

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Department of Administration

RULE CITATION: 01 NCAC 05E .0101

**DEADLINE FOR RECEIPT: December 9, 2022**

***PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.***

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

*In (7), the rule requires “negotiating honestly”. The rule then describes when is made which indicates that the presumption can be overcome. This gets the reader back to what the agency intends by “honestly” which is subjective. Either define “honestly” or consider removing the adjective.*

*In (8), change “may” to shall”. In the alternative, the use of the word “may” indicates there may be other ways of satisfy the “assisting” element. If there are other ways are to be considered, either state them or define “assisting”.*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

William W. Peaslee  
Commission Counsel

Date submitted to agency: December 6, 2022

## SUBCHAPTER 05E – HISTORICALLY UNDERUTILIZED BUSINESS

### 01 NCAC 05E .0101 GOOD FAITH EFFORTS

Agencies shall require Vendors subcontracting all or part of a contract for the purchase of goods or services to undertake good faith efforts to recruit HUB participation when contracting with the State. Good faith efforts shall include at least five of the following:

- (1) Notify HUBs to be included in a response to a Solicitation at least 10 calendar days before the opportunity to respond to the Solicitation ends. The notification shall be made by electronic means and must include:
  - (a) a description of the Goods or Services being solicited;
  - (b) the date, time and location where Offers are to be submitted;
  - (c) the name of the individual within the company who shall be available to answer questions about the opportunity to participate in the response to the Solicitation;
  - (d) where Solicitation documents may be reviewed; and
  - (e) any special requirements that may exist, such as insurance, licenses, bonds and financial arrangements.
- (2) Making plans, Specifications and Requirements available to prospective HUBs at least 10 calendar days before the opportunity to respond to the Solicitation ends.
- (3) Dividing or combining elements of work into economically feasible units to facilitate HUB participation.
- (4) Working with minority trade, community, or similar organizations identified by the HUB Office that provide assistance in recruitment of HUBs.
- (5) Attending any pre-bid conferences or site visits provided for in the Solicitation.
- (6) Providing assistance in obtaining required bonding or insurance or providing alternatives for subcontractors.
- (7) Negotiating in good faith with interested HUBs. Any rejection of a HUB should have the reasons documented in writing.
- (8) Providing assistance to an otherwise qualified HUB in need of equipment, loan capital, lines of credit, or joint pay agreements to secure loans, supplies, or letters of credit, including waiving credit.
- (9) Assisting HUBs in obtaining the same unit pricing with the Vendor's suppliers.
- (10) Negotiating joint venture and partnership arrangements with HUBs to increase opportunities for HUB participation.
- (11) Providing quick pay agreements and policies to enable HUBs and suppliers to meet cash-flow demands.

*History Note: Authority G.S. 143-48.*

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Department of Administration

RULE CITATION: 01 NCAC 05E .0102

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In reviewing this Rule, the staff recommends the following changes be made:

*The Rule states which information the goal will be "based upon" but does not establish a formula or criteria to be applied. As written, the Secretary's determination would be subjective so long as it is based upon the data listed.*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

William W. Peaslee  
Commission Counsel

Date submitted to agency: December 6, 2022

**01 NCAC 05E .0102**      **HUB PARTICIPATION GOAL**

The Secretary shall set the statewide percentage goal for HUB participation biannually based upon the most recent disparity study commissioned by the HUB Office, the preceding year's HUB participation data, and the availability of HUB businesses by commodity code. The participation goal will be published on the NC Department of Administration website, [www.doa.nc.gov](http://www.doa.nc.gov), and in the yearly State of North Carolina Historically Underutilized Business Plan for Goods and Services.

*History Note: Authority G.S. 143-48; 143-53.*

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Department of Administration

RULE CITATION: 01 NCAC 05E .0103

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In reviewing this Rule, the staff recommends the following changes be made:

*In (b)(4) and (5), is the agency requiring compliance with the State Hub Plan?*

*Is the agency requiring compliance with the State Hub Plan in any rule?*

*If the agency is requiring compliance with the State Hub Plan, explain why the State Hub Plan has not been adopted pursuant to Chapter 150B of the General Statutes?*

*What happens if an agency is found to be out of compliance with the State Hub Plan?*

*In (b)(6), is the Secretary requiring agencies to work with the HUB Office? Or is this merely an instruction to the HUB Office?*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

William W. Peaslee  
Commission Counsel

Date submitted to agency: December 6, 2022

## CHAPTER 05 - PURCHASE AND CONTRACT

### SUBCHAPTER 05E – HISTORICALLY UNDERUTILIZED BUSINESS

#### **01 NCAC 05E .0103 OFFICE FOR HISTORICALLY UNDERUTILIZED BUSINESSES RESPONSIBILITIES**

(a) Interested businesses may register as a HUB in accordance with 01 NCAC 44A, STATEWIDE UNIFORM CERTIFICATION. The information provided by the HUB shall be used by the HUB Office to:

- (1) assist public entities in developing a HUB participation plan;
- (2) identify areas of work where there are HUBs;
- (3) create and maintain a list of certified HUB vendors; and
- (4) assess the need for technical assistance for HUBs.

(b) The HUB Office shall also:

- (1) Provide training and technical assistance to HUBs on how to identify and obtain State purchasing and contract opportunities through the Division of Purchase and Contract and other public entities.
- (2) Provide training and technical assistance to public entities on how to identify and obtain HUB participation on projects or contracts.
- (3) Develop relationships with North Carolina trade and professional organizations by providing periodic meetings, such as networking and information sessions, obtaining input and feedback regarding HUB issues, legislation, and policies to improve the ability of HUBs to participate in State purchases and contracts.
- (4) Collaborate with the Division of Purchase and Contract to monitor Agencies' compliance with the State HUB Plan for Goods and Services. Compliance monitoring will be conducted by reviewing quarterly spend reports and other procurement documentation provided by the agency upon written request by the HUB office, such as contracts, purchase orders, and responses to solicitations.
- (5) Notify Agencies in writing of the outcomes of any compliance review with the State HUB Plan for Goods and Services.
- (6) Work collaboratively with Agencies found to be out of compliance to create a corrective action plan.

*History Note: Authority G.S. 143-48; 143-49; 143-53; 143-128.4.*

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Department of Administration

RULE CITATION: 01 NCAC 05E .0104

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In reviewing this Rule, the staff recommends the following changes be made:

*In (b)(3), this is facially ambiguous. There are no objective criteria for determining which media is "likely" to inform "potential HUBs."*

*In (b)(5), specifically which documentation must be used in the evaluation? It appears that the only documentation which is required to be presented by the vendor is in 01 NCAC 05E .0105(a) (one of two affidavits). Is that it? If so, state so.*

*In (b)(5), is the agency evaluating only good faith efforts? What if a vendor meets the HUB participation goal in the absence of good faith efforts?*

*In (b)(6), who determines the "project specific goal" and what is the process?*

*In (c)(1), if the "HUB utilization commitments" are the same as the sworn statements in 01 NCAC 05E .0105? If so, state so. If not, define this term.*

*In (c)(1), is the agency merely to review for compliance? If the vendor is found to have not complied, what happens? Is it the agency's intention by this rule to prohibit payments to vendors found not to be in compliance with the HUB utilization commitments?*

*As was stated in the previous Request for Changes, in paragraph (d), this requirement is vague. What documentation is the agency required to produce to the HUB office?*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

William W. Peaslee  
Commission Counsel

Date submitted to agency: December 6, 2022

## CHAPTER 05 - PURCHASE AND CONTRACT

### SUBCHAPTER 05E – HISTORICALLY UNDERUTILIZED BUSINESS

#### 01 NCAC 05E .0104 AGENCY REQUIREMENTS

(a) The Agency shall develop and implement a HUB participation plan to identify HUBs that can provide Goods and Services and implement outreach efforts to encourage HUB participation. The plan shall include education, recruitment, and interaction between HUBs and non-HUBs.

(b) Before awarding a contract, the Agency shall:

- (1) Attend any pre-bid conference and explain the HUB participation goals and objectives of the State specific to the Agency.
- (2) Notify HUBs from the Agency's HUB vendor list or HUBs that have otherwise indicated interest in the type of work in the Solicitation at least 10 calendar days before the opportunity to respond to the Solicitation ends. The notification shall be made by electronic means and must include:
  - (A) a description of the work being solicited;
  - (B) the date, time, and location where Offers are to be submitted;
  - (C) the name of the Purchasing Officer or individual who will be available to answer questions;
  - (D) where Solicitation requirements may be reviewed; and
  - (E) any special requirements that may exist.
- (3) Utilize media likely to inform potential HUBs of the Solicitation being sought.
- (4) Maintain documentation of any contacts, correspondence, or conversation with HUB firms in accordance with 01 NCAC 05B .1903 and this Subchapter.
- (5) Evaluate documentation to determine that good faith efforts pursuant to 01 NCAC 05E .0101 has been achieved prior to recommendation of award.
- (6) Notify Vendors of the Agency's annual HUB participation goal or project specific participation goal.

(c) After a contract has been awarded, the Agency shall:

- (1) review Vendors' pay applications for compliance with HUB utilization commitments prior to payment; and
- (2) submit a report electronically to the HUB Office regarding payments made to HUBs.

(d) Provide documentation of compliance with this Rule to the HUB Office upon request, such as for a compliance review, complaint, investigation, or other inquiry.

*History Note: Authority G.S. 143-48; 143-49; 143-53; 143-128.4.*

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

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In reviewing this Rule, the staff recommends the following changes be made:

*In Paragraph (b), consider the following language:*

*(b) In the event that a vendor determines that any HUB identified in Subparagraph (a)(1) needs to be replaced, the vendor shall:*

- (1) Provide written notification to the agency and the HUB Office within five calendar days of said determination. The notification shall identify the HUB to be replaced and the circumstances and reasons why the vendor has made the determination; and*
- (2) The vendor shall select another HUB as a replacement or shall make good faith efforts in accordance with Rule .0101 of this Section to replace the HUB; and*
- (3) The vendor shall provide an affidavit in accordance with Paragraph (a) regarding the replacement of the HUB.*

*In Paragraph (c), isn't a vendor required to abide by Rule .0101 anyway? It is unclear what the agency is intending.*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

William W. Peaslee  
Commission Counsel

Date submitted to agency: December 6, 2022

TITLE 01 – DEPARTMENT OF ADMINISTRATION

CHAPTER 05 - PURCHASE AND CONTRACT

SUBCHAPTER 05E – HISTORICALLY UNDERUTILIZED BUSINESS

**01 NCAC 05E .0105      VENDOR REQUIREMENTS**

Vendors responding to Solicitations for the purchase of Goods and Services who intend to use a Subcontractor shall:

- (1)      Attend any scheduled pre-bid conference.
- (2)      Identify opportunities where HUBs may have an interest in providing Goods or Services.
- (3)      Identify the HUBs that will be utilized on the project with the corresponding total dollar value of the work they will perform.
- (4)      Provide one of the following to the Purchasing Agency:
  - (a)      an affidavit including a description of the work by HUBs, expressed as a percentage of the total Contract price, equal to or more than the HUB participation goal; or
  - (b)      an affidavit of all good faith efforts taken pursuant to Rule .0101 of this Section, if the percentage is not equal to the HUB participation goal. Failure to comply with the requirements of Item (4) of this Rule shall be grounds for rejection of the Offer and shall be handled in accordance with 01 NCAC 05B .0501.
- (5)      Submit notification for approval by the Purchasing Agency and the HUB Office within five calendar days of the replacement of a participating HUB. Notification shall be in writing to the contracted address stating the circumstances involved. The Vendor shall make good faith efforts in accordance with Rule .0101 of this Section to replace a participating HUB with another HUB.
- (6)      Make good faith efforts in accordance with Rule .0101 of this Section to solicit bids from HUBs should additional Goods or Services opportunities become available after the Contract is awarded.

*History Note:      Authority G.S. 143-48.*

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Department of Administration

RULE CITATION: 01 NCAC 05E .0106

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In reviewing this Rule, the staff recommends the following changes be made:

*Is (a) necessary pursuant to G.S. 150B-21.9? Does not G.S. 143-48.4(c) already address that only businesses certified as a HUB shall be counted as for Hub participation purposes? If the agency's intention is to require the HUB Office to certify qualifying businesses, a re-write should be considered. Further, as written, the rule states that "HUBs" (which by the definition of a HUB adopted in 01 NCAC 05A .0112 is already certified) shall be certified as a HUB. Does a HUB need to be certified twice?*

*In (b), strike "make a good faith effort by".*

*In (b), what are the consequences, if any, should an interested HUB fail to either "make a good faith effort" or accomplish all the 5 enumerated tasks?*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

William W. Peaslee  
Commission Counsel

Date submitted to agency: December 6, 2022

**SUBCHAPTER 05E – HISTORICALLY UNDERUTILIZED BUSINESS**

**01 NCAC 05E .0106 HISTORICALLY UNDERUTILIZED BUSINESS RESPONSIBILITIES**

(a) HUBs shall be certified or designated as HUB by the HUB Office to be counted toward HUB participation.

(b) HUB businesses shall make a good faith effort by:

- (1) attending the scheduled pre-bid conference;
- (2) responding when contacted by Purchasing Agencies;
- (3) attending training and outreach sessions given by Purchasing Agencies;
- (4) participating in training or other business development programs offered by Purchasing Agencies; or
- (5) negotiating in good faith with Purchasing Agencies.

*History Note:* Authority G.S. 143-48.