

WSR 23-17-136

PROPOSED RULES

DEPARTMENT OF TRANSPORTATION

[Filed August 21, 2023, 2:35 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 23-13-043.

Title of Rule and Other Identifying Information: Compliance with contract goals—Counting participation.

Hearing Location(s): On September 29, 2023, at 10:00 a.m., at Nisqually Conference Room, 310 Maple Park Avenue S.E., 1st Floor Room 1D02, Olympia, WA 98501.

Date of Intended Adoption: October 5, 2023.

Submit Written Comments to: Jackie Bayne, 310 Maple Park Avenue S.E., Olympia, WA 98501, email BayneJ@wsdot.wa.gov, fax 360-705-6801, 360-705-7090, by August 28, 2023.

Assistance for Persons with Disabilities: Contact Jackie Bayne, phone 360-705-7084, fax 360-705-6801, TTY 711, email BayneJ@wsdot.wa.gov, by August 28, 2023.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: This establishes rules, as allowed under RCW 47.28.030(3), that will comply with rules adopted by the office of minority and women's business enterprises (OMWBE) under chapter 39.19 RCW. These rules include:

- (a) Counting participation;
- (b) Commercially useful function;
- (c) Termination and substitution;
- (d) Joint checks;
- (e) Good faith efforts;
- (f) Other program requirements; and
- (g) Penalties for noncompliance.

The rules will provide the framework for the regulation of enforceable OMWBE goals and the use of OMWBEs counting toward those goals.

Reasons Supporting Proposal: Establishing these rules will clear up confusion by Washington state department of transportation (WSDOT), contractors, and consultant about how participation is counted towards the minority, veteran, and women's business enterprises contract goals. These rules will also provide mechanisms for WSDOT to effectively monitor and verify how participation is counted and provide contractors and consultants better assurance that contract work will be eligible to count towards the goals.

Statutory Authority for Adoption: RCW 39.04.155, 43.19.727. 47.01.101, and 47.28.030; chapter 39.19 RCW.

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 has a proposed draft of the regulatory language that can be provided upon request.

Name of Proponent: WSDOT, office of equity and civil rights, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Jackie Bayne, 310 Maple Park Avenue S.E., Olympia, WA 98504, 360-705-7090.

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. WSDOT is not listed in RCW 34.05.328 (5)(a)(i); no cost-benefit analysis 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 19.85.061 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: RCW 19.85.061, the enforceable OMWBE program is being developed to ensure compliance with Title VI of the Civil Rights Act of 1964 and is intended to bring WSDOT into compliance with federal regulations.

Is exempt under RCW 19.85.025(3) as the rule content is explicitly and specifically dictated by statute.

Explanation of exemptions: The rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect.

RCW 34.05.310 (4)(e), WSDOT needs to adopt these rules to comply with the rules adopted by OMWBE under chapter 39.19 RCW. These rules are intended to ensure that minority and women business enterprises can successfully perform work on transportation-related projects. These rules apply to WSDOT's contracting process to reduce and discourage discrimination in WSDOT's contracting.

Is exempt under RCW 19.85.061.

Explanation of exemption: RCW 19.85.061, the enforceable OMWBE program is being developed to ensure compliance with Title VI of the Civil Rights Act of 1964 (Title VI, 42 U.S.C. § 2000d) and is intended to bring WSDOT into compliance with federal regulations.

Scope of exemption for rule proposal:

Is fully exempt.

August 17, 2023

Sam Wilson

Director, Business Support Services

**OTS-4770.2**

**Chapter 468-19 WAC  
MINORITY AND WOMEN BUSINESS ENTERPRISE ENFORCEABLE GOALS PROGRAM**

NEW SECTION

**WAC 468-19-010 Counting participation.** (1) When a business certified by the office of minority and women's business enterprises as a minority or women business enterprise (MWBE) pursuant to RCW 39.19.120 participates in a contract (construction or consultant service agreement), only count the value of the work performed by the MWBE.

(2) Count the entire amount of that portion of the contract that is performed by the MWBE's own forces. Include the cost of supplies and materials obtained by the MWBE for the work of the contract, including supplies purchased or equipment leased by the MWBE (except supplies and equipment the MWBE purchases or leases from the prime contractor or its affiliate).

(3) Count the entire amount of fees or commissions charged by a MWBE for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a contract, toward MWBE goals, provided the fee is determined to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(4) When a MWBE participates as a broker (i.e., arranging a transaction or service but does not provide a work product or enhancement), only the dollar value of the fee or commission charged or 20 percent of the total dollar value of expenditures by the MWBE (whichever is greater) counts toward the MWBE goal.

(5) Do not count the cost of the materials and supplies themselves toward MWBE goals.

(6) When a MWBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward MWBE goals only if the MWBE's subcontractor is itself a MWBE. Work that a MWBE subcontracts to a non-MWBE firm for more than 25 percent does not count toward MWBE goals.

(7) Do not count payments to a MWBE when the MWBE firm participates as an extra participant in a transaction, through which funds are passed in order to give the appearance of participation by the MWBE firm and an attempt to count toward the enforceable MWBE goal. Pass-throughs are not countable towards the MWBE goal and are a violation of the program requirements.

(8) When a MWBE firm performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work, commensurate with the firm's interest in the joint venture, of the contract that the MWBE performs with its own forces toward the goal.

(9) Count expenditures with MWBEs for materials or supplies toward MWBE goals as provided in the following:

(a) If the materials or supplies are obtained from a MWBE manufacturer, count 100 percent of the cost of the materials or supplies toward MWBE goals. For purposes of this paragraph, a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

(b) If the materials or supplies are purchased from a MWBE supplier, count 100 percent of the cost of the materials or supplies toward MWBE goals. A supplier is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

(10) Determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a supplier or a broker) on a contract-by-contract basis.

(11) Count expenditures to a MWBE toward MWBE goals only if the MWBE is performing a commercially useful function (CUF) on that contract.

(12) If a firm is certified as a MWBE at the time of initiation of their contract work, count the firm's participation toward the MWBE goals.

(13) If a firm becomes certified during the performance of their work, count the firm's participation from the date of certification.

(14) Do not count the dollar value of work performed under a contract with a firm 60 days after it has ceased to be certified.

(15) When a MWBE is removed from the MWBE program during the contract, all prior participation of that MWBE shall continue to count towards the MWBE goal, as long as the contract with the MWBE was executed prior to the removal notice.

(16) Do not count the participation of a MWBE toward a prime contractor's final compliance with its MWBE obligations on a contract until the amount being counted has actually been paid to the MWBE.

#### NEW SECTION

**WAC 468-19-020 Commercially useful function (CUF).** (1) A MWBE performs a CUF when it is responsible for execution of the work of the contract and is carrying out its responsibilities by performing, managing, and supervising the work involved. To perform a CUF, the MWBE 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. Paying for materials are subject to the joint check rules established herein.

(2) A MWBE does not perform a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed to obtain the appearance of MWBE participation.

(3) If a MWBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own workforce, or the MWBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, WSDOT will presume it is not performing a commercially useful function.

(4) When a MWBE is presumed not to be performing a CUF pursuant to subsection (3) of this section, the MWBE may present evidence to rebut this determination. It may be determined that the firm is performing a CUF given the type of work involved and normal industry practices.

(5) The following factors are used in determining whether a MWBE trucking company is performing a commercially useful function:

(a) The MWBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting MWBE goals.

(b) The MWBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

(c) The MWBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

(d) The MWBE may lease trucks from another MWBE firm, including an owner-operator who is certified as a MWBE. The MWBE who leases trucks from another MWBE receives credit for the total value of the transportation services the lessee MWBE provides on the contract.

(e) The MWBE may also lease trucks from a non-MWBE firm, including from an owner-operator. The MWBE that leases trucks equipped with drivers from a non-MWBE is entitled to credit for the total value of transportation services provided by non-MWBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by MWBE-owned trucks or leased trucks with MWBE employee drivers. Additional participation by non-MWBE owned trucks equipped with drivers receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the WSDOT office of equity and civil rights.

(i) The MWBE may lease trucks without drivers from a non-MWBE truck leasing company. If the MWBE leases trucks from a non-MWBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

(ii) For purposes of this paragraph, a lease must indicate that the MWBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the MWBE, so long as the lease gives the MWBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the MWBE.

#### NEW SECTION

**WAC 468-19-030 Termination and substitution.** (1) The prime contractor cannot change the scope or reduce the amount of work committed to an MWBE without good cause. Reducing MWBE commitment is considered termination, and therefore subject to the termination procedures, described herein.

(2) In the event that work committed to an MWBE firm underruns the original planned quantities, the prime contractor may be required by WSDOT to substitute other remaining work to another MWBE.

(3) In instances where WSDOT makes changes that result in reductions to work that was committed to an MWBE, the prime contractor may be directed to subcontract other remaining contract work for possible MWBE participation.

(4) Termination of a MWBE is only allowed in whole or in part for good cause and with prior written approval of WSDOT. If the prime contractor terminates or substitutes a MWBE without the prior written approval of WSDOT, the prime contractor may not be entitled to payment for work committed to, but not performed/supplied by the MWBE.

(5) Prior to requesting approval to terminate or substitute a MWBE, the prime contractor shall give notice in writing to the MWBE with a copy to WSDOT of their intent to terminate the MWBE and the reasons for doing so. The MWBE shall have five days to respond to the prime contractor's notice. The MWBE's response shall either support the termination or advise WSDOT and the prime contractor of the reasons it objects to the termination of its subcontract or MWBE commitment.

(6) If the request for termination is approved, the prime contractor is required to make a good faith effort (GFE) to find another

MWBE to perform at least the same dollar amount of work under the contract as the MWBE that was terminated. A plan to replace the MWBE commitment or GFE shall be submitted to WSDOT within seven calendar days of the approval of termination.

(7) Good cause typically includes situations where the MWBE is unable or unwilling to perform the work of its subcontract.

(a) Good cause may exist if:

(i) The MWBE fails or refuses to execute a written contract.

(ii) The MWBE fails or refuses to perform the work of its contract in a way consistent with normal industry standards.

(iii) The MWBE fails or refuses to meet the prime contractor's reasonable nondiscriminatory bond requirements.

(iv) The MWBE becomes bankrupt, insolvent, or fails to pay their suppliers, unions, other creditors, or employees.

(v) The MWBE is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to federal law or applicable state law.

(vi) The MWBE is ineligible to receive credit for the type of work involved.

(vii) The MWBE voluntarily withdraws from the project and provides written notice of its withdrawal.

(viii) The MWBE's work is deemed unsatisfactory by the agency and not in compliance with the contract.

(ix) The MWBE's owner dies or becomes disabled, with the result that the MWBE is unable to complete its work on the contract.

(b) Good cause does not exist if:

(i) The prime contractor seeks to terminate an MWBE so that the prime contractor can self-perform the work.

(ii) The prime contractor seeks to terminate an MWBE so the prime contractor can substitute another MWBE or non-MWBE after the contract has been awarded to the MWBE.

(iii) The failure or refusal of the MWBE to perform its work on its contract results from the bad faith or discriminatory action of the prime contractor (e.g., the failure of the contractor to make timely payments or the unnecessary placing of obstacles in the path of the MWBE's work).

#### NEW SECTION

**WAC 468-19-040 Joint checks.** (1) Joint checks may only be used by a MWBE to pay for materials or supplies.

(a) A joint check is a check between a MWBE and the prime contractor to the supplier of materials/supplies, only.

(b) The check is issued by the prime contractor as payer to the MWBE and the material supplier jointly for items to be incorporated into the project.

(c) The MWBE must release the check to the supplier, while the prime contractor acts solely as the guarantor.

(2) A joint check agreement must be approved by the WSDOT and requested by the MWBE involved. The MWBE joint check agreement between the parties involved must include the conditions of the arrangement and the expected use of the joint checks.

(3) The prime contractor shall not directly pay the supplier for materials or supplies used by the MWBE.

(4) If the procedures described herein are not followed, the MSVWBE may be determined to not be providing a CUF.

NEW SECTION

**WAC 468-19-050 Good faith efforts.** (1) The prime contractor shall utilize the MWBEs to perform the work and supply the materials for which each is committed through an executed contract, unless prior written approval by WSDOT has been received by the contractor. The prime contractor shall not be entitled to any payment for work or material completed by the prime contractor or other subcontractors that was committed to be completed by an MWBE.

(2) The prime contractor shall make a good faith effort (GFE) to achieve the MWBE contract goals. The following is a list of the types of actions which would be considered as part of the prime contractor's GFE to achieve MWBE participation. It is not intended to be an exclusive or exhaustive list. Other factors or types of efforts may be relevant in certain cases.

(a) Prime contractor solicited, through all reasonable and available means, the interest of all certified MWBEs who had the capability to perform the work of the contract.

(b) The prime contractor solicited interest with sufficient time to allow MWBEs to respond to the solicitation.

(c) The prime contractor determined with certainty that MWBEs were interested in taking appropriate steps to follow up initial solicitations with potential MWBEs.

(d) Where appropriate, breaking out the contract work items into economically feasible units to facilitate MWBE participation; even when the prime contractor might otherwise prefer to perform these work items with its own forces.

(e) Provided interested MWBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

(f) Not rejecting MWBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities.

(g) Made efforts to assist interested MWBEs in obtaining bonding, lines of credit, or insurance as required by WSDOT or the prime contractor.

(h) Made efforts to assist interested MWBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

(i) Effectively used the services of available community organizations; contractor's groups; local, state, and federal small business assistance offices; and other organizations to provide assistance in recruitment and placement of MWBEs.

(j) Documentation of GFE must include copies of each MWBE and non-MWBE quotes submitted to the prime contractor when a non-MWBE selected over a MWBE for work on the contract.

NEW SECTION

**WAC 468-19-060 Other program requirements.** (1) The prime contractor shall submit a monthly inclusion report to WSDOT, documenting

each MWBE on the contract, the MWBE's original and current contract value, invoice to date, and total payments to date.

(2) The prime contractor shall provide an inclusion manager responsible for developing, overseeing, and managing a contract inclusion program and the inclusion plan, which describes and defines the process for attaining the MWBE goals.

(3) The inclusion plan shall be submitted to WSDOT within 30 days of initiating contract work, and be updated annually, thereafter, until project physical completion.

#### NEW SECTION

**WAC 468-19-070 Penalties for noncompliance.** If a person, firm, corporation, or business does not comply with any provision of this chapter or with a contract requirement established under this chapter, WSDOT may impose one or more of the following penalties: Withholding payment, suspension or revocation of the prime contractor's prequalification in accordance with chapter 468-16 WAC, or suspension or termination of the contract.