

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §11.1, Historically Underutilized Business Program. The commission proposes the amendment to Chapter 11, Subchapter A, to adopt by reference all, and the most current, Texas General Services Commission (GSC) Historically Underutilized Business (HUB) rules, except those that apply only to the GSC.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

Texas Government Code, §2161.003, as added by Senate Bill (SB) 178, 76th Legislature, 1999, requires every state agency to adopt, as that agency's own rules, the GSC HUB rules promulgated in response to the requirements of Texas Government Code, §2161.002, as revised and expanded by SB 178. The GSC adopted amendments to 1 TAC, §§111.12, 111.16, and new 111.28 on June 9, 2000, to comply with the requirements of Texas Government Code, Subchapter B, §2161.065 (Mentor Protege Program), Subchapter C (Planning and Reporting Requirements), and Subchapter F (Subcontracting) as enacted by SB 178.

To comply with the requirements of Texas Government Code, §2161.003, the commission proposes to adopt by reference all of the GSC HUB rules under Title 1 TAC, Chapter 111, Subchapter B (Historically Underutilized Business Program) through the most recent revisions adopted by the GSC and published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5621); except for §111.24 (Program Review) and §111.25 (Memorandum of Understanding between the Texas Department of Economic Development and the General Services Commission) which apply only to the GSC.

#### SECTION BY SECTION DISCUSSION

The proposed changes to §11.1 would add language to adopt by reference 1 TAC §§111.26 - 111.28, which were not previously adopted by reference, and replace the date and issue of the *Texas Register* the referenced rules are amended through to represent the most recent revisions published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5621). In order to correctly cite the subchapter title of the GSC rules, the word "Certification" would be deleted.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed amendment is in effect there will be no significant fiscal impacts for units of state and local government as a result of administration or enforcement of the proposed amendment, which would implement, by reference, GSC HUB rules.

The GSC is the primary agency responsible for implementing statewide HUB rules. Senate Bill 178 requires all state agencies to adopt the GSC HUB rules. The agency previously implemented GSC HUB rules through July 9, 1999; however, the GSC has updated and added several new HUB rules since then. This rulemaking is proposed to adopt GSC HUB rules, by reference, that have been updated or changed through June 9, 2000.

The primary intended benefit of this rulemaking is to HUBs located in Texas, because these HUBs will no longer have to compete with out-of-state HUBs for business opportunities, primarily those contracts \$25,000 and less (which require a minimum of two of the three required bids to be from HUBs), within

Texas effective August 31, 2001. All state agencies must make a good faith effort to assist HUBs in receiving a portion of the total contract value of all contracts that agencies expect to award in accordance with specific percentages detailed in the GSC HUB rules. Agencies must include a detailed report with their Legislative Appropriations Request showing good faith effort compliance for the past two calendar years. Additionally, the State Auditor's Office will monitor good faith effort compliance and report non-complying agencies to the GSC.

Additional GSC HUB rule revisions that will be implemented as a result of the proposed amendment include: the definition change of a HUB from socially to economically disadvantaged persons; a requirement that state agencies track and report the total amount of purchases and payments made to HUBs and the number of bids and proposals made by HUBs regarding agency acquisitions, construction, or equipping of a facility or implementation of a program; implementation of a GSC designed mentor protege program that pairs new HUB contractors with experienced contractors in order to share information; development of a forum program that will provide HUBs the opportunity to give technical and business presentations demonstrating their ability to do business with the state; and a requirement for a HUB subcontracting plan which applies to contracts with an expected value of at least \$100,000. The agency must determine the probability of subcontracting in its bids, proposals, and offers. If the agency requires a HUB subcontracting plan, a vendor's bid, proposal, or offer must contain the subcontracting plan, which shows that a good faith effort has been made to contact and arrange work with at least three HUBs, in order to be considered for the award of a contract.

The proposed amendment is administrative in nature and provides updated HUB guidance to state

agencies and set up programs to assist HUBs which desire to do business with the state. All state agencies must implement the GSC HUB rules by reference; however, local governments do not have to abide by the GSC HUB rules. The commission anticipates that provisions to be implemented by this rulemaking will not result in increased or additional expenditures for units of state or local government.

#### PUBLIC BENEFITS AND COSTS

Mr. Davis also has determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendment will be the potential increased use of HUBs by units of state government and associated contractors.

This rulemaking is proposed to adopt GSC HUB rules, by reference, that have been updated or changed through June 9, 2000. The primary intended benefit to HUBs is that only HUBs located in Texas can be certified under the GSC certification program. As a result, HUBs located in Texas will no longer have to compete with out-of-state HUBs for business opportunities, primarily those contracts \$25,000 and less (which require a minimum of two of the three required bids to be from HUBs), within Texas effective August 31, 2001.

Additional GSC HUB rule revisions that will be implemented as a result of the proposed amendment include: the definition change of a HUB from socially to economically disadvantaged persons; a requirement that state agencies track and report the total amount of purchases and payments made to HUBs and the number of bids and proposals made by HUBs regarding agency acquisitions, construction, or equipping of a facility or implementation of a program; implementation of a GSC

designed mentor protege program that pairs new HUB contractors with experienced contractors in order to share information; development of a forum that will provide HUBs the opportunity to give technical and business presentations demonstrating their ability to do business with the state; and a requirement for a HUB subcontracting plan which applies to contracts with an expected value of at least \$100,000. The agency must determine the probability of subcontracting in its bids, proposals, and offers. If the agency requires a HUB subcontracting plan, a vendor's bid, proposal, or offer must contain the subcontracting plan, which shows that a good faith effort has been made to contact and arrange work with at least three HUBs, in order to be considered for the award of a contract.

All provisions in the proposed rulemaking are already required to be adhered to; therefore, the commission anticipates no additional costs for individuals and businesses as a result of implementation of the proposed amendment. Those HUBs that are eligible for certification may experience positive fiscal benefits due to the proposed amendment, in an amount that cannot be determined at this time, through increased contracting with state government. Non-certified HUBs which are located outside of Texas may be adversely affected due to potentially fewer contracts with the state, in an amount that cannot be determined at this time.

#### **SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT**

No adverse economic effects are anticipated to any small or micro-business as a result of the proposed amendment. The amendment is administrative in nature and is intended to implement recently updated and newly added GSC HUB rules by reference.

The majority of HUBs in Texas are estimated to be small or micro-businesses. The primary intended benefit to Texas HUBs which only can be certified under the GSC certification program is that they will no longer have to compete with out-of-state HUBs for business opportunities, primarily those contracts \$25,000 and less (which require a minimum of two of the three required bids to be from HUBs), within Texas effective August 31, 2001. The proposed amendment is intended to implement additional beneficial HUB programs that will also set up mentor protege and forum programs in order to promote information exchanges between experienced state contracting vendors and HUBs, and will provide a forum for HUBs, that desire to do business with the state, to demonstrate business and technical expertise to units of state government. Additionally, all vendor bids for state contracts valued in excess of \$100,000 must contain a HUB subcontracting plan, which shows that a good faith effort has been made to contact and arrange work with at least three HUBs.

Small and micro-businesses throughout the state, both HUBs and non-HUBs, that desire to do business with the state already have to adhere to the GSC HUB rules. Since the proposed amendment does not add additional regulatory requirements, the commission estimates that the provisions in the rulemaking will not result in additional costs for small or micro-businesses affected by the proposed amendment. GSC HUB certification will probably have positive and negative fiscal impacts on small and micro-businesses that intend to bid for contracts with state government. Those HUBs that are eligible for certification may experience positive fiscal benefits due to the proposed amendment, in an amount that cannot be determined at this time, through increased contracting with state government. Non-certified HUBs may be adversely affected, in an amount that cannot be determined at this time, due to potentially fewer contracts with the state.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the act. “Major environmental rule” means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposal does not meet the definition of “major environmental rule” because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The rulemaking proposes to adopt by reference administrative rules of the GSC relating to HUBs as required by Texas Government Code, §2161.003. The commission invites public comment on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission’s preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to the proposed rulemaking because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). Nevertheless, the commission further evaluated the proposed rule and performed a preliminary assessment of whether the proposed rule constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule is to

adopt by reference administrative rules of the GSC relating to HUBs as required by Texas Government Code, §2161.003. Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the Coastal Management Program.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-049-011-AD. Comments must be received by 5:00 p.m., January 29, 2001. For further information, please contact Jill Burditt, Regulation Development Section, at (512) 239-0560.

#### STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; and Texas Government Code, §2161.003, which requires a state agency to adopt the GSC rules under Texas Government Code, §2161.002, as the agency's own rules.

The proposed amendment implements Texas Government Code, §2161.003, relating to Agency Rules.

**SUBCHAPTER A : HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM**

**§11.1**

**§11.1. Historically Underutilized Business Program.**

The commission adopts by reference the rules of the Texas General Services Commission in 1 TAC §§111.11 - 111.23 and §§111.26 - 111.28 (relating to Historically Underutilized Business [Certification] Program), as amended through the June 9, 2000, issue of the *Texas Register* (25 TexReg 5621) [July 9, 1999 (24 TexReg 5179)].