

Transcript for October 24, 2023 Lunch 'n Learn meeting

[This transcript was edited for accuracy and clarity.]

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Zavatsky, Drew (DES)

Hi, good afternoon. My name is Drew Zavatsky. I'm with you today at lunch with two folks here, Brandon Cipolla and Zoë Mroz. We are all here to present the Lunch 'n Learn on Exceptions to the Supplier Diversity Policy. Brandon, do you want to check in?

0:0:46.750 --> 0:0:47.400

Cipolla, Brandon (DES)

Slide 2 Absolutely. I'm Brandon Cipolla. I'm a contracts liaison here at DES. As part of my role, I'm available to you to help out answering any procurement issues, questions, best practices, templates that you may have. So, feel free to reach out to me. I also have a page on the DES website for contract liaison services. I'll drop that in chat for everyone. Happy to be here.

0:1:13.310 --> 0:1:14.970

Zavatsky, Drew (DES)

Thank you, sir, and Zoë?

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Mroz, Zoë (DES)

Hi, everyone. Zoë Mroz. I'm the management analyst on the DES Policy Team. I work very closely with Drew and help with the supplier diversity policy. I'm here to monitor chat today, take your questions, compile them, and then help facilitate the Q&A at the end of this session.

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Zavatsky, Drew (DES)

Fantastic. Thanks so much. OK, we'll get started.

Slide 3 Those of you who have seen us in other sessions will recognize the first couple slides. The overview is that we are the State's lead procurement agency. The Department of Enterprise Services was put in that position by legislation in 2012. DES procures and manages about 200 statewide contracts. In those contracts, we have a total of about 1,500 vendors. In addition to that, we're responsible for creating, developing and implementing procurement policies and procedures for Washington state agencies.

Slide 4 The statutory reasons and the executive order reason that we are talking about the supplier diversity policy are those shown here. The basic thing you need to know is that for a long time in Washington state under RCW 39.26.090, we're supposed to – and we have been – developing procurement policies and procedures that encourage and facilitate the use of goods and services acquired from small businesses, micro businesses, mini businesses, minority and women owned businesses. And under a separate statute, veteran owned businesses (RCW 39.26.240). All of that has been assembled and reenergized through executive Order 22-01, in which the governor has said look, we need to do a better job and improve the scope and equity of public spending in Washington state.

Slide 5 OK, this has come into focus because of the 2019 Disparity Study. The basic core finding of the Disparity Study is that minorities and women don't enjoy equal access to all aspects of contracting opportunities presented by the state, and we need to fix that. So that's why we're here now.

Slide 7 We created this slide just to give you a vision of what you'll see when you follow these links. So, there's the policy, which became effective April 1st of this year. There is an accompanying Virtual Handbook. There's also a live link here that basically tells you how to go about complying with and working with the supplier diversity policy. So the policy, POL- DES-090-06 tells you the “what” and the Virtual Handbook tells you the “how” for implementing supplier diversity.

As an aside, if my fast talking has you concerned, don't worry. In about 60 to 90 days from now, we will put onto the website three documents. The first will be an edited transcript. The slide deck that we're presenting today will be a second document. In the third document, we consolidate all of the Q&A that happened during this session.

Slide 8 Ok, I'm going to run through the Policy Exceptions really quickly, and then we'll talk about them a bit more in depth when we get to the Q&A session. So, the first exception is that Statewide Contracts and DES-approved cooperative contracts are excepted from the operation of the supplier diversity policy and we'll talk about why that is the case in just a moment.

Second, emergency contracts are another category of contracts that are excepted.

Third is contracts that could violate international trade agreements, we'll talk about what that means in just a bit.

Fourth, contracts using federal funds are also excepted and we'll explain that.

And fifth, if in fact you have a business need and for some reason, you're coming up against something about the supplier diversity policy that prevents you from fulfilling that business need, you can request an exception and we'll talk about what that means as well.

Slide 9 Let's talk about the first exception: statewide/cooperative contracts. Here are some considerations with this one: The reason that these are generally exceptions is that DES has already done the work needed to be in compliance with the supplier diversity policy for these contracts. That means that all of our statewide contracts that have been refreshed and that are current have been through all of the processes that are contemplated by the supplier diversity policy. So, you don't have to be concerned about meeting supplier diversity requirements if you're using a statewide contract, because we've already done that for you.

The same is true for approved cooperative contracts. We assure that the contract that we agree to be a part of also complies with Washington policies, the whole suite of policies, not just the supplier diversity policy. Now, when DES approves a cooperative contract, we approve it in one of two ways. Either we sign a participating agreement on behalf of the state with the larger national cooperative contract so that we can go ahead and use it and any state agency can piggyback on that participating agreement, or we end up executing a written approval which allows a particular state agency or Group of state agencies to participate directly with that cooperative agreement or contract.

OK, so let's see, there is a wrinkle to this and it has to do with two tier contracts. As many of you are aware, some statewide contracts actually create a pool of vendors. To actually use one of them, you as a

participating state agency need to enter into a second-tier contract. This basically is a solicitation within a solicitation. Now one of the first questions we got when we were first drafting the policy is, well, now wait a minute. Does the supplier diversity policy actually apply to a two-tier contract? The short answer is yes it does, but in a very specific way. Agencies still need to do the forecasting and outreach portions of the supplier diversity policy when they're conducting a two-tier solicitation.

Slide 10 All right, exception #2 is emergency contract considerations. The basic idea here is OK, you're in an emergency. DES is not going to make you jump through a bunch of hoops or fill out a bunch of paperwork because you have to respond to an emergency, right? So that is why we included this exception.

That being said, it has to actually be an emergency, right? And you know, I won't discuss this today, but you can take a look at the statutory language. RCW 39.26.130(3) defines what qualifies as an emergency, as does the DES Policy, "Making Emergency Purchases of Goods and Services," POL-DES-130-00.

Slide 11 The next exception is contracts that violate international trade agreements. This is one that maybe some of you are not aware of in part because a lot of the time, some in-state contract professionals or procurement professionals really only interact with U.S. companies. But where you have a solicitation where in fact maybe some of the bidders are going to be Canadian companies or Mexican, or from elsewhere. I've seen a couple of contracts where the vendor actually ends up being in Germany. In those circumstances, you have to have the idea in the back of your head, "are we complying with international trade agreements if we enter into this contract?" And the reason I put these examples in the slide is just to alert you to the issue. This is not meant to be exhaustive list at all, and definitely is not a substitute for conducting your own analysis. You know exactly what your agency-specific needs are for a given solicitation and or contract. So, by all means, if you have a question about this, speak with one of your supervisors or one of your agency's Assistant Attorney's General's

As an aside, the part about this that surprised me is that for NAFTA, these are the current amounts that indicate that there is going to be an issue. So, for Canada, if you're getting a goods contract, and you know through a solicitation that what you're going to buy costs more than \$25,000, you cannot award any preferences in state. This means that any special in-state contracting or procurement language can't be used, including the supplier diversity policy.

If you're in a situation, for example, under the policy, where the solicitation value is under \$150,000 and you've got that preference language as a part of the solicitation. If one or more of the bidders end up being Canadian there's a good argument that you would not be able to use those preferences at that point. This very complex, very fact specific, so if you think you might be coming up with a situation such as this in a goods contract, give us a call in the DES Policy shop and we will take a look at it and take you through the analysis. Brandon, do you want to chime in here also?

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Cipolla, Brandon (DES)

I was just going to say that they can reach out to me as well.

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Zavatsky, Drew (DES)

OK, beautiful. And then the other example on the slide is where there is a service contract. In that case, if the value is above \$ 83,100, but under the \$150,000 amount, it's entirely feasible that the preference from the supplier diversity policy would not be applicable in that circumstance. So, there too, give us a call. We'll talk about it. We'll work it out and if we get enough of those calls from agencies, we will draft an FAQ on the topic. Note too that if it's Mexico, the dollar amounts are slightly different, but the same result would occur.

Slide 12 And then the next slide has to do with other trade agreements. With the WTO, the dollar amounts are higher and then there's plenty of other free trade agreements around the world. Many of these you won't care about – it is very rare for somebody in Washington state to be conducting commerce with somebody in Australia or Bahrain or, you know, fill in the blank. But you never know. So, if you see any of these countries that are suppliers for your contract, just keep it in the back of your head, “maybe I need to give folks in the DES policy team a shout, or call Drew directly. Either way, we're here to help. And Brandon, I'm going to turn to you now.

Cipolla, Brandon (DES)

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Slide 13 Yes, I worked for the federal government in the Air Force for 14 years, so I'm quite familiar with the Code of Federal Regulations and the Federal Acquisition Regulation and all of its appendices. Very exciting stuff, and I have quite a bit of experience in that realm and I'm more than willing to help agencies out if they have questions about federal requirements. We're talking about exception #4 for using federal funds and the text says the policy shall not apply to any competitively procured contracts that utilize federal funds. If application of the policy would violate any federal laws or risk the loss of any federal funding, we then explain what violating any federal laws would be and risk of federal funding really comes into play when you've received grant money from the federal government. A lot of times those grants will come with different requirements that will be particular to that grant on how you can use that money. And of course, if you don't follow the rules of the grant money that you've been given, you risk losing it. So that's going to be on a case-by-case basis.

Slide 14 Overall the bottom line is that geographic preferences cannot be used when we're utilizing federal funding, which will exclude the uses of Washington small business and veteran preference points that we usually do on our procurements. And that's just because the veteran preference is a Washington veteran preference through the Washington Department of Veterans Affairs. That's the certification. And then the Washington small businesses (obviously for only Washington businesses), those are geographic restrictions. If you care to take a look at it, the language is down at the bottom of this slide. It's in 2 CFR Subpart D. If you go a little deeper, it's in procurement standards in sections 2 CFR 200.317 and 2 CFR 200.319(c) – the two most relevant sections. And I think that about covers it. I look forward to any questions folks have on that.

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Zavatsky, Drew (DES)

Fantastic. And just as a practice note, if you find that you're going to use any of these exceptions, this is just a reminder to document why you're doing it in your contract file. This is necessary because if there's ever an audit in a few years from now, and you end up not being around at that point, you don't want to create a problem for the people who come after you.

Slide 15 The fifth exception says that you can always ask DES for an exception if you find that there's something about the operation of the supplier diversity policy that interferes with you achieving your business objectives. Since the time this policy became active in April, there been two requests for this type of exception to DES. One was formal and one was informal. The formal request was from the agency's director. After we received it, I had a conversation with the folks who sent it to us. I pointed out a couple of things that included, "are you aware of the optics of this request?" (It appeared that the message was simply, "we don't want to follow the policy.") But after further discussion, the agency realized they didn't need to have an exception. Instead, they could do things like forecast and conduct outreach without making specific requests or identification of what they needed. This was necessary because in their circumstances they had to worry about revealing attorney work product when conducting a solicitation. When they figured out a way to comply with the supplier diversity policy, they withdraw their request.

The other one was an informal request and after they spoke with us, they figured out ways of working within the policy. As with the formal request, once the agency thought about it, they realized they did not need to ask for an exception.

So, as a general rule, when you think you might need an exception from the policy, the best practice is to give us a call. So, I think that's basically our presentation now your questions, Zoë, you're on.

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Mroz, Zoë (DES)

Slide 16 Yeah. Thanks Drew. So, at this time, if you have any questions about anything that was presented here today with our exceptions portion of the policy, please go ahead and submit those questions to chat. I did want to highlight one question we've already received. It's the questions from Melissa about federal funding.

Question #1 The exemption about federal funding would also mean that we can't add language that we will award a small or veteran small, sorry, small or veteran owned business for contracts under \$150,000 where federal funds are involved, correct?

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Zavatsky, Drew (DES)

Answer #1 That is correct.

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Mroz, Zoë (DES)

Question #2 Drew, what are your thoughts were about other portions of the policy, like forecasting and outreach, how do those factor in here? We know we can't use preferences when it comes to federal funds. How about any other strategies that we could or couldn't use?

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Zavatsky, Drew (DES)

Answer #2 That's interesting. Answering this question really will only be possible when considering the specific circumstances as they arise because of the nature of the exception. What I mean is that federal funds often have requirements to comply with federal rules or regulations. Because there are so many federal laws and regulations, we aren't able to create a one-size-fits-all answer. Without understanding

the facts of the specific situation, it is not possible to know whether or not using the supplier diversity policy would actually violate federal laws and regulations.

The most recent example of this kind of situation I've encountered had to do with a particular type of federal grant and all the requirements on using the grant from the U.S. Environmental Protection Agency. In that grant, their language is very clear that they didn't want to have any local laws modifying anything having to do with the way it was going to be procured. And instead, they wanted the procurement to be completely within the federal guidelines. So, in that circumstance, I think you're pretty constrained to basically not use much of Washington law.

Question #3 0:24:23.60 --> 0:24:26.790

Mroz, Zoë (DES)

But we did have a question initially from Ty. Who is the policy for? Is it for suppliers or state employees?

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Zavatsky, Drew (DES)

Answer #3 The policy only applies to state agencies. It does not extend to local governments. Local governments can decide to follow the policies, but that's completely their decision.

As to state agencies, there are some that it does not apply to, specifically judicial agencies and legislative agencies. It only applies to executive agencies. It also has it has application to higher education entities, but they have parallel authority for their procurements.

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Mroz, Zoë (DES)

Question #4 Does goods include software?

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Cipolla, Brandon (DES)

Question #4 Yeah, that is a difficult one to answer. Software could be a one-time purchase for the right to use that software, which would fall under goods, or it could be the more common purchase now, which is really for larger purchases – software as a service – where the software is continually updated. In that situation you're really buying a subscription to use that software that comes with support and possibly customization which would fall under a service. So, it could go either direction. If you're having questions about that, you can feel free to reach out to me and I'll help you through it.

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Mroz, Zoë (DES)

Question #5 While not related to exceptions, are you seeing solicitations that are giving preference points for small, diverse subcontractors versus just the main contractor?

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Zavatsky, Drew (DES)

Answer #5 Yes. The policy as written specifically talks about awarding points to primes. It doesn't talk about awarding points to Subs. I'm not seeing any agencies that are doing that.

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Mroz, Zoë (DES)

Question #6 Is the Q&A that gets presented today, will it be documented and shared back to those who participated in the session?

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Zavatsky, Drew (DES)

Answer #6 Yes, they will be published on our web site and available to anyone and everyone.

There have been two month-long blocks of sessions. The first ones in June, there were four. If you go back to the website and by the way, if you go to the DES website, when you get to the facing page, if you go into the search window, put in the phrase lunch and learn and it'll pop up as like the first two hits will be both the June series and also the October series.

If you open the June series, you'll see that there were four sessions. If you click on any of those four, the next screen will show you not just the session identifier, but It'll show you those three documents, the transcript, the Q&A and the PowerPoint. So, you can actually go and see what happened in all those sessions as well.

If you go to the current month's sessions, they have not been posted but they will be.

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Mroz, Zoë (DES)

I'm not seeing any other questions.

0:30:25.140 --> 0:30:30.120

Zavatsky, Drew (DES)

Well, I guess that we're at done. I think it's pretty cool that Brandon's able to join us here today. He was the very first speaker in this series back in June, so we've bookended our sessions with you Brandon. Thank you very much for your help!

I want to thank everybody who's assisted. We've had a different cast of characters each time, and everybody's knocked it out of the park. And I can't say thank, you enough to Zoë, who makes everything happen more smoothly.

And to all of you in the audience, we appreciated all of your questions, all of your input is super helpful to us because it's how we improve our answers and our thinking.

We will likely have more lunch and learns in the future. This has been a very good, helpful, powerful experience for all of us here at DES. That being said, we don't have anything scheduled as yet. So, thank you all and have a great rest of your day.