

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

1 chapter:

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

4 (2) the business must:

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

9 (B) have an annual gross income of not more than
10 \$23.98 million. [~~In determining the size standards, the comptroller~~
11 ~~shall determine the size at which a business should be considered~~
12 ~~sufficiently large that the business probably does not~~
13 ~~significantly suffer from the effects of past discriminatory~~
14 ~~practices.]~~

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

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

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

1 (c) Section 2161.003 and Subsections (a) and (b) of this
2 section [~~do not~~] apply to a project or contract subject to Section
3 201.702, Transportation Code.

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

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

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

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

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

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

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

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

- 10 (1) the name of the business;
- 11 (2) the contact person or owner of the business;
- 12 (3) the address and telephone number of the business;
- 13 (4) the type or category of business, including
14 relevant capabilities of the business and the North American
15 Industry Classification System codes for the business; ~~and~~
- 16 (5) the expiration date of the business's
17 certification; and
- 18 (6) the date of completion of training required under
19 this section.

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

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

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

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

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

5 (3) a list of state purchasing personnel;

6 (4) information regarding electronic commerce
7 opportunities;

8 (5) information regarding the Texas Marketplace
9 website; ~~and~~

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

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

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

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

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

27 (3) match historically underutilized businesses with

1 key staff within the agency.

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

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

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

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

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

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

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

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

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

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

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

10 (c) The mentor-protege program under this section must be
11 consistent with the program established under 49 C.F.R. Section
12 26.35.

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

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

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

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

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

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

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

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

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

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

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

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

25 (b) A contractor or supplier awarded a contract by a state
26 agency shall report to the agency the identity of each historically
27 underutilized business to whom the contractor or supplier awarded a

1 subcontract for the purchase of goods or services and certify that
2 the historically underutilized business can perform a commercially
3 useful function.

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

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

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

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

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

20 (d) A state agency participating in a group purchasing
21 program shall send to the comptroller in the agency's report under
22 Section 2161.121 a separate list of purchases from historically
23 underutilized businesses that are made through the group purchasing
24 program, including the dollar amount of each purchase allocated to
25 the reporting agency that could be counted toward a disadvantaged
26 business enterprise participation goal under 49 C.F.R. Section
27 26.55.

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

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

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

23 (1) has adopted rules under Section 2161.003;

24 (2) has used the comptroller's directory under Section
25 2161.064 and other resources to identify certified and qualified
26 historically underutilized businesses that are able and available
27 to contract with the agency;

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

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

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

10 (A) scheduled fiscal year expenditures; and

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

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

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

27 (b) The report under Subsection (a) must also state whether

1 the historically underutilized business owners have completed
2 training and continuing training required by Section 2161.061 and
3 whether the business can perform a commercially useful function.

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

6 Sec. 2161.181. GOALS FOR PURCHASES OF GOODS AND SERVICES. A
7 state agency, including the comptroller, shall make a good faith
8 effort to increase the contract awards for the purchase of goods or
9 services that the agency expects to make during a fiscal year to
10 historically underutilized businesses based on rules adopted by the
11 comptroller to implement the disparity study described by Section
12 2161.002(c). The agency's efforts and achievement of its goals
13 under this section must be measured based on amounts that could be
14 counted toward a disadvantaged business enterprise participation
15 goal under 49 C.F.R. Section 26.55.

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

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

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

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

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

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

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

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

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

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

24 (2) one member from the state agency; and

25 (3) one member from the prime contracting community.

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

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

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

16 SECTION 21. Section [2161.065\(b\)](#), Government Code, is
17 repealed.

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

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