

### **§20.110 Policy and Purpose**

It is the policy of the ~~commission~~comptroller to encourage the use of historically underutilized businesses (HUBs) by state agencies and to assist agencies in the implementation of this policy through race, ethnic, and gender-neutral means. The purpose of ~~this~~the HUB program is to promote full and equal business opportunities for all businesses in an effort to remedy disparity in state procurement and contracting in accordance with the HUB goals specified in the State of Texas Disparity Study. ~~Sections 111.11 through 111.28 of this title~~ This subchapter (relating to the Historically Underutilized Business Program) ~~described~~describes the minimum steps and requirements to be undertaken by the ~~commission~~comptroller and state agencies to fulfill the state's HUB policy and attain aspirational goals recommended by the Texas Disparity Study.

### **§20.1211 Definitions**

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Applicant--A corporation, sole-proprietorship, partnership, joint venture, limited liability company, or supplier that applies to the ~~commission as a~~comptroller for certification as an historically underutilized business.

(2) Application--~~A written~~The comptroller's form for applicants to request for certification as an historically underutilized business ~~in the required format submitted to the commission.~~

(3) Commodities--~~Materials, supplies, or equipment~~Any tangible good provided by a contractor to the state.

(4) Comptroller--The office of the Texas Comptroller of Public Accounts.

(5) Contractor/~~Vendor~~--~~A~~Any vendor or supplier of commodities or services to a state agency under a purchase order contract or other state contract. A prime contractor is the lead contractor under a state contract.

(6) Directory--The Texas Certified Historically Underutilized Business Directory.

(7) Disparity study--The State of Texas Disparity Study, ~~performed by the National Economic Research Associates, Inc. (NERA).~~ 2009, conducted by MGT of America, Inc., dated March 30, 2010.

(8) Economically disadvantaged person--An eligible HUB applicant~~owner~~ (as defined in paragraph (19) of this section) whose business has not exceeded the graduation size standards according to the ~~commission's~~comptroller's graduation procedures in §~~111~~20.23 of this title (relating to Graduation Procedures).

(9) Forum--A collaborative effort between agencies and potential contractors/~~vendors~~ to provide information and training regarding an agency's procurement opportunities.

(10) Graduation--When a businesscertified HUB exceeds the commission'scomptroller's size standard for HUB certification.

(11) Historically Underutilized Business-- ~~(HUB)~~--A business outlined in subparagraphs ~~(C)~~ ~~(H)~~(A) - (F) of this paragraph that is certified by the State of Texas and has not exceeded the size standards established by §20.23 of this title with its principal place of business in Texas (as defined in paragraph ~~(1921)~~ of this section) ~~in which the owner(s):~~

~~—(A) have a proportionate interest and demonstrate active participation in the control, operation, and management of the entities' affairs; and~~

~~—(B) are economically disadvantaged because of their identification as members of the following groups:~~

~~—(i) Black Americans--which includes persons having origins in any of the Black racial groups of Africa;~~

~~—(ii) Hispanic Americans--which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;~~

~~—(iii) American Women--which includes all women of any ethnicity except those specified in clauses (i), (ii), (iv), and (v) of this subparagraph;~~

~~—(iv) Asian Pacific Americans--which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, the Northern Marianas, and Subcontinent Asian Americans which includes persons whose origins are from India, Pakistan, Bangladesh, Sri Lanka, Bhutan or Nepal; and~~

~~—(v) Native Americans--which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; and~~

~~—(C) (A) a corporation formed for the purpose of making a profit in which at least 51% of all classes of the shares of stock or other equitable securities are owned by one or more persons described by subparagraphs (A) and (B); or paragraph (19)(C) of this section;~~

~~(DB) a sole proprietorship created for the purpose of making a profit that is 100% owned, operated, and controlled by a person described by subparagraphs (A) and (B) paragraph (19)(C) of this section; or~~

~~(EC) a partnership formed for the purpose of making a profit in which 51% of the assets and interest in the partnership is owned by one or more persons who are described by subparagraphs (A) and (B) paragraph (19)(C) of this section; or~~

~~(FD)~~ a joint venture in which each entity in the joint venture is a ~~historically underutilized businessHUB~~ under this ~~subdivision; or paragraph;~~

~~(GE)~~ a supplier contract between a ~~historically underutilized businessHUB~~ under this ~~subdivision paragraph~~ and a prime contractor/~~vendor~~ under which the ~~historically underutilized businessHUB~~ is directly involved in the manufacture or distribution of the supplies or materials or otherwise warehouses and ships the supplies; ~~or~~

~~(HF)~~ a business other than described in subparagraphs ~~(B), (D), (F), and (GE)~~ of this ~~section paragraph~~, which is formed for the purpose of making a profit and is otherwise a legally recognized business organization under the laws of the State of Texas, provided that at least 51% of the assets and 51% of any classes of stock and equitable securities are owned by one or more persons described by ~~subparagraphs (A) and (B) paragraph (19)(C)~~ of this section.

(12) Historically Underutilized Business (HUB) coordinator--~~An agency employee who holds a~~~~The staff member designated by state agencies with more than \$10 million in biennial budget.~~ ~~The position equivalent of coordinator must be at least equal~~ to the procurement director or ~~is may be~~ the procurement director. ~~The employee reports to the agency's executive director on HUB activities including, but not limited to, the agency's good faith effort criteria, HUB reporting, contract administration, and marketing and outreach efforts for HUB participation.~~

(13) HUB report--A fiscal year semi-annual and annual report of the state's total expenditures, contract awards and payments made to certified HUBs.

(14) ~~HUB business plan--A written plan developed by state agencies for increasing HUB utilization required as part of the agency's strategic plan, as required by Government Code, §2161.123.~~

~~(15) HUB subcontracting plan--Written documentation regarding the use of subcontractors, which is required to be submitted with all responses to state agency contracts with an expected value of \$100,000 or more where subcontracting opportunities have been determined by the state agency to be probable. The HUB subcontracting plan subsequently becomes a provision of the awarded contract, and shall be monitored for compliance by the state agency during the term of the contract.~~

~~(16) Mentor-Protégé-Protégé Program--A program designed by the ~~commission comptroller~~ to assist agencies in identifying prime contractors/~~vendors~~ and HUBs ~~to foster long term relationships and~~ for potential long-term contractual relationships. ~~Each agency required to have a HUB coordinator is required to implement the Mentor-Protégé Program in accordance with §20.28 of this title (relating to Mentor-Protégé Program).~~~~

~~(15) NERA—National Economic Research Associates, Inc.~~

~~-(16)~~

~~(17) Non-treasury funds--Funds paid by a state agency that are not treasury fundsstate funds subject to the custody and control of the comptroller and available for appropriation by the legislature.~~

~~(1718) Other services--All services other than construction and professional services, including consulting services subject to Texas Government Code, Chapter 2254, Subchapter B.~~

~~(19) Owner or qualifying owner--A natural person or persons who:~~

~~(A) are residents of the state of Texas as that term is defined in paragraph (23) of this section;~~

~~(B) have a proportionate interest and demonstrate active participation in the control, operation, and management of the entities' affairs; and~~

~~(C) are economically disadvantaged because of their identification as members of the following groups:~~

~~(i) Black Americans--which includes persons having origins in any of the Black racial groups of Africa;~~

~~(ii) Hispanic Americans--which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;~~

~~(iii) American Women--which includes all women of any ethnicity except those specified in clauses (i), (ii), (iv), and (v) of this subparagraph;~~

~~(iv) Asian Pacific Americans--which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, the Northern Marianas, and Subcontinent Asian Americans which includes persons whose origins are from India, Pakistan, Bangladesh, Sri Lanka, Bhutan or Nepal; and~~

~~(v) Native Americans--which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians~~

~~-(18)~~

~~(20) Person-- or natural person--A human being who is a U.S. citizen, born or naturalized.~~

~~(1921) Principal place of business--A permanent business office located in TexasThe location where the majority HUB owner(s) makes the decisions, controls the qualifying owner or owners (as defined in paragraph (19) of this section) of the business direct, control, and coordinate the business's daily operations of the organization, and participates in the business. The qualifying owners must be residents of the State of Texasand activities.~~

(~~2022~~) Professional services--Services of ~~accountants, architects, engineers, land surveyors, and physicians~~ certain licensed or registered professions that must be purchased by state agencies under ~~Texas~~ Government Code, Chapter 2254, Subchapter A.

(~~2423~~) Resident of the State of Texas--Qualifying owners are considered residents of the state if the owners:

(A) physically reside in the state for a period of not less than 12 consecutive months prior to submitting an application for HUB certification, and list Texas as their residency in their most recent tax return submitted to the U.S. Internal Revenue Service, or;

(B) have established, to the satisfaction of the comptroller, a Texas domicile for a period of time sufficient to demonstrate their intention to permanently reside in the state consistently over a substantial period of time.

(24) Respondent--A person that submits a response.

(25) Response--A submission made in answer to an invitation for bid, request for proposal, or other purchase solicitation document, which may take the form of a bid, proposal, offer or other applicable expression of interest.

(26) SBA--The U.S. Small Business Administration.

(27) Subcontractor--As defined by Government Code, §2251.001, this is a person who contracts with a ~~vendor~~prime contractor to work, to supply commodities, or contribute toward completing work for a governmental entity as defined in Texas Government Code, §2251.001.

(~~2228~~) Subcontractor funds--Payments made to ~~certified historically underutilized businesses~~any subcontractor by a prime contractor/~~vendor~~ or supplier under contract with the state.

(~~2329~~) Size standards--Graduation thresholds established by the HUB program consistent with the ~~commission's~~comptroller's rules which are ~~extracted from~~based on the U.S. Small Business Administration's size standards, and based on the North American Industry Classification System codes.- These may also be used to determine eligibility for HUB registration.

(~~2430~~) Term contract--A statewide contract ~~establishing~~established by the comptroller as a ~~source or sources of supply~~ source for a specified period of time as defined in §113.2 of this title (~~relating to Definitions~~); user entities for specific commodities or services.

(~~2531~~) Treasury funds--~~Funds maintained in~~State funds subject to the ~~state treasury~~custody and ~~paid through the comptroller's office for each state agency~~control of the comptroller and available for appropriation by the legislature.

(~~2632~~) USAS--Uniform Statewide Accounting System for the State of Texas.

(2733) Vendor Identification Number (VID)--A 13-digit identification number used in state government to identify the bidder or business for payment or award of contracts, certification as a HUB, and registration on the bidders list.

~~–(28) HUB Subcontracting Plan--Written documentation regarding the use of HUB subcontractors, which is required by a state agency in procurements with an expected value of \$100,000 or more which a potential contractor/vendor must prepare and return with their bid, proposal, offer, or other applicable expression of interest. The HUB subcontracting plan subsequently becomes a provision of the contract awarded as a result of the procurement process.~~

(34) Work--Providing goods or performing services on behalf of a governmental entity pursuant to a contract.

(35) Working day--Normal business day of a state agency, not including weekends, federal or state holidays, or days the agency is declared closed by its executive officer.

## **§20.12 Evaluation of Active Participation in the Control, Operation, and Management of Entities**

(a) In determining the extent of "active participation in the control, operation and management" necessary for qualification as a HUB, the comptroller may consider all relevant evidence. In considering and applying the factors set forth in paragraphs (1) - (10) of this subsection, the comptroller will consider actual roles and responsibilities of the eligible owners, rather than titles or statements of intention regarding the owners' role. Factors which may be considered include, but are not limited to:

(1) appearance and relative scope of responsibility of HUB-eligible owners in articles of incorporation or partnership formation documents;

(2) duties and rights of shareholders or partners relative to operational decisions affecting the short term and long term goals of the business;

(3) any restrictive language in articles of incorporation or partnership agreements applicable to HUB eligible owner;

(4) whether any licenses, certificates, or permits required to operate the business are held by or in the name of the HUB eligible owner, and whether the eligible owner is qualified to hold such licenses or permits pursuant to applicable laws and regulations;

(5) the percentage of profit and/or risk available to the HUB eligible owner under the corporate or partnership agreements;

(6) ability of other owners or partners to dilute either the ownership percentage or operational powers of the HUB eligible owner;

(7) whether the HUB eligible owner has full time employment elsewhere that might conflict with full participation in operation of the business;

(8) the percentage of government versus non-government contracts performed by the business where the HUB eligible owner actively participates in the bidding of the contract or the performance of the work;

(9) the period of time a HUB eligible owner participated in the active management and operation of the business prior to the business seeking HUB status; and

(10) whether and to what extent the HUB business shares management, board members, partners, employees, or other resources with another business in amounts or ways which might indicate that they are related or affiliated businesses.

(b) The comptroller may request any additional information it considers necessary to evaluate any or all of the factors in subsection (a)(1) - (10) of this section prior to a decision to certify an applicant as a HUB.

### **§20.13 Statewide Annual Procurement HUB Utilization Goals**

(a) In accordance with ~~§11.1120.10~~ of this title (relating to Policy and Purpose) and ~~the Texas~~ Government Code, ~~Sections §~~2161.181 and §2161.182, each state agency shall make a good faith effort to utilize HUBs in contracts for construction, services (including professional and consulting services) and commodities purchases. Each agency may achieve the ~~annual procurement goals statewide and/or agency-specific annual HUB goals specified in the agency's Legislative Appropriations Request~~ by contracting directly with HUBs or indirectly through subcontracting opportunities.

~~(b)~~

(b) The statewide HUB goals for the procurement categories for the State of Texas are:

(1) 11.2% for heavy construction other than building contracts;

(2) 21.1% for all building construction, including general contractors and operative builders contracts;

(3) 32.7% for all special trade construction contracts;

(4) 23.6% for professional services contracts;

(5) 24.6% for all other services contracts; and

(6) 21% for commodities contracts.

(c) State agencies shall establish their own agency-specific HUB goals for each procurement category outlined in subsection (b) of this section. Agencies can set their agency-specific HUB goals higher or lower than the goals set out in subsection (b) of this section; however, at a

minimum, the statewide HUB goals should be each agency's starting point for establishing agency-specific goals. Agency-specific goals should be based on:

(1) an agency's fiscal year expenditures and totals contract expenditure;

(2) the availability to an agency of HUBs in each procurement category;

(3) the agency's historic utilization of HUBs; and

(4) other relevant factors.

(d) Each state agency shall make a good faith effort to assist HUBs in receiving a portion of the total contract value of all contracts that the agency expects to award in a fiscal year ~~in~~ accordance with the following percentages. Factors in determining an agency's good faith shall include:

~~(1) 11.9% for heavy construction other than building contracts;~~

~~-(2) 26.1% for all building construction, including general contractors and operative builders contracts;~~

~~-(3) 57.2% for all special trade construction contracts;~~

~~-(4) 20% for professional services contracts;~~

~~-(5) 33% for all other services contracts; and~~

~~-(6) 12.6% for commodities contracts.~~

~~(e) Each state agency shall make a good faith effort to meet or exceed the goals outlined in subsection (b) of this section. The percentage goals established in subsection (b) are overall annual procurement goals for each state agency applicable to the total annual dollar amount of an agency's contracts for each of the performance in meeting or exceeding their agency-specific types of contracts. It may not be practicable to apply these goals to each contract. For each contract, state agencies may set higher or lower procurement goals than those outlined in subsection (b) of this section. Agencies may consider HUB availability, goals or the statewide~~

HUB utilization, geographical location of the project, the contractual scope of work, or other relevant factors. By implementing the following procedures, an agency shall be presumed to have made a good faith effort: goals as they included as part of their legislative appropriations request in accordance with Government Code, §2161.127; and

~~(1)~~

(2) the agency's adoption and implementation of procedures taking the following factors into consideration:

(A) prepare and distribute information on procurement procedures in a manner that encourages participation in state contracts by all businesses;

~~(2)~~ (B) divide proposed requisitions into reasonable lots in keeping with industry standards and competitive bid requirements;

~~(3)~~ (C) where feasible, assess bond and insurance requirements and design requirements that reasonably permit more than one business to perform the work;

~~(4)~~ (D) specify reasonable, realistic delivery schedules consistent with an agency's actual requirements;

~~(5)~~ (E) ensure that specifications, terms, and conditions reflect an agency's actual requirements, are clearly stated, and do not impose unreasonable or unnecessary contract requirements;

~~(6)~~ (F) provide potential bidders with referenced list of certified HUBs for subcontracting;

~~(7)~~ (G) develop and apply a written methodology to determine whether any agency-specific agencywide HUB goals are appropriate under the Disparity Study, as some HUB groups have not been underutilized within applicable contracting categories and should not be included in the HUB goals for that category, or whether the statewide goals from the Disparity Study are appropriate for the agency;

~~(8)~~ (H) identify potential subcontracting opportunities in all contracts and require a HUB subcontracting plan for contracts of \$100,000 or more; over the life of the contract (including any renewals), where such opportunities exist, in accordance with ~~the Texas~~ Government Code; ~~Chapter 2161, Subchapter F~~, §2161.251; and

~~(9)~~ (I) seek HUB subcontracting in contracts that are less than \$100,000 whenever possible.

~~(de)~~ A state agency may also demonstrate good faith under this section by submitting a supplemental letter with documentation to the ~~Commission~~ comptroller with their HUB report or legislative appropriations request identifying the progress, including, but not limited to the following, as prescribed by the ~~commission~~ comptroller:

(1) identifying the percentage of contracts (prime and subcontracts) awarded to women and/or minority-owned businesses that are not certified as HUBs;

(2) demonstrating that a different goal from that identified in subsection (b) of this section was appropriate given the agency's types of purchases;

(3) demonstrating that a different goal was appropriate given the particular qualifications required by an agency for its contracts;

(4) demonstrating that a different goal was appropriate given that graduated HUBs cannot be counted toward the goal; or

(5) demonstrating assistance to noncertified HUBs in obtaining certification with the ~~commission.comptroller~~.

## §20.14 Subcontracts

### ~~(a) General Provisions~~

~~(1) Analyzing potential contracts of \$100,000 or more.~~ In accordance with ~~Texas~~ Government Code, Chapter 2161, Subchapter F, each state agency that considers entering into a contract with an expected value of \$100,000 or more over the life of the contract (including any renewals) shall, before the agency solicits bids, proposals, offers, or other applicable expressions of interest, determine whether subcontracting opportunities are probable under the contract.

~~(A)(1)~~ State agencies shall use the following steps to determine if subcontracting opportunities are probable under the contract:

~~(i) Use the HUB participation goals in §111.13 of this title (relating to Annual Procurement Utilization Goals); and~~

~~(ii)~~

~~(A) examining the scope of work to be performed under the proposed contract and determining if it is likely that some of the work may be performed by a subcontractor;~~

~~(B) research the Centralized Master Bidders List, the HUB Directory, the Internet, and other directories, identified by the ~~commission.comptroller~~, for HUBs that may be available to perform the contract work; and~~

~~(B)~~

~~(C) an agency may determine that subcontracting is probable for only a subset of the work expected to be performed or the funds to be expended under the contract. If an agency determines that subcontracting is probable on only a portion of a contract, it shall document its reasons in writing for the procurement file.~~

(2) In addition, determination of subcontracting opportunities may include, but is not limited to, the following:

~~-(i)(A)~~ contacting other state and local agencies and institutions of higher education to obtain information regarding similar contracting and subcontracting opportunities; and

~~-(ii)(B)~~ reviewing the history of similar agency purchasing transactions.

~~-(2)(b)~~ Receipt of HUB subcontracting plans.

(1) If, through the analysis in subsection (a) of this section, an agency determines that subcontracting opportunities are probable, each agency's then its invitation for bids, requests request for proposals or other purchase solicitation documents for construction, professional services, other services, and commodities with an expected value of \$100,000 or more shall state that probability and require a HUB subcontracting plan. A bid, proposal, offer, or other expression of interest to such a solicitation must include a completed HUB subcontracting plan to be considered responsive.

~~-(A)(2)~~ The HUB subcontracting plan shall be submitted ~~at the same time as with~~ the respondent's response ~~(bid, proposal, offer, or other applicable expression of interest), on or before the due date for responses,~~ except for construction contracts involving alternative delivery methods. For construction contracts involving alternative delivery methods, the HUB subcontracting plan may be submitted up to 24 hours following the date/time that responses are due provided that responses are not opened until the HUB subcontracting plan is received.

~~-(B)(3)~~ Responses that do not include a completed HUB subcontracting plan in accordance with ~~paragraph (3) of this section, subsection~~ shall be rejected due to material failure to comply with ~~advertised specifications in accordance with §113.6(Government Code, §2161.252(b)).~~

(4) If a) of this title (relating properly submitted HUB subcontracting plan contains minor deficiencies (e.g., failure to Bid-Evaluation sign or date the plan, failure to submit already-existing evidence that three HUBs were contacted), the agency may contact the respondent for clarification to the plan if it contains sufficient evidence that the respondent developed and Award)-submitted the plan in good faith.

~~-(3)(c)~~ Requirements of a HUB subcontracting plan.

(1) A state agency shall require a respondent to state whether it is a certified HUB. A state agency shall also require a respondent to state overall subcontracting and overall certified HUB subcontracting to be provided in the contract. Respondents shall follow procedures in ~~subsection (a)(3) paragraph (2)(A)(i), (a)(3)(A)(ii), and (a)(3)(A)(iii) - (D)~~ of this ~~section~~ subsection when developing the HUB subcontracting plan.

~~-(A(2))~~ The HUB subcontracting plan shall include the agency's HUB goals for its HUB business plan, and shall consist of completed forms prescribed by the ~~Texas Building and Procurement Commission~~comptroller and shall include the following:

~~-(i(A))~~ certification that respondent has made a good faith effort to meet the requirements of this section;

~~-(ii(B))~~ identification of the subcontractors that will be used during the course of the contract;

~~-(iii(C))~~ the expected percentage of work to be subcontracted; and

~~-(iv) and(D)~~ the approximate dollar value of that percentage of work. ~~The plan shall include goals established pursuant to §111.13 of this title (relating to Annual Procurement Utilization Goals).~~

~~-(B(3))~~ The successful respondent shall provide all additional documentation required by the agency to demonstrate compliance with good faith effort requirements prior to contract award. If the successful respondent ~~is unable~~fails to provide supporting documentation (phone logs, fax transmittals, electronic mail, etc.) within the timeframe specified by the agency to demonstrate compliance with this subsection prior to contract award, that respondent's bid/proposal shall be rejected for material failure to comply with advertised specifications and state law.

~~(b) Construction Contracts~~d) Establishing good faith effort by respondent.

~~(1) Evidence of good faith effort in developing a HUB subcontracting plan for construction contracts, including heavy construction, building construction, and special trade construction includes, but is not limited to, the following procedures:~~Any person submitting a bid, proposal, offer or other applicable expression of interest in obtaining a contract with the state shall submit a completed HUB subcontracting plan demonstrating evidence of good faith effort in developing that plan. Good faith effort shall be shown through utilization of all methods specified below, and in full conformance with any directions for demonstration and submission specified in the HUB subcontracting plan template.

(A) Divide the contract work into reasonable lots or portions to the extent consistent with prudent industry practices.

(B) Provide written justification of the selection process if ~~a non-HUB~~the selected subcontractor is ~~selected~~not a HUB.

(C) Provide notice to minority or women trade organizations or development centers according to methods established by the comptroller to assist in identifying HUBs by disseminating subcontracting opportunities to their membership/participants. The notice shall, in all instances, include the scope of work, information regarding location to review plans and specifications, information about bonding and insurance requirements, and identify a contact person. Respondent must provide notice to organizations or development centers no less than

~~five (5) seven (7) working days for construction contracts prior to submission of the response (bid, proposal, offer, or other applicable expression of interest).~~

~~—(D) Notify HUBs of the subcontracting opportunities that the respondent intends to subcontract. The preferable method of notification shall be in writing. The notice shall, in all instances, include the scope of the work, information regarding the location to review plans and specifications, information about bonding and insurance requirements, and identify a contact person. The notice shall be provided to potential HUB subcontractors prior to submission of the respondent's response.~~

~~—(2) The respondent shall provide potential HUB subcontractors reasonable time to respond to the respondent's notice. "Reasonable time to respond" in this context is no less than five (5) working days for construction contracts, including heavy construction, building construction, and special trade construction, from receipt of notice, unless circumstances require a different time period, which is determined by the agency and documented in the contract file.~~

~~—(3) The respondent shall use the commission's Centralized Master Bidders List, the HUB Directory, Internet resources, and/or other directories as identified by the commission or agency when searching for HUB subcontractors. Respondents may rely on the services of minority, women, and community organizations contractor groups, local, state, and federal business assistance offices, and other organizations that provide assistance in identifying qualified applicants for the HUB program who are able to provide all or select elements of the HUB subcontracting plan.~~

~~—(4) The respondent shall provide the notice described in this section to three or more HUBs per each subcontracting opportunity that provide the type of work required for each subcontracting opportunity identified in the contract specifications or any other subcontracting opportunity the respondent cannot complete with its own equipment, supplies, materials, and/or employees. The respondent must document the HUBs contacted on the forms prescribed by the Texas Building and Procurement Commission.~~

~~(e) Professional Services Contracts.~~

~~—(1) Evidence of good faith effort in developing a HUB subcontracting plan for professional services contracts is established if the prime contractor meets the following conditions and procedures:~~

~~—(A) A HUB subcontracting plan for a professional services contract which meets or exceeds HUB participation goals in §111.13 of this title (relating to Annual Procurement Utilization Goals), constitutes good faith effort under this section, or~~

~~—(B) Develop a HUB Subcontracting Plan under the following procedures:~~

~~—(i) Divide the contract work into reasonable lots or portions to the extent consistent with prudent industry practices.~~

~~—(ii) Notify HUBs of the subcontracting opportunities that the respondent intends to subcontract. The preferable method of notification shall be in writing. The notice shall, in all instances, include the scope of the work, required qualifications, and identify a contact person. The notice shall be provided to potential HUB subcontractors prior to submission of the respondent's response.~~

~~—(2) The respondent shall provide potential HUB subcontractors reasonable time to respond to the respondent's notice. "Reasonable time to respond" in this context is no less than five (5) working days from receipt of notice, unless circumstances require a different time period, which is determined by the agency and documented in the contract file.~~

~~—(3) The respondent shall use the commission's Centralized Master Bidders List, the HUB Directory, Internet resources, and/or other directories as identified by the commission or agency when searching for HUB subcontractors. Respondents may rely on the services of minority, women, and community organizations, contractor groups, local, state, and federal business assistance offices, and other organizations that provide assistance in identifying qualified applicants for the HUB program who are able to provide all or select elements of the HUB subcontracting plan.~~

~~—(4) The respondent shall provide the notice described in this section to three or more HUBs per each subcontracting opportunity that provide the type of work required for each subcontracting opportunity identified in the contract specifications or any other subcontracting opportunity the respondent cannot complete with its own equipment, supplies, materials, and/or employees. The respondent must document the HUBs contacted on the forms provided by the Texas Building and Procurement Commission.~~

~~—(A) Provide written justification of the selection process if a non-HUB subcontractor is selected.~~

~~—(B) Provide notice to minority or women trade organizations or development centers to assist in identifying HUBs by disseminating subcontracting opportunities to their membership/participants. The notice shall, in all instances, include the scope of the work, required qualifications, and identify a contact person. Respondent must provide notice to organizations or development centers no less than five (5) working days prior to submission of response (bid, proposal, offer, or other applicable expression of interest).~~

~~(d) Commodities and Other Services Contracts.~~

~~—(1) Evidence of good faith effort in developing a HUB subcontracting plan for commodities and other services contracts includes, but is not limited to, the following procedures:~~

~~—(A) Divide the contract work into reasonable lots or portions to the extent consistent with prudent industry practices.~~

~~—(B) Notify HUBs~~

~~(D) Provide documentation of meeting one or more of the following requirements:~~

~~(i) notify at least three (3) HUB businesses of the subcontracting opportunities that the respondent intends to subcontract. The preferable method of notification shall be in writing. The notice shall, in all instances, include the scope of the work, specifications, and identify a contact person. The notice shall be provided to potential HUB subcontractors prior to submission of the respondent's response.~~

~~—(i) The respondent shall provide potential HUB subcontractors reasonable time to respond to the respondent's notice. "Reasonable time to respond" in this context is no less than five working days from receipt of notice, unless circumstances require a different time period, which is determined by the agency and documented in the contract file.~~

~~—(ii) The respondent shall use the commission's Centralized Master Bidders List, the HUB Directory, Internet resources, and/or other directories as identified by the commission or agency when searching for HUB subcontractors. Respondents rely on the services of minority, women, and community organizations, contractor groups, local, state, and federal business assistance offices, and other organizations that provide assistance in identifying qualified applicants for the HUB program who are able to provide all or select elements of the HUB subcontracting plan.~~

~~—(iii) The respondent shall provide the notice described in this section to three or more HUBs per each subcontracting opportunity that provide the type of work required for each subcontracting opportunity identified in the contract specifications or any other subcontracting opportunity the respondent cannot complete with its own equipment, supplies, materials, and/or employees. The notification shall be in writing, and the respondent must document the HUBs contacted on the forms prescribed by the comptroller. The notice shall, in all instances, include the scope of the work, information regarding the location to review plans and specifications, information about bonding and insurance requirements, and identify a contact person. The respondent must document the HUBs contacted on the forms provided by the Texas Building and Procurement Commission. The notice shall be provided to potential HUB subcontractors at least seven (7) working days prior to submission of the respondent's response, unless circumstances require a different time period, which is determined by the agency and documented in the contract file;~~

~~(C) Provide written justification (ii) submit documentation that 100% of the selection process if a non-HUB subcontractor is selected.~~

~~—(D) Provide notice to minority or women trade organizations or development centers to assist in identifying HUBs by disseminating all available subcontracting opportunities to their membership/participants. The notice shall, in all instances, include the scope of the work, specifications, and identify a contact person. Respondent must provide notice to organizations or development centers no less than five (5) working days for construction contracts prior to submission of the response (bid, proposal, offer, or other applicable expression of interest). will be performed by one or more HUBs; or~~

(iii) submit documentation that one or more HUB subcontractors will be utilized and that the total value of those subcontracts will meet or exceed the statewide goal for the appropriate contract category found in §20.13(b) of this title, or the agency-specific goal for the contracting category established by the procuring agency, whichever is higher. When utilizing this demonstration method, only HUB contractors holding existing contracts with the person submitting the HUB subcontracting plan for five years or fewer may be claimed.

(2) The respondent shall use the comptroller's Centralized Master Bidders List, the HUB Directory, Internet resources, and/or other directories as identified by the comptroller or the agency when searching for HUB subcontractors. Respondents may utilize the services of minority, women, and community organizations contractor groups, local, state, and federal business assistance offices, and other organizations that provide assistance in identifying qualified applicants for the HUB program who are able to provide all or select elements of the HUB subcontracting plan.

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~~(23)~~ In making a determination if a good faith effort has been made in the development of the required HUB subcontracting plan, a state agency may require the respondent to submit supporting documentation explaining how the respondent has made a good faith effort according to each criterion listed in subsection ~~(a)(3)(A)(i), (a)(3)(A)(ii), and (a)(3)(A)(iii)(2)(A) - (D)~~ of this section. The documentation shall include at least the following:

(A) how the respondent divided the contract work into reasonable lots or portions consistent with prudent industry practices;

(B) how the respondent's notices contain adequate information about bonding, insurance, the availability of plans, the specifications, scope of work, —required qualifications and other requirements of the contract allowing reasonable time for HUBs to participate effectively;

(C) how the respondent negotiated in good faith with qualified HUBs, not rejecting qualified HUBs who were also the best value responsive bidder;

(D) how the respondent provided notice to minority ~~or~~and women trade organizations or development centers to assist in identifying HUBs by disseminating subcontracting opportunities to their membership/participants;~~and~~

(E) for contracts subject to ~~(e)(paragraph (1)(A), how the respondent plans to subcontract with certified HUBs in an effort to meet or exceed HUB participation goals in §111.13D)(ii)~~ of this title ~~(relating to Annual Procurement Utilization Goals)~~subsection, which HUBs were contracted to perform the subcontracting services for each ~~identified~~subcontracting opportunity; and

~~(3)~~

(F) for contracts subject to paragraph (1)(D)(iii) of this subsection, which contractor(s) were utilized to perform the subcontracting opportunities, and the relevant dates for the respondent's contractual agreements with the contractor(s).

(4) A respondent's participation in a Mentor-Protégé Program under ~~the Texas~~ Government Code, §2161.065, and the submission of a protégé as a subcontractor in the HUB subcontracting plan constitutes a good faith effort for the particular area to be subcontracted with the protégé. When submitted, state agencies may accept a Mentor-Protégé Agreement that has been entered into by the respondent (mentor) and a certified HUB (protégé). The agency shall consider the following in determining the respondent's good faith effort:

(A) if the respondent has entered into a fully executed Mentor-Protégé Agreement that has been registered with the ~~commission~~ comptroller prior to submitting the plan, and

(B) if the respondent's HUB subcontracting plan identifies the areas of subcontracting that will be performed by the protégé.

(45) If the respondent is able to fulfill ~~any~~ all of the potential subcontracting opportunities identified with its own equipment, supplies, materials and/or employees, respondent must sign an affidavit and provide a statement explaining how the respondent intends to fulfill each subcontracting opportunity. The respondent must agree to provide the following if requested by the agency:

(A) evidence of existing staffing to meet contract objectives;

(B) monthly payroll records showing company staff fully engaged in the contract; ~~and~~

(C) on site reviews of company headquarters or work site where services are to be performed; ~~and~~

(D) documentation proving employment of qualified personnel holding the necessary licenses and certificates required to perform the work.

~~(5)(e)~~ Reviewing the HUB subcontracting plan. The HUB subcontracting plan shall be reviewed and evaluated prior to contract award and, if accepted, shall become a provision of the agency's contract. Revisions necessary to clarify and enhance information submitted in the original HUB subcontracting plan may be made in an effort to determine good faith effort. State agencies shall review the documentation submitted by the respondent to determine if a good faith effort has been made in accordance with this section. If the agency determines that a submitted HUB subcontracting plan was not developed in good faith, the agency shall treat ~~the lack of good faith~~ that determination as a material failure to comply with advertised specifications, and the subject response (bid, proposal, offer, or other applicable expression of interest) shall be rejected. The reasons for rejection shall be recorded in the procurement file.

~~(6) If the respondent is selected and decides to subcontract any part of the contract after the award, as a provision of the contract, the contractor/vendor must comply with provisions of this section relating to developing and submitting a subcontracting plan before any modifications or performance in the awarded contract involving subcontracting can be authorized by the state agency. If the selected contractor/vendor subcontracts any of the work without prior~~

~~authorization and without complying with this section, the contractor/vendor would be deemed to have breached the contract and be subject to any remedial actions provided by Texas Government Code, Chapter 2161, state law and this section. Agencies may report nonperformance relative to its contracts to the commission in accordance with Chapter 113, Subchapter F of this title (relating to the Vendor Performance and Debarment Program).~~

~~-(7) If at any time during the term of the contract, a contractor/vendor desires to make changes to the approved subcontracting plan, proposed changes must be received for prior review and approval by the state agency before changes will be effective under the contract. The contractor/vendor must comply with provisions of subsection (a), paragraph 3, relating to developing and submitting a subcontracting plan for substitution of work or of a subcontractor, prior to any alternatives being approved under the subcontracting plan. The state agency shall approve changes by amending the contract or by another form of written agency approval. The reasons for amendments or other written approval shall be recorded in the procurement file.~~

~~-(8) If a state agency expands the original scope of work through a change order or contract amendment, including a contract renewal that expands the scope of work, the state agency shall determine if the additional scope of work contains additional probable subcontracting opportunities not identified in the initial solicitation. If the agency determines additional probable subcontracting opportunities exist, the agency will require the contractor/vendor to submit a HUB subcontracting plan/revised HUB subcontracting plan for the additional probable subcontracting opportunities.~~

~~-(9) The HUB subcontracting plan/revised HUB subcontracting plan shall comply with the provisions of this section relating to development and submission of a subcontracting plan before any modifications or performance in the awarded contract involving the additional scope of work can be authorized by the agency. If the contractor/vendor subcontracts any of the additional subcontracting opportunities identified by the agency without prior authorization and without complying with this section, the contractor/vendor would be deemed to have breached the contract and be subject to any remedial actions provided by Texas Government Code, Chapter 2161, state law and this section. Agencies may report nonperformance relative to its contracts to the commission in accordance with Chapter 113, Subchapter F of this title (relating to the Vendor Performance and Debarment Program.)~~

~~-(10) The contractor/vendor (f) Maintaining records.~~

(1) Prime contractors shall maintain business records documenting ~~its~~ compliance with the HUB subcontracting plan and shall submit a compliance report to the contracting agency

monthly ~~and~~, in the format required by the ~~Texas Building and Procurement Commission~~ comptroller. The compliance report submission shall be required as a condition for payment.

~~(12)~~ During the term of the contract, the state agency shall monitor the HUB subcontracting plan monthly to determine if the value of the subcontracts to HUBs meets or exceeds the HUB subcontracting provisions specified in the contract. Accordingly, state agencies shall audit and require a prime contractor ~~/vendor to whom a contract has been awarded~~ to report to the agency the identity and the amount paid to its subcontractors in accordance with § ~~1120.16~~ (eb) of this title (relating to State Agency Reporting Requirements). If the prime contractor ~~/vendor~~ is meeting or exceeding the provisions, the state agency shall maintain documentation of the prime contractor's ~~/vendor's~~ efforts in the contract file. If the prime contractor ~~/vendor~~ fails to meet the HUB subcontracting provisions specified in the contract, the state agency shall notify the prime contractor of any deficiencies. The state agency shall give the prime contractor ~~/vendor~~ an opportunity to submit documentation and explain to the state agency why the failure to fulfill the HUB subcontracting plan should not be attributed to a lack of good faith effort by the prime contractor ~~/vendor~~.

(g) Monitoring HUB subcontracting plan during the contract.

(1) If the selected respondent decides to subcontract any part of the contract in a manner that is not consistent with its HUB subcontracting plan, the selected respondent must comply with provisions of this section and submit a revised HUB subcontracting plan before subcontracting any of the work under the contract. If the selected respondent subcontracts any of the work without prior authorization and without complying with this section, the selected respondent is deemed to have breached the contract and is subject to any remedial actions provided by Government Code, Chapter 2161, other applicable state law and this section. Agencies shall report nonperformance relative to its contracts to the comptroller in accordance §20.108 of this title (relating to Vendor Performance Tracking System).

(2) If at any time during the term of the contract, the selected respondent desires to make changes to the approved HUB subcontracting plan, proposed changes must be received for prior review and approval by the state agency before changes will be effective under the contract. The selected respondent must comply with provisions of this section, relating to developing and submitting a subcontracting plan for substitution of work or of a subcontractor, prior to any alternatives being approved under the HUB subcontracting plan. The state agency shall approve changes by amending the contract or by another form of written agency approval. The reasons for amendments or other written approval shall be recorded in the procurement file.

~~(12)~~ (3) If a state agency expands the original scope of work through a change order or contract amendment, including a contract renewal that expands the scope of work, the state agency shall determine if the additional scope of work contains additional probable subcontracting opportunities not identified in the initial solicitation. If the agency determines probable subcontracting opportunities exist, the agency will require the selected respondent to submit a HUB subcontracting plan/revised HUB subcontracting plan for the additional probable subcontracting opportunities.

~~(4) To determine if the prime contractor/vendor made the required good faith effort is complying with the HUB subcontracting plan, the agency may ~~not~~ consider the ~~success or failure of the contractor/vendor to subcontract with HUBs in any specific quantity~~. The agency's ~~determination is restricted to considering factors indicating good faith effort including, but not limited to, the~~ following:~~

(A) whether the prime contractor gave timely notice to the subcontractor regarding the time and place of the subcontracted work;

(B) whether the prime contractor facilitated access to the resources needed to complete the work site, electrical power, and other necessary utilities; and

(C) whether ~~documentation or information was provided that included potential changes in the scope of contract work~~ the prime contractor complied with the approved HUB subcontracting plan.

~~(135)~~ If a determination is made that the prime contractor/vendor failed to implement the HUB subcontracting plan in good faith, the agency, in addition to any other remedies, may report nonperformance to the commission comptroller in accordance with Chapter 113, Subchapter F §20.105 of this title (relating to Vendor Performance and Debarment Program;) and §20.106 of this title (relating to Procedures for Investigations and Debarment). In addition, if the prime contractor/vendor failed to implement the HUB subcontracting plan in good faith, the agency may revoke the contract for breach of contract and make a claim against the prime contractor/vendor.

~~(146)~~ State agencies shall review their procurement procedures to ensure compliance with this section. ~~In accordance with §111.26 of this title (relating to HUB coordinator responsibilities) the agency's HUB coordinator and contract administrators should facilitate institutional compliance with this section.~~

### **§20.15 Agency Planning Responsibilities**

(a) Agencies are required to prepare a written HUB business plan for the use of HUBs in purchasing, and in public works contracts in accordance with ~~Texas~~ Government Code, ~~Chapter 2056, and Chapter 2161,~~ §2161.123.

(b) ~~An agency~~ Pursuant to Government Code, §2161.003, state agencies shall adopt the commission's comptroller's rules related to the HUB Program as part of its required strategic plan ~~administering Government Code, Chapter 2161, Subchapters B and C.~~

(c) Agencies must include a detailed report with their appropriations request identifying Good Faith Effort (~~GFE~~) compliance. The report should include the agency's effort to identify HUBs for contracts and subcontracts, the agency's utilization of HUBs and the agency's successes and shortfalls to increase HUB participation.

### **§20.16 State Agency Reporting Requirements**

~~(a) The comptroller will report to the commission not later than March 15 of each year regarding the previous six-month period, and on September 15 of each year regarding the preceding fiscal year, the payments made for the purchase of goods, services and public works awarded and actually paid from treasury funds by each state agency. Subject to the capabilities of the comptroller's USAS system, the comptroller shall identify state agencies' purchases from state term contracts which are paid from treasury funds so that those purchases awarded and actually paid under term contracts may be included in the commission's report of its own purchases.~~

~~(b) State agencies will report to the commission~~(a) State agencies will report to the comptroller, not later than March 15 of each year regarding the previous six-month period and on September 15 of each year regarding the preceding fiscal year, the payments made for the purchase of goods and services awarded and actually paid from non-treasury funds by the state agency. The report shall include information requested by the ~~commission~~comptroller and shall be in a form prescribed by the ~~commission~~comptroller. State agencies' purchases from state term contracts/group purchases which are paid from non-treasury funds must be identified on the report as such so that they may be reflected on the ~~commission's~~comptroller's report of its own purchases.

~~(eb)~~ State agencies shall maintain, and compile monthly, information relating to the agency's and each of its operating division's use of ~~historically underutilized businesses~~HUBs, including information regarding subcontractors and suppliers. This information shall include but is not limited to the information required in ~~subsections (a) and (b) of~~ this section. On a monthly basis, state agencies shall require ~~their prime~~ contractor/~~vendor to whom a state agency has awarded a contract~~ to report to the agency the identity and amount paid to each ~~historically underutilized business~~HUB and ~~non-HUB subcontractor~~ to whom the ~~prime~~ contractor/~~vendor~~ has awarded a subcontract for the purchase of supplies, materials and equipment, ~~provided that payment was made to a historically underutilized business in the month to be reported. Contractors/Vendors,~~ Prime contractors shall report to ~~the applicable~~ state agency the progress payments made to subcontractors, ~~professionals, consultants~~ and suppliers ~~certified as historically underutilized businesses~~ each month in which such payment is made.

~~(dc)~~ State agencies will report to the ~~commission~~comptroller, not later than March 15 of each year regarding the previous six-month period and on September 15 of each year regarding the preceding fiscal year, the total dollar amount of ~~historically underutilized business~~HUB and ~~non-HUB contracting and~~ subcontracting participation in all of the agencies' contracts for the purchase of goods, services and public works payments. State agencies must include contracting and subcontracting participation paid from treasury and non-treasury funds.

~~(ed)~~ State agencies that participate in a group purchasing program under ~~Texas~~ Government Code, §2155.134 shall include a separate report to the ~~commission~~comptroller, not later than March 15 of each year regarding the previous six-month period and September 15 of each year regarding the preceding fiscal year, of purchases that are made through the group purchasing program and shall report the dollar amount of each purchase that is allocated to the reporting agency.

(fe) The ~~commission~~comptroller shall prepare a consolidated report based on a compilation and analysis of the reports submitted by each state agency and other information provided by available to the comptroller ~~in the format specified by the commission.~~ These reports of ~~historically underutilized business~~HUB purchasing and contracts shall form a record of each agency's purchases in which the agency selected the contractor/~~vendor~~. If the contractor/~~vendor~~ was selected by the ~~commission~~comptroller as part of its state term contract program, the purchase will be reflected on the ~~commission's~~comptroller's report of its own purchases. The ~~commission~~comptroller report will contain the following information:

- (1) the total dollar amount of payments made by each state agency;
- (2) the total number of HUBs actually paid by each state agency;
- (3) the total number of contracts awarded to HUBs by each state agency;
- (4) the number of bids received from HUBs by each state agency; and

(5) the graduation rates of HUBs as defined in §~~111.20~~111.20.23 of this title (relating to Graduation Procedures) for the following groups as defined in §~~111.1220.11~~111.1220.11 of this title (relating to Definitions) and certified by the ~~commission~~comptroller:

- (A) Black Americans;
- (B) Hispanic Americans;
- (C) American Women;
- (D) Asian Pacific Americans; and
- (E) Native Americans.

(gf) On April 15 of each year, the ~~commission~~comptroller shall submit the consolidated report regarding the previous six-month period and on October 15 of each year regarding the preceding fiscal year to the presiding officer of each house of the legislature, the members of the legislature and the joint select committee.

(hg) State agencies will receive HUB credit for the total ~~value of contracts~~payments awarded directly to certified prime and subcontract HUBs under the Vendor Identification Number in the ~~commission's~~comptroller's HUB Directory. When the prime contractor/~~vendor~~ is a HUB, it must perform at least 25% of the total value of the contract with its own or leased employees, as defined by the Internal Revenue Service, in order for the agency to receive 100% HUB credit for the entire contract. ~~The~~A prime that is a HUB ~~contractor~~/~~vendor~~ may subcontract up to 75% of the contract with HUBs or non-HUB subcontractors. If a prime HUB contractor's/~~vendor's~~ HUB subcontracting plan identifies that it is planning to perform less than 25% of the total value of contract with its employees, the agency will receive HUB credit for the value of the contract that

was actually performed by the prime HUB contractor/~~vendor~~ and its HUB subcontractors. To obtain HUB credit, the agency must report its HUB subcontracting expenditures to the ~~commission~~comptroller in accordance with subsection (~~dc~~) of this section.

(~~h~~) Any prime HUB contractor/~~vendor~~ that seeks to satisfy the good faith effort requirement shall report to the agency the identity and amount paid to each ~~historically underutilized business~~HUB each month in which such payment is made. The report will include the volume of work performed under the contract, the portion of the work that was performed with its employees, non-HUB contractors/~~vendors~~ and other HUB contractors/~~vendors~~. The agency may request payment documentation in accordance with subsection (~~eb~~) of this section and the HUB subcontracting plan that confirms the performance of the contractor/~~vendor~~. The agency shall discuss the performance of the contractor/~~vendor~~ and document the ~~contractor/vendor's~~contractor's performance in the contract file. Any deficiencies will be identified by the agency and must be rectified prior to the next reporting period by the contractor/~~vendor~~.

### **§20.17 Certification Process**

(a) A business seeking certification as a ~~historically underutilized business~~HUB must submit an application to the ~~commission~~comptroller in a form prescribed by the ~~commission~~comptroller, affirming under penalty of perjury that the business qualifies as a ~~historically underutilized business~~HUB.

(b) If requested by the ~~commission~~comptroller, the applicant must provide any and all materials and information necessary to demonstrate an economically disadvantaged person's active participation in the control, operation, and management of the ~~historically underutilized business~~HUB.

~~(c) Texas Government Code, §2161.231, provides that a person commits a felony of the third degree if the person intentionally applies as an historically underutilized business for an award of a purchasing contract or public works contract and the person knowingly does not meet the definition of a historically underutilized business.~~

~~(d) The commission shall certify the applicant as a historically underutilized business. It shall be the burden of the person claiming Texas residency to prove their status through submission of adequate and appropriate documentation. Such documentation may include, but is not limited to, a current valid Texas driver's license or I.D. card, voter registration card showing Texas address, appraisal statement for Texas real property (including whether a homestead exemption was claimed for that real property), or recent paid utility statements. The comptroller shall certify the applicant as a HUB or provide the applicant with written justification of its denial of certification within 90 days after the date the ~~commission~~comptroller receives a satisfactorily completed application from the applicant.~~

(~~ed~~) The ~~commission~~comptroller reviews and evaluates applications, and may reject an application based on one or more of the following:

(1) the application is not satisfactorily completed;

(2) the applicant does not meet the requirements of the definition of ~~historically underutilized business;~~HUB;

(3) the application contains false information;

(4) the applicant does not provide required information in connection with the certification review conducted by the ~~commission~~comptroller; or

(5) the applicant's record of performance on any prior contracts with the state.

~~(f)~~ The ~~commission~~comptroller may approve the existing certification program of one or more local governments or nonprofit organizations in this state that certify historically underutilized businesses, minority business enterprises, women's business enterprises, or disadvantaged business enterprises that substantially fall under the same definition, to the extent applicable for ~~historically underutilized businesses~~HUBs found in ~~§2161.001, Texas~~ Government Code, §2161.001, and maintain them on the ~~commission's~~comptroller's Historically Underutilized Businesses List, if the local government or nonprofit organization:

(1) ~~the local government or nonprofit organization~~ meets or exceeds the standards established by the ~~commission~~comptroller as set out in ~~Chapter 111, Subchapter B of this title (relating to the Historically Underutilized Business Program);~~subchapter; and

(2) agrees to the terms and conditions as required by statute relative to the agreement between the local government and/or nonprofits for the purpose of certification of ~~historically underutilized businesses~~HUBs.

~~(g)~~ The agreement in subsection ~~(f)~~ of this section must take effect immediately and contain conditions as follows:

(1) allow for automatic certification of businesses certified by the local government or nonprofit organization as prescribed by the ~~commission~~comptroller;

(2) provide for the efficient updating of the ~~commission~~comptroller database containing information about ~~historically underutilized businesses~~HUBs and potential ~~historically underutilized businesses~~HUBs as prescribed by the ~~commission~~comptroller;

(3) provide for a method by which the ~~commission~~comptroller may efficiently communicate with businesses certified by the local government or nonprofit organization;

(4) provide those businesses with information about the state's Historically Underutilized Business Program; and

(5) require that a local government or nonprofit organization that enters into an agreement under subsection (fe) of this section, complete the certification of an applicant with written justification of its certification denial within the period established by the ~~commission~~comptroller in its rules for certification.

(hg) The ~~commission~~comptroller will not accept the certification of a local government or nonprofit organization that charges for the certification of businesses to be listed on the Historically Underutilized Business List maintained by the ~~commission~~comptroller.

(ih) The ~~commission~~comptroller may terminate an agreement made under this section if a local government or nonprofit organization fails to meet the standards established by the ~~commission~~comptroller for certifying ~~historically underutilized businesses~~HUBs. In the event of the termination of an agreement, those HUB's that were certified as a result of the agreement will maintain their HUB status during the fiscal year in which the agreement was in effect. Those HUB's who are removed from the HUB list as a result of the termination of an agreement with a local government or nonprofit organization may apply directly to the ~~commission~~comptroller for certification as a ~~historically underutilized business~~HUB.

(ji) The ~~commission~~comptroller will send all certified HUBs an orientation packet including a certificate, description of certification value/significance, list of agency purchasers, and information regarding electronic commerce, the Texas Marketplace, and the state procurement process.

(j) The certification is valid for a four-year period beginning on the date TPASS certified the applicant as a HUB.

### **§20.18 Protests**

An applicant may protest the ~~commission's~~comptroller's denial of its application by filing a written protest with the ~~commission~~comptroller within 30 days after the date the ~~commission~~comptroller sent notice of the disposition to the applicant. ~~Commission~~Comptroller staff will then prepare a recommendation for review by the ~~executive~~ director of the ~~commission~~TPASS division of the comptroller. The decision of the ~~executive~~ director is final.

### **§20.19 Recertification**

(a) The certification is valid for a four-year period beginning on the date the commission certified the applicant as a historically underutilized business.

(b) Upon expiration of the four-year period, historically underutilized business that desires recertification must:

(1) return a completed recertification form as provided by the commission; and

(2) comply with the requirements specified in §111.17 of this title (relating to the Certification Process) which apply to the recertification process.

## §20.20 Revocation

(a) The ~~commission~~comptroller shall revoke the certification of a ~~historically underutilized business~~HUB if the ~~commission~~comptroller determines that a business does not meet the definition of ~~historically underutilized business~~HUB or that the business fails to provide requested information in connection with a certification review conducted by the ~~commission~~comptroller. The ~~commission~~comptroller shall provide the business with written notice of the proposed revocation. Applicants have 30 days from receipt of the written notice to provide written documentation stating the basis for disputing the grounds for revocation. The applicant shall also submit documentation to address the deficiencies identified in the notice. The ~~commission~~comptroller shall evaluate the documentation to confirm the applicant's eligibility. The ~~commission~~comptroller shall provide the applicant with written notification of their certification status. If an applicant's certification is revoked, the applicant may appeal to the ~~commissioners~~director of the TPASS division of the comptroller within 14 days of receipt of written notice of the revocation. Upon receipt of the applicant's request for appeal, the ~~commissioners~~director will ~~voterender a decision~~ on the ~~proposed revocation at appeal~~ within 30 days of receipt of the ~~next available open meeting written appeal~~. The ~~action~~decision of the ~~commissioners~~director is final.

(b) If a ~~historically underutilized business~~HUB is barred from participating in state contracts in accordance with ~~Texas~~ Government Code, ~~section §~~2155.077, the ~~commission~~comptroller shall revoke the certification of that business for a period commensurate with the debarment period.

## §20.21 Certification and Compliance Reviews

(a) The ~~commission~~comptroller will conduct certification reviews of applicants and random compliance reviews of certified businesses by auditing them to verify the information submitted by a business is accurate, and the business continues to meet all HUB eligibility requirements after certification has been granted. Certification is subject to revocation if it is determined that a business does not qualify as an ~~historically underutilized business~~HUB. Certification and compliance reviews of any business may be conducted upon determining a review is warranted.

(b) Businesses subject to certification and compliance reviews must provide the ~~commission~~comptroller with any information requested to verify the certification eligibility of the business.

~~(e) In order to be qualified,~~(c) The applicant's business documentation shall be reviewed to substantiate ~~an applicant's~~the required level of participation and control, and must demonstrate responsibility in the critical areas of the business' operation. Eligible owners must be able to make independent and unilateral business decisions which guide the future and destiny of the business, and must be proportionately responsible for the direction and management of the business. ~~The eligible owner's level of participation in the business will be evaluated as set forth in §20.12 of the title (relating to Evaluation of Active Participation in the Control, Operation, and Management of Entities).~~ Absentee or titular ownership by eligible owners who do not take an active role in controlling and participating in the business is not consistent with the definition of a HUB.

(d) The business must meet all other certification and compliance requirements identified in the Commission's comptroller's HUB Policies and Procedures used to determine eligibility.

### **§20.22 Texas Historically Underutilized Business Certification Directory**

The commission comptroller shall compile in the most cost-efficient format a directory of businesses certified as historically underutilized businesses HUBs. The commission comptroller shall update the directory as necessary to maintain its accuracy. The commission comptroller shall provide a copy to state agencies, local governments and the public on a cost recovery basis upon receipt of a written request. The commission comptroller shall provide access to the directory either electronically or in hard copy, on floppy diskette, or on CD, magnetic tape, or other portable electronic media, depending on the needs of ~~the~~ each state agency. The commission comptroller and state agencies shall use the directory in conjunction with the commission's comptroller's bidders list to solicit bids from certified HUBs for state purchasing and public works contracts.

### **§20.23 Graduation Procedures**

(a) A HUB shall be graduated from being used to fulfill HUB procurement utilization goals when it has maintained gross receipts or total employment levels during four consecutive years which exceed the SBA size standards set forth in 13 CFR, §121.201 for the following categories:

(1) heavy construction other than building construction;

(2) building construction, including general contractors and operative builders;

(3) special trade construction;

(4) medical, financial, and accounting services;

(5) architectural, engineering and surveying services;

(6) other services including legal services;

(7) commodities wholesale; and

(8) commodities manufacturers.

(b) Firms that achieve the size standards identified in subsection (a) of this section will be assumed to have reached a competitive status in overcoming the effects of discrimination. The comptroller shall review, as part of the certification or recertification process, the financial revenue or relevant data of firms to determine whether the size standards identified in subsection (a) of this section have been achieved.

(c) Businesses that have graduated from the HUB program in accordance with this section, or that have been decertified in accordance with §§20.17 - 20.22 of this title, may not be included in meeting agency HUB goals.

(d) The comptroller shall review the SBA size standards each fiscal year to determine the need to reassess HUB graduation size standards and make any appropriate changes needed.

(e) A HUB that has graduated pursuant to this section or does not qualify as a HUB under §20.11(11) and (19) of this title (relating to Definitions), shall be eligible to reapply for HUB certification only after demonstrating that they meet the qualifications for HUB, including the graduation size standards.

(f) If a HUB is mentoring two or more protégé businesses when it reaches the graduation size standards set forth in subsection (a) of this section, it may petition the director of the TPASS division of the comptroller for a one-year extension of HUB status. The granting of such extension shall be solely at the discretion of the director.

#### **§20.24 Program Review**

The ~~commission~~comptroller shall revise the HUB rules based on updates of disparity studies conducted and prepared on behalf of the State of Texas. The ~~commission~~comptroller may determine the need to reassess the HUB rules upon receipt of new disparity study information.

#### **§20.25 Memorandum of Understanding between the ~~Texas Department~~Governor's Division of Economic Development and Tourism and the ~~Texas Building and Procurement Commission~~Comptroller**

(a) Pursuant to the ~~Texas~~Government Code, §481.028 the ~~Texas Building and Procurement Commission~~comptroller adopts the following Memorandum of Understanding (MOU) with the ~~Texas Department~~Governor's Division of Economic Development and Tourism, under which they agree to cooperate in program planning and budgeting relating to procurement information, and certification and technical assistance to small and historically underutilized businesses.

(b) The ~~Texas Building and Procurement Commission~~comptroller and the ~~Texas Department~~Governor's Division of Economic Development and Tourism mutually agree to the following in order to serve the citizens of Texas in an efficient and fiscally responsible way:

- (1) to cooperate on regional economic planning with Texas;
- (2) to cooperate in providing procurement information, certification and technical assistance to small and historically underutilized businesses;
- (3) to share information of mutual interest;
- (4) to develop the agreements necessary to accomplish the activities set forth in the MOU; and
- (5) to cooperate to encourage economic development within Texas.

(c) The MOU becomes effective upon execution by authorized representatives of each agency and shall remain in effect until terminated by either party.

#### **§20.26 HUB Coordinator Responsibilities**

(a) In accordance with ~~Texas~~ Government Code, §2161.062(e), state agencies with biennial budgets that exceed \$10 million shall designate a staff member to serve as the Historically Underutilized Business (HUB) Coordinator for the agency during the fiscal year. The HUB coordinator will advise and assist agency executive directors and staff in complying with the requirements of ~~Chapter 111, Subchapter B of this title (relating to the Historically Underutilized Business Program), the Texas~~subchapter, Government Code, §§§321.013, and §2101.011, and ~~the Texas~~ Government Code, Chapter 2161.

(b) To demonstrate good faith effort, an agency shall provide the HUB coordinator with necessary and sufficient resources from its current operations and budget to effectively promote the achievement of all the responsibilities of the HUB coordinator. The HUB coordinator will assist its agency in the development of the agency's procurement specifications, HUB subcontracting plans, and evaluation of contracts for compliance. The HUB coordinator should be ~~identified~~ in a ~~responsive role~~position that reports, communicates, and provides information ~~directly~~ to the agency's executive director. To assist state agencies and the ~~commission~~comptroller with HUB compliance, the duties and responsibilities of HUB coordinators include, but are not limited to, facilitating compliance with the agency's good faith effort criteria, HUB reporting, contract administration, and marketing and outreach efforts for HUB participation. The ~~commission~~comptroller may assist agencies, upon request, to identify other responsibilities of a HUB coordinator for compliance.

#### **§20.27 HUB Forum Programs for State Agencies**

(a) In accordance with ~~Texas~~ Government Code, §2161.066, the ~~Commission~~comptroller shall design a program of forums in which ~~historically underutilized businesses~~HUBs are invited by state agencies to deliver technical and business presentations that demonstrate their capability to do business with the agency:

(1) to senior managers and procurement personnel at state agencies that acquire goods and services of a type supplied by the ~~historically underutilized businesses~~HUBs; and

(2) to prime contractors/ or vendors with the state who may be subcontracting for goods and services of a type supplied by the ~~historically underutilized businesses~~HUBs.

(b) Each agency with a biennial appropriation exceeding \$10 million shall participate in the forums by sending senior managers and procurement personnel to attend relevant presentations. The agency will inform their prime contractors/ or vendors about presentations relevant to subcontracting opportunities for HUBs and small businesses. The ~~commission~~comptroller and each agency that has a HUB coordinator shall:

(1) design its own forum program and model the program, to the extent appropriate, following the format established by the ~~commission~~comptroller;

(2) sponsor presentations by HUBs at the agency offices unless agency facilities will not accommodate forum participants as determined and documented by the Agency HUB Coordinator; and

(3) identify and invite HUBs to make marketing presentations on the types of goods and services they provide.

(c) Agencies may elect to implement forums individually or cooperatively with other agencies. The agency's forum programs may include, but are not limited to, the following initiatives:

(1) providing marketing information that will direct HUBs to key staff within the agency;

(2) requesting other state agencies to assist in the preparation and planning of the forum when necessary;

(3) informing HUBs about potential contract opportunities and future awards; and

(4) preparing an annual report of each sponsored and/or cosponsored forum.

### **§20.28 Mentor-~~Protege-Protégé~~ Program**

(a) In accordance with ~~the Texas~~ Government Code, ~~Section §~~2161.065, the ~~commission~~~~comptroller~~ shall design a Mentor-~~Protege-Protégé~~ Program to foster long-term relationships between prime contractors/~~vendors~~ and Historically Underutilized Businesses (HUBs) and to increase the ability of HUBs to contract with the state or to receive subcontracts under a state contract. The objective of the Mentor-~~Protege-Protégé~~ Program is to provide professional guidance and support to the protegeprotégé to facilitate their development and growth. All participation is voluntary and program features should remain flexible so as to maximize participation. Each state agency with a biennial appropriation that exceeds \$10 million shall implement a Mentor-~~Protege-Protégé~~ Program.

(b) In efforts to design a Mentor-~~Protege-Protégé~~ Program, each agency, because of its unique mission and resources, is encouraged to implement a Mentor-~~Protege-Protégé~~ Program that considers;

(1) the needs of protegeprotégé businesses requesting to be mentored;

(2) the availability of mentors who possess unique skills, talents, and experience related to the mission of the agency's program; and

(3) the agency's staff and resources.

(c) Agencies may elect to implement Mentor-~~Protege-Protégé~~ Programs individually or cooperatively with other agencies, and/or other public entities and private organizations, with skills, resources and experience in Mentor-~~Protege-Protégé~~ Programs. Agencies are encouraged to implement a Mentor-~~Protege-Protégé~~ Program to address the needs of its protegeprotégé businesses in the following critical areas of the state's procurements:

(1) construction,

(2) commodities, and/or

(3) services.

(d) State agencies may consider, but are not limited to, the following factors in developing their Mentor-~~Protege-Protégé~~ Program:

(1) develop and implement internal procedures, including an application process, regarding the Mentor-~~Protege-Protégé~~ Program which identifies the eligibility criteria and the selection criteria for mentors and potential HUB ~~protegeprotégé~~ businesses;

(2) recruit prime contractor/ or vendor mentors and ~~protegesprotégé~~ to voluntarily participate in the program;

(3) establish a Mentor-~~Protege-Protégé~~ Program objective identifying both the roles and expectations of the agency, mentor and the ~~protegeprotégé~~;

(4) monitor the progress of the mentor ~~protegeprotégé~~ relationship;

(5) identify key agency resources including senior managers and procurement personnel to assist with the implementation of the program; ~~and~~

(6) encourage partnerships with local governmental and nonprofit entities to implement a community based Mentor-~~Protege-Protégé~~ Program-;

(7) the appropriate length of time for mentor-protégé relationships to continue. As a general matter, the statewide HUB program recommends that such relationships be limited to four years;

(8) explore other methods and procedures related to Mentor-Protégé Programs recommended in the Texas Disparity Study-2009; and

(9) assess the effectiveness of their Mentor-Protégé Program by conducting periodic surveys/interviews of both mentors and protégés.

(e) An agency's Mentor-~~Protege-Protégé~~ Program must include mentor eligibility and selection criteria. In determining the eligibility and selection of a mentor, state agencies may consider the following criteria:

(1) whether the mentor is a registered bidder on the ~~commission's~~comptroller's Centralized Master Bidders List (CMBL);

(2) whether the mentor has extensive work experience and can provide developmental guidance in areas that meet the needs of the ~~protegeprotégé~~, including but not limited to, business, financial, and personnel management; technical matters such as production, inventory control and quality assurance; marketing; insurance; equipment and facilities; and/or other related resources;

(3) whether the mentor is in "good standing" with the State of Texas and is not in violation of any state statutes, rules or governing policies;

(4) whether the mentor has mentoring experience; ~~and~~

~~(5)~~

(5) the number of protégés that a mentor can appropriately assist;

(6) whether the mentor has a successful past work history with the agency;

(7) the amount of time a HUB has participated as a mentor in the program, or in other agencies' programs; and

(8) whether and to what extent the mentor and protégé businesses share management, board members, partners, current or former employees, or other resources that might indicate that they are related or affiliated businesses.

(f) An agency's Mentor-~~Protege-Protégé~~ Program must include ~~protegeprotégé~~ eligibility and selection criteria. In determining the eligibility and selection of HUB ~~protegesprotégés~~, state agencies may use the following criteria:

(1) whether the ~~protegeprotégé~~ is eligible and willing to become certified as a HUB;

(2) whether the ~~protege'sprotégé's~~ business has been operational for at least one year;

(3) whether the ~~protegeprotégé~~ is willing to participate with a mentoring firm and will identify the type of guidance that is needed for its development;

(4) whether the ~~protegeprotégé~~ is in "good standing" with the State of Texas and is not in violation of any state statutes, rules or governing policies; ~~and~~

(5) whether the ~~protegeprotégé~~ is involved in a mentoring relationship with another contractor; ~~vendor;~~

(6) the amount of time a HUB has participated as a protégé in the program, or in other agencies' programs; and

(7) whether and to what extent the mentor and protégé businesses share management, board members, partners, employees, or other resources that might indicate that they are related or affiliated businesses.

(g) The mentor and the ~~protegeprotégé~~ should agree on the nature of their involvement under the agency's mentor/~~protegeprotégé~~ initiative. Each agency will monitor the process of the relationship. The mentor and ~~protegeprotégé~~ relationship should be reduced to writing and that agreement may include, but is not limited to, the following:

- (1) identification of the developmental areas in which the protegeprotégé needs guidance;
  - (2) the time period which the developmental guidance will be provided by the mentor;
  - (3) name, address, phone and fax numbers, and the points of contact that will oversee the agreement of the mentor and protegeprotégé;
  - (4) procedure for a mentor firm to notify the protegeprotégé in advance if it intends to voluntarily withdraw from the program or terminate the mentor-protege-protégé relationship;
  - (5) procedure for a protegeprotégé firm to notify the mentor in advance if it intends to terminate the mentor-protege-protégé relationship; and
  - (6) a mutually agreed upon timeline to report the progress of the mentor-protege-protégé relationship to the state agency.
- (h) The protegeprotégé must maintain its HUB certification status for the duration of the agreement. If a prime contractor/~~vendor~~ has been awarded a contract with a state agency, which requires a HUB subcontracting plan, and the Mentor-Protege-Protégé Agreement is terminated, or the protege'sprotégé's HUB certification expires, the prime contractor/~~vendor~~ must either:
- (1) enter into a new agreement with a certified HUB protegeprotégé, or
  - (2) comply with the requirements of this title relating to developing and submitting a HUB subcontracting plan.
- (i) Each agency must notify its mentors and protegesprotégés that participation is voluntary. The notice must include written documentation that participation in the agency's Mentor-Protege-Protégé Program is neither a guarantee for a contract opportunity nor a promise of business; but the program's intent is to foster positive long-term business relationships.
- (j) State agencies may demonstrate their good faith under this section by submitting a supplemental letter with documentation to the commissioncomptroller with their HUB report or legislative appropriations request identifying the progress and testimonials of mentors and protegesprotégés that participate in the agency's program. In accordance with §~~44~~20.26 of this title (relating to HUB Coordinator Responsibilities) the agency's HUB coordinator shall facilitate compliance by its agency.
- (k) Each state agency that sponsors a Mentor-Protege-Protégé Program must report that information to the commissioncomptroller upon completion of a signed agreement by both parties. Information regarding the Mentor-Protege-Protégé Agreement shall be reported to the commissioncomptroller in a form prescribed by the commissioncomptroller within 21 calendar days after the agreement has been signed. The commissioncomptroller will register that agreement on the approved list of mentors and protegesprotégés. Approved Mentor-Protege-Protégé Agreements are valid for all state agencies in determining good faith effort for the

particular area of subcontracting to be performed by the Protegeprotégé as identified in the HUB subcontracting plan.

(1) The commissioncomptroller shall maintain and make available to state agencies all registered Mentor-Protege-Protégé Agreements. The sponsoring agency shall monitor and report the termination of an existing Mentor-Protege-Protégé Agreement that has been registered with the commissioncomptroller within 21 calendar days.