a description of the work that each ~~((SBE, VOB, micro-business or mini-business))~~ PWSBE or VOB will perform; the dollar amount of the participation of each ~~((SBE, VOB, micro-business or mini-business))~~ PWSBE or VOB; the contractor's written commitment to use the ~~((SBE, VOB, micro-business or mini-business))~~ PWSBE or VOB submitted; and written confirmation from each ~~((SBE))~~ PWSBE or VOB firm that it is participating in the contract in the kind and amount of work provided in the inclusion plan. The small and veteran business plan for design-build and general contractor/construction manager contracts must list in detail the contractor's means and methods that it will use to meet the goal and a commitment by the contractor to attempt to meet the goal. If the total ~~((SBE))~~ PWSBE and VOB participation in the small and veteran business plan does not meet the goal, then the contractor must also submit evidence of good faith efforts (GFEs). A contractor may be awarded a project only after WSDOT has approved its small and veteran business plan or confirmed its GFEs. Revisions of small and veteran business plans may be necessary prior to plan approvals.

(2) Quarterly small and veteran business plans are required for design-build and general contractor/construction manager projects. The first quarterly small and veteran business plan shall be submitted prior to contract award and must be approved by the department prior to contract execution. Subsequent small and veteran business plans must include information, as applicable, regarding:

- (a) Small and veteran business goal attainment;
- (b) A list all of the ~~((SBEs, VOBs, mini-businesses or micro-businesses))~~ PWSBEs or VOBs that have been contracted to date;
- (c) A description of the work that each ~~((SBE, VOB, micro-business or mini-business))~~ PWSBE or VOB will perform;
- (d) The dollar amount of the participation of each ~~((SBE, VOB, micro-business or mini-business))~~ PWSBE or VOB;
- (e) The contractor's written commitment to use the ~~((SBE, VOB, micro-business or mini-business))~~ PWSBE or VOB submitted;
- (f) Written confirmation from each ~~((SBE, VOB, micro-business or mini-business))~~ PWSBE or VOB firm that it is participating in the con-

tract in the kind and amount of work provided in the small and veteran business plan;

- (g) Corrective actions necessary to meet the established goals;
- (h) Outreach strategies;
- (i) Innovative approaches to secure goal(s); and
- (j) Other evidence of GFES to meet the contract goal.

AMENDATORY SECTION (Amending WSR 19-12-026, filed 5/29/19, effective 6/29/19)

WAC 468-17-100 Good faith efforts. The efforts employed by the prime contractor, design-builder, or consultant should be commercially reasonable and should demonstrate that they are actively and aggressively trying to fulfill the established small and veteran business goals. Mere pro forma efforts are not commensurate with good faith efforts. Actions that may be considered as part of good faith efforts to achieve small and veteran business goals include, but are not limited to:

- (1) Identification of interested small and veteran-owned firms that have the capability to perform the work of the contract;
- (2) Providing reasonable time for (~~(SBE, VOB, mini-businesses and micro-businesses)~~) PWSBE or VOB to fully and meaningfully respond to bid solicitations, that includes providing adequate information about the plans, specifications, and requirements of the contract along with timely responses to subcontractor inquiries and proposals;
- (3) Apportioning contract work items into economically feasible units to facilitate (~~(SBE, VOB, micro-business or mini-business)~~) PWSBE or VOB participation and where possible, establishing flexible time frames for performance to encourage participation;
- (4) Effectively using the services of available veteran and small business community organizations, contractors' groups, local and state support offices, and other organizations in the recruitment and placement of targeted firms;
- (5) Adequately researching interested subcontractors and their capabilities before rejecting their proposals;
- (6) Not relying on price alone in the selection of subcontractors and considering reasonable quotes from (~~(SBE, VOB, micro-business or mini-business)~~) PWSBE or VOB, even if other quotes are less expensive.

AMENDATORY SECTION (Amending WSR 19-12-026, filed 5/29/19, effective 6/29/19)

WAC 468-17-110 Overhead reimbursement. WSDOT may reimburse each prime contractor or consultant five percent of the actual amount that the prime contractor or consultant paid to (~~(SBEs, VOBS, micro-businesses or mini-businesses)~~) PWSBEs or VOBS and that is counted toward the goal. This overhead reimbursement is available only on construction projects, is to be based on actual dollars paid, excludes multiplier credits, and may not exceed (~~(one hundred thousand dollars)~~) \$100,000 for any prime contractor or consultant in a single calendar year. Overhead reimbursement payments will be made only after a contractor has fulfilled its small and veteran business goals. Reimbursement payments will not be paid to contractors for partial completion

of aforementioned goals. No contractor may receive an overhead reimbursement if it meets the contract goal using work performed with its own forces.