

WSR 21-05-053

PROPOSED RULES

DEPARTMENT OF TRANSPORTATION

[Filed February 13, 2021, 8:23 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR [21-01-173].

Title of Rule and Other Identifying Information: Reduce conflict in the definition of small businesses.

Hearing Location(s): On March 23, 2021, at 11:00 a.m., virtual hearing. The hearing will be broadcast on Teams.

Date of Intended Adoption: March 23, 2021.

Submit Written Comments to: Jackie Bayne, 310 Maple Park Avenue S.E., Olympia, WA 98504-7314, email Baynej@wsdot.wa.gov, fax 360-705-6801, 360-705-7090, by March 17, 2021.

Assistance for Persons with Disabilities: Contact Jackie Bayne, phone 360-705-7090, fax 360-705-6801, TTY 711, email Baynej@wsdot.wa.gov, by March 17, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The rules are being modified as the current definition of small business allows for firms certified by the Washington state office of minority and women's business enterprises (OMWBE) or registered in Washington's electronic business solution (WEBS) to participate in the small and veteran's business enforceable goals program.

The revisions include: (b) ~~Is certified with the office of minority and women's business enterprises (OMWBE) as a DBE, MBE, WBE or SBE under chapter 39.19 RCW; or is self-certified as a "small business enterprise (SBE)" through the Washington state department of enterprise services and is listed as a SBE on the WEBS.~~

Reasons Supporting Proposal: OMWBE and WEBS have different size standards. This difference may cause unnecessary confusion and the agency will be creating different standards for businesses based upon ownership, which is not the intent of the program.

Statutory Authority for Adoption: RCW 39.04.155, 43.19.727, 47.01.101, and 47.28.030.

Statute Being Implemented: Chapter 468.17 RCW.

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

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: Washington state department of transportation (WSDOT) is in the process of implementing the small and veteran's business enforceable goals program. Program participants must meet the size standards listed in WAC 468-17-030. As currently written, the WAC refers to both WEBS system and OMWBE when defining the size standards for program participants. The size standards for each of these programs are different as OMWBE uses federal size standard[s] to regulate their Federal Small Business Enterprise Program whereas, the WEBS system uses Washington state size standards for determining state small businesses. To eliminate confusion for who can participate in the state small and veteran's business enforceable goals program, it is necessary that all references to OMWBE be removed from the WAC.

Additionally, OMWBE utilizes the federal size standard and WEBS utilizes the state size standard. WSDOT would like to implement the state small and veteran's business enforceable goals program utilizing the state size standard. The result will be a single clearly defined

size standard for the small businesses in the small and veteran's business enforceable goals program.

Name of Proponent: WSDOT, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Jackie Bayne, 310 Maple Park Avenue S.E., Olympia, WA 98504-7314, 360-338-5783.

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

A cost-benefit analysis is not required under RCW 34.05.328. This program is to the benefit of small businesses and therefore is not necessary.

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

Is exempt under RCW 19.85.025(3) as the rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect.

Is exempt under RCW 34.05.328.

Explanation of exemptions: RCW 34.05.328 only requires an impact statement for significant legislative rules of certain agencies listed in RCW 34.05.328 (5)(a)(i), which do not include WSDOT. The proposed rule is exempt because [it] is not for a significant legislative rule of those agencies.

February 11, 2021
Shannon Gill, Interim Director
Risk Management and Legal Services

OTS-2921.1

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

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

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

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

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

(4) "Consultant agreement" means a contract entered into by a public body for architectural and engineering services (performed pursuant to chapter 39.80 RCW) with another party, i.e., an independent individual or firm, in which the other party agrees to perform a service, render an opinion, or recommendations according to the consultant's methods and without being subject to the control of the public body except as to the result of the work.

(5) "Contract goal" means a percentage of the contract award amount the prime contractor or prime consultant must meet with small, mini, micro and veteran-owned businesses in order to receive award of the contract:

(a) For design-bid-build contracts, the contract goal is a percentage of the prime contractor's total bid plus any executed change orders;

(b) For design-build and consulting agreements, the contract goal is a percentage of the original contract amount plus any executed change orders or supplements;

(c) For general contractor/construction manager contracts, the contract goal is a percentage of the maximum allowable contract cost (MACC) plus any executed change orders or supplements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Fifty or fewer employees; or

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

(b) Is (~~certified with the office of minority and women's business enterprises (OMWBE) as a DBE, MBE, WBE or SBE under chapter 39.19 RCW; or is~~) self-certified as a "small business enterprise (SBE)" through the Washington state department of enterprise services and is listed as a SBE on the WEBS.

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

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

[Statutory Authority: RCW 39.04.155, 43.19.727, 47.01.101, and 47.28.030. WSR 19-12-026, § 468-17-030, filed 5/29/19, effective 6/29/19.]