



**General Services Commission**

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**RQ-721**

SJS

July 15, 1994

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Opinion Committee

FILE # ML-27700-94

The Honorable Dan Morales  
Attorney General of Texas  
Office of The Attorney General  
Price Daniel Sr. Bldg.  
411 West 13th Street  
Austin, Texas 78701

I.D.# 27700

**RE: The scope of the definition of historically underutilized businesses set forth in Tex. Rev. Civ. Stat. Ann. art. 601b (Vernon Supp. 1994) and related questions**

Dear General Morales:

The General Services Commission is responsible for administering the state's historically underutilized business program. The requirements of the program are set forth in Texas Civil Statutes, Article 601b, and include certifying historically underutilized businesses, maintaining a directory of such businesses, and providing the directory to other state agencies and cities. Agencies are required to use the Commission's directory to make a good faith effort to award at least 30% of the value of all contracts to historically underutilized businesses under sections 3.10 and 5.36 of Article 601b.

To implement the program, the Commission has applied the definition of an historically underutilized business ("HUB") contained in section 1.02 (3) of Article 601b. In relevant part, the Legislature defined a HUB to mean a business entity owned by

"...a person or persons...who are socially disadvantaged because of their identification as members of certain groups including black Americans, Hispanic Americans, women, Asian pacific Americans, and Native Americans, and have suffered the effects of discriminatory practices or similar insidious circumstances over which they have no control."

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the Texas Rehabilitation Commission and other interested parties have requested consideration of a rule amendment that would classify businesses owned by persons with disabilities as HUBs. A copy of TRC's request is attached Exhibit A.

The Commission questions whether it has the legal authority to adopt such an amendment. The Commission's concerns arise from the fact that the Legislature has not identified persons with disabilities as an historically underutilized group, and the Commission currently has no information which demonstrates that disabled persons have been disadvantaged with respect to state contracting.

The questioned language of section 1.02(3) was originally enacted by H.B. 799, Acts, 72nd Legislature, R.S. (1991) to define "disadvantaged business", which definition had previously been provided in section 118, Article V, of the General Appropriations Act for the 1990/1991 biennium, Ch. 1263, Acts, 71st Legislature (1989). The source of the language appears to be the federal Small Business Act, 15 U.S.C. §§ 631 et. seq. In 1993, the section was amended to change the term defined from "disadvantaged business" to "historically underutilized business." It is not clear whether the Legislature intended groups other than those expressly listed to be considered as HUBS, and there is no indication that the Legislature considered the status of disabled persons for the purpose of the HUB program. However, the HUB reporting requirements, enacted in H.B.2626, Acts, 73rd Legislature (1993), suggest that disabled persons were not intended to be included in the HUB program because the Commission is required to categorize HUBs that have received state contracts by sex, race, and ethnicity. (See Article 601b, § 1.03(g).)

Further, persons with disabilities are afforded special treatment under two preference programs. Chapter 94, Texas Human Resources Code and Article 601b, § 4.15 require blind persons and handicapped persons who are not blind to be given a first and second preference for licenses for vending facilities in state buildings. Also, Article 601b, §§ 3.20 and 3.22 provide a mandatory set-aside for goods and services of persons with disabilities. That is, goods or services offered by sheltered workshops and approved in accordance with Chapter 122, Human Resources Code, must be purchased by state agencies in lieu of competitive bidding.

Although these preference programs are significantly different from the HUB program, they must be considered for two reasons. First, the State's historical experience under

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the long-standing preference programs could have a bearing on the factual determination of historical discrimination in State contracting. Secondly, the Legislature's clear expression of policy concerning state agency purchases of goods and services produced by disabled persons may exclude an alternative policy.

The Commission has been advised also that including persons with disabilities in the HUB program is consistent with the Americans with Disabilities Act of 1990. (See Exhibit B. attached.) The ADA prohibits discrimination, but it would not alone provide legal support for an affirmative action of the Commission under state law. This view has been recognized at the federal level and responsive legislation has been introduced. For your information, a copy of H.R. 794 is attached (Exhibit C). Enactment of H.R. 794 would not wholly resolve the question under state law.

Given the significant issues which are not resolved by current authority, on behalf of the Commission, I respectfully request your response to the following questions:

(1) Does the Commission have the authority to consider businesses owned by members of groups other than those listed in Article 601b, §1.02(3) to be historically underutilized businesses?

(2) If the Commission has such authority, what factors should be considered and what record, if any, would the Commission have to assemble in determining whether disabled persons come within the scope of §1.02(3)?

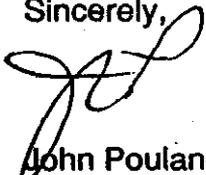
(3) Would the Commission be required to look solely at the State's historical contracting practices in making such a determination?

(4) Do the preference programs set forth in Chs. 94 and 122, Texas Human Resources Code and Article 601b, §§3.20, 3.22, and 4.15 establish Legislative policy concerning state contracting precluding administrative action on the issue?

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The Commission would appreciate as prompt a response as possible. If you have questions or need additional information, please call me at 463-3446.

Sincerely,



**John Pouland**  
**Executive Director**

**Attachments: Exhibits A, B and C**

**cc: Chairman Parker C. Folse III**  
**Commissioner Robert E. Davis**  
**Commissioner Lee Elliott Brown**  
**Commissioner Betty McKool**  
**Commissioner Ramiro Guzman**  
**Commissioner Ofelia de los Santos**