



Enterprise Services Policy No. POL-DES-EO 18-03

Policy Regarding Executive Order 18-03

FREQUENTLY ASKED QUESTIONS

PUBLISH DATE: July 10, 2024

- Question:** **What is the Effective Date of EO 18-03?**
Answer: The effective date of EO 18-03 is June 12, 2018. [FAQ Published 05-12-2019]
- Question:** **What is a Mandatory Individual Arbitration Clause?**
Answer: For purposes of EO 18-03, a ‘mandatory individual arbitration clause’ is a requirement by an employer to arbitrate (rather than litigate) employment grievances. It is mandatory in the sense that it is a condition of employment. Such clauses can be found in:

 - Employment agreements.
 - Employee handbooks.
 - Employer policies.
 - An email or other communication delivered to employees. [FAQ Published 05-12-2019]
- Question:** **What is a class or collective action waiver?**
Answer: For purposes of EO 18-03, a ‘class or collective action waiver’ is a requirement by an employer that employees individually arbitrate employment grievances. It precludes class actions or employees pursuing workplace grievances as a group. Such clauses can be found in:

 - Employment agreements.
 - Employee handbooks.
 - Employer policies.
 - An email or other communication delivered to employees. [FAQ Published 05-12-2019]
- Question:** **Does EO 18-03 apply to my agency?**
Answer: EO 18-03 applies to all state executive and small cabinet agencies.

 - [State Executive Agencies](#).
 - [Small Cabinet Agencies](#). [FAQ Published 05-12-2019]
- Question:** **How does an agency determine if it is reasonably practicable to EO 18-03 to direct buy purchases?**
Answer: It may not be practicable for a vendor to demonstrate or certify that its employees are not required, as a condition of employment, to agree to mandatory individual arbitration requirements and class or collective action waivers when an agency/direct buy purchaser has no contract language (parties’ obligations, including terms). Therefore, compliance with EO 18-03 may not apply where there is no contract language. The application and documentation of EO 18-03 in direct buy purchases shall be at the discretion of the covered agency. [FAQ Published 07-10-2024]

6. **Question:** **Who is tasked with administrative implementation of EO 18-03?**
Answer: The Department of Enterprise Services (DES) is tasked with administering implementation of EO 18-03. To ensure operational success and consistent application of this Order across state agencies, DES administers implementation of this Order. [FAQ Original Published 05-12-2019]. [FAQ Published 05-12-2019, Revised 07-10-2024].
7. **Question:** **Can state agencies do business with a firm that requires their employees, as a condition of employment, to use mandatory individual arbitration for workplace grievances?**
Answer: Yes. EO 18-03 creates an opportunity. EO 18-03 requires covered agencies to seek to purchase and procure from firms that do not have mandatory individual arbitration clauses. EO 18-03 is similar to other Legislative and Executive procurement preferences regarding how the state spends its money. [FAQ Published 05-12-2019]
8. **Question:** **Can state agencies do business with a firm that requires their employees, as a condition of employment, to forgo class or collective action dispute resolution for workplace grievances?**
Answer: Yes. EO 18-03 creates the opportunity. EO 18-03 requires covered agencies to purchase and procure from firms that do not have mandatory individual arbitration clauses. EO 18-03 is similar to other Legislative and Executive procurement preferences regarding how the state spends its money. [FAQ Published 05-12-2019]
9. **Question:** **Does EO-18-03 Apply to competitive procurements?**
Answer: Yes. EO-18-03 applies to competitive procurements for covered state agencies. See FAQ 4 to understand which state agencies are covered for purposes of EO 18-03. [FAQ Published 05-12-2019]
10. **Question:** **Does EO-18-03 apply to legacy contracts?**
Answer: No. EO-18-03 does not apply to existing contracts. The EO is forward looking. [FAQ Published 05-12-2019]
11. **Question:** **Does EO-18-03 Apply to Statewide Contracts?**
Answer: Yes. EO-18-03 applies to any Statewide Contracts after June 12, 2018. EO 18-03 has been implemented in the solicitation process for Statewide Contracts after this date. [FAQ Published 05-12-2019]
12. **Question:** **Does EO-18-03 Apply to noncompetitive procurements?**
Answer: Non-competitive procurements' are identified in [RCW 39.26.125](#). With the exception of 'direct buy purchases (see [RCW 39.26.125\(3\)](#)).
 - EO 18-03 does not apply to non-competitive procurements such as emergency or sole source procurements.
 - EO 18-03 does, however, apply to direct buy purchases if *reasonable practicable*. See the FAQs 12 and 13 for examples. [FAQ Published 05-12-2019]
13. **Question:** **Some of our staff are required to make small and unusual purchases, sometimes at the last minute, such as refreshments for remote location meetings, or a Nerf Gun for a demonstration for a class. Are we required to check with Hasbro and the local grocery stores to ensure that they don't require employees to sign arbitration clauses?**
Answer: This policy states that application of executive order 18-03 is expected for direct buy purchases when *reasonably practicable* and up to the discretion of the agency. Acquiring a vendor certification from the vendors in the scenarios you provide is not likely to be reasonably practicable. However, just because it isn't practicable in the scenarios you

provided, doesn't mean that requiring a vendor certification for other direct buy purchases won't be practicable. DES has provided a sample vendor certification for you to customize and use at your own discretion. See the [Desk Aid](#) [FAQ Published 05-12-2019]

14. **Question:** **When would it ever be reasonably practicable to ask a vendor to certify they don't have their employees sign arbitration agreements if it isn't a competitive purchase?**
Answer: An example of requesting the vendor complete a vendor certification during a direct buy or non-competitive purchase could be as follows: If your agency needs to purchase customized lightweight jackets for all of the employees for a total cost of \$8,000, it may be *reasonably practicable* to request vendors certify if they do or don't have their employees sign arbitration clauses when submitting their cost estimations. [FAQ Published 05-12-2019]
15. **Question:** **Does EO-18-03 apply beyond goods & services?**
Answer: Yes. EO 18-03 applies beyond purchases and procurements for goods and services. The EO implementation, however, will be prioritized. The implementation prioritization begins with competitive goods and services procurements; and direct buy purchases, when [reasonably practicable](#). Covered agencies, if authorized by their statutory authority, can implement the EO more broadly. [FAQ Published 05-12-2019]
16. **Question:** **Does EO-18-03 change the procurement code?**
Answer: No. EO 18-03 does not amend any RCW provisions. [FAQ Published 05-12-2019]
17. **Question:** **What If a Vendor is a critical supplier, does EO-18-03 still apply?**
Answer: Yes. However, to the extent permissible under state and federal law, legislature may have required certain vendors, for example, ferry vessels must be built in Washington. EO 18-03, however, does NOT preclude state executive and small cabinet agencies from purchasing or contracting with particular firms. [FAQ Published 05-12-2019]
18. **Question:** **Does EO-18-03 apply to contract extensions?**
Answer: It depends on the contract. For contract renewals – No. Here, for example, you have a 6-year term, but contract was set up to require year-by-year 'renewal. For Contract extensions – possibly. It depends on the contract. If original contract term is over, then yes, EO 18-03 does apply. [FAQ Published 05-12-2019]
19. **Question:** **Does EO-18-03 apply to subcontractors?**
Answer: It depends on what the contract states. Generally speaking, the EO will apply to the Contractor. [FAQ Published 05-12-2019]
20. **Question:** **How do state agencies obtain legal advice on implementing EO-18-03?**
Answer: The AGO is coordinating legal advice regarding EO 18-03 through the AGO's TPC Division. Start by asking your assigned AAG for advice. Your AAG then will consult with TPC and then get back to you. [FAQ Published 05-12-2019]
21. **Question:** **Where can I find a copy of the supreme court's decision?**
Answer: The U.S. Supreme Court's decision is available here: [Epic Systems Corp. v. Lewis](#), 584 U.S. (May 21, 2018). [FAQ Published 05-12-2019]
22. **Question:** **What does "reasonably practicable" mean for direct buys?**
Answer: In the case of direct buy purchases, "reasonably practicable" means practicable unless the agency can show that there is a gross disproportion between the benefit of applying 18-03 and the cost, in time, trouble and money, of requesting vendors certify whether or not they

require employees sign arbitration/class action clauses. See examples of when it may or may not be reasonably practicable to apply 18-03 to direct buy purchases in FAQ # 12 and FAQ #13. [FAQ Published 05-12-2019]

23. Question: What are the ramifications if an agency doesn't implement 18-03?

Answer: Executive order 18-03 is a directive from the Governor to state agencies communicating to those agencies what the Governor wants the agency to accomplish. The EO does not have the force of law, but agency heads serve at the pleasure of the Governor. [FAQ Published 05-12-2019]

24. Question: What does 18-03 mean for purchasing card purchases?

Answer: Purchasing Card (P-card) purchases are not different from any other purchases when it comes to 18-03. Regardless of the method of payment (p-card, purchase order etc...) 18-03 applies. See FAQ #8 – FAQ #14 for more information about applying 18-03 to p-card purchases. [FAQ Published 05-12-2019]

25. Question: When should the agencies collect the contractor certification?

Answer: When bids are due.

Both to maximize agency due diligence and to minimize opportunity costs, covered agencies should require bidders (e.g., vendors/contractors) to provide the Contractor Certification as part of their bid.

The purpose of requiring the Contractor Certification as part of the bid rather than waiting until a contract is to be awarded is that covered agencies' 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 procuring agency need to understand that fact (and its consequences) earlier; rather than later.

In addition, because the bidder may be evaluated – as part of a best value evaluation – on whether it requires its employees, as a condition of employment, to sign or agree to mandatory individual arbitration clauses or class or collective action waivers, the certification MUST be included as part of the bid submission. [FAQ Published 05-12-2019]

26. Question: What happens if a bidder certifies it requires its employees, as a condition of employment, to sign or agree to mandatory individual arbitration clauses or class or collective action waivers?

Answer: Firms are not deemed to be 'nonresponsive' if they submit a Contractor Certification in which they cannot certify that, as a condition of employment, they do not require their employees to sign or agree to mandatory individual arbitration clauses or class or collective action waivers.

Such firms, however, would be ineligible to align with that portion of a solicitation's best value criteria to distinguish vendors that implement this procurement priority as compared to firms that can certify that, as a condition of employment, they do not require their employees to sign or agree to mandatory individual arbitration clauses or class or collective action waivers. Such firms are eligible to be awarded the resulting contract pursuant to the competitive solicitation.

Note: The applicable solicitation evaluation criteria (e.g., bid evaluation points or a percentage) must be set forth in the Solicitation document. In addition, the bid evaluation for the competitive solicitation must follow the process set forth in the Solicitation document. [FAQ Published 05-12-2019]

27. Question: Do I need to ask the vendor if they make their employees sign arbitration clauses, if I am making a new purchase or a second-tier purchase on a master contract that was established prior to June 2018?

Answer: When using Master Contracts that were established before June 2018 for new purchases, there is no need to request a contractor provide certification that they do not require employees to sign arbitration/class action clauses as 18-03 is not required for legacy contracts. However, covered agencies can apply 18-03 within the Master Contract at their own discretion. An example of this may be if there are several contractors to choose from on a Master Contract, the Agency could choose to research whether or not each contractor on that contract requires their employees to sign arbitration/class action clauses. The Agency could use their findings to choose which contractor they use. Again, this is not required but up to the discretion of the Agency. [FAQ Published 05-12-2019]

28. Question: The EO 18-03 Policy states that agencies shall grant a bid preference for such certification not to exceed five percent (5%) to bidders that certify they will not require its employees, as a condition of employment, to agree to mandatory individual arbitration requirements and class or collective action waivers. To what total should the percentage point apply?

Answer: When an agency determines the percentage amount to award a bidder during the procurement process, the agency will apply the percentage to the total bid price or, in the scenario where points are allocated, to the total solicitation points available based on cost and non-cost factors. The table shows examples of how the points are assigned when bid submissions are evaluated based on cost and non-cost factors or based on price proposed by bidders alone (cost factor).

<p>Example 1: Bid evaluation based on cost and non-cost factors.</p>	<p>If during a procurement process, an agency determines to award 5% extra points to a bidder that certifies it will not require its employees, as a condition of employment, to agree to mandatory individual arbitration requirements and class or collective action waivers and the total solicitation points available is 1000 for both the cost and non-cost factors, the agency will award an extra 50 points [(0.05 X 1000) to the bidder. If the bidder scores 900 points, the total points with 50 points added will be 950 points (900 + 50).</p>
<p>Example 2: Bid evaluation based on cost factor alone.</p>	<p>If during a procurement process, an agency determines to award 5% extra points to a bidder that certifies it will not require its employees, as a condition of employment, to agree to mandatory individual arbitration requirements and class or collective action waivers and the award will be based on the lowest responsive and responsible bidder. If the bidder certifies it will not require its employees, as a condition of employment, to agree to mandatory individual arbitration requirements and class or collective action waivers, and the bidder's bid is \$1,000, then the bidder will receive a \$50 deduction (\$1,000 x 5% = \$50) in their bid (for evaluation purposes only).</p>

A bidder that requires an arbitration agreement with its employees as a condition of employment will not be awarded the preference. [FAQ Published 07-10-2024]