Chapter 200-320 WAC
COMPETITIVE CONTRACTING

WAC

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GENERAL PURPOSE AND DEFINITIONS

WAC 200-320-001 Purpose. Under RCW 41.06.142, agencies may competitively contract for services that state employees have customarily and historically provided. The law directs the department of general administration to adopt rules to ensure that the submittal and evaluation of bids are fair and objective, and that there exists a competitive market for the service. The department of general administration's objective in writing these rules is to provide clear, simple, fair, and consistent guidance in complying with the law.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-001, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-001, filed 3/17/04, effective 7/1/05.]

WAC 200-320-005 Scope of chapter. This chapter applies to all services customarily and historically provided by state employees, except:

(1) As described in RCW 41.06.142(3) and 41.06.070;

(2) In the case of emergency purchases, which may be made in response to unforeseen circumstances beyond the control of the agency which present a real, immediate, and extreme threat to the proper performance of essential functions or which may reasonably be expected to result in excessive loss or damage to property, bodily injury, or loss of life. When an emergency purchase is made, the agency head shall submit written notification of the purchase, within three days of the purchase, to the director of general administration. This notification shall contain a description of the purchase, description of the emergency and the circumstances leading up to the emergency, and an explanation of why the circumstances required an emergency purchase; or

(3) If state employees will not be displaced.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-005, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-005, filed 3/17/04, effective 7/1/05.]

WAC 200-320-006 If state employees will not be displaced. If state employees will not be displaced, agencies shall comply with RCW 41.06.142 (1)(a), (d) and (e), and applicable laws and rules governing the purchase of such services.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-006, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-006, filed 3/17/04, effective 7/1/05.]

WAC 200-320-010 Definitions. The following words, terms, and phrases, used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) "Agency" means an office, department, board, commission, institution of higher education, or other separate unit or division, however designated, of the state government and all personnel thereof; it includes any unit of state government established by law, the executive officer or members of

which are either elected or appointed, upon which the statutes confer powers and impose duties in connection with operations of either a governmental or proprietary nature.

(2) "Appeal" means both a request for an adjudicative proceeding or the actual adjudicative proceeding presided over by an administrative law judge from the office of administrative hearings in accordance with chapter 34.05 RCW.

(3) "Award" means to grant a contract to a successful bidder or bidders, which occurs on the date as specified in the award notice.

(4) "Bid" means a written offer to perform services by contract in response to a solicitation.

(5) "Bidder" means a party who submits a bid or proposal for consideration by an agency issuing a solicitation.

(6) "Competitive contracting" means the process by which classified employees compete with businesses, individuals, nonprofit organizations, or other entities for the performance of services those employees have customarily and historically performed.

(7) "Complainant" means bidder or potential bidder who files a complaint about the bidding process to the agency head or designee on allowable grounds.

(8) "Conflict of interest" means having a personal or financial interest that is in conflict with the proper discharge of state duties, including the transaction of state business with an entity or individual in which a state employee has an interest.

(9) "Date of award" means the date on which the agency and the successful bidder sign the contract.

(10) "Day," whether calendar or business day, means 8:00 a.m. to 5:00 p.m. Pacific Standard Time or Pacific Daylight Time, whichever is in effect. Business day excludes weekends and state holidays. Calendar day is every day including weekends and state holidays. If the end of a period calculated using calendar days falls on a weekend or state holiday, it will be extended to 5:00 p.m. of the next business day.

(11) "Displaced employee" means a classified employee whose position or work would be eliminated, resulting in the employee being laid off or assigned to a different job classification, as a result of an award via the competitive contracting process.

(12) "Efficiency improvement" means the enhanced value and/or quality that an agency achieves as a result of a change to a service or the ways a service is provided. This enhancement may come at a higher cost but its relative value offsets it. Such improvements may include, but are not limited to:

(a) Reduced preparation or process time;

(b) Greater accessibility or availability of service; or

(c) Improved data quality and timeliness.

(13) "Employee business unit" means a group of employees who perform services for which an agency proposes to competitively contract and who:

(a) Notify the agency of their intent to submit a bid for the performance of those services through competitive contracting; or

(b) Receive award of a contract from the agency as a result of being the successful bidder.

(14) "Employee business unit leader" means a member of the employee business unit chosen and granted authority by the other employee business unit members to represent the interests of the employee business unit in the bid process.

(15) "Employee notice" means the notice the agency is required to provide in RCW 41.06.142 (4)(a), "At least ninety calendar days prior to the date the contracting agency requests bids from private entities for a contract for services provided by classified employees, the contracting agency shall notify the classified employees whose positions or work would be displaced by the contract."

(16) "Fully allocated costs" means those costs associated with a service, including the cost of employees' salaries and benefits, space, equipment, materials, and other costs necessary to perform the service but does not include the state or agency's indirect overhead costs unless those costs can be attributed directly to the function in question and would not exist if that function were not performed by the state.

(17) "In writing" means written communication from one party to another including, but not limited to, electronic means.

(18) "Indirect costs" means state or agency costs linked to services which may not be assigned directly. Indirect costs include various administrative and support activities provided to a service by other units from within the agency or by other state government entities. These indirect costs are generally assigned to a service through cost allocation methods.

(19) "Notice of intent to award" means a written announcement of the apparent awardee(s) and the expected date of award.

(20) "Performance work statement" means a statement of the technical, functional and performance characteristics or requirements of the work to be performed. The statement identifies essential functions to be performed, determines performance factors, including the location of the work, the units of work, the quantity of work units, and the quality and timeliness of the work units.

(21) "Potential bidder" means a business, individual, nonprofit organization, employee business unit, or other entity capable of providing the services being considered for competitive contracting.

(22) "Quality assurance plan" means a plan by which an agency will monitor a contract awardee's performance to ensure that the standards of the performance work statement are met within the costs, quality of service, delivery, and other standards of the contract.

(23) "Resource plan" means a detailed written plan created by potentially displaced employees or the employee business unit and submitted to the agency for approval of the use of state resources including, but not limited to: State funds, facilities, tools, property, employees and their time requested for:

(a) Potentially displaced employees to prepare an alternative within the sixty calendar day window, as described in RCW 41.06.142 (4)(a), using state resources other than those offered by an agency; or

(b) The employee business unit to prepare its bid.

(24) "Responsible bidder" means a bidder who has the capability in all respects to perform in full the contract requirements and meet the elements of responsibility. In determining the "lowest responsible bidder," in addition to cost, the following elements shall be given consideration:

(a) The ability, capacity, and skill of the bidder to perform the contract or provide the service required;

(b) The character, integrity, reputation, judgment, experience, and efficiency of the bidder;

(c) Whether the bidder can perform the contract within the time specified;

(d) The quality of performance of previous contracts or services;

(e) The previous and existing compliance by the bidder with laws relating to the contract or services; and

(f) Such other information as may be secured having a bearing on the decision to award the contract.

(25) "Sealed bid" means a bid that is submitted in a manner to prevent its contents from being revealed or known before the deadline for submission of all bids.

(26) "Solicitation" means the process of notifying potential bidders that the agency desires to receive competitive bids or proposals for furnishing services. This includes references to the actual document used in that process, such as the bid or request for proposal and any amendments to such documents.

(27) "State employee" or "employee" mean an employee in the classified service subject to the provisions of chapter 41.06 RCW.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-010, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-010, filed 3/17/04, effective 7/1/05.]

PRELIMINARY STEPS TO COMPETITIVE CONTRACTING

WAC 200-320-100 Determining the existence of a competitive market. (1) Under the law, an agency that considers contracting for services historically and customarily performed by state employees shall determine whether a competitive market exists for the service.

(2) For the purposes of this chapter, a competitive market exists when there are two or more separate businesses, individuals, nonprofit organizations, or other entities capable of providing the services being considered for competitive contracting.

(3) Agencies shall not consider an employee business unit as an entity capable of providing the service when determining the existence of a competitive market for that service.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-100, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-100, filed 3/17/04, effective 7/1/05.]

WAC 200-320-110 Agencies shall notify employee(s) of intent to solicit bids. As required by RCW 41.06.142 (4)(a), the agency shall provide written notice to all potentially displaced employees of the agency's intent to solicit bids. The notice shall include at a minimum:

(1) A statement that the agency will pursue competitive contracting of specified services;

(2) The agency's determination that a competitive market exists;

(3) The date that the agency intends to solicit bids;

(4) A statement that employees whose position or work will be displaced have sixty calendar days from the date of notification to offer alternatives to competitive contracting as described in RCW 41.06.142 (4)(a) and an agency contact for submitting alternatives;

(5) The amount and type of state resources allocated by the agency to assist employees in developing alternatives within the time frame described in subsection (4) of this section; and

(6) A statement that employees whose positions or work will be displaced may compete in competitive contracting as one or more employee business units.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-110, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-110, filed 3/17/04, effective 7/1/05.]

WAC 200-320-115 Employees wanting to use state resources other than those offered by an agency. If potentially displaced employees want to use state resources other than those offered by the agency to develop alternatives pursuant to WAC 236-51-110(5), they shall submit a written resource plan to the agency for consideration. No state resources other than those offered by the agency pursuant to WAC 236-51-110(5) shall be used in developing alternatives without prior written agency approval.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-115, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-115, filed 3/17/04, effective 7/1/05.]

WAC 200-320-120 Agency response to a potentially displaced employee alternative. (1) An agency shall respond in writing to all potentially displaced employee alternatives.

(2) If no potentially displaced employee alternatives are accepted, the agency shall notify in writing all potentially displaced employees of:

(a) Its intent to proceed with soliciting bids on the date indicated in the agency's original notification referred to in WAC 236-51-110(3) or in twenty calendar days, whichever is greater; and

(b) The amount and type of state resources allocated by the agency to assist potentially displaced employees in developing the notice referred to in WAC 236-51-200.

(3) Failure to comply with subsection (2)(a) of this section is an allowable ground for complaint under WAC 236-51-510(1).

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-120, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-120, filed 3/17/04, effective 7/1/05.]

EMPLOYEE BUSINESS UNITS IN THE BID PROCESS

WAC 200-320-200 An employee business unit shall notify the agency of its formation. (1) Potentially displaced employees that decide to compete by forming an employee business unit shall notify the agency in writing before the agency's intended day to solicit bids pursuant to WAC 236-51-110 and provide the following information:

(a) A list of those potentially displaced employees forming the employee business unit;

(b) The employee business unit leader(s); and

(c) A resource plan outlining the employee business unit's request for use of state resources needed to prepare the employee business unit's bid.

(2) The agency shall not consider a bid from an employee business unit if the employee business unit fails to notify the agency of its formation as provided in subsection (1) of this section.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-200, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-200, filed 3/17/04, effective 7/1/05.]

WAC 200-320-205 Agency's response to an employee business unit resource plan. (1) An agency shall respond, in writing, to an employee business unit resource plan prior to soliciting bids. The response will either approve of the resource plan in its entirety, or modify it based on available state resources and the needs of the agency to meet its mission.

(2) An employee business unit shall not use state resources to prepare its bid prior to receiving the agency's response as provided in subsection (1) of this section.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-205, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-205, filed 3/17/04, effective 7/1/05.]

WAC 200-320-210 Agencies shall identify state standards. If an agency intends to require the use of state standards it shall identify them in the solicitation document. State standards may include, but are not limited to: Financial, accounting, audit, payroll, human resources, procurement, record retention, or other systems, methods, infrastructure, or practices. Agencies shall use technology standards established by the Washington state department of information services, information services board.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-210, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-210, filed 3/17/04, effective 7/1/05.]

WAC 200-320-215 An employee business unit's bid shall include all costs related to delivering the service. Pursuant to RCW 41.06.142 (4)(e), an employee business unit's bid shall include the fully allocated cost of the service. These fully allocated costs include, but are not limited to:

(1) Direct costs; which are costs that the service consumes or expends and thus are chargeable to the service. These direct costs include, but are not limited to:

(a) Salaries, wages, overtime, and benefits of employees directly performing the service;

(b) Purchased services, supplies and materials;

(c) Space, rents, and leases;

(d) Equipment and depreciation;

(e) One-time, transition, or start-up costs; and

(f) Travel.

(2) Indirect costs that would be reduced or eliminated if the service currently being provided by employees were instead provided by an outside contractor.

(3) Inflation assumptions.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-215, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-215, filed 3/17/04, effective 7/1/05.]

WAC 200-320-220 An employee business unit shall designate a point of contact for the competitive contracting process. The employee business unit leader or their designee from within the employee business unit shall represent the employee business unit membership in the competitive contracting process. Representation includes, but is not limited to:

(1) Authority to contractually obligate the employee business unit;

(2) Receiving and submitting notices (including the notice to the agency of employee business unit formation);

(3) Participating in any presolicitation conference;

(4) Signing solicitation documents and submittals;

(5) Seeking clarifications and amendments of solicitations;

(6) Acknowledging award and conducting negotiations;

(7) Filing complaints;

(8) Filing appeals; and

(9) Committing to a performance agreement or quality assurance plan.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-220, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-220, filed 3/17/04, effective 7/1/05.]

WAC 200-320-225 Limits on performance of services not contained in a contract. An employee business unit awarded a contract by an agency shall not perform or bid on solicitations for services not contained in its contract unless their agency approves in writing.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-225, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-225, filed 3/17/04, effective 7/1/05.]

SOLICITING BIDS

WAC 200-320-300 General administration may establish formats. The department of general administration may establish formats, guidelines, procedures, or instructions concerning solicitation, determining fully allocated costs, or submittal and evaluation of bids for use by agencies, employee business units, and other bidders.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-300, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-300, filed 3/17/04, effective 7/1/05.]

WAC 200-320-302 Solicitation development. Employees whose work or positions may be displaced and potential bidders may provide technical assistance in the preparation of the solicitation document and performance work statement provided that their assistance does not create an unfair advantage over other bidders. Potentially displaced employees and potential bidders shall not determine the award methodology and scoring to be used in the evaluation of bids.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-302, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-302, filed 3/17/04, effective 7/1/05.]

WAC 200-320-305 Solicitation content. Solicitations shall include:

(1) Complete bidder instructions;

(2) Submittal requirements;

(3) Performance work statement;

(4) Cost and noncost evaluation criteria;

(5) Name and address of the person designated to receive complaints and appeals;

(6) Agency's plan for publication and notice of award/intent to award; and

(7) Contract requirements, which shall include, but are not limited to:

(a) State standards as provided in WAC 236-51-210;

(b) Compliance and adherence to a quality assurance plan;

(c) Measurable standards for the performance of the contract;

(d) Methods used to measure contract performance, costs, service delivery quality, and other contract standards;

(e) Terms and conditions;

(f) Provisions requiring an entity other than an employee business unit to consider employment of state employees who may be displaced by the contract;

(g) Cancellation provisions for improper or failed performance;

(h) Complaint process; and

(i) Appeal process.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-305, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-305, filed 3/17/04, effective 7/1/05.]

WAC 200-320-306 Cost evaluation criteria. (1) An agency shall compare its current service cost against the total cost of contracting with the most responsive employee business unit and nonemployee business unit as part of its evaluation process.

(2) The total cost of contracting shall not include solicitation related costs such as, but not limited to:

(a) An evaluator's time;

(b) Bid-related expenses; or

(c) The cost of complaints or appeal.

(3) The most responsive employee and nonemployee business unit's bid shall include, but is not limited to:

(a) Bid price. The nonemployee business unit's bid price will include any applicable state tax paid by the agency on the purchase of services;

(b) Required one-time, transition, or start-up costs for implementing the proposal and recognized during the contract in the year those costs would be incurred; and

(c) Inflation assumptions.

(4) An agency shall adjust the bids of the most responsive employee and nonemployee business unit in accordance with the following factors:

(a) The agency's conversion or transition costs relative to each bid;

(b) Contract administration costs incurred by the agency to administer either contract. Contract administration costs may differ depending on the performance monitoring requirements of the agency;

(c) Revenue impact to the state from changes to the tax base or collections that would result from an award of a contract to perform the service. Examples include, but are not limited to, state sales and use, business and occupation, inventory, fuel, and real estate tax; provided that a revenue impact does not mean, nor imply, that any added fees or charges for state services may be part of a bid.

(5) Agencies shall consider costs associated with the state's assumed risks in the evaluation of bid costs. If the agency cannot reasonably estimate the state's assumed risk costs, the agency shall structure the solicitation to eliminate these costs from the evaluation process. These costs include, but are not limited to:

(a) Insurance. Agencies shall calculate casualty, liability and property insurance premiums in cost estimates and enter these costs as appropriate for assets and risk coverage.

(b) Performance bonds. When a solicitation requires nonemployee business unit bidders to provide a performance bond, the agency shall exclude the cost from the nonemployee business unit's bid price. The solicitation bid structure should facilitate the elimination of this cost from the nonemployee business unit's bid.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-306, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-306, filed 3/17/04, effective 7/1/05.]

WAC 200-320-310 Amendment of solicitation. An agency may amend or change a solicitation provided the change is issued prior to the specified bid opening date and time. Any material information that an agency provides to one potential bidder shall be provided to all potential bidders consistent with WAC 236-51-320. Oral interpretations of the solicitation shall not be binding.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-310, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-310, filed 3/17/04, effective 7/1/05.]

WAC 200-320-320 Public notice—Solicitations, amendments, and notices. (1) Agencies shall post or otherwise publicize competitive contracting solicitations, amendments, notice of intent to award, notice of award, or notice of cancellation using methods and/or systems established by the department of general administration.

(2) In addition to using methods and systems provided above, agencies may post or otherwise publicize competitive contracting solicitations, amendments, notice of intent to award, notice of award, or notice of cancellation via other methods and/or systems of their choosing.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-320, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-320, filed 3/17/04, effective 7/1/05.]

THE BIDDING PROCESS

WAC 200-320-400 Receiving bids. (1) Bidders shall submit sealed bids in writing. Electronic submittal systems and processes may be utilized provided the submittal meets the definition of a sealed bid and the other requirements of this section.

(2) The agency shall ensure that bids remain sealed until the opening date and time specified in the solicitation.

(3) The agency shall open all sealed bids at the same time.

(4) Bidders shall submit bids to the agency no later than the opening date and time, and at the place specified, in the solicitation. An agency shall reject any bid received at a place

different than, or on a date and time later than, what was specified in the solicitation.

(5) The agency may modify bid submission dates. When modifying the time allowed for submitting a bid, the agency shall issue an amendment as required by WAC 236-51-310 and provide notice consistent with WAC 236-51-320.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-400, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-400, filed 3/17/04, effective 7/1/05.]

WAC 200-320-405 Bid information disclosure. Upon submission, all bids become the property of the agency and, except for purposes of evaluation, shall not be released or otherwise distributed until after the agency completes the evaluation and issues its notice of intent to award. Evaluation team members shall maintain confidentiality of information to ensure the integrity of the process. After award and distribution of award information or posting of such information electronically for public review, the bids, quotes, and proposals of all bidders shall be open to public inspection at the offices of the purchasing activity during normal office hours. Copies of documents subject to public disclosure will be made available upon request in accordance with purchasing activity policy. The purchasing activity assumes no responsibility for the confidentiality of bids, quotes or proposals after award. Any document(s) or information which the bidder believes is exempt from public disclosure per RCW 42.17.-310 shall be clearly identified by bidder and placed in a separate envelope marked with bid number, bidder's name, and the words "proprietary data" along with a statement of the basis for such claim of exemption. The state's sole responsibility shall be limited to maintaining the above data in a secure area and to notify bidder of any requests for disclosure within a period of five years from date of award. Failure to so label such materials or failure to provide a timely response after notice of request for public disclosure has been given shall be deemed a waiver by the bidder of any claim that such materials are, in fact, so exempt.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-405, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-405, filed 3/17/04, effective 7/1/05.]

WAC 200-320-410 Bid evaluation. (1) RCW 41.06.-142 (4)(d)(i) prohibits employees who prepared the employee business unit's bid or who perform any of the services to be contracted from participating in the bid evaluation process.

(2) Members of an EBU or others who provided technical assistance to the EBU in the development of their bid shall be excluded from being evaluators.

(3) Evaluators cannot have a personal or financial interest in the outcome of the award.

(4) Evaluators shall sign declaratory statements certifying that they have no conflicts of interest and assuring confidentiality.

(5) Evaluators shall use only the evaluation criteria stated in the solicitation in evaluating bids.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-410, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-410, filed 3/17/04, effective 7/1/05.]

THE COMPLAINT PROCESS

WAC 200-320-500 Who may file. Bidders or potential bidders may file complaints regarding the bidding process.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-500, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-500, filed 3/17/04, effective 7/1/05.]

WAC 200-320-502 Time and place for filing complaints. Complaints shall be filed with the contracting agency head or designee identified in the solicitation prior to the expected date of award.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-502, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-502, filed 3/17/04, effective 7/1/05.]

WAC 200-320-505 Form of complaints. Complaints shall be submitted in writing and shall include the following:

(1) Complainant's name, address, and telephone number;

(2) Identification of the specific grounds for filing the complaint; and

(3) The relevant facts, arguments, exhibits, and supporting evidence known to the complainant and related to each identified ground.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-505, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-505, filed 3/17/04, effective 7/1/05.]

WAC 200-320-510 Grounds for filing a complaint. Complaints must be based on the bidding process, which includes, but is not limited to, one or more of the following factors:

(1) The manner in which the solicitation was conducted;

(2) Undue constraint of competition by requirements of the solicitation;

(3) Inadequate and/or improper criteria in the solicitation document;

(4) Bias or discrimination; or

(5) Conflict of interest.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-510, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-510, filed 3/17/04, effective 7/1/05.]

WAC 200-320-515 Agency's response to complaints. The agency shall respond to all complaints in writing prior to the award of the contract. If necessary, an agency shall extend the date of award to respond to all complaints.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-515, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-515, filed 3/17/04, effective 7/1/05.]

THE AWARD PROCESS

WAC 200-320-600 Notice of intent to award. (1) An agency shall issue a notice of intent to award after concluding negotiations authorized under WAC 236-51-605, if any, and prior to the date of award. This notice shall also include a statement that any complaints must be filed prior to the expected date of award.

(2) Agencies shall notify all bidders of the intent to award consistent with WAC 236-51-320.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-600, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.142. WSR 04-07-104, § 236-51-600, filed 3/17/04, effective 7/1/05.]

WAC 200-320-605 Negotiations. The agency may enter into negotiations exclusively with the apparent successful bidder for the purpose of, but not limited to:

(1) Determining if the bid may be improved;

(2) Clarifying elements of the bid that are not sufficiently precise or direct; or

(3) Securing better terms and conditions for the agency.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-605, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-605, filed 3/17/04, effective 7/1/05.]

WAC 200-320-610 Award. (1) On the date of award, the agency shall send an award notice to all bidders in accordance with WAC 236-51-320.

(2) The award notice shall include the right to appeal, the appeal deadline, and the address for submitting an appeal. See WAC 236-51-700.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-610, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-610, filed 3/17/04, effective 7/1/05.]

WAC 200-320-615 Cancellation of solicitation. An agency may cancel a solicitation or reject all bids after the bid opening, but before the award, if the agency determines that:

(1) The award will not achieve anticipated cost savings or efficiency improvements as required by RCW 41.06.142 (1)(e);

(2) The solicitation did not include all factors for the agency to determine cost savings or efficiency improvements;

(3) No responsive bid has been received from a responsible bidder;

(4) The solicitation and evaluation process was not fair, equitable, or objective; or

(5) There have been changes in business or market conditions that significantly impact the agency's original intent to competitively contract the service.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-615, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-615, filed 3/17/04, effective 7/1/05.]

WAC 200-320-620 Notice of cancellation. If an agency cancels a competitive contracting solicitation, the agency shall post a notice of cancellation in writing pursuant to WAC 236-51-320. The notice shall include the specific reason for cancellation.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-620, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-620, filed 3/17/04, effective 7/1/05.]

APPEALING AN AWARD

WAC 200-320-700 Time and place for filing appeal. An appeal shall be filed after contract award with the contracting agency head or designee as identified in the solicitation. The appeal shall be filed within twenty calendar days after the date of the award. An administrative law judge does not have jurisdiction to consider an appeal filed after this deadline.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-700, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-700, filed 3/17/04, effective 7/1/05.]

WAC 200-320-710 Who may file an appeal. An appeal may only be filed by the following parties with regard to the respective specified grounds:

(1) Unsuccessful bidders with regard to elements of the bid submittal and evaluation process;

(2) Complainants with regard to an agency response to their complaint; or

(3) Displaced or potentially displaced employees with regard to an agency's:

(a) Adherence to the statutory notice requirements of RCW 41.06.142 (4)(a); or

(b) Determination of the existence of a competitive market as provided in RCW 41.06.142 (4)(d).

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-710, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-710, filed 3/17/04, effective 7/1/05.]

WAC 200-320-715 Form of an appeal. Appeals shall be submitted in writing to the head of the agency that awarded the contract or to that person's designee. An appeal shall include, but not be limited to, the following information:

(1) Appellant's name, contact person, and/or representative with respective address, and telephone numbers;

(2) Identification and brief description of the grounds relied on for filing an appeal and a brief description of the issues to be resolved.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-715, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-715, filed 3/17/04, effective 7/1/05.]

WAC 200-320-720 Stay of award. An agency may stay award decisions or actions pending resolution of an appeal.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-720, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-720, filed 3/17/04, effective 7/1/05.]

WAC 200-320-725 Transmission of an appeal. (1) An appeal shall be transmitted by the agency to the office of administrative hearings within five business days after receipt.

(2) The agency shall provide the office of administrative hearings with the following information:

(a) The name of the agency contact in the matter and any contact information;

(b) The name of the appellant and any contact information, including address and telephone number;

(c) The name and any contact information for other bidders;

(d) The name and address of the agency contact for billing purposes; and

(e) The name and address of the agency contact where the file should be sent after the office of administrative hearings closes the appeal.

(3) The agency shall transmit all appeals to the headquarters of the office of administrative hearings in Olympia, Washington.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-725, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-725, filed 3/17/04, effective 7/1/05.]

WAC 200-320-730 Procedures for hearing. (1) The office of administrative hearings shall issue the notice of hearing to the appellant, the agency, and other bidders.

(2) Bidders may intervene as a party to the appeal if they file a petition for intervention with the office of administrative hearings and all parties within ten business days after the issuance of the notice of hearing. The administrative law judge may limit intervention under RCW 34.05.443.

(3) The administrative law judge may schedule a prehearing conference.

(4) Hearings shall be scheduled for the earliest possible date available for the administrative law judge that does not result in prejudice to the parties.

(5) The hearing shall be recorded electronically at the discretion of the administrative law judge unless specified otherwise in law or rule.

(6) No transcript is required unless specified otherwise in law or rule.

(7) In any appeal under this chapter, the administrative law judge shall apply the model rules of procedure set forth in chapter 10-08 WAC, irrespective of the provisions of WAC 10-08-001(4) or other agency procedural rules.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-730, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-730, filed 3/17/04, effective 7/1/05.]

WAC 200-320-735 Costs of hearing. All costs incurred by the office of administrative hearings in conducting the hearing shall be borne by the agency, and the office of administrative hearings shall bill the agency for the hearing costs incurred. Each party is responsible for its own costs of representation.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-735, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-735, filed 3/17/04, effective 7/1/05.]

WAC 200-320-740 Burden of proof. The burden of proof is on the appellant to prove by a preponderance of the evidence that the contract was not properly awarded.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-740, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-740, filed 3/17/04, effective 7/1/05.]

WAC 200-320-745 Decision of the administrative law judge. (1) If the administrative law judge finds against the appellant, the agency's decision to award stands.

(2) If the administrative law judge finds for the appellant, the administrative law judge shall:

(a) Remand back to the agency for reconsideration or action if the appeal was from an unsuccessful bidder with regard to the bid submittal and evaluation process;

(b) Remand back to the agency for reconsideration or action if the appeal was from a complainant with regard to their complaint; or

(c) Remand back to the agency to start the bidding process over if the appeal was from a displaced or potentially displaced employee with regard to:

(i) The statutory notice requirements of RCW 41.06.142 (4)(a); or

(ii) The determination of the existence of a competitive market as provided in RCW 41.06.142 (4)(d).

(3) The decision of the administrative law judge in any appeal under this chapter shall be considered a final order.

[Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-320-745, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 41.06.-142. WSR 04-07-104, § 236-51-745, filed 3/17/04, effective 7/1/05.]