

WSR 21-15-050

PROPOSED RULES

DEPARTMENT OF TRANSPORTATION

[Filed July 14, 2021, 3:25 p.m.]

Original Notice.

Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1).

Title of Rule and Other Identifying Information: Clarify contract goals for the small and veteran-owned business enforceable goals program.

Hearing Location(s): On August 24, 2021, at 10 a.m., https://teams.microsoft.com/l/meetup-join/19%3ameeting_YzVlYtC0NjEtNGE4Yy00OGY1LWI5YjctNDQ0M2FmOWNmN2Rl%40thread.v2/0?context=%7b%22Tid%22%3a%226f10858a-931e-4554-89f7-a3694e8e0fla%22%2c%22Oid%22%3a%22f2663ad6-d7bd-4270-97fc-7de8de8e7642%22%7d, Teams meeting.

Date of Intended Adoption: September 10, 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, other 360-705-7090, by August 6, 2021.

Assistance for Persons with Disabilities: Contact Jackie Bayne, phone 360-705-7084, fax 360-705-6801, TTY 711, email Baynej@wsdot.wa.gov, by as soon as possible.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The rules are being modified to simplify the process, and clarify the language, regarding contract goals for the small and veteran-owned business enforceable goals program. This rule simplification will refine the WAC 468-17-030(5) definition of "Contract goal" to apply only to the contract amount, and will clarify current language by removing multiple references to "condition of award."

The revisions include: (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.~~

Additional modifications include the striking of all usage of the term "condition of award."

Reasons Supporting Proposal: The Washington state department of transportation (WSDOT) is in the process of implementing the small and veteran's business enforceable goals program. Program participants require clarity in both the application of goals and the terminology regarding goal settings. Confusion in the administration of goals will both increase the administrative burden of the program as well as reduce the program effectiveness. Striking all the condition of award language will reduce confusion and streamline program implementation.

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

Statute Being Implemented: RCW 47.01.101 and 47.01.260.

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: WSDOT is in the process of implementing the small and veteran's business enforceable goals program. The proposed changes will help reduce confusion in a new program, which will both lessen the program's administrative burden and increase program effectiveness. Striking all the condition of award language will remove duplicative definitions within the 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. As WSDOT is not listed in RCW 34.05.328 (5)(a)(i), no preliminary collective bargaining agreement is required.

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 is not for a significant legislative rule of those agencies.

July 14, 2021
Shannon Gill
Interim Director
Risk Management
and Legal Services

OTS-3193.1

AMENDATORY SECTION (Amending WSR 21-07-127, filed 3/23/21, effective 4/23/21)

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 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 34.05.310. WSR 21-07-127, § 468-17-030, filed 3/23/21, effective 4/23/21. 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.]

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

WAC 468-17-050 ((Condition of award)) Goals. On solely state-funded projects, the small and veteran business goals for participation of small and veteran-owned enterprises shall be as directed by the department or other state agencies conducting disparity studies. Presently these goals are set as follows:

(1) Veteran business goal of five percent; and

(2) Small business goal of five percent.

[Statutory Authority: RCW 39.04.155, 43.19.727, 47.01.101, and 47.28.030. WSR 19-12-026, § 468-17-050, filed 5/29/19, effective 6/29/19.]

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

WAC 468-17-060 Commercially useful function. Under the enforceable goals program, commercially useful function (CUF) restrictions apply to all SBEs, mini-businesses, micro-businesses and VOBs. These businesses must perform a CUF in order for their participation to be counted against any (~~condition of award~~) goal. A business performs a CUF when it is both responsible for the execution of the work of the contract and it meets its responsibility under the contract by actually performing, managing, and supervising the work involved. If any materials or supplies are needed to perform the contract, the business must negotiate price, determine quality and quantity, order the material, install (if applicable), and pay for those materials or supplies itself.

Additional considerations when making a determination on a CUF are as follows:

(1) A SBE, VOB, micro-business or mini-business does not perform a CUF if its role is limited to that of an extra participant in a transaction or contract or it is involved in a project for the purposes of creating a semblance of SBE, VOB, micro-business or mini-business participation.

(2) Other relevant factors that may be considered when evaluating whether a SBE, VOB, micro-business or mini-business is performing a CUF include industry practices, the amount of work subcontracted and whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing.

(3) In addition, a business that functions as a supplier shall:

(a) Be the manufacturer of the goods or materials or assume the actual and contractual responsibility for furnishing the goods or materials and executing material changes in the configuration of those goods or materials; or

(b) Secure a contract or distributor agreement with a manufacturer to act as an independent authorized representative capable of passing on product warranties to the purchaser.

(4) Factors which may indicate that a supplier is not performing a commercially useful function include, but are not limited to, the following:

(a) A minimum amount of inventory is not maintained;

(b) Billing and shipping arrangements are performed by nonowners or staff of nonowners;

(c) A significant amount of deliveries are shipped directly from the producer or manufacturer to the end user;

(d) The firm does not take ownership of the product.

[Statutory Authority: RCW 39.04.155, 43.19.727, 47.01.101, and 47.28.030. WSR 19-12-026, § 468-17-060, filed 5/29/19, effective 6/29/19.]

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

WAC 468-17-090 Small and veteran business plans. (1) Prime contractors, design-builders, general contractors/construction managers and consultants must submit a small and veterans' business plan that specifies how the contractor will meet SBE and VOB participation goals, prior to the award of any contract. The small and veteran business plan for design-bid-build and consultant contracts must list all of the SBEs, VOBs, mini-businesses and micro-businesses that will participate in the contract; a description of the work that each SBE, VOB, micro-business or mini-business will perform; the dollar amount of the participation of each SBE, VOB, micro-business or mini-business; the contractor's written commitment to use the SBE, VOB, micro-business or mini-business submitted; and written confirmation from each SBE or VOB firm that it is participating in the contract in the kind and amount of work provided in the inclusion plan. The small and veteran business plan for design-build and general contractor/construction manager contracts must list in detail the contractor's means and methods that it will use to meet the goal and a commitment by the contractor to attempt to meet the goal. If the total SBE and VOB participation in the small and veteran business plan does not meet the ~~((condition of award))~~ goal, then the contractor must also submit evidence of good faith efforts (GFEs) ~~((to meet the contract goal))~~. A contractor may be awarded a project only after WSDOT has approved its small and veteran business plan or confirmed its GFEs. Revisions of small and veteran business plans may be necessary prior to plan approvals.

(2) Quarterly small and veteran business plans are required for design-build and general contractor/construction manager projects. The first quarterly small and veteran business plan shall be submitted prior to contract award and must be approved by the department prior to contract execution. Subsequent small and veteran business plans must include information, as applicable, regarding:

- (a) Small and veteran business goal attainment;
- (b) A list all of the SBEs, VOBs, mini-businesses or micro-businesses that have been contracted to date;
- (c) A description of the work that each SBE, VOB, micro-business or mini-business will perform;
- (d) The dollar amount of the participation of each SBE, VOB, micro-business or mini-business;
- (e) The contractor's written commitment to use the SBE, VOB, micro-business or mini-business submitted;
- (f) Written confirmation from each SBE, VOB, micro-business or mini-business firm that it is participating in the contract in the kind and amount of work provided in the small and veteran business plan;
- (g) Corrective actions necessary to meet the established goals;
- (h) Outreach strategies;
- (i) Innovative approaches to secure goal(s); and
- (j) Other evidence of GFEs to meet the contract goal.

[Statutory Authority: RCW 39.04.155, 43.19.727, 47.01.101, and 47.28.030. WSR 19-12-026, § 468-17-090, filed 5/29/19, effective 6/29/19.]