88R9563 RDS-F

By:  Miles S.B. No. 1490

A BILL TO BE ENTITLED

AN ACT

relating to the state historically underutilized business program; creating a criminal offense.

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

SECTION 1.  Section 2161.001, Government Code, is amended by adding Subdivision (5) to read as follows:

(5)  "Commercially useful function" means responsibility for the execution of a distinct element of the work of a contract and performance, management, and supervision of the work involved, including:

(A)  negotiation of the terms of a contract or subcontract;

(B)  assumption of financial risk commensurate with a contract or subcontract;

(C)  acquisition of appropriate lines of credit or loans; or

(D)  fulfillment of the responsibilities of a joint venture partner under a joint venture agreement.

SECTION 2.  Section 2161.0015, Government Code, is amended to read as follows:

Sec. 2161.0015.  DETERMINING SIZE STANDARDS FOR HISTORICALLY UNDERUTILIZED BUSINESSES. To [~~The comptroller may establish size standards that a business may not exceed if it is to~~] be considered a historically underutilized business under this chapter:

(1)  the business owner may not have an individual personal net worth of more than $1.32 million; and

(2)  the business must:

(A)  meet the Small Business Administration's size standards for a small business for purposes of federal government procurement under 13 C.F.R. Section 121.401, et seq.; and

(B)  have an annual gross income of not more than $23.98 million. [~~In determining the size standards, the comptroller shall determine the size at which a business should be considered sufficiently large that the business probably does not significantly suffer from the effects of past discriminatory practices.~~]

SECTION 3.  Section 2161.002(c), Government Code, is amended to read as follows:

(c)  In adopting rules to administer this chapter, the comptroller shall adopt rules that are based on the results of the "Texas Department of Transportation Disparity Study 2019" prepared by Colette Holt & Associates [~~"State of Texas Disparity Study, A Report to the Texas Legislature as Mandated by H.B. 2626, 73rd Legislature, December 1994" (prepared by National Economic Research Associates, Inc.)~~]. The comptroller shall revise the rules in response to the findings of any updates of the study that are prepared on behalf of the state.

SECTION 4.  Section 2161.004(c), Government Code, is amended to read as follows:

(c)  Section 2161.003 and Subsections (a) and (b) of this section [~~do not~~] apply to a project or contract subject to Section 201.702, Transportation Code.

SECTION 5.  Section 2161.061, Government Code, is amended by amending Subsections (a) and (e) and adding Subsections (a-1), (a-2), and (a-3) to read as follows:

(a)  The comptroller shall certify and recertify historically underutilized businesses.

(a-1)  A certification or recertification under this section expires on the first anniversary of the date the certification or recertification was issued.

(a-2)  The comptroller may not initially certify a business as a historically underutilized business unless each owner of the business completes at least 32 hours of training provided by the comptroller or a local government or nonprofit organization approved by the comptroller to provide the training. The training must include information regarding:

(1)  the requirements of this chapter and rules adopted under this chapter; and

(2)  the programs available under 49 C.F.R. Part 26 and the requirements for participation in those programs.

(a-3)  The comptroller may not recertify a business as a historically underutilized business unless each owner of the business completes at least eight hours of continuing training provided by the comptroller or a local government or nonprofit organization approved by the comptroller to provide the continuing training.

(e)  A local government or a nonprofit organization that certifies historically underutilized businesses under Subsection (c) or that conducts a certification program described by and approved under Subsection (b) shall make available to the public an online searchable database containing information about historically underutilized businesses, minority business enterprises, women's business enterprises, and disadvantaged business enterprises certified by the local government or nonprofit organization, including:

(1)  the name of the business;

(2)  the contact person or owner of the business;

(3)  the address and telephone number of the business;

(4)  the type or category of business, including relevant capabilities of the business and the North American Industry Classification System codes for the business; [~~and~~]

(5)  the expiration date of the business's certification; and

(6)  the date of completion of training required under this section.

SECTION 6.  Sections 2161.062(b), (d), and (e), Government Code, are amended to read as follows:

(b)  The comptroller shall offer historically underutilized businesses assistance, [~~and~~] training, and continuing training regarding state procurement procedures.

(d)  The comptroller shall send each historically underutilized business [~~businesses~~] an orientation package on certification or recertification. The package shall include:

(1)  a certificate issued in the historically underutilized business's name;

(2)  a description of the significance and value of certification;

(3)  a list of state purchasing personnel;

(4)  information regarding electronic commerce opportunities;

(5)  information regarding the Texas Marketplace website; [~~and~~]

(6)  additional information about the state procurement process; and

(7)  the business's current training and continuing training status.

(e)  A state agency with a biennial budget that exceeds $10 million shall designate a staff member to serve as the historically underutilized businesses coordinator for the agency during the fiscal year. The procurement director may serve as the coordinator. In agencies that employ a historically underutilized businesses coordinator, the position of coordinator, within the agency's structure, must be at least equal to the position of procurement director. In addition to any other responsibilities, the coordinator shall:

(1)  coordinate training programs for the recruitment, training, and retention of historically underutilized businesses;

(2)  report required information to the comptroller annually; and

(3)  match historically underutilized businesses with key staff within the agency.

SECTION 7.  Section 2161.063(a), Government Code, is amended to read as follows:

(a)  The comptroller shall encourage state agencies to use historically underutilized businesses by:

(1)  working with state agencies to establish a statewide policy for increasing the use of historically underutilized businesses;

(2)  assisting state agencies in seeking historically underutilized businesses capable of supplying required goods or services;

(3)  assisting state agencies in identifying and advising historically underutilized businesses on the types of goods and services the agencies need; [~~and~~]

(4)  assisting state agencies in increasing the amount of business placed with historically underutilized businesses; and

(5)  assisting state agencies in identifying historically underutilized businesses that can perform commercially useful functions for agencies.

SECTION 8.  Section 2161.064, Government Code, is amended by adding Subsection (f) to read as follows:

(f)  The comptroller shall verify that each historically underutilized business listed in the directory is in full compliance with the training requirements under Section 2161.061.

SECTION 9.  Section 2161.065, Government Code, is amended by amending Subsection (a) and adding Subsection (c) to read as follows:

(a)  The comptroller shall design and oversee the implementation by state agencies of a mentor-protege program to foster long-term relationships between prime contractors and historically underutilized businesses and to increase the ability of historically underutilized businesses to contract with the state or to receive subcontracts under a state contract. Each state agency with a biennial appropriation that exceeds $10 million shall implement and require participation in the program designed by the comptroller.

(c)  The mentor-protege program under this section must be consistent with the program established under 49 C.F.R. Section 26.35.

SECTION 10.  Section 2161.066(d), Government Code, is amended to read as follows:

(d)  Each state agency that has a historically underutilized businesses coordinator shall:

(1)  design its own program and model the program to the extent appropriate on the program developed by the comptroller under this section; [~~and~~]

(2)  sponsor presentations by historically underutilized businesses at the agency; and

(3)  provide a method for a historically underutilized business to provide documentation through a state-approved source that the business is able to perform a commercially useful function in the industry for which the business is certified as a historically underutilized business, according to the North American Industry Classification System.

SECTION 11.  Section 2161.121(a), Government Code, is amended to read as follows:

(a)  The comptroller shall prepare a consolidated report that:

(1)  includes the number and dollar amount of contracts awarded and paid to historically underutilized businesses certified by the comptroller;

(2)  analyzes the relative level of opportunity for historically underutilized businesses for various categories of acquired goods and services; [~~and~~]

(3)  tracks, by vendor identification number and, to the extent allowed by federal law, by social security number, the graduation rates for historically underutilized businesses that grew to exceed the size standards determined by the comptroller; and

(4)  includes assurances by state agencies that the number and the dollar amounts of contracts awarded to historically underutilized businesses are properly calculated according to the level of participation each historically underutilized business performs for purposes of determining the amount that could be counted toward a disadvantaged business enterprise participation goal under 49 C.F.R. Section 26.55.

SECTION 12.  Sections 2161.122(b), (c), and (d), Government Code, are amended to read as follows:

(b)  A contractor or supplier awarded a contract by a state agency shall report to the agency the identity of each historically underutilized business to whom the contractor or supplier awarded a subcontract for the purchase of goods or services and certify that the historically underutilized business can perform a commercially useful function.

(c)  Each state agency shall report to the comptroller in accordance with Section 2161.125 the following information with regard to the expenditure of both treasury and nontreasury funds:

(1)  the total dollar amount of purchases and payments made under contracts awarded to historically underutilized businesses that could be counted toward a disadvantaged business enterprise participation goal under 49 C.F.R. Section 26.55;

(2)  the number of businesses participating in any issuance of state bonds by the agency;

(3)  the number of contracts awarded to businesses with regard to the agency's acquisition, construction, or equipping of a facility or implementation of a program; and

(4)  the number of bids, proposals, or other applicable expressions of interest made by historically underutilized businesses with regard to the agency's acquisition, construction, or equipping of a facility or implementation of a program.

(d)  A state agency participating in a group purchasing program shall send to the comptroller in the agency's report under Section 2161.121 a separate list of purchases from historically underutilized businesses that are made through the group purchasing program, including the dollar amount of each purchase allocated to the reporting agency that could be counted toward a disadvantaged business enterprise participation goal under 49 C.F.R. Section 26.55.

SECTION 13.  Sections 2161.123(a) and (d), Government Code, are amended to read as follows:

(a)  Each state agency, including the comptroller, that is required to have a strategic plan under Chapter 2056 shall include in its strategic plan a written plan for increasing the agency's use of historically underutilized businesses in purchasing and public works contracting and for monitoring the agency's use of historically underutilized businesses based on amounts that could be counted toward a disadvantaged business enterprise participation goal under 49 C.F.R. Section 26.55. The governing board of each university system or institution of higher education not included in a university system, other than a public junior college, shall prepare a written plan for increasing the use of historically underutilized businesses in purchasing and public works contracting by the system or institution.

(d)  The comptroller and the state auditor shall cooperate to develop procedures providing for random periodic monitoring of state agency compliance with this section. The state auditor shall report to the comptroller a state agency that is not complying with this section. In determining whether a state agency is making a good faith effort to comply, the state auditor shall consider whether the agency:

(1)  has adopted rules under Section 2161.003;

(2)  has used the comptroller's directory under Section 2161.064 and other resources to identify certified and qualified historically underutilized businesses that are able and available to contract with the agency;

(3)  made good faith, timely efforts to contact identified historically underutilized businesses regarding contracting opportunities;

(4)  conducted its procurement program in accordance with the good faith effort methodology set out in comptroller rules; and

(5)  established goals for contracting with historically underutilized businesses in each procurement category based on:

(A)  scheduled fiscal year expenditures; and

(B)  the availability of historically underutilized businesses in each category as determined by rules adopted under Section 2161.002.

SECTION 14.  Section 2161.125, Government Code, is amended to read as follows:

Sec. 2161.125.  CATEGORIZATION OF HISTORICALLY UNDERUTILIZED BUSINESSES; TRAINING INFORMATION. (a) The comptroller, in cooperation with each state agency reporting under this subchapter, shall categorize each historically underutilized business included in a report under this subchapter by sex, race, and ethnicity and by whether the business qualifies as a historically underutilized business because it is owned or owned, operated, and controlled, as applicable, wholly or partly by one or more veterans as defined by 38 U.S.C. Section 101(2) who have suffered at least a 20 percent service-connected disability as defined by 38 U.S.C. Section 101(16).

(b)  The report under Subsection (a) must also state whether the historically underutilized business owners have completed training and continuing training required by Section 2161.061 and whether the business can perform a commercially useful function.

SECTION 15.  Section 2161.181, Government Code, is amended to read as follows:

Sec. 2161.181.  GOALS FOR PURCHASES OF GOODS AND SERVICES. A state agency, including the comptroller, shall make a good faith effort to increase the contract awards for the purchase of goods or services that the agency expects to make during a fiscal year to historically underutilized businesses based on rules adopted by the comptroller to implement the disparity study described by Section 2161.002(c). The agency's efforts and achievement of its goals under this section must be measured based on amounts that could be counted toward a disadvantaged business enterprise participation goal under 49 C.F.R. Section 26.55.

SECTION 16.  Section 2161.182(a), Government Code, is amended to read as follows:

(a)  A state agency that contracts for a construction project, including a project under Section 2166.003, shall make a good faith effort to increase the construction contract awards that the agency expects to make during a fiscal year to historically underutilized businesses based on rules adopted by the comptroller to implement the disparity study described by Section 2161.002(c). The agency's efforts and achievement of its goals under this subsection must be measured based on amounts that could be counted toward a disadvantaged business enterprise participation goal under 49 C.F.R. Section 26.55.

SECTION 17.  Section 2161.231, Government Code, is amended by adding Subsection (a-1) to read as follows:

(a-1)  A person commits an offense if the person intentionally makes a false report under this subtitle regarding an award of a purchasing contract or public works contract to a historically underutilized business.

SECTION 18.  Section 2161.252, Government Code, is amended by adding Subsection (c) to read as follows:

(c)  A state agency may not approve a historically underutilized business subcontracting plan or award a contract to which the plan relates unless the plan has been approved by the agency's good faith effort review committee established under Section 2161.2521.

SECTION 19.  Subchapter F, Chapter 2161, Government Code, is amended by adding Section 2161.2521 to read as follows:

Sec. 2161.2521.  GOOD FAITH EFFORT REVIEW COMMITTEE. (a) A state agency that determines that there is a probability for subcontracting opportunities under Section 2161.252 shall establish a good faith effort review committee for the purpose of reviewing any subcontracting plans.

(b)  The committee shall consist of five members, including:

(1)  three members from the state historically underutilized business community;

(2)  one member from the state agency; and

(3)  one member from the prime contracting community.

SECTION 20.  Sections 2161.253(b) and (c), Government Code, are amended to read as follows:

(b)  To the extent that subcontracts are not contracted for as originally submitted in the historically underutilized business subcontracting plan, the contractor shall report to the state agency and the agency's good faith effort review committee all the circumstances that explain that fact and describe the good faith efforts made to find and subcontract with another historically underutilized business.

(c)  The state agency and the agency's good faith effort review committee shall audit the contractor's compliance with the historically underutilized business subcontracting plan. In determining whether the contractor made the required good faith effort, the agency may not consider the success or failure of the contractor to subcontract with historically underutilized businesses in any specific quantity. The agency's determination is restricted to considering factors indicating good faith.

SECTION 21.  Section 2161.065(b), Government Code, is repealed.

SECTION 22.  The changes in law made by this Act apply only to a contract for which the request for bids or proposals or other applicable expressions of interest, if applicable, is made public on or after the effective date of this Act.

SECTION 23.  This Act takes effect September 1, 2023.