

Title 326 WAC

MINORITY AND WOMEN'S BUSINESS ENTERPRISES, OFFICE OF

Chapters

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DISPOSITION OF CHAPTERS FORMERLY CODIFIED IN THIS TITLE

Chapter 326-06 PUBLIC RECORDS RULES AND REGULATIONS FOR THE OFFICE OF MINORITY AND WOMEN'S BUSINESS ENTERPRISES

326-06-010	Purpose. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-06-010, filed 4/5/84.] Repealed by 92-24-107, filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).
326-06-020	Definitions. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-06-020, filed 4/5/84.] Repealed by 92-24-107, filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).
326-06-030	Description of office organization. [Statutory Authority: Chapter 39.19 RCW. 85-14-101 (Order 85-6), § 326-06-030, filed 7/2/85; 84-09-002 (Order 84-5), § 326-06-030, filed 4/5/84.] Repealed by 92-24-107, filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).
326-06-040	Operations and procedures. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-06-040, filed 4/5/84.] Repealed by 92-24-107, filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).
326-06-050	Public records available. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-06-050, filed 4/5/84.] Repealed by 92-24-107, filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).
326-06-060	Public records officer. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-06-060, filed 4/5/84.] Repealed by 92-24-107, filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).
326-06-070	Office hours. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-06-070, filed 4/5/84.] Repealed by 92-24-107, filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).
326-06-080	Requests for public records. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-06-080, filed 4/5/84.] Repealed by 92-24-107, filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).
326-06-090	Copying. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-06-090, filed 4/5/84.] Repealed by 92-24-107, filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).
326-06-100	Exemptions. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-06-100, filed 4/5/84.] Repealed by 92-24-107, filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).
326-06-110	Review of denials of public records request. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-06-110, filed 4/5/84.] Repealed by 92-24-107,

filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).

Protection of public records. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-06-120, filed 4/5/84.] Repealed by 92-24-107, filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).

Records index. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-06-130, filed 4/5/84.] Repealed by 92-24-107, filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).

Communications with the agency. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-06-140, filed 4/5/84.] Repealed by 92-24-107, filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).

Request for public record—Form. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-06-160, filed 4/5/84.] Repealed by 92-24-107, filed 12/2/92, effective 1/2/93. Statutory Authority: RCW 39.19.030(7).

Chapter 326-02 WAC GENERAL PROVISIONS

WAC

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WAC 326-02-010 Purpose. The purpose and intent of chapter 120, Laws of 1983, and of Title 326 WAC is to provide the maximum practicable opportunity for increased participation by minority, women, and socially and economically disadvantaged-owned and controlled businesses in public works and the process by which goods and services are procured by state agencies and educational institutions from the private sector. This purpose will be accomplished by encouraging the full use of existing minority, women, and socially and economically disadvantaged-owned and controlled businesses and the entry of new and diversified minority, women, and socially and economically disadvantaged-owned and controlled businesses into the marketplace. These rules shall be applied and interpreted to promote this purpose.

[Statutory Authority: RCW 39.19.030 and 39.19.120. 04-08-093, § 326-02-010, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-02-010, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7). 83-22-045 (Order 83-3), § 326-02-010, filed 10/28/83.]

WAC 326-02-020 Applicability. Title 326 WAC applies to all applications for certification and to all public works and procurement by state agencies and educational institutions: Provided, That this title does not apply where it is found to be in conflict with federal requirements which are a prescribed condition to the allocation of federal funds to the state. In such a case, the conflicting portions of this chapter are inoperative solely to the extent of the conflict and with respect to the agencies directly affected.

[Statutory Authority: RCW 39.19.030(7), 92-11-007, § 326-02-020, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7), 83-22-045 (Order 83-3), § 326-02-020, filed 10/28/83.]

WAC 326-02-030 Definitions. Words and terms used in this title shall have the same meaning as each has under chapter 120, Laws of 1983, unless otherwise specifically provided in this title, or the context in which they are used clearly indicates that they should be given some other meaning.

(1) "Advisory committee" means the advisory committee on minority, women, and socially and economically disadvantaged individual's business enterprises.

(2) "Broker" means a person that provides a bona fide service, such as professional, technical, consultant, brokerage, or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials, or supplies required for performance of a contract.

(3) "Certified business" or "certified" means a business or the status of a business that has been examined by the Washington state office of minority and women's business enterprises and deemed to be a minority business enterprise (MBE), a women's business enterprise (WBE), a minority woman's business enterprise (MWBE), a combination business enterprise (CBE), or socially and economically disadvantaged business enterprise (SEDBE).

(4) "Class of contract basis" means an entire group of contracts having a common characteristic. Examples include, but are not limited to, personal service contracts, public works contracts, leases, purchasing contracts, and contracts for specific types of goods and/or services.

(5) "Combination business enterprise" or "CBE" means a small business concern organized for profit, performing a commercially useful function, that is fifty percent owned and controlled by one or more minority men or MBEs certified by the office and fifty percent owned and controlled by one or more nonminority women or WBEs certified by the office. The owners must be United States citizens or lawful permanent residents.

(6) "Commercially useful function" means the performance of real and actual services which are integral and necessary in the discharge of any contractual endeavor, and not solely for the purpose of obtaining certification or obtaining credit for participation goal attainment.

(7) "Common industry practices" means those usages, customs, or practices which are ordinary, normal, or prevalent among businesses, trades, or industries of similar types engaged in similar work in similar situations in the community.

(8) "Conduit" means a certified business which agrees to be named as a subcontractor on a contract in which such certified business does not perform the work but, rather, the

work is performed by the prime contractor, prime consultant, material supplier, purchasing contractor, or any other noncertified business.

(9) "Contract" means a mutually binding legal relationship (including a purchase order, lease, or any modification thereof), which obligates the seller to furnish goods or services (including construction), and the buyer to pay for them.

(10) "Contract by contract basis" means a single contract within a specific class of contracts.

(11) "Contractor" means a party who enters into a contract directly with a state agency or educational institution.

(12) "Corporate-sponsored dealership" means a business that does not meet the requirements for certification but is participating in a program specifically developed by a national or regional corporation to address the present-day issue of lack of opportunities for minorities or women in the dealership industry.

(13) "Director" means the director of the office of minority and women's business enterprises.

(14) "Economically disadvantaged individuals" means socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(15) "Educational institutions" means the state universities, the regional universities, The Evergreen State College, and the community colleges.

(16) "Front" means a business which purports to be eligible for certification but is not in fact legitimately owned and controlled by minorities, women, socially and economically disadvantaged individuals, or a combination thereof.

(17) "Goods and/or services" means all goods and services, including professional services.

(18) "Graduation" means the business is no longer certified because it is no longer a small business concern.

(19) "Heavy construction" means construction other than building construction; e.g., highway or street, sewer and pipeline, railroad, communication and power line, flood control, irrigation, marine, etc.

(20) "Joint venture" means a partnership of two or more persons or businesses created to carry out a single business enterprise for profit, for which purpose they combine their capital, efforts, skills, knowledge or property and in which they exercise control and share in profits and losses in proportion to their contribution to the enterprise.

(21) "Legitimately owned and controlled" means that minorities, women, socially and economically disadvantaged individuals, or a combination thereof, own at least fifty-one percent interest in the business (unless the business qualifies as a corporate sponsored dealership under the provisions of subsection (12) of this section and WAC 326-20-050(4)); and the minorities, women, socially and economically disadvantaged individuals, or combination thereof, possess and exercise sufficient expertise specifically in the firm's field of operation to make decisions governing the long-term direction and the day-to-day operations of the firm.

(22) "Manufacturer" means a business which owns, operates, or maintains a factory or establishment that produces or creates goods from raw materials or substantially alters goods before reselling them.

(23) "Minority" means a person who is a citizen or lawful permanent resident of the United States and who is:

(a) Black: Having origins in any of the black racial groups of Africa;

(b) Hispanic: Of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(c) Asian American: Having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands; or

(d) American Indian or Alaskan Native: Having origins in any of the original peoples of North America.

(24) "Minority business enterprise," "minority-owned business enterprise," or "MBE" means a small business concern, organized for profit, performing a commercially useful function, which is legitimately owned and controlled by one or more minority individuals or minority business enterprises certified by the office. The minority owners must be United States citizens or lawful permanent residents.

(25) "Minority women's business enterprise" or "MWBE" means a small-business concern, organized for profit, performing a commercially useful function, which is legitimately owned and controlled by one or more minority women and is certified by the office. The owners must be United States citizens or lawful permanent residents.

(26) "Office" means the office of minority and women's business enterprises of the state of Washington.

(27) "Pass-through" means a certified business which buys goods from a noncertified business and simply resells those goods to the state, state contractors or other persons doing business with the state for the purpose of allowing those goods to be counted towards fulfillment of WBE or MBE goals.

(28) "Person" means one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons.

(29) "Personal net worth" means the socially and economically disadvantaged individual's net personal assets and liabilities, excluding an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence. If the statement of personal net worth that an individual submits shows that the individual's personal net worth exceeds seven hundred fifty thousand dollars, the individual's economic disadvantage is rebutted.

(30) "Procurement" means the purchase, lease, or rental of any goods or services.

(31) "Public works" means all work, including construction, highway and ferry construction, alteration, repair, or improvement other than ordinary maintenance, which a state agency or educational institution is authorized or required by law to undertake.

(32) "Regular dealer" means a certified business that owns, operates, or maintains a store, warehouse or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business.

(33) "Services" in the context of "goods and/or services," means all services including, but not limited to, client services, personal services, and purchased services as defined in RCW 39.29.006.

(34) "Socially disadvantaged individuals" means those individuals who have been subjected to racial or ethnic prejudice or cultural bias, gender, disability, long-term residence in an isolated environment, or other similar causes negatively impacting entry into or advancement in the business world within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control.

(35) "Socially and economically disadvantaged business enterprise" or "SEDBE" means a small-business concern, organized for profit, performing a commercially useful function, which is legitimately owned and controlled by one or more socially and economically disadvantaged individuals or socially and economically disadvantaged business enterprises certified by the office. The socially and economically disadvantaged owners must be United States citizens or lawful permanent residents.

(36) "Socially and economically disadvantaged individual" means a person who is a citizen or lawful permanent resident of the United States and who is:

(a) Found to be a socially and economically disadvantaged individual on a case-by-case basis by OMWBE; or

(b) A member of one of the following groups that are presumed to be socially and economically disadvantaged:

(i) Minority;

(ii) Women;

(iii) Any additional groups whose members are designated as socially and economically disadvantaged by the U.S. Small Business Administration (SBA), at such time as the SBA designation becomes effective.

(37) "State agency" includes the state of Washington and all agencies, departments, offices, divisions, boards, commissions, and correctional and other types of institutions. "State agency" does not include the judicial or legislative branches of government except to the extent that procurement or public works for these branches is performed by a state agency.

(38) "Subcontractor" means a party that indirectly provides goods or services, including but not limited to construction, to a state agency or educational institution through a contractor.

(39) "Supplier" means a manufacturer or regular dealer that:

(a) Provides or furnishes goods or materials;

(b) Performs a commercially useful function; and

(c) Is not considered a conduit, front, pass-through or broker.

(40) "Switch business" means a business which was previously owned and controlled by a man, men or nonminorities, or individuals who are not socially and economically disadvantaged, which has made technical changes to its business structure so that it is now purportedly owned and controlled by a woman or women or by a minority person or persons, or by a socially and economically disadvantaged individual or individuals, but continues to operate in substantially the same manner as it did prior to the written revisions of the business structure.

(41) "Women's business enterprise," "women-owned business enterprise," or "WBE" means a small business concern, organized for profit, performing a commercially useful function, which is legitimately owned and controlled by one

or more women or women's business enterprises certified by the office. The women owners must be United States citizens or lawful permanent residents.

[Statutory Authority: RCW 39.19.030 and 39.19.120. 04-08-093, § 326-02-030, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). 96-24-085, § 326-02-030, filed 12/3/96, effective 1/3/97. Statutory Authority: RCW 39.19.030. 94-11-116, § 326-02-030, filed 5/18/94, effective 6/18/94. Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-02-030, filed 12/2/92, effective 1/2/93; 92-11-007, § 326-02-030, filed 5/11/92, effective 6/11/92; 89-24-047, § 326-02-030, filed 12/1/89, effective 1/1/90. Statutory Authority: Chapter 39.19 RCW. 88-12-060 (Order 88-5), § 326-02-030, filed 5/31/88; 88-08-031 (Order 88-4), § 326-02-030, filed 4/1/88; 87-18-030 (Order 87-6), § 326-02-030, filed 8/27/87; 86-17-018 (Order 86-2), § 326-02-030, filed 8/11/86; 85-14-101 (Order 85-6), § 326-02-030, filed 7/2/85; 84-09-002 (Order 84-5), § 326-02-030, filed 4/5/84. Statutory Authority: 1983 c 120 § 3(7). 83-22-045 (Order 83-3), § 326-02-030, filed 10/28/83.]

WAC 326-02-031 Office of minority and women's business enterprises account—Created—Purpose. The office of minority and women's business enterprises account is created in the custody of the state treasurer for the purpose of defraying costs of the office in administering chapter 39.19 RCW. Only the director or the director's designee may authorize expenditures from the account. Money in the account may be spent only after appropriation. The revolving fund account is subject to the allotment procedures provided under chapter 43.88 RCW. The director of the office of financial management shall prescribe appropriate accounting procedures to accurately record payments to the fund from businesses, state agencies and educational institutions, and political subdivisions and expenditures from the fund.

[Statutory Authority: 1993 c 195. 93-16-080, § 326-02-031, filed 8/3/93, effective 9/3/93.]

WAC 326-02-033 State agency and educational institution fees. The office shall charge a fee to each state agency and educational institution to assist in the support of the state's minority and women's business enterprise program. The fee will be apportioned according to the state agency and educational institution's expenditure level of funds which are subject to chapter 39.19 RCW and Title 326 WAC.

State agency and educational institution's charges that are five-hundred dollars or less will be billed once in a biennium. Charges over five hundred dollars will be billed at least yearly to limit administrative expenditures. The office will submit invoices to state agencies and educational institutions and payments will be due on or before July 15 unless, the state agency or educational institution is billed more frequently than yearly.

[Statutory Authority: 1993 c 195. 93-16-080, § 326-02-033, filed 8/3/93, effective 9/3/93.]

WAC 326-02-034 Political subdivision fees. (1) It is the intent of the state legislature that political subdivisions within the state of Washington contribute to the costs of the state's certification program for minority and women's business enterprises. For the purpose of this section, political subdivisions means any city, town, county, special purpose district, public corporation created by the state, municipal corporation, or quasi-municipal corporation within the state of Washington that administers a policy or program, or funds from whatever source, which requires or encourages the use

of certified minority, women, or disadvantaged business enterprises.

(2) Effective July 1, 1993, the office shall allocate a portion of its biennial operational costs to political subdivisions. Each political subdivision shall pay a proportionate share of this allocation based on the formula set forth in subsection (4) of this section.

(3)(a) The fee charged to each political subdivision for the period, July 1, 2003 - June 30, 2005, and subsequent bienniums unless revised by rule, shall be based on the annual average of expenditures for capital projects, supplies and other services for fiscal years 1999-2001 as reflected in the state auditor's on-line BARS report, when available. Data on the annual average of capital expenditures by the transit districts during the relevant period will be taken from a report produced by the Washington state department of transportation entitled, *2001 Summary of Public Transportation Systems in Washington State*. Data on the annual average of expenditures by school districts and educational service districts will be obtained from the office of the superintendent of public instruction. The basis for the fee to be charged to the Housing Authorities is the number of low-income units owned or managed during the last fiscal year as reported to the U.S. Department of Housing and Urban Development. The maximum amount charged to any political subdivision shall not exceed \$40,000.00 in a single biennium.

(b) For the biennium beginning July 1, 2005, and subsequent biennia, similar data reflecting expenditures during the previous biennium or in the case of Housing Authorities, the average number of low-income units owned or managed during the previous biennium will be used to calculate the fee charged to each political subdivision.

(c) When insufficient data is available to calculate the average expenditures from the sources listed in (a) of this subsection, the office may either use other sources for the data or estimate the amount of relevant expenditures. In either event, the office shall allow the affected political subdivisions to offer alternative data on which to base its calculation. New political subdivisions will be charged based on the office's estimate of the annual average of relevant expenditures by the entity for the current biennium.

(d) After paying the fee, the political subdivisions may challenge the office about the accuracy of the data used to calculate the fee under (b) of this subsection. Upon verification by the state auditor, the fee may be revised and refund issued or additional fee assessed.

(e) Following the initial billing in each biennium, which will include the total amount due for the biennium beginning July 1, 2003, the office will mail invoices on a quarterly basis one month before the start of each quarter for the outstanding balance at that time. Payments shall be due within thirty calendar days after receipt of the invoice.

(4)(a) The following formula will be used to calculate the fees:

For the annual average of expenditures ranging from \$1m - \$50.99m, a sliding scale as follows: (\$1m - \$10m = \$100; \$11m - \$20m = \$150; \$21m - \$30m = \$200; \$31m - \$40m = \$250; \$41m - \$50m = \$300). For \$51m - \$99.99m, the formula will be the annual average of expenditures multiplied by .0001. At \$100m, a sliding scale resumes; beginning at \$10k and increasing in incre-

ments of \$5k for each additional \$100m in the annual average of expenditures; e.g., \$200m - \$299m = \$15k; \$300m - \$399m = \$20,000; etc. Fees will not be charged to any political subdivision with an average annual expenditure totaling less than \$1m during the period under review.

(b) The fee to Housing Authorities will be \$1 per low-income unit owned or managed during the last fiscal year.

(5) The office shall develop a policy and procedure for collection of any invoice that is not paid within thirty calendar days. The office shall distribute the collection policy and procedure to all political subdivisions along with the initial and quarterly billings.

[Statutory Authority: RCW 39.19.220. 04-13-032, § 326-02-034, filed 6/9/04, effective 7/10/04. Statutory Authority: RCW 39.19.030(17). 98-13-075, § 326-02-034, filed 6/15/98, effective 7/16/98. Statutory Authority: RCW 39.19.030(7). 97-17-045, § 326-02-034, filed 8/14/97, effective 9/15/97. Statutory Authority: RCW 39.19.220. 94-11-113, § 326-02-034, filed 5/18/94, effective 6/18/94.]

WAC 326-02-040 Prohibited activities with regard to chapter 39.19 RCW. (1) RCW 39.19.080 makes it unlawful for a person, firm, corporation, business, union, or other organization to:

(a) Prevent or interfere with a contractor's or subcontractor's compliance with this chapter, or any rule adopted under this chapter;

(b) Submit false or fraudulent information to the state concerning compliance with this chapter or any such rule;

(c) Fraudulently obtain, retain, attempt to obtain or retain, or aid another in fraudulently obtaining or retaining or attempting to obtain or retain certification as a minority, women, or socially and economically disadvantaged individual's business enterprise for the purpose of this chapter;

(d) Knowingly make a false statement, whether by affidavit, verified statement, report, or other representation, to a state official or employee for the purpose of influencing the certification or denial of certification of any entity as a minority, women, or socially and economically disadvantaged individual's business enterprise;

(e) Knowingly obstruct, impede, or attempt to obstruct or impede any state official or employee who is investigating the qualification of a business entity that has requested certification as a minority, women, or socially and economically disadvantaged individual's business enterprise;

(f) Fraudulently obtain, attempt to obtain, or aid another person in fraudulently obtaining or attempting to obtain public moneys to which the person is not entitled under this chapter;

(g) Knowingly make false statements that any entity is or is not certified as a minority, women, or socially and economically disadvantaged individual's business enterprise for purposes of obtaining a contract governed by this chapter;

(h) To fail or refuse to comply with any provision of chapter 39.19 RCW or with a contract requirement established under this chapter.

(2) A certified business engages in prohibited activity when it fails to perform a commercially useful function on any public-sector contract or procurement. Failure to perform a commercially useful function occurs when a business:

(a) Functions as a conduit; or

(b) Functions as a pass-through; except brokers and firms operating in industries where such activity is common industry practice, e.g., insurance or real estate.

(3) A business that is deemed to be a switch business is also deemed to have engaged in prohibited activity.

[Statutory Authority: RCW 39.19.030 and 39.19.120. 04-08-093, § 326-02-040, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-02-040, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 88-22-017 (Order 88-9), § 326-02-040, filed 10/24/88.]

WAC 326-02-045 Factors considered in determining performance of commercially useful function. (1) In determining the performance of a commercially useful function, factors which may be considered include, but are not limited to, the following:

(a) Whether the work to be performed by the business is within the scope of work included in the Standard Industrial Classification code(s) under which the business is listed in the directory of certified businesses published by the office or in the records of the office.

(b) Whether the business could be considered a conduit, front, or pass-through;

(c) Whether the minority and/or woman and/or socially and economically disadvantaged individual owner(s) has the skill and expertise to perform the work for which the business is being or has been certified;

(d) Whether the business is or will be responsible for executing a distinct element of work in the performance of a contract; and the principals or employees of the business actually perform, manage, and supervise the work for which the business is or will be responsible;

(2) 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 execute material changes in the configuration of those goods or materials; or

(b) Prior to submitting an application for certification, 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.

(3) 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.

[Statutory Authority: RCW 39.19.030 and 39.19.120. 04-08-093, § 326-02-045, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-02-045, filed 5/11/92, effective 6/11/92.]

WAC 326-02-050 Penalties which may be imposed.

(1) The penalties under this section may be imposed by the office, or by the state agency or educational institution administering a contract or procurement within which a violation occurs. Nothing in chapter 39.19 RCW or this title prevents the state agency or educational institution administer-

ing the contract from pursuing any procedures or sanctions as are otherwise provided by statute, rule, or contract provision.

(2) Penalties which may be imposed include one or more of the following:

- (a) Withhold payment until the violation is remedied;
- (b) Debarment from contracting with the state for up to one year; debarment for up to three years may be imposed for willful repeated violations, exceeding a single violation;
- (c) Suspension of the contract;
- (d) Termination of the contract;
- (e) Immediate suspension of the certification of a certified firm;
- (f) Payment of civil penalties of up to five thousand dollars for each violation or up to ten percent of the amount of the contract; or
- (g) Decertification or denial of certification.

(3) Penalties may be imposed on one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons.

(4) Penalties shall be imposed by the office giving a written notice which is either served personally or by certified mail, return receipt requested, to the person or business incurring the penalty. Except for suspension of certification, which is covered by WAC 326-02-090, the notice of the civil penalty shall be a final order of the office unless, within fifteen days after the notice is served, the person incurring the penalty appeals the penalty by filing a notice of appeal with the office.

(5) If a notice of appeal is filed in a timely manner, the office shall conduct a show cause review as outlined in WAC 326-20-171 or an adjudicative proceeding shall be conducted on behalf of the office by the office of administrative hearings in accordance with the provisions in chapter 326-08 WAC.

[Statutory Authority: RCW 39.19.030. 94-11-117, § 326-02-050, filed 5/18/94, effective 6/18/94. Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-02-050, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 88-22-017 (Order 88-9), § 326-02-050, filed 10/24/88.]

WAC 326-02-060 Factors considered in determining penalties. In determining the nature of the penalty and monetary amount, if any, of a penalty to be imposed, the factors which may be considered include, but are not limited to:

- (1) The potential harm to the certified or noncertified business;
- (2) Potential harm to the state, due to delay or other problems;
- (3) The potential for harm to the public;
- (4) Whether the violation occurs in the context of particular contract;
- (5) The stage or percent of completion of a contract at which the violation occurs;
- (6) The timing of the discovery of the violation;
- (7) The contracting history of the alleged violator;
- (8) The extent to which the alleged violator has cooperated with the investigation;
- (9) Whether there have been previous violations by the person.

[Title 326 WAC—p. 6]

[Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-02-060, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 88-22-017 (Order 88-9), § 326-02-060, filed 10/24/88.]

WAC 326-02-070 Suspension of contract. (1) The performance of a contract may be immediately suspended upon receipt of adequate evidence received by the office that the person has engaged in any of the prohibited activities described in WAC 326-02-040 and RCW 39.19.080.

(2) The decision of the office to suspend a contract is discretionary and will not be based on an unsupported allegation. Decisions to suspend shall be in the public interest, including the government's interest in doing business with firms that are responsible and in preserving competition.

[Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-02-070, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 88-22-017 (Order 88-9), § 326-02-070, filed 10/24/88.]

WAC 326-02-080 Suspension of certification. The certification of a business may be suspended for engaging in any of the activities prohibited by RCW 39.19.080 and WAC 326-02-040, upon a showing that immediate action is necessary to prevent harm to the public welfare.

[Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-02-080, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 88-22-017 (Order 88-9), § 326-02-080, filed 10/24/88.]

WAC 326-02-090 Procedures for suspension, hearing provided. (1) If the director determines that suspension of the certification of a business is necessary to prevent immediate harm to the public welfare, the business will be notified by personal service or certified mail, return receipt requested, of the suspension and the reasons therefor. The suspension shall take effect immediately upon receipt of the notice. The suspended business will be entitled to a hearing pursuant to chapter 326-08 WAC, but a written request for hearing must be made within twenty days of receipt of the notice of suspension.

(2) After the hearing, the administrative law judge may recommend that:

- (a) Suspension of certification remain in effect for up to one year;
- (b) The suspension be removed; or
- (c) That the business be decertified.

[Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-02-090, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 88-22-017 (Order 88-9), § 326-02-090, filed 10/24/88.]

Chapter 326-07 WAC

PUBLIC RECORDS RULES AND REGULATIONS FOR THE OFFICE OF MINORITY AND WOMEN'S BUSINESS ENTERPRISES

WAC

326-07-010	Purpose.
326-07-020	Definitions.
326-07-030	Description of office organization.
326-07-040	Operations and procedures.
326-07-050	Public records available.
326-07-060	Public records officer.
326-07-070	Office hours.
326-07-080	Requests for public records.
326-07-090	Inspection and copying.
326-07-100	Fees.
326-07-110	Exemptions.

326-07-120	Review of denials of public records request.
326-07-130	Protection of public records.
326-07-140	Records index.
326-07-150	Communications with the office.

WAC 326-07-010 Purpose. The purpose of this chapter shall be to ensure compliance by the office with the provisions of chapter 42.17 RCW, and in particular with RCW 42.17.250 through 42.17.320, dealing with public records.

[Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-07-010, filed 12/2/92, effective 1/2/93.]

WAC 326-07-020 Definitions. (1) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by the office regardless of physical form or characteristics.

(2) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including letters, words, pictures, sounds, symbols, or combination thereof; and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents.

[Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-07-020, filed 12/2/92, effective 1/2/93.]

WAC 326-07-030 Description of office organization.

(1) The office is located at 406 South Water Street, Olympia, Washington 98504.

(2) The office consists of a director, deputy director, confidential secretary, support staff, and three divisions; certification, agency support and business development, and information services.

(3) The office provides the following services: Certification of businesses, monitoring agency/educational institution compliance with chapter 39.19 RCW and this title, publication of a list of certified businesses, identification of barriers to participation by minority, women, and socially and economically disadvantaged-owned businesses in the contracting and procurement processes of state agencies and educational institutions, and development of a plan which ensures opportunities for qualified minority, women, and socially and economically disadvantaged-owned businesses to participate.

[Statutory Authority: RCW 39.19.030 and 39.19.120. 04-08-093, § 326-07-030, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-07-030, filed 12/2/92, effective 1/2/93.]

WAC 326-07-040 Operations and procedures. (1)

Practice and procedure in and before the office are governed by the Model rules of procedure, chapter 10-08 WAC. Adjudicative proceedings are governed by chapter 326-08 WAC.

(2) The operations of the office are conducted according to the provisions of chapter 39.19 RCW.

[Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-07-040, filed 12/2/92, effective 1/2/93.]

WAC 326-07-050 Public records available. All public records of the office, except as otherwise provided in RCW

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42.17.310, shall be available for public inspection and copying during the customary office hours of the office.

[Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-07-050, filed 12/2/92, effective 1/2/93.]

WAC 326-07-060 Public records officer. The person designated by the director as the public records officer shall be responsible for the following:

The implementation of the agency's rules and regulations regarding release of public records, coordinating the staff of the agency in this regard, and generally ensuring compliance by the staff with the public records disclosure requirements of chapter 42.17 RCW.

[Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-07-060, filed 12/2/92, effective 1/2/93.]

WAC 326-07-070 Office hours. For the purposes of this chapter, the customary office hours shall be from 8:00 a.m. to noon and from 1:00 p.m. to 5:00 p.m., Monday through Friday, excluding legal holidays.

[Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-07-070, filed 12/2/92, effective 1/2/93.]

WAC 326-07-080 Requests for public records. In accordance with requirements of chapter 42.17 RCW that agencies prevent unreasonable invasions of privacy, protect public records from damage or disorganization, and prevent excessive interference with essential functions of the office, public records may be inspected or copied or copies of such records may be obtained, by members of the public, upon compliance with the following procedures:

(1) A request shall be made in writing upon a form prescribed by the office which shall be available at its office. The form shall be presented to the public records officer; or to the appropriate member of the office's staff, if the public records officer is not available, at the office during customary office hours. The request shall include the following information:

(a) The name, address, and organization represented, if any, of the person requesting the record;

(b) The calendar date on which the request was made;

(c) The nature of the request;

(d) If the matter requested is referenced within the current index maintained by the records officer, a reference to the requested record as it is described in such current index;

(e) If the requested matter is not identifiable by reference to the office's current index, an appropriate description of the record requested;

(2) In all cases in which a member of the public is making a request, it shall be the obligation of the public records officer or, in his or her absence, the appropriate staff member to whom the request is made, to assist the member of the public in appropriately identifying the public record requested.

[Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-07-080, filed 12/2/92, effective 1/2/93.]

WAC 326-07-090 Inspection and copying. (1) Inspection of public records shall be made in the presence of the public records officer or, in his or her absence, the presence of the appropriate staff member.

(2) Copying of public records shall be performed only by the public records officer or, in his or her absence, the appropriate staff member.

[Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-07-090, filed 12/2/92, effective 1/2/93.]

WAC 326-07-100 Fees. No fee shall be charged for the inspection of public records. The office shall charge a fee of fifteen cents per page for providing copies of public records. This charge is the amount necessary to reimburse the office for its actual costs incident to such copying.

[Statutory Authority: RCW 39.19.030(7). 98-13-007, § 326-07-100, filed 6/4/98, effective 7/5/98; 92-24-107, § 326-07-100, filed 12/2/92, effective 1/2/93.]

WAC 326-07-110 Exemptions. (1) The office reserves the right to determine that a public record requested in accordance with the procedures outlined in WAC 326-07-080 is exempt under the provisions of RCW 42.17.310.

(2) In addition, pursuant to RCW 42.17.260(1), the office reserves the right to delete identifying details when it makes available or publishes any public record, in any cases where there is reason to believe that disclosure of such details would be an invasion of personal privacy protected by chapter 42.17 RCW. The public records officer will fully justify such deletion in writing.

(3) All denials of requests for public records must be accompanied by a written statement specifying the reason for the denial, including a statement of the specific exemption authorizing the withholding of the record and a brief explanation of how the exemption applies to the records withheld.

[Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-07-110, filed 12/2/92, effective 1/2/93.]

WAC 326-07-120 Review of denials of public records request. (1) Any person who objects to the denial of a request for a public record may petition for a review of such decision by tendering a written request for review. The written request shall specifically refer to the written statement by the public records officer which constituted or accompanied the denial.

(2) Immediately after receiving a written request for review of a decision denying a public record, the public records officer shall refer it to the director, who shall consider the matter in a timely manner. The request shall be returned with a final decision, within two business days following the original denial.

(3) Administrative remedies shall not be considered exhausted until the office has returned the petition with a decision or until the close of the second business day following denial, whichever occurs first.

[Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-07-120, filed 12/2/92, effective 1/2/93.]

WAC 326-07-130 Protection of public records. (1) No person shall knowingly alter, deface, or destroy public records of the agency.

(2) Original copies of public records of the office shall not be removed from the office.

[Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-07-130, filed 12/2/92, effective 1/2/93.]

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WAC 326-07-140 Records index. (1) A chronological index shall be maintained by the public records officer on the following:

(a) All final orders entered after June 30, 1990, issued in adjudicative proceedings;

(b) Declarative orders entered after June 30, 1990, that are issued pursuant to RCW 34.05.240;

(c) Interpretative statements as defined in RCW 34.05.010(8) that were entered after June 30, 1990; and

(d) Policy statements as defined in RCW 34.05.010(14) that were entered after June 30, 1990.

(2) The index shall contain identifying information on each item listed in subsection (1) of this section and shall be maintained in ascending chronological order.

[Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-07-140, filed 12/2/92, effective 1/2/93.]

WAC 326-07-150 Communications with the office. All communications with the office, including but not limited to, the submission of materials pertaining to its operations and/or the administration or enforcement of chapter 42.17 RCW and these rules, requests for copies of the office's rules, and other matters, shall be addressed as follows:

Office of Minority and Women's
Business Enterprises
c/o Public Records Officer
P.O. Box 41160
Olympia, Washington 98504-1160

[Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-07-150, filed 12/2/92, effective 1/2/93.]

Chapter 326-08 WAC HEARINGS PROCEDURES

WAC

326-08-010	Purpose.
326-08-015	Procedure to request an adjudicative proceeding.
326-08-016	Action on requests for adjudicative proceeding.
326-08-018	Presiding officer.
326-08-020	General procedures rules.
326-08-030	Amendments apply to pending cases.
326-08-035	Who may appear.
326-08-040	Who may appear in a representative capacity.
326-08-050	Notice of hearing.
326-08-051	Accommodations.
326-08-070	Service of papers.
326-08-080	Who may issue subpoenas.
326-08-090	Service of subpoenas.
326-08-095	Burden of proof at a hearing.
326-08-100	Procedures for settlement or disposition without a hearing.
326-08-105	Default.
326-08-110	Initial order.
326-08-120	Objections to initial order.
326-08-130	Review of initial order—Final order.
326-08-140	Petition for reconsideration of a final order.

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

326-08-060	Form of pleadings. [Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-08-060, filed 4/5/84.] Repealed by 92-15-077, filed 7/16/92, effective 8/16/92. Statutory Authority: RCW 39.19.030(7).
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WAC 326-08-010 Purpose. The purpose of this chapter is to effectuate the intent of chapter 39.19 RCW by providing procedures for adjudicative proceedings to review decisions

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by the office to decertify or deny certification of a business and for the assessment of penalties.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-010, filed 7/16/92, effective 8/16/92. Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-08-010, filed 4/5/84.]

WAC 326-08-015 Procedure to request an adjudicative proceeding. (1) When business has been notified that it is to be decertified, denied certification, or assessed a penalty, the aggrieved party may request an adjudicative proceeding.

(2) The request shall be made in writing on 8 1/2" x 11" paper and shall set forth in detail the reasons the business believes the office's decision is in error.

(3) The request must be filed and served on the office within twenty calendar days from the service of the notice to decertify or deny certification, or assess penalties. Service must be made pursuant to WAC 326-08-070.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-015, filed 7/16/92, effective 8/16/92. Statutory Authority: Chapter 39.19 RCW. 85-14-101 (Order 85-6), § 326-08-015, filed 7/2/85.]

WAC 326-08-016 Action on requests for adjudicative proceeding. (1) The office shall commence an adjudicative proceeding within ninety days after receipt of a request for an adjudicative proceeding.

(2) An adjudicative proceeding commences when the office notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted.

(3) Within thirty days after receipt of the request for an adjudicative proceeding, the office shall examine the request, notify the requestor of any obvious errors or omissions, request any additional information the office wishes to obtain and is permitted by law to require, and notify the requestor of the name, mailing address, and telephone number of the office that may be contacted regarding the request.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-016, filed 7/16/92, effective 8/16/92.]

WAC 326-08-018 Presiding officer. The presiding officer in an adjudicative proceeding is the administrative law judge designated by the office of administrative hearings after notice of hearing is issued by the office.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-018, filed 7/16/92, effective 8/16/92.]

WAC 326-08-020 General procedures rules. The provisions of chapter 10-08 WAC, "Model rules of procedure" shall apply to hearings regarding certification or penalties by the office.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-020, filed 7/16/92, effective 8/16/92. Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-08-020, filed 4/5/84.]

WAC 326-08-030 Amendments apply to pending cases. An amendment to this chapter applies to cases pending at the time of the adoption of the amendment, unless the amendment or rule-making order says that it does not apply to pending cases. An amendment to this chapter does not require that anything already done be redone to comply with the amendment unless the amendment expressly says so.

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[Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-08-030, filed 4/5/84.]

WAC 326-08-035 Who may appear. (1) Any party to an adjudicative proceeding may participate personally.

(2) The owner of the majority interest in a certified business is a necessary party and shall appear on behalf of the business.

(3) A former employee of the office shall not, at any time after severing his or her employment with the office, appear as a representative or expert witness on behalf of a petitioner in a matter in which he or she previously took an active part as a representative of the office, except with the written permission of the director.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-035, filed 7/16/92, effective 8/16/92.]

WAC 326-08-040 Who may appear in a representative capacity. (1) Any party to an adjudicative proceeding may be represented or advised by:

(a) An attorney admitted to practice before the Washington state supreme court;

(b) Other attorney admitted to practice before the highest court of any other state, if attorneys from Washington state are permitted to appear in a representative capacity before administrative agencies of that state, and if not otherwise prohibited by Washington law;

(2) A former employee of the office may appear only as permitted in WAC 326-08-035(3).

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-040, filed 7/16/92, effective 8/16/92. Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-08-040, filed 4/5/84.]

WAC 326-08-050 Notice of hearing. (1) When the director receives a request for an adjudicative proceeding, the office will issue a notice to all parties and to the office of administrative hearings as provided by RCW 34.05.434.

(2) Time. All parties shall be served with notice not less than twenty days before the hearing.

(3) The notice shall include:

(a) The names and mailing addresses of all parties to whom notice is being given and, if known, the names and addresses of their representatives;

(b) The name of the proceeding;

(c) The name, official title, mailing address, and telephone number of the presiding officer, if known;

(d) A statement of the time, place, and nature of the proceeding;

(e) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(f) A reference to the particular sections of the statutes and rules involved;

(g) A short and plain statement of the matters asserted by the agency; and

(h) A statement that a party who fails to attend or participate in a hearing or other stage of an adjudicative proceeding may be held in default in accordance with WAC 326-08-105.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-050, filed 7/16/92, effective 8/16/92. Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-08-050, filed 4/5/84.]

WAC 326-08-051 Accommodations. (1) If limited English-speaking or hearing impaired parties or witnesses will be involved in an adjudicative proceeding and need an interpreter, an interpreter will be provided at no cost to the party or witness.

(2) If disabled parties or witnesses will be involved in a hearing and need accommodation of facilities or services, the office will provide reasonable accommodation.

(3) Any party or witness requiring an interpreter or accommodation shall notify the office at the time of the request for an adjudicative proceeding.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-051, filed 7/16/92, effective 8/16/92.]

WAC 326-08-070 Service of papers. (1) All notices, pleadings, and other papers filed with the presiding officer shall be served upon all counsel and representatives of record and upon unrepresented parties or upon their agents designated by them or by law.

(2) Service shall be made personally or, unless otherwise provided by law, by first-class, registered, or certified mail; by telegraph, by electronic telefacsimile transmission and same-day mailing of copies, or by commercial parcel delivery company.

(3) Service by mail shall be regarded as completed upon deposit in the United States mail properly stamped and addressed. Service by telegraph shall be regarded as completed when deposited with a telegraph company properly addressed and with charges prepaid. Service by electronic telefacsimile transmission shall be regarded as completed upon production by the telefacsimile device of confirmation of transmission. Service by commercial parcel delivery shall be regarded as completed upon delivery to the parcel delivery company with charges prepaid.

(4) Papers required to be filed with the office shall be deemed filed upon actual receipt during office hours at any location of the office. Papers required to be filed with the presiding officer shall be deemed filed upon actual receipt during office hours at the office of the presiding officer.

[Statutory Authority: RCW 39.19.030(7). 92-24-107, § 326-08-070, filed 12/2/92, effective 1/2/93; 92-15-077, § 326-08-070, filed 7/16/92, effective 8/16/92. Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-08-070, filed 4/5/84.]

WAC 326-08-080 Who may issue subpoenas. Subpoenas may be issued by the director of the office, the director's designee, the assigned administrative law judge, or an attorney for any party in the adjudicative proceeding as provided in RCW 34.05.446.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-080, filed 7/16/92, effective 8/16/92. Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-08-080, filed 4/5/84.]

WAC 326-08-090 Service of subpoenas. Subpoenas may be served in any manner authorized by WAC 326-08-070.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-090, filed 7/16/92, effective 8/16/92. Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-08-090, filed 4/5/84.]

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WAC 326-08-095 Burden of proof at a hearing. (1) At a hearing held pursuant to WAC 326-08-010, the burden of proof shall be on the applicant to demonstrate that the applicant qualifies for certification under chapter 39.19 RCW and Title 326 WAC.

(2) The administrative law judge shall only admit and consider evidence on the issue of whether the office's decision to decertify or to deny certification based on the information which was submitted or obtained by the office, was correct at the time it was made.

(3) The administrative law judge shall only admit and consider evidence related to the grounds specified in the request for an adjudicative proceeding.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-095, filed 7/16/92, effective 8/16/92. Statutory Authority: Chapter 39.19 RCW. 86-17-018 (Order 86-2), § 326-08-095, filed 8/11/86.]

WAC 326-08-100 Procedures for settlement or disposition without a hearing. (1) Disposition may be made of any adjudicative proceeding by stipulation, consent order, default, or summary judgment.

(2) Summary judgment will be considered pursuant to a time schedule set by the administrative law judge and may be decided without oral argument.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-100, filed 7/16/92, effective 8/16/92. Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-08-100, filed 4/5/84.]

WAC 326-08-105 Default. (1) If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding, the administrative law judge may serve upon all parties a default order with a statement of the grounds for the order.

(2) Within seven days after service of a default order under subsection (1) of this section, the party against whom the default order was entered may file a written motion to the administrative law judge requesting that the order be vacated and stating the grounds relied upon. The administrative law judge will set aside an order of default only upon a showing of good and sufficient cause for such failure to appear or to request a postponement prior to the scheduled time for hearing. In the event such order of default is set aside, all interested parties shall be so notified in writing and the matter restored to the hearing calendar.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-105, filed 7/16/92, effective 8/16/92.]

WAC 326-08-110 Initial order. (1) Within ninety days after the conclusion of an adjudicative proceeding or after submission of memos, briefs, or proposed findings that the administrative law judge may allow after the adjudicative proceeding, the administrative law judge shall prepare an initial order for signature by the director.

(2) The initial order shall include a statement of findings and conclusions and the reasons and basis on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction. Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified. Findings set forth in language that is essentially a repetition or paraphrase of the relevant provision of law shall be accompanied by a concise and explicit state-

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ment of the underlying evidence of record to support the findings. The initial order shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order.

(3) Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the administrative law judge shall not base a finding exclusively on such inadmissible evidence unless the administrative law judge determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

(4) Where it bears on the issues presented, the experience, technical competency, and specialized knowledge of the office may be used in the evaluation of evidence.

(5) If an administrative law judge becomes unavailable for any reason before the entry of the order, a substitute administrative law judge shall be appointed by the office of administrative hearings. The substitute administrative law judge shall use any existing record and may conduct any further proceedings appropriate in the interests of justice. Any action taken by a duly appointed administrative law judge for an unavailable administrative law judge is as effective as if taken by the unavailable administrative law judge.

(6) The administrative law judge shall cause to be served copies of the order on all parties.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-110, filed 7/16/92, effective 8/16/92. Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-08-110, filed 4/5/84.]

WAC 326-08-120 Objections to initial order. (1) Any party to an adjudicative proceeding may file objections to an initial order pursuant to RCW 34.05.464.

(2) The objections to the initial order shall be filed with the director within twenty days of the date of service of the initial order. Copies of the objections to the initial order shall be served upon all other parties.

(3) The objections to the initial order shall specify the portions of the initial order to which objection is taken and shall refer to the evidence of the record which is relied upon to support each objection.

(4) Any party may file a reply to the objections to the initial order. The reply shall be filed with the director within ten days of the date of service of the objections to the initial order and copies of the reply shall be served upon all other parties.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-120, filed 7/16/92, effective 8/16/92. Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-08-120, filed 4/5/84.]

WAC 326-08-130 Review of initial order—Final order. (1) An initial order will become final without further action by the office unless, within ninety days of the service of the initial order:

(a) The director determines that the initial order should be reviewed; or

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(b) A party to the adjudicative proceeding files objections to the initial order as required in WAC 326-08-120(2).

(2) Upon the occurrence of either subsection (1)(a) or (b) of this section, the director will serve in writing a final order.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-130, filed 7/16/92, effective 8/16/92. Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-08-130, filed 4/5/84.]

WAC 326-08-140 Petition for reconsideration of a final order. (1) Within ten days of the service of a final order or when an initial order becomes final, any party may file a petition for reconsideration, stating the specific grounds upon which relief is requested. The petition shall be filed with the office.

(2) No petition for reconsideration may stay the effectiveness of an order.

(3) If a petition for reconsideration is timely filed, the time for filing a petition for judicial review does not commence until the director disposes of the petition for reconsideration.

(4) The petition shall be disposed of by the same person or persons who entered the final order, if reasonably available. The disposition shall be in the form of a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and remanding for further hearing by the administrative law judge.

(5) The director is deemed to have denied the petition for reconsideration, if, within twenty days from the date the petition is filed, the director does not either:

(a) Dispose of the petition; or

(b) Serve the parties with a written notice specifying the date by which it will act on the petition.

(6) The filing of a petition for reconsideration is not a prerequisite for seeking judicial review. An order denying reconsideration, or a notice provided for in subsection (5)(b) of this section is not subject to judicial review.

[Statutory Authority: RCW 39.19.030(7). 92-15-077, § 326-08-140, filed 7/16/92, effective 8/16/92.]

Chapter 326-20 WAC CERTIFICATION

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). 83-22-045 (Order 83-3), § 326-20-020, filed 10/28/83.] Repealed by 92-11-007, filed 5/11/92, effective 6/11/92. Statutory Authority: RCW 39.19.030(7).
326-20-090	Size and length of time in business. [Statutory Authority: 1983 c 120 § 3(7). 83-22-045 (Order 83-3), § 326-20-090, filed 10/28/83.] Repealed by 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. 88-09-047 (Order 88-5), § 326-20-091, filed 4/18/88.] Repealed by 92-11-007, filed 5/11/92, effective 6/11/92. Statutory Authority: RCW 39.19.030(7).
326-20-093	Definitions. [Statutory Authority: Chapter 39.19 RCW. 88-09-047 (Order 88-5), § 326-20-093, filed 4/18/88.] Repealed by 92-11-007, filed 5/11/92, effective 6/11/92. Statutory Authority: RCW 39.19.030(7).
326-20-097	Change in firm size. [Statutory Authority: Chapter 39.19 RCW. 88-09-047 (Order 88-5), § 326-20-097, filed 4/18/88.] Repealed by 92-11-007, filed 5/11/92, effective 6/11/92. Statutory Authority: RCW 39.19.030(7).
326-20-200	Complaints. [Statutory Authority: 1983 c 120 § 3(7). 83-22-045 (Order 83-3), § 326-20-200, filed 10/28/83.] Repealed by 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. 84-09-002 (Order 84-5), § 326-20-210, filed 4/5/84. Statutory Authority: 1983 c 120 § 3(7). 83-22-045 (Order 83-3), § 326-20-210, filed 10/28/83.] Repealed by 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. 04-08-093, § 326-20-010, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-20-010, filed 5/11/92, effective 6/11/92. Statutory Authority:

ity: Chapter 39.19 RCW. 87-18-030 (Order 87-6), § 326-20-010, filed 8/27/87. Statutory Authority: 1983 c 120 § 3(7). 83-22-045 (Order 83-3), § 326-20-010, filed 10/28/83.]

WAC 326-20-030 Proof of minority status. Each minority owner of a business applying for certification who is visibly identifiable as a minority shall submit with the MWBE application form a photograph or copy of documentation containing the owner's photograph. Each minority owner who is not visibly identifiable as a minority shall submit a copy of his or her birth certificate, tribal enrollment papers, or other document which shows that the owner meets the definition of "minority" as set forth in these rules. The final determination will be in the sole discretion of the office.

[Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-20-030, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7). 83-22-045 (Order 83-3), § 326-20-030, filed 10/28/83.]

WAC 326-20-040 Proof of woman's status. Each woman owner of a business applying for certification shall submit with the application form a copy of her birth certificate, valid driver's license, or other document which shows that the owner is a woman. The final determination will be in the sole discretion of the office.

[Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-20-040, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7). 83-22-045 (Order 83-3), § 326-20-040, filed 10/28/83.]

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 CFR 124.103(c) and 124.104) and 49 CFR 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. 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. 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

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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 financial 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. 04-08-093, § 326-20-047, filed 4/6/04, effective 5/7/04.]

WAC 326-20-048 Presumption of disadvantage. (1)

The office presumes that citizens of the United States or lawfully admitted permanent residents who are women, African Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the program, are socially and economically disadvantaged individuals. Applicants are required to submit a signed, notarized certification that each disadvantaged owner is, in fact, socially and economically disadvantaged.

(2)(a) The office requires each individual nonpresumptive socially and economically disadvantaged owner of a firm applying to participate as a SEDBE whose ownership and control are relied upon for SEDBE certification to submit a signed, notarized statement of personal net worth, with appropriate supporting documentation.

(b) In determining net worth, the office excludes an individual's ownership interest in the applicant firm and the indi-

vidual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). A contingent liability does not reduce an individual's net worth.

(i) Rebuttal of disadvantage. If the statement of personal net worth that an individual submits under this section shows that the individual's personal net worth exceeds seven hundred fifty thousand dollars, the individual's economic disadvantage is rebutted. The office is not required to have a proceeding under this section in order to rebut the presumption of economic disadvantage in this case.

(ii) When an individual's social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of SEDBE eligibility under this section unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting a determination that the individual's personal net worth exceeds seven hundred fifty thousand dollars, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

(3) 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 proceeding, 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 seven hundred fifty thousand dollars shall not be deemed to be economically disadvantaged. In making these determinations, the office uses the guidance found in 49 CFR Part 26, Appendix E. The office requires that applicants provide sufficient information to permit determinations under the guidance of 49 CFR Part 26, Appendix E.

[Statutory Authority: RCW 39.19.030 and 39.19.120. 04-08-093, § 326-20-048, filed 4/6/04, effective 5/7/04.]

WAC 326-20-050 Proof of ownership of business. (1)

All minority, women, or socially and economically disadvantaged owners shall submit to the office proof of their ownership of the requisite percentage of the business at the time the application is submitted. Such proof shall consist of stock certificates, a notarized affidavit of stock ownership from the corporate treasurer, a partnership agreement, canceled check used to purchase ownership, or other recognized proof of ownership. The ownership shall be real, substantial, and continuing, shall go beyond the pro forma ownership of the business reflected in the ownership documents, and shall be based on the owner's capital contribution. The minority, and/or women, and/or socially and economically disadvantaged owner(s) shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance and the form of the arrangements.

(2) In cases of sole proprietorships or other cases where documentary proof of ownership is not available, the minority, women, or socially and economically disadvantaged

owners shall so advise the office, which may undertake further investigation. The office may also require documents showing how and when the minority, women, or socially and economically disadvantaged owners' interest in the business was acquired.

(3) The office may, for any reason, require any minority, women, or socially and economically disadvantaged owners to provide additional proof of, or information concerning, ownership. The office may request additional information regarding separate ownership of a business including, but not limited to, a separate property agreement.

(4) Ownership of a corporate-sponsored dealership shall be evaluated by using the following standards:

(a) The minority, women, or socially and economically disadvantaged owner(s) have entered into a written agreement, contract, or arrangement with a national or regional corporation and has been granted a license to offer, sell, or distribute goods or services at wholesale or retail, leasing, or otherwise use the name, service mark, trademark, or related characteristics of the sponsoring corporation.

(b) The capital investment for the dealership or business is jointly contributed by the minority, women, or socially and economically disadvantaged owner(s) and the sponsoring corporation.

(c) The original investment contributed by the minority, women, or socially and economically disadvantaged owner(s) may be less than fifty-one percent, but must constitute at least twenty-five percent of the capitalization investment (total required equity capital) in the dealership corporation.

(d) A specified time limit of not more than ten years must be established, binding between the minority, women, or socially and economically disadvantaged owner(s) and the sponsoring corporation, within which the buy-out of the corporate sponsor's interest shall be complete.

(e) The sponsoring corporation must have specifically developed a national or regional corporate sponsored dealership program which includes such features as capitalization assistance from the sponsoring corporation, on-going business operations training, technical assistance to the dealership owner, and a corporate sponsored minority, women, and socially and economically disadvantaged individual's business program.

(f) The minority, women, or socially and economically disadvantaged owner(s) must demonstrate that the relationship between the corporate sponsor and the minority, women, or socially and economically disadvantaged individual's business was not formed for the primary purpose of achieving certification under chapter 39.19 RCW, or any similar provision of any ordinance, regulation, rule, or law.

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

WAC 326-20-060 Community ownership. An ownership interest arising in a nonapplicant spouse solely because of the operation of community property laws will not disqual-

ify the applicant spouse from certification. Both spouses shall certify that:

(a) Only one spouse participates in the management of the business.

(b) The nonparticipating spouse relinquishes control over his/her community interest in the subject business.

[Statutory Authority: RCW 39.19.030(7), 92-11-007, § 326-20-060, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 84-09-002 (Order 84-5), § 326-20-060, filed 4/5/84. Statutory Authority: 1983 c 120 § 3(7), 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, 04-08-093, § 326-20-070, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7), 92-11-007, § 326-20-070, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7), 83-22-045 (Order 83-3), § 326-20-070, filed 10/28/83.]

WAC 326-20-080 Factors considered in determining control. (1) The minority, woman, or socially and economically disadvantaged owner(s) must possess and exercise managerial and operational control over the day-to-day affairs of the business.

(a) Managerial control. The minority, woman, or socially and economically disadvantaged owner(s) has the demonstrable ability to make independent and unilateral business decisions needed to guide the future and direction of the firm.

(b) Operational control. The minority, woman, or socially and economically disadvantaged owner(s) has the demonstrable ability to independently make basic decisions pertaining to the daily operations of the business.

(2) Whether a minority, woman, or socially and economically disadvantaged owner meets the control requirement is determined on an application-by-application basis. Office management, clerical, or other experience unrelated to the firm's field of operations, is insufficient to establish that the business is legitimately owned and controlled.

(3) Factors which may be considered in determining whether the minority, woman, or socially and economically disadvantaged owner meets the control requirement include, but are not limited to, the following:

(a) Authority and restrictions as indicated in the articles of incorporation, bylaws, partnership agreements and/or other business agreements and documents;

(b) The financial interest and/or participation in any other business by any owner or key personnel;

(c) Past and current employment history of minority and women owners involved in the business;

(d) Members of the board of directors and corporate officers;

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(e) Experience, training, and expertise of any owners and key personnel;

(f) Recent changes in ownership and/or control of the business;

(g) Financial obligation to and capital contributions from owners and nonowners of the business; and

(h) Documentation indicating who has ultimate authority to make policy and management decisions and to legally obligate the business.

(4) If persons who are not minorities, women, or socially and economically disadvantaged are disproportionately responsible for the operation of the business, then the business is not eligible for certification.

(5) The requirements of this section shall not apply, if the business qualifies as a corporate-sponsored dealership under the provisions of WAC 326-20-050(4). Control of a corporate-sponsored dealership will be evaluated using the following standards:

(a) If the sponsoring corporation retains majority voting rights and control of the board of directors, then the minority, women, or socially and economically disadvantaged owner(s) must annually apply at least fifty percent of the net profit and bonuses toward the buy-out of the corporate sponsors' interest within the buy-out time limit established with the corporation.

(b) The minority, women, or socially and economically disadvantaged owner(s) must show active participation in the decision-making process on the board of directors of the dealership.

(c) The minority, women, or socially and economically disadvantaged owner(s) must have and exercise managerial and operational control over the day-to-day management of the dealership, with responsibility for sales, service volume, and profits.

(d) The minority, women, or socially and economically disadvantaged owner(s) must have prior business or management experience relating to the business being entered into as an owner.

(e) The minority, women, or socially and economically disadvantaged owner(s) must be president of any corporation formed by the business.

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

WAC 326-20-081 Intertwinement. To be eligible for certification, a business must be independent. Intertwinement with a noncertified business may be grounds for denial or decertification of a business. The office will determine whether a business is intertwined with a noncertified business by looking for factors which include, but are not limited to, the following:

(1) Shared ownership;

(2) Common directors or partners;

(3) Shared equipment, facilities, resources, or employees;

(4) Beneficial financial arrangements which indicate less than arms length transactions with a noncertified business;

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(5) Overdependency on a noncertified business to obtain and perform work;

(6) Such an identity of interest exists between the business seeking certification and a noncertified business that an affiliation may be presumed; and

(7) The degree to which financial, equipment, leasing, business and other relationships with noncertified businesses vary from normal industry practice.

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

WAC 326-20-092 Small business concern requirement. (1) In addition to meeting the ownership and control requirements of chapter 39.19 RCW and these regulations, a business must qualify as a small business concern to be eligible for certification or recertification.

(a) Except as otherwise provided in WAC 326-20-096 (for certain federal projects), a small business concern is a business which is independently owned and operated, is not dominant in its field of operations, and which does not exceed the size limitations as set forth in the current table of North American Industrial Classification System (NAICS) codes and corresponding industry size standards as set forth in 49 CFR 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 shall be, whenever possible, based on criteria that is 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 which exceeds the small business size limits after certification by the office shall be subject to graduation.

[Statutory Authority: RCW 39.19.030, 04-08-075, § 326-20-092, filed 4/5/04, effective 5/6/04. Statutory Authority: RCW 39.19.030(7), 92-11-007, § 326-20-092, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW, 88-09-047 (Order 88-5), § 326-20-092, filed 4/18/88.]

WAC 326-20-094 Assignment of North American Industrial Classification System (NAICS) code. (1) The office will determine which NAICS code an applicant falls under based on information submitted by the business. The office will prepare conversion tables showing the department of general administration's commodity code designations, the codes developed by the Construction Specifications Institute, and the corresponding NAICS codes listed in the directory of certified businesses as described in WAC 326-20-190.

(2) In the event the business plans to expand the areas in which it operates, it must notify the office in writing at least thirty calendar days before the effective date of such expansion.

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

WAC 326-20-095 Determination of firm size. (1) 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 that the business continues to be a small business concern, once certified, at any time. In verifying the business's size, the office will review such financial documentation of the business as may be made available to the office; e.g., annual financial statements, federal income tax returns, state and/or local excise tax reports, and other relevant information.

(2) Affiliates. Except as otherwise provided in this chapter, businesses are affiliates of each other when either directly or indirectly:

(a) One controls or has power to control the other; or
(b) A third party or parties controls or has the power to control both; or

(c) Such an "identity of interest" exists between or among them that affiliation may be presumed.

(3) Annual receipts. Where the maximum size standard is set by reference to "annual receipts," a business that exceeds the annual receipts in that standard is not eligible for certification. Annual receipts includes all revenue in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. However, the term "receipts" excludes proceeds from sales of capital assets and investments, proceeds from transactions between a concern and its domestic and foreign affiliates, proceeds from payments of notes receivable and accounts receivable, and amounts collected as an agent for another, such as gross bookings on which a commission is earned (in which case only the commission earned would constitute revenue) or such as taxes collected for remittance to a taxing authority.

(4) Period of measurement.

(a) The size of a business that has completed three or more fiscal years will be determined by averaging the annual receipts of the business for each of the most recent three years.

(b) The size of a business that has completed less than three fiscal years will be determined by computing the average of the annual receipts from the time the business was formed as follows: 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 firm 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.

(5) Number of employees. Where the size standard is "number of employees" size eligibility requires that the concern may not exceed the number of employees in that standard.

(a) "Number of employees" means that average employment of the concern, including the employees of its domestic and foreign affiliates, 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 are counted 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.

[Statutory Authority: RCW 39.19.030. 04-08-075, § 326-20-095, filed 4/5/04, effective 5/6/04. Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-20-095, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 88-09-047 (Order 88-5), § 326-20-095, filed 4/18/88.]

WAC 326-20-096 Size standard. (1) No business, regardless of its primary NAICS code, is eligible for certification if it exceeds the largest annual revenue limit contained in 49 CFR Part 26 and any amendments or inflationary adjustments thereof.

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

(3) 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.

(4) A firm which exceeds the small business size limits after certification by the office shall be subject to graduation.

(5) For purposes of utilization on projects funded by any operating modal of the U.S. Department of Transportation the maximum dollar size standard set out in 49 CFR Part 26 as may be amended or adjusted for inflation, shall apply, even if the size standard would otherwise be set by reference to number of employees. This standard is a ceiling. 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. 04-08-075, § 326-20-096, filed 4/5/04, effective 5/6/04. Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-20-096, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 88-09-047 (Order 88-5), § 326-20-096, 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 CFR Part 26 shall provide guidance to resolve such issues.

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

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

WAC 326-20-115 Signatures of applicant business owners. An application for certification must be signed under oath by all individuals claiming an ownership interest in the business regardless of the structure of the applicant business. Upon written request, the office may accept the affidavit of a corporate officer or other designated representative, identifying the stockholders or owners by sex and race, and providing such other information as the office may require.

[Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-20-115, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 85-20-058 (Order 85-9), § 326-20-115, filed 9/26/85.]

WAC 326-20-120 Submittal of forms. Application forms may be submitted by mail to the office at the following address:

STATE OF WASHINGTON
OFFICE OF MINORITY AND WOMEN'S BUSINESS ENTERPRISES
PO BOX 41160
OLYMPIA, WA 98504-1160

Forms may also be delivered to the office at its location, 406 South Water Street, Olympia, Washington.

The minority, woman, or socially and economically disadvantaged owner shall be responsible for ensuring that the form is complete and accurate and is properly delivered to the office. The applicant should keep a copy of the completed form and all documents submitted with the form for its own reference.

[Statutory Authority: RCW 39.19.030 and 39.19.120. 04-08-093, § 326-20-120, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030. 94-11-114, § 326-20-120, filed 5/18/94, effective 6/18/94. Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-20-120, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 85-14-101 (Order 85-6), § 326-20-120, filed 7/2/85. Statutory Authority: 1983 c 120 § 3(7). 83-22-045 (Order 83-3), § 326-20-120, 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. 04-08-074, § 326-20-125, filed 4/5/04, effective 5/6/04. Statutory Authority: RCW 39.19.030. 94-11-115, § 326-20-125, filed 5/18/94, effective 6/18/94. Statutory Authority: 1993 c 195. 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). 92-11-007, § 326-20-130, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7). 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). 92-11-007, § 326-20-140, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 88-22-017 (Order 88-9), § 326-20-140, filed 10/24/88. Statutory Authority: 1983 c 120 § 3(7). 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). 92-11-007, § 326-20-150, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7). 83-22-045 (Order 83-3), § 326-20-150, filed 10/28/83.]

WAC 326-20-160 Burden of proof. The applicant shall have the burden of proving to the satisfaction of the office that it is eligible for certification or recertification.

[Statutory Authority: RCW 39.19.030 and 39.19.120. 04-08-093, § 326-20-160, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-20-160, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7). 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 by mail 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(7). 92-11-007, § 326-20-170, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 85-07-006 (Order 85-2), § 326-20-170, filed 3/8/85. Statutory Authority: 1983 c 120 § 3(7). 83-22-045 (Order 83-3), § 326-20-170, filed 10/28/83.]

WAC 326-20-171 Denial of certification—Show cause review. (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 must either:

(a) Submit a written request for show cause review by the director or designee, containing the information specified in subsection (2) of this section; or

(b) Submit a written request for an adjudicative proceeding, pursuant to WAC 326-08-015.

(2) A request for show cause review 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 show cause review, the finality of the denial for appeal purposes is stayed until the show cause review is complete.

(4) Upon receipt of a timely request for a show cause review 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. This notification is considered final for purposes of WAC 326-08-015.

[Statutory Authority: RCW 39.19.030(7), 92-11-007, § 326-20-171, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 88-09-047 (Order 88-5), § 326-20-171, filed 4/18/88; 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 notify the business in writing of its intent to decertify the business.

(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. This notification is final for purposes of appeal pursuant to WAC 326-08-015.

(4) Upon receipt of an "intent to decertify" letter, the business must either:

(a) Submit a written request for a show cause review by the director which meets the criteria set out in (c) of this subsection; or

(b) Submit a written request for an adjudicative proceeding pursuant to WAC 326-08-015.

(c) The request for show cause review must be received by the office within twenty calendar days of receipt of the notice of intent to decertify the firm. The request for a show cause review 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 show cause review nor any additional written documentation within twenty days of receipt of the "intent to decertify" 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 show cause review, the office will review the request and any additional information provided and may conduct further investigation and/or request that the owner(s) attend a show cause meeting. The office will thereafter notify the business in writing of its decision to either affirm or reverse its intent to decertify the business. This decertification decision is considered final for purposes of WAC 326-08-015.

(2005 Ed.)

(7) If a show cause review is requested and the decision to decertify is affirmed, any aggrieved party may request an adjudicative proceeding pursuant to WAC 326-08-015. The request must be made in writing and must be made within twenty days of receipt of the office's decision affirming the decertification decision.

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

(a) The time provided by WAC 326-08-015 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.

(9) 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(7), 92-11-007, § 326-20-172, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 88-09-047 (Order 88-5), § 326-20-172, filed 4/18/88; 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. 04-08-093, § 326-20-173, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7), 92-11-007, § 326-20-173, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 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 obli-

gations 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.

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

WAC 326-20-185 Recertification. The office may require any certified business to submit annual notarized statements regarding changes in the information provided during the initial certification process. 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. Debarment of a business by the state or one or more federal agencies or local government jurisdictions may be grounds for nonrenewal of decertification.

Each certified business must submit a statement of present status prior to expiration of its three-year certification. The statement form will be provided to the certified business sixty days before expiration of its certification. Failure to return the completed form within thirty days may lead to decertification by expiration.

[Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-20-185, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 88-09-047 (Order 88-5), § 326-20-185, filed 4/18/88; 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 certified businesses as follows:

(1) The office will maintain a directory of businesses certified by the office for state projects and for federally funded projects.

(2) The office will update and compile the directory into a form suitable for distribution annually and may issue supplements on a more frequent basis.

(3) The directory will be available for purchase from the office at a reasonable cost. One copy will be made available to each state agency and educational institution at no charge. Copies will be provided to the state library.

(4) Information concerning the status of a business may be obtained by contacting the office during designated working hours.

[Statutory Authority: RCW 39.19.030(7). 92-11-007, § 326-20-190, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 85-07-006 (Order 85-2), § 326-20-190, filed 3/8/85. Statutory Authority: 1983 c 120 § 3(7). 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, is denied certification, or has been decertified, may be required to submit a new application or to submit additional documentation if there has been a substantial change in ownership, control, or organiza-

tion of the business. However, no business may file more than two applications in any calendar year.

(2) 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(7). 92-11-007, § 326-20-220, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. 86-17-018 (Order 86-2), § 326-20-220, filed 8/11/86. Statutory Authority: 1983 c 120 § 3(7). 83-22-045 (Order 83-3), § 326-20-220, filed 10/28/83.]

Chapter 326-30 WAC GOALS AND GOAL SETTING

WAC

326-30-010	Purpose.
326-30-020	Scope.
326-30-030	Procedure for setting overall annual goals.
326-30-041	Annual goals.
326-30-046	Procedures for setting goals on individual transactions.
326-30-051	Counting participation toward agency and educational institution goals.
326-30-061	Effect of decertification, after commencement of work, on counting participation.
326-30-110	Monitoring of compliance with chapter 39.19 RCW.

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

326-30-035	Goals for 1983-84. [Statutory Authority: 1983 c 120. 84-03-005 (Order 83-7), § 326-30-035, filed 1/5/84.] Repealed by 92-20-079, filed 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).
326-30-036	Goals for 1984-85. [Statutory Authority: Chapter 39.19 RCW. 84-17-049 (Order 84-7), § 326-30-036, filed 8/13/84.] Repealed by 92-20-079, filed 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).
326-30-037	Goals for 1985-86. [Statutory Authority: Chapter 39.19 RCW. 85-20-058 (Order 85-9), § 326-30-037, filed 9/26/85.] Repealed by 92-20-079, filed 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).
326-30-038	Goals for 1986-87. [Statutory Authority: Chapter 39.19 RCW. 86-17-018 (Order 86-2), § 326-30-038, filed 8/11/86.] Repealed by 92-20-079, filed 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).
326-30-039	Goals for 1987-88. [Statutory Authority: Chapter 39.19 RCW. 87-18-029 (Order 87-5), § 326-30-039, filed 8/27/87.] Repealed by 92-20-079, filed 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).
326-30-03901	Goals for 1988-1989. [Statutory Authority: Chapter 39.19 RCW. 88-17-045 (Order 88-8), § 326-30-03901, filed 8/16/88.] Repealed by 92-20-079, filed 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).
326-30-03902	Goals for 1989-90. [Statutory Authority: RCW 39.19.030(7). 90-06-041, § 326-30-03902, filed 3/1/90, effective 4/1/90.] Repealed by 92-20-079, filed 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).
326-30-03903	Goals for 1990-91. [Statutory Authority: RCW 39.19.030(7). 90-21-139, § 326-30-03903, filed 10/24/90, effective 11/24/90.] Repealed by 92-20-079, filed 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).
326-30-03904	Goals for 1991-92. [Statutory Authority: RCW 39.19.030(7). 91-18-041, § 326-30-03904, filed 8/30/91, effective 9/30/91.] Repealed by 95-19-014, filed 9/7/95, effective 10/8/95. Statutory Authority: RCW 39.19.030(7).
326-30-040	Agency/educational institution responsibilities. [Statutory Authority: 1983 c 120. 84-03-005 (Order 83-7), § 326-30-040, filed 1/5/84.] Repealed by 92-20-079, filed 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).
326-30-050	Contents of agency/educational institution plan. [Statutory Authority: 1983 c 120. 84-03-005 (Order 83-7), § 326-30-050, filed 1/5/84.] Repealed by 92-20-079, filed

- 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).
- 326-30-060 General exclusions from the contracting base. [Statutory Authority: Chapter 39.19 RCW. 88-17-045 (Order 88-8), § 326-30-060, filed 8/16/88. Statutory Authority: 1983 c 120. 84-03-005 (Order 83-7), § 326-30-060, filed 1/5/84.] Repealed by 92-20-079, filed 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).
- 326-30-070 Extraordinary exclusions from the contracting base. [Statutory Authority: 1983 c 120. 84-03-005 (Order 83-7), § 326-30-070, filed 1/5/84.] Repealed by 92-20-079, filed 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).
- 326-30-080 Substitutions in contracts requiring MWBE participation. [Statutory Authority: 1983 c 120. 84-03-005 (Order 83-7), § 326-30-080, filed 1/5/84.] Repealed by 92-20-079, filed 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).
- 326-30-090 Timely certification. [Statutory Authority: 1983 c 120. 84-03-005 (Order 83-7), § 326-30-090, filed 1/5/84.] Repealed by 92-20-079, filed 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).
- 326-30-100 Agency/educational institution reporting of MWBE participation. [Statutory Authority: Chapter 39.19 RCW. 84-17-049 (Order 84-7), § 326-30-100, filed 8/13/84; 84-09-002 (Order 84-5), § 326-30-100, filed 4/5/84; 84-06-017 (Order 84-4), § 326-30-100, filed 2/29/84. Statutory Authority: 1983 c 120. 84-03-005 (Order 83-7), § 326-30-100, filed 1/5/84.] Repealed by 92-20-079, filed 10/6/92, effective 11/6/92. Statutory Authority: RCW 39.19.030(7).

WAC 326-30-010 Purpose. The purpose of chapter 120, Laws of 1983 and of this chapter is to provide the maximum practicable opportunity for increased participation by minority and women-owned businesses in public works contracts and in contracts for the procurement of goods and services from the private sector for state agencies and educational institutions.

These rules set forth the procedures by which individual contract goals and the overall annual goals for participation of certified business enterprises are set and reviewed; and the procedures to be used by the office in monitoring compliance.

[Statutory Authority: RCW 39.19.030(7). 92-20-079, § 326-30-010, filed 10/6/92, effective 11/6/92. Statutory Authority: 1983 c 120. 84-03-005 (Order 83-7), § 326-30-010, filed 1/5/84.]

WAC 326-30-020 Scope. This chapter applies to all public works, personal service contracts, and procurement from the private sector of goods and services by state agencies and educational institutions not expressly exempted or excluded by this chapter.

These rules do not pertain to agency/educational institution expenditures such as: Amortization; debt service; depreciation; employee benefits including but not limited to mileage, per diem, relocation expenses, and salaries; per diem for prospective state employees, members of institutions' boards and agencies' commissions; postage; relocation expenses for prospective employees; and transfers of charges.

[Statutory Authority: RCW 39.19.030(7). 92-20-079, § 326-30-020, filed 10/6/92, effective 11/6/92. Statutory Authority: 1983 c 120. 84-03-005 (Order 83-7), § 326-30-020, filed 1/5/84.]

WAC 326-30-030 Procedure for setting overall annual goals. The director of the office of minority and women's business enterprises will establish overall annual goals for participation in state contracts by qualified MBEs and WBEs for all state agencies and educational institutions.

(2005 Ed.)

The annual period shall be the state fiscal year. The goals will be a percentage of the reporting base which includes all expenditures for public works, personal services, and for the procurement of goods and services by state agencies and educational institutions.

(1) Time for establishment of goals. The overall annual goals will be adopted each year by June 15.

(2) Distribution. The overall annual goals will be distributed to the head of each agency and educational institution on or before June 30 each year.

(3) Process used to establish goals. The director will review the overall annual goals each year and establish goals for the upcoming year. In establishing the new goals, the director shall consider the following categories of information, to the extent that such data is reasonably obtainable: (a) The number of certified businesses available to perform work in each class of contract; (b) the state's success in attaining goals over the last year; (c) information regarding the percentage of available MBEs and WBEs as compared to the percentage of dollars awarded to MBEs and WBEs, per class of contract; (d) information indicating discrimination against minority and women-owned businesses in each class of contract; (e) and such other relevant information as may be available.

[Statutory Authority: RCW 39.19.030(7). 92-20-079 and 92-20-124, § 326-30-030, filed 10/6/92 and 10/7/92, effective 11/6/92 and 11/7/92; 90-06-040, § 326-30-030, filed 3/1/90, effective 4/1/90. Statutory Authority: 1983 c 120. 84-03-005 (Order 83-7), § 326-30-030, filed 1/5/84.]

WAC 326-30-041 Annual goals. The annual overall goals for participation by certified firms in the public works, other contracting, and procurement of each state agency and educational institution, subject to this chapter, shall be as follows:

July 1, 2000, through June 30, 2001,

Construction/Public Works	10% MBE	6% WBE
Architect/Engineering	10% MBE	6% WBE
Purchased Goods	8% MBE	4% WBE
Purchased Services	10% MBE	4% WBE
Professional Services	10% MBE	4% WBE

[Statutory Authority: RCW 39.19.030(7). 00-17-059, § 326-30-041, filed 8/9/00, effective 9/9/00; 98-20-005, § 326-30-041, filed 9/24/98, effective 10/25/98; 97-16-073 § 326-30-041, filed 8/4/97, effective 9/4/97; 96-14-064, § 326-30-041, filed 6/28/96, effective 7/29/96; 95-19-014, § 326-30-041, filed 9/7/95, effective 10/8/95; 95-10-086, § 326-30-041, filed 5/3/95, effective 6/3/95; 94-03-068, § 326-30-041, filed 1/14/94, effective 2/14/94; 92-20-079, § 326-30-041, filed 10/6/92, effective 11/6/92.]

WAC 326-30-046 Procedures for setting goals on individual transactions. Each agency and educational institution shall establish goals for the participation of MBEs and WBEs on individual purchases and contracts. Factors to be considered include, but are not limited to:

(1) The number of MBEs and WBEs available to perform work in the contract;

(2) The agency/educational institution's success in attaining goals during the current year;

(3) Whether there is an opportunity to facilitate the entry of certified businesses into industries in which such firms are underrepresented.

[Statutory Authority: RCW 39.19.030(7), 92-20-079, § 326-30-046, filed 10/6/92, effective 11/6/92.]

WAC 326-30-051 Counting participation toward agency and educational institution goals. The office will count an agency's or educational institution's expenditures to certified businesses toward goal attainment as follows:

(1) Prime contractors and consultants.

(a) Where a certified business performs a commercially useful function in the work of the contract, the dollar value of expenditures to the business for such work will be counted toward the agency or educational institution's goal attainment according to the certification status of the business.

(b) Where a certified business is a partner in a joint venture, and the business performs a commercially useful function in the work of the contract, only the dollar value of expenditures to the certified business which is commensurate with its interest in the joint venture will be counted toward the agency or educational institution's goal attainment according to the certification status of the business.

(2) Subcontractors and subconsultants.

(a) Where a certified business performs a commercially useful function in the work of a subcontract, the dollar value of expenditures to the business for such work will be counted toward the agency or educational institution's goal attainment according to the certification status of the business.

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

(3) Suppliers.

Where a certified business is the manufacturer or a regular dealer of goods or materials required under a contract, one hundred percent of the dollar value of expenditures to the business for such materials or supplies will be counted toward the agency or educational institution's goal attainment according to the certification status of the business.

(4) Where a certified business is a broker of goods or materials required under a contract, effective June 6, 1996, the value of the goods or materials will not be counted. Only the dollar value of the fee or commission charged or twenty percent (five percent in the case of food brokers) of the dollar value of expenditures to the business, whichever is greater, will be counted toward the agency or educational institution's goal attainment according to the certification status of the business.

(5) Where a certified business is a hauler, trucker, or delivery service, but is not also a regular dealer or the manufacturer of the goods or materials required on the job site, the dollar value of expenditures to the business for fees charged to deliver the goods or materials required will be counted toward the agency or educational institution's goal attainment according to the certification status of the business.

(6) Where a certified business provides bonds or insurance specifically required for the performance of a contract, the dollar value of expenditures to the business for the fee or commission charged for providing the bonds or insurance will be counted toward the agency or educational institution's

goal attainment 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 of expenditures to the business to provide a bona fide service in the procurement of transportation will be counted toward the agency or educational institution's goal attainment according to the certification status of the business.

[Statutory Authority: RCW 39.19.030(7), 96-24-085, § 326-30-051, filed 12/3/96, effective 1/3/97; 94-07-064, § 326-30-051, filed 3/14/94, effective 4/14/94; 92-20-079 and 92-20-124, § 326-30-051, filed 10/6/92 and 10/7/92, effective 11/6/92 and 11/7/92.]

WAC 326-30-061 Effect of decertification, after commencement of work, on counting participation. (1) Where a certified business is decertified after it has begun work on a contract, for reasons other than having exceeded the size standard, only the dollar value of expenditures to the business made prior to the date of decertification plus sixty days will be counted toward the agency's or educational institution's overall annual goal attainment.

(2) Where a certified business is decertified because it was found to exceed the size standard after it has begun work on a contract, the dollar value of all expenditures to the business for work which constitutes a commercially useful function until the completion of that contract will be counted toward the agency's or educational institution's overall annual goal attainment.

(3) Where a certified business is decertified pursuant to WAC 326-20-173, i.e., because of the owner's death or disability, the dollar value of all expenditures to the business prior to the date of decertification plus sixty days will be counted toward the agency's or educational institution's overall annual goal attainment: Provided, That the business performed a commercially useful function in the contract.

[Statutory Authority: RCW 39.19.030(7), 92-20-124, § 326-30-061, filed 10/7/92, effective 11/7/92.]

WAC 326-30-110 Monitoring of compliance with chapter 39.19 RCW. The office will monitor the performance of each state agency and educational institution and generate periodic status reports for their internal use from data developed pursuant to WAC 326-40-050.

The office will issue a report annually on the total expenditures of the state and the dollars expended with certified businesses by each agency and educational institution. The report will include the percentage paid to certified businesses. The report will be provided to the governor and the legislature as required by RCW 39.19.030(8).

[Statutory Authority: RCW 39.19.030(7), 92-20-124, § 326-30-110, filed 10/7/92, effective 11/7/92. Statutory Authority: 1983 c 120, 84-03-005 (Order 83-7), § 326-30-110, filed 1/5/84.]

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	Agency and educational institution reporting.
326-40-060	Determining compliance and counting participation at time of bid opening.
326-40-070	Determination of commercially useful function.
326-40-080	Substitutions in contracts requiring participation of certified businesses.
326-40-090	Timely certification.
326-40-100	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

(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.]

(2005 Ed.)

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.

(2005 Ed.)

(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.

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tion 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.]

Chapter 326-50 WAC

PARTICIPATION PROGRAMS

WAC

326-50-010	Participation programs, purpose and intent.
326-50-020	Definitions.
326-50-030	Business partnership program—Purchased goods and services, architecture, engineering and other consultants—Purpose and intent.
326-50-040	Implementation of business partnership program.
326-50-050	Utilization of credits in business partnership account.
326-50-060	Default by either party to the agreement of intent.

WAC 326-50-010 Participation programs, purpose and intent. It is the policy of the state of Washington to provide the maximum practicable opportunity for increased participation by minority and women-owned businesses in public works and the process by which goods and services are procured by state agencies and educational institutions from the private sector.

OMWBE is directed by RCW 39.19.030(1) to: "Develop, plan, and implement programs" to provide such opportunities for participation by qualified minority and women-owned businesses. OMWBE has found that there is a need to supplement the certification program in order to encourage MWBE participation in state contracts. Therefore, OMWBE will develop participation programs to advance the state of Washington's policy to mitigate the effects of societal discrimination, and to increase opportunities for minority and women-owned firms to do business with the state. The implementation of these programs will result in increased opportunities for MWBEs to develop and grow in the existing market place, and to assist them in establishing new business relationships with the state of Washington.

[Statutory Authority: Chapter 39.19 RCW, 85-24-010 (Order 85-10), § 326-50-010, filed 11/25/85, effective 3/1/86.]

WAC 326-50-020 Definitions. For purposes of chapter 326-50 WAC;

(1) "Non-MWBE firm" means a firm or business which is not certifiable as a MWBE under chapter 39.19 RCW and its implementing regulations, or a firm which has chosen not to seek certification as a MWBE;

(2) Solely for purposes of participation programs as used in chapter 326-50 WAC, "MWBE" shall mean:

(a) Either an enterprise certified by OMWBE on or before November 22, 1985; or an enterprise which is certified at any time, provided such enterprise has been engaged in bona fide business activities as a minority or woman-owned business for at least one year prior to the filing of an agreement of intent with OMWBE, and

(b) Either an enterprise which is incorporated in the state of Washington as a Washington domestic corporation; or an enterprise whose principal place of business is located within the state of Washington for enterprises which are not incorporated.

(c) Nothing contained in subsections (a) and (b) shall be construed to include or allow foreign corporations to participate in any participation program.

(3) "Participation program" means programs created to supplement the certification program to encourage MWBE participation in state contracts in the areas of goods and services, construction, and personal services.

[Statutory Authority: Chapter 39.19 RCW, 85-24-010 (Order 85-10), § 326-50-020, filed 11/25/85, effective 3/1/86.]

WAC 326-50-030 Business partnership program—Purchased goods and services, architecture, engineering and other consultants—Purpose and intent. (1) Purpose and intent. The primary purpose of this Participation Program I, hereinafter referred to as the business partnership program, is to increase opportunities for certified MWBEs to provide purchased goods and services, and architecture, engineering and other consultant services to state agencies and educational institutions. This program is designed to increase the number of MWBEs participating in state contracts, and to enhance the economic viability of certified businesses, by providing incentives to non-MWBE firms, both large and small, to develop ongoing business relationships with OMWBE certified firms.

(a) The business partnership program will be in effect as of March 1, 1986. This program is a prototype program, and will be periodically evaluated by OMWBE. After the program has been in effect for 12 months, OMWBE will evaluate the program to determine whether it is fulfilling the purposes for which it is designed.

(2) The program is designed to address several specific needs of minority and women firms by (a) increasing opportunities for providing purchased goods and services, and architecture, engineering and other consultant services, and (b) providing short-term and limited financial assistance, technical assistance, and networking.

[Statutory Authority: RCW 39.19.030(7), 89-24-050, § 326-50-030, filed 12/1/89, effective 1/1/90. Statutory Authority: Chapter 39.19 RCW, 85-24-010 (Order 85-10), § 326-50-030, filed 11/25/85, effective 3/1/86.]

WAC 326-50-040 Implementation of business partnership program. (1) Agreement of intent—Contents of agreement. In order to claim business partnership credit for contracts or other assistance provided to MWBEs, an agreement of intent must be filed with OMWBE by the non-MWBE firm within seven days of the commencement of the supplier-service contract. The agreement of intent to be filed with OMWBE must include such information as required by OMWBE.

(2) Evaluation committee.

(a) An evaluation committee will review each agreement of intent and make a recommendation to the director. Evaluation committees appointed by OMWBE will consist of a representative from the private sector, a representative from the MWBE community, and a state agency representative. During the prototype phase of the program, the purchased

goods and services workgroup, appointed by the OMWBE advisory committee, will serve as the evaluation committee.

(b) The office, through the evaluation committee, will monitor the progress of the agreement of intent against the details outlined in the agreement of intent as filed with OMWBE, or as approved under subsection (3) below.

(3) The director may approve the agreement, with or without modifications, or disapprove the agreement. Upon approval of the agreement, OMWBE will establish an account for non-MWBE firms under the number assigned to the agreement of intent. Upon proof of completion of the agreement, or portions thereof if applicable, credits for the negotiated dollar value of the contract will be placed in the non-MWBE firm's account.

(4) The credit received by the non-MWBE firms will be calculated from the firm's documented expenditures. Prior to initiating a goods or service contract or other approved assistance, the non-MWBE firm must file an agreement of intent with OMWBE. Upon approval of the plan, the firm will thereafter document the actions that have been taken on behalf of MWBEs. The actual dollar value to be credited may be established either before or after the program is concluded, but the agreement of intent must set the standards for evaluation and receive approval by OMWBE. The amount of credit that will be given for any contracted good or service or other approved assistance will be established between OMWBE and the non-MWBE firm.

[Statutory Authority: Chapter 39.19 RCW. 85-24-010 (Order 85-10), § 326-50-040, filed 11/25/85, effective 3/1/86.]

WAC 326-50-050 Utilization of credits in business partnership account. (1) The credits in a non-MWBE firm's business partnership account may be applied to goods and services, architecture, engineering and other consultant services contracts or requests for proposals. The credits cannot apply to MWBE requirements set on construction or public works contracts.

(2) Only the value of those transactions requested and approved may be applied against MWBE requirements set by state agencies or educational institutions in meeting contract specifications.

(3) When the non-MWBE firm bids on a state contract, it may utilize the credit it has established with OMWBE by applying the credit against the MWBE participation requirements set on contracts or requests for proposals for purchase of goods and services, architecture, engineering and other consultant services.

(4) The state agency or educational institution shall give the non-MWBE firm equal consideration as other vendors utilizing certified MWBE vendors in evaluating the bids or requests for proposal. The state agency or educational institution may count the credit toward its annual overall goals.

(5) The credit obtained by an agreement of intent shall only be used once. Additional credits may be obtained by filing additional agreements of intent with OMWBE.

(6) If credits on file with OMWBE are invoked by the non-MWBE firm on more than one outstanding bid or proposal, the credits shall be utilized on the first contract awarded.

(7) The state agency letting a contract shall contact the OMWBE to verify the existence of credits on file at the time

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an apparent low bidder using business partnership credits to meet the MWBE requirements of the contract is identified. The state agency letting the contract shall notify the OMWBE of the award of the contract, and the number of credits utilized by the non-MWBE firm to meet the MWBE requirements of the contract.

(8) If credits are used on one contract (first awarded), the non-MWBE firm, if the apparent low bidder, may be allowed a period of up to 24 working hours to secure new or additional MBE or WBE subcontractors. If written proof of subcontractors with new or additional MBE or WBE firms is not provided to the agency within that time, agency may award contract pursuant to WAC 326-40-020.

(9) The business partnership credits will remain in the account established for the non-MWBE firm for one year after the credits are accrued, or for one year from the time the contract in the agreement of intent is completed, as stipulated in the agreement of intent. All unused credit will be voided six months after the effective date, in the event the business partnership program is discontinued.

[Statutory Authority: RCW 39.19.030(7). 89-24-050, § 326-50-050, filed 12/1/89, effective 1/1/90. Statutory Authority: Chapter 39.19 RCW. 85-24-010 (Order 85-10), § 326-50-050, filed 11/25/85, effective 3/1/86.]

WAC 326-50-060 Default by either party to the agreement of intent. The parties to the agreement of intent (the non-MWBE firm and MWBE firm) reserve their rights to pursue legal remedies based upon the underlying contract between them. In the event of default by either party, appropriate action can be taken by either to assure compliance or to recover damages. Approval of the agreement of intent by OMWBE does not constitute a ruling that the contract is in compliance with state laws, nor that either party is capable of performing its portion of the agreement. Approval of the agreement by OMWBE merely signifies that OMWBE believes the fulfillment of this agreement will further the goals of the program established by the state under chapter 39.19 RCW. If the MWBE is unable or unwilling to perform the agreement of intent, the non-MWBE firm may utilize its right to substitute under WAC 326-30-080. OMWBE also reserves the authority to apply the full range of sanctions available under the law against the parties to the agreement of intent, as appropriate, if perjured agreements of intent are filed, or spurious claims for credits are made.

[Statutory Authority: Chapter 39.19 RCW. 85-24-010 (Order 85-10), § 326-50-060, filed 11/25/85, effective 3/1/86.]