

WSR 21-06-043

PROPOSED RULES

DEPARTMENT OF TRANSPORTATION

[Filed February 25, 2021, 8:11 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-10-035.

Title of Rule and Other Identifying Information: Enhancing Title VI Compliance to ameliorate discrimination on construction and consulting contracts.

Per Title VI, 42 U.S.C. § 2000d and Federal Highway Administration regulations 23 U.S.C. part 200, the Washington state department of transportation (WSDOT) has an obligation to ensure all of our programs and services are free from discrimination. Should the department have evidence of discrimination in the award and administration of state funded construction and consulting contracts, in the form of a disparity study, WSDOT shall require contractors and consultants to submit a nondiscrimination plan. This plan will demonstrate the actions the contractor or consultant shall take to ensure the contract they are working under is not discriminatory to firms owned by socially and economically disadvantaged individuals. Contractors and consultants shall supply a nondiscrimination plan with the bids and proposal.

If the provided nondiscrimination plan does not sufficiently demonstrate actions that the contractor or consultant will use to mitigate discrimination on their projects, then the bid or proposal will be considered nonresponsive. This rule will apply to WSDOT's contract and consulting award process to reduce and discourage discrimination in the department's public works contracting, including alternative public works, and professional service consulting.

Hearing Location(s): On April 13, 2021, at 9:30 [a.m.], virtual hearing. The hearing will be broadcast on [Microsoft] Teams.

Date of Intended Adoption: April 13, 2021.

Submit Written Comments to: Jackie Bayne, 310 Maple Park Avenue S.E., Olympia, WA 98501, email BayneJ@wsdot.wa.gov, fax 360-705-6801, work 360-705-7084, by April 6, 2021.

Assistance for Persons with Disabilities: Contact Jackie Bayne, phone 360-338-5783, fax 360-705-6801, TTY 711, email BayneJ@wsdot.wa.gov, 310 Maple Park Avenue S.E., Olympia, WA 98501, by April 6, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of this rule is to reduce discrimination by requiring nondiscrimination plans on WSDOT contracts. Contractors and consultants will be required to provide a nondiscrimination plan along with all bids and proposals to demonstrate the actions they will take to ensure the contracts they are working under are free from discrimination. Anticipated effects of this rule on WSDOT state contracts include: More equitable contracting, mitigation of possible Title VI violations on state funded contracting and consulting, as well as decreased disparity ratios, which would result in an overall increase in participation of under-represented firms in department contracting.

This proposal will result in no changes to existing rules.

Reasons Supporting Proposal: Title VI requires WSDOT to ensure nondiscrimination based on race, sex, color, and national origin in all of the department's programs, services, activities and contracts.

WSDOT continues to receive disparity studies which note statistically significant disparity ratios in our contracting and consulting on state funded contracts. As long as these statistically significant disparity ratios exist, the agency has an obligation under Title VI to ensure equitable distribution and fairness in our contracting and consulting.

Statutory Authority for Adoption: RCW 47.01.101 and 47.01.260(1). Rule is necessary because of federal law, [Title VI].

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: See WAC sections following.

Name of Proponent: WSDOT, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Jackie Bayne, Office of Equal Opportunity, Headquarters, 310 Maple Park Avenue S.E., Olympia, WA 98501, 360-705-7084.

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

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Jackie Bayne, 310 Maple Park Avenue S.E., Olympia, WA 98501, phone 360-705-7084, fax 360-705-6801, email BayneJ@wsdot.wa.gov.

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

Is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Citation of the specific federal statute or regulation and description of the consequences to the state if the rule is not adopted: Per Title VI, 42 U.S.C. § 2000d Federal Highway Administration regulations 23 U.S.C. part 200, WSDOT has an obligation to ensure all of our programs and services are free from discrimination. Should this rule not be adopted, WSDOT will continue to run the risk of Title VI violations on state funded contracting and consulting, due to disparity study evidence showing significant disparity ratios on state funded contracting which demonstrates discrimination in state funded contracting.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated.

A copy of the detailed cost calculations may be obtained by contacting Jackie Bayne, 310 Maple Park Avenue S.E., Olympia, WA 98501, phone 360-705-7084, fax 360-705-6801, TTY 711, email BayneJ@wsdot.wa.gov.

February 25, 2021
Streator Johnson
for Shannon Gill
Administrative Risk Manager

OTS-2833.1

Chapter 468-19 WAC

**ENSURING NONDISCRIMINATION IN THE AWARD OF TRANSPORTATION CONSULTING
AND CONSTRUCTION PROJECTS**NEW SECTION

WAC 468-19-010 Authority. RCW 47.01.101 provides that the Washington state department of transportation (WSDOT) may adopt rules that are subject to the adoption procedures contained in the state Administrative Procedure Act. RCW 47.01.260(1) provides that WSDOT "shall exercise all the powers and perform all the duties necessary" to managing the state's transportation systems.

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NEW SECTION

WAC 468-19-020 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

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

(2) "Discrimination" means an act (or action), or lack therefore, whether intentional or unintentional, through which a person in the United States, solely because of race, color, religion, sex, or national origin, has been otherwise subjected to unequal treatment under any program or activity.

(3) "Owned" means a firm that is at least fifty-one percent owned by one or more individuals who are socially disadvantaged or, in the case of a corporation, in which fifty-one percent of the stock is owned by one or more such individuals.

(4) "Socially disadvantaged individual" is a person evidenced as disadvantaged through certification by the Washington state office of minority and women's business enterprises.

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NEW SECTION

WAC 468-19-030 Purpose. Per Title VI, 42 U.S.C. § 2000d and Federal Highway Administration (FHWA) regulations 23 C.F.R. Part 200, the department has an obligation to ensure all of our programs and services are free from discrimination. Should the department have evidence of discrimination in the award and administration of state-funded construction contracts, in the form of a disparity study conducted by WSDOT, WSDOT shall require contractors and consultants bidding on contracts over the agency estimated cost of three hundred fifty thousand dollars to submit a nondiscrimination plan. These nondiscrimination plans will demonstrate the actions the contractor or consultant will take to ensure the contracts they are working under are free from discrimination.

Contractors and consultants shall supply a nondiscrimination plan with each bid or proposal. If the nondiscrimination plan, submitted with the bid or proposal, does not include the elements listed in WAC 468-19-040, then the bid or proposal will be considered nonresponsive and awarded to the second lowest responsive bidder, or most qualified consultant. This rule will apply to the department of transportation's contract award and consulting procurement processes to remedy discrimination in WSDOT's contracting.

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NEW SECTION

WAC 468-19-040 Nondiscrimination plan contents. For a nondiscrimination plan to sufficiently demonstrate the actions the contractor or consultant will use to ensure their contracts are free from discrimination, it must address the following areas and issues, as applicable, and include the following elements:

(1) A signed statement from the organization's chief executive officer, comparable position, or designee, noting their intent to ensure nondiscrimination in the execution of the agreement.

(2) A document detailing the strategies and approaches the contractor or consultant will undertake in order to mitigate discrimination in the administration of their contract, including:

(a) Review of opportunities traditionally self-performed by contractor or consultant:

(i) What types of work will be subcontracted to ensure equitable participation from businesses owned by socially disadvantaged individuals; and

(ii) What other activities will be undertaken to expand contracting access including, but not limited to: Frequency of payment, relaxing or eliminating retainage/bonding/insurance requirement, or unbundling.

(b) Review of work items that may be managed or performed without a bidding process.

(c) Review of internal processes for direct negotiation with subcontractors, including detailed approaches to eliminate discriminatory activities in contracting on:

(i) Competitively bid trade packages and scopes of work; and

(ii) Solicitation of bid packages and scopes of work.

(3) The contractor or consultant will document, in detail, how they will conduct outreach, with examples of how they have in the past, if relevant, and will currently increase bid access for firms owned by individuals determined to be socially disadvantaged.

(4) The contractor or consultant will update the plan in detail, as outlined below, describing how they will conduct oversight, monitoring, and reporting, with detailed progress made in expanding access to contracting opportunities, including:

(a) For contracts up to fifty million, quarterly progress reports will be submitted to the department detailing:

(i) Documented outreach efforts to firms owned by socially disadvantaged individuals;

(ii) Detailed utilization rates including individuals and firms designated as socially disadvantaged; and

(iii) Adjustments implemented to increase outreach and reduce discrimination in contracting.

(b) For contracts over fifty million, monthly progress reports will be submitted to the department detailing:

(i) Documented outreach efforts to firms owned by socially disadvantaged individuals;

(ii) Detailed utilization rates, including individuals and firms designated as socially disadvantaged; and

(iii) Adjustments implemented to increase outreach and reduce discrimination in contracting.

(5) The contractor or consultant will document, in detail, methods they will use to ensure their contracting processes are free of unnecessary burdens including, but not limited to, the following areas:

(a) Prompt payment, to include "net 30" when feasible;

(b) Timely return of retainage;

(c) Dispute resolution process; and

(d) Prime contractor prequalification processes for subcontractors, if required.

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