

By: Reynolds

H.B. No. 1851

A BILL TO BE ENTITLED

1 AN ACT
2 relating to historically underutilized businesses and the
3 preference given for goods and services purchased by state
4 agencies; providing penalties.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Section 2155.074(b), Government Code, is amended
7 to read as follows:

8 (b) In determining the best value for the state, the
9 purchase price and whether the goods or services meet
10 specifications are the most important considerations. However, the
11 commission or other state agency may, subject to Subsection (c) and
12 Section 2155.075, consider other relevant factors, including:

13 (1) installation costs;
14 (2) life cycle costs;
15 (3) the quality and reliability of the goods and
16 services;

17 (4) the delivery terms;

18 (5) indicators of probable vendor performance under
19 the contract such as past vendor performance, the vendor's
20 financial resources and ability to perform, the vendor's experience
21 or demonstrated capability and responsibility, and the vendor's
22 ability to provide reliable maintenance agreements and support;

23 (6) the cost of any employee training associated with
24 a purchase;

- 1 (7) the effect of a purchase on agency productivity;
- 2 (8) the vendor's anticipated economic impact to the
3 state or a subdivision of the state, including potential tax
4 revenue and employment; ~~and~~
- 5 (9) whether the business is a historically
6 underutilized business as defined by Section 2161.001; and
- 7 (10) other factors relevant to determining the best
8 value for the state in the context of a particular purchase.

9 SECTION 2. Sections 2155.444(a), (b), (c), and (e),
10 Government Code, are amended to read as follows:

11 (a) The commission and all state agencies making purchases
12 of goods, including agricultural products, shall give preference to
13 those produced or grown in this state or offered by Texas bidders as
14 follows:

15 (1) goods produced or offered by a Texas bidder that is
16 a historically underutilized business ~~[owned by a service-disabled~~
17 ~~veteran who is a Texas resident]~~ shall be given a first preference
18 and goods produced in this state or offered by other Texas bidders
19 shall be given second preference, if the cost to the state and
20 quality are equal; and

21 (2) agricultural products grown in this state shall be
22 given first preference and agricultural products offered by Texas
23 bidders shall be given second preference, if the cost to the state
24 and quality are equal.

25 (b) If goods, including agricultural products, produced or
26 grown in this state or offered by Texas bidders exceed 105 percent
27 of the cost of other goods or are not equal in ~~[cost and]~~ quality to

1 other products, then goods, including agricultural products,
2 produced or grown in other states of the United States shall be
3 given preference over foreign products if the cost to the state and
4 quality are equal.

5 (c) In this section:

6 (1) "Agricultural products" includes textiles and
7 other similar products.

8 (2) "Historically underutilized business" has the
9 meaning assigned by Section 2161.001.

10 [~~(1-a) "Service-disabled veteran" means a person who~~
11 ~~is a veteran as defined by 38 U.S.C. Section 101(2) and who has a~~
12 ~~service-connected disability as defined by 38 U.S.C. Section~~
13 ~~101(16).~~]

14 (3) [(2)] "Texas bidder" means a business:

15 (A) incorporated in this state;

16 (B) that has its principal place of business in
17 this state; or

18 (C) that has an established physical presence in
19 this state.

20 (e) The commission and all state agencies procuring
21 services shall give first preference to services offered by a Texas
22 bidder that is a historically underutilized business [~~owned by a~~
23 ~~service-disabled veteran who is a Texas resident~~] and shall give
24 second preference to services offered by other Texas bidders if:

25 (1) the services meet state requirements regarding the
26 service to be performed and expected quality; and

27 (2) the cost of the service does not exceed the cost of

1 other similar services of similar expected quality that are offered
2 by a bidder that is not entitled to a preference under this
3 subsection.

4 SECTION 3. Section 2161.001, Government Code, is amended by
5 amending Subdivision (3) and adding Subdivision (5) to read as
6 follows:

7 (3) "Economically disadvantaged person" means a
8 person who is economically disadvantaged because of the person's
9 identification as a member of a certain group, including Black
10 Americans, Hispanic Americans, women, Asian Pacific Americans,
11 ~~and~~ Native Americans, and veterans as defined by 38 U.S.C.
12 Section 101(2) who have a service-connected disability as defined
13 by 38 U.S.C. Section 101(16), and who has suffered the effects of
14 discriminatory practices or other similar insidious circumstances
15 over which the person has no control.

16 (5) "Professional services" has the meaning assigned
17 by Section 2254.002.

18 SECTION 4. Section 2161.064, Government Code, is amended by
19 adding Subsection (f) to read as follows:

20 (f) A state agency may use the directory compiled under this
21 section to create a mailing list for soliciting bids from
22 historically underutilized businesses. The state agency may rotate
23 the businesses included on the mailing list by using different
24 portions of the directory for separate acquisitions of goods or
25 services if the agency determines that the size of the acquisition
26 justifies the rotation. If the state agency rotates the businesses
27 included on a solicitation mailing list, bids must be solicited

1 from:

2 (1) a bidder who was previously awarded the bid for the
3 goods or services;

4 (2) businesses that have been added to the directory
5 since the last solicitation; and

6 (3) businesses included in the portion of the
7 directory selected to be included in the solicitation mailing
8 list.

9 SECTION 5. Subchapter B, Chapter 2161, Government Code, is
10 amended by adding Section 2161.067 to read as follows:

11 Sec. 2161.067. JOINT VENTURES. (a) In this section:

12 (1) "Eligible purchase" means a purchase of goods or
13 services that:

14 (A) the comptroller determines is eligible for a
15 joint venture based on work and market availability; and

16 (B) exceeds the minimum dollar value provided by
17 comptroller rule.

18 (2) "Joint venture" means an association of two or
19 more individuals or businesses, at least one of which is a
20 historically underutilized business, that is:

21 (A) established to carry on a single business
22 activity;

23 (B) certified as a joint venture by the
24 comptroller; and

25 (C) limited in scope and duration.

26 (b) The comptroller shall determine whether a purchase of
27 goods or services is an eligible purchase for which a state agency

1 is required to make a good faith effort to award the contract to a
2 joint venture. The state agency may not accept a contract bid
3 submitted by any bidder other than a joint venture unless the
4 comptroller determines, after reviewing relevant facts, documents,
5 and circumstances, that the agency has demonstrated its good faith
6 efforts to award the contract to a joint venture.

7 (c) A contract for a joint venture must be in writing and
8 must:

9 (1) be based on the sharing of real economic interest
10 in the venture that includes proportionate control over management,
11 interest in capital acquired by the joint venture, and interest in
12 earnings;

13 (2) be completed by all parties to the joint venture;

14 (3) be executed before a notary public;

15 (4) clearly delineate the rights and responsibilities
16 of each member or partner;

17 (5) comply with any requirements of the comptroller as
18 provided in bid documents or otherwise; and

19 (6) provide that the joint venture continue for, at a
20 minimum, the duration of the eligible purchase.

21 (d) The comptroller shall review and approve all
22 contractual agreements regarding the terms of each joint venture
23 relationship before a contract is awarded for an eligible purchase,
24 including agreements related to:

25 (1) the initial capital investment of each venture
26 partner;

27 (2) the proportional allocation of profits and losses

1 to each venture partner;

2 (3) prohibitions on each venture partner's liability
3 exceeding the partner's percentage of revenue earned while a
4 participant in the joint venture;

5 (4) the sharing of the right to control the ownership
6 and management of the joint venture;

7 (5) actual participation of the venture partners with
8 regard to the purchase;

9 (6) the method of and responsibility for accounting;

10 (7) the method by which disputes are resolved; and

11 (8) any additional information required by the
12 comptroller as provided in bid documents or otherwise.

13 (e) A joint venture may submit an agreement required under
14 Subsection (d) for preapproval not later than the 14th day before
15 the date set for receipt of bids on an eligible purchase.

16 (f) An agreement required under Subsection (d) must be
17 submitted on or before the date set for receipt of bids on an
18 eligible purchase. A bid submitted by a joint venture that does not
19 include a satisfactory written joint venture agreement in
20 accordance with the requirements of this section is considered
21 nonresponsive and rejected.

22 (g) The joint venture, and each member of the joint venture,
23 shall provide the comptroller access to review all records
24 pertaining to joint venture agreements before and after the award
25 of a contract in order to reasonably assess compliance with this
26 section.

27 (h) After the award of a contract to a joint venture, any

1 member of the joint venture who believes that the terms of the
2 agreement as approved by the comptroller have not been complied
3 with may seek review and mediation of the agreement before the
4 comptroller. The request for review must be made in writing.

5 (i) If, after the award of a contract, a dispute arises
6 between the prime contractor and a subcontractor regarding
7 performance of work on or provision of services or supplies for the
8 eligible purchase, the prime contractor or subcontractor may seek
9 review and mediation of the issue before the comptroller. The
10 request for review must be made in writing.

11 (j) Not later than the 20th day after the date the
12 comptroller receives a request for review and if the dispute has not
13 been resolved informally among the parties, the comptroller shall
14 set a mediation date and provide written notice of the mediation
15 date to each interested party. The comptroller may make
16 recommendations in an attempt to resolve the dispute.

17 (k) If the mediation with the comptroller does not resolve
18 all disputes, the comptroller may refer the mediation proceedings
19 to a qualified outside mediator on consent of the interested
20 parties.

21 (l) A member of a joint venture who fails to comply with any
22 portion of this section, and whose failure to comply continues for a
23 period of at least 30 days after receiving written notice of the
24 noncompliance from the comptroller, is subject to any or all of the
25 following penalties:

26 (1) withholding of 10 percent of all future payments
27 for the eligible purchase until the comptroller determines the

1 member of the joint venture is in compliance with this section;

2 (2) withholding of all future payments under the
3 eligible purchase until the comptroller determines the member of
4 the joint venture is in compliance with this section;

5 (3) cancellation of the eligible purchase; and

6 (4) ineligibility for future contracts or
7 subcontracts with this state for one to five years from the date on
8 which the penalty is imposed.

9 SECTION 6. Section 2161.252, Government Code, is amended by
10 adding Subsection (c) to read as follows:

11 (c) A subcontracting plan must require the contractor to
12 accept bids, proposals, offers, or other applicable expressions
13 from historically underutilized businesses for not less than 10
14 working days after the date the contractor notifies the business of
15 the subcontracting opportunity. This subsection does not apply to
16 a professional services contract.

17 SECTION 7. Section 2254.002(2), Government Code, is amended
18 to read as follows:

19 (2) "Professional services" means services:

20 (A) within the scope of the practice, as defined
21 by state law, of:

22 (i) accounting;

23 (ii) architecture;

24 (iii) landscape architecture;

25 (iv) land surveying;

26 (v) medicine;

27 (vi) optometry;

- 1 (vii) professional engineering;
- 2 (viii) real estate appraising; or
- 3 (ix) professional nursing; or
- 4 (B) provided in connection with the professional
- 5 employment or practice of a person who is licensed or registered as:
- 6 (i) a certified public accountant;
- 7 (ii) an architect;
- 8 (iii) a landscape architect;
- 9 (iv) a land surveyor;
- 10 (v) a physician, including a surgeon;
- 11 (vi) an optometrist;
- 12 (vii) a professional engineer;
- 13 (viii) a state certified or state licensed
- 14 real estate appraiser; ~~or~~
- 15 (ix) a registered nurse; or
- 16 (x) an attorney.

17 SECTION 8. (a) Not later than December 1, 2011, the
18 comptroller of public accounts shall adopt the rules required to
19 implement the changes in law made by this Act.

20 (b) Chapters 2155 and 2161, Government Code, as amended by
21 this Act, apply only to a purchase for goods or services or a
22 contract entered into on or after January 1, 2012.

23 SECTION 9. This Act takes effect September 1, 2011.