ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER BB COMMISSIONER'S RULES CONCERNING STATE PLAN FOR EDUCATING ENGLISH LANGUAGE LEARNERS

19 TAC §§89.1201, 89.1203, 89.1205, 89.1207, 89.1210, 89.1215, 89.1220, 89.1226 - 89.1230, 89.1233, 89.1235, 89.1240, 89.1245, 89.1250, 89.1265

The Texas Education Agency (TEA) adopts amendments to §§89.1201, 89.1203, 89.1205, 89.1207, 89.1210, 89.1215, 89.1220, 89.1226-89.1230, 89.1233, 89.1235, 89.1240, 89.1245, 89.1250, and 89.1265, concerning the state plan for educating English learners. The amendments to §§89.1201, 89.1203, 89.1205, 89.1207, 89.1227-89.1230, 89.1233, 89.1235, 89.1240, 89.1245, 89.1250, and 89.1265 are adopted without changes to the proposed text as published in the April 21, 2023 issue of the *Texas Register* (48 TexReg 2023) and will not be republished. The amendments to §§89.1210, 89.1215, 89.1220, and 89.1226 are adopted with changes to the proposed text as published in the April 21, 2023 issue of the *Texas Register* (48 TexReg 2023) and will be republished. The adopted amendments align terminology with Senate Bill (SB) 2066, 87th Texas Legislature, Regular Session, 2021, and clarify policies and procedures for the education of emergent bilingual students and related program implementation.

REASONED JUSTIFICATION: In accordance with Texas Education Code, Chapter 29, Subchapter B, Bilingual Education and Special Language Programs, the commissioner has exercised rulemaking authority to establish rules to guide the implementation of bilingual education and special language programs. The commissioner's rules in Chapter 89, Subchapter BB, establish the policy that every student in the state who has a primary language other than English and who is identified as an emergent bilingual student must be provided a full opportunity to participate in a bilingual education or English as a second language (ESL) program. These rules outline the requirements of the bilingual education and ESL programs, including program content and design, home language survey, the language proficiency assessment committee (LPAC), testing and classification, facilities, parental authority and responsibility, staffing and staff development, required summer school programs, and evaluation.

The adopted amendments to Chapter 89, Subchapter BB, implement SB 2066, 87th Texas Legislature, Regular Session, 2021, by updating the term "English learner" to "emergent bilingual student" throughout the rules. The amendments also provide clarification and make technical edits. In addition, the following changes have been made.

Section 89.1201, Policy, has been amended to more clearly identify the academic and linguistic progress expected of emergent bilingual students and the methods by which that progress is achieved.

Section 89.1203, Definitions, has been amended by adding new definitions and expanding others to ensure consistency, accuracy, and clarity for school districts.

Section 89.1205, Required Bilingual Education and English as a Second Language Programs, has been amended to include updated terminology in alignment with SB 2066.

Section 89.1207, Bilingual Education Exceptions and English as a Second Language Waivers, has been amended to include updated terminology in alignment with SB 2066.

Section 89.1210, Program Content and Design, has been amended to include updated terminology in alignment with SB 2066 and to provide clarity related to approved program models. Based on public comment noting an inadvertent omission, subsection (b)(2)(A) has been revised at adoption. Regarding the linguistic needs of a bilingual program, a statement has been added to specify that the English language proficiency standards are to be taught in conjunction with the Texas Essential Knowledge and Skills, which aligns with the same requirement for ESL programs.

Section 89.1215, Home Language Survey, has been amended to confirm that the original home language survey shall serve as the only survey that should be kept in a student's permanent record and transferred to any subsequent district in which the student enrolls. This section also includes an additional question to ensure a holistic understanding of a child's first language. The amendment clarifies the process for a parent to request a correction to the home language survey. Based on public comment, changes have been made at adoption to subsection (b)(1)-(3) to simplify the questions asked on the home language survey. The questions will now ask which languages are used at home; which languages are used by the child at home; and if the child had a previous home setting, which languages were used.

Section 89.1220, Language Proficiency Assessment Committee, has been amended to include alternative meeting methods as well as allow for the use of electronic signatures. Subsection (g) explicitly states when and for whom the LPAC should review all pertinent information. Subsection (k) includes more details to support LPAC decisions regarding reconsideration for program participation after reclassification. These changes incorporate stakeholder feedback from school districts and align with terminology used in SB 2066. Based on public comment, a change to subsection (g)(1)(B) has been made at adoption to require that

the LPAC recommend, rather than designate, the initial instructional placement. The LPAC's recommendation is still subject to parental approval. A similar change, based on public comment, has been made in subsection (g)(3)(D) to require the LPAC to recommend, rather than determine, exit from program.

Section 89.1226, Testing and Classification of Students, has been amended to update language and emphasize access to multiple programs for dual-identified students. Subsection (b) clarifies that the state-approved English language proficiency test must be administered within four calendar weeks of initial enrollment. Subsection (i) changes how a student can be reclassified as English proficient by requiring a composite proficiency rating in the areas of listening, speaking, reading, and writing rather than a proficiency rating in each of the four language domains. Subsection (k) clarifies that an emergent bilingual student may still be able to be reclassified if there are designated supports for non-linguistic purposes recommended by a committee other than the LPAC. In addition, further clarification has been added regarding the individualized reclassification process for an emergent bilingual student with a severe cognitive disability. These changes address clarification requested by school districts and align the section with the agency's policies on special education and assessment. A change to subsection (b) has been made at adoption to specify that a student shall be recommended for placement, rather than placed, into a required bilingual or ESL program after being identified as emergent bilingual. Based on public comment, a change to subsection (h) has been made at adoption to require the LPAC to recommend, rather than determine, placement. Finally, also based on public comment, a similar change to subsection (m) has been made at adoption to specify that the LPAC may recommend, rather than determine, that the state's assessments are not appropriate for students with significant cognitive disabilities.

Section 89.1227, Minimum Requirements for Dual Language Immersion Program Model, has been amended to use the term "partner language" and to include the development of the program's language allocation plan. Clarification is provided on the inclusion of former emergent bilingual students who have reclassified as English proficient for the duration of the program. Additionally, the amendment specifies that emergent bilingual students' access to dual language programs must not be restricted based on linguistic or academic measures in the partner language or English. These changes incorporate stakeholder feedback from school districts.

Section 89.1228, Two-Way Dual Language Immersion Program Model Implementation, has been amended to include a statement about access not being restricted for emergent bilingual students or non-emergent bilingual students based on linguistic or achievement measures in the partner language or English. The amendment also clarifies the district's commitment to program continuity. These changes incorporate stakeholder feedback from school districts.

Section 89.1229, General Standards for Recognition of Dual Language Immersion Program Models, has been amended to update language reflective of the Results Driven Accountability system.

Section 89.1230, Eligible Students with Disabilities, has been amended to more clearly explain the roles of the LPAC and the admission, review, and dismissal committee in the identification and monitoring of dual-identified students in an effort to align processes across the state.

Section 89.1233, Participation of English Proficient Students, has been amended to use the new term "non-emergent bilingual" for students who have never been identified as emergent bilingual students and clarify that non-emergent bilingual students may not make up more than 40% of the total bilingual education program students districtwide.

Section 89.1235, Facilities, has been amended to align with terminology of SB 2066.

Section 89.1240, Parental Authority and Responsibility, has been amended to include updated terminology in alignment with SB 2066 and provide explicit procedures for parental approvals, program changes, and parental denials.

Section 89.1245, Staffing and Staff Development, has been amended to clarify the use of Bilingual Education Allotment funds for salary supplements.

Section 89.1250, Required Summer School Programs, has been amended to include updated terminology in alignment with SB 2066.

Section 89.1265, Evaluation, has been amended to include updated terminology in alignment with SB 2066. The section title has also been amended to provide clarity on the contents of the section.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began April 21, 2023, and ended May 22, 2023. Following is a summary of public comments received and agency responses.

§89.1201, Policy

Comment: One teacher and two school administrators indicated disapproval of measuring both linguistic and academic progress of students.

Response: The agency disagrees. The state adheres to federal requirements in relation to measuring progress of emergent bilingual students.

§89.1203, Definitions

Comment: Ten administrators, one teacher, and a community member indicated disagreement on the organization within §89.1203 and disapproval of the use of various terms used in the definitions, such as temporary, primary language, English proficient, and emergent bilingual.

Response: The agency disagrees. Emergent bilingual is a statutory term provided in the Texas Education Code. Any changes in the use of that term would require legislative action. The other terms are either commonly used terms or terms used in other state and federal regulations and guidance.

Comment: A school administrator and a lobbyist asked that more specific language be added on how the funding should be tied to effective implementation of dual language programs and those under an alternative language program instead of teacher certifications.

Response: The agency disagrees that a change is needed. The monitoring of program implementation would require a legislative change.

§89.1205, Required Bilingual Education and English as a Second Language Programs

Comment: One administrator noted support for changes in the home language survey and requested a change to address bilin-

gual programs at Grade 6 when Grade 6 is housed at an elementary campus.

Response: The agency disagrees that a change is necessary at this time but will investigate whether future guidance can be provided on this topic.

§89.1207, Bilingual Education Exceptions and English as a Second Language Waivers

Comment: One administrator voiced disapproval that all teachers are not required to have an ESL certification and stated that if certification was required, it would reduce the need for waiver requests.

Response: This comment is outside the scope of the proposed rulemaking. In addition, a change requiring certification would require legislative action.

Comment: One lobbyist suggested having a streamlined process for submitting and approving exceptions and waivers and recommended removing the spending requirement of using 10% of bilingual education allotment funds. The commenter offered suggestions to improve the waiver process.

Response: The agency disagrees that additional detail is necessary for the rule but intends to provide guidance and training on a cyclical process for exceptions and waivers. The agency also disagrees with modifying the spending requirement because it would require a legislative change.

§89.1210, Program Content and Design

Comment: One administrator requested that changes be made in addition to changes that were made under House Bill (HB) 3, 86th Texas Legislature, 2019.

Response: The comment is outside the scope of the proposed rulemaking as the agency cannot change law.

Comment: One administrator sought clarity on the term "pull-out" and requested a change if it was not referring to pulling students out of a classroom.

Response: The agency disagrees that a change is necessary. The term "pull-out" is referring to a state-approved program and the certification of ESL teachers serving emergent bilingual students as defined in §89.1210(d)(2). Renaming the program model would require a legislative change.

Comment: One administrator and the Texas Public Charter Schools Association (TPCSA) made recommendations to include English development through the English language proficiency standards (ELPS) in the linguistic section.

Response: The agency agrees and has made a change to §89.1210(b)(2)(A) at adoption to state that for bilingual programs, the ELPS are used in conjunction with the Texas Essential Knowledge and Skills in the English language. This statement was inadvertently omitted with the proposed amendment, and the change now aligns with the same statement related to ESL programs.

Comment: One individual stated the sentence structure and word order should be modified throughout §89.1210.

Response: The agency disagrees and has determined that changes to sentence structure and word order are unnecessary.

§89.1215, Home Language Survey

Comment: Two administrators and one community member posed questions related to implementation of the changes to §89.1215 and expectations for local education agencies when providing guidance to families providing the language(s) spoken at home and by the child.

Response: The agency provides the following clarification. The agency intends to provide guidance and training on the implementation of the amended rules once they become effective.

Comment: Two administrators commented in support of the changes to the home language survey.

Response: The agency agrees that the changes are necessary. In response to other comments, the rule was modified at adoption to simplify the questions asked on the home language survey.

Comment: Four teachers, twenty-three school administrators, one lobbyist, and one parent expressed concerns that the language of the home language survey questions and the inclusion of the third question would be confusing for families and difficult to translate.

Response: The agency agrees that further clarification is necessary. While the agency has determined that the third question is necessary, changes have been made at adoption to simplify the way in which the questions are asked.

§89.1220, Language Proficiency Assessment Committee

Comment: Five administrators suggested clarifying the terminology pertaining to an LPAC's authority from "determining" to "recommending."

Response: The agency agrees and has modified §89.1220(g)(1)(B) and (3)(D) at adoption to replace the terms "designate" and "determine" with "recommend." Conforming edits were made to §89.1226(b), (h), and (m).

Comment: One parent, four school administrators, and one teacher asked clarifying questions or made procedural suggestions on the parent role in LPAC meetings.

Response: The agency disagrees that changes are necessary to the rule text but will continue to provide additional guidance and training on the required members and their roles.

§89.1226, Testing and Classification of Students

Comment: Three parents, forty-seven school administrators, and thirty-seven teachers commented that moving to a composite score is a positive change.

Response: The agency agrees.

Comment: Ten administrators and five teachers requested that the agency reconsider the inclusion of State of Texas Assessments of Academic Readiness (STAAR®) results as a component of reclassification criteria.

Response: The comments are outside the scope of the proposed rulemaking as any changes related to STAAR® requirements would require legislative action.

Comment: One parent, three administrators, and three teachers disapproved of the speaking portion and other logistical aspects of the Texas English Language Proficiency Assessment System administration.

Response: The comments are outside the scope of the proposed rulemaking.

Comment: One community member, five school administrators, and three teachers asked for additional resources and guidance on the reclassification of emergent bilingual students.

Response: The agency disagrees that any changes are necessary to the rule to address reclassification, but the agency will continue to provide resources and guidance, including after the amended rules become effective.

§89.1227, Minimum Requirements for Dual Language Immersion Program Model

Comment: Two administrators asked for clarification or additional resources for dual language immersion programs focusing on emergent bilingual students when implementing a one-way program and especially with a two-way program.

Response: The agency disagrees that additional information on dual language immersion programs should be included in the rule, but the agency continuously seeks to develop tools and resources commensurate with its regulatory authority.

Comment: One teacher voiced general support for prioritization of the needs of emergent bilingual students.

Response: The agency agrees.

Comment: One individual suggested changing the sentence structure in §89.1227.

Response: The agency disagrees and has determined that changes to the sentence structure are unnecessary.

§89.1228, Two-Way Dual Language Immersion Program Model Implementation

Comment: Four administrators and one lobbyist commented generally on the participation/access of non-emergent bilingual students in two-way program models.

Response: The agency disagrees that the rule should be modified to address participation/access of non-emergent bilingual students in two-way program models, but the agency will continue to provide guidance and resources, including after the amended rules become effective.

§89.1229, General Standards for Recognition of Dual Language Immersion Program Models

Comment: One administrator asked how language would be reflective for non-English speakers.

Response: This comment is outside the scope of the proposed rulemaking.

§89.1230, Eligible Students with Disabilities

Comment: One administrator and two teachers expressed concerns related to students with disabilities and the reclassification criteria that students need to meet to participate in academic programs.

Response: The agency provides the following clarification. The agency's rules are in alignment with current federal and state law, and the agency will continue to provide necessary resources and guidance.

§89.1233, Participation of English Proficient Students

Comment: One administrator asked that additional resources be provided for emergent bilingual students when being identified with special needs.

Response: The agency provides the following clarification. The agency will continue to provide guidance and resources, including after the amended rules become effective.

§89.1235, Facilities

Comment: One individual commented that there should be a reasonability factor included in terms of mileage when districts concentrate their programs at a limited number of facilities.

Response: The agency disagrees. The issue addressed by the commenter would be expected to be a topic discussed as district decisions are made.

§89.1240, Parental Authority and Responsibility

Comment: One administrator and one community member called for the need to provide clear guidance on parental authority and responsibilities.

Response: The agency disagrees that the suggested guidance should be included in the rule, but the agency will continue to provide guidance and resources, including after the amended rules become effective.

Comment: One administrator asked if school districts have to use TEA-developed letters or if they could get those letters from other platforms.

Response: The agency provides the following clarification. Once TEA develops forms, districts will be expected to use the agency-developed letters.

§89.1245, Staffing and Staff Development

Comment: One administrator asked for clarification regarding the use of bilingual education allotment funds to be used for supplemental teacher pay and whether it includes non-certified bilingual/ESL teachers.

Response: The agency disagrees that the suggested clarification should be included in the rule, but the agency will continue to provide guidance and resources, including after the amended rules become effective.

§89.1250, Required Summer School Programs

Comment: Three administrators commented on the 120-hour rule, citing difficulty in implementation.

Response: The agency disagrees that changes are necessary to the rule at this time, but the agency will consider this comment when developing future guidance or in future rulemaking.

Comment: One individual stated that the sentence structure in §89.1250 needed to be revised.

Response: The agency disagrees and has determined that changes to the sentence structure are unnecessary.

§89.1265, Evaluation

Comment: One community member asked clarifying questions on the requirement that a student's language development be added in program evaluation and parent notification.

Response: The agency disagrees that clarification should be provided in rule, but the agency will continue to provide guidance and resources, including after the amended rules become effective.

General comments

Comment: One parent, nineteen school administrators, one community member, and twenty-six teachers reported general support for the proposed rules.

Response: The agency agrees.

Comment: TPCSA expressed that the agency has interpreted language in HB 3 from the 2019 legislative session to mean that in certain instances where a waiver is approved for non-certified bilingual teachers, qualifying students do not generate the .05 weight. TPCSA recommended that the agency follow the legislative intent of HB 3.

Response: This comment is outside the scope of the proposed rulemaking.

Comment: One administrator expressed that a minimum number of minutes daily or weekly should be required to hold districts accountable to guarantee student progress.

Response: The agency disagrees and has determined that a minimum number of minutes should not be required through this rule action.

Comment: One administrator expressed that an August 8 implementation date for the rules would put a burden on districts.

Response: The agency provides the following clarification. The amended rules are required to go through the rulemaking process prescribed by law, and an effective date earlier than August 8 is not feasible.

STATUTORY AUTHORITY. The amendments are adopted under Texas Education Code (TEC), §29.053, which establishes the requirement of bilingual programs at elementary grades, and other special language programs such as English as a second language; TEC, §29.055, which requires bilingual programs and other special language programs to consider students' learning experiences and incorporate cultural aspects of the students' backgrounds; TEC, §29.058, which allows the participation of students who are not identified as emergent bilingual students to participate in a bilingual program; however, the percentage of non-emergent bilingual students may not exceed 40% of the number of students enrolled in the program; TEC, §29.060, which requires school districts to offer a bilingual education or special language program that is voluntary for emergent bilingual students entering Kindergarten or Grade 1; TEC, §29.062, which requires school districts comply with state policy in areas including: program content and design, program coverage, identification procedures, classification procedures, staffing, learning and testing materials, reclassification and the activities of the language proficiency assessment committees; and TEC, §29.063, which requires the establishment of a language proficiency assessment committee.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§29.053, 29.055, 29.058, 29.060, 29.062, and 29.063.

§89.1210. Program Content and Design.

(a) Each school district required to offer a bilingual education or English as a second language (ESL) program shall provide each emergent bilingual student the opportunity to be enrolled in the required program at his or her grade level. Each student's level of proficiency shall be designated by the language proficiency assessment committee (LPAC) in accordance with §89.1220(g) of this title (relating to Language Proficiency Assessment Committee). The school district shall accommodate the instruction, pacing, and materials to ensure that emergent bilingual students have a full opportunity to master the essential knowledge and skills of the required curriculum, which includes the Texas Essential Knowledge and Skills (TEKS) and English language proficiency standards (ELPS). Students participating in the bilingual education program may demonstrate their mastery of the essential knowledge and skills in either their primary language or in English for each content area.

(1) A bilingual education program of instruction established by a school district shall be a full-time program of dual-language instruction (English and primary language) that provides for learning academic and literacy skills in the primary language of the students enrolled in the program and for carefully structured and sequenced mastery of English language skills under Texas Education Code (TEC), §29.055(a).

(2) An ESL program of instruction established by a school district shall be a program of intensive instruction in English in which ESL teachers recognize and address language differences in accordance with TEC, §29.055(a).

(b) The bilingual education program and ESL program shall be integral parts of the general educational program required under Chapter 74 of this title (relating to Curriculum Requirements) to include foundation and enrichment areas, ELPS, and college and career readiness standards. In bilingual education programs, school districts shall purchase instructional materials in both program languages with the district's instructional materials allotment or otherwise acquire instructional materials for use in bilingual education classes in accordance with TEC, §31.029(a). Instructional materials for bilingual education programs on the list adopted by the commissioner of education, as provided by TEC, §31.0231, may be used as curriculum tools to enhance the learning process. The school district shall provide for ongoing coordination between the bilingual/ESL program and the general educational program. The bilingual education and ESL programs shall address the affective, linguistic, and cognitive needs of emergent bilingual students as follows.

(1) Affective.

(A) Emergent bilingual students in a bilingual program shall be provided instruction using content-based language instructional methods and/or their primary language to acclimate students to the school environment and to develop academic language skills, which instills confidence, self-assurance, and a positive identity with their cultural heritages. The program shall be designed to consider the students' learning experiences and shall incorporate the cultural aspects of the students' backgrounds in accordance with TEC, §29.055(b).

(B) Emergent bilingual students in an ESL program shall be provided instruction using content-based language instructional methods in English to acclimate students to the school environment and to develop academic language skills, which instills confidence, self-assurance, and a positive identity with their cultural heritages. The program shall be designed to incorporate the students' primary languages and learning experiences and shall incorporate the cultural aspects of the students' backgrounds in accordance with TEC, §29.055(b).

(2) Linguistic.

(A) Emergent bilingual students in a bilingual program shall be provided targeted and intentional academic language instruction to develop proficiency in listening, speaking, reading, and writing in both English and their primary language. The instruction in both languages shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills in all subjects, providing individualized linguistically accommodated content instruction commensurate with the students' language profi-

ciency levels. The ELPS student expectations are provided for English development in conjunction with the TEKS.

(B) Emergent bilingual students in an ESL program shall be provided targeted and intentional academic language instruction to develop proficiency in listening, speaking, reading, and writing in the English language. The instruction in academic content areas shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills in all subjects, providing individualized linguistically accommodated content instruction commensurate with the students' language proficiency levels. The ELPS student expectations are provided for English development in conjunction with the TEKS.

(3) Cognitive.

(A) Emergent bilingual students in a bilingual program shall be provided instruction in reading and language arts, mathematics, science, and social studies in both their primary language and English, using content-based language instructional methods in either their primary language, English, or both, depending on the program model(s) implemented by the district. The content area instruction in both languages shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills in all subjects.

(B) Emergent bilingual students in an ESL program shall be provided instruction in English in reading and language arts, mathematics, science, and social studies using content-based language instructional methods. The instruction in academic content areas shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills.

(c) The bilingual education program shall be implemented through at least one of the following program models.

(1) Transitional bilingual/early exit is a bilingual program model in which students identified as emergent bilingual students are served in both English and the students' primary language and are prepared to meet reclassification criteria to be successful in English instruction with no second language acquisition supports not earlier than two or later than five years after the student enrolls in school. Instruction in this program is delivered by a teacher appropriately certified in bilingual education under TEC, §29.061(b)(1), for the assigned grade level and content area. The goal of early-exit transitional bilingual education is for program participants to use their primary language as a resource while acquiring full proficiency in English. This model provides instruction in literacy and academic content through the medium of the students' primary language and English using content-based language instruction methods.

(2) Transitional bilingual/late exit is a bilingual program model in which students identified as emergent bilingual students are served in both English and the students' primary language and are prepared to meet reclassification criteria to be successful in English instruction with no second language acquisition supports not earlier than six or later than seven years after the student enrolls in school. Instruction in this program is delivered by a teacher appropriately certified in bilingual education under TEC, §29.061(b)(2), for the assigned grade level and content area. The goal of late-exit transitional bilingual education is for program participants to use their primary language as a resource while acquiring full proficiency in English. This model provides instruction in literacy and academic content through the medium of the students' primary language and English through content-based language instruction.

(3) Dual language immersion/one-way is a bilingual/biliteracy program model in which students identified as emergent bilingual students are served in both English and the program's partner language and are prepared to meet reclassification criteria in order to be successful in English instruction with no second language acquisition supports not earlier than six or later than seven years after the student enrolls in school. Instruction provided in the partner language and English is delivered by a teacher appropriately certified in bilingual education under TEC, §29.061. When the instructional time for both the partner language and English is 50%, a paired-teaching arrangement may be utilized in which instruction provided in English may be delivered either by a teacher appropriately certified in bilingual education or by a different teacher certified in ESL in accordance with TEC, §29.061. The goal of one-way dual language immersion is for program participants to attain bilingualism and biliteracy in English and the partner language. This model provides ongoing instruction in literacy and academic content through content-based language instruction in English as well as the students' primary language, with at least half of the instruction delivered in the students' primary language for the duration of the program.

(4) Dual language immersion/two-way is a bilingual/biliteracy program model in which students identified as emergent bilingual students are integrated with non-emergent bilingual students and are served in both English and the program's partner language and are prepared to meet reclassification criteria in order to be successful in English instruction with no second language acquisition supports not earlier than six or later than seven years after the student enrolls in school. Instruction provided in English and the partner language is delivered by a teacher appropriately certified in bilingual education under TEC, §29.061. When the instructional time for both the partner language and English is 50%, a paired-teaching arrangement may be utilized in which instruction provided in English may be delivered either by a teacher appropriately certified in bilingual education or by a different teacher certified in ESL in accordance with TEC, §29.061. The goal of two-way dual language immersion is for program participants to attain bilingualism and biliteracy in English as well as the partner language. This model provides ongoing instruction in literacy and academic content through content-based language instruction in English and the partner language with at least half of the instruction delivered in the partner language for the duration of the program.

(d) The ESL program shall be implemented through one of the following program models.

(1) An ESL/content-based program model is an English acquisition program that serves students identified as emergent bilingual students through English instruction provided by a teacher appropriately certified in ESL under TEC, §29.061(c), using content-based language instruction methods in reading and language arts, mathematics, science, and social studies. The goal of content-based ESL is for emergent bilingual students to attain full proficiency in English in order to participate equitably in school.

(2) An ESL/pull-out program model is an English acquisition program that serves students identified as emergent bilingual students through English instruction using content-based language instruction methods provided by an appropriately certified ESL teacher under TEC, §29.061(c), through English reading and language arts in a pull-out or inclusionary delivery setting. The goal of ESL pull-out is for emergent bilingual students to attain full proficiency in English in order to participate equitably in school.

(e) Except in the courses specified in subsection (f) of this section, content-based language instructional methods, which may involve the use of the students' primary language, may be provided in any of the courses or electives required for promotion or graduation to assist students identified as emergent bilingual students to master the essential knowledge and skills for the required subject(s). The use of con-

tent-based language instruction shall not impede the awarding of credit toward meeting promotion or graduation requirements.

(f) In subjects such as art, music, and physical education, emergent bilingual students shall participate with their non-emergent bilingual peers in general education classes provided in the subjects. As noted in TEC, §29.055(d), elective courses included in the curriculum may be taught in a partner language. The school district shall ensure that emergent bilingual students enrolled in bilingual education and ESL programs have a meaningful opportunity to participate with non-emergent bilingual peers in all extracurricular activities.

(g) The required bilingual education or ESL program shall be provided to every emergent bilingual student with parental approval until such time that the student meets reclassification criteria as described in §89.1226(i) of this title (relating to Testing and Classification of Students) or graduates from high school. Parental approval is required when the LPAC recommends continued dual language immersion program participation beyond reclassification.

§89.1215. Home Language Survey.

(a) For each new student enrolling for the first time in a Texas public school in any grade from prekindergarten through Grade 12, the Texas Education Agency (TEA)-developed home language survey shall be administered. This home language survey will serve as the original and only home language survey throughout the student's educational experience in Texas public schools. School districts shall require that the survey be signed by the student's parent for each student in prekindergarten through Grade 8 or by the student in Grades 9-12 as permitted under Texas Education Code, §29.056(a)(1). It is the school district's responsibility to ensure that the student's parent understands the language used in the survey and its implications. The original copy of the survey shall be kept in the student's permanent record and transferred to any subsequent Texas public school districts in which the student enrolls.

(b) The TEA-developed home language survey shall be administered in English and a language that the parents can understand. The home language survey shall include the following questions.

(1) "Which languages are used at home?"

(2) "Which languages are used by the child at home?"

(3) "If the child had a previous home setting, which languages were used? If there was no previous home setting, answer Not Applicable (N/A)."

(c) If any response on the home language survey indicates that a language other than English is or was used for communication, the student shall be tested in accordance with §89.1226 of this title (relating to Testing and Classification of Students).

(d) For students previously enrolled in a Texas public school, the receiving district shall secure the student records, including the original home language survey and language proficiency assessment committee documentation as described in §89.1220(l) of this title (relating to Language Proficiency Assessment Committee), as applicable. All attempts to contact the sending district to request records shall be documented. Multiple attempts to obtain the student's original home language survey shall be made.

(e) If a parent determines an error was made when completing the original home language survey, the parent may request a correction only if:

(1) the student has not yet been assessed for English proficiency; and

(2) corrections are made within two calendar weeks of the student's initial enrollment date in Texas public schools.

§89.1220. Language Proficiency Assessment Committee.

(a) School districts shall by local board policy establish and operate one or more language proficiency assessment committees (LPACs). The school district shall have on file a policy and procedures for the selection, appointment, and orientation of members of the LPAC(s).

(b) The LPAC shall include an appropriately certified bilingual educator (for students served through a bilingual education program), an appropriately certified English as a second language (ESL) educator (for students served through an ESL program), a parent of an emergent bilingual student participating in a bilingual or ESL program, and a campus administrator in accordance with Texas Education Code (TEC), §29.063.

(c) In addition to the three required members of the LPAC, the school district may add other trained members to the committee.

(d) No parent serving on the LPAC shall be an employee of the school district.

(e) A school district shall establish and operate a sufficient number of LPACs to enable them to discharge their duties within four weeks of the enrollment of an emergent bilingual student.

(f) All members of the LPAC, including parents, shall be acting for the school district and shall observe all laws and rules governing confidentiality of information concerning individual students. The school district shall be responsible for the orientation of all members of the LPAC, including the parents. The LPAC may use alternative meeting methods, such as phone or video conferencing and the use of electronic signatures that adhere to district policy.

(g) Upon a student's initial enrollment in Texas public schools, a student's transfer from a previous Texas public school district, and at the end of each school year, the LPAC shall review all pertinent information on all potential and identified emergent bilingual students, including emergent bilingual students with a parental denial of program participation, in accordance with §89.1226 of this title (relating to Testing and Classification of Students).

(1) For students initially enrolling in Texas public schools, the LPAC shall:

(A) designate the language proficiency level of each emergent bilingual student in accordance with the guidelines issued pursuant to §89.1226(b)-(f) of this title;

(B) recommend, subject to parental approval, the initial instructional placement of each emergent bilingual student in the required bilingual or ESL program without restricting access due to scheduling, staffing, or class size constraints; and

(C) facilitate the participation of emergent bilingual students in other special programs for which they are eligible while ensuring full access to the language program required under TEC, §29.053.

(2) For transferring students previously enrolled in a Texas public school district, the LPAC shall:

(A) review permanent record and LPAC documentation from the previous Texas school district to determine if the student has been identified as an emergent bilingual student based on the original home language survey and initial identification process;

(B) determine the continuation of the required bilingual or ESL program participation with parental approval for students pre-

viously identified as emergent bilingual or determine the need for monitoring of students who have previously met reclassification and are in their first two years of monitoring;

(C) review linguistic progress and academic achievement data of each emergent bilingual student to inform instructional practices; and

(D) facilitate the participation of emergent bilingual students in other special programs for which they are eligible while ensuring full access to the language program required under TEC, §29.053.

(3) At the end of the school year, for all identified emergent bilingual students, including emergent bilingual students with a parental denial of program participation, the LPAC shall:

(A) review language proficiency progress in English and, to the extent possible, the primary language of each emergent bilingual student;

(B) review academic achievement data in English and, to the extent possible, the primary language of each emergent bilingual student;

(C) reclassify eligible emergent bilingual students as English proficient in accordance with the criteria described in §89.1226(i) of this title;

(D) recommend exit from program of reclassified English proficient students, pending parental approval, or continuation of program participation for reclassified students participating in a dual language immersion one-way or two-way program model, according to the goals of the program; and

(E) prepare parental reports on student progress for all identified emergent bilingual students to be provided to parents within the first 30 calendar days after the beginning of the next school year, which include data on linguistic and academic progress, benefits of bilingual or ESL program participation, and the criteria for reclassification as English proficient.

(h) The LPAC shall give written notice to the student's parent, informing the parent that the student has been identified as an emergent bilingual student and requesting approval to place the student in the required bilingual education or ESL program not later than the 10th calendar day after the date of the student's classification in accordance with TEC, §29.056. The notice shall include information about the benefits of the bilingual education or ESL program for which the student has been recommended and that it is an integral part of the school program.

(i) Before the administration of the state criterion-referenced test each year, the LPAC shall determine the appropriate assessment option for each emergent bilingual student as outlined in Chapter 101, Subchapter AA, of this title (relating to Commissioner's Rules Concerning the Participation of English Language Learners in State Assessments).

(j) Pending completion of the identification process, receipt of LPAC documentation for transferring students, or parental approval of an identified emergent bilingual student's placement into the bilingual education or ESL program recommended by the LPAC, the school district shall place the student in the recommended program. Only emergent bilingual students with parental approval for program participation will be included in the bilingual education allotment.

(k) The LPAC shall monitor the academic progress of each student, including any student who previously had a parental denial of program participation, who has met criteria for reclassification in accordance with TEC, §29.056(g), for the first two years after reclassification. If the student earns a failing grade in a subject in the foundation curriculum under TEC, §28.002(a)(1), during any grading period in the first two school years after the student is reclassified, the LPAC shall determine, based on the student's second language acquisition needs, whether the student may require targeted instruction or, after careful consideration of multiple linguistic and academic data points, should be reconsidered for placement in a bilingual education or ESL program. In accordance with TEC, §29.0561, the LPAC shall review the student's performance and consider, at a minimum, the following:

(1) the total amount of time the student was enrolled in a bilingual education or ESL program;

(2) the student's grades each grading period in each subject in the foundation curriculum under TEC, §28.002(a)(1);

(3) the student's performance on each assessment instrument administered under TEC, §39.023(a) or (c);

(4) the number of credits the student has earned toward high school graduation, if applicable; and

(5) any disciplinary actions taken against the student under TEC, Chapter 37, Subchapter A (Alternative Settings for Behavior Management).

(l) The student's permanent record shall contain documentation of all actions impacting the emergent bilingual student.

(1) Documentation shall include:

(A) the original home language survey;

(B) the identification of the student as an emergent bilingual student;

(C) the designation of the student's level of language proficiency;

(D) the recommendation of program placement;

(E) parental approval or denial of placement into the program;

(F) the date of placement in the program;

(G) assessment information as outlined in Chapter 101, Subchapter AA, of this title;

(H) additional instructional linguistic accommodations provided to address the specific language needs of the student;

(I) the date of reclassification and the date of exit from the program with parental approval; and

(J) the results of monitoring for academic success, including students formerly classified as emergent bilingual students, as required under TEC, §29.063(c)(4).

(2) Current documentation as described in paragraph (1) of this subsection shall be forwarded in the same manner as other student records to another school district in which the student enrolls.

(m) A school district may place a student in or exit a student from a program without written approval of the student's parent if:

(1) the student is 18 years of age or has had the disabilities of minority removed;

(2) the parent provides approval through a phone conversation or e-mail that is documented in writing and retained; or

(3) an adult who the school district recognizes as standing in parental relation to the student provides written approval. This may

include a foster parent or employee of a state or local governmental agency with temporary possession or control of the student.

§89.1226. Testing and Classification of Students.

(a) The single state-approved English language proficiency test for identification of emergent bilingual students described in subsection (c) of this section shall be used as part of the standardized, statewide identification process.

(b) Within four calendar weeks of initial enrollment in a Texas public school, a student with a language other than English indicated on the home language survey shall be administered the state-approved English language proficiency test for identification as described in subsection (c) of this section and shall be identified as emergent bilingual and recommended for placement into the required bilingual education or English as a second language (ESL) program in accordance with the criteria listed in subsection (f) of this section.

(c) To identify emergent bilingual students, school districts shall administer to each student who has a language other than English as identified on the home language survey:

(1) in prekindergarten through Grade 1, the listening and speaking components of the state-approved English language proficiency test for identification; and

(2) in Grades 2-12, the listening, speaking, reading, and writing components of the state-approved English language proficiency test for identification.

(d) School districts that provide a bilingual education program at the elementary grades shall administer a language proficiency test in the primary language of the student who is eligible to be served in the bilingual education program. If the primary language of the student is Spanish, the school district shall administer the Spanish version of the state-approved language proficiency test for identification. If a state-approved language proficiency test for identification is not available in the primary language of the student, the school district shall determine the student's level of proficiency using informal oral language assessment measures.

(e) All language proficiency testing shall be administered by professionals or paraprofessionals who are proficient in the language of the test and trained in the language proficiency testing requirements of the test publisher.

(f) For placement into a bilingual education or ESL program, a student shall be identified as emergent bilingual using the following criteria.

(1) In prekindergarten through Grade 1, the student's score(s) from the listening and/or speaking components on the state-approved English language proficiency test for identification is/are below the level designated for indicating English proficiency.

(2) In Grades 2-12, the student's score(s) from the listening, speaking, reading, and/or writing components on the state-approved English language proficiency test for identification is/are below the level designated for indicating English proficiency.

(g) A student shall be identified as emergent bilingual if the student's beginning English language skills interfere with the completion of the English language proficiency assessment described in subsection (c) of this section.

(h) The language proficiency assessment committee (LPAC), in conjunction with the admission, review, and dismissal (ARD) committee, shall identify a student as emergent bilingual if the student's disabilities interfere with the completion of the English language proficiency assessment described in subsection (c) of this section. The decision for placement into a bilingual education or ESL program shall be recommended by the LPAC, in conjunction with the ARD committee, in accordance with §89.1220(f) of this title (relating to Language Proficiency Assessment Committee), ensuring access to both the bilingual education or ESL program and the special education and related services needed to provide a free, appropriate public education as identified in the student's individualized education program.

(i) An emergent bilingual student may be reclassified as English proficient only at the end of the school year in which a student routinely demonstrates readiness for reclassification as English proficient and the ability to successfully participate in grade level content instruction that is delivered with no second language acquisition supports. This determination shall be based upon all of the following:

(1) a composite proficiency rating, which includes ratings in the areas of listening, speaking, reading, and writing, on the state-approved English language proficiency test for reclassification that is designated for indicating English proficiency;

(2) passing standard met on the reading assessment instrument under Texas Education Code (TEC), §39.023(a), or, for students at grade levels not assessed by the aforementioned reading assessment instrument, a score at or above the 40th percentile on both the English reading and the English language arts sections of the state-approved norm-referenced standardized achievement instrument; and

(3) the results of a subjective teacher evaluation using the state's standardized rubric.

(j) An emergent bilingual student may not be reclassified as English proficient in prekindergarten or Kindergarten. A school district must ensure that emergent bilingual students are prepared to meet academic standards required by TEC, §28.0211.

(k) An emergent bilingual student may not be reclassified as English proficient if the LPAC has recommended designated supports or accommodations on the state reading assessment instrument based on the student's second language acquisition needs. Designated supports or accommodations for non-linguistic purposes that are recommended for student use by any other committee, including the ARD committee for students served in special education, do not prevent the student from being eligible to reclassify.

(l) For emergent bilingual students who are also eligible for special education services, the standardized process for emergent bilingual student reclassification is followed in accordance with applicable provisions of subsection (i) of this section. However, annual meetings to review student progress and make recommendations for reclassification must be made in all instances by the LPAC, in conjunction with the ARD committee, in accordance with §89.1230(b) of this title (relating to Eligible Students with Disabilities). Additionally, the LPAC, in conjunction with the ARD committee, shall determine participation and designated support or accommodation decisions on state criterion-referenced and English language proficiency assessments that differentiate between language proficiency and disabling conditions in accordance with §89.1230(a) of this title.

(m) For an emergent bilingual student with a significant cognitive disability, the LPAC, in conjunction with the ARD committee, may recommend that the state's criterion-referenced and English language proficiency assessments used for reclassification are not appropriate because of the nature of the student's disabling condition. In these cases, the LPAC, in conjunction with the ARD committee, may recommend that the student take the state's alternate criterion-referenced and alternate English language proficiency assessments. Additionally, the LPAC, in conjunction with the ARD committee, may utilize the individualized reclassification process to determine appropriate

performance standard requirements for the state standardized reading assessment and English language proficiency assessment by language domain under subsection (i)(1) of this section and utilize the results of a subjective teacher evaluation using the state's standardized alternate rubric.

(n) Notwithstanding §101.101 of this title (relating to Group-Administered Tests), all tests used for the purpose of identification and reclassification of students and approved by TEA must be re-normed at least every eight years.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 20, 2023.

TRD-202302606
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: August 9, 2023
Proposal publication date: April 21, 2023
For further information, please call: (512) 475-1497

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CHAPTER 100. CHARTERS
SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING OPEN-ENROLLMENT CHARTER SCHOOLS
DIVISION 1. GENERAL PROVISIONS

19 TAC §100.1010

The Texas Education Agency adopts an amendment to §100.1010, concerning charter school performance frameworks. The amendment is adopted without changes to the proposed text as published in the May 5, 2023 issue of the *Texas Register* (48 TexReg 2315) and will not be republished. The amendment adopts in rule the *2022 Charter School Performance Framework (CSPF) Manual,* which is updated to comply with statutory provisions and the accountability framework currently used to rate the performance of open-enrollment charter schools in Texas.

REASONED JUSTIFICATION: Section 100.1010 defines the standards by which the commissioner will measure the performance of open-enrollment charter schools.

The adopted amendment replaces the *2021 CSPF Manual* with the *2022 CSPF Manual.* The 2022 version of the manual reflects the current accountability system and ratings.

Throughout the manual, language has been revised with clarifying edits such as updated dates and references to accountability indicators. Indicators that were not rated in 2021 reflect the most current rating methodology. To provide clarity for schools that were not rated under the accountability system, a designation of "N/A" is for the Academic Standard and the Alternative Education Accountability Academic Standard.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began May 5, 2023, and ended June 5, 2023. Following is a summary of the public comment received and agency response.

Comment: The Texas Association of School Administrators and Texas School Alliance expressed two issues with the proposal. The first concern was regarding how local education agencies (LEAs) with campuses rated NR: SB1365 would be scored on Indicator 1c: Campus Status. The second concern was regarding how LEAs were held accountable for performance of students in special populations.

Response: The agency provides the following clarification. For Indicator 1c, if an LEA has a campus rated NR: SB 1365, the LEA would receive an N/A for Indicator 1c, Academic Performance, and Tier Rating. If an LEA in this situation were to request an expansion amendment, they would be required to request a waiver for 19 TAC §100.33(b)(9)(A)(vi), which requires an LEA to be rated Tier 1 or Tier 2 on the most current CSPF. The 2022 CSPF takes into account the performance of student subgroups in 1a (Overall A-F score), 1b (Achievement Status for Student Groups), 1c (Campus Status), 3b (Program Requirements: Special Populations), and 3c (Program Requirements: Bilingual Education/English as a Second Language Populations). Separately from the CSPF, charter schools are also monitored for compliance with special education requirements through TEA's Office of Special Populations. The Office of Special Populations monitors LEAs related to Individuals with Disabilities Education Act, special populations, and federal and state statutes using a risk assessment index and holistic student-centered practices and provides targeted technical assistance and support for LEAs related to special education and special populations.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code, §12.1181, which requires the commissioner to develop and adopt performance frameworks to measure the performance of an open-enrollment charter school.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §12.1181.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 21, 2023.

TRD-202302609
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: August 10, 2023
Proposal publication date: May 5, 2023
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 343. CONTESTED CASE PROCEDURE

22 TAC §§343.5, 343.6, 343.8, 343.9, 343.21, 343.22, 343.36, 343.40, 343.41

The Texas Board of Physical Therapy Examiners adopts amendments to 22 Texas Administrative Code (TAC) Chapter 343. Contested Case Procedures, Occupations Code. Specif-

ically, the Board adopts amendments to §343.5. Licensure of Persons with a History of Substance Abuse, §343.6. Other Grounds for Denial of a License or Discipline of a Licensee, §343.8. Licensure of Persons with a History of Voluntary or Involuntary Psychiatric Hospitalization, §343.9. Licensure of Persons with Criminal Convictions, §343.21. Witness Fees and Expenses, §343.22. Service of Notice, §343.36. Filing and Receipt of Complaints, §343.40. Informal Conference, and §343.41. Agreed Orders.

The amendments are adopted without changes to the proposed text as published in the June 16, 2023 issue of the *Texas Register* (48 TexReg 3060). The rules will not be republished.

The amendments are adopted in order to provide clarity to the procedures for contested cases; to correct inaccurate and outdated references; and to conform the rules with the physical therapy provisions in Chapter 453, Occupations Code, with the administrative procedures in Chapter 2001, Government Code, and with the consequences of criminal conviction in Chapter 53, Occupations Code.

No public comment was received.

Statutory authority: The amendments are adopted under Texas Occupation Code §453.102, which authorizes the board to adopt rules necessary to implement chapter 453.

The amended rules are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 24, 2023.

TRD-202302618
Ralph Harper
Executive Director
Texas Board of Physical Therapy Examiners
Effective date: September 1, 2023
Proposal publication date: June 16, 2023
For further information, please call: (512) 305-6900

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CHAPTER 346. PRACTICE SETTINGS FOR PHYSICAL THERAPY

22 TAC §346.3

The Texas Board of Physical Therapy Examiners adopts amendments to 22 Texas Administrative Code (TAC) §346.3. Early Childhood Intervention (ECI) Setting, relating to the provision of physical therapy services to infants and toddlers in an early childhood setting.

The amendments are adopted in order to update a Code of Federal Regulations reference, to eliminate the requirement for the completion of an evaluation and reevaluation to be done onsite allowing for provision via telehealth if indicated, to align the 60-day review of the plan of care (POC) to the requirement in other settings prior to continuation of treatment by a physical therapist assistant, and to report recommendations following a review of the POC to the ECI Interdisciplinary Team.

The amendments are adopted without changes to the proposed text as published in the June 16, 2023, issue of the *Texas Register* (48 TexReg 3063) and will not be republished.

No public comment was received.

The amended rule is adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 24, 2023.

TRD-202302619
Ralph Harper
Executive Director
Texas Board of Physical Therapy Examiners
Effective date: September 1, 2023
Proposal publication date: June 16, 2023
For further information, please call: (512) 305-6900

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PART 17. TEXAS STATE BOARD OF PLUMBING EXAMINERS

CHAPTER 361. ADMINISTRATION

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §§361.1, 361.4, 361.6, 361.10, 361.12, 361.15

The Texas State Board of Plumbing Examiners (Board) adopts the rule amendments to 22 Texas Administrative Code (TAC), Chapter 361, §§361.1(a)(3), (9), (14), (21), (23), (25), (36), (39), (47); 361.1(b); 361.4; 361.6; 361.10; 361.12; and 361.15 which concern definitions and general provisions. The rule amendments for §§361.4, 361.6, 361.10, 361.12, and 361.15 are adopted without changes to the proposed text published in the February 24th, 2023, issue of the *Texas Register* (48 TexReg 1011). These rules will not be republished. The published proposed rule amendment under §361.1(a)(18) regarding virtual supervision was not adopted as proposed which constitutes a change. Therefore, §361.1 will be republished.

REASONED JUSTIFICATION FOR THE ADOPTED RULE AMENDMENTS

The rules under 22 TAC, Chapter 361, support Texas Occupations Code, Chapter 1301, Texas State Board of Plumbing Examiners (Plumbing License Law or PLL).

The adopted rule amendments implement changes to the PLL as amended by House Bill 636, 87th Texas Legislature, Regular Session, 2021 (HB 636), and Board efforts to improve regulation of the industry by simplifying the rules as part of its four-year rule review. The rule simplification efforts, directed by the Board, make the rules easier to understand and enforce by eliminating unnecessary language, adding clarifying language, and restructuring regulations to make the rules more efficient. Unnecessary internal references to rule and statute have been eliminated to keep the rules current regardless of changes to statutes and rules.

SECTION-BY-SECTION SUMMARY

The adopted rule amends §361.1 which lists definitions. The definitions do not create any affirmative duty on or regulation of registrants or licensees. The definitions simply define terms for use by the rules and PLL. The specific definitions adopted are amended as follows:

(3) Advisory Committee. The language is updated to be more concise and eliminates unnecessary and outdated rule reference. This allows the rules to stay current regardless of changes to referenced laws or rules.

(9) Certificate of Insurance. The language is updated to be more concise and eliminates unnecessary and outdated rule and statutory references. This allows the rules to stay current regardless of changes to referenced laws or rules.

(14) Complaint. The language is updated to be more concise.

(21) Field Representative. The amendment makes the rule more concise by eliminating an unnecessary reference and correcting a spelling mistake.

(23) License. The language has been updated to be more concise.

(25) Maintenance Man or Maintenance Engineer. This definition defines what work maintenance staff may perform. The definition is amended to include longstanding and inadvertently repealed language showing that work incidental to and in connection with maintenance duties does not include cutting into fuel gas plumbing systems and installation of gas fueled water heaters. This language was present from 2000 until July 2017 when the rule was re-organized. Staff, discovering the inadvertent deletion during the four-year rule review, believe it was repealed in error. The long-standing language is reclaimed into the definition to provide clarifying guidance for ease of use and does not expand or restrict the current industry practice of maintenance men or maintenance engineers.

(36) Petitioner. The definition is updated to eliminate unnecessary references. This allows the rules to stay current regardless of changes to referenced laws or rules.

(39) Plumbing Inspector. The definition is updated to eliminate unnecessary references. This allows the rule to stay current regardless of changes to referenced laws or rules.

(47) Responsible Master Plumber (RMP). The definition is updated to eliminate unnecessary references. This allows the rule to stay current regardless of changes to referenced laws or rules.

The amendment at §361.1(b) deletes language that states that any definition not in rule is defined by the statute. This language is unnecessary and deleted to make the rules more concise.

The adopted rule amends §361.4 which makes the rule more concise by deleting language requiring the Board to set forth in writing procedures for its operation. These written procedures are not required in statute.

The adopted rule amends §361.6 on renewal fees for Medical Gas Installation, Multipurpose Residential Fire Protection Sprinkler Specialists, Water Supply Protection Specialists endorsements and the related late renewal fees. These fees are eliminated. The Board has not been collecting these fees. The rules simply update their current practice.

The adopted rule amends §361.10 on the Historically Underutilized Business (HUB) Program. The rule is amended to incorporate the rules of the Texas Comptroller of Public Accounts, not the Texas Facilities Commission as is appropriate.

The adopted rule amends §361.12 on advisory boards. Rule provisions, not required by statute, for advisory boards are eliminated to make the rule more concise. The Board currently has no advisory boards.

The adopted rule amends §361.15. Rule language about when the Board will elect a secretary is eliminated as unnecessary and not required by Section 1301.157 of the statute.

SUMMARY OF PUBLIC COMMENT

The Board drafted and distributed the proposed rule amendments to persons internal and external to the agency. The proposed rule amendments were published in the February 24th, 2023 issue of the *Texas Register* (48 TexReg 1101). No comment was received on the adopted rule amendments.

Public comments were received only on §361.1(a)(18), which was not adopted. Those comments are summarized below:

Comment: APHCCT opposed the proposed rule amendment stating that the change has the potential to negatively impact the health and safety of Texans, particularly in terms of faulty installation in homes and businesses. Loosening supervision restrictions by allowing virtual supervision poses risks to both customers and licensed plumbers because it can be exploited by unethical individuals seeking to cut corners in their work. The proposal does not adequately train individuals to install safe, sanitary plumbing. It is essential to have a licensed plumber on-site to demonstrate and explain the necessary steps and reasons behind proper installation to train a plumber. The use of virtual supervision may not provide the licensed plumber with a comprehensive view of the situation, as the on-site individual controls what they show and hide. Apprentices currently do not have to submit their fingerprints to the board, and without a licensed plumber present, the purpose of requiring fingerprints for customer protection is defeated.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment stating that permitting virtual offsite supervision will diminish the value of journeyman and tradesman licenses.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment stating that permitting virtual offsite supervision will diminish the value of journeyman and tradesman licenses.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor expressed concern that permitting virtual supervision could take jobs away from licensed plumbers. However, virtual supervision could be useful if limited to on-site licensed plumbers sending progress updates to RMPS.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment. Permitting virtual offsite supervision will diminish the value of journeyman and tradesman licenses.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment. Allowing virtual supervision puts the public at risk by drastically reducing the required skill level of individuals performing plumbing work. However, the amendment would benefit hiring and increase production but considers the cost to public safety too high.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment. Concerned that this change would seriously impact the installation of plumbing systems, especially medical gasses, fuel gas systems, sanitary sewer, and potable water systems. Virtual supervision will harm on-the-job learning processes and the Board's enforcement of this rule.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment because it incentivizes RMPs to only employ apprentice plumbers instead of tradesmen or journeymen. Asserts that RMPs should not be able to supervise from miles or states away.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment because it will be detrimental to the public's health. Concerned that video supervision is susceptible to manipulation and is an insufficient tool to train new apprentices or prevent dangerous situations on-site. Argues that this amendment harms the necessary hands-on training and supervision required of the profession.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment because it is not a sufficient option for supervising plumbers.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment because it will diminish the value of plumbing licenses and contradicts the importance of education in the industry. Indirect supervision increases the risk of accidents and problems.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment because virtual supervision is inadequate. It is impossible to see the job's full parameters and necessary details from offsite.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment because inexperienced plumbers should not have to video call their supervisors at every job.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment because it will act as a loophole for companies to employ inexperienced apprentice plumbers in Texas to work without real supervision. The commentor recommends limiting this rule to exclude plumbers with limited time in the trade.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment because virtual supervision is insufficient. Concerned that allowing virtual job supervision is not as effective as providing a presence on the job site.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment because it will diminish industry integrity. Journeyman and Tradesman licenses will be devalued and replaced by less expensive apprentices. Companies will rely on apprentices that need no prerequisites threatening the industry's integrity. The commentor has concern that the amendment lacks distinction between new residential, existing residential, and commercial plumbing, and recommends restricting the rule for apprentices qualified to take the examination instead of all apprentices. The commentor recommends a minimum of one year of apprentice work before qualifying for virtual supervision and the exclusion of commercial plumbing. Virtual supervision should be limited to minor residential repairs, not including slab leaks, water heaters, gas work, or tunnel jobs.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment because permitting virtual supervision will destroy tradesman licenses. Additionally, it would be difficult for a RMP to properly view the on-site work.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment because virtual supervision may incentivize inexperienced apprentices to avoid seeking guidance from supervisors. In this situation, the health and safety of plumbers and the public may be at risk.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor opposed the rule amendment because the proposed language is too broad. There is concern that

this change will negate the necessity of tradesman and journeyman licenses. The commentor recommends excluding commercial work from virtual supervision.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

Comment: The commentor supports RMPs being fully responsible for direct supervision, including virtual.

Response: The Board appreciates the comment.

Comment: The commentor supports the use of modern technology to allow RMPs to supervise experienced apprentices performing simple activities. The amendment would allow for more efficient management, and the liability of the apprentice's work will still fall back on the RMP and the company.

Response: The Board appreciates the comment.

Comment: The commentor supports the ability to remotely supervise experienced apprentices because it helps address the industry's labor shortage.

Response: The Board appreciates the comment.

Comment: The commentor states that virtual visual oversight will make it easier to put workers on job sites but is concerned with RMP's supervising multiple job sites simultaneously. The commentor requests clarification as to whether this allows for intermittent video/virtual oversight or if continuous supervision is required.

Response: The Board appreciates the comment and as a result has determined not to adopt the rule amendment at §361.1(a)(18) as published.

BOARD ACTION

At its meeting on June 27, 2023, the Board adopted the proposed rule amendments as published, with the exception of the proposed definition on virtual supervision at §361.1(a)(18).

STATUTORY AUTHORITY

The rules are adopted under the authority of § 1301.251(2) of the Occupations Code, which requires the Board to adopt and enforce rules necessary to administer and enforce the Plumbing License Law.

§361.1. Definitions.

The following words and terms, when used in this part, have the following meanings, unless the context clearly indicates otherwise:

(1) APA--The Administrative Procedure Act, Chapter 2001 of the Texas Government Code.

(2) Adopted Plumbing Code--A plumbing code, including a fuel gas code adopted by the Board or a political subdivision, in compliance with §1301.255 and §1301.551 of the Plumbing License Law.

(3) Advisory Committee--A committee appointed by the presiding officer of the board created to assist the board in exercising its powers and duties.

(4) Appliance Connection--An appliance connection procedure using only a code-approved appliance connector that does not require cutting into or altering the existing plumbing system.

(5) Applicant--An individual seeking to obtain a license, registration or endorsement issued by the Board.

(6) Board--The Texas State Board of Plumbing Examiners.

(7) Board Member--An individual appointed by the governor and confirmed by the senate to serve on the Board.

(8) Building Sewer--The part of the sanitary drainage system outside of the building, which extends from the end of the building drain to a public sewer, private sewer, private sewage disposal system, or other point of sewage disposal.

(9) Certificate of Insurance--A form submitted to the Board certifying that the Responsible Master Plumber carries insurance coverage as specified in the Plumbing License Law and Board Rules.

(10) Chief Examiner--An employee of the Board who, under the direction of the Executive Director, coordinates and supervises the activities of the Board examinations and registrations.

(11) Cleanout--A fitting, other than a p-trap, approved by the adopted plumbing code and designed to be installed in a sanitary drainage system to allow easy access for cleaning the sanitary drainage system.

(12) Code-Approved Appliance Connector--A semi-rigid or flexible assembly of tube and fittings approved by the adopted plumbing code and designed for connecting an appliance to the existing plumbing system without cutting into or altering the existing plumbing system.

(13) Code-Approved Existing Opening--For the purposes of drain cleaning activities described in §1301.002(3) of the Plumbing License Law, a code-approved existing opening is any existing cleanout fitting, inlet of any p-trap or fixture, or vent terminating into the atmosphere that has been approved and installed in accordance with the adopted plumbing code.

(14) Complaint--A written complaint filed with the Board against a person whose activities are subject to the jurisdiction of the Board.

(15) Contested Case--A proceeding in which the legal rights, duties, or privileges of a party are to be determined by the Board after an opportunity for adjudicative hearing.

(16) Continuing Professional Education or CPE--Approved courses/programs required for a licensee or registrant.

(17) Director of Enforcement--An employee of the Board who meets the definition of "Field Representative" and, under the direction of the Executive Director, coordinates and supervises the activities of the Field Representatives.

(18) Direct Supervision--

(A) The on-the-job oversight and direction of a registered Plumber's Apprentice performing plumbing work by a licensed plumber who is fulfilling his or her responsibility to the client and employer by ensuring the following:

(i) that the plumbing materials for the job are properly prepared prior to assembly according to the material manufacturers recommendations and the requirements of the adopted plumbing code; and

(ii) that the plumbing work for the job is properly installed to protect health and safety by meeting the requirements of the adopted plumbing code and all requirements of local and state ordinances, regulations and laws.

(B) The on-the-job oversight and direction by a licensed Plumbing Inspector of an individual training to qualify for the Plumbing Inspector Examination.

(C) For plumbing work performed only in the construction of a new one-family or two-family dwelling in an unincorporated area of the state, a Responsible Master Plumber is not required to provide for the continuous or uninterrupted on-the-job oversight of a Registered Plumber's Apprentice's work by a licensed plumber, however, the Responsible Master Plumber must:

(i) provide for the training and management of the Registered Plumber's Apprentice by a licensed plumber;

(ii) provide for the review and inspection of the Registered Plumber's Apprentice's work by a licensed plumber to ensure compliance with subparagraph (A)(i) and (ii) of this paragraph; and

(iii) upon request by the Board, provide the name and plumber's license number of the licensed plumber who is providing on-the-job training and management of the Registered Plumber's Apprentice and who is reviewing and inspecting the Registered Plumber's Apprentice's work on the job, or the name and plumber's license number of the licensed plumber who trained and managed the Registered Plumber's Apprentice and who reviewed and inspected the Registered Plumber's Apprentice's work on a job.

(19) Endorsement--A certification issued by the Board as an addition to a Master Plumber, Plumbing Inspector, or Journeyman Plumber License or a Plumber's Apprentice Registration, including a Drain Cleaner Registration, a Drain Cleaner-Restricted Registration, and a Residential Utilities Installer Registration.

(20) Executive Director--The executive director of the Texas State Board of Plumbing Examiners who is employed by the Board as the executive head of the agency.

(21) Field Representative--An employee of the Board who is:

(A) knowledgeable of the Plumbing License Law and of municipal ordinances related to plumbing;

(B) qualified by experience and training in good plumbing practice and compliance with the Plumbing License Law;

(C) designated by the Board to assist in the enforcement of the Plumbing License Law and Board rules;

(D) licensed by the Board as a plumber; and

(E) hired to:

(i) make on-site license and registration checks to determine compliance with the Plumbing License Law;

(ii) investigate complaints; and

(iii) assist municipal plumbing inspectors in cooperative enforcement of the Plumbing License Law.

(22) Journeyman Plumber--An individual licensed under the Plumbing License Law who has met the qualifications for registration as a Plumber's Apprentice or for licensure as a Tradesman Plumber-Limited, who has completed at least 8,000 hours working under the supervision of a Responsible Master Plumber, who supervises, engages in, or works at the actual installation, alteration, repair, service and renovating of plumbing, and who has successfully fulfilled the examinations and requirements of the Board.

(23) License--A license, registration, certification, or endorsement issued by the Board.

(24) Licensing and Registering--The process of granting, denying, renewing, reinstating, revoking, or suspending a license, registration or endorsement.

(25) Maintenance Man or Maintenance Engineer--An individual who:

(A) is an employee, and not an independent contractor or subcontractor;

(B) performs plumbing maintenance work incidental to and in connection with other employment-related duties; and

(C) does not engage in plumbing work for the general public.

(D) For the purposes of paragraph 25(B), "incidental to and in connection with" includes the repair, maintenance and replacement of existing potable water piping, existing sanitary waste and vent piping, existing plumbing fixtures and existing water heaters. It does not include cutting into fuel gas plumbing systems and the installation of gas fueled water heaters.

(E) An individual who erects, builds, or installs plumbing not already in existence may not be classified as a maintenance man or maintenance engineer. Plumbing work performed by a maintenance man or maintenance engineer is not exempt from state law and municipal rules and ordinances regarding plumbing codes, plumbing permits and plumbing inspections.

(26) Master Plumber--An individual licensed under the Plumbing License Law who is skilled in the design, planning, superintending, and the practical installation, repair, and service of plumbing, who is knowledgeable about the codes, ordinances, or rules and regulations governing those matters, who alone, or through an individual or individuals under his supervision, performs plumbing work, and who has successfully fulfilled the examinations and requirements of the Board.

(27) Medical Gas Piping Installation Endorsement--

(A) A certification entitling the holder of a Master or Journeyman Plumber License to install piping that is used solely to transport gases used for medical purposes including, but not limited to, oxygen, nitrous oxide, medical air, nitrogen, or medical vacuum.

(B) A certification entitling the holder of a Plumbing Inspector License to inspect medical gas and vacuum system installations.

(28) Multipurpose Residential Fire Protection Sprinkler Specialist Endorsement--

(A) A certification entitling the holder of a Master or Journeyman Plumber License to install a multipurpose residential fire protection sprinkler system in a one or two family dwelling.

(B) A certification entitling the holder of a Plumbing Inspector License to inspect a multipurpose residential fire protection sprinkler system.

(29) Military service member--A person who is currently serving in the armed forces of the United States, in a reserve component of the armed forces of the United States, including the National Guard, or in the state military service of any state.

(30) Military spouse--A person who is married to a military service member who is currently on active duty.

(31) Military veteran--A person who has served in the army, navy, air force, marine corps, or coast guard of the United States, or in an auxiliary service of one of those branches of the armed forces.

(32) One-Family Dwelling--A detached structure designed for the residence of a single family that does not have the characteristics of a multiple family dwelling, and is not primarily designed for

transient guests or for providing services for rehabilitative, medical, or assisted living in connection with the occupancy of the structure.

(33) Party--A person or state agency named or admitted as a party to a contested case.

(34) Paid Directly--As related to §1301.255(e) of the Plumbing License Law, "paid" and "directly" have the common meanings and "paid directly" means that compensation for plumbing inspections must be paid by the political subdivision to the individual Licensed Plumbing Inspector who performed the plumbing inspections or the plumbing inspection business which utilized the plumbing inspector to perform the inspections.

(35) Person--An individual, partnership, corporation, limited liability company, association, governmental subdivision or public or private organization of any character other than an agency.

(36) Petitioner--A person requesting the Board to adopt, amend or repeal a rule pursuant to §2001.021 of the Texas Government Code and the Board Rules.

(37) Plumbing--

(A) All piping, fixtures, appurtenances, and appliances, including disposal systems, drain or waste pipes, multipurpose residential fire protection sprinkler systems or any combination of these that: supply, distribute, circulate, recirculate, drain, or eliminate water, gas, medical gasses and vacuum, liquids, and sewage for all personal or domestic purposes in and about buildings where persons live, work, or assemble; connect the building on its outside with the source of water, gas, or other liquid supply, or combinations of these, on the premises, or the water main on public property; and carry waste water or sewage from or within a building to the sewer service lateral on public property or the disposal or septic terminal that holds private or domestic sewage.

(B) The installation, repair, service, maintenance, alteration, or renovation of all piping, fixtures, appurtenances, and appliances on premises where persons live, work, or assemble that supply gas, medical gasses and vacuum, water, liquids, or any combination of these, or dispose of waste water or sewage. Plumbing includes the treatment of rainwater to supply a plumbing fixture or appliance. The term "service" includes, but is not limited to, cleaning a drain or sewer line using a cable or pressurized fluid.

(38) Plumbing Company--A person who engages in the plumbing business.

(39) Plumbing Inspection--Any of the inspections required in the Plumbing License Law, including any check of multipurpose residential fire protection sprinkler systems, pipes, faucets, tanks, valves, water heaters, plumbing fixtures and appliances by and through which a supply of water, gas, medical gasses or vacuum, or sewage is used or carried that is performed on behalf of any political subdivision, public water supply, municipal utility district, town, city or municipality to ensure compliance with the adopted plumbing and gas codes and ordinances regulating plumbing.

(40) Plumbing Inspector--Any individual who is employed by a political subdivision or state agency, or who contracts as an independent contractor with a political subdivision or state agency, for the purpose of inspecting plumbing work and installations in connection with health and safety laws, ordinances, and plumbing and gas codes, who has no financial or advisory interests in any plumbing company, and who has successfully fulfilled the examinations and requirements of the Board.

(41) Plumbing License Law or PLL--Chapter 1301 of the Texas Occupations Code.

(42) Pocket Card--A card issued by the Board which:

(A) certifies that the holder has a Responsible Master Plumber License, Master Plumber License, Journeyman Plumber License, Tradesman Plumber-Limited License, Plumbing Inspector License, or a Plumber's Apprentice Registration; and

(B) lists any Endorsements obtained by the holder.

(43) Political Subdivision--A political subdivision of the State of Texas that includes a:

(A) city;

(B) county;

(C) school district;

(D) junior college district;

(E) municipal utility district;

(F) levee improvement district;

(G) drainage district;

(H) irrigation district;

(I) water improvement district;

(J) water control improvement district;

(K) water control preservation district;

(L) freshwater supply district;

(M) navigation district;

(N) conservation and reclamation district;

(O) soil conservation district;

(P) communication district;

(Q) public health district;

(R) river authority; and

(S) any other governmental entity that:

(i) embraces a geographical area with a defined boundary;

(ii) exists for the purpose of discharging functions of government; and

(iii) possesses authority for subordinate self-government through officers selected by it.

(44) P-Trap--A fitting connected to the sanitary drainage system for the purpose of preventing the escape of sewer gasses from the sanitary drainage system and designed to be removed to allow for cleaning of the sanitary drainage system. For the purposes of drain cleaning activities described in §1301.002(2) of the Plumbing License Law, a p-trap includes any integral trap of a water closet, bidet, or urinal.

(45) Public Water System--A system for the provision to the public of water for human consumption through pipes or other constructed conveyances. Such a system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year. Two or more systems with each having a potential to serve less than 15 connections or less than 25 individuals, but owned by the same person, firm, or corporation and located on adjacent land will be considered a public water system when the total potential service connections in the combined systems are 15 or greater or if the total number of individuals served by the combined systems total 25 or greater, at least 60 days out of the year. Without excluding other meanings of the terms "indi-

vidual" or "served," an individual shall be deemed to be served by a water system if the individual lives in, uses as the individual's place of employment, or works in a place to which drinking water is supplied from the water system.

(46) Respondent--A person charged in a complaint filed with the Board.

(47) Responsible Master Plumber or RMP--A licensed Master Plumber who:

(A) allows the person's Master Plumber License to be used by only one plumbing company for the purpose of offering and performing plumbing work;

(B) is authorized to obtain permits for plumbing work;

(C) assumes responsibility for plumbing work performed under the person's license;

(D) has submitted a certificate of insurance as required by the Plumbing License Law and Board Rules; and

(E) When used in Board forms, applications or other communications by the Board, the abbreviation "RMP" shall mean Responsible Master Plumber.

(48) Registration--A document issued by the Board to certify that the named individual fulfilled the requirements of the PLL and Board Rules to register as a Plumber's Apprentice.

(49) Rule--An agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of the agency. The term includes the amendment or repeal of a prior rule but does not include statements concerning only the internal management or organization of the agency and not affecting private rights or procedures.

(50) Supervision--The general oversight, direction and management of plumbing work and individuals performing plumbing work by a Responsible Master Plumber, or licensed plumber designated by the RMP.

(51) System--An interconnection between one or more public or private end users of water, gas, sewer, or disposal systems that could endanger public health if improperly installed.

(52) Tradesman Plumber-Limited Licensee--An individual who has completed at least 4,000 hours working under the direct supervision of a Journeyman or Master Plumber as a registered Plumber's Apprentice, who has passed the required examination and fulfilled the other requirements of the Board, or successfully completed a career and technology education program, who constructs, installs, changes, repairs, services, or renovates plumbing for one-family or two-family dwellings under the supervision of a Responsible Master Plumber, and who has not met or attempted to meet the qualifications for a Journeyman Plumber License.

(53) Two-Family Dwelling--A detached structure with separate means of egress designed for the residence of two families ("duplex") that does not have the characteristics of a multiple family dwelling and is not primarily designed for transient guests or for providing services for rehabilitative, medical, or assisted living in connection with the occupancy of the structure.

(54) Water Supply Protection Specialist--A Master or Journeyman Plumber who holds the Water Supply Protection Specialist Endorsement issued by the Board to engage in customer service inspections, as defined by rule of the Texas Commission on Environmental Quality, and the installation, service, and repair of plumbing associated with the treatment, use, and distribution of rainwater to supply a plumbing fixture or appliance.

(55) Water Treatment--A business conducted under contract that requires experience in the analysis of water, including the ability to determine how to treat influent and effluent water, to alter or purify water, and to add or remove a mineral, chemical, or bacterial content or substance. The term also includes the installation and service of potable water treatment equipment in public or private water systems and making connections necessary to complete installation of a water treatment system. The term does not include treatment of rainwater or the repair of systems for rainwater harvesting.

(56) Yard Water Service Piping--The building supply piping carrying potable water from the water meter or other source of water supply to the point of connection to the water distribution system at the building.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 18, 2023.

TRD-202302576
Lynn Latombe
General Counsel
Texas State Board of Plumbing Examiners
Effective date: August 7, 2023
Proposal publication date: February 24, 2023
For further information, please call: (512) 936-5216

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 330. MUNICIPAL SOLID WASTE SUBCHAPTER O. REGIONAL AND LOCAL SOLID WASTE MANAGEMENT PLANNING AND FINANCIAL ASSISTANCE GENERAL PROVISIONS

30 TAC §330.647

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to 30 Texas Administrative Code (TAC) §330.647.

Amended 30 TAC §330.647 is adopted without changes to the proposed text as published in the February 24, 2023, issue of the *Texas Register* (48 TexReg 1020) and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

In Texas, 24 regional planning commissions, also known as councils of governments (COGs), have the primary responsibility under Texas Health and Safety Code (THSC), §363.0615 for regional solid waste management planning. All 24 COGs submitted regional solid waste management plans to TCEQ, and TCEQ reviewed the plans in accordance with THSC, Chapter 363, Subchapter D. This rulemaking adopts the approved

regional solid waste management plans in compliance with THSC, §363.062(f), which states the commission will adopt the plans by rule. THSC, §363.062 and 30 TAC §330.641 describe the procedures for submission and approval of the regional solid waste management plans.

These new regional solid waste management plans will replace existing regional plans developed in 2002. The period for the existing regional solid waste management plans is from 2002 to 2022. All 24 COGs will reference the goals and strategies in the commission-approved plans in their implementation activities and projects.

The regional solid waste management plans include goals and strategies for implementing and promoting proper waste disposal management, waste diversion from landfills, recycling, and waste minimization, as well as initiatives for reducing illegal dumping of waste in each planning region. The regional solid waste management plans also describe the regions' current and anticipated activities as required by 30 TAC §330.643(a)(3). Plan requirements include documenting and estimating future growth for the region's population and commercial and industrial base; estimating future solid waste amounts by type; descriptions of current and planned waste management activities; and assessment and adequacy of existing waste management facilities, practices, and programs. The regional solid waste management plans also require assessment of current and future efforts of source reduction and waste minimization activities, as well as reuse and recycling of waste.

The regional solid waste management plans were developed by each COG using the most recent population, business, industry, and solid waste management data available from the State of Texas, universities, and financial and business entities. Local stakeholders were also surveyed to solicit feedback and ideas on goals and strategies.

Notice of the plans' availability for public review was published in local newspapers and/or media pages, and public comment meetings were scheduled and held in all 24 COG areas. The final regional solid waste management plans were approved by each COG's Solid Waste Advisory Committee and Board of Directors.

Section by Section Discussion

§330.647, Approved Regional and Local Solid Waste Management Plans

The commission adopts amended §330.647(a) to specify that subsection (d) contains the adopted regional solid waste management plans.

The commission adopts new §330.647(d)(1)-(24) to incorporate the approved regional solid waste management plans by reference.

Final Regulatory Impact Determination

The commission reviewed the rulemaking adoption under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking adoption is administrative in nature and is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Rather, this rulemaking is procedurally required for the commission to adopt the approved regional solid waste management plans by rule in accordance with THSC, §363.062(f).

Furthermore, Texas Government Code §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. The rulemaking adoption action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, or adopt a rule solely under the general powers of the commission but is authorized by specific sections of the Texas Water Code, the Texas Government Code, and the Texas Health and Safety Code, which are cited in the statutory authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated this rulemaking adoption and performed analysis of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking adoption is to adopt the new regional solid waste management plans for the 2022-2042 planning period that the commission has approved to replace the existing regional solid waste management plans from the 2002-2022 planning period, in accordance with THSC, §363.062(f), which states that the commission shall adopt an approved regional solid waste management plan by rule. The adopted rule will substantially advance this stated purpose by amending 30 TAC §330.647(a) and adding §330.647(d)(1)-(24) to incorporate the new approved regional solid waste management plans by reference into 30 TAC Chapter 330, Subchapter O.

Promulgation and enforcement of the adopted rule will be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted rule does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the rules. In other words, the adopted rule will not burden private real property because the adopted rule is not directed at private real property owners. The rule adopts plans reflecting goals and objectives for solid waste management that regional and local councils of governments submitted to the commission for review. Therefore, the adopted rule will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rule and found the adoption is a rulemaking identified in the Coastal Coordination Act implementation rules, 31 TAC §29.11(b)(4) (relating to Actions and Rules Subject to the Coastal Management Program (CMP)), and will, therefore, require that goals and policies of the Texas CMP be considered during the rulemaking process.

The commission reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is administrative in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency of this rulemaking with the CMP goals and policies during the public comment period. No comments were received.

Public Comment

The commission held a public hearing on March 23, 2023. The comment period closed on March 27, 2023. The commission received comments from Harris County Pollution Control Services (PCS) and one individual. The two commenters were neither in support of nor against the proposed rule revisions. The two commenters suggested changes to the proposed rule revisions.

Response to Comments

Comment

PCS commented that many landfills in Texas have permitted heights that are hundreds of feet in elevation and that recyclables are being disposed of in landfills. PCS expressed concern with future expansion of municipal solid waste (MSW) facilities and that expansion of MSW facilities may lead to nuisance complaints from the public. PCS noted that the Houston-Galveston Area Council's (HGAC) draft Regional Solid Waste Management Plan contains objectives to encourage development of larger regional facilities, expansion of existing MSW facilities, and development of transfer stations and citizen collection stations. PCS recommended an increase in the recycling rate percentage goals contained within the regional solid waste management plans to reduce expansion of MSW facilities in the future.

Response

THSC, §363.064 describes the required contents of a regional solid waste management plan. THSC, §363.064(a)(8) and 30 TAC §330.635(a)(2)(B)(ii) state that a regional solid waste management plan must establish recycling rate goals that are appropriate to the region. COGs used historical data, current recycling rates, population projections, local solid waste management plans, and stakeholder input to determine recycling rate goals that are appropriate for their regions, and these regional goals may differ from the statewide goal in THSC, §361.422(a). The HGAC plan establishes a recycling rate goal of 31% that HGAC determined is appropriate for its region because of historical data, waste generation projections, and current and projected improvements of recycling programs in the region. The commission determined through its review of the regional solid waste management plans, in accordance with THSC, §363.062, that all COGs, including HGAC, met the requirement of including an appropriate regional recycling rate goal in their regional solid waste management plans.

THSC, §363.064(a)(11) requires COGs to "assess the need for new waste disposal capacity" in their regional solid waste management plans. Additionally, 30 TAC §330.643(a)(3)(D) requires a "description and assessment of the adequacy of existing resource recovery, storage, transportation, treatment, and disposal facilities and practices, and programs for the collection and disposal of household hazardous wastes." HGAC is a COG subject to this requirement. The commission determined through its review of the regional solid waste management plans, in accordance with THSC, §363.062, that HGAC met the requirement to assess the need for new waste disposal capacity in its region, including recycling facilities, disposal facilities, transfer stations, and citizen collection centers.

In accordance with 30 TAC §305.122(d), "[t]he issuance of a permit does not authorize any injury to persons or property or an invasion of other property rights, or any infringement of state or local law or regulations." MSW facilities are required to operate in a way that prevents the occurrence of nuisance conditions in accordance with 30 TAC §330.15. If a facility violates a term of its permit or other authorization or applicable rules or regulations, the owner or operator of the facility may be subject to an enforcement action. The commission has made no changes in response to this comment.

Comment

PCS commented that other states are achieving recycling rates of over 40 percent and recommended that TCEQ should reevaluate the achievable recycling rate goal of 40 percent for the State of Texas that is provided in THSC, §361.422(a).

Response

The Texas state legislature initiates changes to solid waste management requirements in statute, and the commission's role is to adopt rules that implement the legislation pursuant to the Texas Government Code, Chapter 2001. While §361.422(a) provides a state goal to reduce municipal solid waste disposal through source reduction and recycling, legislation codified in THSC, §363.064 states the requirements for regional solid waste management plans. THSC, §363.064(a)(8) requires that a regional solid waste management plan must "establish recycling rate goals appropriate to the area covered by the plan." Additionally, THSC, §363.064(a) provides that a regional solid waste management plan must identify additional opportunities and make recommendations for encouraging and achieving waste minimization and waste reuse or recycling.

The recycling goal in THSC, §361.422(a) was implemented through actions in Chapter 328 of the agency's rules. Chapter 328 is outside the scope of this rulemaking. The commission has made no changes in response to this comment.

Comment

PCS expressed concern that private recycling partnerships, such as the Houston Recycling Collaborative and the Community and Industry Partnership, are being developed without the knowledge or support of the COG, thereby reducing the COG's facilitation of such partnerships and reducing their availability to the public.

Response

While THSC, Chapter 363, Subchapter D does not require TCEQ or the COGs to participate in or support private recycling partnerships, TCEQ will always encourage community partnerships between local businesses, non-governmental organizations, local governments, and the public as a way to understand the many perspectives from a community. TCEQ will notify HGAC of the Community and Industry Partnership and the Houston Re-

cycling Collaborative. The commission has made no changes in response to this comment.

Comment

PCS commented that TCEQ should ensure MSW facilities comply with THSC §363.066(a) upon the commission's adoption of the regional solid waste management plans.

Response

The commission acknowledges this comment. THSC, §363.066(a) provides, "[o]n the adoption of a regional or local solid waste management plan by commission rule, public and private solid waste management activities and state regulatory activities must conform to that plan." This rulemaking adoption does not change the requirement in THSC, §363.066(a) or the commission's implementation of it. Instead, this rulemaking adoption incorporates by reference the 24 regional solid waste management plans for years 2022 through 2042. The commission determined, through its review of the regional solid waste management plans, that all COGs met the requirement in 30 TAC §330.643(a)(3)(O) to identify in the regional solid waste management plans the processes the regions will use to evaluate whether a proposed MSW facility would conform to the regional plan. COGs may evaluate whether proposed MSW activities would conform to the regional solid waste management plan's goals and objectives and provide that determination to TCEQ. The Executive Director may consider recommendations in COGs' conformance reviews during technical review of applications for MSW facilities. TCEQ is responsible for making final determinations approving or denying MSW facility applications. The commission has made no change in response to this comment.

Comment

PCS commented that some of the public notices to announce public meetings for the purpose of receiving public comment about proposed regional solid waste management plans were not published 15 days in advance of the public meetings in accordance with 30 TAC §330.639(d). PCS further commented that the public was not given an adequate opportunity to review and comment on the proposed regional solid waste management plans when public notices did not meet the rule requirement. PCS recommended that TCEQ review the public notices and require re-publication of any notices that did not meet the requirements of 30 TAC §330.639(d).

Response

During review of the regional solid waste management plans, TCEQ determined that, although some COGs published notice of their plans less than 15 days before their public meetings about the plans, the COGs substantially complied with 30 TAC §330.639 in notifying the public about the plans. In developing their plans, the COGs solicited input from stakeholders through several methods, including meetings and surveys. Each COG's advisory committee, composed of members representing a broad range of interests, including local government staff, public officials, private operators, citizen groups, and interested individuals, also provided input on the plans. All 24 COGs published notice of their plans' availability for public review in local newspapers and/or on the COGs' websites and media pages and held public meetings to receive comments on their draft plans before submitting them to TCEQ. Some of the COGs, including HGAC, made changes to their plans based on the public comments they received, as documented in their regional plans. All regional solid waste management plans were listed on the COGs' agendas and approved by their boards of directors at meetings held open to the public. In August 2022, before this rulemaking, the commission published additional notice of the draft regional solid waste management plans and provided the public with an additional opportunity, not required by rule, to submit informal comments on the draft plans during an informal 30-day comment period. Many of the COGs posted notice of the informal comment period on their websites and/or media pages. No comments were received during that comment period. Also, with this rulemaking, there was a public comment opportunity in March 2023. The commission has made no changes in response to this comment.

Comment

PCS commented that, when considering public comment about solid waste permitting actions, the Executive Director often responds that public comments are outside of the Executive Director's jurisdiction to consider or that regulatory requirements of the solid waste permitting action have been met.

Response

Sometimes a public comment is submitted in response to a solid waste permit application that addresses a subject outside the agency's jurisdiction. In accordance with 30 TAC Chapters 39 and 55, the executive director considers and responds to all timely, relevant and material, or significant public comments about permit applications and draft permits, but may only consider issues that are within TCEQ's jurisdiction as it has been established by the legislature when determining whether to make a change in response to public comment. TCEQ is not able to impose requirements or address matters for which the legislature has not conferred authority to the agency to do so. The commission has made no changes in response to this comment.

Comment

An individual expressed concern regarding how TCEQ and COGs track recycling rates. The individual commented that measuring the average amount of waste disposed per person for each county would allow TCEQ and counties in Texas to see which county recycling programs are effective and which are not. The individual requested that TCEQ and the COGs require landfills to report the amount of waste disposed for each county from which waste has originated, in addition to each landfill reporting the total amount of waste disposed in the landfill.

Response

30 TAC §330.643(a)(3) requires COGs to include the following data in their regional solid waste management plans: population patterns, commercial and industrial data, demographic information necessary to estimate solid waste quantities and characteristics, and estimates of future and current solid waste amounts by type. The data requirements do not include the average amount of waste disposed for each county. TCEQ reviewed the regional solid waste management plans according to the requirements in 30 TAC Chapter 330, Subchapter O, and the purpose of this rulemaking is to adopt the plans that were approved using the requirements in place at the time of the review.

30 TAC §330.675(a)(1)(C) requires municipal solid waste disposal facilities to report the amount of waste they receive for processing or disposal. However, THSC, Chapter 363, Subchapter D does not authorize COGs to require landfills to report the amount of waste disposed for each county from which waste has

originated. The commission has made no change in response to this comment.

Comment

An individual expressed concern about the effectiveness of current efforts in Texas to recycle mattresses. Specifically, the individual voiced concern that the Mattress Recycling Council, if established in Texas, would destroy mattresses that could be refurbished. The individual requested that mattress inspectors be established again. The individual stated that each city in Texas has a Salvation Army and requested that the Salvation Army be included in decisions regarding the collection of mattresses to be refurbished.

Response

The commission acknowledges receipt of this comment. The requirements for the manufacture, sale, and distribution of mattresses are described in 25 TAC, Chapter 205, Subchapter A. These rules are under the authority of the Texas Department of State Health Services. Issues regarding the collection of mattresses to be refurbished should be presented to the Texas Department of State Health Services. The commission has made no changes in response to this comment.

Statutory Authority

The rulemaking is adopted under Texas Water Code (TWC), §5.102 (relating to General Powers), which provides the commission the power to perform any acts necessary and convenient to the commission's exercise of its jurisdiction and powers as provided in this code and other laws; TWC, §5.103 (relating to Rules), which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105 (relating to General Policy), which provides the commission with the authority to establish and approve by rule all general policy of the commission; the Administrative Procedures Act under Texas Government Code, Chapter 2001, which authorizes the commission as a state agency to adopt rules pursuant to the rulemaking process; and Texas Health and Safety Code (THSC), §363.062 (relating to Regional Solid Waste Management Plan), which authorizes the commission to consider for approval and to adopt by rule an approved regional solid waste management plan that is developed and submitted to the commission for review in accordance with THSC, §363.0615 (relating to Responsibility for Regional Planning).

The adopted rulemaking implements THSC, Chapter 363, Subchapter D (relating to Regional and Local Solid Waste Management Plans).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 21, 2023.

TRD-202302614
Charmaine Backens
Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: August 10, 2023
Proposal publication date: February 23, 2023
For further information, please call: (512) 239-2678

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 17. TEXAS STATE SOIL AND WATER CONSERVATION BOARD

CHAPTER 518. GENERAL PROCEDURES SUBCHAPTER C. RESTRICTIONS ON ASSIGNMENT OF VEHICLES

31 TAC §518.10

Introduction:

The Texas State Soil and Water Conservation Board adopts the new rule Pursuant to Government Code, Sec. 2171.1045, adopted under Section 2171.104, relating to the assignment and use of the agency's vehicles. During an internal audit, it was determined that the agency had yet to adopt rules per the statute. The proposed new rule was posted for public comment in the *Texas Register* on April 21, 2023, page (48 TexReg 2084); no comments were received. The rule is adopted without changes to the text as published in the *Texas Register* and will not be republished.

Justification: During an internal audit, it was determined that the agency had yet to adopt rules per the statute.

How the Rule will Function: This rule identifies the assignment of the agency vehicles and acceptable use of the agency vehicles.

Comments: No public comments were received.

Statutory Authority: Government Code, Sec. 2171.1045, each state agency shall adopt rules, consistent with the management plan adopted under Section 2171.104.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 24, 2023.

TRD-202302621
Heather Bounds
Government Affairs Specialist
Texas State Soil and Water Conservation Board
Effective date: August 13, 2023
Proposal publication date: April 21, 2023
For further information, please call: (254) 778-8741

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CHAPTER 523. AGRICULTURAL AND SILVICULTURAL WATER QUALITY MANAGEMENT

31 TAC §523.6

The Texas State Soil and Water Conservation Board (Board) has completed the review of Title 31, Texas Administrative Code, Part 17, Chapter 523.6(e)(5), which limits the amount of cost share incentive funding per operating unit to $15,000. The agency adopted without changes the amendment to remove the amount from rule and base it on a routine state board decision within the Water Quality Management Plan Program. This rule was published for comment in the May 5, 2023, issue

of the *Texas Register* (48 TexReg 2320). The rule will not be republished.

With the enactment of Senate Bill 503 (73rd Regular Session - Sims / Counts) in 1993, the Texas Legislature designated the Texas State Soil and Water Conservation Board (TSSWCB) the lead agency in the state for the abatement, management, and prevention of nonpoint source pollution from agricultural or silvicultural sources. Additionally, the Legislature authorized the agency to administer a certified Water Quality Management Plan (WQMP) Program, complete with a cost-share program to incentivize participation and offset the cost of implementing soil and water land improvement measures for lands within the state. While the TSSWCB makes the program available on a statewide basis, the State Board approves priorities based on activity and geography to target the cost-share incentive funding to the areas of the state that exhibit the most need for nonpoint source pollution abatement.

The amendment will identify the maximum allowable amount of cost-share funds that may be applied to any single operating unit and will be adopted by the State Board prior to the beginning of each biennium. This provision applies only to general revenue funds appropriated by the Texas Legislature to assist program participants with the implementation of soil and water conservation land improvement measures as allowed by Agriculture Code §201.301. In cases where the funding for cost-share incentives originates from sources other than appropriations made directly to this program by the Texas Legislature, the maximum allowable amount of cost-share incentive funding per operating unit will be established by the terms of the contractual agreement providing the funds until otherwise specified by the State Board.

The board received no comments in response to its request for comment published in the May 5, 2023, issue of the *Texas Register* (48 TexReg 2320).

The amendment is adopted under the Texas Agriculture Code, title 7, Chapter 201, §201.020, which authorizes the State Board to adopt rules that are necessary for the performance of its functions under the Agriculture Code.

No other statutes, articles, or codes are affected by this amendment.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 24, 2023.

TRD-202302620
Heather Bounds
Government Affairs Specialist
Texas State Soil and Water Conservation Board
Effective date: August 13, 2023
Proposal publication date: May 5, 2023
For further information, please call: (254) 778-8741

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 20. STATEWIDE PROCUREMENT AND SUPPORT SERVICES

SUBCHAPTER D. SOCIO-ECONOMIC PROGRAM

DIVISION 1. HISTORICALLY UNDERUTILIZED BUSINESSES

34 TAC §§20.281 - 20.294, 20.297, 20.298

The Comptroller of Public Accounts adopts amendments to §20.281, concerning policy and purpose, §20.282, concerning definitions, §20.283, concerning evaluation of active participation in the control, operation, and management of entities, §20.284, concerning statewide annual HUB utilization goals, §20.285, concerning subcontracts, §20.286, concerning state agency planning responsibilities, §20.287, concerning state agency reporting requirements, §20.288, concerning the certification process, §20.289, concerning protests, §20.290, concerning recertification, §20.291, concerning revocation, §20.292, concerning certification and compliance reviews, §20.293, concerning Texas historically underutilized business certification directory, §20.294, concerning graduation procedures, §20.297, concerning HUB forum programs in state agencies, and §20.298, concerning mentor-protégé program, with changes to the proposed text as published in the February 3, 2023, issue of the *Texas Register* (48 TexReg 477). The rules will be republished.

The amendment of §20.281 deletes a sentence that described Chapter 20, Subchapter D, Division 1. That description was incomplete and unnecessary.

The amendments of §20.282 update and rearrange the definitions as needed and expressly refer to additional applicable definitions located in §20.25.

The amendment of paragraph (1) revises the definition of "applicant" to remove the term "supplier" from the list of business organizations that may apply for HUB certification. A supplier is not a form of business organization recognized by the Texas HUB program. The amended definition of "applicant" also adds the catchall term "other business organizations," to indicate that the list of business organizations is not exhaustive.

The amendment of paragraph (2) revises the definition of "application" to mean the set of materials submitted by an applicant for HUB certification, rather than the comptroller's form for requesting HUB certification. This revised definition is consistent with the usage of the term in Chapter 20, Subchapter D, Division 1.

The amendment of paragraph (3) revises the definition of "commodities" to recognize that that term may include goods sought by the state, or contracted for, not only goods that have been delivered.

The amendments of former paragraphs (4), (5), and (24) delete the definitions of "comptroller," "contractor," and "respondent" because the terms are defined in §20.25 of this title (related to Definitions) and these definitions apply to the entire chapter, including Subchapter D, Division 1.

The amendment of former paragraph (6) deletes the definition of "directory" and replaces it with "HUB directory" in new paragraph (9), which is the term used throughout Chapter 20, Subchapter D, Division 1, and revises its definition. The revised definition

provides the current name of the directory and informs that it is an online resource.

The amendment of former paragraph (8), renumbered paragraph (5), revises the definition of "economically disadvantaged person" to state that this term has the definition assigned by Government Code, Chapter 2161.001(3).

The amendment of former paragraph (9) deletes the definition of "forum" because the term is explained in §20.297, concerning HUB forum programs for state agencies.

The amendment of former paragraph (10), renumbered paragraph (6), revises the definition of "graduation" to use the term "size standards" rather than "comptroller's size standards for HUB certification," consistent with the rest of Chapter 20, Subchapter D, Division 1, and to indicate that a business becomes ineligible for HUB certification when it exceeds the size standards.

The amendment of former paragraph (11), renumbered paragraph (7), revises the definition of "historically underutilized business (HUB)" for clarity and style by eliminating surplus verbiage and needless cross-references to other definitions. The defined term "qualifying owner," contained in former paragraph (19), renumbered paragraph (17), is used to make the definition more readable.

The amendment of former paragraph (12), renumbered paragraph (8), revises the definition of "historically underutilized business (HUB) coordinator" to better describe the role and to remove language that merely restates Government Code, §2161.062(e). The responsibilities of a HUB coordinator are more thoroughly stated in §20.296, concerning HUB coordinator responsibilities.

The amendment of former paragraph (13) deletes the definition of "HUB report" because the definition conflicts with the usage of the term in the rules, and the meaning of the term is otherwise clear from context.

The amendment of former paragraph (14) deletes the definition of "HUB business plan" because the term is only used once in §20.286, concerning state agency planning responsibilities, where its meaning is clear from context.

The amendment of former paragraph (15), renumbered paragraph (10), revises the definition of "HUB subcontracting plan" to better describe what a HUB subcontracting plan is, and to remove miscellaneous facts that do not define the term.

The amendment of former paragraph (16), renumbered paragraph (11), revises the definition of "mentor-protégé program" for clarity and to remove a requirement for certain state agencies to implement such a program, which is not part of the definition. That requirement is retained in §20.298, concerning the mentor-protégé program.

The amendment of former paragraph (19), renumbered paragraph (17), deletes the definition of "owner or qualifying owner" and replaces it with "qualifying owner" only in renumbered paragraph (16), because "owner" is a substantially broader term that includes anyone who legally owns a business, even if they would not qualify to own a historically underutilized business. The definition is further revised to indicate that the term is singular and not plural, to eliminate a needless cross-reference to another definition, and for style.

The amendment of former paragraph (20) deletes the definition of "person or natural person" and moves the definition of "person" only to new paragraph (14), because the term "natural person" is no longer used in Chapter 20, Subchapter D, Division 1. It is further revised to eliminate the requirement of U.S. citizenship or veterancy, which is not part of the ordinary meaning of "person." The U.S. citizenship or veterancy requirement is relocated to the definition of "qualifying owner" in renumbered paragraph (17).

The amendment of former paragraph (21) deletes the definition of "principal place of business" and moves the revised definition to new paragraph (15). The revised definition eliminates a needless cross-reference to another definition.

The amendment of former paragraph (22) deletes the definition of "professional services" and moves it to new paragraph (16).

The amendment of former paragraph (23), renumbered paragraph (18), revises the definition of "resident of the state of Texas" to reduce the requirement of physical residence from 12 consecutive months to six consecutive months if the person has indicated Texas residency on their latest federal income tax return.

The amendments of former paragraphs (26), (28), (31), and (32) delete the definitions of "SBA," "subcontractor funds," "treasury funds," and "USAS" because these terms are not used in Chapter 20, Subchapter D, Division 1.

The amendment of former paragraph (27), renumbered paragraph (20), revises the definition of "subcontractor" to replace the word "person" with "entity." The usage of "person" in this definition was inconsistent with the definition of "person" in §20.282. The revised definition makes it clear that a subcontractor may or may not be working on a contract for a state government entity. It also states that an employee of a contractor is not considered a subcontractor, but contract workers may be subcontractors.

The amendment of former paragraph (29), renumbered paragraph (21), revises the definition of "size standards" for ease of understanding and to add a cross-reference to §20.294, concerning graduation procedures.

The amendment of former paragraph (33), renumbered paragraph (23), revises the definition of "vendor identification number" for ease of understanding.

The amendment of former paragraph (34), renumbered paragraph (24), revises the definition of "work" so that it is no longer limited to the context of a government contract.

The amendment of former paragraph (35), renumbered paragraph (25), revises the definition of "working day" to eliminate days on which a state agency is declared closed by its executive officer. As revised, the definition will provide more clarity for contractors and subcontractors.

The amendment of §20.283 utilizes the term "qualifying owner" as defined in §20.282. It also incorporates language that was previously contained in §20.292 into a new subsection (c). As a result, the substance of the active participation requirement is now entirely contained in §20.283.

The amendment of §20.284 revises the section for readability and concision and deletes language that is no longer needed. The amendment also adds to subsection (d) two optional measures an agency may take to help show its good faith effort to meet HUB utilization goals: providing courtesy reviews of HUB subcontracting plans and offering HUB compliance training during vendor conferences or agency HUB forums. Subsection (e) is revised to add a reference to the Government Code, Chapter

2161 definition of "economically disadvantaged person," which the comptroller considers more appropriate than the reference it replaces.

The amendments of §20.285 reorganize and condense the rule for ease of readability.

The amendment of subsection (a) uses the term "contract value," which is defined in §20.25. It also recognizes that the only official source of HUB certification information is the comptroller's online HUB directory.

The amendment of subsection (b) replaces the special rule for "alternative delivery methods" for construction, which were not explained or defined in rule. Instead, it includes a rule allowing state agencies to specify separate deadlines for the HUB subcontracting plan and other parts of the response. For example, this will allow an agency bidding a construction project to accept HUB subcontracting plans after other parts of responses are due, as long as it does not open responses until the HUB subcontracting plans are due. Revised subsection (b) also clarifies the notice provided to vendors in a solicitation regarding HUB subcontracting requirements. Finally, it provides additional examples of both minor deficiencies in a HUB subcontracting plan that may be corrected after submission and significant deficiencies that render the HUB subcontracting plan nonresponsive.

The amendment of subsection (c) requires a respondent to use a HUB subcontracting plan form prescribed by the comptroller. It also eliminates an incomplete description of the content that may appear on the forms, such as "the expected percentage of work to be subcontracted" and "the approximate dollar value of that percentage of work."

The amendment of subsection (d) consolidates and organizes information about the four methods by which a respondent may demonstrate a good faith effort to include HUBs in subcontracting, which information was previously scattered among several subsections. While the four methods are substantially the same as before, the revised rule gives them names: the solicitation method, the all-HUB-subcontractors method, the meeting-or-exceeding-HUB-goal method, and the self-performing method. Paragraph (1), which covers the solicitation method, clarifies that neither the day on which the respondent sends notice to a HUB nor the day on which the respondent submits its response counts toward the minimum number of days the respondent must give HUBs to bid on subcontract work. Paragraph (3), which covers the meeting-or-exceeding-HUB-goal method, eliminates from the conditions of meeting the utilization goal the prohibition on using HUBs with which the respondent has existing contracts that have been in place for more than five years. This prohibition was inconsistent with the statutory aim of increasing HUB participation in state contracts, which is not limited to new HUBs or new HUB subcontracting relationships.

The amendment of subsection (e) improves style and adds clarity, and further clarifies that revisions of a submitted HUB subcontracting plan may be made in accordance with subsection (b)(4).

The amendment of subsection (f) separates the contractor's duty to maintain records demonstrating HUB compliance from its duty to submit periodic reports of its compliance to the state agency. The latter obligation is relocated to revised subsection (g), concerning progress assessment reports.

The amendment of subsection (g) allows the state agency to accept progress assessment reports from the contractor electronically, provided that the electronic report meets the comptroller's formatting and content requirements.

New subsection (h) consolidates and organizes state agency requirements to monitor HUB subcontracting plan compliance during the contract, which were previously scattered among multiple subsections. It no longer instructs a state agency to require the contractor to report payments to subcontractors, which duplicated a requirement in revised subsection (g). Instead, it requires the agency to carefully review the contractor's progress assessment reports, including whether the contractor is utilizing only subcontractors named in the HUB subcontracting plan. It also removes the references to reporting a contractor's noncompliance "in accordance with §20.585 of this title (relating to Debarment) and §20.586 of this title (relating to Procedures for Investigations and Debarment)," because those referenced sections do not mention reporting to the comptroller. Instead, new subsection (h) states that the state agency shall report such noncompliance "in accordance with §20.509 of this title (relating to Performance Reporting)" and may also report it as grounds for potential debarment.

New subsection (i) states the rule for amending a HUB subcontracting plan. Because HUB subcontracting plan amendments may occur outside the context of monitoring a contractor's compliance with the HUB subcontracting plan, the two subjects no longer occupy the same subsection. New subsection (i) also clarifies that a contractor must demonstrate good faith by complying with the requirements of subsection (d) in the development of an amended HUB subcontracting plan. Although the substance of the rule is not significantly changed from the prior version, it is condensed.

The amendment of §20.286 revises the section for accuracy and ease of comprehension. The revised subsection (a) more accurately states the goal of Government Code, Chapter 2161, Subchapter D, to increase HUB utilization by state agencies. The revised subsection (c) articulates that an agency's legislative appropriation request must demonstrate compliance with statutes and rules related to HUBs.

The amendment of §20.287 adds a descriptive title to each subsection for ease of use. The revised subsection (b) eliminates language related to contractor reporting of payments to subcontractors, which duplicated a requirement in §20.285. The revised subsection (d) provides the correct reference to the statute which addresses group purchasing for health care. The revised subsection (e) eliminates the term "bids," which was not defined, and instead refers to the defined term "responses" and clarifies that the comptroller reports the graduation rates for HUBs, rather than subgroups of HUBs, consistent with Government Code, §2161.121(a)(3). The revised subsection (g) eliminates the term "HUB credit," which was not defined, and instead refers to HUB "expenditure," consistent with Government Code, §2161.122(c). The revised subsection (g) adds a new clause stating that if a business is certified as a HUB for at least one day during a reporting period, all payments to that business for the entire period qualify as HUB expenditures. The amendment deletes subsection (h), which restated reporting requirements contained in §20.285.

The amendment of §20.288 revises the section for accuracy, concision, and ease of comprehension. The revised subsection (a) refers to the online HUB certification system, which is the only accepted method for an applicant to request certification. The revised subsection (c) requires an applicant to provide evidence of Texas residency that is satisfactory to the comptroller. Sub-

section (c) was divided into two subsections to separate information regarding proof of residency (retained in subsection (c)) from information regarding the comptroller's goal of processing applications within 90 days (now in subsection (d)). The revised subsection (d) eliminates surplus language. The revised subsection (e) clarifies that a business may be denied HUB certification on the basis that it has an unfavorable record of performance on state contracts. The subsection which described a packet of orientation materials provided by the comptroller to new HUBs is deleted to allow flexibility to provide the most current and helpful information by mail, email, meetings, virtual meetings, streaming video, and other means. The revised subsection (j) adds a sentence to specify that the expiration of HUB certifications granted by an organization other than the comptroller occurs as provided by the certifying organization.

The amendment of §20.289 clarifies that a HUB may protest a denial or revocation of certification using the online HUB certification system. The revised section also reflects that a protest is decided by the director of the division of the comptroller responsible for administering state procurement laws, and the director's decision is the final administrative action of the comptroller.

The amendment of §20.290 revises the section to include the online HUB certification system, which is the only accepted method for an applicant to seek recertification.

The amendment of §20.291 revises the section for clarity and to eliminate surplus language. It states that the HUB seeking to avoid revocation of HUB status shall submit documentation through the online HUB certification system. Information regarding the protest process, which merely repeated §20.289, is deleted. New subsection (c) states that businesses that have had their HUB status revoked may not be included in meeting statewide or state agency HUB utilization goals after the end of the last reporting period in which they held certification for at least one day.

The amendment of §20.292 revises the section to provide additional detail and improve ease of comprehension. The revised subsection (a) distinguishes between certification reviews and compliance reviews and specifies that the methods of conducting reviews are desk reviews, virtual reviews, and in-person, onsite reviews. A description of the consequences of a review is moved from subsection (a) to revised subsection (d). The standard for active participation and control by a qualifying owner is relocated from §20.292(c) to §20.283(c) in order to consolidate rules on the same subject. The revised subsection (d) expressly states that HUB certification may be denied or revoked after a certification or compliance review.

The amendment of §20.293 changes the title of the section from "Texas historically underutilized business certification directory" to "historically underutilized business directory" and describes the free online database of current HUB certification information provided by the comptroller. It eliminates references to printed directories or other media, which are no longer used to provide HUB certification information.

The amendment of §20.294 eliminates surplus language, addresses HUB eligibility, and revises the section for ease of comprehension. It adds a title for each subsection. It consistently uses the term "size standards" rather than other terms that are not defined in the rules.

The amendment of subsection (a) clarifies that the size of an entity includes affiliate businesses as defined by the Small Business Administration rules referenced therein. This includes entities that own a HUB or HUB applicant, as well as entities owned by an owner of a HUB or HUB applicant. A HUB applicant that exceeds the size standards in combination with its affiliates will be denied certification or recertification. A HUB that is found to exceed the size standards in combination with its affiliates during a compliance review will graduate from the HUB program.

New subsection (c)(3) provides that the HUB application of a successor in interest of a HUB graduate, meaning a business that has acquired substantially all the assets and liabilities of the HUB graduate, will be treated as a reapplication by the HUB.

The amendment of §20.294 also removes several provisions that are no longer appropriate. The list of Small Business Administration categories in subsection (a) is no longer accurate, because the Small Business Administration instead provides size standards based on industry codes. Because the comptroller has incorporated the Small Business Administration size standards, it does not need to review and reassess the size standards annually as provided in the former subsection (d). Finally, because there is no need for a mentor to be a HUB under the current mentor-protégé program rules, and in fact most mentors are not HUBs, there is no practical reason to keep the provision in former subsection (f) allowing the director to extend a mentor's HUB status after it exceeds the size standards. A mentor that graduates and thus loses its HUB status may continue as a mentor, regardless of HUB status. The amended §20.294 omits each of these provisions.

The amendment of §20.297 eliminates the imprecise conjunction "and/or."

The amendment of §20.298 revises the section for ease of comprehension and to eliminate surplus wording. The revised subsection (a) clarifies that the purpose of the Mentor-Protégé Program is to foster relationships between experienced contractors and HUBs and to increase the ability of HUBs to participate in state contracts and subcontracts. The revised subsection (a) eliminates a redundant statement of the objective of the Mentor-Protégé Program and a description of certain features of the program, which are already described in other subsections. The revised subsection (b) states that agencies "shall consider" certain factors in implementing the Mentor-Protégé Program, rather than stating that agencies "are encouraged to" consider the factors. The amended subsection (e) expressly requires, as a condition of participating as a mentor, an entity's registration on the Centralized Master Bidders List. The revised subsection (h) eliminates unclear guidance regarding the revocation of a protégé's HUB status while the protégé is participating as a subcontractor. As with any other change to a HUB subcontracting plan, the contractor shall work with the state agency in good faith to amend the plan in compliance with §20.285.

The comptroller received comments regarding adoption of the amendment from three parties.

Karen L. Gross (Manager, Supplier Diversity Programs/HUB Coordinator, UTMB Health) made no statement of position for or against adoption, but recommended removal of a possible unintended hyphen in the "meeting-or-exceeding-HUB-goal" method in §20.285(d)(3).

The comptroller has confirmed the referenced hyphens were intended and thus declines to adopt this recommendation.

Karen L. Gross next recommended that each of the four good faith effort methods covered in §20.285(d) be titled to match "the names of the forms."

The comptroller declines to change or remove the proposed titles for the following reasons. Section 20.285 did not previously contain titles for the four good faith effort methods. The proposed titles for three of the good faith effort methods ("all-HUB-subcontractors," "meeting-or-exceeding-HUB-goal," and "self-performing") are substantially the same as the titles of the corresponding HUB subcontracting plan forms prescribed by the comptroller. The remaining good faith effort method is completed by soliciting bids on subcontracts from a specified number of HUBs and organizations. It corresponds to a form titled, "Good Faith Effort with Attachment B." It is the judgment of the comptroller that that title does not describe the method or distinguish it from other methods. The title in the proposed rule, "solicitation method," is more descriptive and better fitting.

Pauline E. Anton and Samuel Guzman (President and CEO, and Chairman of the Board, respectively, Texas Association of Mexican American Chambers of Commerce; no statement of position for or against adoption) stated that proposed changes would not require prime contractors or state agencies to ensure the utilization of historically underutilized businesses. They cited amended §20.285(e) and new §20.285(i) as examples and stated that revisions of a HUB subcontracting plan should only be allowed for clarifications of minor deficiencies. They opined that the referenced subsections do not require monitoring and that the amended §20.285 would allow a prime contractor to represent that it will utilize HUB subcontractors in its initial HUB subcontracting plan submission, and then revise the HUB subcontracting plan following award and instead utilize non-HUB subcontractors. They stated further that the prime contractor must demonstrate good faith in the development of the HUB subcontracting plan "{a}t every step."

The proposed rule was not intended to reduce contractors' obligations to undertake good faith efforts to include HUBs in subcontracting, nor to relieve state agencies of their obligations to monitor contractors' efforts. To make that perfectly clear, the comptroller adopts §20.285 with the following revisions. Subsection (e) no longer includes language referring to revisions for clarity and maximum HUB utilization. Instead, that subsection provides that prior to award, revisions may only be made to cure minor deficiencies in accordance with §20.285(b)(4). Subsection (i), which covers an amendment of a HUB subcontracting plan during the term of a contract, clarifies that the requirement in §20.285(d) to develop a HUB subcontracting plan in good faith (and complete good faith effort methods) also applies to an amended HUB subcontracting plan.

Ms. Anton and Mr. Guzman next stated the rules must require agencies to monitor contracts "to ensure that HUBs are utilized at the highest level to meet the Good Faith minimum of twenty percent (20%)."

There is not currently a requirement in statute or rule for state agencies to utilize a certain "minimum" percentage of historically underutilized businesses in state contracting. Government Code, Chapter 2161, directs the comptroller to adopt rules to provide goals for increasing contract awards from state agencies to qualified HUBs, and further provides all state agencies shall make a good faith effort to increase contract awards for construction and the purchase of goods or services specifically. The comptroller's rules in turn set out statewide HUB goals for procurement categories (e.g., 21.1% for commodities contracts). In consideration of the limited authority provided in statute, the comptroller declines to adopt a 20% minimum rate of HUB utilization.

Laura Cagle-Hinojosa (no statement of position for or against adoption) noted, with respect to §20.285(i), that the statement in the preamble that HUB subcontracting plan revisions "are not part of monitoring a contractor's compliance with the HUB subcontracting plan" (48 TexReg 479) is inaccurate.

The purpose of new §20.285(i) was to separate monitoring provisions from amendment provisions. Although contract monitoring may reveal a need to amend the HUB subcontracting plan, amendments may also occur outside the context of monitoring a contractor's compliance with the HUB subcontracting plan. The adoption reflects this intent. Further, in connection with the comments that follow, subsection §20.285(i) now refers to changes in the HUB subcontracting plan made during the term of the contract as "amendments" rather than "revisions."

Ms. Cagle-Hinojosa next recommended the addition of a sentence in §20.282 that informs additional applicable definitions can be found in §20.25 of this title.

It was the intent of the revision to avoid conflicting or duplicative definitions between Chapter 20 and Subchapter D, Division 1. The proposed sentence is consistent with that intent and may be helpful in navigating the rules. The comptroller has added this as the second sentence of §20.282.

Ms. Cagle-Hinojosa next stated that Government Code, §2161.001(2), defines a historically underutilized business as an entity with its principal place of business in this state, and that the amended definition of "principal place of business" in §20.282(15) should address that requirement. The amended §20.288, concerning the certification process, does not address this requirement and focuses on residency.

The comptroller agrees that the requirement to maintain a principal place of business in Texas is a material component of the definition of a historically underutilized business. The comptroller has accordingly defined "historically underutilized business" in §20.282(7) as an entity that maintains its principal place of business in Texas, consistent with Government Code, §2161.001(2), in addition to other requirements.

Ms. Cagle-Hinojosa next recommended keeping language stricken from the definition of historically underutilized business coordinator in §20.282(8). The stricken language is a restatement of the portion of Government Code, §2161.062(e), that provides a state agency with a biennial budget greater than $10 million shall designate a historically underutilized business coordinator; a procurement director may serve as a historically underutilized business coordinator; and for agencies that employ a coordinator, the position within the agency's structure must be at least equal to the position of procurement director.

The stricken language merely restates the statute, as noted. Furthermore, these requirements applicable to a state agency do not define the role of a HUB coordinator. Therefore, the comptroller adopts the definition of historically underutilized business coordinator in §20.282(8) without revision.

Ms. Cagle-Hinojosa next recommended keeping language stricken from §20.285(a). The stricken language specifies that in determining whether subcontracting opportunities are probable under a contract with an expected value of $100,000 or more, a state agency must measure the contract value "over the life of the contract (including any renewals)." The comment informed that agencies had historically approached valuation of contracts inconsistently, as some would only consider the value during the initial term of the contract in determining whether a

HUB subcontracting plan was required. The recommendation was thus to keep the stricken language to avoid inconsistencies in measuring value of contracts.

Contract value is defined in §20.25 to include amendments, extensions, and renewals of a contract. That definition applies to all of Chapter 20, including the proposed rules. By referring to contract value, the proposed §20.285(a) requires agencies to include amendments, extensions, and renewals. Because the recommendation would not further clarify the intent of §20.285(a), that section is adopted without revision.

Ms. Cagle-Hinojosa next stated that §20.285(b)(4) and §20.285(e), which both address the pre-award phase of reviewing whether a HUB subcontracting plan is responsive, are in conflict. Whereas §20.285(b)(4) only provides for revisions of a HUB subcontracting plan to cure minor deficiencies, §20.285(e) allowed revisions "for clarity and maximum HUB utilization." Per the comment, the revisions described in §20.285(e) were too vague and effectively allowed a respondent to submit a revised HUB subcontracting plan, which "has been stated as a major issue for non-attainment of minority/women businesses in disparity studies." Ms. Cagle-Hinojosa further stated revisions of a HUB subcontracting plan during the pre-award phase should be permitted only in connection with clarifications necessary to confirm compliance with the good faith effort requirements.

In response to these comments, and in the interest of clarity, the comptroller has revised §20.285(e) to remove the language authorizing revisions for "clarity and maximum HUB utilization." Instead, the rule states that a submitted HUB subcontracting plan may be revised in accordance with §20.285(b)(4). This change makes clear that revisions of a submitted HUB subcontracting plan may only be made to cure minor deficiencies.

Ms. Cagle-Hinojosa next recommended deleting from the examples of material deficiencies in a HUB subcontracting plan, in §20.285(b)(4), the following: "...producing a description of the resources the respondent will use to self-perform the work." Per the comment, the "evidence for self-performing should be reflected within the actual response," but an agency may request a clarification to determine whether a respondent is self-performing as stated in its HUB subcontracting plan. The comment cited §20.285(d)(4), which expressly provides a state agency may request, and a respondent shall provide, the types of documentation enumerated in §20.285(d)(4)(A)-(D). The comment further informed this documentation is submitted through a clarification request.

In response to this comment, the comptroller has revised the quoted portion of §20.285(b)(4). The updated §20.285(b)(4) clarifies that this example of a material deficiency refers to the omission of the statement of how a contractor intends to fulfill the entire contract that is expressly required by §20.285(d)(4). This initial statement must be submitted with the original HUB subcontracting plan before the response deadline. Although the state agency may allow the contractor to clarify its plan to self-perform the work after the deadline under §20.285(d)(4)(A)-(D), it cannot excuse the contractor's failure to submit its plan with its solicitation response.

Ms. Cagle-Hinojosa next recommended the addition of language to §20.285(h)(1) that expressly requires a state agency, as part of its responsibility to monitor a contractor's compliance with its HUB subcontracting plan, to determine whether the contractor is utilizing only subcontractors named in the HUB subcontracting plan. Per the comment, this task is an important component of ensuring compliance with a HUB subcontracting plan and any amendments require completion of the good faith effort methods described in §20.285(d).

The recommendation is consistent with the intent of proposed §20.285(h)(1) and helps to clarify the state agency's monitoring obligations. The comptroller agrees with the recommendation, and adopts the rule with the addition of the suggested language.

Ms. Cagle-Hinojosa next recommended, in §20.285(i), replacing "revised" with "amended" in connection with changes made to the HUB subcontracting plan during the term of the contract. The reasoning for the recommendation was that a HUB subcontracting plan becomes a contract provision and thus must be amended rather than revised.

The comptroller agrees with the recommendation and has updated §20.285(i) accordingly.

Ms. Cagle-Hinojosa next recommended the addition of language to §20.285(i)(1) and §20.285(i)(3) that expressly provides a contractor must demonstrate good faith by complying with the requirements of §20.285(d) in the development of an amended HUB subcontracting plan. The reasoning was that the recommended language sets out a process for complying with Government Code, §2161.253(b), which requires the contractor to describe good faith efforts made to find and utilize other historically underutilized businesses when subcontracting differs from the original HUB subcontracting plan.

The recommendation is consistent with the intent of proposed §20.285(i) and helps to clarify the standard for approving a contractor's proposed amendment to a HUB subcontracting plan. The comptroller adopts the rule with the recommended modification.

In addition to changes made in response to specific comments, the comptroller made the following revisions to further clarify the rules or their intent, or to make clerical edits determined beneficial during staff review of the proposed rules and comments received.

In §20.282(9), concerning the definition of "HUB directory," "website" has been replaced with "website."

In §20.282(17), a stray "and" has been deleted at the end of subparagraph (B).

In §20.282(21), the word "concerning" is replaced with "relating to," to be consistent with the other rules.

Section 20.284(d)(2)(K), concerning procedures that a state agency may adopt in making a good faith effort to assist HUBs in receiving a portion of its awarded contracts, has been revised to provide that HUB-subcontracting-plan-compliance training may also be conducted at agency HUB forums. The comptroller has made this change to provide the full range of options for state agencies to conduct the training for the purpose of demonstrating good faith effort.

Section 20.285(e) has been revised to provide that a HUB subcontracting plan shall "become a provision of" the state agency's contract, which replaces the statement in the proposed amendment of subsection (e) that the HUB subcontracting plan shall "be incorporated into" the state agency's contract. This revision has been made for clarity and to align with Government Code, Chapter 2161.

Section 20.285(h)(1) is adopted with a grammatical correction, replacing the phrase "HUB progress assessment reports" with "each HUB progress assessment report."

These amendments are adopted under Government Code, §2161.0012, which authorizes the comptroller to adopt rules to efficiently and effectively administer Government Code, Chapter 2161 regarding historically underutilized businesses.

These amendments implement Government Code, Chapter 2161.

§20.281. Policy and Purpose.

It is the policy of the comptroller to encourage the use of historically underutilized businesses (HUBs) by state agencies and to assist agencies in the implementation of this policy through race, ethnic, and gender-neutral means. The purpose of the HUB program is to promote full and equal business opportunities for all businesses in an effort to remedy disparity in state procurement and contracting in accordance with the HUB utilization goals specified in the State of Texas Disparity Study.

§20.282. Definitions.

The following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise. Additional applicable definitions are located in §20.25 of this title.

(1) Applicant--A corporation, sole proprietorship, partnership, joint venture, limited liability company, or other business organization that applies to the comptroller for certification as a historically underutilized business.

(2) Application--The information, documents, and representations submitted by an applicant that constitute its request for certification as a historically underutilized business.

(3) Commodities--Any tangible goods.

(4) Disparity study--The State of Texas Disparity Study - 2009, conducted by MGT of America, Inc., dated March 30, 2010, or any updates of the study that are prepared on behalf of the state as provided by Government Code, §2161.002(c).

(5) Economically disadvantaged person--Has the meaning assigned by Government Code, §2161.001(3).

(6) Graduation--When a certified HUB exceeds the size standards and becomes ineligible for continued certification as a result.

(7) Historically underutilized business (HUB)--A business organization described in subparagraphs (A) - (F) of this paragraph that is certified by the comptroller because it has not exceeded the size standards established by §20.294 of this title, maintains its principal place of business in Texas, and is:

(A) a corporation formed for the purpose of making a profit in which at least 51% of all classes of the shares of stock or other equitable securities are owned by one or more qualifying owners;

(B) a sole proprietorship created for the purpose of making a profit that is 100% owned, operated, and controlled by a qualifying owner;

(C) a partnership formed for the purpose of making a profit in which 51% of the assets and interest in the partnership is owned by one or more qualifying owners;

(D) a joint venture in which each entity is a HUB;

(E) a supplier contract between a HUB and a prime contractor under which the HUB is directly involved in the manufacture or distribution of the supplies or materials or otherwise warehouses and ships the supplies; or

(F) a business other than described in subparagraphs (B), (C), (D), and (E) of this paragraph, which is formed for the purpose of making a profit and is otherwise a legally recognized business organization under the laws of the State of Texas, provided that at least 51% of the assets and 51% of any classes of stock and equitable securities are owned by one or more qualifying owners.

(8) Historically underutilized business (HUB) coordinator--The staff member designated by a state agency to be primarily responsible for overseeing the implementation of HUB laws and monitoring attainment of HUB utilization goals.

(9) HUB directory--The Historically Underutilized Business Directory published on the comptroller's website.

(10) HUB subcontracting plan--Written plan identifying whether a contract will be self-performed or include the use of subcontractors, which subcontractors will be used, how much of the contract each subcontractor will receive, and how subcontractors were selected.

(11) Mentor-Protégé Program--A program designed by the comptroller to encourage agencies to work with prime contractors and HUBs to foster long-term relationships.

(12) Non-treasury funds--Funds that are not state funds subject to the custody and control of the comptroller and available for appropriation by the legislature.

(13) Other services--All services other than construction and professional services, including consulting services subject to Government Code, Chapter 2254, Subchapter B.

(14) Person--A human being.

(15) Principal place of business--The location where the qualifying owner or owners of the business direct, control, and coordinate the business's daily operations and activities.

(16) Professional services--Services of certain licensed or registered professions that must be purchased by state agencies under Government Code, Chapter 2254, Subchapter A.

(17) Qualifying owner--A person who:

(A) is a resident of the State of Texas;

(B) has a proportionate interest and demonstrates active participation in the control, operation, and management of an applicant;

(C) is a member of one of the following groups:

(i) Black Americans, which includes persons having origins in any of the Black racial groups of Africa;

(ii) Hispanic Americans, which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) American Women, which includes all women of any ethnicity except those specified in clauses (i), (ii), (iv), and (v) of this subparagraph;

(iv) Asian Pacific Americans, which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, the Northern Marianas, and Subcontinent Asian Americans which includes persons whose origins are from India, Pakistan, Bangladesh, Sri Lanka, Bhutan or Nepal;

(v) Native Americans, which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; and

(vi) Service-disabled Veterans, which includes veterans as defined by 38 U.S.C. §101(2) who have suffered at least a 20% service-connected disability as defined by 38 U.S.C. §101(16) who are not Black Americans, Hispanic Americans, American Women, Asian Pacific Americans, or Native Americans; and

(D) is a U.S. citizen, born or naturalized, or a service-disabled veteran as defined by 38 U.S.C., §101(2) who has suffered at least a 20% service-connected disability as defined by 38 U.S.C., §101(16).

(18) Resident of the State of Texas-- An individual who:

(A) physically resides in the state for a period of not less than six consecutive months prior to submitting an application for HUB certification, and lists Texas as their residency in their most recent tax return submitted to the U.S. Internal Revenue Service, or;

(B) has established, to the satisfaction of the comptroller, a Texas domicile for a period of time sufficient to demonstrate their intention to permanently reside in the state consistently over a substantial period of time.

(19) Response--A submission made in answer to an invitation for bid, request for proposal, or other purchase solicitation document, which may take the form of a bid, proposal, offer, or other applicable expression of interest.

(20) Subcontractor--An entity that contracts with a prime contractor to work or contribute toward completing work under a purchase order or other contract. The term does not include employees of the contractor but includes contracted workers who will work on the contract.

(21) Size standards--Graduation and eligibility thresholds established by the comptroller under §20.294 (relating to Graduation Procedures).

(22) Term contract--A statewide contract established by the comptroller as a supply source for user entities for specific commodities or services.

(23) Vendor Identification Number (VID)--A 13-digit identification number used in state government to identify the bidder or business for payment or award of contracts, certification as a HUB, and on the bidders list.

(24) Work--Providing goods or performing services pursuant to a contract.

(25) Working day--Normal business day of a state agency, not including weekends, federal or state holidays.

§20.283. Evaluation of Active Participation in the Control, Operation, and Management of Entities.

(a) In determining the extent of active participation in the control, operation and management necessary for qualification as a HUB, the comptroller may consider all relevant evidence. In considering and applying the factors set forth in this subsection, the comptroller will consider actual roles and responsibilities of the qualifying owners, rather than titles or statements of intention regarding the owners' role. Factors which may be considered include, but are not limited to:

(1) appearance and relative scope of responsibility of qualifying owners in articles of incorporation or partnership formation documents;

(2) duties and rights of shareholders or partners relative to operational decisions affecting the short term and long term goals of the business;

(3) any restrictive language in articles of incorporation or partnership agreements applicable to qualifying owner;

(4) whether any licenses, certificates, or permits required to operate the business are held by or in the name of the qualifying owner, and whether the qualifying owner is qualified to hold such licenses or permits pursuant to applicable laws and regulations;

(5) the percentages of profit and risk available to the qualifying owner under the corporate or partnership agreements;

(6) ability of other owners or partners to dilute either the ownership percentage or operational powers of the qualifying owner;

(7) whether the qualifying owner has full time employment elsewhere that might conflict with full participation in operation of the business;

(8) the percentage of government versus non-government contracts performed by the business where the qualifying owner actively participates in the bidding of the contract or the performance of the work;

(9) the period of time a qualifying owner participated in the active management and operation of the business prior to the business seeking HUB status; and

(10) whether and to what extent the HUB business shares management, board members, partners, employees, or other resources with another business in amounts or ways which might indicate that they are related or affiliated businesses.

(b) The comptroller may request any additional information it considers necessary to evaluate an applicant as a HUB.

(c) Qualifying owners must be able to make independent and unilateral business decisions which guide the future and destiny of the business, and must be proportionately responsible for the direction and management of the business. Absentee or titular ownership by qualifying owners who do not take an active role in controlling and participating in the business is not consistent with the definition of a HUB.

§20.284. Statewide Annual HUB Utilization Goals.

(a) In accordance with §20.281 of this title (relating to Policy and Purpose) and Government Code, §2161.181 and §2161.182, each state agency shall make a good faith effort to utilize HUBs in contracts for construction, services (including professional and consulting services) and commodities purchases. Each state agency may achieve the statewide and the annual HUB utilization goals specified in the state agency's Legislative Appropriations Request by contracting directly with HUBs or indirectly through subcontracting opportunities.

(b) The statewide HUB utilization goals are:

(1) 11.2% for heavy construction other than building contracts;

(2) 21.1% for all building construction, including general contractors and operative builders contracts;

(3) 32.9% for all special trade construction contracts;

(4) 23.7% for professional services contracts;

(5) 26.0% for all other services contracts; and

(6) 21.1% for commodities contracts.

(c) State agencies shall establish HUB utilization goals for each procurement category identified in subsection (b) of this section. Agencies may set their HUB utilization goals higher or lower than the statewide utilization goals. However, the statewide HUB utilization

goals shall be the starting point for establishing state agency-specific goals. State agency-specific HUB utilization goals shall be based on:

(1) a state agency's fiscal year expenditures and total contract expenditures;

(2) the availability to a state agency of HUBs in each procurement category;

(3) the state agency's historic utilization of HUBs; and

(4) other relevant factors.

(d) Each state agency shall make a good faith effort to assist HUBs in receiving a portion of the total value of all contracts that the state agency expects to award in a fiscal year. Factors in determining a state agency's good faith shall include:

(1) the state agency's performance in meeting or exceeding their HUB utilization goals or the statewide HUB utilization goals as they included as part of their legislative appropriations request in accordance with Government Code, §2161.127; and

(2) the state agency's adoption and implementation of the following procedures:

(A) prepare and distribute information on procurement procedures in a manner that encourages participation in state contracts by all businesses;

(B) divide proposed requisitions into reasonable lots in keeping with industry standards and competitive bid requirements;

(C) where feasible, assess bond and insurance requirements and design requirements that reasonably permit more than one business to perform the work;

(D) specify reasonable, realistic delivery schedules consistent with a state agency's actual requirements;

(E) ensure that specifications, terms, and conditions reflect a state agency's actual requirements, are clearly stated, and do not impose unreasonable or unnecessary contract requirements;

(F) provide potential bidders with referenced list of certified HUBs for subcontracting;

(G) develop and apply a written methodology to determine whether their HUB utilization goals are appropriate under the Disparity Study, or whether the statewide HUB utilization goals from the Disparity Study are appropriate for the state agency, and taking into account the provisions of Government Code, §2161.002(d);

(H) identify potential subcontracting opportunities in all contracts and require a HUB subcontracting plan for contracts of $100,000 or more over the life of the contract (including any renewals), where such opportunities exist, in accordance with Government Code, §2161.251;

(I) seek HUB subcontracting in contracts that are less than $100,000 whenever possible;

(J) provide, at a state agency's option, courtesy reviews of respondents' HUB subcontracting plans required to be submitted with responses pursuant to Government Code, §2161.252; and

(K) provide, at a state agency's option, HUB-subcontracting-plan-compliance training to potential respondents during pre-bid, pre-offer, and pre-proposal conferences, or at agency HUB forums.

(e) A state agency may also demonstrate good faith under this section by submitting a supplemental letter with documentation to the comptroller with their HUB report or legislative appropriations request including other relevant information, such as:

(1) identifying the percentage of contracts (prime and subcontracts) awarded to businesses that are not HUBs, but that are owned by economically disadvantaged persons as defined in Government Code, §2161.001;

(2) demonstrating that a different goal from that identified in subsection (b) of this section was appropriate given the state agency's types of purchases;

(3) demonstrating that a different goal was appropriate given the particular qualifications required by a state agency for its contracts;

(4) demonstrating that a different goal was appropriate given that graduated HUBs cannot be counted toward the goal; or

(5) demonstrating assistance to business entities in obtaining HUB certification.

§20.285. Subcontracts.

(a) Analyzing potential contracts of $100,000 or more. In accordance with Government Code, Chapter 2161, Subchapter F, each state agency that considers entering into a contract with an expected value of $100,000 or more shall, before it solicits responses, determine whether subcontracting opportunities are probable under the contract.

(1) State agencies shall use the following steps to determine if subcontracting opportunities are probable under the contract:

(A) examine the scope of work to be performed under the proposed contract and determine if it is likely that some of the work may be performed by a subcontractor;

(B) check the HUB directory for HUBs that may be available to perform the contract work; and

(C) consider whether subcontracting is probable for only a subset of the work expected to be performed or the funds to be expended under the contract.

(2) State agencies may consider additional sources of information regarding the probability of subcontracting, including:

(A) information from other state agencies and local governments; and

(B) information about past state contracts with similar scopes of work.

(b) Requiring HUB subcontracting plans.

(1) If a state agency determines that subcontracting opportunities are probable, the solicitation shall state that probability and explicitly require that any response include a completed HUB subcontracting plan to be considered responsive. The solicitation shall state the applicable HUB utilization goal, and provide information on where to find and how to complete the comptroller's HUB subcontracting plan form.

(2) A state agency shall require HUB subcontracting plans to be submitted with each response. If a state agency permits responses to be submitted in parts, with deadlines for each part, the solicitation shall specify which deadline applies to the HUB subcontracting plan and shall not open responses until after the HUB subcontracting plan is due.

(3) A state agency shall reject any response that does not include a completed and timely HUB subcontracting plan due to material failure to comply with Government Code, §2161.252(b).

(4) If a properly submitted HUB subcontracting plan contains minor deficiencies, such as failure to sign or date the plan or failure to submit already-existing evidence that a good faith effort was

completed, the state agency may allow the respondent to cure the minor deficiency. A state agency may not allow a respondent to cure material deficiencies, including completion of a good faith effort after the response deadline (such as contacting minority trade organizations or producing the statement of how the respondent intends to self-perform the work that is required by subsection (d)(4) of this section).

(c) Completing a HUB subcontracting plan. The HUB subcontracting plan shall consist of a completed form prescribed by the comptroller, with attachments as appropriate.

(d) Demonstrating good faith in the development of a HUB subcontracting plan. The HUB subcontracting plan must demonstrate that the respondent developed it in good faith. For each part of the work that the solicitation identified as a probable subcontracting opportunity and each part of the work that the respondent actually intends to subcontract, the respondent must demonstrate its good faith development of a HUB subcontracting plan by a method described in paragraphs (1)-(4) of this subsection.

(1) Solicitation Method. To complete the solicitation method, the respondent shall comply with all requirements of this clause.

(A) The respondent shall divide the work into reasonable lots or portions consistent with prudent industry practices.

(B) The respondent shall notify, in writing, at least two trade organizations or development centers that serve economically disadvantaged persons, of the subcontracting opportunities that the respondent intends to subcontract.

(C) The respondent shall notify, in writing, at least three HUBs of the subcontracting opportunities that the respondent intends to subcontract. The respondent shall provide the notice described in this subclause to three or more HUBs per subcontracting opportunity that provide the type of work required.

(D) The notices required by subparagraphs (B) and (C) of this paragraph shall include the scope of work, information regarding location to review plans and specifications, information about bonding and insurance requirements, required qualifications, and other contract requirements and identify a contact person.

(E) The respondent shall provide the notices required by subparagraphs (B) and (C) of this paragraph at least seven working days prior to submission of the response. Neither the day on which the notice is sent nor the day on which the respondent submits its response count as one of the required seven working days. A state agency may determine that circumstances require a different time period than seven working days but must notify potential vendors of the requirement and document the justification in the contract file.

(F) The respondent shall submit documentation of having provided the notices required by subparagraphs (B) and (C) of this paragraph, including copies of relevant correspondence with the recipients, with its HUB subcontracting plan.

(G) If the respondent selects a non-HUB business to perform a subcontract instead of a HUB that bid for the same subcontract work, the respondent shall include a written justification for the selection in its HUB subcontracting plan.

(H) The respondent shall retain documentation of its compliance with each aspect of the solicitation method and submit it to the state agency upon request.

(2) All-HUB-Subcontractors Method. The respondent may use the all-HUB-subcontractors method to demonstrate a good faith effort for any subcontracting opportunity by submitting documentation that 100% of subcontracting opportunities will be performed by HUBs.

(3) Meeting-or-Exceeding-HUB-Goal Method. The respondent may use the meeting-or-exceeding-HUB-goal method to demonstrate a good faith effort for any subcontracting opportunity by submitting documentation that it will utilize one or more HUBs to perform subcontracts with a total value that will meet or exceed the HUB utilization goal identified by the procuring state agency in the solicitation.

(4) Self-performing Method. The respondent may use the self-performing method to demonstrate a good faith effort for any subcontracting opportunity by providing a statement of how it intends to fulfill the entire contract, including each subcontracting opportunity, with its own equipment, supplies, materials, and employees. The respondent shall provide the following if requested by the procuring state agency:

(A) evidence of existing staffing to meet contract objectives;

(B) monthly payroll records showing employees engaged in the contract;

(C) on-site reviews of company headquarters or work site where services are to be performed; and

(D) documentation proving employment of qualified personnel holding the necessary licenses and certificates required to perform the work.

(5) Subcontracting to a HUB Protégé. If the respondent is a mentor in a mentor-protégé agreement that is registered with the comptroller under §20.298 of this title (relating to Mentor-Protégé Program), the respondent may demonstrate a good faith effort for any subcontracting opportunity by subcontracting the work to its protégé.

(6) The respondent shall use the HUB directory to identify HUBs. If the respondent uses any alternate source, it accepts the risk that its HUB subcontracting plan may be noncompliant due to inaccurate HUB certification information.

(e) Accepting or rejecting the HUB subcontracting plan. The state agency shall review the respondent's HUB subcontracting plan prior to award. The HUB subcontracting plan shall become a provision of the state agency's contract. The agency and contractor may agree to revise the submitted HUB subcontracting plan in accordance with subsection (b)(4) of this section. State agencies shall review the documentation submitted by the respondent to determine if the respondent made a good faith effort. If the state agency determines that a HUB subcontracting plan was not developed in good faith or the good faith effort was incomplete, the state agency shall reject the response. The state agency shall document the reasons for rejection in the contract file.

(f) Contractor records. The contractor shall maintain records documenting its compliance with the HUB subcontracting plan.

(g) Progress assessment reports. The contractor shall submit a progress assessment report to the state agency with each invoice, in the format required by the comptroller. A state agency may, at its option, allow electronic submissions of the compliance report required by this subsection so long as the electronically-submitted compliance reports are in the format and contain all information required by the comptroller. The progress assessment report shall be a condition for payment.

(h) Monitoring HUB subcontracting plan compliance.

(1) During the term of the contract, the state agency shall monitor the contractor's subcontracting by reviewing each HUB

progress assessment report to determine whether it complies with the HUB subcontracting plan. The state agency shall perform monitoring at intervals corresponding to invoice submissions. The state agency shall determine if the value of the payments to HUBs meets or exceeds the HUB subcontracting plan, and whether the contractor is utilizing only subcontractors named in the HUB subcontracting plan. The state agency shall document the contractor's performance in the contract file.

(2) To determine if the contractor is complying with the HUB subcontracting plan, the state agency may consider the following:

(A) whether the contractor gave timely notice to the subcontractor regarding the time and place of the subcontracted work;

(B) whether the contractor facilitated access to the resources needed to complete the work; and

(C) any other information the state agency considers relevant.

(3) If the contractor fails to comply with the HUB subcontracting plan, the state agency shall notify the contractor of the deficiencies and give the contractor an opportunity to submit documentation and explain why its failure to fulfill the HUB subcontracting plan should not be attributed to a lack of good faith effort by the contractor. Any deficiencies identified by the state agency must be rectified by the contractor prior to the next reporting period.

(4) The state agency shall report failure to comply with the HUB subcontracting plan to the comptroller in accordance with §20.509 of this title (relating to Vendor Performance Reporting). If the state agency determines that the contractor failed to implement the HUB subcontracting plan in good faith, the state agency may, in addition to any other remedies, bar the contractor from further contracting opportunities with the agency. The state agency may also report nonperformance to the comptroller for consideration for possible debarment pursuant to Government Code, §2155.077. A debarment for failure to implement the HUB subcontracting plan may be for a period of no more than five years.

(i) Amending the HUB subcontracting plan.

(1) Before the contractor performs or subcontracts any part of the contract in a manner that is not consistent with its HUB subcontracting plan, it shall submit an amended HUB subcontracting plan to the state agency for its review and approval. The contractor shall demonstrate good faith by complying with the requirements of subsection (d) of this section in the development of the amended HUB subcontracting plan. Failure to comply with this section may be deemed a breach of the contract subject to any remedies provided by Government Code, Chapter 2161 and other applicable law.

(2) The state agency may approve requested changes to the HUB subcontracting plan by amending the contract. The reasons for amending the HUB subcontracting plan shall be recorded in the contract file.

(3) If a state agency expands the scope of work through a change order or contract amendment, including a renewal that expands the scope of work, it shall determine if the additional scope of work contains additional probable subcontracting opportunities. If the state agency determines probable subcontracting opportunities exist, the state agency shall require the contractor to submit for its review and approval an amended HUB subcontracting plan for the additional probable subcontracting opportunities. The contractor shall demonstrate good faith by complying with the requirements of subsection (d) of this section in the development of the amended HUB subcontracting plan.

§20.286. State Agency Planning Responsibilities.

(a) Agencies are required to prepare a written HUB business plan, which shall provide for increasing the utilization of HUBs in purchasing, and in public works contracts in accordance with Government Code, §2161.123.

(b) Pursuant to Government Code, §2161.003, state agencies shall adopt the comptroller's rules related to administering Government Code, Chapter 2161, Subchapters B and C.

(c) Agencies must include a detailed report with their legislative appropriations request that shows the extent to which the agency complied with Government Code, Chapter 2161, and the rules of the comptroller relating to HUBs. The report should include the state agency's effort to identify HUBs for contracts and subcontracts, the agency's utilization of HUBs, and the agency's successes and shortfalls at increasing HUB participation.

§20.287. State Agency Reporting Requirements.

(a) Non-treasury funds. State agencies will report to the comptroller, not later than March 15 of each year regarding the previous six-month period and on September 15 of each year regarding the preceding fiscal year, the payments made for the purchase of goods and services awarded and actually paid from non-treasury funds by the state agency. The report shall include information requested by the comptroller and shall be in a form prescribed by the comptroller. State agencies' purchases from state term contracts or group purchases which are paid from non-treasury funds must be identified on the report as such so that they may be reflected on the comptroller's report of its own purchases.

(b) Monthly information. State agencies shall maintain and compile monthly information relating to the use of HUBs by the agency and each of their operating divisions, including information regarding subcontractors and suppliers.

(c) Spending totals. State agencies will report to the comptroller, not later than March 15 of each year regarding the previous six-month period and on September 15 of each year regarding the preceding fiscal year, the total dollar amount of HUB and non-HUB contracting and subcontracting participation in all of the agencies' contracts for the purchase of goods, services and public works. State agencies must include contracting and subcontracting participation paid from treasury and non-treasury funds.

(d) Group purchasing report. State agencies that participate in a group purchasing program under Government Code, §2155.144 shall submit a separate report to the comptroller, not later than March 15 of each year regarding the previous six-month period and September 15 of each year regarding the preceding fiscal year, of purchases that are made through the group purchasing program and shall report the dollar amount of each purchase that is allocated to the reporting state agency.

(e) Consolidated report. The comptroller shall prepare a consolidated report based on a compilation and analysis of the reports submitted by each state agency and other information available to the comptroller. These reports of HUB purchasing and contracts shall form a record of each state agency's purchases in which the state agency selected the contractor. If the contractor was selected by the comptroller as part of its state term contract program, the purchase will be reflected on the comptroller's report of its own purchases. The comptroller report will contain the following information:

(1) the total dollar amount of payments made by each state agency;

(2) the total number of HUBs paid by each state agency;

(3) the total number of contracts awarded to HUBs by each state agency;

(4) the number of responses received from HUBs by each state agency; and

(5) the graduation rate of HUBs as defined in §20.294 of this title (relating to Graduation Procedures).

(f) Report to legislature. On May 15 of each year, the comptroller shall submit the consolidated report regarding the previous six-month period and on November 15 of each year regarding the preceding fiscal year to the presiding officer of each house of the legislature, the members of the legislature and the joint select committee.

(g) Determination of HUB expenditures. State agencies shall report as HUB expenditures the total payments made directly to certified prime and subcontractor HUBs under the Vendor Identification Number in the comptroller's HUB directory as follows:

(1) A state agency shall report as HUB expenditures payments made to prime and subcontractor HUBs who were certified for at least one day during the reporting period.

(2) When the prime contractor is a HUB, it must perform at least 25% of the total value of the contract with its own or leased employees, as defined by the Internal Revenue Service, in order for the state agency to report all payments to the prime contractor for the contract as HUB expenditures. If a HUB prime contractor performs less than 25% of the total value of contract with its employees or leased employees, the state agency shall only report as HUB expenditures the value of the contract that was actually performed by the contractor and its HUB subcontractors.

§20.288. Certification Process.

(a) A business seeking certification as a HUB must submit an application through the online HUB certification system, affirming under penalty of perjury that the business qualifies as a HUB.

(b) If requested by the comptroller, the applicant must provide any and all materials and information necessary to demonstrate a qualifying active participation in the control, operation, and management of the HUB.

(c) A person claiming Texas residency must prove residency status by submitting:

(1) a current valid Texas driver's license or I.D. card; and

(2) additional evidence of residency satisfactory to the comptroller, such as an appraisal statement for Texas real property (including whether a homestead exemption was claimed for that real property) or most recent paid utility statements.

(d) The comptroller shall certify the applicant as a HUB or provide the applicant with written justification of its denial of certification within 90 days after the date the comptroller receives an application.

(e) The comptroller may reject an application based on one or more of the following:

(1) the application is not satisfactorily completed;

(2) the applicant does not meet the requirements of the definition of HUB;

(3) the application contains false information;

(4) the applicant does not provide required information in connection with the certification review conducted by the comptroller; or

(5) the applicant has an unfavorable record of performance on prior contracts with the state.

(f) The comptroller may approve the existing certification program of one or more local governments or nonprofit organizations in this state that certify historically underutilized businesses, minority business enterprises, women's business enterprises, or disadvantaged business enterprises that substantially fall under the same definition, to the extent applicable for HUBs found in Government Code, §2161.001, and maintain them on the comptroller's HUB directory, if the local government or nonprofit organization:

(1) meets or exceeds the standards established by the comptroller and

(2) agrees to the terms and conditions as required by statute relative to the agreement between the local government or nonprofits for the purpose of certification of HUBs.

(g) The agreement in subsection (f) of this section must take effect immediately and contain conditions as follows:

(1) allow for automatic certification of businesses certified by the local government or nonprofit organization as prescribed by the comptroller;

(2) provide for the efficient updating of the HUB directory;

(3) provide for a method by which the comptroller may efficiently communicate with businesses certified by the local government or nonprofit organization;

(4) provide those businesses with information about the state's Historically Underutilized Business Program; and

(5) require that a local government or nonprofit organization that enters into an agreement under subsection (f) of this section, complete the certification of an applicant with written justification of its certification denial within the period established by the comptroller in its rules for certification.

(h) The comptroller will not accept the certification of a local government or nonprofit organization that charges money for the certification of businesses to be listed on the HUB directory.

(i) The comptroller may terminate an agreement made under this section if a local government or nonprofit organization fails to meet the standards established by the comptroller for certifying HUBs. In the event of the termination of an agreement, those HUBs that were certified as a result of the agreement will maintain their HUB status during the fiscal year in which the agreement was in effect. Businesses which are removed from the HUB directory as a result of the termination of an agreement with a local government or nonprofit organization may apply to the comptroller for certification.

(j) The certification is valid for a four-year period beginning on the date the comptroller certifies the applicant as a HUB. If the certification was granted by an organization other than the comptroller under subsections (f) and (g) of this section, it is valid for the period granted by that organization.

§20.289. Protests.

An applicant may protest the comptroller's denial or revocation of certification by filing a protest through the online HUB certification system within 30 days after the date the comptroller sent notice of the denial or revocation to the applicant. The director will consider the protest and issue a final decision. The director's decision shall be the final administrative action of the comptroller.

§20.290. Recertification.

Upon expiration of the four-year period, a HUB that desires recertification must:

(1) submit an application through the online HUB certification system; and

(2) comply with the requirements specified in §20.288 of this title (relating to the Certification Process) which apply to the recertification process.

§20.291. Revocation.

(a) The comptroller shall revoke the certification of a HUB if the comptroller determines that a business does not meet the definition of HUB or that the business fails to provide requested information in connection with a certification review conducted by the comptroller. The comptroller shall provide the business with written notice of the proposed revocation. A HUB shall have 30 days from receipt of the written notice to provide written documentation through the online HUB certification system stating the basis for disputing the revocation. The comptroller shall evaluate the documentation to determine the HUB's eligibility, and provide the applicant with written notification of the decision.

(b) If a HUB is barred from participating in state contracts in accordance with Government Code, §2155.077, the comptroller shall revoke the certification of that business for a period commensurate with the debarment period.

(c) Businesses that have had their HUB status revoked may not be included in meeting statewide or state agency HUB utilization goals after the end of the last reporting period in which they held certification for at least one day.

§20.292. Certification and Compliance Reviews.

(a) The comptroller will conduct certification reviews of applicants and compliance reviews of certified HUBs. The comptroller may perform random or targeted compliance desk, virtual, or in-person, onsite reviews. The comptroller may verify the information submitted by a business is accurate, and the business continues to meet all HUB eligibility requirements after certification has been granted. Certification and compliance reviews of any business may be conducted upon determining a review is warranted.

(b) Businesses subject to certification and compliance reviews must provide the comptroller with any information requested to verify the eligibility of the business.

(c) The applicant's business documentation shall be reviewed to substantiate the required level of participation and control, and must demonstrate responsibility in the critical areas of the business' operation as set forth in §20.283 of the title (relating to Evaluation of Active Participation in the Control, Operation, and Management of Entities).

(d) If a business does not meet all eligibility requirements or does not provide requested information within the timeframe specified by the comptroller, the business will be denied certification or have its certification revoked.

§20.293. Historically Underutilized Business Directory.

The comptroller provides an online HUB directory that is updated daily to indicate current certification status. Access to the HUB directory is free and open to the public.

§20.294. Graduation Procedures.

(a) Size Standards. A HUB shall graduate from being eligible for HUB certification when it has maintained gross receipts or total employment levels during four consecutive years which, including all affiliates, exceed the U.S. Small Business Administration size standards set forth in 13 CFR Part 121.

(b) Graduation. Businesses that achieve the size standards identified in subsection (a) of this section have reached a competitive status in overcoming the effects of discrimination. The comptroller shall review, as part of the certification or recertification process, the financial revenue or relevant data of a business to determine whether the size standards identified in subsection (a) of this section have been achieved. When the comptroller determines that the business exceeds the applicable size standard, the comptroller shall inform the business that it has graduated and is no longer certified as a HUB, and shall remove the business from the HUB directory.

(c) Effects of Graduation.

(1) Businesses that have graduated from the HUB program may not be included in meeting statewide or state agency HUB utilization goals after the end of last reporting period in which they held certification for at least one day.

(2) A business that has graduated or does not qualify as a HUB under this title, shall be eligible to reapply for HUB certification only after demonstrating that it meets the qualifications for HUB, including the size standards.

(3) A business is considered a successor in interest if it has acquired substantially all of the assets and liabilities of another business. The application of the successor in interest to a HUB that has graduated will be treated as a reapplication of the HUB. The successor in interest applicant must show that it meets the size standards before it is considered eligible to apply.

§20.297. HUB Forum Programs for State Agencies.

(a) In accordance with Government Code, §2161.066, the comptroller shall design a program of forums in which HUBs are invited by state agencies to deliver technical and business presentations that demonstrate their capability to do business with the state agency:

(1) to senior managers and procurement personnel at state agencies that acquire goods and services of a type supplied by the HUBs; and

(2) to prime contractors or vendors with the state who may be subcontracting for goods and services of a type supplied by the HUBs.

(b) Each state agency with a biennial appropriation exceeding $10 million shall participate in the forums by sending senior managers and procurement personnel to attend relevant presentations. The state agency will inform their prime contractors or vendors about presentations relevant to subcontracting opportunities for HUBs and small businesses. The comptroller and each agency that has a HUB coordinator shall:

(1) design its own forum program and model the program, to the extent appropriate, following the format established by the comptroller;

(2) sponsor presentations by HUBs at the state agency offices unless state agency facilities will not accommodate forum participants as determined and documented by the HUB Coordinator; and

(3) identify and invite HUBs to make marketing presentations on the types of goods and services they provide.

(c) Agencies may elect to implement forums individually or cooperatively with other agencies. The state agency's forum programs may include, but are not limited to, the following initiatives:

(1) providing marketing information that will direct HUBs to key staff within the agency;

(2) requesting other state agencies to assist in the preparation and planning of the forum when necessary;

(3) informing HUBs about potential contract opportunities and future awards; and

(4) preparing an annual report of each sponsored and cosponsored forum.

§20.298. Mentor-Protégé Program.

(a) The Mentor-Protégé Program is a program administered by the comptroller in accordance with Government Code, §2161.065, and implemented by state agencies. The purpose of the Mentor-Protégé Program is to foster long-term relationships between experienced contractors and HUBs and to increase the ability of HUBs to obtain and perform contracts and subcontracts for state agency business. Each state agency with a biennial appropriation that exceeds $10 million shall implement the Mentor-Protégé Program.

(b) Each state agency that implements the Mentor-Protégé program shall consider:

(1) the needs of protégé businesses requesting to be mentored;

(2) the availability of mentors who possess unique skills, talents, and experience related to the mission of the state agency's program; and

(3) the state agency's staff and other resources.

(c) Agencies may elect to implement the Mentor-Protégé Program individually or in cooperation with other agencies, public entities, or private organizations. Agencies are encouraged to implement a Mentor-Protégé Program to address the needs of protégé businesses in the following areas:

(1) construction;

(2) commodities; and

(3) services.

(d) State agencies may consider, but are not limited to, the following factors in developing their Mentor-Protégé Program:

(1) internal procedures, including an application process, regarding the Mentor-Protégé Program which identifies the eligibility criteria and the selection criteria for mentors and potential HUB protégé businesses;

(2) recruitment of contractor mentors and protégés;

(3) documentation of the roles and expectations of the state agency, the mentor and the protégé;

(4) monitoring progress of mentor-protégé relationships;

(5) key agency resources including senior managers and procurement personnel to assist with the implementation of the program;

(6) partnerships with local governmental and nonprofit entities;

(7) the appropriate length of time for mentor-protégé relationships to continue (generally limited to four years);

(8) guidance related to the Mentor-Protégé Program in the Disparity Study; and

(9) assessment of the effectiveness of their Mentor-Protégé Program by conducting periodic surveys and interviews of mentors and protégés.

(e) A state agency's Mentor-Protégé Program implementation must include mentor eligibility and selection criteria. In determining the eligibility and selection of a mentor, state agencies shall require each mentor to be registered on the Centralized Master Bidders List (CMBL); and may additionally consider the following criteria:

(1) whether the mentor has extensive work experience and can provide developmental guidance in areas that meet the needs of the protégé, including but not limited to, business, financial, and personnel management; technical matters such as production, inventory control and quality assurance; marketing; insurance; equipment and facilities; and other related resources;

(2) whether the mentor is in "good standing" with the State of Texas and is not in violation of any state statutes, rules or governing policies;

(3) whether the mentor has mentoring experience;

(4) the number of protégés that a mentor can appropriately assist;

(5) whether the mentor has a successful past work history with the state agency;

(6) the amount of time a HUB has participated as a mentor in the program, or in other agencies' programs; and

(7) whether and to what extent the mentor and protégé businesses share management, board members, partners, current or former employees, or other resources that might indicate that they are related or affiliated businesses.

(f) A state agency's Mentor-Protégé Program implementation must include protégé eligibility and selection criteria. In determining the eligibility and selection of HUB protégés, state agencies may use the following criteria:

(1) whether the protégé is eligible and willing to become certified as a HUB;

(2) whether the protégé's business has been operational for at least one year;

(3) whether the protégé is willing to participate with a mentor and will identify the type of guidance that is needed for its development;

(4) whether the protégé is in "good standing" with the State of Texas and is not in violation of any state statutes, rules, or governing policies;

(5) whether the protégé is involved in a mentoring relationship with another contractor;

(6) the amount of time a HUB has participated as a protégé in the program, or in other agencies' programs; and

(7) whether and to what extent the mentor and protégé businesses share management, board members, partners, employees, or other resources that might indicate that they are related or affiliated businesses.

(g) The mentor and the protégé should agree on the nature of their involvement under the state agency's Mentor-Protégé Program. The state agency will monitor the progress of the relationship. The mentor and protégé relationship should be reduced to writing and may include, but is not limited to, the following:

(1) identification of the developmental areas in which the protégé needs guidance;

(2) the time period which the developmental guidance will be provided by the mentor;

(3) points of contact that will oversee the agreement of the mentor and protégé;

(4) procedure for a mentor to notify the protégé in advance if it intends to withdraw from the program or terminate the mentor-protégé relationship;

(5) procedure for a protégé to notify the mentor in advance if it intends to terminate the mentor-protégé relationship; and

(6) a mutually agreed upon timeline to report the progress of the mentor-protégé relationship to the state agency.

(h) The protégé must maintain its HUB certification status for the duration of the agreement.

(i) Each state agency must notify its mentors and protégés that participation is voluntary. The notice must include written documentation that participation in the state agency's Mentor-Protégé Program implementation is neither a guarantee of a contract opportunity nor a promise of business; but the program's intent is to foster positive long-term business relationships.

(j) State agencies may demonstrate their good faith under this section by submitting a supplemental letter with documentation to the comptroller with their HUB report or legislative appropriations request identifying the progress and testimonials of mentors and protégés that participate in the state agency's program.

(k) Each state agency that implements the Mentor-Protégé Program must report that information to the comptroller upon completion of a signed agreement by both parties. Information regarding the Mentor-Protégé Agreement shall be reported in a form prescribed by the comptroller within 21 calendar days after the agreement has been signed. The comptroller will register that agreement on the approved list of mentors and protégés. Approved Mentor-Protégé Agreements are valid for all state agencies in determining good faith effort for the particular area of subcontracting to be performed by the protégé as identified in the HUB subcontracting plan.

(l) The comptroller shall retain and make available to state agencies all registered Mentor-Protégé Agreements. The sponsoring state agency shall monitor and report the termination of an existing Mentor-Protégé Agreement that has been registered with the comptroller within 21 calendar days.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Don Neal
General Counsel Operations and Support Legal Services
Comptroller of Public Accounts
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For further information, please call: (512) 475-2220