As required by

The Washington State Administrative Procedure Act

Chapter 34.05 RCW

A CONCISE EXPLANATORY STATEMENT

Relating to adoption of changes to

Chapter 200-330 WAC

Small Works Roster

March 12, 2024

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# Reason for rule adoption

## Background

Small Works Roster laws first put in place in 1982

At the request of the Department of General Administration, the 1982 Legislature enacted ESSB 4200, Public Works Contracting - State Agency Small Works Roster. ESSB 4200 allowed the use of a small works roster for public works projects up to $25,000.00 and required at least one invitation to propose from a qualified minority contractor. The bill required the Department of General Administration by rule to put procedures in place to pre-qualify contractors for placement on the roster.

Small Works Roster laws updated in 2023 to increase equity

The 2023 Legislature passed [2SSB 5268, Efficiency and Equity in Public Works Contracting](https://app.leg.wa.gov/billsummary?BillNumber=5268&Initiative=false&Year=2023), to increase equity in public works contracting by helping small, minority, women, and veteran-owned businesses secure public works contracts.

The bill requires an update of the existing small works roster rules, establishes a small business certification program, aligns small works contracting thresholds throughout the state, adds a direct contracting option, a statewide roster, and requires the Municipal Research and Services Center (MRSC) to host the statewide roster. Additionally, the Department of Enterprise Services (DES) is required to put in place bid templates for use by other agencies with public works authority.

DES rulemaking partnerships

While DES’ rulemaking authority under 2SSB 5268 is narrowly limited in scope, the rule changes are closely connected to other work required by the changes to the public works laws. Alignment of all related work effort is critical. To make sure everything lines up, DES and the others partnered together:

* Department of Labor & Industries has updated prevailing wages rules for contracts under $2,500.
* The OMWBE has updated its Certification rules and created a new Public Works Small Business Enterprise (PWSBE) Certification Program.
* The Department of Commerce (Commerce), through the Municipal Research and Services Center (MRSC), must develop a statewide small-works roster that aligns with the changes to the small works roster rules.

Outreach

Before adopting the changes, DES worked with stakeholders on a rule draft between September and December 2023 to ensure that the rules meet the intent of the Legislature under [SSSB 5268](https://lawfilesext.leg.wa.gov/biennium/2023-24/Pdf/Bills/Session%20Laws/Senate/5268-S2.SL.pdf?q=20231108094953) to update and revise the small and limited works roster process to:

* increase administrative efficiency,
* encourage greater participation and utilization by small, minority, women, and veteran-owned businesses, and
* continue to protect the rights of workers engaging in public works projects.

During this time, DES first gathered feedback from participants who responded to a series of discussion questions on rule content. This was done before the formal start of rulemaking to gather feedback on potential rule content. Later, DES held a series of public workshops and governmental workshops. In addition, discussions with the CPARB advisory group directly informed the rulemaking.

## Comment consideration and response summary

On November 27, 2023, Enterprise Services filed proposed rules with the Office of the Code Reviser. The Office of the Code Revisor [published the proposed rules in the Washington State Register as WSR 23-24-006](https://lawfilesext.leg.wa.gov/law/wsr/2023/24/23-24-006.htm).

Consistent with the requirements of [RCW 34.05.325](https://app.leg.wa.gov/RCW/default.aspx?cite=34.05), we received public comments through January 12, 2024. Enterprise Services received oral comments at a virtual public hearing held on January 5, 2021. In addition, Enterprise Services received written comments submitted online through the agency rule-making web site. We are responding to all comments received as required by RCW 34.05.325 (6) (a)(iii) and (b).

The rules DES intends to adopt comply with the legislative intent and authority granted us in Chapters 43.19.125 and 46.08.150 Revised Code of Washington. DES made a thorough review of the text of the rules DES intends to adopt.

The final rules reflect DES’ effort in seeking participation during the rulemaking process from a diverse group of stakeholders. We would like to thank the many participants who contributed to this process and without whose help this undertaking would have been challenging.

# Differences between proposed text and adopted rule

## Change #1: Scope of rulemaking authority

We have amended **WAC 200-330-010 Purpose and authority** to clarify the scope of DES’ rulemaking authority is limited to oversight over state agencies.

Basis for change:

In the interest of making sure a cost effective and efficient small works roster is available to all state and local governments, the Legislature has instructed the Municipal Research and Services Center to put in place a statewide small works roster. The state further encourages the use of the statewide small works roster by both state agencies and local governments.

State law requires DES to put in place small works roster procedures by rule and further requires state agencies to include the procedures in any small works roster rules they adopt. In support of the interests of the state, DES’ small works roster procedures are provided as a model for required use by state agencies as well as a model for discretionary use by local governments.

## Change #2: Rulemaking mandate

We have amended **WAC 200-330-010 Purpose and authority** to properly identify the basis for amending the small works roster procedures rules.

Basis for change:

Proposed rule WAC 200-330-010 references chapter 98, laws of 1982 as the authority for the rules. Chapter 98, laws of 1982 instruct the former Department of General Administration to put in place rules to “prequalify contractors for inclusion on a small works roster established by the state agencies.” Chapter 138, laws of 2000 repealed this requirement and, in its place, directed the former Department of General Administration to establish a small works roster procedure by rule to be “included in any rules providing for a small works roster or rosters that is adopted by another state agency.”

## Change #3: Accepting written or electronic quotations

We have amended **WAC 200-330-040 Small works competitive contracting** to clarify written or electronic quotations are acceptable.

Basis for change:

RCW 39.04.152(4)(a)(i) authorizes state and local agencies to accept written or electronic quotations when contracting for small works roster projects. Our proposed rule under WAC 200-330-040 inadvertently limited state and local agencies to accepting only electronic quotations. This change makes clear written or electronic quotations are acceptable.

# Summary of all comments received and our consideration of the comments

**Note to reader:** Enterprise Services received comments in several formats, including email, oral testimony, letters, and via our website. We have tried to present comments as closely as possible to their original formats. The comments listed are verbatim and no changes were made to correct typos, grammatical or other similar errors.

## General Comments

Enterprise Services received several comments that did not cite a specific section or provision of the proposed rules.

| **Comment** |
| --- |
| We are all for equal bidding opportunities. That is the reason we have competitive public bidding process. Every contractor in Washington that is in good standing can already bid on these projects. It doesn't make sense and definately does not symplifly the bidding process to add requirements to a system that already has equitable goals in place. This will only make things more complicated and costly for the contractors and the taxpayers without adding real value to public contracting. |
| **Response** |
| The department appreciates the time taken to comment and recognizes the concerns and opinions presented.The Legislature finds the need to increase equity and efficiencies in public works procurement. The legislature further finds that small, minority, women, and veteran-owned businesses are essential to a robust and high-functioning economy, which provides high quality living wage jobs throughout the state. The legislature further finds that public works contracting agencies need a streamlined and effective method for delivering small public works projects while protecting worker rights. Therefore, the Legislature intends to provide a small business definition, best practices to be included in inclusion plans, and to update and revise the small and limited works roster process to increase administrative efficiency, to encourage greater participation and utilization by small, minority, women, and veteran-owned businesses, and continue to protect the rights of workers engaging in public works projects.No changes were made based on your comments. |

| **Comment** |
| --- |
| The state process leaves a little out on the "competitive" pricing by requiring Direct Contracting if more than 5 PWSBE, so if federal funds are being used for a project estimated $10K to Under $150K is the direct contracting allowed to be skipped to allow for lowest price procurement? |
| **Response** |
| Yes. State law encourages but does not mandate state agencies and local governments to use direct contracting for small public works projects with an estimated cost less than $150,000. Because of this, contracting agencies may exercise their discretion and choose to use direct contracting or choose to use competitive bidding. In situations where the acceptance and use of federal funding does not allow for the use of direct contracting, the contracting agency should choose to use competitive bidding.The department appreciates the time taken to comment and recognizes the concerns and opinions presented.No changes were made based on your comments. |

| **Comment** |
| --- |
| Please clarify the rulemaking WAC 200-330 outline stating, public agencies "must" accept electronic bids? Is it really making all public agencies go out and get/implement an electronic bid software and acceptance policy? Rumor is that MRSC will somehow be electronic request/notice by email for direct bid requesting, does that mean the contractor response to accept or decline to direct bid must be by email NOT phone (which is typically their method of response to say not bidding) Can you clarify and define what it means by "validate the bid", please provide a sample/example if possible. |
| **Response** |
| You ask for rulemaking clarity relating to the following:Are public agencies restricted to only accepting electronic bids?No. State and local governments are not restricted to only accepting electronic bids. State law under 39.04.152(4)(a)(i) allows contracting agencies to accept written or electronic bids.Are public agencies required to put in place electronic bid software?No. State and local governments are not required to put in place electronic bid software.As an example:* In situations where bid acceptance is not integrated with a small works roster system, contractors submit written (hard copy) bids or electronic bids (email) directly to the contracting agency.
* In situations where a bid acceptance feature is integrated with a small works roster system, written bids are still allowed. Here, contractors submit written (hard copy) bids directly to the contracting agency and the contracting agency uploads the written bid into the small works roster system.

Are contractors required to respond when declining a direct contracting opportunity?No. Contractors declining a direct contracting opportunity may choose but are not required to inform the contracting agency. A contractor not responding by the required due date will automatically be considered as non-responsive by default. As a courtesy to the contracting agency, a contractor declining to quote may choose to call in advance of the due date, but this is not necessary.Define what it means by "validate the bid", please provide a sample/example if possible.We are not familiar with this term as it relates to a small works roster. Neither the proposed rule or the authorizing legislation mentions “validate the bid.”The department appreciates the time taken to comment and recognizes the concerns and opinions presented.We have changed the proposed rule WAC 200-330-040 to clarify written or electronic quotations are acceptable. |

| **Comment** |
| --- |
| If there were exactly 6 PWSBE and direct contracting is required and used, after using all 6 PWSBE on projects is an agency allowed to start using non PWSBE and be seen as Equitable Distribution. Or is the agency required to keep cycling through the same 6 PWSBE every time? |
| **Response** |
| Under the scenario you provide, the contracting agency is required to rotate direct contracting opportunities through all available contractors on the appropriate roster. After providing a direct contracting opportunity to all available contractors on the appropriate roster, the contracting agency then begins the rotation anew. Inclusion of non-PWSBE in the direct contracting rotation, when there are 6 or more PWSBE available, is not permitted and would not be seen as equitable distribution.Proposed rule WAC 200-330-050 requires contracting agencies to “rotate direct contracting opportunities among the available contractors on the appropriate roster.” The proposed rule further requires “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.”The department appreciates the time taken to comment and recognizes the concerns and opinions presented.No changes were made based on your comments. |