

**ENTERPRISE SERVICES BACKGROUNDER – CONTRACTS:
CONTRACTOR CERTIFICATION: WAGE THEFT PREVENTION – RESPONSIBLE BIDDER CRITERIA
WASHINGTON STATE GOODS & SERVICES CONTRACTS
FOR
WASHINGTON ASSOCIATION OF CONTRACT SPECIALISTS**

Dated July 20, 2017

This Backgrounder is designed for use by the Washington Association of Contract Specialists for goods and services contracts.

The Backgrounder – and our ability to deliver contract services efficiently and cost effectively – will be improved with input from all team members. The Backgrounder is designed, in part, to leverage the knowledge and experience of our team members.

Enterprise Services worked with Mark Lyon from the AGO to prepare this document. Please contact Enterprise Services (Greg Tolbert) or AGO (Mark Lyon) with revisions or suggestions for improvement.

This Backgrounder was last revised on July 20, 2017.

INTRODUCTION

This backgrounder briefly covers:

- Contractor Certification for Wage Theft Prevention for Goods & Services Contracts

The backgrounder is divided into the following three sections

1. Overview of Wage Theft Legislation & Change to Procurement Law
2. Frequently Asked Questions (FAQs) for issue and Template tool
3. Using the Template - Instructions

I. OVERVIEW OF WAGE THEFT LEGISLATION & CHANGE TO PROCUREMENT LAW

In 2017, the Office of the Attorney General requested legislation to address wage theft. SSB 5301 passed the Senate 46-3 and the House 63-33 and was signed by the Governor on May 8, 2017. See Chapter 258, 2017 Laws. The law is effective July 23, 2017.

The policy traction driving SSB 5301 was a legislative determination that taxpayer funds, in the form of public contracts, should not go to firms who cheat workers. Rather, government contracts – and taxpayer dollars – should only go to firms that comply with the applicable rules.

SSB 5301 amended the responsible bidder criteria for both public works contracts and goods and services contracts. In regard to goods and services contracts, SSB 5301 amended RCW 39.26.160(2) to require agencies, in determining whether a bidder is a responsible bidder, to consider:

Whether, within the three-year period immediately preceding the date of the bid solicitation, the bidder has been determined by a final and binding citation and notice of assessment issued by the department of labor and industries or through a civil judgment entered by a court of limited or general jurisdiction to have willfully violated, as defined in RCW 49.48.082, any provision of chapter 49.46, 49.48, or 49.52 RCW;

In short, this means that, to be eligible for public goods and services contracts, a firm must not have willfully violated: (1) wage payment requirements; (2) minimum wage rate payments; or (3) proper wage deductions for benefits and contributions.

SSB 5301 further required that,

Before award of a contract, a bidder shall submit to the contracting agency a signed statement in accordance with RCW 9A.72.085 verifying under penalty of perjury that the bidder is in compliance with the responsible bidder criteria requirement of [new] subsection (2)(f) of [RCW39.26.160]. A contracting agency may award a contract in reasonable reliance upon such a sworn statement.

Accordingly, to implement this Legislative policy and statutory requirement, on or before July 23, 2017, Agencies could do three (3) things:

1. Modify the ‘responsible bidder’ evaluation and analysis for every competitive procurement to include the revised statutory requirement;
2. As a condition of any competitive contract award, require the Contractor Certification using the template; and
3. Include in contracts, as appropriate, a contractor representation and warranty regarding compliance with state wage laws to ensure forward compliance.

II. FREQUENTLY ASKED QUESTIONS

<i>Question 1:</i>	What is the ‘procurement solicitation date’?
<i>Answer:</i>	<p>This is the date the solicitation is posted or published on WEBS or the date the procurement is distributed to solicit bids. The date does NOT change if the procurement solicitation is amended.</p> <p>The purpose of the date is to mark a point in time, for contractors/bidders to make certifications for the prior three (3) year period.</p>

<i>Question 2:</i>	When should I collect the Contractor Certification for Wage Theft Prevention?
<i>Answer:</i>	<p>When bids are due.</p> <p>Agencies are required to obtain the Contractor Certification “before award of a contract.” See RCW 39.26.160(4). Both to maximize agency due diligence and to minimize opportunity costs, agencies may wish to require vendors (e.g., bidders) to provide the Contractor Certification as part of their bid.</p> <p>The purpose of requiring the Contractor Certification as part of the bid rather than waiting until contract award is that agency’ options decrease significantly and costs increase significantly as the procurement process moves forward. If a bidder is unable to provide the required Contractor Certification, both the bidder and the agency needs to understand that fact (and its consequences) earlier; rather than later.</p>

<i>Question 3:</i>	Why are there two options for the Vendor?
<i>Answer:</i>	<p>To provide vendors with opportunity to make accurate certification regarding their compliance with the responsible bidder criteria pertaining to ‘wage theft.’ Including both options (it is a binary choice) provides all vendors and opportunity to be accurate and to be avoid the potential for misrepresentations (e.g., “there was only one box to check”).</p> <p>In short, vendors either are in compliance (and have no wage violations) or are NOT in compliance (and have violations of wage laws).</p>

<i>Question 4:</i>	What happens if a Vendor marks ‘Violations of Wage Laws’ – i.e., certifies that it has VIOLATED the applicable wage laws?
<i>Answer:</i>	<p>The agency will need to review the vendor. Pursuant to the State’s responsible bidder criteria for goods and services contracts [RCW 39.26.160(2)(f)], the agency is required to consider certain factors which include the vendor’s compliance with the ‘wage theft’ statutes.</p> <p>It’s possible that the vendor misunderstood the certification. The agency, for example, could request an explanation or additional detail from the vendor and, upon receipt, follow up with the Washington Department of Labor and Industries (or review the applicable court order) to determine whether it constitutes wage theft or is outside the relevant time period.</p> <p>Alternatively, it also is possible that the vendor has violated the wage theft statutes and is certifying as such. In such a situation, it is unlikely that such a vendor would be considered a responsible bidder in light of the Legislature’s recent finding that “government contracts should not be awarded to those who knowingly and intentionally violate state [wage] laws.” 2017 Laws, chap.258 § 1.</p>
<i>Question 5:</i>	Does the Contractor Certification for Wage Theft Prevention apply to other types of contracts?
<i>Answer:</i>	<p>Yes. The wage theft prevent legislation, SSB 5301, that amended the responsible bidder criteria for goods and services contracts [RCW 39.26.160(2)(f)] also amended the responsible bidder criteria for public works contracts [RCW39.04.350].</p>
<i>Question 6:</i>	Where can I learn more about ‘wage theft’?
<i>Answer:</i>	The Washington Department of Labor and Industries.

III. USING THE CERTIFICATION TEMPLATE: INSTRUCTIONS

Using the template (last revised July 12, 2017), do the following:

- Procurement No. & Date
 - Insert the applicable procurement number – *e.g.*, the RFP number
 - Insert the applicable Solicitation Date – *i.e.*, the date the RFP, IFB, etc. was posted or published on WEBS or distributed. This date is critical as the certification obligations are triggered by this precise date.

- Firm Name
 - Insert the full legal name of the Contractor/Bidder – *e.g.*, Sunshine Fulfillment LLC, a Delaware limited liability company

- Return email address
 - Insert the applicable return email address for the applicable procurement coordinator at the bottom of the form

- Provide the form to the Contractor/Bidder to complete. The Contractor/Bidder must:
 - Mark one of the two boxes.
 - **Note:** If the second box is marked (violations of wage laws), the Contractor should be flagged for review. See FAQ No. 4
 - Sign the Certification
 - Print their name
 - Include their title
 - Provide the City and State where signed (this is an element of the certification)
 - Provide the date of the certification
 - Return the completed Certification to the Procurement Coordinator via email at the email address provided.

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