

**WSR 23-24-006
PROPOSED RULES
DEPARTMENT OF
ENTERPRISE SERVICES**

[Filed November 27, 2023, 9:39 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 23-11-169.

Title of Rule and Other Identifying Information: Public works contracting; addressing equity and efficiencies, including small works contracting requirements.

Hearing Location(s): On January 9, 2024, at 10:00 a.m., virtually via Zoom. To attend the hearing please use this link <https://des-wa.zoom.us/j/96728302186>; or One-tap mobile 8778535247,,96728302186# US Toll Free, 8887880099,,96728302186# US Toll Free; or phone. Dial (for higher quality, dial a number based on your current location) 877-853-5247 US Toll Free, 888-788-0099 US Toll Free, Webinar ID 967 2830 2186. International numbers available <https://des-wa.zoom.us/j/adYnWfhsLw>.

Date of Intended Adoption: January 24, 2024.

Submit Written Comments to: <https://www.surveymonkey.com/r/HouseBill-ESSB5268>, by 5 p.m. PST, January 12, 2024.

Assistance for Persons with Disabilities: Contact Chris Ferguson, email chris.ferguson@des.wa.gov, by December 31, 2023.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: To enhance administrative efficiency, promote the utilization and growth of small businesses, and maintain protections to the labor work force.

Reasons Supporting Proposal: The 2023 efficiency and equity in public works contracting bill (SSSB [2SSB] 5268) modified the existing small works roster requirements, put in place a statewide roster and a small business enterprise certification program, aligned financial thresholds throughout the state, added a direct contracting option, and made changes to public works small works roster. Current rules need to be updated to align with changes made by SSSB [2SSB] 5268.

Statutory Authority for Adoption: SSSB [2SSB] 5268.

Statute Being Implemented: SSSB [2SSB] 5268.

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

Name of Proponent: Washington state department of enterprise services (DES), governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Bill Frare, 1500 Jefferson [Street S.E.], Olympia, WA, 360-280-6083.

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. DES is not an agency listed in RCW 34.05.328 (5)(a)(i). Further, DES does not voluntarily make section 201 applicable to this rule adoption, nor to date, has the joint administrative rules review committee made section 201 applicable to this rule adoption.

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

Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party; rules only correct typographical errors, make address or name changes, or clarify

language of a rule without changing its effect; and rule content is explicitly and specifically dictated by statute.
Scope of exemption for rule proposal:
Is fully exempt.

November 27, 2023
Jack Zeigler
Policy and Rules Manager

OTS-5070.1

AMENDATORY SECTION (Amending WSR 15-23-062, filed 11/13/15, effective 12/14/15)

WAC 200-330-010 Purpose and authority. The purpose of this chapter is to establish a common procedure that state agencies and local governments may use to award contracts under the small works roster process established in RCW 39.04.151. This chapter of the Washington Administrative Code is adopted pursuant to (~~chapter 98, Laws of 1982~~) RCW 39.04.151, which (~~requires~~) authorizes the director of the department of enterprise services to adopt by rule a procedure to prequalify contractors for inclusion on a small works roster established by the state agencies enumerated in section 2, chapter 98, Laws of 1982. The procedure set forth in this chapter shall be utilized by those agencies in establishing a small works roster.

NEW SECTION

WAC 200-330-025 Definitions. As used in this chapter the terms:

- (1) "Contracting agency" means all agencies and political subdivisions of the state with public works contracting authority.
- (2) "Independent roster" means a small works roster established by a contracting agency either by itself or with another contracting agency.
- (3) "MRSC" means the municipal research and services center.
- (4) "OMWBE" means the office of minority and women's business enterprises.
- (5) "Publicly available" means published on a contracting agency's public website. If an agency does not support a public website, the agency must make printed copies of the material available at the reception area of its headquarters by having printed copies available at the office's reception desk or posted on a bulletin board available to the public at the office.
- (6) "Public work" means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the contracting agency, or which is by law a lien or charge on any property therein. "Public work" does not include work, construction, alteration, repair, or improvement performed under contracts entered into under RCW 36.102.060(4) or under development agreements entered into under RCW 36.102.060(7) or leases entered into under RCW 36.102.060(8).

(7) "Statewide roster" means the statewide small works roster developed by the department of commerce through MRSC.

NEW SECTION

WAC 200-330-035 General roster rules and procedures. (1) Small works rosters. Contracting agencies may use the statewide roster or an independent roster when contracting for small works. Contracting agencies are encouraged to use the statewide roster to promote administrative efficiency for both contracting agencies and contractors.

(2) Requirements. The statewide roster and independent rosters must meet the requirements of RCW 39.04.151, 39.04.152, and this chapter including, but not limited to, the following:

(a) Roster inclusion. All qualified responsible, licensed contractors must be included on the roster at their request. MRSC and contracting agencies with independent rosters may implement an application process for contractors to be placed on the roster.

(b) Contact information. Contractors included on the roster must designate an official email to receive bids notifications from the contracting agency.

(c) Contractor recordkeeping. Contractors included on the roster must keep records of applicable licenses, certifications, registrations, bonding, and insurance as required by RCW 39.04.350. This information must be made available at the request of the contracting agency.

(d) Small and diverse business certification.

(i) At the time of a contractor's application to be included on a roster, the contractor must indicate its certification status with OMWBE and the department of veterans affairs.

(ii) MRSC and contracting agencies with independent rosters must be able to download data from OMWBE and the department of veterans affairs to obtain current information on contractor certifications at the time of solicitation.

NEW SECTION

WAC 200-330-040 Small works competitive contracting. (1) Small works bid process. In lieu of a formal public works bidding process, contracting agencies may use the following small works competitive contracting process to invite contractors from the small works roster to submit bids for small works contracts. To use the competitive contracting process, the contracting agency's estimate of the work must be equal to or less than the competitive contracting cost limit established in RCW 39.04.152 (4) (a), excluding sales tax.

(2) Requirements. Contracting agencies must meet the requirements of RCW 39.04.151, 39.04.152, and this chapter, when implementing a small works competitive contracting process, inclusive of, but not limited to, the following:

(a) Invitations to bid.

(i) Invitations to bid must include:

(A) Plans, specifications, and an estimate of the work sufficient to define the work and for the contractor to generate a bid; and

(B) A date and time for receipt of bids through the designated bidding system.

(ii) Contracting agencies must provide an invitation to bid to all contractors on the appropriate roster category associated with the work to be performed.

(b) Estimated cost. The contracting agency's estimate of the work must be equal to or under the cost limit specified in RCW 39.04.152 to solicit bids under competitive contracting process. The contracting agency may award contracts for more than this amount if the contract cost is not excessive or does not constitute a cardinal change. A general guideline is that 10 percent or less of the statutory bid limit will not constitute a cardinal change.

(c) Change orders. Change orders may be added to the contract amount at the discretion of the contracting agency if the change orders are necessary to complete the work described in the plans, specifications, and estimate, or do not constitute a cardinal change. Contracting agencies shall not use change orders to avoid the statutory bid limit for this type of solicitation.

(d) Retainage. Retainage may be waived or reduced by the contracting agency. If the contracting agency waives or reduces retainage, the waiver or reduction must be indicated in the invitation to bid at the time of solicitation, and the contracting agency assumes liability for any unpaid wages and taxes.

(e) Bid acceptance. Contracting agencies:

(i) Must accept bids through electronic methods such as electronic mail or an electronic bid system;

(ii) Shall not establish a formal bid opening; and

(iii) Must make bid tabs publicly available.

NEW SECTION

WAC 200-330-050 Small works direct contracting. (1) Direct contracting process. In lieu of a formal public works bidding process and the small works competitive contracting process provided in WAC 200-330-040, contracting agencies may enter into direct contracts with a contractor by soliciting a quote from a single selected contractor on the statewide roster or independent roster and negotiate a final price. Pursuant to the limits set forth in RCW 39.04.151 and 39.04.152, the direct contracting process may be used when the contracting agency's estimate for the work is equal to or less than the cost limit specified in RCW 39.04.152 (4) (b), excluding sales tax.

(2) Requirements. Contracting agencies must meet the requirements of RCW 39.04.151, 39.04.152, and this chapter, when implementing a small works direct contracting process, inclusive of, but not limited to, the following:

(a) Administrative efficiency. Direct contracting is intended to be a quick and administratively efficient process with a focus on promoting the use of small and diverse businesses. This is not a competitive solicitation.

(b) Diverse business utilization plan. Contracting agencies must establish a small, minority, women, and veteran-owned business utilization plan prior to using the direct contracting process.

(c) Contractor rotation.

(i) Contracting agencies must rotate direct contracting opportunities among the available contractors on the appropriate roster.

(ii) Contracting agencies must not favor certain contractors by repeatedly awarding contracts to contractors without documented attempts to directly contract with other contractors.

(iii) Contracting agencies must adopt a policy regarding how contract opportunities will be rotated to avoid favoritism in direct contracting. Contracting agencies must make this policy publicly available.

(iv) A contracting agency's rotation policy must, at a minimum, provide the following:

(A) Contractors that have been issued a contract under the direct contracting process must not be offered a future contract until all other contractors on the roster have received a solicitation for a quote through the direct contracting process; and

(B) Contracting agencies must consider nonresponsive solicitations and the inability to negotiate an agreed price in their rotation policy.

(d) Soliciting quotes.

(i) Solicitations for a quote under the direct contracting process must include the following:

(A) A description of the work to be performed sufficient for the contractor to develop a price;

(B) The date the contracting agency must receive the contractor's quote; and

(C) Any timeline requirements for mobilization.

(ii) When six or more contractors certified as public works small business enterprises by OMWBE are listed on the appropriate roster, the contracting agency must solicit a quote from a certified public works small business enterprise contractor on the roster in accordance with the agency's rotation policy.

(iii) When five or fewer contractors certified as public works small business enterprises by OMWBE are listed on the appropriate small works roster for this type of work, the contracting agency may solicit a quote from any contractor on the roster in accordance with the agency's rotation policy.

(e) Negotiated price.

(i) A contract price must be negotiated with a single selected contractor from the statewide or independent roster. The negotiated price should be based on the quote from the contractor and available project funds identified by the contracting agency.

(ii) If the contractor and the contracting agency cannot agree on a price, the agency may elect to end negotiations and move to the next contractor on the rotation in accordance with the agency's rotation policy.

(iii) Once a price is established and all other requirements are met, the contracting agency may proceed with award and execution of the contract.

(iv) Contracting agencies are prohibited from bid shopping using the direct contracting process. If the contracting agency and the next contractor on the rotation cannot agree on a contract price, the contracting agency must competitively bid the work under WAC 200-300-040, if the agency intends to proceed with the work.

(f) Notice of award. Contracting agencies must provide notice of a small works contract award to all other contractors on the appropriate roster of award.

(g) LNI portal. Contracting agencies are required to initiate the small works project using labor and industries' awarding agency portal when awarding a contract under the direct contracting process.

(h) Recordkeeping. Contracting agencies must keep documented records of their efforts under the direct contracting process, including records of the following:

- (i) The contractors that the contracting agency solicited for the contract;
- (ii) Whether the contractor responded to the solicitation;
- (iii) Records of price negotiations;
- (iv) The contracts that were awarded and to whom; and
- (v) Records documenting the reasons a negotiated price could not be reached.

NEW SECTION

WAC 200-330-060 Small works roster contracting templates. The department of enterprise services will develop and make publicly available templates for bid invitations, bidding, and contracting using the direct contracting process for the use of all contracting agencies.

REPEALER

The following sections of the Washington Administrative Code are repealed:

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| WAC 200-330-020 | Notice required by agency establishing small works roster. |
| WAC 200-330-030 | Contractors application form—Information required. |
| WAC 200-330-070 | Denial or removal of contractors from small works roster—Reasons. |
| WAC 200-330-080 | Denial or removal from roster—Notice and hearing. |