

Chapter 326-20 WAC

CERTIFICATION

WAC

326-20-010	In general.
326-20-030	Proof of minority status.
326-20-040	Proof of woman's status.
326-20-045	Proof of socially and economically disadvantaged status.
326-20-046	Proof of social disadvantage.
326-20-047	Proof of economic disadvantage.
326-20-048	Presumption of disadvantage.
326-20-050	Proof of ownership of business.
326-20-060	Community ownership.
326-20-070	Counting ownership held in trust.
326-20-080	Factors considered in determining control.
326-20-081	Intertwinement.
326-20-092	Small business concern requirement.
326-20-094	Assignment of North American Industrial Classification System (NAICS) code.
326-20-095	Determination of firm size.
326-20-096	Size standard.
326-20-098	Applicability of federal regulations.
326-20-110	Application process.
326-20-115	Signatures of applicant business owners.
326-20-120	Submittal of forms.
326-20-125	Processing fee.
326-20-130	Processing applications—Time.
326-20-140	Duty to cooperate.
326-20-150	On-site investigations.
326-20-160	Burden of proof.
326-20-170	Decision.
326-20-171	Denial of certification—Brief adjudicative proceeding.
326-20-172	Decertification of firms.
326-20-173	Expiration of certification upon death or disability of owner of certified business.
326-20-180	Effect of certification.
326-20-185	Recertification.
326-20-190	Directory of certified businesses.
326-20-220	Resubmission of applications.

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 Repealed by WSR 85-07-006 (Order 85-2), filed 3/8/85.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

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

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

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

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

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

326-20-020	Federally funded projects. [Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-020, filed 10/28/83.] Repealed by WSR 92-11-007, filed 5/11/92, effective 6/11/92. Statutory Authority: RCW 39.19.030(7).
326-20-090	Size and length of time in business. [Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-090, filed 10/28/83.] Repealed by WSR 88-06-030 (Order 88-2), filed 2/26/88. Statutory Authority: Chapter 39.19 RCW.
326-20-091	Size standards—Purpose. [Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-091, filed 4/18/88.] Repealed by WSR 92-11-007, filed 5/11/92, effective 6/11/92. Statutory Authority: RCW 39.19.030(7).
326-20-093	Definitions. [Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-093, filed 4/18/88.] Repealed by WSR 92-11-007, filed 5/11/92, effective 6/11/92. Statutory Authority: RCW 39.19-030(7).
326-20-097	Change in firm size. [Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-097, filed 4/18/88.] Repealed by WSR 92-11-007, filed 5/11/92, effective 6/11/92. Statutory Authority: RCW 39.19.030(7).
326-20-200	Complaints. [Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-200, filed 10/28/83.] Repealed by WSR 92-11-007, filed 5/11/92, effective 6/11/92. Statutory Authority: RCW 39.19-030(7).
326-20-210	Reconsideration of decision. [Statutory Authority: Chapter 39.19 RCW. WSR 84-09-002 (Order 84-5), §

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

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

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

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

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

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

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

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

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

(ii) Employment. The office will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into nonprofessional or nonbusiness fields.

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

(2) With respect to subsection (1) of this section, the office notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities

available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities—especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments)—may be socially and economically disadvantaged.

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

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

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

(1) Submission of narrative and financial information.

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

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

(2) Factors to be considered. In considering diminished capital and credit opportunities, the office will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. The office will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The 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. WSR 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 individual'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 C.F.R. Part 26, Appendix E. The office requires that applicants provide sufficient information to permit determinations under the guidance of 49 C.F.R. Part 26, Appendix E.

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

WAC 326-20-050 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 consti-

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

WAC 326-20-060 Community ownership. An ownership interest arising in a nonapplicant spouse solely because of the operation of community property laws will not disqualify 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). WSR 92-11-007, § 326-20-060, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 84-09-002 (Order 84-5), § 326-20-060, filed 4/5/84. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-060, filed 10/28/83.]

WAC 326-20-070 Counting ownership held in trust.

In determining whether the fifty-one percent ownership requirement is met, no stock or ownership held in trust shall be counted, except in the following cases:

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

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

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 04-08-093, § 326-20-070, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-070, filed 5/11/92, effective

6/11/92. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-070, filed 10/28/83.]

WAC 326-20-080 Factors considered in determining control. (1) 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;

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

WAC 326-20-081 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;
- (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). WSR 92-11-007, § 326-20-081, filed 5/11/92, effective 6/11/92; WSR 89-24-047, § 326-20-081, filed 12/1/89, effective 1/1/90.]

WAC 326-20-092 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

(5/11/11)

in 49 C.F.R. Part 26 and amendments or inflationary adjustments thereof.

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

(c) The office's determination of whether a business qualifies as a small business concern 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. WSR 04-08-075, § 326-20-092, filed 4/5/04, effective 5/6/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-092, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-092, filed 4/18/88.]

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

WAC 326-20-095 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 what-

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

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 C.F.R. 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 distribu-

tion 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 C.F.R. 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. WSR 04-08-075, § 326-20-096, filed 4/5/04, effective 5/6/04. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-096, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 88-09-047 (Order 88-5), § 326-20-096, filed 4/18/88.]

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

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

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

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

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

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

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

[Statutory Authority: RCW 39.19.030 and 39.19.120. WSR 04-08-093, § 326-20-110, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19-030(7). WSR 92-11-007, § 326-20-110, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 86-17-018 (Order 86-2), § 326-20-110, filed 8/11/86. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-110, filed 10/28/83.]

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

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
P.O. BOX 41160
OLYMPIA, WA 98504-1160

Forms may also be delivered to the office at its location, 406 Water Street S.W., 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. WSR 11-11-030, § 326-20-120, filed 5/11/11, effective 6/11/11. Statutory Authority: RCW 39.19.030 and 39.19-120. WSR 04-08-093, § 326-20-120, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19.030. WSR 94-11-114, § 326-20-120, filed 5/18/94, effective 6/18/94. Statutory Authority: RCW 39.19.030(7). WSR 92-11-007, § 326-20-120, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 85-14-101 (Order 85-6), § 326-20-120, filed 7/2/85. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-120, filed 10/28/83.]

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,

(5/11/11)

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

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

WAC 326-20-130 Processing applications—Time. The office will process all applications as promptly as its resources permit. The office does not guarantee that any application will be processed within any certain time period and the inability to process an application by a certain time shall not subject the office or the state to liability.

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

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

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

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

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

WAC 326-20-160 Burden of proof. The applicant 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. WSR 04-08-093, § 326-20-160, filed 4/6/04, effective 5/7/04. Statutory Authority: RCW 39.19-030(7). WSR 92-11-007, § 326-20-160, filed 5/11/92, effective 6/11/92. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-160, filed 10/28/83.]

WAC 326-20-170 Decision. The office shall notify the applicant business 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). WSR 92-11-007, § 326-20-170, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 85-07-006 (Order 85-2), § 326-20-170, filed 3/8/85. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-170, filed 10/28/83.]

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

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

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

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

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

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

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

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

the office will provide the business with written notice of decertification.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WAC 326-20-185 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.

(5/11/11)

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

WAC 326-20-190 Directory of certified businesses. The office will maintain a directory of 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). WSR 92-11-007, § 326-20-190, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 85-07-006 (Order 85-2), § 326-20-190, filed 3/8/85. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-190, filed 10/28/83.]

WAC 326-20-220 Resubmission of applications. (1) A business which withdraws its application, 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 organization 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). WSR 92-11-007, § 326-20-220, filed 5/11/92, effective 6/11/92. Statutory Authority: Chapter 39.19 RCW. WSR 86-17-018 (Order 86-2), § 326-20-220, filed 8/11/86. Statutory Authority: 1983 c 120 § 3(7). WSR 83-22-045 (Order 83-3), § 326-20-220, filed 10/28/83.]