

Burgos, Alexander N

From: Peaslee, William W
Sent: Monday, November 21, 2022 1:33 PM
To: Burgos, Alexander N
Subject: FW: DOA Request for Changes 11102022
Attachments: 01 NCAC 05E .0101 with notice of text.docx; 01 NCAC 05E .0101.docx; 01 NCAC 05E .0102 with notice of text.docx; 01 NCAC 05E .0102.docx; 01 NCAC 05E .0103 with notice of test.docx; 01 NCAC 05E .0103.docx; 01 NCAC 05E .0104 with notice of text.docx; 01 NCAC 05E .0104.docx; 01 NCAC 05E .0105 with notice of text.docx; 01 NCAC 05E .0105.docx; 01 NCAC 05E .0106 with notice of text.docx; 01 NCAC 05E .0106.docx; 01 NCAC 05E .0112 with notice of text.docx; 11.2022 DOA Request for Changes.docx; 01 NCAC 05E .0112.docx

FYI

William W. Peaslee
Rules Review Commission Counsel / Legislative Liaison
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh NC, 27609
(984) 236-1939
Bill.Peaslee@oah.nc.gov

Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

From: Strong, Donya M <donya.strong@doa.nc.gov>
Sent: Thursday, November 10, 2022 4:52 PM
To: Rules, Oah <oah.rules@oah.nc.gov>; Peaslee, William W <bill.peaslee@oah.nc.gov>
Cc: Pfeiffer-Haynes, Haley <haley.pfeifferhaynes@doa.nc.gov>
Subject: DOA Request for Changes 11102022

Mr. Peaslee,

Attached to this message please find the NC Department of Administration's revised rules. In addition to the revised rules, I also have attached the Request for Changes document with the agency's responses in blue.

Thank you,

Donya Strong
General Counsel
NCDOA

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TITLE 01 – DEPARTMENT OF ADMINISTRATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Administration intends to adopt the rule cited as 01 NCAC 05E .0101.

Link to agency website pursuant to G.S. 150B-19.1(c): <https://ncadmin.nc.gov/about-doa/administrative-rules-review/proposed-rules-and-public-comment>

Proposed Effective Date: *December 1, 2022*

Public Hearing:

Date: *September 7, 2022*

Time: *10 a.m. - 12 p.m.*

Location: <https://ncgov.webex.com/ncgov/j.php?MTID=m6ec63d526b11aac916194686af01b366>

Join by meeting number Meeting number (access code): 2439 099 7809

Meeting password: c78sUA4SMsh

Reason for Proposed Action: *New rules were created to encourage and promote the use of historically underutilized businesses when purchasing goods and services on behalf of the State of North Carolina. Additionally, new definitions were added for further clarification.*

Comments may be submitted to: *Donya Strong, 116 W. Jones St., Raleigh, NC 27603; phone (984) 236-0003; email donya.strong@doa.nc.gov*

Comment period ends: *October 14, 2022*

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Fiscal impact. Does any rule or combination of rules in this notice create an economic impact? Check all that apply.

- State funds affected**
- Local funds affected**
- Substantial economic impact (\geq \$1,000,000)**
- Approved by OSBM**
- No fiscal note required**

1 01 NCAC 05A .0101 is adopted with changes as published in 37:04 NCR 311 as follows:

2
3 **SUBCHAPTER 05E – HISTORICALLY UNDERUTILIZED BUSINESS**

4
5 **01 NCAC 05E .0101 GOOD FAITH EFFORTS**

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

- 9 (1) Notifying HUBs to be included in a Solicitation about the opportunity to participate as a
10 subcontractor at least 10 calendar days before the opportunity to respond to the Solicitation ends.

11 The notification shall be made by electronic means and must include:

- 12 (a) a description of the Goods or Services being solicited;
13 (b) the date, time and location where Offers are to be submitted;
14 (c) the name of the individual within the company who shall be available to answer questions
15 about the opportunity to participate in the response to the Solicitation;
16 (d) where Solicitation documents may be reviewed; and
17 (e) any special requirements that may exist, such as insurance, licenses, bonds and financial
18 arrangements.

- 19 (2) Making plans, Specifications and Requirements available accessible to prospective HUBs for
20 review at least 10 calendar days before the opportunity to respond to the Solicitation ends.

- 21 (3) Dividing or combining elements of work into subcontracts economically feasible units as
22 determined by the Vendor to facilitate HUB participation.

- 23 (4) Working with minority trade, community, or similar organizations identified by the HUB Office
24 that provide assistance in recruitment of HUBs.

- 25 (5) Attending any pre-bid conferences or site visits provided for in the Solicitation.

- 26 (6) Providing assistance in obtaining required bonding or insurance or providing alternatives for
27 subcontractors.

- 28 (7) Negotiating in good faith with interested HUBs. HUBs. Any rejection of a HUB should have the
29 reasons documented in writing.

- 30 (8) Providing assistance to an Assisting an otherwise qualified HUB in need of in obtaining equipment,
31 loan capital, lines of credit, or joint pay agreements to secure loans, supplies, or letters of credit,
32 including waiving credit.

- 33 (9) Assisting HUBs in obtaining the same unit pricing with the Vendor's suppliers.

- 34 (10) Negotiating joint venture and partnership arrangements with HUBs to increase opportunities for
35 HUB participation.

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TITLE 01 – DEPARTMENT OF ADMINISTRATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Administration intends to adopt the rule cited as 01 NCAC 05E .0102.

Link to agency website pursuant to G.S. 150B-19.1(c): <https://ncadmin.nc.gov/about-doa/administrative-rules-review/proposed-rules-and-public-comment>

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- Approved by OSBM**
- No fiscal note required**

1 01 NCAC 05A .0102 is adopted with changes as published in 37:04 NCR 311 as follows:

2

3 **01 NCAC 05E .0102 HUB PARTICIPATION GOAL**

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

9

10 *History Note:* Authority G.S. ~~143-53~~; 143-53(a)(1); 143-53(a)(8);

11 Eff. December 1, 2022.

12

1 01 NCAC 05A .0102 is adopted with changes as published in 37:04 NCR 311 as follows:

2

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9

10 *History Note:* Authority G.S. ~~143-53~~; 143-53(a)(1); 143-53(a)(8);

11 Eff. December 1, 2022.

12

TITLE 01 – DEPARTMENT OF ADMINISTRATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Administration intends to adopt the rule cited as 01 NCAC 05E .0103.

Link to agency website pursuant to G.S. 150B-19.1(c): <https://ncadmin.nc.gov/about-doa/administrative-rules-review/proposed-rules-and-public-comment>

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- Approved by OSBM**
- No fiscal note required**

1 01 NCAC 05A .0103 is adopted with changes as published in 37:04 NCR 311-312 as follows:

2
3 **01 NCAC 05E .0103 OFFICE FOR HISTORICALLY UNDERUTILIZED BUSINESSES**
4 **RESPONSIBILITIES**

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

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

11 (b) The HUB Office shall also:

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

27
28 *History Note:* Authority G.S. 143-128.4(c); 143-48(a); 143-49(1); 143-49(3); 143-49(10); 143-49(11); 143-
29 53(a)(1);
30 Eff. December 1, 2022.
31

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29 53(a)(1);
30 Eff. December 1, 2022.
31

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- No fiscal note required**

1 01 NCAC 05A .0104 is adopted with changes as published in 37:04 NCR 312 as follows:

2
3 **01 NCAC 05E .0104 AGENCY REQUIREMENTS**

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

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

8 (1) Attend any pre-bid conference and explain the HUB participation goals and objectives of the State
9 specific to the Agency.

10 (2) Notify HUBs from the Agency's HUB vendor list or HUBs that have otherwise indicated interest in
11 the type of work in the Solicitation at least 10 calendar days before the opportunity to respond to the
12 Solicitation ends. The notification shall be made by electronic means and must include:

13 (A) a description of the work being solicited;

14 (B) the date, time, and location where Offers are to be submitted;

15 (C) the name of the Purchasing Officer or individual who will be available to answer questions;

16 (D) where Solicitation requirements may be reviewed; and

17 (E) any special requirements that may exist.

18 (3) Utilize media likely to inform potential HUBs of the Solicitation being sought.

19 (4) Maintain documentation of any contacts, correspondence, or conversation with HUB firms in
20 accordance with 01 NCAC 05B .1903 and this Subchapter.

21 (5) Evaluate documentation to determine that good faith efforts pursuant to 01 NCAC 05E .0101 has
22 been achieved prior to recommendation of award.

23 (6) Notify Vendors of the Agency's annual HUB participation goal or project specific participation goal.

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

25 (1) Review Vendors' pay applications for compliance with HUB utilization commitments prior to
26 payment; and

27 (2) Submit ~~a report~~ electronically to the HUB Office the percentage of contract payments that were paid
28 to HUBs.

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

31
32 *History Note:* Authority G.S. 143-48; 143-49; 143-53; 143-128.4; 143-128.4(c); 143-48(a); 143-53(a)(1);

33 Eff. December 1, 2022.

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32 *History Note:* Authority G.S. 143-48; 143-49; 143-53; 143-128.4; 143-128.4(c); 143-48(a); 143-53(a)(1);

33 Eff. December 1, 2022.

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1 01 NCAC 05A .0105 is adopted with changes as published in 37:04 NCR 312 as follows:

2
3 **01 NCAC 05E .0105 VENDOR REQUIREMENTS**

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

5 ~~(1) Attend any scheduled pre bid conference.~~

6 ~~(2) Identify opportunities where HUBs may have an interest in providing Goods or Services., based~~
7 ~~upon the Vendor's discretion as to whether subcontracting opportunities exist.~~

8 ~~(3) Identify the HUBs that will be utilized on the project with the corresponding total dollar value of~~
9 ~~the work they will perform, and submit this information to the procurement contracting office at the~~
10 ~~purchasing agency.~~

11 ~~(4)~~ Provide one of the following to the Purchasing Agency:

12 (a) an affidavit the HUBs that will be utilized on the project with the corresponding total dollar
13 value of the work they will perform, including a description of the work by HUBs,
14 expressed as a percentage of the total Contract price, equal to or more than the HUB
15 participation goal; or

16 (b) an affidavit of all good faith efforts taken pursuant to Rule .0101 of this Section, if the
17 percentage is not equal to the HUB participation goal. Failure to comply with the
18 requirements of subsection (a) of this Rule shall be grounds for rejection of the Offer and
19 shall be handled in accordance with 01 NCAC 05B .0501.

20 ~~(5)(2)~~ Submit notification for approval by the Purchasing Agency and the HUB Office within five calendar
21 days of the replacement of a participating HUB. Notification shall be in writing to the contracted
22 address stating the circumstances involved. The Vendor shall make good faith efforts in accordance
23 with Rule .0101 of this Section to replace a participating HUB with another HUB.

24 ~~(6)(3)~~ Make good faith efforts in accordance with Rule .0101 of this Section to solicit bids from HUBs
25 should additional Goods or Services opportunities become available after the Contract is awarded.

26
27 *History Note:* Authority G.S. ~~143-48 143-48(a); 143-53(a)(4);~~

28 ~~Eff. December 1, 2022.~~

29

1 01 NCAC 05A .0105 is adopted with changes as published in 37:04 NCR 312 as follows:

2
3 **01 NCAC 05E .0105 VENDOR REQUIREMENTS**

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

5 ~~(1) Attend any scheduled pre bid conference.~~

6 ~~(2) Identify opportunities where HUBs may have an interest in providing Goods or Services., based~~
7 ~~upon the Vendor's discretion as to whether subcontracting opportunities exist.~~

8 ~~(3) Identify the HUBs that will be utilized on the project with the corresponding total dollar value of~~
9 ~~the work they will perform, and submit this information to the procurement contracting office at the~~
10 ~~purchasing agency.~~

11 ~~(4)~~ Provide one of the following to the Purchasing Agency:

12 (a) an affidavit the HUBs that will be utilized on the project with the corresponding total dollar
13 value of the work they will perform, including a description of the work by HUBs,
14 expressed as a percentage of the total Contract price, equal to or more than the HUB
15 participation goal; or

16 (b) an affidavit of all good faith efforts taken pursuant to Rule .0101 of this Section, if the
17 percentage is not equal to the HUB participation goal. Failure to comply with the
18 requirements of subsection (a) of this Rule shall be grounds for rejection of the Offer and
19 shall be handled in accordance with 01 NCAC 05B .0501.

20 ~~(5)(2)~~ Submit notification for approval by the Purchasing Agency and the HUB Office within five calendar
21 days of the replacement of a participating HUB. Notification shall be in writing to the contracted
22 address stating the circumstances involved. The Vendor shall make good faith efforts in accordance
23 with Rule .0101 of this Section to replace a participating HUB with another HUB.

24 ~~(6)(3)~~ Make good faith efforts in accordance with Rule .0101 of this Section to solicit bids from HUBs
25 should additional Goods or Services opportunities become available after the Contract is awarded.

26
27 *History Note:* Authority G.S. ~~143-48 143-48(a); 143-53(a)(4);~~
28 ~~Eff. December 1, 2022.~~
29

TITLE 01 – DEPARTMENT OF ADMINISTRATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Administration intends to adopt the rule cited as 01 NCAC 05E .0106.

Link to agency website pursuant to G.S. 150B-19.1(c): <https://ncadmin.nc.gov/about-doa/administrative-rules-review/proposed-rules-and-public-comment>

Proposed Effective Date: *December 1, 2022*

Public Hearing:

Date: *September 7, 2022*

Time: *10 a.m. - 12 p.m.*

Location: <https://ncgov.webex.com/ncgov/j.php?MTID=m6ec63d526b11aac916194686af01b366>

Join by meeting number Meeting number (access code): 2439 099 7809

Meeting password: c78sUA4SMsh

Reason for Proposed Action: *New rules were created to encourage and promote the use of historically underutilized businesses when purchasing goods and services on behalf of the State of North Carolina. Additionally, new definitions were added for further clarification.*

Comments may be submitted to: *Donya Strong, 116 W. Jones St., Raleigh, NC 27603; phone (984) 236-0003; email donya.strong@doa.nc.gov*

Comment period ends: *October 14, 2022*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 984-236-1850.

Fiscal impact. Does any rule or combination of rules in this notice create an economic impact? Check all that apply.

- State funds affected**
- Local funds affected**
- Substantial economic impact (\geq \$1,000,000)**
- Approved by OSBM**
- No fiscal note required**

1 01 NCAC 05A .0106 is adopted with changes as published in 37:04 NCR 312-313 as follows:

2

3 **01 NCAC 05E .0106 HISTORICALLY UNDERUTILIZED BUSINESS RESPONSIBILITIES**

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

5 (b) ~~HUB businesses~~ HUBs interested in bidding shall make a good faith effort by:

6 (1) attending the scheduled pre-bid conference;

7 (2) responding when contacted by Purchasing Agencies;

8 (3) attending training and outreach sessions given by Purchasing Agencies;

9 (4) participating in training or other business development programs offered by Purchasing Agencies;

10 or

11 (5) negotiating in good faith with Purchasing Agencies.

12

13 *History Note:* Authority G.S. ~~143-48-143-128.4 (c); 143-48(a);~~

14 Eff. December 1, 2022.

1 01 NCAC 05A .0106 is adopted with changes as published in 37:04 NCR 312-313 as follows:

2

3 **01 NCAC 05E .0106 HISTORICALLY UNDERUTILIZED BUSINESS RESPONSIBILITIES**

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

5 (b) ~~HUB businesses~~ HUBs interested in bidding shall make a good faith effort by:

6 (1) attending the scheduled pre-bid conference;

7 (2) responding when contacted by Purchasing Agencies;

8 (3) attending training and outreach sessions given by Purchasing Agencies;

9 (4) participating in training or other business development programs offered by Purchasing Agencies;

10 or

11 (5) negotiating in good faith with Purchasing Agencies.

12

13 *History Note:* Authority G.S. ~~143-48-143-128.4 (c); 143-48(a);~~

14 Eff. December 1, 2022.

TITLE 01 – DEPARTMENT OF ADMINISTRATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Administration intends to amend the rule cited as 01 NCAC 05A .0112.

Link to agency website pursuant to G.S. 150B-19.1(c): <https://ncadmin.nc.gov/about-doa/administrative-rules-review/proposed-rules-and-public-comment>

Proposed Effective Date: *December 1, 2022*

Public Hearing:

Date: *September 7, 2022*

Time: *10 a.m. - 12 p.m.*

Location: <https://ncgov.webex.com/ncgov/j.php?MTID=m6ec63d526b11aac916194686af01b366>

Join by meeting number Meeting number (access code): 2439 099 7809

Meeting password: c78sUA4SMsh

Reason for Proposed Action: *New rules were created to encourage and promote the use of historically underutilized businesses when purchasing goods and services on behalf of the State of North Carolina. Additionally, new definitions were added for further clarification.*

Comments may be submitted to: *Donya Strong, 116 W. Jones St., Raleigh, NC 27603; phone (984) 236-0003; email donya.strong@doa.nc.gov*

Comment period ends: *October 14, 2022*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 984-236-1850.

Fiscal impact. Does any rule or combination of rules in this notice create an economic impact? Check all that apply.

- State funds affected**
- Local funds affected**
- Substantial economic impact (\geq \$1,000,000)**
- Approved by OSBM**
- No fiscal note required**

1 01 NCAC 05A .0112 is amended with changes as published in 37:04 NCR 308-310 as follows:

2
3 **CHAPTER 05 - PURCHASE AND CONTRACT**

4
5 **SUBCHAPTER 05A – DIVISION OF PURCHASE AND CONTRACT**

6
7 **01 NCAC 05A .0112 DEFINITIONS**

8 For the purpose of this Chapter:

- 9 (1) "Agency" or "Agencies" means all departments, institutions, boards, commissions, universities,
10 community colleges, or other units of the State subject to G.S. 143, Article 3, unless specifically
11 exempted by statute.
- 12 (2) "Best and Final Offer" ("BAFO") is a document that memorializes the details of Negotiations
13 between the State and a Vendor and mutually modifies the Vendor's Offer.
- 14 (3) "Best Value Procurement" shall have the same meaning as in G.S. 143-135.9.
- 15 (4) "Bid Value Benchmark" or "General Delegation" means the maximum authorized expenditure set
16 pursuant to G.S. 116-31.10, G.S. 115D-58.14, or G.S. 143-52(a) and 143-53.1 for which an Agency
17 may contract to purchase Goods or Services without obtaining prior approval for the purchase from
18 the Division.
- 19 (5) "Clarification" means communications between the State and a Vendor that occur after receipt of a
20 Vendor's Offer made for the purpose of eliminating irregularities, informalities, or apparent clerical
21 mistakes in an Offer. A Clarification may also be used in order for the State to interpret an Offer or
22 Offers or to facilitate the State's evaluation of all Offers. A Clarification shall not be used to cure
23 material deficiencies in an Offer, alter the scope of an Offer, or to negotiate.
- 24 (6) "Consultant Services" means contracted work or tasks performed by a Vendor or independent
25 contractor possessing specialized knowledge, experience, expertise, and professional qualifications
26 to investigate a Purchasing Agency's defined problems or projects and to provide counsel, review,
27 analysis, or advice in formulating or implementing improvements in programs or Services. This
28 includes improvements related to the organization, planning, directing, control, evaluation, and
29 operation of a program, Agency or department.
- 30 (7) "Competition" in purchasing exists when the available market for the Goods or Services to be
31 acquired consists of more than one Responsible Vendor that is qualified and willing to submit an
32 Offer.
- 33 (8) "Contract" means any type of agreement entered into by Agencies, regardless of what it may be
34 titled or called, setting out the obligations of the parties concerning a Procurement of Goods or
35 Services.
- 36 (9) "Contract Term" means the time period in which a Contract is active and in effect.

- 1 (10) "Deficiency" means either a failure to meet a stated Requirement or a combination of weaknesses
2 in an Offer that increases the risk that a Vendor will be unable to meet its contractual obligations.
- 3 (11) "Division" means the Division of Purchase and Contract.
- 4 (12) "Electronic" means electrical, digital, magnetic, optical, electromagnetic, or any other similar
5 technology.
- 6 (13) "Electronic Bid System" means the Division's Electronic system used variously to advertise
7 Solicitations, notify Vendors, conduct Reverse Auctions, and post Contract awards.
- 8 (14) "Emergency Situations" means unforeseen circumstances as stated in G.S. 143-57, that endanger
9 lives, property, or the continuation of a vital program such as those essential for health or safety, as
10 determined by the Purchasing Agency Director, and that can be rectified only by immediate
11 purchases or rental of Goods or Services.
- 12 (15) "Extension" means an additional Contract Term not provided for in the Contract that is mutually
13 agreed to by the State and all Vendor parties in a Contract amendment.
- 14 (16) "Goods" means any tangible property, including all equipment, materials, supplies, and
15 commodities. Where the printing is not the predominant aspect of a service contract, acquisition of
16 printing shall be considered the purchase of Goods under these Rules.
- 17 (17) "Goods Contract" means any agreement involving the Procurement of Goods from a Vendor, but
18 that may also have ancillary Services aspects.
- 19 (18) "HUB" means Historically Underutilized Business as defined in G.S. 143-128.4 and certified in
20 accordance with G.S. 143-48.4.
- 21 (19) "HUB Office" means the North Carolina Department of Administration Office for Historically
22 Underutilized Business.
- 23 (20) "Initial Contract Term" means the initial period for performance under a Contract after which the
24 Contract will either terminate or be extended pursuant to a Renewal or Extension.
- 25 (21) "Negotiation" means oral or written communications in a waived or open competitive Procurement
26 between the State and Vendor undertaken with the intent of allowing a Vendor to revise its Offer.
27 Revisions may apply to price, schedule, technical requirements, or other terms of the proposed
28 Contract. Negotiations are specific to each Offer and shall be conducted to maximize the State's
29 ability to obtain best value based on the evaluation factors set forth in the Solicitation. Negotiations
30 shall be memorialized in any resulting Contract.
- 31 (22) "Offer" means a bid, proposal, BAFO, or other proposition submitted in response to any Solicitation,
32 Negotiation, or other approved acquisition process, as well as responses to solution-based
33 Solicitations and government-Vendor partnerships.
- 34 (23) "Personal Services Contract" has the same definition as in G.S. 143-48.6(b). A Personal Services
35 Contract is a type of Service Contract.
- 36 (24) "Pressing Need" means a need arising from unforeseen causes as stated in G.S. 143-57, outside the
37 State's control, including delay by contractors, delay in transportation, breakdown in machinery, or

1 unanticipated volume of work, as determined by the Purchasing Agency Director, which can be
2 satisfied only by immediate purchase or rental of Goods or Services.

3 (25) "Price" means the amount paid by the State to a Vendor for Goods or Services.

4 (26) "Procurement" means the process of acquiring Goods or Services.

5 (27) "Professional Services" means the contracted work or tasks performed by a Vendor or independent
6 contractor possessing specialized knowledge, experience, expertise, and professional qualifications,
7 who provides ongoing Services. A Professional Services Contract is a type of Service Contract.

8 (28) "Progressive Award" means an award for portions of a definite quantity requirement to more than
9 one Vendor. Each portion is for a definite quantity and the sum of the portions is the total quantity
10 procured. A Progressive Award may be in the Purchasing Agency's best interest when awards to
11 more than one Vendor for different amounts of the same item are needed to obtain the total quantity
12 or the time or times of delivery required.

13 (29) "Public Funds" means any amount received, held, disbursed, or otherwise subject to or accounted
14 for in accordance with the State Budget Act and amounts used to acquire Goods and Services that
15 are required to be purchased in accordance with Article 3 of Chapter 143 of the General Statutes.

16 (30) "Purchasing Agency" or "Purchaser" means the Agency that issues a purchase order or otherwise
17 acquires Goods or Services through a purchasing process.

18 (31) "Recalled Bid" means a Bid that is rescinded by the Vendor after the bid opening but prior to a
19 contract being awarded.

20 (32) "Renewal" means an optional term provided for in the Contract that can be exercised as of right by
21 the State.

22 (33) "Responsible Vendor" means a Vendor who demonstrates in its Offer that it has the capability to
23 perform the requirements of the Solicitation.

24 (34) "Responsive Offer" means an Offer that conforms to the Requirements of the Solicitation.

25 (35) "Requirement" is a provision of a Solicitation and any resulting Contract that prescribes the nature
26 or details of a standard, process, or procedure that must be complied with by the Vendor before any
27 further evaluation of the Offer is conducted by the State.

28 (36) "Sealed Offer" means an Offer that remains unopened until the public opening time stated in the
29 Solicitation.

30 (37) "Secretary" means the Secretary of the North Carolina Department of Administration.

31 (38) "Service Contract" means any agreement for compensation involving Services and requiring a
32 particular or specialized knowledge, experience, expertise, or similar capabilities in the Vendor.
33 Contracts for Consultant Services, Professional Services, and Personal Services are also examples
34 of a Service Contract. A Service Contract may also involve the ancillary purchase of Goods.

35 (39) "Services" means the tasks and duties undertaken by a Vendor in a Service Contract to fulfill the
36 Requirements and Specifications of the Contract.

- 1 (40) "Signature" means a manual autograph, an Electronic identifier, or an Electronic authentication
2 technique, that is intended by the person using it to have the same force and effect as a manual
3 signature.
- 4 (41) "Small Purchase" means the purchase of Goods and Services not covered by a Term Contract where
5 the expenditure of Public Funds including Extensions and Renewals is equal to or less than the Small
6 Purchase Benchmark amount, pursuant to 01 NCAC 05B .0301.
- 7 (42) "Solicitation" means to request or invite Vendor Offers, or to request information regarding the
8 acquisition of Goods and Services, through the use of Solicitation Documents.
- 9 (43) "Solicitation Documents" means a Written or Electronic (a) Invitation for Bids (IFB); (b) Request
10 for Quotations (RFQ); (c) Request for Proposals (RFP); (d) Best and Final Offer (BAFO); or (e)
11 other documents to invite Vendor Offers, including all mutually agreed attachments and items
12 incorporated by reference therein.
- 13 (44) "Specification" means any description of the physical or functional characteristics of, or the nature
14 of, the Goods or Services to be procured.
- 15 (45) "SPO" means the State Procurement Officer who is also the Director of the Division.
- 16 (46) "Subcontractor" means a firm under contract with the prime contractor/vendor for supplying
17 materials, labor, or materials and labor.
- 18 (47) "Tabulation" means a list of Vendors submitting Offers in response to a particular Solicitation and,
19 if applicable, the prices offered as allowed under G.S. 143-52(a).
- 20 (48) "Technical Offer" means a proposal by a Vendor in response to the Solicitation, absent the price
21 content.
- 22 (49) "Term Contract" is a binding agreement between purchaser and seller to buy and sell certain Goods
23 or Services at certain prices, for an agreed Contract Term, and under specific terms and conditions.
- 24 (50) "Total Cost of Ownership" means a summation of all purchase, operating, and related costs to be
25 expended during the projected lifetime of a Good or Service or both.
- 26 (51) "Vendor" means a contractor, supplier, bidder, company, independent contractor, firm, corporation,
27 partnership, individual, or other entity submitting a response to a Solicitation.
- 28 (52) "Voided Bid" means an Electronic bid that was submitted by a Vendor in connection with an
29 Electronic Solicitation that has been cancelled, the bids voided and not opened electronically.
- 30 (53) "Weakness" means a flaw in the Offer that increases the risk of unsuccessful contract performance.
- 31 (54) "Withdrawal" or "Withdrawn Bid" means a Bid that is rescinded by the Vendor prior to the bid
32 opening.
- 33 (55) "Written" or "Writing" means a communication recorded in a medium of expression that can be
34 preserved, read, retrieved, and reproduced for an indefinite period of time, including information in
35 a form that is electronically transmitted and stored.
- 36

37 *History Note: Authority G.S. 143-48.3; 143-48.6; 143-49; 143-52; 143-53; 143-53.1; 143-57; 143-135.9;*

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Eff. February 1, 1996;
Amended Eff. April 1, 1999;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23,
2016;
Amended Eff. December 1, 2022; March 1, 2022; November 1, 2021; October 1, 2019.

1 01 NCAC 05A .0112 is amended with changes as published in 37:04 NCR 308-310 as follows:

2
3 **CHAPTER 05 - PURCHASE AND CONTRACT**

4
5 **SUBCHAPTER 05A – DIVISION OF PURCHASE AND CONTRACT**

6
7 **01 NCAC 05A .0112 DEFINITIONS**

8 For the purpose of this Chapter:

- 9 (1) "Agency" or "Agencies" means all departments, institutions, boards, commissions, universities,
10 community colleges, or other units of the State subject to G.S. 143, Article 3, unless specifically
11 exempted by statute.
- 12 (2) "Best and Final Offer" ("BAFO") is a document that memorializes the details of Negotiations
13 between the State and a Vendor and mutually modifies the Vendor's Offer.
- 14 (3) "Best Value Procurement" shall have the same meaning as in G.S. 143-135.9.
- 15 (4) "Bid Value Benchmark" or "General Delegation" means the maximum authorized expenditure set
16 pursuant to G.S. 116-31.10, G.S. 115D-58.14, or G.S. 143-52(a) and 143-53.1 for which an Agency
17 may contract to purchase Goods or Services without obtaining prior approval for the purchase from
18 the Division.
- 19 (5) "Clarification" means communications between the State and a Vendor that occur after receipt of a
20 Vendor's Offer made for the purpose of eliminating irregularities, informalities, or apparent clerical
21 mistakes in an Offer. A Clarification may also be used in order for the State to interpret an Offer or
22 Offers or to facilitate the State's evaluation of all Offers. A Clarification shall not be used to cure
23 material deficiencies in an Offer, alter the scope of an Offer, or to negotiate.
- 24 (6) "Consultant Services" means contracted work or tasks performed by a Vendor or independent
25 contractor possessing specialized knowledge, experience, expertise, and professional qualifications
26 to investigate a Purchasing Agency's defined problems or projects and to provide counsel, review,
27 analysis, or advice in formulating or implementing improvements in programs or Services. This
28 includes improvements related to the organization, planning, directing, control, evaluation, and
29 operation of a program, Agency or department.
- 30 (7) "Competition" in purchasing exists when the available market for the Goods or Services to be
31 acquired consists of more than one Responsible Vendor that is qualified and willing to submit an
32 Offer.
- 33 (8) "Contract" means any type of agreement entered into by Agencies, regardless of what it may be
34 titled or called, setting out the obligations of the parties concerning a Procurement of Goods or
35 Services.
- 36 (9) "Contract Term" means the time period in which a Contract is active and in effect.

- 1 (10) "Deficiency" means either a failure to meet a stated Requirement or a combination of weaknesses
2 in an Offer that increases the risk that a Vendor will be unable to meet its contractual obligations.
- 3 (11) "Division" means the Division of Purchase and Contract.
- 4 (12) "Electronic" means electrical, digital, magnetic, optical, electromagnetic, or any other similar
5 technology.
- 6 (13) "Electronic Bid System" means the Division's Electronic system used variously to advertise
7 Solicitations, notify Vendors, conduct Reverse Auctions, and post Contract awards.
- 8 (14) "Emergency Situations" means unforeseen circumstances as stated in G.S. 143-57, that endanger
9 lives, property, or the continuation of a vital program such as those essential for health or safety, as
10 determined by the Purchasing Agency Director, and that can be rectified only by immediate
11 purchases or rental of Goods or Services.
- 12 (15) "Extension" means an additional Contract Term not provided for in the Contract that is mutually
13 agreed to by the State and all Vendor parties in a Contract amendment.
- 14 (16) "Goods" means any tangible property, including all equipment, materials, supplies, and
15 commodities. Where the printing is not the predominant aspect of a service contract, acquisition of
16 printing shall be considered the purchase of Goods under these Rules.
- 17 (17) "Goods Contract" means any agreement involving the Procurement of Goods from a Vendor, but
18 that may also have ancillary Services aspects.
- 19 (18) "HUB" means Historically Underutilized Business as defined in G.S. 143-128.4 and certified in
20 accordance with G.S. 143-48.4.
- 21 (19) "HUB Office" means the North Carolina Department of Administration Office for Historically
22 Underutilized Business.
- 23 (20) "Initial Contract Term" means the initial period for performance under a Contract after which the
24 Contract will either terminate or be extended pursuant to a Renewal or Extension.
- 25 (21) "Negotiation" means oral or written communications in a waived or open competitive Procurement
26 between the State and Vendor undertaken with the intent of allowing a Vendor to revise its Offer.
27 Revisions may apply to price, schedule, technical requirements, or other terms of the proposed
28 Contract. Negotiations are specific to each Offer and shall be conducted to maximize the State's
29 ability to obtain best value based on the evaluation factors set forth in the Solicitation. Negotiations
30 shall be memorialized in any resulting Contract.
- 31 (22) "Offer" means a bid, proposal, BAFO, or other proposition submitted in response to any Solicitation,
32 Negotiation, or other approved acquisition process, as well as responses to solution-based
33 Solicitations and government-Vendor partnerships.
- 34 (23) "Personal Services Contract" has the same definition as in G.S. 143-48.6(b). A Personal Services
35 Contract is a type of Service Contract.
- 36 (24) "Pressing Need" means a need arising from unforeseen causes as stated in G.S. 143-57, outside the
37 State's control, including delay by contractors, delay in transportation, breakdown in machinery, or

1 unanticipated volume of work, as determined by the Purchasing Agency Director, which can be
2 satisfied only by immediate purchase or rental of Goods or Services.

3 (25) "Price" means the amount paid by the State to a Vendor for Goods or Services.

4 (26) "Procurement" means the process of acquiring Goods or Services.

5 (27) "Professional Services" means the contracted work or tasks performed by a Vendor or independent
6 contractor possessing specialized knowledge, experience, expertise, and professional qualifications,
7 who provides ongoing Services. A Professional Services Contract is a type of Service Contract.

8 (28) "Progressive Award" means an award for portions of a definite quantity requirement to more than
9 one Vendor. Each portion is for a definite quantity and the sum of the portions is the total quantity
10 procured. A Progressive Award may be in the Purchasing Agency's best interest when awards to
11 more than one Vendor for different amounts of the same item are needed to obtain the total quantity
12 or the time or times of delivery required.

13 (29) "Public Funds" means any amount received, held, disbursed, or otherwise subject to or accounted
14 for in accordance with the State Budget Act and amounts used to acquire Goods and Services that
15 are required to be purchased in accordance with Article 3 of Chapter 143 of the General Statutes.

16 (30) "Purchasing Agency" or "Purchaser" means the Agency that issues a purchase order or otherwise
17 acquires Goods or Services through a purchasing process.

18 (31) "Recalled Bid" means a Bid that is rescinded by the Vendor after the bid opening but prior to a
19 contract being awarded.

20 (32) "Renewal" means an optional term provided for in the Contract that can be exercised as of right by
21 the State.

22 (33) "Responsible Vendor" means a Vendor who demonstrates in its Offer that it has the capability to
23 perform the requirements of the Solicitation.

24 (34) "Responsive Offer" means an Offer that conforms to the Requirements of the Solicitation.

25 (35) "Requirement" is a provision of a Solicitation and any resulting Contract that prescribes the nature
26 or details of a standard, process, or procedure that must be complied with by the Vendor before any
27 further evaluation of the Offer is conducted by the State.

28 (36) "Sealed Offer" means an Offer that remains unopened until the public opening time stated in the
29 Solicitation.

30 (37) "Secretary" means the Secretary of the North Carolina Department of Administration.

31 (38) "Service Contract" means any agreement for compensation involving Services and requiring a
32 particular or specialized knowledge, experience, expertise, or similar capabilities in the Vendor.
33 Contracts for Consultant Services, Professional Services, and Personal Services are also examples
34 of a Service Contract. A Service Contract may also involve the ancillary purchase of Goods.

35 (39) "Services" means the tasks and duties undertaken by a Vendor in a Service Contract to fulfill the
36 Requirements and Specifications of the Contract.

- 1 (40) "Signature" means a manual autograph, an Electronic identifier, or an Electronic authentication
2 technique, that is intended by the person using it to have the same force and effect as a manual
3 signature.
- 4 (41) "Small Purchase" means the purchase of Goods and Services not covered by a Term Contract where
5 the expenditure of Public Funds including Extensions and Renewals is equal to or less than the Small
6 Purchase Benchmark amount, pursuant to 01 NCAC 05B .0301.
- 7 (42) "Solicitation" means to request or invite Vendor Offers, or to request information regarding the
8 acquisition of Goods and Services, through the use of Solicitation Documents.
- 9 (43) "Solicitation Documents" means a Written or Electronic (a) Invitation for Bids (IFB); (b) Request
10 for Quotations (RFQ); (c) Request for Proposals (RFP); (d) Best and Final Offer (BAFO); or (e)
11 other documents to invite Vendor Offers, including all mutually agreed attachments and items
12 incorporated by reference therein.
- 13 (44) "Specification" means any description of the physical or functional characteristics of, or the nature
14 of, the Goods or Services to be procured.
- 15 (45) "SPO" means the State Procurement Officer who is also the Director of the Division.
- 16 (46) "Subcontractor" means a firm under contract with the prime contractor/vendor for supplying
17 materials, labor, or materials and labor.
- 18 (47) "Tabulation" means a list of Vendors submitting Offers in response to a particular Solicitation and,
19 if applicable, the prices offered as allowed under G.S. 143-52(a).
- 20 (48) "Technical Offer" means a proposal by a Vendor in response to the Solicitation, absent the price
21 content.
- 22 (49) "Term Contract" is a binding agreement between purchaser and seller to buy and sell certain Goods
23 or Services at certain prices, for an agreed Contract Term, and under specific terms and conditions.
- 24 (50) "Total Cost of Ownership" means a summation of all purchase, operating, and related costs to be
25 expended during the projected lifetime of a Good or Service or both.
- 26 (51) "Vendor" means a contractor, supplier, bidder, company, independent contractor, firm, corporation,
27 partnership, individual, or other entity submitting a response to a Solicitation.
- 28 (52) "Voided Bid" means an Electronic bid that was submitted by a Vendor in connection with an
29 Electronic Solicitation that has been cancelled, the bids voided and not opened electronically.
- 30 (53) "Weakness" means a flaw in the Offer that increases the risk of unsuccessful contract performance.
- 31 (54) "Withdrawal" or "Withdrawn Bid" means a Bid that is rescinded by the Vendor prior to the bid
32 opening.
- 33 (55) "Written" or "Writing" means a communication recorded in a medium of expression that can be
34 preserved, read, retrieved, and reproduced for an indefinite period of time, including information in
35 a form that is electronically transmitted and stored.
- 36

37 *History Note: Authority G.S. 143-48.3; 143-48.6; 143-49; 143-52; 143-53; 143-53.1; 143-57; 143-135.9;*

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Eff. February 1, 1996;
Amended Eff. April 1, 1999;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23,
2016;
Amended Eff. December 1, 2022; March 1, 2022; November 1, 2021; October 1, 2019.

Request for Changes Pursuant to N.C. Gen. Stat. § 150B-21.10

Staff reviewed these Rules to ensure that each Rule is within the agency's statutory authority, reasonably necessary, clear and unambiguous, and adopted in accordance with Part 2 of the North Carolina Administrative Procedure Act. Following review, staff has issued this document that may request changes pursuant to G.S. 150B-21.10 from your agency or ask clarifying questions.

The imposition of a question implies that the rule as written is unclear or there is some ambiguity. If the request includes questions and you do not understand the question, please contact the reviewing attorney to discuss. Failure to respond may result in a staff opinion recommending objection.

Staff may suggest the agency "consider" an idea or language in this document. This is in no way a formal request that the agency adopt the idea or language but rather is offered merely for consideration which the agency may find preferable and clarifying.

To properly submit rewritten rules, please refer to the following Rules in the NC Administrative Code:

- Rule 26 NCAC 02C .0108 – The Rule addresses general formatting.
- Rule 26 NCAC 02C .0404 – The Rule addresses changing the introductory statement.
- Rule 26 NCAC 02C .0405 – The Rule addresses properly formatting changes made after publication in the NC Register.

Note the following general instructions:

1. You must submit the revised rule via email to oah.rules@oah.nc.gov. The electronic copy must be saved as the official rule name (XX NCAC XXXX).
2. For rules longer than one page, insert a page number.
3. Use line numbers; if the rule spans more than one page, have the line numbers reset at one for each page.
4. Do not use track changes. Make all changes using manual strikethroughs, underlines and highlighting.
5. You cannot change just one part of a word. For example:
 - Wrong: "~~a~~Association"
 - Right: "~~association~~ Association"
6. Treat punctuation as part of a word. For example:
 - Wrong: "day, ~~and~~"
 - Right: "~~day,~~ day, and"
7. Formatting instructions and examples may be found at:
www.ncoah.com/rules/examples.html

If you have any questions regarding proper formatting of edits after reviewing the rules and examples, please contact the reviewing attorney.

William W. Peaslee
Commission Counsel

Date submitted to agency: November 2, 2022

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: November 10, 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:

Generally, to the Rule: The Rule is not properly formatted. Please see 26 NCAC 02C .0108(1)(f).

The rule has been reformatted according to 26 NCAC 02C .0108(1)(f).

Generally, to the Rule: The agency cites as its authority G.S. 143-48. Please identify with specificity which part or parts of G.S. 143-48 authorizes the adoption of this Rule.

G.S. 143-48(a) provides in pertinent part that “Policy. - It is the policy of this State to encourage and promote the use of small contractors, minority contractors, physically handicapped contractors, and women contractors in State purchasing of goods and services. All State agencies, institutions and political subdivisions shall cooperate with the Department of Administration and all other State agencies, institutions and political subdivisions in efforts to encourage the use of small contractors, minority contractors, physically handicapped contractors, and women contractors in achieving the purpose of this Article.”

G.S. 143-53(a)(4) authorizes the Secretary of Administration to adopt rules prescribing the items and quantities, conditions and procedures, governing the acquisition of goods and services which may be delegated to departments, institutions and agencies.

In (1), the sentence is unclear. How is the determination made which HUBs are “to be included in a response to a Solicitation”? Must the Vendor notify the HUBs 10 days in advance, or the HUB present its offer to the Vendor 10 days in advance?

Revised for clarity. The Vendor can determine which HUB certified business it wants to solicit as part of its response. The Vendor must notify the HUBs 10 days prior to the bid date.

William W. Peaslee
Commission Counsel

Date submitted to agency: November 2, 2022

In (2), what constitutes “available”? Does available include coming by the Vendor’s office during normal business hours? Must they be sent to the HUB in a particular format?

Revised. Plans, Specifications, and Requirements are considered available when they are made accessible for review by HUB firms. The rule is meant to be flexible so that Vendors may use various means for making the bid specifications available to HUBs. It is generally expected that Vendors will accomplish this by e-mailing the information to HUBs that they are aware of or have a history of working with, but this is not the only way in which they can satisfy this requirement.

In (3), “economically feasible units” is an undefined phrase. How will compliance be determined? What criteria will be used?

Revised to simplify.

In (4), what criteria and process will the HUB Office use to determine which organizations qualify for “identification”? What is the agency’s authority to establish the identification process? How will Vendors be made aware of the HUB Office’s determinations?

Identification of the organizations is an informal, inclusive process that grows out of the networking function of the HUB Office that identifies organizations that share the mission of increasing participation of HUBs. The list is publicly available on the Department of Administration’s website at <https://ncadmin.nc.gov/businesses/historically-underutilized-businesses-hub/business-resources/business-services>. It is updated whenever the HUB Office becomes aware of additional organizations that help with the recruitment of HUBs.

The Department of Administration’s authority comes from the following:

G.S. 143-48(a) provides in pertinent part that “All State agencies, institutions and political subdivisions shall cooperate with the Department of Administration and all other State agencies, institutions and political subdivisions in efforts to encourage the use of small contractors, minority contractors, physically handicapped contractors, and women contractors in achieving the purpose of this Article.”

G.S. 143-128.4 (c) gives the Department of Administration the power, duty, and authority to administer a statewide program for historically underutilized businesses. G.S. 143-53(a)(1) authorizes the Secretary of Administration to adopt rules governing the routine and procedure to be followed in the canvassing of bids and the awarding of contracts.

In (6), what constitutes “assistance”? How will that determination be made and using what criteria?

Revised. Assistance means providing support, such as networking, providing connections with lending institutions, insurance agents or potential partners. Providing evidence of an action that has occurred will meet these criteria. The rules

William W. Peaslee
Commission Counsel

Date submitted to agency: November 2, 2022

were designed with flexibility to give Vendors options to meet the standard and allow ease of compliance while encouraging the use of HUBs.

In (7), the agency lists “negotiating in good faith” as one of the efforts which can be used in satisfying the “good faith efforts” requirement of the Rule. How will the agency determine whether a Vendor has negotiated in good faith? What criteria will be used? How is a Vendor going to know when it has satisfied the “good faith effort” standard in its negotiating? As written, this is ambiguous and subjective.

The Vendor is deemed to have satisfied the good faith efforts requirement of this rule when it fulfills five of the eleven requirements and provides documentation for each. The Vendor satisfies the good faith effort standard when it provides evidence of the actions it took to negotiate with HUBs. The rules were designed with flexibility to give Vendors options to meet the standard and allow ease of compliance while encouraging the use of HUBs.

In (8), what constitutes “assistance”? How will that determination be made and using what criteria?

Revised. Assistance means providing support, such as equipment, loan capital, lines of credit, or joint pay agreements. Providing evidence that such an action has occurred will meet these criteria. The rules were designed with flexibility to give Vendors options to meet the standard and allow ease of compliance while encouraging the use of HUBs.

In (9), what constitutes “assisting”? How will that determination be made and using what criteria?

Assistance means providing support that facilitates obtaining the same unit pricing with the Vendor’s suppliers. Providing evidence that such an action has occurred will meet these criteria. The rules were designed with flexibility to give Vendors options to meet the standard and allow ease of compliance while encouraging the use of HUBs.

In (11), “Quick pay agreements and policies” is an undefined term. By what process will the agency determine whether an agreement or policy satisfies this standard?

Revised. The rules were designed with flexibility to give Vendors options to meet the standard and allow ease of compliance while encouraging the use of HUBs.

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: November 2, 2022

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

AGENCY: North Carolina Department of Administration

RULE CITATION: 01 NCAC 05E .0102

DEADLINE FOR RECEIPT: November 10, 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:

Generally, to the Rule: The Rule is not properly formatted. Please see 26 NCAC 02C .0108(1)(f).

The rule has been reformatted according to 26 NCAC 02C .0108(1)(f).

Generally, to the Rule: The agency cites as its authority G.S. 143-53. Please identify with specificity which part or parts of G.S. 143-53 authorizes the adoption of this Rule.

G.S. 143-53(a)(1) authorizes the Secretary of Administration to adopt rules governing the routine and procedure to be followed in the canvassing of bids and the awarding of contracts. G.S. 143-53(a)(8) states that the Secretary may provide the conditions under which bids may be rejected in whole or in part.

Generally, to the Rule: Why is this Rule necessary pursuant to G.S. 150B-21.9? Please see G.S. 150B-2(8a), a.

This rule is necessary to implement G.S. § 143-48(a), which states that it is the policy of the State of North Carolina to encourage and promote the use of historically underutilized businesses when procuring goods and services for the State. The statute requires that all State agencies, institutions, and political subdivisions cooperate with the Department of Administration (“the Department”) in efforts to encourage the use of these firms in the procurement of goods and services. The proposed rules are designed to operationalize the State’s policy in the procurement of goods and services by setting an annual HUB participation goal. G.S. 143-128.4 (c) gives the Department of Administration the power, duty, and authority to administer a statewide program for historically underutilized businesses. This rule explains in detail the varied roles the Office of Historically Underutilized Businesses plays beyond certification in the administration of the statewide program referenced in G.S. 143-128.4(c). Thus, the rule is necessary pursuant to G.S. 150B-21.9.

William W. Peaslee
Commission Counsel

Date submitted to agency: November 2, 2022

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: November 2, 2022

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

AGENCY: North Carolina Department of Administration

RULE CITATION: 01 NCAC 05E .0103

DEADLINE FOR RECEIPT: November 10, 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:

Generally, to the Rule: The Rule is not properly formatted. Please see 26 NCAC 02C .0108(1)(f).

The rule has been reformatted according to 26 NCAC 02C .0108(1)(f).

Generally, to the Rule: The agency cites as its authority G.S. 143-48, 49, 53 and 128.4. Please identify with specificity the language in those statutes which authorizes the adoption of this Rule.

G.S. 143-48(a) provides in pertinent part that “All State agencies, institutions and political subdivisions shall cooperate with the Department of Administration and all other State agencies, institutions and political subdivisions in efforts to encourage the use of small contractors, minority contractors, physically handicapped contractors, and women contractors in achieving the purpose of this Article.”

G.S. 143-128.4 (c) gives the Department of Administration the power, duty, and authority to administer a statewide program for historically underutilized businesses. G.S. 143-53(a)(1) authorizes the Secretary of Administration to adopt rules governing the routine and procedure to be followed in the canvassing of bids and the awarding of contracts. G.S. 143-53(a)(8) states that the Secretary may provide the conditions under which bids may be rejected in whole or in part.

G.S. 143-49, sections 1, 3, 10, and 11, give the Secretary of Administration the power and authority to: canvass sources of supply, including sources of goods with recycled content, and to purchase or to contract for the purchase, lease and lease-purchase of all goods required by the State government, or any of its departments, institutions or agencies under competitive bidding or other suitable means authorized by the Secretary; purchase or to contract for, by sealed, competitive bidding or other suitable means authorized by the Secretary; monitor and enforce the terms and conditions of statewide term contracts; and to develop rules, regulations, and procedures specifying the manner in which departments, agencies, and institutions of the State shall monitor and enforce agency term and non-term contracts.

William W. Peaslee
Commission Counsel

Date submitted to agency: November 2, 2022

Generally, to the Rule: Why is this Rule necessary pursuant to G.S. 150B-21.9? Please see G.S. 150B-2(8a), a.

This rule is necessary to implement G.S. § 143-48(a), which states that it is the policy of the State of North Carolina to encourage and promote the use of historically underutilized businesses when procuring goods and services for the State. The statute requires that all State agencies, institutions, and political subdivisions cooperate with the Department of Administration (“the Department”) in efforts to encourage the use of these firms in the procurement of goods and services. The proposed rules are designed to operationalize the State’s policy in the procurement of goods and services by setting an annual HUB participation goal. G.S. 143-128.4 (c) gives the Department of Administration the power, duty, and authority to administer a statewide program for historically underutilized businesses. This rule explains in detail the varied roles the Office of Historically Underutilized Businesses plays beyond certification in the administration of the statewide program referenced in G.S. 143-128.4(c). Thus, the rule is necessary pursuant to G.S. 150B-21.9.

In (b)(4) & (6): What is the agency’s authority to require “compliance” with the “State HUB Plan”?

The Purchase and Contract Division conducts compliance reviews under G.S. 143-49(2), which gives the Secretary of Administration the power and authority to establish and enforce specifications which apply to all goods and services purchased or leased for the use of state government or any of its departments, agencies, or institutions.

In (b)(4) & (6): If state agencies are required to comply with the State Hub Plan, has the State HUB Plan been adopted pursuant to Chapter 150B?

The State HUB Plan has not been adopted.

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

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

AGENCY: North Carolina Department of Administration

RULE CITATION: 01 NCAC 05E .0104

DEADLINE FOR RECEIPT: November 10, 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:

Generally, to the Rule: The Rule is not properly formatted. Please see 26 NCAC 02C .0108(1)(f).

The rule has been reformatted according to 26 NCAC 02C .0108(1)(f).

Generally, to the Rule: The agency cites as its authority G.S. 143-48, 49, 53 and 128.4. Please identify with specificity the language in those statutes which authorize the Secretary to compel other Agencies in (a), (b), and (c).

G.S. 143-48(a) provides in pertinent part that “All State agencies, institutions and political subdivisions shall cooperate with the Department of Administration and all other State agencies, institutions and political subdivisions in efforts to encourage the use of small contractors, minority contractors, physically handicapped contractors, and women contractors in achieving the purpose of this Article.”

G.S. 143-128.4 (c) gives the Department of Administration the power, duty, and authority to administer a statewide program for historically underutilized businesses. G.S. 143-53(a)(1) authorizes the Secretary of Administration to adopt rules governing the routine and procedure to be followed in the canvassing of bids and the awarding of contracts.

In (b)(2), are agencies required to have an “Agency Hub vendor list”?

Agencies are not required to have an “Agency HUB vendor list.” Over time, agencies may develop a list of HUBs they work with regularly or that they have become aware of for providing goods or services relevant to the agency’s procurement needs. There is a statewide listing of certified HUBs. The list is public, updated regularly, and available on the HUB website.

In(c)(1), what are “HUB utilization commitments”?

William W. Peaslee
Commission Counsel

Date submitted to agency: November 2, 2022

A HUB utilization commitment is the forecast the Vendor makes regarding its HUB use on a contract.

In (c)(2), this requirement is vague. What information must the report contain?

Revised.

In (d), this requirement is vague. What documentation is the agency required to produce to the HUB office?

Revised. The same as above.

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: November 2, 2022

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

AGENCY: North Carolina Department of Administration

RULE CITATION: 01 NCAC 05E .0105

DEADLINE FOR RECEIPT: November 10, 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:

Generally, to the Rule: The Rule is not properly formatted. Please see 26 NCAC 02C .0108(1)(f).

The rule has been reformatted according to 26 NCAC 02C .0108(1)(f).

Generally, to the Rule: The agency cites as its authority G.S. 143-48. Please identify with specificity the language in G.S. 143-48 which authorizes the Secretary to adopt this Rule.

G.S. 143-48(a) provides in pertinent part that “All State agencies, institutions and political subdivisions shall cooperate with the Department of Administration and all other State agencies, institutions and political subdivisions in efforts to encourage the use of small contractors, minority contractors, physically handicapped contractors, and women contractors in achieving the purpose of this Article.”

G.S. 143-53(a)(4) authorizes the Secretary of Administration to adopt rules prescribing the items and quantities, conditions and procedures, governing the acquisition of goods and services which may be delegated to departments, institutions and agencies.

In (b)(2), are agencies required to have an “Agency Hub vendor list”?

Agencies are not required to have an Agency HUB vendor list. Over time, agencies often develop a list of HUBs they work with regularly. There is a statewide listing of certified HUBs. The list is public and available on the HUB website. There is a statewide HUB vendor list that is maintained by the HUB office. This list is publicly available on the HUB office website.

In (2), how are Vendors to identify the “opportunities”?

William W. Peaslee
Commission Counsel

Date submitted to agency: November 2, 2022

Revised. Vendors identify opportunities based on their scope of work and determine whether subcontracting opportunities exist.

In (3), how will the Vendors identify the HUBs? Is there a form Vendors are required to use? To whom do they give this information?

Vendors are not required to use a particular form. Vendors will submit this information with their proposal submittal, and it goes to the procurement contracting office at the purchasing agency.

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: November 2, 2022

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

AGENCY: North Carolina Department of Administration

RULE CITATION: 01 NCAC 05E .0106

DEADLINE FOR RECEIPT: November 10, 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:

Generally, to the Rule: The Rule is not properly formatted. Please see 26 NCAC 02C .0108(1)(f).

The rule has been reformatted according to 26 NCAC 02C .0108(1)(f).

Generally, to the Rule: The agency cites as its authority G.S. 143-48. Please identify with specificity the language in G.S. 143-48 which authorizes the Secretary to adopt this Rule.

G.S. 143-48(a) provides in pertinent part that “All State agencies, institutions and political subdivisions shall cooperate with the Department of Administration and all other State agencies, institutions and political subdivisions in efforts to encourage the use of small contractors, minority contractors, physically handicapped contractors, and women contractors in achieving the purpose of this Article.”
Further, G.S. 143-128.4 (c) gives the Department of Administration the power, duty, and authority to administer a statewide program for historically underutilized businesses.

Is (a) necessary pursuant to G.S. 150B-21.9? Is not the Department of Administration already required to certify HUBs pursuant to G.S. 143-128.4 (c)(3)? Is not the designation of the HUB Office as the certifying division not a decision internal to the Department? Please see G.S. 150B-2(8a), a.

The rule is necessary. The rule in (a) does not require the Department of Administration to certify HUBs. It states that only businesses that have been certified as HUBs by the HUB office will count toward HUB participation. G.S. 143-128.4(e) is a similar provision in the realm of state construction, and this provision is meant to ensure parallel treatment for state procurement of goods and services.

William W. Peaslee
Commission Counsel

Date submitted to agency: November 2, 2022

In (b), as written, HUBs are required to make a good faith effort without regard to their interest in bidding. Is that the agency's intention?

Revised to specify the rule applies to HUBs who have an interest in bidding.

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: November 2, 2022

Burgos, Alexander N

From: Peaslee, William W
Sent: Wednesday, November 16, 2022 11:31 AM
To: Strong, Donya M
Cc: Burgos, Alexander N
Subject: 01 NCAC 05A .0112, 01 NCAC 05E .0101, .0102, .0103, .0104, .0105, and .0106
Attachments: 11.2022 Administration Staff Opinion 01 NCAC 05A .0112, 01 NCAC 05E .0101, .0102, .0103, .0104, .0105, .0106.doc

Good morning,

Attached please find the staff opinion on the above captioned rules which will be considered at the Rules Review Commission meeting Thursday, November 17, 2022.

If you have any questions or concerns please do not hesitate to contact me.

William W. Peaslee
Rules Review Commission Counsel / Legislative Liaison
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh NC, 27609
(984) 236-1939
Bill.Peaslee@oah.nc.gov

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DOA Request for Changes

PW

Peaslee, William W

To: Strong, Donya M

Cc: Burgos, Alexander N; Pfeiffer-Haynes, Haley

👍 ↩ ⏪ ⏩ ⋮

Wed 11/2/2022 3:33 AM



11.2022 DOA Request for Ch... ⌵

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I'm the attorney who reviewed the Rules submitted by the North Carolina Department of Administration for the November 2022 RRC meeting. The RRC will formally review these Rules at its meeting on Thursday, November 17, 2022, at 9:00 a.m. The meeting will be a hybrid of in-person and WebEx attendance, and an evite should be sent to you as we get closer to the meeting. If there are any other representatives from your agency who will want to attend virtually, let me know prior to the meeting, and we will get evites out to them as well.

Please submit the revised Rules and forms to me via email, no later than 5 p.m. on November 10, 2022.

In the meantime, please let me know if you have any questions or concerns.

William W. Peaslee**Rules Review Commission Counsel / Legislative Liaison**

Office of Administrative Hearings

1711 New Hope Church Road

Raleigh NC, 27609

(984) 236-1939

Bill.Peaslee@oah.nc.gov

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