

## 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 rules cited as 01 NCAC 05E .0101-.0106 and amend the rule cited as 01 NCAC 05A .0112.*

### CHAPTER 05 - PURCHASE AND CONTRACT

#### SUBCHAPTER 05A – DIVISION OF PURCHASE AND CONTRACT

##### 01 NCAC 05A .0112 DEFINITIONS

For the purpose of this Chapter:

- (1) "Agency" or "Agencies" means all departments, institutions, boards, commissions, universities, community colleges, or other units of the State subject to G.S. 143, Article 3, unless specifically exempted by statute.
- (2) "Best and Final Offer" ("BAFO") is a document that memorializes the details of Negotiations between the State and a Vendor and mutually modifies the Vendor's Offer.
- (3) "Best Value Procurement" shall have the same meaning as in G.S. 143-135.9.
- (4) "Bid Value Benchmark" or "General Delegation" means the maximum authorized expenditure set 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 may contract to purchase Goods or Services without obtaining prior approval for the purchase from the Division.
- (5) "Clarification" means communications between the State and a Vendor that occur after receipt of a Vendor's Offer made for the purpose of eliminating irregularities, informalities, or apparent clerical mistakes in an Offer. A Clarification may also be used in order for the State to interpret an Offer or Offers or to facilitate the State's evaluation of all Offers. A Clarification shall not be used to cure material deficiencies in an Offer, alter the scope of an Offer, or to negotiate.
- (6) "Consultant Services" means contracted work or tasks performed by a Vendor or independent contractor possessing specialized knowledge, experience, expertise, and professional qualifications to investigate a Purchasing Agency's defined problems or projects and to provide counsel, review, analysis, or advice in formulating or implementing improvements in programs or Services. This includes improvements related to the organization, planning, directing, control, evaluation, and operation of a program, Agency or department.
- (7) "Competition" in purchasing exists when the available market for the Goods or Services to be acquired consists of more than one Responsible Vendor that is qualified and willing to submit an Offer.
- (8) "Contract" means any type of agreement entered into by Agencies, regardless of what it may be titled or called, setting out the obligations of the parties concerning a Procurement of Goods or Services.
- (9) "Contract Term" means the time period in which a Contract is active and in effect.
- (10) "Deficiency" means either a failure to meet a stated Requirement or a combination of weaknesses in an Offer that increases the risk that a Vendor will be unable to meet its contractual obligations.
- (11) "Division" means the Division of Purchase and Contract.
- (12) "Electronic" means electrical, digital, magnetic, optical, electromagnetic, or any other similar technology.
- (13) "Electronic Bid System" means the Division's Electronic system used variously to advertise Solicitations, notify Vendors, conduct Reverse Auctions, and post Contract awards.
- (14) "Emergency Situations" means unforeseen circumstances as stated in G.S. 143-57, that endanger lives, property, or the continuation of a vital program such as those essential for health or safety, as determined by the Purchasing Agency Director, and that can be rectified only by immediate purchases or rental of Goods or Services.
- (15) "Extension" means an additional Contract Term not provided for in the Contract that is mutually agreed to by the State and all Vendor parties in a Contract amendment.
- (16) "Goods" means any tangible property, including all equipment, materials, supplies, and commodities. Where the printing is not the predominant aspect of a service contract, acquisition of printing shall be considered the purchase of Goods under these Rules.

- (17) "Goods Contract" means any agreement involving the Procurement of Goods from a Vendor, but that may also have ancillary Services aspects.
- (18) "HUB" means Historically Underutilized Business as defined in G.S. 143-128.4 and certified in accordance with G.S. 143-48.4.
- (19) "HUB Office" means the North Carolina Department of Administration Office for Historically Underutilized Business.
- ~~(18)~~(20) "Initial Contract Term" means the initial period for performance under a Contract after which the Contract will either terminate or be extended pursuant to a Renewal or Extension.
- ~~(19)~~(21) "Negotiation" means oral or written communications in a waived or open competitive Procurement between the State and Vendor undertaken with the intent of allowing a Vendor to revise its Offer. Revisions may apply to price, schedule, technical requirements, or other terms of the proposed Contract. Negotiations are specific to each Offer and shall be conducted to maximize the State's ability to obtain best value based on the evaluation factors set forth in the Solicitation. Negotiations shall be memorialized in any resulting Contract.
- ~~(20)~~(22) "Offer" means a bid, proposal, BAFO, or other proposition submitted in response to any Solicitation, Negotiation, or other approved acquisition process, as well as responses to solution-based Solicitations and government-Vendor partnerships.
- ~~(21)~~(23) "Personal Services Contract" has the same definition as in G.S. 143-48.6(b). A Personal Services Contract is a type of Service Contract.
- ~~(22)~~(24) "Pressing Need" means a need arising from unforeseen causes as stated in G.S. 143-57, outside the State's control, including delay by contractors, delay in transportation, breakdown in machinery, or unanticipated volume of work, as determined by the Purchasing Agency Director, which can be satisfied only by immediate purchase or rental of Goods or Services.
- ~~(23)~~(25) "Price" means the amount paid by the State to a Vendor for Goods or Services.
- ~~(28)~~(26) "Procurement" means the process of acquiring Goods or Services.
- ~~(25)~~(27) "Professional Services" means the contracted work or tasks performed by a Vendor or independent contractor possessing specialized knowledge, experience, expertise, and professional qualifications, who provides ongoing Services. A Professional Services Contract is a type of Service Contract.
- ~~(26)~~(28) "Progressive Award" means an award for portions of a definite quantity requirement to more than one Vendor. Each portion is for a definite quantity and the sum of the portions is the total quantity procured. A Progressive Award may be in the Purchasing Agency's best interest when awards to more than one Vendor for different amounts of the same item are needed to obtain the total quantity or the time or times of delivery required.
- ~~(27)~~(29) "Public Funds" means any amount received, held, disbursed, or otherwise subject to or accounted for in accordance with the State Budget Act and amounts used to acquire Goods and Services that are required to be purchased in accordance with Article 3 of Chapter 143 of the General Statutes.
- ~~(28)~~(30) "Purchasing Agency" or "Purchaser" means the Agency that issues a purchase order or otherwise acquires Goods or Services through a purchasing process.
- ~~(29)~~(31) "Recalled Bid" means a Bid that is rescinded by the Vendor after the bid opening but prior to a contract being awarded.
- ~~(30)~~(32) "Renewal" means an optional term provided for in the Contract that can be exercised as of right by the State.
- ~~(31)~~(33) "Responsible Vendor" means a Vendor who demonstrates in its Offer that it has the capability to perform the requirements of the Solicitation.
- ~~(32)~~(34) "Responsive Offer" means an Offer that conforms to the Requirements of the Solicitation.
- ~~(33)~~(35) "Requirement" is a provision of a Solicitation and any resulting Contract that prescribes the nature or details of a standard, process, or procedure that must be complied with by the Vendor before any further evaluation of the Offer is conducted by the State.
- ~~(34)~~(36) "Sealed Offer" means an Offer that remains unopened until the public opening time stated in the Solicitation.
- ~~(35)~~(37) "Secretary" means the Secretary of the North Carolina Department of Administration.
- ~~(36)~~(38) "Service Contract" means any agreement for compensation involving Services and requiring a particular or specialized knowledge, experience, expertise, or similar capabilities in the Vendor. Contracts for Consultant Services, Professional Services, and Personal Services are also examples of a Service Contract. A Service Contract may also involve the ancillary purchase of Goods.

- ~~(37)~~(39) "Services" means the tasks and duties undertaken by a Vendor in a Service Contract to fulfill the Requirements and Specifications of the Contract.
- ~~(38)~~(40) "Signature" means a manual autograph, an Electronic identifier, or an Electronic authentication technique, that is intended by the person using it to have the same force and effect as a manual signature.
- ~~(39)~~(41) "Small Purchase" means the purchase of Goods and Services not covered by a Term Contract where the expenditure of Public Funds including Extensions and Renewals is equal to or less than the Small Purchase Benchmark amount, pursuant to 01 NCAC 05B .0301.
- ~~(40)~~(42) "Solicitation" means to request or invite Vendor Offers, or to request information regarding the acquisition of Goods and Services, through the use of Solicitation Documents.
- ~~(41)~~(43) "Solicitation Documents" means a Written or Electronic (a) Invitation for Bids (IFB); (b) Request for Quotations (RFQ); (c) Request for Proposals (RFP); (d) Best and Final Offer (BAFO); or (e) other documents to invite Vendor Offers, including all mutually agreed attachments and items incorporated by reference therein.
- ~~(42)~~(44) "Specification" means any description of the physical or functional characteristics of, or the nature of, the Goods or Services to be procured.
- ~~(43)~~(45) "SPO" means the State Procurement Officer who is also the Director of the Division.
- ~~(46)~~ "Subcontractor" means a firm under contract with the prime contractor/vendor for supplying materials, labor, or materials and labor.
- ~~(44)~~(47) "Tabulation" means a list of Vendors submitting Offers in response to a particular Solicitation and, if applicable, the prices offered as allowed under G.S. 143-52(a).
- ~~(45)~~(48) "Technical Offer" means a proposal by a Vendor in response to the Solicitation, absent the price content.
- ~~(46)~~(49) "Term Contract" is a binding agreement between purchaser and seller to buy and sell certain Goods or Services at certain prices, for an agreed Contract Term, and under specific terms and conditions.
- ~~(47)~~(50) "Total Cost of Ownership" means a summation of all purchase, operating, and related costs to be expended during the projected lifetime of a Good or Service or both.
- ~~(48)~~(51) "Vendor" means a contractor, supplier, bidder, company, independent contractor, firm, corporation, partnership, individual, or other entity submitting a response to a Solicitation.
- ~~(49)~~(52) "Voided Bid" means an Electronic bid that was submitted by a Vendor in connection with an Electronic Solicitation that has been cancelled, the bids voided and not opened electronically.
- ~~(50)~~(53) "Weakness" means a flaw in the Offer that increases the risk of unsuccessful contract performance.
- ~~(51)~~(54) "Withdrawal" or "Withdrawn Bid" means a Bid that is rescinded by the Vendor prior to the bid opening.
- ~~(52)~~(55) "Written" or "Writing" means a communication recorded in a medium of expression that can be preserved, read, retrieved, and reproduced for an indefinite period of time, including information in a form that is electronically transmitted and stored.

*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; 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. March 1, 2022; November 1, 2021; October 1, 2019.*

## 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.*

**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.*

## 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.*

## 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.*

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.*

**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.*