

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Department of Administration

RULE CITATION: 01 NCAC 05E .0103

RECOMMENDATION DATE: December 13, 2022

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
 - Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

*G.S. 150B-19.1(a)(1) states, "An agency may adopt only **rules** that are expressly authorized by federal and State law and that are necessary to serve the public interest." **(Emphasis added)***

Pursuant to G.S. 150B-2(8a) a "rule" is defined as:

"Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency...The term does not include the following:

- a. **Statements concerning only the internal management of an agency** or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-61, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.*
- b. ..."*

This rule does not place any obligation or restriction on any entity but the Department of Administration ("DOA"). A plain reading of the rule appears to only encumber or regulate the DOA

1 G.S. 143B-6(8) DEPARTMENT OF ADMINISTRATION

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and infringes upon the management prerogatives of the Secretary, and that of her successors, until the rule would be amended. The language directing the HUB Office is so ambiguous and devoid of any criteria that it cannot affect the procedural or substantive rights of anyone outside the DOA.

As 01 NCAC 05E .0103 is not a "Rule", the agency lacks statutory authority to adopt it. Further, the adoption of 01 NCAC 05E .0103 was not in accordance with Article 2A of G.S.150B as only "Rules" can be adopted. Lastly, as 01 NCAC 05E .0103 is not a "Rule" it cannot be "reasonably necessary" pursuant to G.S. 150B-21.9(a)(3) as only "Rules" can be reasonably necessary.

Assuming arguendo that this Rule meets the definition of a rule, the Rule is not reasonably necessary pursuant to G.S. 150B-21.9(a)(3). If the DOA has the authority to, for example, "provide training and technical assistance" and "develop relationships", the Secretary does not need a rule to require the HUB Office to conduct these activities. The adoption of an administrative rule does grant the Secretary any more authority than statutorily provided.

Accordingly, staff recommends that the Rules Review Commission object to 01 NCAC 05E .0103.

William W. Peaslee
Commission Counsel

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (1) Administrative law judge. - A person appointed under G.S. 7A-752, 7A-753, or 7A-757.
- (1a) **Adopt. - To take final action to create, amend, or repeal a rule.**
- (1b) Agency. - An agency or an officer in the executive branch of the government of this State. The term includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.
- (1c) Codifier of Rules. - The person appointed by the Chief Administrative Law Judge of the Office of Administrative Hearings pursuant to G.S. 7A-760(b).
- (1d) Commission. - The Rules Review Commission.
- (2) Contested case. - An administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. The term does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.
- (2a) Repealed by Session Laws 1991, c. 418, s. 3.
- (2b) Hearing officer. - A person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.
- (3) License. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes, occupational licenses, and certifications of electronic poll books, ballot duplication systems, or voting systems under G.S. 163-165.7.
- (4) Licensing. - Any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. The term does not include controversies over whether an examination was fair or whether the applicant passed the examination.
- (4a) Occupational license. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.
- (4b) Occupational licensing agency. - Any board, commission, committee, or other agency of the State that is established for the primary purpose

of regulating the entry of persons into, or the conduct of persons within a particular profession, occupation, or field of endeavor, and that is authorized to issue and revoke licenses. The term does not include State agencies or departments that may as only a part of their regular function issue permits or licenses.

- (5) Party. - Any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate.
- (5a) Person. - Any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society that may sue or be sued under a common name.
- (6) Person aggrieved. - Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.
- (7) Recodified as subdivision (5a) of this section by Session Laws 2021-88, s. 16(a), effective July 22, 2021.
- (7a) Policy. - Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.
- (8) Residence. - Domicile or principal place of business.
- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
 - a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
 - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.

- c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - e. Statements of agency policy made in the context of another proceeding, including:
 - 1. Declaratory rulings under G.S. 150B-4.
 - 2. Orders establishing or fixing rates or tariffs.
 - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
 - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
 - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
 - i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
 - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
 - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
 - l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.
- (8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.
- (8c) Substantial evidence. - Relevant evidence a reasonable mind might accept as adequate to support a conclusion.

§ 150B-21.2. Procedure for adopting a permanent rule.

(a) Steps. - Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:

- (1) Publish a notice of text in the North Carolina Register.
- (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.

- (3) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
 - (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
 - (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.
- (b) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
- (c) Notice of Text. - A notice of the proposed text of a rule must include all of the following:
- (1) The text of the proposed rule, unless the rule is a readoption without substantive changes to the existing rule proposed in accordance with G.S. 150B-21.3A.
 - (2) A short explanation of the reason for the proposed rule.
 - (2a) A link to the agency's Web site containing the information required by G.S. 150B-19.1(c).
 - (3) A citation to the law that gives the agency the authority to adopt the rule.
 - (4) The proposed effective date of the rule.
 - (5) The date, time, and place of any public hearing scheduled on the rule.
 - (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
 - (7) The period of time during which and the person within the agency to whom written comments may be submitted on the proposed rule.
 - (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
 - (9) Repealed by Session Laws 2013-143, s. 1, effective June 19, 2013.
- (d) Mailing List. - An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice or text to each person on the mailing list who has requested notice on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.
- (e) Hearing. - An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.
- An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency shall publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.
- (f) Comments. - An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public

hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

(g) Adoption. - An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency shall review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. - An agency must issue a concise written statement explaining why the agency adopted a rule if, within 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. - An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, any fiscal note that has been prepared for the rule, and any written explanation made by the agency for adopting the rule.

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.

(4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1.

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.

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Department of Administration

RULE CITATION: 01 NCAC 05E .0104

RECOMMENDATION DATE: December 13, 2022

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
 - Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
 - Extend the period of review

COMMENT:

The published Rule required agencies to review vendors' pay applications prior to payment. The proposed Rule did not address the consequences of a vendor being out of "compliance with HUB utilization commitments."

Since publication the agency has added language that vendors found to be out of compliance will have their payments either withheld until the agency and the vendor "mutually agree" upon a plan for the vendor to meet the commitments, or paid if the vendor makes "assurance acceptable to the agency" that the commitments will be satisfied by the end of the project.

It appears that this additional language produces an effect that could not reasonably have been expected based upon the proposed text of the rule pursuant to G.S. 150B-21.2(g). There was no mention of withholding payments in the proposed rule. Therefore, the agency adopted a rule that differs substantially from the proposed rule.

Further, there is no objective standard by which an agency will find an assurance "acceptable." The Rule is therefore unclear and ambiguous.

Accordingly, staff recommends that the RRC object to the Rule pursuant to G.S. 150B-21.9(a)(2) and (4).

William W. Peaslee
Commission Counsel

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) **It is clear and unambiguous.**
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

§ 150B-21.2. Procedure for adopting a permanent rule.

(a) Steps. - Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:

- (1) Publish a notice of text in the North Carolina Register.
- (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.
- (3) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
- (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
- (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

(b) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.

(c) Notice of Text. - A notice of the proposed text of a rule must include all of the following:

- (1) The text of the proposed rule, unless the rule is a readoption without substantive changes to the existing rule proposed in accordance with G.S. 150B-21.3A.
- (2) A short explanation of the reason for the proposed rule.
- (2a) A link to the agency's website containing the information required by G.S. 150B-19.1(c).
- (3) A citation to the law that gives the agency the authority to adopt the rule.
- (4) The proposed effective date of the rule.
- (5) The date, time, and place of any public hearing scheduled on the rule.
- (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
- (7) The (i) period of time during which and (ii) person within the agency to whom written comments may be submitted on the proposed rule.
- (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
- (9) Repealed by Session Laws 2013-143, s. 1, effective June 19, 2013.

(d) Mailing List. - An agency must maintain a mailing list of persons that have requested notice of rulemaking. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice of text to each person on the mailing list that has requested notice on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. - An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency must publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. - An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

(g) Adoption. - An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency must review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons that, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. - An agency must issue a concise written statement explaining why the agency adopted a rule if, within 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. - An agency must keep a record of a rulemaking proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, any fiscal note that has been prepared for the rule, and any written explanation made by the agency for adopting the rule. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 63; 1977, c. 915, s. 2; 1983, c. 927, ss. 3, 7; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), (7); 1987, c. 285, ss. 7-9; 1989, c. 5, s. 1; 1991, c. 418, s. 1; 1995, c. 507, s. 27.8(d); 1996, 2nd Ex. Sess., c. 18, s. 7.10(e); 2003-229, s. 4; 2011-398, s. 5; 2013-143, s. 1; 2013-413, s. 3(a); 2021-88, s. 17.)

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.

RRC STAFF OPINION

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AGENCY: North Carolina Department of Administration

RULE CITATION: 01 NCAC 05E .0105

RECOMMENDATION DATE: December 13, 2022

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - Lack of statutory authority
 - X Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
 - Extend the period of review

COMMENT:

The Rule requires vendors to provide an affidavit that states the vendor has either met the "[Historically Underutilized Business] participation goal" or, if the goal was not met, provide an affidavit that the vendor made good faith efforts pursuant to 01 NCAC 05B .0501 to meet the goal. The Rule also requires the vendor to provide one of the two aforesaid affidavits if a HUB needs to be replaced by the vendor after contract.

01 NCAC 05E .0102 addressed how the HUB participation goal would be set; however, the agency decided to withdraw that Rule. Currently, there is no rule or system by which the HUB participation goal will be established. Absent a rule, it appears that the standard could be set arbitrarily by either the DOA or the purchasing agency.

01 NCAC 05E .0104 requires the purchasing agencies, prior to awarding a contract, to review the affidavits submitted pursuant to this Rule to determine whether good faith efforts have been achieved. In reply to a question posed in the second set of Requests for Changes dated December 6, 2022, the DOA stated that "good faith efforts are only relevant if the vendor has not met the HUB participation goal."

Contextually, the HUB participation goal is more than aspirational. The goal is a standard which will greatly affect the extent to which and the frequency which a vendor must conduct good faith efforts. If the goal is set low, vendors are more likely to not have to make good faith efforts. More good faith efforts will have to be made if the goal is set higher.

William W. Peaslee
Commission Counsel

Absent a rule establishing the HUB participation goal or a rule establishing a system to set a goal, this Rule would provide the entity setting the goal with power to regulate on an arbitrary basis.

In short, this Rule requires vendors to state under oath that they have met a goal established by an ambiguous method or they have undertaken good faith efforts to meet the goal established by an ambiguous method.

Accordingly, staff recommends that the RRC object to the Rule pursuant to G.S. 150B-21.9(a)(2) it requires vendors to act according to scheme which is based upon a standard which is unclear and ambiguous.

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

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.*