



Contract Language Best Practices

Contract language can have a significant impact on inclusion and access in contracting and procurement efforts. Clear, concise, and plain-talked language, for example, can allow small and diverse businesses to better compete for and enter into contracts with your agency.

Below are ten recommended changes to contract language to be more inclusive. These changes will help increase small and diverse business participation and accessibility. Refer to your Assistant Attorney General (AAG) or legal counsel for additional guidance on making contract language changes.

[Bracketed Text] in example contract language must be replaced with your agency's name/information.

1. Increase contractor awareness of agency supplier diversity goals	Applies to: All solicitations and contracts
<p>How?</p> <p>Specify aspirational supplier diversity goals in advertisements, requests for proposals (RFPs), requests for qualifications (RFQs), and contracts. Set goals for each contract. Consider the availability of small and diverse businesses for a contract and set goals that help the agency meet its overall target. While goals should be attainable, zero participation is not a goal and provides no opportunities for small and diverse businesses.</p>	<p>Why?</p> <ul style="list-style-type: none">• Demonstrates your agency is committed to meeting their annual overall supplier diversity goals, set by OMWBE.• Seeks equitable representation in contracting opportunities of small and diverse businesses.• Encourages businesses to:<ul style="list-style-type: none">○ Become certified by the Office of Minority and Women's Business Enterprises (OMWBE) and the Department of Veteran's Affairs (DVA); and○ Register in Washington's Electronic Business Solution (WEBS).



Example Contract Language:

UTILIZATION OF DIVERSE BUSINESSES

This contract contains an aspirational **[total goal]**% Small and Diverse Business Goal, as follows:

- **[OMWBE goal]**% OMWBE certified businesses
- **[VOB goal]**% Veteran Owned Business (VOB)
- **[Small goal]**% Small, Mini or Micro businesses (Small Businesses)

Contractor is expected to make genuine efforts to meet or exceed the above aspirational goals in this contract.

Contractor may count their own participation and any participation from subcontractors towards aspirational goals on this contract. Contractor may only count participation from businesses certified by OMWBE under Chapter 39.19 RCW toward the OMWBE aspirational goal. Contractors may only count participation from businesses certified by DVA under RCW 43.60A.010 toward the aspirational VOB goal. Contractors may only count participation from businesses that meet the requirements under RCW 39.26.010(22) toward the Small Business aspirational goal.

Preference shall not be given in the evaluation of bids and no minimum level of small and diverse participation is required as a condition for receiving an award. Bids will not be evaluated, rejected, or considered non-responsive on that basis unless it is required by a federal law, regulation, grant, or contract term in the original solicitation.

2. Share information on how to obtain OMWBE Business certification and Veteran's Owned Businesses certification, and small business registration.

Applies to: All solicitations and contracts

How?

Include information and links in the solicitation to promote OMWBE and DVA certification. Include certification information on the agency's website (link to www.omwbe.wa.gov and www.dva.wa.gov) and other forms of communication where possible.

Why?

Increasing awareness and participation in the certification and registration process contributes to a more accurate data of the state's diverse business spend. It also encourages adding certified businesses in industry areas that the state does business with.



Encourage small businesses to register with Washington’s Electronic Business Solutions at www.des.wa.gov .	This creates data that can be used to better target activities for improving equity in contracting, and opportunities for businesses.
<p>This section is intended to invite bidder participation from all businesses. Prior to performance, a business that intends to use small or diverse subcontractors is encouraged to identify the participating business(s) to [agency name]. Businesses are encouraged to utilize small businesses on this agreement (See RCW 39.26.010).</p> <p>Example Contract Language: UTILIZATION OF DIVERSE BUSINESSES</p> <p>Bidders are encouraged to use OMWBE and DVA’s directories of certified firms for potential subcontracting arrangements. Bidders are also encouraged to contact OMWBE and DVA for information on becoming a certified minority-, woman-, or veteran-owned business.</p>	
3. Outline Agency policies around culture competency, inclusion, and anti-discrimination	Applies to: All contracts
<p>How?</p> <p>Include agency policy(ies) on cultural competency, inclusion, and anti-discrimination in contract language.</p>	<p>Why?</p> <p>Including this language shows your agency’s commitment to diversity and inclusion generally and in contracting and procurement. It ensures contractors are aware of and work to meet the goals and expectations around cultural competency, inclusion, and anti-discrimination.</p>
4. Compliance with the use of diverse businesses	Applies to: Agency contracts where diverse businesses participation can be anticipated
<p>How?</p> <p>Make changes in the Agency General Terms and Conditions section of the contract to outline agency expectations.</p>	<p>Why?</p> <ul style="list-style-type: none"> • To encourage compliance with diverse business participation goals. • To help ensure equitable spend. • To promote accountability for commitments made.



Example Contract Language:

UTILIZATION OF DIVERSE BUSINESSES

The State of Washington works towards providing the maximum practicable opportunity for small and diverse businesses in the performance of all State contracts. Contractor shall use genuine efforts to utilize race- or gender-neutral means to allow opportunities for small and diverse businesses to participate in subcontracts, where participation opportunities are present. Contractor shall make genuine efforts to ensure all available business enterprises, including small and diverse businesses, have equal opportunity for participation which might be presented under this Agreement.

Examples of genuine efforts include, but are not limited to, the following:

1. Submit inclusion plans with genuine efforts to meet the aspirational goals on the project
2. Engaging in targeted outreach
3. Providing training
4. Using the OMWBE & DVA certified business directories to locate certified minority, women- and veteran-owned businesses, and WEBS to search for qualified small business

Contractor shall include a similar provision in all subcontracts awarded for work to be performed under the contract with the State.

5. Outline diverse business spend data collection requirements and reporting	Applies to: All contracts
How? Add contract language to require small and diverse business spend data collection and reporting.	Why? <ul style="list-style-type: none">• Assist in properly reporting and tracking accurate small and diverse business spend.• Promote transparency and accountability.• Allows the agency to determine what is working, verify data, and adjust as needed.



Example Contract Language:

SUBCONTRACTING

Contractor shall submit reports in a form, system, or format to be provided by [Agency], and at intervals as agreed by the parties, regarding work under this Contract performed by subcontractors and the portion of contracts funds expended for work performed by subcontractors, including but not limited to diverse businesses. "Subcontractors" includes subcontractors of any tier. (Agency example reporting form [WSDOT 271-056](#))

If the **[Agency]** approves subcontracting, the Contractor shall maintain written procedures related to subcontracting, and copies of all subcontracts and records related to subcontracts. For cause, the **[Agency]** in writing may: (a) require the Contractor to amend its subcontracting procedures as they relate to this Contract; (b) prohibit the Contractor from subcontracting with a particular person or entity; or (c) require the Contractor to rescind or amend a subcontract.

6. Requiring the Contractor and Subcontractor to register in WEBS

Applies to: All contracts

How?

Add language requiring registration in WEBS for businesses participating on contracts.

Why?

- Increases the amount of small and diverse businesses in WEBS.
- Helps OMWBE and DVA increase certification pools.
- Decreases project costs by increasing available businesses and competition.

Example Contract Language:

WASHINGTON'S ELECTRONIC BUSINESS SOLUTION (WEBS).

Contractor represents and warrants that it and all subcontractors are registered in WEBS, Washington's contract registration system and that, all of their information therein is current and accurate and that, throughout the term of this Contract, Contractor and Subcontractors shall maintain an accurate profile in WEBS.



7. Requiring Contractors to timely pay their Subcontractors	Applies to: All contracts
How? Add language to contract requiring timely/prompt payment and release of any retainage. Add language that holds contractors accountable for this commitment.	Why? More small and diverse businesses willing and able to work as a Subcontractor for the state if payment is made on a more frequent basis. Many small and diverse businesses may face cash flow challenges and thus cannot wait longer periods for payment.
Example Contract Language: PROMPT PAYMENT, SUBCONTRACT COMPLETION AND RETURN OF RETAINAGE WITHHELD The following procedure shall apply to all subcontracts entered into as a part of this Contract Requirements: 1. Section 1. Prompt Payment. 1.1. Upon request, the project manager will provide a copy of any or all progress payment estimates, with regard to contract payments to any interested party to the project. 1.2. The Contractor shall make payment to the Lower Tier Subcontractor not later than ten calendar days after work done by the Lower Tier Subcontractor is satisfactorily completed. 1.3. In the event the Contractor believes they have the right under the Contract or Subcontract to withhold payment in part or whole from a Lower Tier Subcontractor they shall provide immediate notification to that Lower Tier Subcontractor and the Agency. The notice shall include an accounting of payments to date, the value and reason for the withheld amount, and an explanation of what must be done to have the withheld amount released. The Lower Tier Subcontractor shall be paid within eight calendar days after the Subcontractor completes the remedial action identified. 2. Section 2. Dispute Resolution. 2.1. Every subcontract and lower tier subcontract shall have a dispute resolution process incorporated for resolving issues between the parties to the subcontract, or one shall be established as necessary. Those not a party to a dispute remain entitled to full and prompt payment of their portion of a draw, progress payment, final payment, or released retainage.	



- 2.2. If the parties agree, the Contracting Agency will make a third party neutral available provided the parties to the dispute agree that the cost of doing so is split between them.
 - 2.3. The Contracting Agency will withhold the same amount of funds from the Contractor as was withheld if the issue is not resolved by the next progress estimate.
 - 2.4. Failure by a Contractor or Subcontractor to comply with these requirements may result in one or more of the following:
 - a. Reflected in the Prime Contractor's Performance Evaluation.
 - b. Cancellation, termination, or suspension of the Contract, in whole or in part.
 - c. Sanctions as provided by the Contract; subcontract; or by law under applicable prompt payment statutes including RCW 39.04.250.
 - 2.5. In addition to all other remedies, any person from whom funds have been withheld in violation of this section shall be entitled to receive from the person wrongfully withholding the funds, for every month and portion thereof that payment including retainage is not made, interest at the highest rate allowed under RCW 19.52.025. In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to costs of suit and reasonable attorneys' fees.
3. Release of Retainage.
 - 3.1. The Subcontractor shall make a written request to the Contractor for the release of the Subcontractor's retainage or retainage bond.
 - 3.2. Within 10 calendar days of the request, the Contractor shall determine if the subcontract has been satisfactorily completed including any required lien releases, documentation and material testing and shall inform the Subcontractor, in writing, of the Contractor's determination.
 - 3.3. If the Contractor determines that the subcontract has been satisfactorily completed, the Subcontractor's retainage or retainage bond shall be released by the Contractor within 10 calendar days from the date of the written notice.
 - 3.4. If the Contractor determines that the Subcontractor has not achieved satisfactory completion of the subcontract, the Contractor must provide the Subcontractor with written notice stating:
 - a. Specifically, why the subcontract work is not satisfactorily completed.
 - b. What has to be done to achieve completion.
 - 3.5. The Contractor shall release the Subcontractor's retainage or retainage bond within 10 calendar days after the Subcontractor has satisfactorily completed the Work identified in the notice.
 - 3.6. In determining whether satisfactory completion has been achieved, the Contractor may require the Subcontractor to provide documentation such as certifications and releases, showing that all laborers, lower-tiered Subcontractors, suppliers



of material and equipment, and others involved in the Subcontractor's Work have been paid in full. The Contractor may also require any documentation from the Subcontractor that is required by the subcontract or by the Contract between the Contractor and Contracting Agency or by law such as affidavits of wages paid, and material acceptance certifications to the extent that they relate to the Subcontractor's Work.

- 3.7. If the Contractor fails to comply with the requirements of the Specification and the Subcontractor's retainage or retainage bond is wrongfully withheld, the Contractor will be subject to the actions described in 2.4 & 2.5 listed above. The Subcontractor may also seek recovery against the Contractor under applicable prompt pay statutes in addition to any other remedies provided for by the subcontract or by law.

8. Evaluate insurance requirements for Contractors and establish appropriate levels of coverage based on actual risk and state law.

Applies to: All solicitations and contracts

How?

Analyze past insurance claims, evaluate the contract risk based on the type of work being performed, determine reasonable requirements based on historical data (e.g. tiered levels of insurance requirements), and adjust contract language and requirements accordingly.

Why?

Boiler-plate insurance requirements might be much higher than necessary for contracts, making it difficult for small and diverse businesses to compete. Adjusting these requirements makes it possible for more small and diverse businesses to participate in solicitations and contracts. Small and diverse businesses identified insurance requirements as a major barrier to state contracting, as documented in the [2019 Disparity Study](#).



9. Increase diverse business participation through inclusions plans	Applies to: All solicitations and contracts
<p>How?</p> <p>Include language in the solicitation requiring bidders to submit inclusion plans.</p> <p>For a guide on how to use inclusion plans, including a template and instructions and requirements for the plan, click here. This plan would be located in the fill-in section below.</p> <p>For more information on inclusion plans, click here.</p>	<p>Why?</p> <p>Demonstrates to bidders that inclusion is a priority and clarifies agency expectations to allow for participation and monitoring of small and diverse spend.</p>
<p>Example Contract Language:</p> <p>INCLUSION PLANS</p> <p>The [Agency] is committed to increasing opportunities for small and diverse businesses that contract with the State. This Contract may provide opportunities for all business working with small and diverse businesses through an Inclusion Plan. Accordingly, Bidder must submit an Inclusion Plan as part of their bid package. Instructions and requirements regarding the plan, along with a template are included in section [Inclusion Plan Section].</p>	
10. Review contract language for other barriers	Applies to: All contracts
<p>How?</p> <p>Meet with small and diverse business community and internal stakeholders (e.g. legal, diversity and inclusion staff, contracting office, program managers) to identify where the existing contract language is excessive, unnecessary, and/or unduly burdensome.</p>	<p>Why?</p> <p>Eliminating barriers makes it easier for small and diverse businesses to work with your agency. It also ensures the contract language aligns with your aspirational spend goals.</p>