

## Equity and Efficiencies in Public Works Including Modifying Small Works Roster Requirements

### Overview & Frequently Asked Questions

#### Background

The Capital Projects Advisory Review Board and its committees in partnership with various state agencies and public and private stakeholder groups have worked to develop this bill for the 2023 Legislative session. CPARB unanimously support the proposed bill.

Key issues came out of two important reports requested by the legislature to CPARB:

- Addressing equity and efficiencies in public works procurement was initiated in the [Business Equity/Diverse Business Inclusion Report](#) to the Legislature in June 2022 (from [SB 5032](#), Sec. 20).
- Modifying and updating small works roster requirements was suggested in the [Local Government Public Works Study Report](#) to the Legislature in 2021 (from [ESHB 5418](#), Sec. 16).

#### Key Points

- Provides a common definition for small businesses pursuing public works.
- Creates a small business certification program by OMWBE.
- Continues to protect the rights of workers.
- Streamlines small projects procurement:
  - Creates a statewide small public works roster.
  - Provides a direct contracting option. *See images below for comparison of the changes.*
  - Updates RCW references with various small works thresholds.
  - Requires owners to have a small business utilization plan to use direct contracting.
  - Aligns small works limits of ports & irrigation districts for parity with other agencies.
- Calls for periodic reviews by CPARB for small works thresholds starting in 2025.
- Removes barriers and encourages participation by small and diverse businesses:
  - Small works roster has provisions for direct contracting with certified small businesses, under certain conditions.
  - Certified MBE/MWBE/WBE/SEDBE businesses will be provided small businesses certification without having to reapply.
  - Eliminates fees for small contractors and promotes the use of a statewide roster to reduce administrative time to small and diverse businesses seeking work.
  - Provides foundation for small and diverse businesses to build payment and performance bond experience with sureties and build credit history.
  - Discourages favoritism by prohibiting repeat awards to same contractor when direct contracting.
  - Adds features to inclusion plans for alternative public works projects.
  - Eliminates confusion between Federal DBE program and State certification programs.
- Effective date July 1, 2024, to allow adequate time for various agencies to develop rules, procedures and revisions to data systems. (July 1, 2023, for small works limit parity for ports & irrigation districts.)
- Success is dependent on funding for revisions to L&I, OMWBE, and MRSC systems.

**Previous Statute Overview:**

PUBLIC WORKS CATEGORIES	THRESHOLD	COMPETITION REQUIREMENT	RETAINAGE REQUIREMENT	BOND REQUIREMENT	INTENT/AFFIDAVIT REQUIREMENT
Limited Public Works	< \$50,000	Small Works Roster Process, Invite Quotes from All or select minimum of 3	Public Owners allowed the option to assess risk and determine waiver of retainage	Allows waiver of bonds	Allows for combined intent/affidavit forms per 39.12.040 (2)  Otherwise, Individual Intent/Affidavits Required
Small Works	\$50,000 - \$250,000	Small Works Roster Process, Invite Quotes from All or select from minimum of 5	Public Owners allowed the option to assess risk and determine waiver of retainage	Allow 10% retainage in lieu of Bond for public works contracts under \$150,000	Individual Intent/Affidavits Required
	\$250,000 – \$350,000 *\$300,000 for Port and Irrigation Districts	Small Works Roster Process, Invite Quotes from all Contractors on Rosters	Public Owners allowed the option to assess risk and determine waiver of retainage	Performance & Payment Bond Required	Individual Intent/Affidavits Required

**Proposed Legislation Overview:**

PUBLIC WORKS CATEGORY	THRESHOLD	COMPETITION REQUIREMENT	RETAINAGE REQUIREMENT	BOND REQUIREMENT	INTENT/AFFIDAVIT REQUIREMENT
Small Works	Under \$150,000	1) Contract through direct negotiation with equitable distribution OR 2) solicit quotes from all on the appropriate roster	Under \$5,000 – No retainage Required  All remaining contracts - Public Owners allowed the option to assess risk and determine reduction or waiver of retainage	Under \$5,000 – No bond Required  Allow 10% retainage in lieu of Bond	Under \$5,000 – Combo Forms allowed  Individual Intent/Affidavits Required
	\$150,000 – \$350,000	Invite Quotes from all Contractors on Rosters	All remaining contracts - Public Owners allowed the option to assess risk and determine reduction or waiver of retainage	Performance & Payment Bond Required	Individual Intent/Affidavits Required

**What is the public works threshold...does it increase the dollar limit for the SWR?**

This act sets the threshold for public works at \$350,000 and standardizes that dollar value for all agencies authorized to utilize the Small Works Roster Act. Small Works Roster projects are those public works with an estimated cost under \$350,000 exclusive of WA state sales tax.

The previous limited public works threshold of \$50K is replaced by a new threshold of \$150k and allows for direct contracting under certain conditions.

For projects \$150k or less, the public body may send notice to bid to all firms on the roster category, OR the public body may contract directly with a firm on the roster category.

There is a preference for small business built into the act to encourage the utilization of these contractors. See Section 15 subsection 2.

Defining Thresholds

- Two primary public works thresholds
  - Bid Threshold
  - SWR
- Take a variety of forms across agency types

Government Type	Bid Threshold	Small Works Roster Threshold	Applicable RCW	Limits for Work by Agency Employees
Area Agency on Aging	Subject to state bid requirements of RCW 43.19		74.38.050	Follows state requirements of RCW 43.19
City, first class	\$75,500 (1 craft) \$150,000 (>1 craft)	\$350,000	35.22.620	Per project: \$75,500 (1 trade), \$150,000 (>1 trade). NTE 10% of public works budget.
City, second class and towns city code	\$75,500 (1 craft) \$116,155 (>1 craft)	\$350,000	35.23.352 35A.40.210	Per project: \$75,500 (1 trade), \$116,155 (>1 trade). NTE 10% of public works budget.
Conservation district	None; established by policy		89.08	No statutory limits - set by policy
County, population >400k with purchasing department	\$0	\$350,000	36.32.235	Per project: \$45,000 or \$125k for Riverine or stormwater project (1 trade), \$90,000 or \$250k for Riverine or stormwater project (>1 trade). NTE 10% of public works budget.
County, population <400,000 with purchasing department	\$0	\$350,000	36.32.240 36.32.235	Per project: \$45,000 or \$125k for Riverine or stormwater project (1 trade), \$90,000 or \$250k for Riverine or stormwater project (>1 trade). NTE 10% of public works budget.
County without purchasing department	\$40,000	\$350,000	36.32.250	Allowed for non-road projects; road project limits set according to population and motor vehicle fuel tax factor
Educational service district (ESD)	None; established by policy (unless contracting on behalf of a school district, in which case school district bid laws apply)		28A.310	Most restrictive of establishing jurisdiction; if NA then by policy
Fire district	\$20,000	\$350,000	52.14.110	Not authorized
Flood/diking/drainage district	\$5,000	\$350,000	85.38.190	\$5,000
Health district	None; established by policy		70.46	No statutory limits - set by policy
Hospital district	\$75,000	\$350,000	70.44.140	\$75,000
Housing authority	None; established by policy		35.82 AGO 2009 No. 2	No statutory limits - set by policy
Intrastate agreement agency	Most restrictive of establishing jurisdiction		39.34	Most restrictive of establishing jurisdiction
Irrigation district	\$0	\$300,000	8703.435-436	No limit; must bid materials used by employees; must follow public works bid process when materials unless provided by contractor
Library district	None; established by policy		2712	Most restrictive of establishing jurisdiction; if NA then by policy
Mosquito control district	None; established by policy		17.28	No statutory limits - set by policy
Park and recreation district	None; established by policy		36.69	Most restrictive of establishing jurisdiction; if NA then by policy
Metropolitan parks district	\$20,000	\$350,000	35.61135	\$20,000
Port district	\$40,000	\$300,000	53.08.120	Allowed for all projects, except when over \$40k; must make a determination whether cost is lower performed by contract.
Public development authority (PDA)	Statutes of creating city or county		35.21730	Statutes of creating city or county
Public facilities district (PFD)	None; established by policy		36.100.030 35.57620	No statutory limits - set by policy
Public utility district (PUD)	\$50,000	\$350,000	54.04.070	\$300,000
Reclamation district (over 1 million acres)	All public works must be formally bid		89.30154	Not authorized
Regional support network (RSN)	Statutes of creating county		71.24.300	Statutes of creating county
School district	\$100,000	\$350,000	28A.335.190	\$75,000
Self-insurance risk pool	Most restrictive of establishing jurisdiction		48.62	Most restrictive of establishing jurisdictions
State college or university	\$45,000 (1 craft) \$90,000 (>1 craft)	\$350,000	28B.10.350 28B.50.330	\$45,000 (1 craft) \$90,000 (>1 craft)
Transportation authority (under RCW 36.57 or 36.57A)	None; established by policy		36.57A	No statutory limits - set by policy
Transportation authority (under RCW 35.21.225 or 36.73)	Statutes of creating city or county		35.21.225 36.73	Most restrictive of establishing jurisdictions
Water-sewer district	\$50,000	\$350,000	5708.050	\$50,000

Note: "Craft" refers to professional trades. The bid threshold is thus based on the number of professional trades required to complete a project.

**Which businesses are eligible to be on the SWR?**

SWR is open to all responsible contractors who have requested to be on the list, and where required by law, are properly licensed or registered to perform such work in this state in accordance with 39.04.350.

Contractors must indicate if they meet the definition of women-, minority-, veteran-owned business and/or small business as defined in this act.

Contractors must keep current records of any applicable licenses, certifications, registrations, bonding, insurance, or other appropriate matters on file with the appropriate agency as a condition of being placed on the roster(s) and award of a contract.

- **What is considered a small business?**

- “Small Business” means a business meeting certification criterion for size, ownership, control, and personal net worth adopted by the Office of Minority & Women’s Business Enterprises in accordance with RCW 39.19.030(7)(b).
- A small business is based on U.S. Small Business Administration (SBA) size standards.
- Average of annual gross revenue less than \$28.48M, or less depending on NAICS code (specialty subcontractors are \$16.5M for example). And owner’s net worth must be \$1.32M or less, excluding value of primary residence and business.
- The definition of small business matches the federal definition without the requirement for citizenship or permanent resident.
- There is no race or gender preference in the definition or certification of a small business.

- **What are the requirements for direct contracting?**

- For small public works projects with an estimated cost less than \$150,000, not including sales tax, to increase the utilization of small businesses, state agencies and local governments are encouraged to and may direct contract with small businesses as defined in the act.
  - (a) *if there are 6 or more contractors meeting the definition of small business on the applicable roster the state agency or authorized local government must direct contract with one of those small businesses on the applicable roster that have indicated interest in performing work in the applicable geographical area.*
  - (b) *if there are 5 or less contractors meeting the definition of small business on the applicable roster the state agency or authorized local government may direct contract with any contractor on the applicable roster.*

When direct contracting, utilization plans are required, and agencies must not repeat award to same contractor without documented attempt to direct contract with others on the roster.

- Invitations for bids or direct contract negotiation must include, at a minimum, an estimate for the scope of work including the nature of the work to be performed as well as the materials and equipment to be furnished. Detailed plans and specifications need not be included.

- **Why are the direct contract numbers at 6 or more and 5 or less?**

- Finding a consensus and a middle ground for this number was a major discussion.
- While using a smaller number would give the perception that there is more of an opportunity for smaller businesses, using a larger number provides a pool of contractors available to do the work, particularly for smaller agencies and authorized local governments struggling to find contractors to perform work today.
- The limited public works and small works roster processes from the past used a “3-5 contractors” in the solicitation process. Various iterations of this new SWR act were written/re-written with 5 being the accepted compromise.

• **What is the effective date of this bill?**

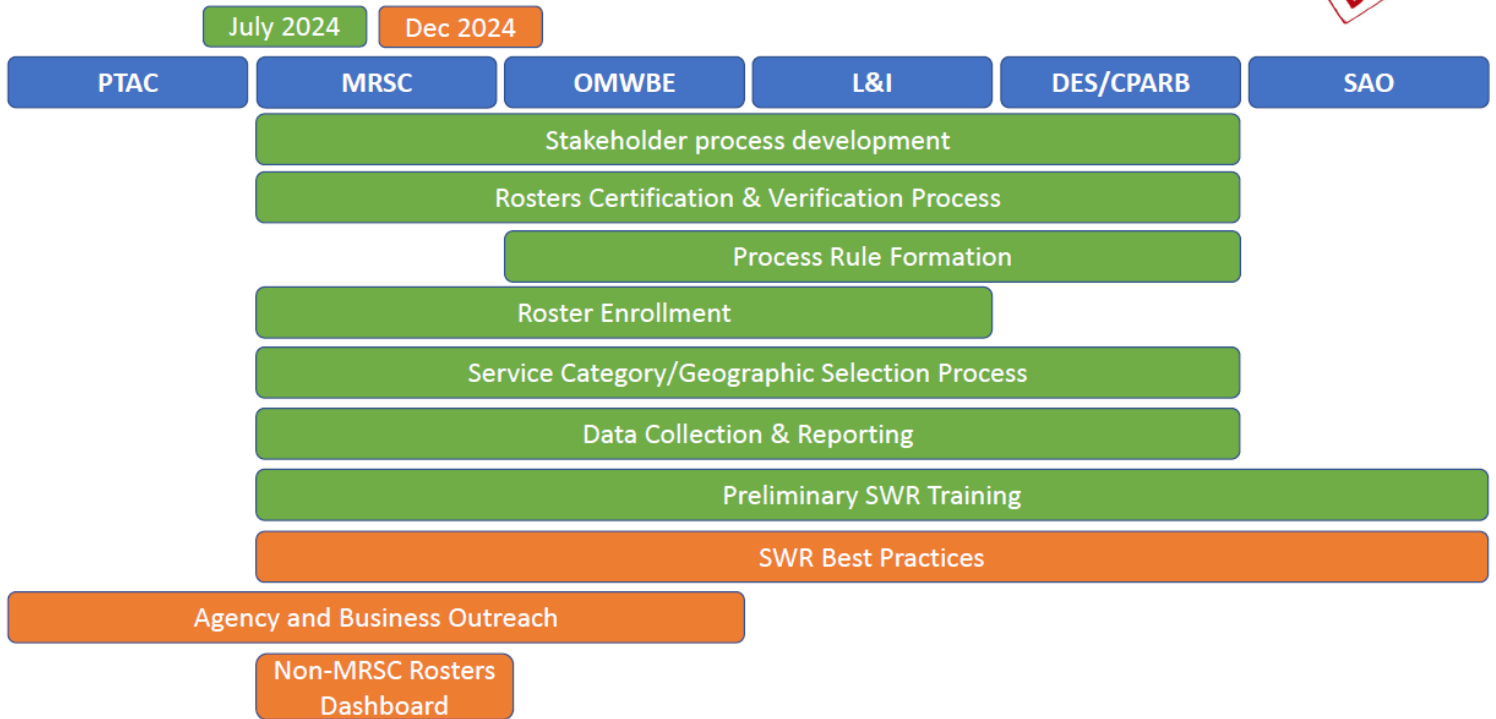
The expected implementation date is no later than July 1, 2024, except for small works limits parity for ports and irrigation districts will be effective July 1, 2023.

• **Why will it take until July 2024 to fully execute this bill?**

- Pending approval by the Legislature in spring of 2023, various agencies’ tasks, hiring, technical requirements and processes will need time to be funded, developed, tested, and training developed before full implementation can occur.
- We currently don’t have a small business certification process today – the work to be completed to implement a successful roll out is depicted here below: \*

# Small Works Roster Implementation Tasks

**DRAFT**



\*Details/description of these tasks can be found on page 7.

		Business Type								
<\$150K Direct Contract		Not Small	Small							
Action	Scenarios									
Direct Contract any	No Small	Green	Green	Green	Green	Green	Green	Green	Green	Green
Direct Contract Small Business	6 or more Small	Orange	Orange	Orange	Orange	Orange	Orange	Orange	Green	Green
Direct Contract any	5 or less Small	Orange	Orange	Green	Green	Green	Green	Green	Green	Green

*Guidance to be provided.*

- **What does the small business certification process look like?**

Certification is a rigorous process to eliminate fraud. Non-certified firms are encouraged to be certified.

If found not meeting the definition, a business may not receive preference for small works projects under \$150K where direct contracting is utilized.

- **What about specialized work?**

A public body or roster sponsor needs to determine what categories it needs in its roster.

Should it believe there is a need for a roster category of various specialized work, then it needs to establish that roster category.

The process of populating the all the roster categories is as noted above and the process of sending invitations to bid to all firms in the roster remains the same.

- **Why is the threshold for which retainage and bonding is not required at \$5,000?**

The new legislation removes the requirement for retainage and bonding for projects under \$5,000.

**Why not higher?** Contractor’s must provide surety bond for their contractor license/registration, which is either \$6,000 or \$12,000, depending on their specialty. This should cover any unpaid wages thereby protecting the rights of the workers.

**What about projects over \$5,000?** For contracts greater than \$5,000, the awarding agency may reduce or waive retainage requirements up to \$350K, thereby assuming the liability for the contractor’s nonpayment of: (a) Laborers, subcontractors, and suppliers; and (b) taxes (see Section 16 (5)).

- **What needs to be included in the Small Business Utilization Plan?**

A stakeholder group will be meeting including business and agency outreach to define and develop best practices.



- **What does documentation look like for good faith efforts look like?**

Annually, a state agency or authorized local government must publish a list of small works contracts awarded and contractors contacted for direct negotiation pursuant to 39.04.200. The list shall contain the name of the contractor or vendor awarded the contract, the amount of the contract, a brief description of the type of work performed or items purchased under the contract, and the date it was awarded. The list shall also state the location where the bid quotations for these contracts are available for public inspection.

## Description of the Implementation Tasks

- **Stakeholder Process Development**

- The user experience for both agencies and businesses contain pain points that should be identified and remediated. This task would involve stakeholder review to identify more fully the scope of the supplemental tasks below.

- **Rosters Certification & Verification Process**

- OMWBE will need to form a Small Business certification team and associated procedures.
- With the incorporation of small business identification into the Rosters process, there will be system and process updates that need to be completed.
- Review existing verification controls to better align businesses with the categories of work they intend to perform.

- **Process Rule Formation**

- After the legislation is adopted, there will need to be a follow up effort to clarify specifics of implementation not covered in the bill's language. This may take the form of supplemental WAC or RCW's.
- DES, OMWBE and L&I will need to coordinate, craft and change rules in order to implement.

- **Rosters Enrollment**

- IT system changes for the Rosters enrollment process will need to be implemented for various administrators.

- **Service Category/Geographic Selection Process**

- Review the existing service category structure to identify needed revisions and the process for future category additions.
- Identify and implement the logic for geographic selection process.

- **Data Collection & Reporting**

- Work with stakeholders to identify reporting needs and create the data collection structure to support it.

- **Preliminary Small Works Roster Training**

- Develop training material to support both agency and business participants in understanding and following the new requirements.

- ***Small Works Roster Best Practices***
  - Create resources to help guide agencies and businesses for efficiency and risk mitigation.
  - This differs from the preliminary training (legal requirements vs. best practices).
- ***Agency and Business Outreach***
  - This will be a continuous effort to provide access and encourage participation to the Statewide Roster for businesses and agencies.
- ***Non-MRSC Rosters Dashboard***
  - Provide information on all available Rosters.
  - Capture relevant related information for display on the Rosters portal.