TABLE 2.2

GSC'S 1993 PURCHASING REQUIREMENTS FOR SERVICES

Dollar Amount	Requirememts
Up to $1,000	Purchase delegated to individual agency; no bid required.
$1,000.01 to $5,000	Purchase delegated to individual agency; three informal bids required; one bid must be from minority-owned business and one must be from a woman-owned business.
$5,000.01 to $15,000	Purchase delegated to individual agency; three formal bids required; one bid must be from minority-owned business and one must be from a woman-owned business.
$15,000.01 to $100,000	Purchase delegated to individual agency; agency must solicit bids from all eligible vendors on the bidders list.
$100,000.01 and more	The GSC must review individual agency's bid specifications to determine whether the agency can handle the purchase.

Source: GSC Rule 113.11. Rule applies to services other than consulting or professional.

thresholds at which the requirements change. In this case, if the contract is for $15,000 or more, the purchasing agency must solicit bids from all eligible vendors on its bidders list that serve the agency's geographic region. We discuss additional statutory requirements which apply to professional and consulting services in separate subsections, below.

The statute identifies three different purchasing methods: (1) the contract purchase method, (2) the multiple award contract procedure, and (3) the open market purchase procedure. These methods were not affected by the FY93 changes in purchasing procedures. Regardless of the contracting procedure used by a State agency, the purchasing statute requires each State agency to make a good faith effort to insure that HUBs receive not less than 30 percent of the total value of all contract awards for the purchase of supplies, materials, services and equipment that the GSC or

the purchasing agency expects to make during a given year. Fulfilling this duty is the responsibility of the purchasing agency, even for those goods or services procured through the GSC.

Under the contract purchase method, the purchasing agency must give public notice inviting bids at least once in at least one newspaper of general circulation in Texas and at least seven days before the last day set for the receipt of bids. The purchasing agency must also maintain a bidders list and send bid invitations to those who have expressed a desire to bid on the type of item that is the subject of the bid.

After receiving the bids, the GSC or the purchasing agency must award the contract to the bidder submitting the "lowest and best" bid. In determining the lowest and best bidder, the GSC or the purchasing agency must consider:[23]

- price;
- the quality of the supplies, materials, equipment, or contractual services, and their availability and adaptability to the particular use required;
- the number and scope of conditions attached to the bid;
- the ability, capacity, and skill of the bidder to fulfill the contract or provide the service required;
- whether the bidder can complete the contract or provide the service promptly or within the time required, without delay or interference;
- the character, responsibility, integrity, reputation, and experience of the bidder;
- the quality of performance on previous contracts or services;
- the previous and existing compliance by the bidder with laws relating to the contract or service;
- any previous or existing noncompliance by the bidder with specification requirements relating to time of submission of specified data such as samples, models, drawings, certificates, or other information;

[23] Tex. Admin Code § 3.11(e).

- the sufficiency of the financial resources and ability of the bidder to fulfill the contract or provide the service; and
- the ability of the bidder to provide future maintenance, repairs, parts, and service.

Under the open market purchase method, the GSC or purchasing agency may forego the public notice requirement if it determines that any purchase of supplies, materials, equipment, or services can be made most effectively in the open market. While there are no dollar-based thresholds for determining whether to use the open market or the contract purchase method, the open market purchase method is used most often for short-term needs that cannot be filled under current contract arrangements. The contract purchase method is used to procure any items that the GSC or purchasing agency believes will be needed on an on-going or widespread basis.

Once the decision to use the open market purchase method is made, the GSC or purchasing agency must give notice to potential bidders either by direct mail, telephone, or telegraph and obtain at least three competitive bids. The contract must be awarded to the "lowest and best" bidder, as defined by the factors described above.

The multiple award contract procedure is a purchasing procedure by which the GSC establishes multiple levels of quality and performance and makes one or more award at each level.[24] The GSC or purchasing agency may use this procedure only after the agency purchasing director has made a written determination based on one or more specified factors that its use is in the State's best interests.

[24] 1 Tex. Admin. Code § 113.

3. Professional Services

The Professional Services Procurement Act applies to the contracting for professional services by every State agency.[25] The services governed by the Act include services provided by licensed physicians, optometrists, surgeons, architects, certified public accountants, land surveyors, and professional engineers. The Act prohibits acquiring such services on the basis of competitive bids. Instead, it mandates that contracts for these services be selected and awarded on the basis of demonstrated competence and qualifications for the type of professional service to be performed, and requires that prices be fair and reasonable.

4. Consulting Services

The Consulting Services Act is intended to ensure the provision of notice to all potential private consultants of the need for and opportunity to provide consulting services, as well as competition in the selection of private consultants by State agencies, regardless of the dollar value of those services.[26] The Act does not apply to professional services that are covered by the Professional Services Procurement Act.[27]

The Act requires each State agency offering a contract for consulting services to first obtain permission from the Governor's Budget and Planning Office. Next, the agency must publish in the Texas Register an invitation for private consultants to provide offers of consulting services. The invitation must be submitted for publishing at least 30 days prior to the date the agency enters into a contract for consulting services.

---

[25] Chapter 2254, Subchapter A, Government Code.

[26] Chapter 2254, Subchapter A, Government Code.

[27] The Act does not apply to actuaries, investment counselors, medical or dental service providers, or private legal counsel (see § 2254.024(a), Gov't Code).

In selecting a consultant to provide services, the agency must base its choice on demonstrated competence, knowledge, qualifications, and on the reasonableness of the proposed fee. If all other factors are equal, the agency is required to give preference to those consultants whose principal place of business is located within the State. The Act does not require or prohibit the use of competitive bidding procedures or sole-source contracts.[28]

Following its selection of a consultant, the agency must publish in the Texas Register the name and business address of the consultant, a description of the activities that the consultant will perform, the value of the contract, the dates of the contract, and the presentation deadlines for the consultant.

II. Agency Procurement Practices

To learn more about individual State agency procurement practices and how these practices impact HUBs, we sent a series of surveys to the thirteen following agencies and institutions of higher education: the GSC, Texas Comptroller of Public Accounts (Comptroller), Texas Department of Criminal Justice (TDCJ), Texas Department of Human Services (TDHS), Texas Department of Mental Health and Mental Retardation (MHMR), Texas Parks and Wildlife Department (TPWD), Texas Department of Public Safety (TDPS), Texas Department of Transportation (TxDOT), the Texas Natural Resource Conservation Commission, the University of Texas at Austin, University of Texas System (UT-System), Texas A&M University at College Station, and Texas A&M University System (TAMU-System). Each survey contained a series of questions on procurement practices in the following areas: construction, commodity purchasing, professional services and other services.[29]

---

[28] The statute provides no guidance on how to determine when or whether to use a particular method.

[29] Copies of the surveys are provided in Appendix I.

The selection of these specific agencies reflects an effort to track the practices that account for a significant portion of the procurement dollars spent by the State. The agencies surveyed included: (1) the GSC, whose authority it is to oversee much of the purchasing for State agencies; (2) agencies such as institutions of higher education, which are statutorily exempted from GSC control for significant portions of procurement dollars (such as spending for construction); and (3) still other agencies, whose purchases under their delegated authority from the GSC make up a large percentage of the State's procurement dollars. When taken together, these twelve selected agencies and educational institutions account for over 80 percent of the procurement dollars the State spent during the study period.

Finally, we interviewed both procurement officials who completed the surveys and procurement officials from agencies that were not surveyed. The next section summarizes the survey and interview responses we received.

A. Construction

1. Bid Process

As noted above, the GSC is responsible for most State construction procurement unless there is a specific exemption.[30] Among the State agencies surveyed that handle their own construction procurement, all use a competitive sealed bid process. The agencies advertise construction opportunities by sending bid requests to businesses on their master bidders lists, placing public notices in general circulation newspapers (especially those in close proximity to the construction project), notifying trade organizations and women and minority business organizations, and placing notices on bulletin boards. Each agency generally allows thirty days from the date of bid notification until the completed bids are due. Some agencies and institutions allow much less time, however. For

[30] Art. 601b, Tex. Civ. Stat. §§ 5.13, 5.14 (Vernon's 1994).

instance, Texas A&M University allows only one to two weeks for contractors to complete bidding documents. TxDOT allows three weeks.

Most of the agencies and educational institutions that responded to the survey do not require attendance at pre-bid conferences. Instead, many of them hold such conferences solely for informational purposes. Only MHMR reported that it routinely requires attendance at pre-bid conferences. Texas A&M University System reported that it holds mandatory pre-bid conferences only for complex projects.

2. Sole Sourcing

When asked how often they solicit only one firm for a bid on a construction contract, the responding agencies and educational institutions uniformly reported that such sole sourcing occurs rarely, if at all, with some estimating no more than 1 percent of the time. Sole sourcing is used only in emergency circumstances or when there is only one known firm that can provide the service needed. For example, MHMR described an emergency as a situation in which immediate work is needed to remedy conditions that are preventing or significantly impairing the agency's delivery of services.

3. Bid Award

Each State agency and educational institution awards its construction contracts to the "lowest and best" bidder. Common reasons given for the low bidder not receiving the contract are: (1) the bidder failed to attach a bid bond or cannot obtain bonding; or (2) the bidder did not properly complete the bid documents. Some agencies reported that they would not award a contract to the low bidder if the bidder was not financially stable,[31] had a record of previous poor performance with the

[31] Beyond the financial scrutiny that comes with completion of GSC's Contractor Qualification Form, the GSC also considers the bidder's "financial stability." In doing so, the GSC uses a "rule of thumb" that a bidder must have available liquid assets equal to the estimated largest single monthly cost of the project.

agency, or failed to make a good faith effort to obtain HUBs as subcontractors. None of the officials surveyed could estimate how often contracts are not awarded to low bidders.

4. Bid Requirements

All of the agencies and educational institutions surveyed have extensive requirements that contractors must meet to perform agency and institution work. For instance, all contractors on State construction projects must obtain the following types of insurance: workers' compensation insurance, employer's liability insurance, comprehensive general liability insurance, comprehensive automobile liability insurance, owner's protective liability insurance, and builder's risk insurance.[32] These requirements are part of the Uniform General Conditions incorporated in all building construction contracts entered into by State agencies.[33] While the purchasing statute mandates a committee review of the Uniform General Conditions and that committee's composition, the statute does not prescribe the types of insurance required or the amounts.[34]

In addition to the insurance requirements, State bonding requirements are also extensive. In general, each agency and educational institution surveyed requires a 5 percent bid bond, 100 percent performance bond, and 100 percent payment bond. Only the University of Texas requires a 3 percent bid bond. Most of the agencies and educational institutions may waive some or all of the bonding requirements depending on the contract amount. For instance, Texas A&M University System and the GSC waive all of their bonding requirements if the contract is for less than $100,000. TDCJ and TxDOT waive all their bonding requirements if the contract is for less than $25,000. Other agencies,

---

[32] Some of the agencies surveyed occasionally require that contractors also purchase umbrella coverage and flood insurance.

[33] Art. 601b, Tex. Civ. Stat. § 5.26(a) (Vernon's 1994); 1 Texas Admin. § 123.21(c).

[34] Art. 601b, Tex. Civ. Stat. § 5.26(b) (Vernon's 1994).

such as MHMR and TDHS, waive their payment and performance bond requirements if the contract is below a certain amount, but always require payment of a bid bond.[35] The University of Texas System requires a 3 percent bid bond on all contracts, requires a 100 percent payment bond only on contracts over $25,000, and requires a 100 percent performance bond on contracts over $100,000.

5. Efforts to Assist HUBs

Attempts by State agencies and educational institutions to assist HUBs have been quite recent. Most of the agencies and institutions reported that they attend economic forums, mail bid notices to HUBs, and send notices regarding bid opportunities to HUB organizations. Some agencies also reported that they publish and distribute their own HUB directory, and a few agencies have recently implemented subcontracting programs to boost the level of HUB participation.

TxDOT was the only agency surveyed that reported a significant history of assisting HUBs. Since 1988, TxDOT has employed six field officers to provide assistance to potential HUB subcontractors. These field officers meet with HUBs and provide information about business practices, how to prepare and estimate a bid, and how to read construction plans. TxDOT also makes efforts to break large projects into smaller projects to encourage broader HUB participation. Further, TxDOT maintains a certification program to assist prime contractors in meeting federally-mandated DBE (Disadvantaged Business Enterprise) goals and Federal Department of Transportation requirements. Of course, TxDOT's exceptional record among the agencies surveyed with respect to

---

[35] The GSC procures all construction services for TDHS, except for work deemed to constitute renovation. Renovation is work done to repair or reconfigure space that the agency leases from other government entities or receives as free space. There is no dollar threshold that distinguishes renovation work from the construction work that the GSC procures on behalf of TDHS. The classification decision is made at the outset of the project. If the project is determined to be renovation, the bonding requirements outlined above apply. These requirements are not statutory, but are set by the agency itself based on a review of its experience.

its HUB efforts may be due in large part to the fact that TxDOT must comply with federal minority participation requirements for transportation projects involving federal funds.[36]

B. Commodity Purchasing

1. Bid Process

Without exception, all of the agencies and educational institutions surveyed reported that they follow the GSC's rules regarding commodities purchased with State funds. As noted above, the GSC has jurisdiction over commodity purchases only for amounts greater than $10,000. Therefore, agencies other than the GSC reported their experiences concerning purchases below that $10,000 threshold.

The percentage of contracts put out for competitive bid varies widely among survey respondents. While the GSC, TxDOT, TDCJ, and the University of Texas System all reported that more than 90 percent of their commodities contracts are put out for competitive bid, the University of Texas at Austin reported using competitive bidding only 60 percent of the time and MHMR reported that it used a competitive bidding process only 10 percent of the time.[37,38]

---

[36] In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the United States Supreme Court upheld the constitutionality of legislation that the United States Congress enacted in 1977. That legislation required that ten percent of all federal funds for local public works projects, such as highway construction, be reserved for minority business enterprises (MBEs). The statutory definition of an MBE under federal law is comparable to that for a HUB under Texas law.

[37] The official at University of Texas at Austin reported that 10 percent of their contracts are sole sourced, and 30 percent are awarded for small orders under $1,000.

[38] Such competitive bidding would apply to contracts under $10,000 but over $1,000. For purchases below $1,000, an agency does not have to obtain a bid. Consequently, an agency like MHMR which does 60 percent of its purchasing in amounts under $1,000, has limited opportunities to use competitive bidding. Other than the 10 percent that MHMR does procure through competitive bids, MHMR acquires 5 percent of its commodities through sole sourcing and 25 percent through an approved vendor in the GSC catalog, a State term contract, or an agency with which MHMR works.

When contracts are put out for competitive bid, the agencies and institutions reported that they informed potential contractors of bid opportunities by sending bid notices to firms on their master bidders lists and to firms that previously provided the agencies with similar products, placing notices on bulletin boards, notifying organizations for minority and woman-owned businesses, placing public notices in trade journals and general circulation newspapers, and contacting HUBs listed in the HUB directory maintained by the GSC. The agencies and institutions generally allow anywhere from 10 to 30 days from the date they give notice of the bid opportunity until completed bids must be submitted.

2. Sole Sourcing

TDHS, TPWD, and TDPS all reported that they keep no statistics regarding the percentage of contracts that they sole source. Of the agencies and institutions that do keep track of this information, most responded that they sole source 10 percent or less of their commodities contracts, for example, the GSC—9.5 percent, TxDOT—less than 4 percent, TDCJ—approximately 5 percent, MHMR—5 percent, University of Texas System—5 percent, and University of Texas at Austin—10 percent. Texas A&M University at College Station reported the greatest amount of sole sourcing on commodities contracts at 30 percent.[39] When agencies engage in sole sourcing, they do so because of emergency circumstances, because the contract is for less than $1,000, or because there is only one known manufacturer who can provide the product.[40] A number of the survey respondents stated that they must get approval from their agency head prior to obtaining only one bid for a contract.

---

[39] Texas A&M considers a contract sole sourced if they receive only one response to a request for bids.

[40] Notably, many agencies did not distinguish sole sourcing from purchases under $1,000 for which they did not have to obtain a bid. This would seem to suggest that some purchasers may treat small (i.e., under $1,000) purchases as opportunities to contact and obtain goods from a single source.

3. Bid Award

The agencies and institutions surveyed uniformly stated that they award all commodities contracts that are competitively bid to the lowest and best bidder. According to survey respondents, common reasons why a low bidder may not be awarded a contract are: (1) the bidder did not comply with bid specifications; (2) the bidder added unacceptable conditions to the bid; (3) the bidder cannot provide timely delivery; and (4) the bidder has a record of previous poor performance with the contracting agency.

4. Bid Requirements

The agencies and educational institutions responding to the surveys reported few bid requirements in the commodities area. The University of Texas System requires contractors to provide insurance and bonding for its furniture contracts, and the University of Texas at Austin reported that it occasionally requires its commodities contractors to carry insurance.

5. Efforts to Assist HUBs

When asked what they have done to assist HUBs in the commodities area, the survey respondents gave a wide variety of answers. Many reported that they attend economic forums, notify HUB organizations of bid opportunities, and use the HUB directory to solicit HUBs. For example, the GSC began sponsoring economic opportunity forums in April 1992 and held such forums at various sites throughout the state. In September 1990, Texas A&M University adopted a procedure to develop and participate in various outreach efforts; however, it is not clear when these efforts actually began. Other State agencies reported more direct contact with HUBs. The TDPS reported that they hired a HUB coordinator to implement HUB policies and procedures. The University of Texas System trains HUBs on its bidding process, and conducts outreach efforts. The GSC has a program to assist small businesses in meeting State bidding requirements.

C. Other Services

1. Bid Process

The survey respondents purchase a wide variety of services other than professional services, including, but not limited to, temporary employees, elevator repair services, computer hardware and software maintenance, security, and janitorial services. Although the GSC delegates authority over all purchases of services for $100,000 or less to the relevant purchasing agency, without exception, the agencies and educational institutions surveyed reported that they follow the GSC's rules in making these delegated purchases of services with State funds.

For the most part, the agencies and institutions surveyed appear to use a competitive bidding process to obtain bids on contracts for services other than professional or consulting services. The agencies and institutions advertise their services contract opportunities in much the same way they advertise their commodities contracts. They send notices of the contracting opportunity to those firms on their master bidders list and to previous bidders, place information about the upcoming contract on bulletin boards, place public notices in general circulation newspapers and trade journals, and notify HUB organizations of the bidding opportunity.

Only a handful of agencies reported using Requests for Proposals (RFPs) to solicit bids. MHMR and Texas A&M University both stated that they occasionally use RFPs. When Texas A&M uses the RFP process, potential contractors are given four to six weeks to submit their proposals. When MHMR uses the RFP process, bidders are required to attend a pre-bid conference. The Texas Natural Resources Conservation Commission also uses RFPs, but only for large and expensive projects.

2. Sole Sourcing

As with sole sourcing in the commodities area, the survey respondents have had varied experiences with sole sourcing in the services area. While most of the survey respondents sole sourced less than 10 percent of their contracts, Texas A&M System reported that it sole sources approximately 60 percent of its service contracts.[41] The most common reasons for engaging in sole sourcing in the services area are the presence of emergency conditions and the lack of available firms that can provide the necessary service.

3. Bid Award

Those agencies and institutions that procure services other than professional services stated that they award contracts to the lowest and best bidder. While the statute prescribes the factors to be used in making this determination, most stated that they review bids with more of an eye toward conformity to the bid specifications. As a result, the award decision depends heavily upon the extent to which the bid specifications incorporate the statutory factors. Notably, GSC took the position that one could not consider factors outside those referenced in the bid while others such as TPWD and MHMR indicate that factors that are outside the bid specifications but which are listed in the statute can be considered.

Texas A&M University made it clear that price determines award once a bidder meets specifications. Despite the latitude with which one could assess several of the statutory factors (e.g., "the ability, capacity, and skill of the bidder to perform" and "the character, responsibility, integrity, reputation, and experience of the bidder"), no respondent indicated that a determination of the "best"

---

[41] An official at Texas A&M reported that although 60 percent of contracts are sole sourced, those contracts represent only 10 to 20 percent of the total dollar value of contracts awarded. Also, the official noted that Texas A&M issued bid proposals for 90 percent of the sole-sourced contracts, but received bids from only one vendor. Most of the sole-source contracts are awarded for preventive maintenance.

bidder among those meeting the specifications considers anything beyond price. In other words, "lowest" appears to take precedence over "best" in awarding contracts for other services.

4. Bid Requirements

Several of the survey respondents require their services contractors to carry insurance and to obtain bonding. For instance, TDHS requires services contractors to carry workers' compensation insurance. TxDOT requires its services contractors to obtain bonding, but only for contracts in excess of $100,000.[42] TxDOT requires a $25,000 performance bond for projects between $100,000 and $250,000 and a $50,000 performance bond for projects between $250,000 and $500,000. Likewise, the GSC requires a performance bond if the contract exceeds $100,000. As a general matter, the purchasing statute only specifies that the GSC, and presumably agencies to which it delegates authority, "may require a performance bond...."[43] Furthermore, the statute does not mandate any bond amounts or contract sizes for which bonds may be required. Instead, the bond is to be "in such amount as [the GSC] finds reasonable and necessary" to protect the State. By rule, the GSC raised the threshold for requiring a performance bond from contracts over $25,000 to those over $100,000. The GSC also requires services contractors to carry workers' compensation insurance, personal liability insurance, and property damage insurance.

5. Efforts to Assist HUBs

Most of the agencies and institutions surveyed engage in the same efforts to assist HUBs in the services area as they do in the commodities area. In addition to these general efforts, a few of

---

[42] The GSC reviews bid specifications and approves advertising the bid. However, the GSC delegates authority to TxDOT to process the bids and award services contracts over $100,000. The GSC has the authority to exercise its discretion and permit any agency to make such purchases under similar procedures.

[43] Art. 601b. Tex. Civ. Stat. § 3.11(i) (Vernon's 1994).

the agencies reported that they encourage their prime contractors to award a certain percentage of the contract to HUB subcontractors.

For example, in the fall of 1993, TPWD instituted a requirement that a bidder submit a Historically Underutilized Business Policy Compliance Response outlining the percentage of the subcontracting opportunities that will go to HUBs. This response also requires the successful bidder to certify that he or she will document compliance with this commitment or good faith effort to do so. The educational institutions require those bidders who will subcontract portions of work to submit descriptions of their plans for HUB participation. Texas A&M University reported that they have required a detailed description of such plans since FY92; prior to that year, Texas A&M merely included a question about a bidder's expected use of HUB subcontractors in all RFPs. The Texas Natural Resources Conservation Commission began to include a thirty percent good faith goal in all of its service procurements, following the adoption of that figure by the 73rd Texas Legislature in 1993.

D. Professional Services

The agencies and institutions surveyed procure a variety of professional services. These range from architectural and engineering services to medical services to accounting to asbestos surveys. In procuring these services, the survey respondents reported that they follow the guidelines set forth in the Professional Services Procurement Act.

1. Bid Process

Some of the agencies and institutions surveyed reported that they use RFPs to solicit professional services contractors. As described above, awards under an RFP are not determined by price or cost as a competitive bid would be. TxDOT generally sends RFPs to five firms and gives

each firm two to four weeks to submit a proposal. The University of Texas System, Texas A&M System, and Texas A&M University also use RFPs.[44]

2. Bid Award

Most of the survey respondents reported that in evaluating a professional services contractor, they look at the contractor's previous work experience, staff qualifications, and quality controls.[45] MHMR also considers whether the firm has a local presence. The University of Texas System reported that it considers the firm's bonding and insurance capacity and whether it has made a good faith effort to meet the institution's HUB subcontracting goals. Almost all of the survey respondents stated that they preferred to work with companies with which they have had a previous positive experience.

3. Bid Requirements

Few of the survey respondents reported that they had bid requirements for their professional services contracts. The University of Texas System reported that it requires professional insurance coverage but not a bond. Texas A&M University System reported that it occasionally requires automobile or professional liability insurance. It also requires prime contractors to make a good faith

---

[44] Of those who responded to the professional services survey, only Texas A&M System and Texas A&M University indicated that they also used Requests for Qualifications (RFQs) as a procurement method. More specifically, Texas A&M System uses RFQs in the construction area to obtain services involving materials testing. While Texas A&M University stated that it used RFPs, further inquiry revealed that the practice of procuring professional services occurs in phases. The first is essentially an RFQ process by which the institution determines the top qualified candidates. The second phase involves negotiating with the candidates in rank order to obtain satisfactory contract terms. In essence, the distinction between an RFP and an RFQ is based on the stage at which the institution considers price. If price is considered as part of the initial evaluation, it is an RFP. If price is considered after the evaluation of prospective service providers, it is more of an RFQ process.

[45] The statutory standard is more vague. It states that the selection and award to a professional services provider shall be made: "(1) on the basis of demonstrated competence and qualifications to perform the services; and (2) for a fair and reasonable price." V.A.C.S. Art. 664-4, § 3(a). The statute does not impose any bonding or insurance requirements.

effort to meet its HUB subcontracting goals. The University of Texas at Austin reported that it occasionally requires a performance bond and usually requires its professional service contractors to carry general liability insurance.

III. Race and Gender Neutral Efforts

As noted above, some agencies are taking steps to provide training and assistance to small businesses generally. For example, the GSC has sponsored economic forums for small businesses. In addition, the Texas Legislature required the creation of a small contractor participation assistance program.[46] As components of this program, the GSC was to implement a system for the centralized purchase of any necessary insurance and bonding coverage, public outreach to small contractors, a technical assistance plan, and a financing assistance plan.[47] The GSC did not meet the legislative deadline of January 1, 1994 for this program.[48]

Another race and gender neutral approach is an expanded effort to provide notice of bidding opportunities. Some agencies and institutions use bulletin boards and send notices to previous bidders and businesses that appear on master bidders lists. For example, for service contracts over $15,000 and under $100,000, an agency must solicit bids from all eligible vendors on the vendor list. The GSC also is in the process of establishing a toll-free telephone service that vendors could call to learn about upcoming projects.

---

[46] Art. 601b. Tex. Civ. Stat. § 5.37 (Vernon's 1994).

[47] *Id.*

[48] The GSC has prepared draft formal rules for publication and comment. Those draft rules await GSC approval. At present, the rules call for implementation of the program for projects costing over $20 million. The GSC acknowledges that it has not had any projects of that size recently.

However, the agencies and educational institutions surveyed identified few more tangible race or gender neutral practices that would tend to increase HUB utilization. For example, the surveys did not identify any policies or procedures for granting exceptions to bonding requirements or simplifying the bidding process for smaller businesses. Furthermore, only one agency surveyed, TxDOT, identified efforts in the area of construction procurement to break larger projects into smaller projects to encourage increased participation of smaller business.

In the next chapter, we examine the extent to which State agencies procured goods and services from HUBs before and after the State's HUB Program was adopted.

CHAPTER 3
STATISTICAL ANALYSIS OF HUB UTILIZATION BY THE STATE OF TEXAS

The statistical evidence reported in this chapter will tell us:

- Where the State spends the majority of its procurement dollars.
- From which geographic regions the State draws its vendors.
- What percentage of all establishments in Texas are Historically Underutilized Businesses (HUBs) available to do business with the State.
- To what extent the State has utilized HUBs in its procurement opportunities.
- To what extent the State's prime contractors have utilized HUBs in their subcontracting opportunities.

- Whether the State has utilized HUBs to the extent that they are available in the marketplace.

- Whether the State's HUB program has increased HUB utilization in State procurement opportunities.

To report this information, we have organized the data at the following levels of detail:

First, we report the geographic market and our estimates of utilization, availability and disparity for four major procurement categories—construction, professional services, other services and commodity purchasing.[49,50] Although these four procurement categories are fairly broad, they have been selected because they are supported by the underlying data with the necessary levels of precision. They also cover many of the significant differences in procedures that are used for different procurements by the State. For example, construction work contains bonding requirements that generally do not apply to other procurement areas; professional service procurements—unlike other types—are often solicited through Requests for Proposals (RFPs), where price is usually only one factor in consideration for award. Other service procurements are, perhaps, the most diverse in that some procurements are awarded on a low bid basis while others are solicited through RFPs. In commodity purchasing, perhaps the most straightforward procurement area, price is the determining factor for the State.

---

[49] Construction consists predominantly of building construction, heavy construction and special trade construction. Professional services consists of architectural, engineering, accounting, financial, medical and surveying services. Other services includes insurance and real estate; research, management and consulting services; business services such as advertising; transportation services; repair services; legal services; personal services such as cleaners; social services; and educational services. Commodity purchasing consists of manufacturing; wholesale trade–durables; wholesale trade–nondurables; and retail trade.

[50] We report disparity results for selected two-digit SIC codes in Appendix H. The two-digit SIC codes included in the analysis were selected on the basis of State expenditures (i.e., more than $1 million in total expenditures) and number of vendors (i.e., more than 300 vendors) in the two-digit SIC code over the study period, FY89-FY93. The two-digit SIC codes selected comprised over 98 percent of the total dollars paid to vendors in Texas and accounted for approximately 97 percent of the vendors in Texas.

Second, we report the availability, utilization and disparity results for four major race, ethnic and gender groups: African Americans, Hispanics, Asians (including Native Americans and other minorities), and white women. These are the groupings for which the most reliable data on HUBs are available.[51]

Third, we report the results of our statistical analysis for the "pre-program" period (i.e., FY89-FY91) and for the "program" period (i.e., FY92-FY93). In its *Croson* decision, the Supreme Court stated that a non-federal entity, such as the State, would need to show that race-based goal programs are necessary to remedy discrimination in order to justify such programs.[52] To determine if a race-based program is necessary to remedy discrimination, we conducted a statistical disparity analysis for contracts that *were not* subject to HUB participation requirements—i.e., State contracting during the pre-program period. We compared utilization to availability on procurements covered by the State's goal program to show us how effective the program has been.

---

[51] To measure disparity, we compare HUB utilization to HUB availability. We use the State's central payment data, as described below, to measure the utilization of HUBs. The State's HUB definition does not include Asian Indian-owned firms. However, the Census data, which we rely on to estimate HUB availability, does include Asian Indian-owned firms under the category "Asian and Other Minorities." Therefore, to make accurate comparisons, we have included Asian Indian-owned firms in our estimates of utilization for the race/ethnic group of Asian and Other Minorities.

See U.S. Bureau of the Census, *Survey of Minority-Owned Business Enterprises* and the *Survey of Women-Owned Businesses*, various years. The race/ethnic groups are defined as follows by Census: (1) *African Americans* (Black persons having origins in any of the Black African racial groups); *(2) Hispanics* (Mexicans, Puerto Ricans, Dominicans, Cubans, Central or South Americans of either Indian or Hispanic descent); (3) *Asians and Other Minorities* include Asian/Pacific Islanders (persons with origins in any of the Far East countries, South East Asia, Indian subcontinent, or Pacific islands) and Native Americans/Alaskans (native persons having origins in any of the original peoples of North America).

In Texas, the composition of firms identified as *Asian and Other Minorities* with paid employees is as follows: 76 percent Asian-Pacific firms, 21.2 percent Asian Indian-owned firms and 2.8 percent Native American firms.

[52] See U.S. 488 at 491-492 (plurality opinion of O'Connor, J. with Rehnquist, C.J. and White, J.); *id* at 537-38 (Marshall, J. with Brennan and Blackmun, J.J., dissenting).

We reach several findings:

- In Section I, we find that the State spends the majority of its procurement dollars in Texas. In addition, over 80 percent of the State's construction, professional services and other services vendors are located in Texas. Slightly more than 65 percent of the State's commodity vendors are located in Texas. We provide more detailed results and describe our data sources below.

- In Section II, we present information on the extent to which HUBs have been utilized in State procurement and the extent to which HUBs have been utilized as subcontractors on the State's construction contracts. At the prime contractor level, we find that, prior to the State's HUB program, HUBs received less than 8 percent of the dollars in each major procurement category. Under the State's HUB program, HUB utilization increased slightly, ranging from 8 percent in construction to almost 12 percent in professional services. At the subcontractor level, we find very similar results. In the absence of a goal program, HUB subcontractors received approximately 8 percent of subcontracts awarded on prime contracts awarded by the GSC, TDCJ, MHMR, University of Texas System and Texas A&M University System. Under the State's HUB program, HUB subcontractor utilization increased slightly to 10 percent of subcontracts. We describe our methodology and data sources below.[53]

- In Section III, we describe our methodology and data for determining HUB availability for State procurement opportunities.[54] We find that HUB availability varies greatly across procurement categories, ranging from 12 percent in commodity purchasing to 30 percent in other services during the pre-program period. Similarly, within procurement categories, HUB availability varies greatly across race, ethnic and gender groups. For example, Asian-owned construction firms comprised less than 1 percent of all construction firms available to do work for the State; Hispanic-owned construction firms comprised 8 percent.

- Finally, in Section IV, we compare the State's utilization of HUBs to HUB availability. Our findings show that the State has substantially underutilized HUBs given their availability in the marketplace. During the pre-program period, HUBs received no more than 63 percent of the dollars that we would expect them to receive given their availability in the marketplace. The extent

---

[53] This chapter will review in full our methodology and the results of our statistical analysis for the State of Texas. The results of our statistical analysis for individual governmental agencies will be presented in Appendices A and B.

[54] This section also presents the data and methodology that we used to calculate the HUB goals reported and discussed in Chapter 6.

of the disparities vary dramatically by race/ethnicity, gender and procurement category. For example, during the pre-program period, African American-owned construction firms received just over 1 percent of their expected construction dollars given their availability in the marketplace; white woman-owned firms received 89 percent of their availability. On the other hand, in professional services, white woman-owned firms received only 10 percent of their expected dollars given their availability in the marketplace; Asian-owned firms received 157 percent of their availability. In general, the State's HUB program has eased disparities for HUBs, as a group, only slightly.

I. Where Does the State Spend its Procurement Dollars?

The State conducts the preponderance of its procurement transactions with Texas firms, whether measured by the *dollars* spent with vendors in Texas, or by the *number* of vendors in Texas. Over 80 percent of construction dollars, approximately three-quarters of professional services dollars, and approximately two-thirds of other services and commodity purchasing dollars are paid to in-State firms.[55] Similarly, over 90 percent of the State's construction and professional services vendors are located in Texas; over 80 percent of its other services vendors are located in Texas and over 65 percent of the State's commodities vendors are located in Texas.

A. Determination of the State's Geographic Procurement Market

To determine the geographic area in which the State spends its procurement dollars, and from which the State draws its vendors, we examined the location of firms the State paid for the procurement of goods and services. We divided the state into 10 economic regions: the High Plains, Northwest Texas, Metroplex, Upper East Texas, Gulf Coast, Central Texas, South Texas, West Texas

[55] The percentage of other services expenditures going to Texas firms would be approximately 72 percent except that one out-of-State firm, responsible for the operation of the State's lottery, receives about 17 percent of the other services dollars paid to out-of-State firms.

and Upper Rio Grande regions.[56] Figure 3.1 outlines the geographic area that each of the economic regions comprise and reports the percentage of construction dollars paid to vendors in each of the areas. We then developed a file that identified the counties that corresponded to each economic region. We obtained the zip code of each of the vendors reported in the State's central payment database and used the zip codes to identify the counties and, thereby, the economic regions in which the vendors were located. We determined the geographic market area for each major procurement category by calculating the percentage of vendors, and total dollars paid to vendors, in each economic region in Texas.[57]

Table 3.1 outlines the results of our analysis. We report the percentage of vendors and dollars paid to vendors in each economic region in Texas, to firms in the State of Texas as a whole, and to firms outside of Texas.

B. Source of Data

We used the State's central payment database, maintained by the State Comptroller of Public Accounts (Comptroller), to estimate the geographic market. The central payment database included payment and vendor information for all State treasury-funded procurement expenditures made by all State agencies from FY89 through FY93. It accounted for more than $15 billion dollars in expenditures and contained information on almost 190,000 vendors. The data included information on the total dollars paid to a vendor by fiscal year, agency and object code (i.e., an expenditure code

---

[56] The State Comptroller of Public Accounts was authorized to create the 10 economic regions through legislation passed by the Texas legislature. General Appropriations Act, Article V, Section 120, 72nd Legislature.

[57] For a discussion of geographic markets and the factors that lead geographic markets to be broader or narrower, see F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance* (Boston: Houghton Mifflin Company, 1990).