

Contractor Certification and Wage Theft Prevention for Goods and Services Contracts.

Section 1: Welcome

[Greg:]Welcome to the Washington State Contractor Certification—Wage Theft Prevention for Goods and Services Contract Training Course.

I am Greg Tolbert and I will be presenting the course today with Mark Lyon. Mark is an Assistant Attorney General with the Office of the Attorney General. I serve as the legal services manager for Enterprise Services.

The Legislature created Enterprise Services “to provide centralized leadership in efficiently and cost-effectively managing resources necessary to support the delivery of state government services.”

In doing so, the Legislature tasked Enterprise Services with a mission “to implement a world-class, customer-focused organization that provides valued products and services to government and state residents.”

To deliver on that mission, Enterprise Services and the Attorney General’s Office collaborate, in part, to develop procurement solutions to improve the customer experience and optimize the vendor relationship.

This training is designed to provide procurement professionals a brief summary on how to implement the Washington State Legislature’s new mandate regarding wage theft in an efficient, cost-effective manner.

Section 2: Agenda

I will walk us through the first half of the agenda. Mark will handle the second half.

We will discuss: Wage Theft—what this term covers and how it has been addressed; the recent Legislative Change—SSB 5301; the Contractor Certification template that is included as a part of this training; Contracts: Looking Forward—how to address the issue post-award; Takeaway Messages; and we will also include a list of Additional Resources.

Section 3: Goals and Tools

You are correct. This was NOT listed on the agenda. It’s a bonus section.

Let’s spend a moment and identify our goals for this session and a couple of tools. We have two team goals: First, have participants understand the statutory change. Second, provide operational tools to implement the Legislative direction efficiently.

The training course includes three tools: First, a suggested Template—the Contractor Certification Wage Theft Prevention—Responsible Bidder Criteria for Goods and Services Contracts. Second, a Backgrounder—a reference tool that accompanies the template and includes frequently asked questions, which Mark also addresses in this training course. Third, this PowerPoint deck.

Section 4: Wage Theft

Before addressing the recent legislative change, let's take a couple of minutes to discuss Wage Theft. Wage theft is the denial of wages or employee benefits that are rightfully owed to an employee. Most commonly, wage theft means failure to pay minimum wage and overtime, as outlined by the Federal Labor Standards Act, or FLSA. Wage theft, however, includes, a variety of situations including: Nonpayment of wages—simply not paying people the wages that they are owed.

Underpayment of wages—paying less than the agreed upon amount or paying less than the state or federal minimum wage requirements.

Overtime violations—failing to pay overtime for hours worked over 40 hours per week, or miscalculating overtime hours to pay fewer than are actually due.

Breaks—not providing meal breaks or rest breaks.

Tipped job violations—withholding tips, using tips to count towards minimum wage requirements (which is legal in some states, but currently not in Washington), and/or tipping out managers and others who are not eligible to receive tips.

Deduction violations—deducting the cost of tools, uniforms, or items damaged on the job, or register shortages from employee paychecks.

Misclassification of employees—one of the most common forms of wage theft is classifying workers as independent contractors, rather than employees.

When misclassified as an independent contractor, an employee loses benefits, most protections under federal and state labor laws, and must pay for job-related expenses, such as fuel and vehicle maintenance.

Wage theft can occur in a wide variety of employment sectors.

As indicated on this slide, according to recent data from the Washington Department of Labor and Industries, the highest areas for wage theft are the following employment sectors: Service, Construction, Food Service, Retail/Sales. [picture of donut chart showing Service 37%, Construction 27%, Food Services 24%, and Retail/Sales 12%]

How to combat wage theft? Traditionally, the governmental response to wage theft has been 3-pronged.

First, education—this includes Public Service Announcements and information awareness efforts, such as the required posters that you see in workplaces, often in the lunchrooms, that detail worker rights, such as minimum wage rules.

Enforcement efforts—which occurs when education and compliance fails, which we will discuss on the next slide.

And, legislation—addressing things like this recent legislation.

Let us very briefly discuss enforcement remedies. Typically, when wage theft occurs, an employee has some remedies.

Critics, however, contend that these remedies are insufficient. The Washington State Department of Labor and Industries enforces Washington’s wage and hour laws. The state makes it very easy for workers to file a complaint against an employer.

Employees simply can complete a form from Labor and Industries’ website and turn it in to any Labor and Industries office. Labor and Industries then conducts an investigation and, if there is a violation of the state’s wage laws, seeks recovery on behalf of the employee from the employer. In 2011, for example, Labor and Industries collected more than two million dollars in unpaid wages for employees. The Fair Labor Standards Act: This is the federal law that we mentioned earlier; it is enforced by the U.S. Department of Labor. Private lawsuits: employees, of course, may bring lawsuits against employers for unpaid wages. Local Public Enforcement: the City of Seattle, for example, enacted a Wage Theft Ordinance on April 1, 2015. And finally, public shaming: these are organized protests designed to bring attention and change.

Section 5: Legislative Change

Let us take a couple of minutes to discuss the recent legislative change. We will cover three points: The history of the bill development/passage, highlights of the law, and impacts to procurement professionals who work on state contracts for goods and services.

The legislative history is wonderfully brief and uncomplicated. In 2015, Washington's Attorney General, Bob Ferguson, worked with the State Legislature to propose wage theft legislation. The legislation did not pass.

In 2017, the AGO again worked with the State Legislature to propose wage theft legislation. The legislation was sponsored by Senator Miloscia and passed the Senate 46-3. It also passed the House of Representatives, 63-33, and was signed by the Governor on May 8, 2017. The bill, SSB 5301, now a law—Chapter 258 of the Laws of 2017—is effective as of July 23, 2017.

For our training purposes, there are three key highlights of the law: First, its effective date—that’s when this matters. The law is effective as of July 23, 2017 and applies to any contracts for goods or services solicited on or after July 23, 2017.

Second, the purpose of the statutory change—i.e., what was the Legislature trying to accomplish? We'll cover that in the next slide.

Third, the operational impacts—how the law amended the statutory framework that we operate within. We'll address this later in the training.

One important note to keep in mind: [SSB 5301](#) amended the responsible bidder criteria both for goods and services contracts AND for public works contracts. Although the changes are very similar, we're addressing goods and services contracts.

Legislative findings provide clear, unambiguous guidance to non-legislators—courts, executive branch agencies, regulated industries, etc. as to what the Legislature intended. People do not have to guess. It is written down and a majority of both houses passed it.

That's the case with [SSB 5301](#). The bill included specific legislative findings which are set forth in section one of the bill.

In short, the Legislature said this: "Government contracts should NOT be awarded to individuals or firms who knowingly and intentionally violate state laws.

Businesses that follow the law and pay their workers appropriately are placed at a competitive disadvantage to those who reduce costs by willfully violating the minimum wage act and wage payment act.

To create a level playing field for businesses and avoid taxpayer contracts going to those who willfully violate the law and illegally withhold money from workers, the state should amend the state responsible bidder criteria to consider whether a company has willfully violated the states wage payment laws over the previous three years."

In other words, the legislative findings create a clear policy presumption that, if a firm knowingly and intentionally violates Washington's wage payment laws during the prior three years, it is not a responsible bidder for purposes of being awarded a state contract.

For goods and Services contracts, the bill amends the responsible bidder criteria set forth in [RCW 39.26.160](#). In short, Enterprise Services—and all other agencies awarding competitive contracts—must, in applying the responsible bidder criteria, consider whether the bidder is a wage thief—i.e., whether, the firm within the prior three (3) years, was determined by the Washington Department of Labor and Industries or a court to have violated Washington's wage laws—which are found in the following RCW chapters: [Chapter 49.46](#)—Washington Minimum Wage Act, [Chapter 49.48](#)—Wages, Payment, Collection, and, [Chapter 49.52](#)—Wages, Deductions, Contributions, Rebates. This seems like a burdensome task, but not to worry; the Legislature provided a path forward.

Agencies have a safe harbor—a Contractor Certification [amending [RCW 39.26.160\(4\)](#)].

The Legislature amended the procurement statute such that if Enterprise Services or any contract-awarding agency awards a contract on reasonable reliance of a Contractor Certification that the person or firm is NOT a wage thief, that is sufficient.

This, of course, raises the obvious question of what is NOT reasonable reliance?

Well, agencies—notwithstanding that they receive a Contractor Certification—cannot assert reasonable reliance if the agency: Has actual knowledge that the person/firm is a wage thief.

Or, has some evidence that the person/firm is a wage thief and the agency did not bother to investigate—in other words, they didn't check with the Washington Department of Labor and Industries.

Section 6: Contractor Certification—Wage Theft Prevention

This section briefly introduces a template for the Contractor Certification and then Mark walks through a variety of operational issues.

Section 7: FAQ

Mark: Hi. I'm Assistant Attorney General, Mark Lyon.

In the next few slides, we'll walk through some questions, that likely may come up as agencies implement this new legislative requirement.

The first question that comes up is: What is the Procurement Solicitation Date?

Remember, the statute focuses on three years immediately preceding the date of the bid. This is the date that the solicitation is posted or published on WEBS or the date the procurement is distributed to solicit bids. The purpose of the date is to mark a point in time, for bidders to make certifications for the prior three (3) year period. The date does NOT change if the procurement solicitation is amended.

When should you collect the Certification?

The law requires agencies to obtain the Contractor Certification "before award of a contract." Operationally, the best practice is to require the Certification with the bid. Both to maximize agency due diligence and to minimize opportunity costs. The purpose of requiring the Contractor Certification as part of the bid rather than waiting until contract award is that agency' options decrease significantly and costs increase significantly as the procurement process moves forward. Put in another way, why are you reviewing a bid from someone who is not qualified to submit the bid? If a bidder is unable to provide the required Contractor Certification, both the bidder and the agency need to understand that fact (and its consequences) earlier rather than later. In addition, certification with the bid significantly reduces the ability for vendors to game the bidding process. For example, submitting a bid that is too low and then refusing to submit the required certification without raising their bid.

Why does the template have two options?

To provide vendors with an opportunity to make accurate certification regarding their compliance with the responsible bidder criteria pertaining to wage theft. Including both options (it is a binary choice) provides all vendors an opportunity to be accurate and to avoid the potential for misunderstandings. For example, "there was only one box to check." In short, vendors either are in compliance (or have no wage violations) or are NOT in compliance (and have violations of wage laws).

What happens if the vendor marks Violations of Wage Laws?

The agency will need to review the vendor. Pursuant to the State's responsible bidder criteria for goods and services contracts, the agency is required to consider certain factors, which include the vendor's compliance with the wage theft statutes. It's possible, however, that the vendor misunderstood the certification. The agency, for example, could request an explanation or additional detail from the vendor and, upon receipt, follow up with the Washington Department of Labor and Industries (or review the applicable court order) to determine whether it constitutes willful wage theft or is outside the relevant time period. Alternatively, it

is also possible that the vendor has violated the wage theft statutes and is certifying as such. In that situation, it is unlikely that such a vendor would be considered a responsible bidder in light of the Legislature's recent finding that "government contracts should not be awarded to those who knowingly and intentionally violate state wage laws."

[Does this requirement apply to out-of-state vendors?](#)

Yes. The law applies to firms incorporated in Washington as well as firms organized in any other state, or out of the country. But, the issue is whether they have violated Washington State wage laws. In regard to wage theft, the responsible bidder criteria is specific to violations of Washington State wage statutes.

[Does the wage theft certification apply to other types of contracts?](#)

Yes. The wage theft prevention legislation, SSB 5301, that amended the responsible bidder criteria for goods and services contracts also amended the responsible bidder criteria for public works contracts and certain purchases by Higher Education.

[Can Wage Theft Certification be combined with other contract or bidder certifications?](#)

Yes. The law does NOT specify any particular type of certification format. But, to be valid, whatever Certification format, must comply with statutory perjury requirements. See [RCW 9A.72.085](#).

As an operational matter, however, you may wish to keep the Wage Theft Certification as a separate document. Doing so will make it easier to track and demonstrate compliance with legislative mandates.

The law says before award of a contract, a bidder shall submit to the contracting agency a signed statement in accordance with [RCW 9A.72.085](#) verifying under penalty of perjury that the bidder is in compliance with the responsible bidder criteria requirement. Perjury is a felony, a serious crime.

[So what does RCW 9A.72.085 require?](#)

A valid certification requires three things. First, a written document must recite that the person signing certifies or declares that the statement in the document is true under penalty of perjury.

Two, the signature block must both state the date and the place where the sworn certification was signed.

Three, the signature of the person making the sworn statement, the person signing, must be the person swearing that the statement is true. Someone else, for example, be it secretary or executive assistant, cannot sign for the person making the certification.

A bidder certification can be signed by traditional hand signature or by electronic signature. Here is a signature block contained as a sample in [RCW 9A.72.085](#). Providing the required elements discussed in the previous slide are included.

"I CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT":

.....
(DATE AND PLACE) (SIGNATURE)

Other formatting is acceptable. But you can't go wrong by following the sample in the statute.

[Where can I learn more about wage theft?](#)

The Washington Department of Labor and Industries. Their website includes a list of wage violators.

Section 8: Contracts: Looking Forward

The Contractor Certification, of course, is a rearview mirror—looking backwards three years. But what if the bidder becomes a willful wage violator after you release the RFP? Or, even after you sign the contract?

Agencies don't have a crystal ball. But, there are a couple of tools, contractually, that you can consider to address the wage theft issue into the future. Note, however, that the recent legislation does NOT require any contract changes. Only the responsible bidder criteria are amended. The contract suggestions discussed on the following slides are ideas to align the contract with the legislative policy direction. They are not required by statute.

[Your contract can include a compliance with law provision. Here is an example:](#)

COMPLIANCE WITH LAW. CONTRACTOR SHALL COMPLY WITH ALL APPLICABLE LAW.

Contracts, of course, cannot excuse a party from complying with applicable law. Nor, obviously, does the absence of a clause specifying that a party must comply with applicable law afford any party a right to violate the law. This provision simply states the obvious as succinctly as possible.

Your contract also, can include representations and warranties from the contractor that it is not a wage thief and that, in the event it can no longer represent and warrant as such, it will provide you with notice.

[Here are examples of possible contract language.](#)

- CONTRACTOR REPRESENTATIONS AND WARRANTIES. CONTRACTOR MAKES EACH OF THE FOLLOWING REPRESENTATIONS AND WARRANTIES AS OF THE EFFECTIVE DATE OF THIS CONTRACT AND AT THE TIME OF PERFORMANCE PURSUANT TO THIS CONTRACT. IF, AT THE TIME OF PERFORMANCE, CONTRACTOR CANNOT MAKE SUCH REPRESENTATIONS AND WARRANTIES, CONTRACTOR SHALL NOT PERFORM AND SHALL, WITHIN THREE (3) BUSINESS DAYS NOTIFY ENTERPRISE SERVICES, IN WRITING, OF SUCH BREACH.
- WAGE VIOLATIONS. CONTRACTOR REPRESENTS AND WARRANTS THAT NEITHER IT NOR ITS PRINCIPALS OR AFFILIATES PRESENTLY ARE DETERMINED, BY A FINAL ORDER OF THE

WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES OR A COURT, TO BE IN WILLFUL VIOLATION OF STATE WAGE LAWS.

Your contract could also include a provision that, in the event of a breach of such representations and warranties, you have a right to suspend and or terminate the contract.

Here is some sample language that could address that issue.

- SUSPENSION & TERMINATION; REMEDIES.
 - SUSPENSION & TERMINATION FOR DEFAULT. ENTERPRISE SERVICES MAY SUSPEND CONTRACTOR'S OPERATIONS UNDER THIS CONTRACT IMMEDIATELY BY WRITTEN CURE NOTICE OF ANY DEFAULT. SUSPENSION SHALL CONTINUE UNTIL THE DEFAULT IS REMEDIED TO ENTERPRISE SERVICES' REASONABLE SATISFACTION; PROVIDED, HOWEVER, THAT, IF AFTER TWENTY (20) DAYS FROM SUCH A SUSPENSION NOTICE, CONTRACTOR REMAINS IN DEFAULT, ENTERPRISE SERVICES MAY TERMINATE CONTRACTOR'S RIGHTS UNDER THIS CONTRACT. ALL OF CONTRACTOR'S OBLIGATIONS TO ENTERPRISE SERVICES SURVIVE TERMINATION OF CONTRACTOR'S RIGHTS UNDER THIS CONTRACT, UNTIL SUCH OBLIGATIONS HAVE BEEN FULFILLED.
 - DEFAULT. EACH OF THE FOLLOWING EVENTS SHALL CONSTITUTE DEFAULT OF THIS CONTRACT BY CONTRACTOR:
 - CONTRACTOR FAILS TO PERFORM OR COMPLY WITH ANY OF THE TERMS OR CONDITIONS OF THIS CONTRACT;
 - CONTRACTOR BREACHES ANY REPRESENTATION OR WARRANTY PROVIDED HEREIN; OR
 - CONTRACTOR ENTERS INTO PROCEEDINGS RELATING TO BANKRUPTCY, WHETHER VOLUNTARY OR INVOLUNTARY.

Section 9: Takeaway Messages

Finally, four brief takeaway points.

First, the Legislature does not want the State to contract with willful wage violators, the legislature directs how the state allocates governmental resources, including government contracts. Here, the Legislature has directed that firms who knowingly violate Washington's wage laws in the prior three years are NOT responsible bidders.

Second, effective July 23, 2017, the responsible bidder criteria is changed.

Third, agencies have a safe harbor if they reasonably rely on a Contractor Certification, sworn under threat of perjury.

Finally, agencies can tailor contracts, as appropriate, to address ongoing compliance with wage payment requirements.

Section 10: Additional Resources.

Yes, we have some.

The training course includes links to referenced materials. Select the Resources tab in the upper right hand corner.

Thank you.