LEGISLATIVE BILL 1218

Introduced by Wayne, 13.
Read first time January 23, 2020
Committee: Government, Military and Veterans Affairs

1 A BILL FOR AN ACT relating to economic development; to adopt the Nebraska
Historically Underutilized Business Program Act; to provide a
penalty; and to provide an operative date.
4 Be it enacted by the people of the State of Nebraska,
Section 1. Sections 1 to 15 of this act shall be known and may be
cited as the Nebraska Historically Underutilized Business Program Act.

Sec. 2. (1) The Legislature finds:

(a) That the promotion of historically underutilized businesses is a
matter of state concern;

(b) That it is necessary and expedient to require the inclusion of
certain provisions in contracts with constitutional offices, state
agencies, and political subdivisions to promote and encourage the
creation of business opportunities for historically underutilized
businesses of this state, and businesses in economic redevelopment areas,
to promote equality of access to public contracts;

(c) That it is in the best interest of the people of Nebraska to
promote the interests of historically underutilized businesses because it
is vital that all Nebraskans have an opportunity to contribute
economically by participating in business opportunities existing in
government;

(d) That a coordinated effort is necessary to eliminate any barriers
impeding equal opportunity for historically underutilized businesses
doing business with a constitutional office, state agency, or political
subdivision;

(e) That the utilization of historically underutilized businesses is
critical to creating a vibrant, sustainable, and diverse business
community in Nebraska; and

(f) That it is the policy of this state to encourage the use of
historically underutilized businesses by constitutional offices, state
agencies, and political subdivisions and to assist such offices, agencies, and political subdivisions in the implementation of this policy
through means that are neutral as to race, ethnicity, and gender.

(2) The purpose of the Nebraska Historically Underutilized Business
Program Act is to promote full and equal business opportunities for all
businesses in an effort to remedy disparity in state and local
procurement and contracting.

(3) The Nebraska Historically Underutilized Business Program Act describes the minimum steps and requirements to be undertaken by the Director of Administrative Services and the constitutional offices, state agencies, and political subdivisions of the state to fulfill the state's historically underutilized business policy and attain aspirational goals.

Sec. 3. For purposes of the Nebraska Historically Underutilized Business Program Act:

(1) Applicant means a person or business that applies to the Commissioner of Labor for certification as a historically underutilized business;

(2) Application means the Department of Labor's form for applicants to request certification as a historically underutilized business;

(3) Bidder means any person or business seeking to be awarded a government entity contract;

(4) Commodities means any tangible good provided by a contractor to the state;

(5) Construction contract means any government entity contract for the construction, demolition, rehabilitation, alteration, conversion, extension or repair of buildings, streets, or other improvements to real property;

(6) Construction contractor is a person or business that enters into a construction contract with a government entity as the builder of the prime construction contract for the project, responsible for the means and methods, material, labor, and equipment to be used in the execution of the project in accordance with the plans, specifications and contract documents;

(7) Contract means any contract awarded by the government entity whereby the government entity is committed to expend or does expend its public funds, including any public funds received from other government entities, tax incentives, tax increment financing, and any usage of
public funds, in return for work, labor services, financial services, technical services, professional services, supplies, equipment, materials, or any combination of the foregoing;

(8) Economic redevelopment area means an area in which: (a) The average rate of unemployment in the area during the period covered by the most recent federal decennial census or American Community Survey 5-Year Estimate is at least one hundred fifty percent of the average rate of unemployment in the state during the same period; and (b) the average poverty rate in the area exceeds twenty percent for the total federal census tract or tracts or federal census block group or block groups in the area;

(9) Goods means supplies, materials, or equipment;

(10) Government entity means a constitutional office, a state agency, or a political subdivision;

(11) Historically underutilized business or HUB means:

(a) An entity with its principal place of business in this state that is:

(i) A participant in the Department of Transportation's disadvantaged business enterprise program and adheres to the requirements and guidance contained in 49 C.F.R. part 26, as such part existed on the operative date of this act; or

(b) An entity with its principal place of business located in this state and within an economic redevelopment area and:

(i) That is one of the following:

(A) A construction contractor, including a building constructor or heavy and civil engineering constructor as described in subsectors 236 and 237, respectively, of the North American Industry Classification System whose average annual gross receipts from the past three years does not exceed the size standard of XX million dollars or the size standard in number of employees, twenty-five percent of North American Industry Classification System code, for those subsectors of the North American Industry Classification System.
Industry Classification System as published in the current United States Small Business Administration Table of Small Business Size Standards matched to the North American Industry Classification System Subsectors; or

(B) A specialty trade contractor as described in subsector 238 of the North American Industry Classification System whose average annual gross receipts from the past three years does not exceed the size standard of XX million dollars or the size standard in number of employees, twenty-five percent of the North American Industry Classification System for those subsections of the NAICS as published in the current United States Small Business Administration Table of Small Business Size Standards matched to North American Industry Classification System Subsectors; or

(C) Any other contractor whose average annual gross receipts from the past three years does not exceed the size standard of XX million dollars or the size standard in number of employees, twenty-five percent of North American Industry Classification System as published in the current United States Small Business Administration Table of Small Business Standards matched to North American Industry Classification System Subsectors; and that is not an affiliate or subsidiary of a business in its field of operation; and

(ii) That is not: A manufacturer's representative; a franchise, unless operating as an independent entrepreneur utilizing a franchise name only; a business for which the owner is an owner or part owner of another similar business; or a non-stocking retailer or wholesaler; and

(iii) The owner or owners of which:

(A) Have a net worth less than the sum of one million three hundred twenty thousand dollars after excluding the equity of the individual or individuals in the business seeking certification and such individual's equity in their primary residences; and

(B) Hold no more than ten percent ownership in any other single business, unless the other business is certified as a historically
underutilized business;

(12) HUB coordinator means the staff member designated by a
government entity with public contracts of more than ten million dollars;

(13) HUB subcontracting plan means written documentation regarding
the use of subcontractors, which is required to be submitted with all
responses to government entity solicitation with an expected value of one
hundred thousand dollars or more and for which subcontracting
opportunities have been determined by the government entity to be
probable. The HUB subcontracting plan subsequently becomes a provision of
the awarded contract and shall be monitored for compliance by the
government entity during the term of the contract;

(14) Mentor-protégé program means a program under section 12 of this
act designed to assist government entities in identifying prime
contractors and historically underutilized businesses to foster long-term
relationships and potential long-term contractual relationships. Each
government entity required to have a HUB coordinator is required to
implement the mentor-protégé program;

(15) North American Industry Classification System means the
standard established by the United States Office of Management and Budget
and used by federal statistical agencies in classifying business
establishments for the purpose of collecting, analyzing, and publishing
statistical data related to the United States business economy;

(16) Owner means any person holding any percentage ownership in a
business;

(17) Other contractor means a business that contracts with a
government entity to provide supplies or services, including professional
services;

(18) Principal place of business means the location where the owner
or owners of the business direct, control, and coordinate the business's
daily operations and activities;

(19) Professional services means services of certain licensed or
registered professions that must be purchased by a government entity;

(20) Reside, when used in reference to a requirement that a person reside within this state, means that a person:

(a) Physically resides in the state for a period of not less than twelve consecutive months prior to submitting an application for HUB certification and lists Nebraska as such person's residency in such person's most recent federal tax return; or

(b) Has established, to the satisfaction of the Department of Revenue, a Nebraska domicile for a period of time sufficient to demonstrate an intention to permanently reside in the state consistently over a substantial period of time;

(21) Respondent means a person that submits a response;

(22) Response means a submission made in answer to an invitation for bids, requests for proposals, or other purchase solicitation documents, which may take the form of a bid, proposal, offer, or other applicable expression of interest;

(23) Subcontractor means a person who contracts with a prime contractor to work or contribute toward completing work for a governmental entity;

(24) Tier I HUB means any historically underutilized business that is self-certified under the penalty of perjury and:

(a) Has invested in a primary headquarters office located within Nebraska and within an economic redevelopment area; and

(b) Twenty percent or more of its employees reside in Nebraska and within an economic redevelopment area;

(25) Tier II HUB means any historically underutilized business that is self-certified under the penalty of perjury and:

(a) Has invested in a primary headquarters office located within Nebraska and within an economic redevelopment area; or

(b) Twenty percent or more of its employees reside in Nebraska and within an economic redevelopment area; and
(26) Tier III HUB means any historically underutilized business that is self-certified under penalty of perjury and is not a Tier I HUB or Tier II HUB.

Sec. 4. (1) A business desiring to be certified as a historically underutilized business must complete a form prescribed by the Department of Labor or participate in the Department of Transportation's Nebraska Unified Certification Program.

(2) The Department of Labor and Department of Transportation may conduct any necessary investigation of the business to determine its qualifications for the program. Such investigation shall focus on the nature of the work performed and the company's capacity to perform that work. Determination of capacity may include, but is not limited to: verifying the number of employees; the gross receipts of the business from the past three years; the net worth of the individual owners; the owners' interest in any other business; and verification of confirmation of the business by a bonding company as a prime contractor or financial institution of the business's financial government entity. This investigation may include, but is not limited to, reviewing business records and files; personal and corporate tax returns; certificates of insurance; and articles of incorporation.

(3) Once a business has been certified as a historically underutilized business, the certification shall remain in place for five years, as long as the business' certification status does not change. The business must complete an annual affidavit of certification that states its current certification status, regardless of whether variables have changed. A business may apply to be recertified as a historically underutilized business if the business maintains its qualifications for certification, subject to the limits set forth in this section. A historically underutilized business shall only be permitted to recertify three times for a maximum of fifteen years. No business that was initially certified as a historically underutilized business shall...
participate in the historically underutilized business program for a period greater than twenty years.

(4) The Department of Labor shall maintain a list of all businesses that have been certified and the nature of the business along with its capacity to perform the work.

(5) When a business no longer meets the criteria of the historically underutilized business program, the business shall be decertified and shall no longer participate in the program. However, if a business is certified to participate in the program at the time it enters into any contract, the business shall remain certified for that contract only until the expiration of the contract. Nothing contained within this section shall prohibit the Department of Labor or the Department of Transportation from decertifying any business that violates any rule, policy, or procedure of the historically underutilized business program.

(6) In determining the extent of active participation in the control, operation, and management necessary for certification as a historically underutilized business, the Department of Labor or the Department of Transportation may consider all relevant evidence. In considering and applying the factors set forth in this section, the Department of Labor or the Department of Transportation shall consider actual roles and responsibilities of the eligible owners, rather than titles or statements of intention regarding the owners' role. Factors which may be considered include, but are not limited to:

(a) The appearance and relative scope of responsibility of HUB-eligible owners in articles of incorporation or partnership formation documents;

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

(c) Any restrictive language in articles of incorporation or partnership agreements applicable to Hub-eligible owners:
(d) Whether any licenses, certificates, or permits required to operate the business are held by or in the name of the HUB-eligible owner, and whether such owner is qualified to hold such licenses or permits pursuant to applicable laws and regulations;

(e) The percentage of profit and risk available to the HUB-eligible owner under the corporate or partnership agreements;

(f) The ability of other owners or partners to dilute either the ownership percentage or operational powers of the HUB-eligible owner;

(g) Whether the HUB-eligible owner has full time employment elsewhere that might conflict with full participation in operation of the business;

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

(i) The period of time a HUB-eligible owner participated in the active management and operation of the business prior to the business seeking historically underutilized business status; and

(j) Whether and to what extent the historically underutilized 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.

(7) The Department of Labor and the Department of Transportation may request any additional information determined necessary to evaluate any or all of the factors in this section prior to a decision to certify an applicant as a historically underutilized business.

Sec. 5. (1) Each constitutional office, state agency, and political subdivision shall make a good faith effort to utilize historically underutilized businesses in contracts for construction, services, including professional and consulting services, and commodities purchases. Each constitutional office, state agency, and political
subdivision may achieve the statewide or office, agency, political
subdivision-specific annual HUB goals specified in the constitutional
office's or state agency's appropriations request or the political
subdivision's budget by contracting directly with historically
underutilized businesses or indirectly through subcontracting
opportunities.

(2) The statewide HUB goals for the procurement categories for this
state are:

(a) Ten percent for heavy construction other than building
contracts;

(b) Twenty percent for all building construction, including general
contractors and operative builders contracts;

(c) Twenty percent for all special trade construction contracts;

(d) Ten percent for professional services contracts;

(e) Ten percent for all other services contracts; and

(f) Ten percent for commodities contracts.

(3) Government entities shall establish their own specific
historically underutilized business goals for each procurement category
outlined in subsection (2) of this section. Government entities may set
their HUB goals higher or lower than the goals set out in subsection (2)
of this section, however, at a minimum, the statewide HUB goals should be
each government entity's starting point for establishing specific goals.
Such goals should be based on:

(a) A government entity's fiscal year expenditures and total
contract expenditures;

(b) The availability to a government entity of historically
underutilized businesses in each procurement category;

(c) The government entity's historic utilization of historically
underutilized businesses; and

(d) Other relevant factors.

(4) Each government entity shall make a good faith effort to assist
historically underutilized businesses in receiving a portion of the total contract value of all contracts that the government entity expects to award in a fiscal year. Factors in determining a government entity's good faith shall include:

(a) The government entity's performance in meeting or exceeding its specific HUB goals or the statewide HUB goals as they are included as part of their legislative appropriations request or budget request; and

(b) The government entity's adoption and implementation of procedures taking the following factors into consideration:

(i) Preparation and distribution of information on procurement procedures in a manner that encourages participation in contracts by all businesses;

(ii) Division of proposed requisitions into reasonable lots in keeping with industry standards and competitive bid requirements;

(iii) Where feasible, assessment of bond and insurance requirements and design requirements that reasonably permit more than one business to perform the work;

(iv) Specification of reasonable, realistic delivery schedules consistent with a government entity's actual requirements;

(v) Ensuring that specifications, terms, and conditions reflect a government entity's actual requirements, are clearly stated, and do not impose unreasonable or unnecessary contract requirements;

(vi) Provision of potential bidders with a referenced list of certified historically underutilized businesses for subcontracting;

(vii) Identification of potential subcontracting opportunities in all contracts and requiring a HUB subcontracting plan for contracts of one hundred thousand dollars or more over the life of the contract, including any renewals, where such opportunities exist; and

(viii) Seeking of HUB subcontracting in contracts that are less than one hundred thousand dollars whenever possible.

(5) If a HUB subcontracting plan is required, the awarded contract
shall contain, as a provision of the contract that must be fulfilled, the plan that the contractor submitted in its bid, proposal, offer, or other applicable expression of interest for the contract. The contractor shall make a good faith effort to implement the plan. A contractor's participation in a mentor-protégé program under section 11 of this act and submission of a protégé as a subcontractor in the contractor's HUB subcontracting plan constitutes a good faith effort under this section for the particular area of the subcontracting plan involving the protégé.

(6) To the extent that subcontracts are not contracted for as originally submitted in the HUB subcontracting plan, the contractor shall report to the government entity the circumstances and make good faith efforts to find and subcontract with another historically underutilized business.

(7) The government entity shall audit the contractor's compliance with the HUB subcontracting plan.

(8) If a determination is made that the contractor failed to implement the plan in good faith, the government entity, in addition to any other remedies, may bar the contractor from further contracting opportunities with the government entity.

Sec. 6. (1) Priorities shall be set forth as follows: If there is an adequate number of qualified and certified historically underutilized businesses, first priority shall be given to Tier I HUBs; if not, then the next priority will be given to Tier II HUBs; and then Tier III HUBs.

(2) Any business receiving a sales and use tax incentive from this state shall receive an additional (a) one percent of such sales and use tax incentive for utilizing a Tier I HUB, (b) one-half of one percent of such sales and use tax incentive for utilizing a Tier II HUB, and (c) one-half of one percent of such sales and use tax incentive for utilizing a Tier III HUB. Total incentives awarded under this subsection shall not exceed five million dollars for all businesses.

(3) Each government entity that considers entering into a contract
with an expected value of one hundred thousand dollars or more over the
life of the contract, including any renewals, shall, before the
government entity solicits bids, proposals, offers, or other applicable
expressions of interest, determine whether subcontracting opportunities
are probable under the contract. If the government entity determines, as
set forth in subsection (4) of this section, that there is that
probability, the government entity shall require that each bid, proposal,
offer, or other applicable expression of interest for the contract
include a HUB subcontracting plan as set forth in section 5 of this act.

(4) Government entities shall use the following steps to determine
if subcontracting opportunities are probable under the contract:

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

(b) Researching the HUB directory compiled under section 11 of this
act, Internet resources, or other directories as identified by the
Commissioner of Labor, for historically underutilized businesses that may
be available to perform the contract work;

(c) Determine if subcontracting is probable for only a subset of the
work expected to be performed or the funds to be expended under the
contract. If a government entity determines that subcontracting is
probable on only a portion of a contract, it shall document its reasons
in writing for the procurement file; and

(d) In addition, determination of subcontracting opportunities may
include, but are not limited to, the following:

(i) Contacting other state and local agencies and institutions of
higher education to obtain information regarding similar contracting and
subcontracting opportunities; and

(ii) Reviewing the history of similar government entity purchasing
transactions.

(5)(a) If, through the analysis in subsection (4) of this section, a
government entity determines that subcontracting opportunities are probable, then its invitation for bids, request for proposals, or other purchase solicitation documents shall require a HUB subcontracting plan. A bid, proposal, offer, or other expression of interest to such a solicitation must include a completed HUB subcontracting plan to be considered responsive.

(b) The HUB subcontracting plan shall be submitted with the respondent's response on or before the due date for responses, except for construction contracts involving alternative delivery methods. For construction contracts involving alternative delivery methods, the HUB subcontracting plan may be submitted up to twenty-four hours following the date and time that responses are due.

(c) Responses that do not include a completed HUB subcontracting plan in accordance with this subsection shall be rejected.

(d) If a properly submitted HUB subcontracting plan contains minor deficiencies such as a failure to sign or date the plan or a failure to submit already-existing evidence that three historically underutilized businesses were contacted, the government entity may contact the respondent for clarification to the plan, if it contains sufficient evidence that the respondent developed and submitted the plan in good faith. The respondent shall have twenty-four hours to clarify the plan or cure a defect in the plan.

(6)(a) A government entity shall require a respondent to state whether it is a certified historically underutilized business. A government entity shall also require a respondent to state overall subcontracting and overall certified historically underutilized business subcontracting to be provided in the contract. Respondents shall follow procedures set forth in subsection (5) of this section when developing the HUB subcontracting plan.

(b) The HUB subcontracting plan shall include the government entity's HUB goals for its HUB plan, and shall consist of completed forms
prescribed by the Commissioner of Labor and shall include the following:

(i) Certification that respondent has made a good faith effort to meet the requirements of this section;

(ii) Identification of the subcontractors that will be used during the course of the contract;

(iii) The expected percentage of work to be subcontracted; and

(iv) The approximate dollar value of that percentage of work.

(c) The successful respondent shall provide all additional documentation required by the government entity to demonstrate compliance with good faith effort requirements prior to contract award. If the successful respondent fails to provide supporting documentation such as telephone logs, fax transmittals, or electronic mail within the timeframe specified by the government entity to demonstrate compliance with this subsection prior to contract award, that respondent's bid or proposal shall be rejected.

(7)(a) Any person submitting a bid, proposal, offer, or other applicable expression of interest in obtaining a contract shall submit a completed HUB subcontracting plan demonstrating evidence of a good faith effort in developing that plan. In determining whether a good faith effort has been made in the development of the required HUB subcontracting plan, a government entity may require the respondent to submit supporting documentation explaining how the respondent has made a good faith effort according to the following criterion:

(i) How the respondent divided the contract work into reasonable lots or portions consistent with prudent industry practices;

(ii) How the respondent's notices contained adequate information about bonding, insurance, the availability of plans, the specifications, scope of work, required qualifications, and other requirements of the contract allowing reasonable time for historically underutilized businesses to participate effectively;

(iii) How the respondent negotiated in good faith with qualified

-16-
historically underutilized businesses, not rejecting qualified historically underutilized businesses who were also the responsive bidder;

(iv) How the respondent provided notice to trade organizations or development centers to assist in identifying historically underutilized businesses by disseminating subcontracting opportunities to their membership or participants;

(v) Which historically underutilized businesses were contracted to perform the subcontracting services for each subcontracting opportunity;

(vi) Which contractor or contractors were utilized to perform the subcontracting opportunities and the relevant dates for the respondent's contractual agreements with the contractor;

(vii) How the respondent provided written justification of the selection process if the selected subcontractor is not a historically underutilized business; and

(viii) How the respondent provided documentation of meeting one or more of the following requirements:

(A) Notifying at least three historically underutilized businesses of the subcontracting opportunities that the respondent intended to subcontract. The respondent shall provide the notice described in this subsection to three or more historically underutilized businesses per each subcontracting opportunity that provides the type of work required for each subcontracting opportunity identified in the contract specifications or any other subcontracting opportunity the respondent cannot complete with its own equipment, supplies, materials, and employees. The notification shall be in writing, and the respondent must document the historically underutilized businesses contacted on the forms prescribed by the Commissioner of Labor. The notice shall, in all instances, include the scope of the work, information regarding the location to review plans and specifications, information about bonding and insurance requirements, and identify a contact person. The notice
shall be provided to potential HUB subcontractors at least seven working
days prior to submission of the respondent's response, unless
circumstances require a different time period, which is determined by the
government and documented in the contract file;

(B) Submitting documentation that one hundred percent of all
available subcontracting opportunities will be performed by one or more
historically underutilized businesses; or

(C) Submitting documentation that one or more HUB subcontractors
will be utilized and that the total value of those subcontracts will meet
or exceed the statewide goal for the appropriate contract category set
forth in section 5 of this act, or the government entity's specific goal
for the contracting category established by the procuring government
entity, whichever is higher.

(b) A HUB subcontracting plan shall be reviewed and evaluated prior
to contract award and, if accepted, shall become a provision of the
government entity's contract. Revisions necessary to clarify and enhance
information submitted in the original HUB subcontracting plan may be made
in an effort to determine good faith effort. Government entities shall
review the documentation submitted by the respondent to determine if a
good faith effort has been made in accordance with this section. If the
government entity determines that a submitted HUB subcontracting plan was
not developed in good faith, the government entity shall treat that
determination as a material failure to comply with advertised
specifications, and the subject response such as a bid, a proposal, an
offer, or other applicable expression of interest shall be rejected. The
reasons for rejection shall be recorded in the procurement file.

(c) The respondent shall use the HUB directory compiled under
section 10 of this act, Internet resources, or other directories as
identified by the Commissioner of Labor or the government entity when
searching for HUB subcontractors. Respondents may utilize the services of
minority, women, and community organization contractor groups, local,
state, and federal business assistance offices, and other organizations that provide assistance in identifying qualified applicants for the HUB program who are able to provide all or select elements of the HUB subcontracting plan.

(d) A respondent's participation in a mentor-protégé program, and the submission of a protégé as a subcontractor in the HUB subcontracting plan constitutes a good faith effort for the particular area to be subcontracted with the protégé. When submitted, a government entity may accept a mentor-protégé agreement that has been entered into by the respondent (mentor) and a certified historically underutilized business (protégé). The government entity shall consider the following in determining the respondent's good faith effort to participate in a mentor-protégé program:

(i) If the respondent has entered into a fully executed mentor-protégé agreement that has been registered with the Department of Administrative Services prior to submitting the plan; and

(ii) If the respondent's HUB subcontracting plan identifies the areas of subcontracting that will be performed by the protégé.

(e) If the respondent is able to fulfill all of the potential subcontracting opportunities identified with its own equipment, supplies, materials, and employees, respondent must sign an affidavit and provide a statement explaining how the respondent intends to fulfill each subcontracting opportunity. The respondent must agree to provide the following, if requested by the government entity:

(i) Evidence of existing staffing to meet contract objectives;

(ii) Monthly certified payroll records showing company staff fully engaged in the contract;

(iii) Onsite reviews of company headquarters or work site where services are to be performed; and

(iv) Documentation proving employment of qualified personnel holding the necessary licenses and certificates required to perform the work.
(f) If the government entity determines that the project or portions of the project are appropriate for historically underutilized businesses either as a prime contractor or a subcontractor, then such determinations shall be made a part of the bid specifications and bidders not adhering to the requirements set forth in the bid specifications will be deemed nonresponsive.

(8)(a) Prime contractors shall maintain business records documenting compliance with the HUB subcontracting plan and shall submit a compliance report in a format required by the Commissioner of Labor to the contracting government entity as a condition for payment.

(b) To determine if the prime contractor is complying with the HUB subcontracting plan, the government entity may consider the following:

(i) Whether the prime contractor gave timely notice to the subcontractor regarding the time and place of the subcontracted work;

(ii) Whether the prime contractor facilitated access to the resources needed to complete the work; and

(iii) Whether the prime contractor complied with the approved HUB subcontracting plan.

(c) During the term of the contract, the government entity shall monitor the HUB subcontracting plan monthly to determine if the value of the subcontracts to historically underutilized businesses meets or exceeds the HUB subcontracting provisions specified in the contract. Accordingly, government entities shall audit and require a prime contractor to report to the government entity the identity and the amount paid to its subcontractors. If the prime contractor is meeting or exceeding the provisions, the government entity shall maintain documentation of the prime contractor's efforts in the contract file. If the prime contractor fails to meet the HUB subcontracting provisions specified in the contract, the government entity shall notify the prime contractor of any deficiencies. The government entity shall give the prime contractor an opportunity to submit documentation and explain to
the government entity why the failure to fulfill the HUB subcontracting plan should not be attributed to a lack of good faith effort by the prime contractor.

(9)(a) If the selected respondent decides to subcontract any part of the contract in a manner that is not consistent with its HUB subcontracting plan, the selected respondent must submit a revised HUB subcontracting plan before subcontracting any of the work under the contract. If the selected respondent subcontracts any of the work without prior authorization, the selected respondent is deemed to have breached the contract and is subject to any remedial actions provided by applicable state law and the Nebraska Historically Underutilized Business Program Act. Government entities shall report nonperformance relative to its contracts to the Director of Administrative Services.

(b) If, at any time during the term of the contract, the selected respondent desires to make changes to the approved HUB subcontracting plan, proposed changes must be received for prior review and approval by the government entity before changes will be effective under the contract. The government entity shall approve changes by amending the contract or by another form of written approval by the government entity. The reasons for amendments or other written approval shall be recorded in the procurement file.

(c) If, after the bid opening and during contract performance, the successful bidder or contractor determines that a historically underutilized business identified in the bid is unable to perform successfully or is not performing satisfactorily, such bidder or contractor shall make every reasonable effort to replace a HUB subcontractor with another historically underutilized business. Prior to substituting such replacement historically underutilized business, the apparent successful bidder or contractor must show good cause for the replacement. All substitutions shall be approved in writing.

(d) If a government entity expands the original scope of work
through a change order or contract amendment, including a contract renewal that expands the scope of work, the government entity shall determine if the additional scope of work contains additional probable subcontracting opportunities not identified in the initial solicitation. If the government entity determines probable subcontracting opportunities exist, the government entity shall require the selected respondent to submit a HUB subcontracting plan or revised HUB subcontracting plan for the additional probable subcontracting opportunities.

(e) If a determination is made that the prime contractor failed to implement the HUB subcontracting plan in good faith, the government entity, in addition to any other remedies, may report nonperformance to the Director of Administrative Services. In addition, if the prime contractor failed to implement the HUB subcontracting plan in good faith, the government entity may revoke the contract for breach of contract and make a claim against the prime contractor.

(10) All historically underutilized businesses will be paid no later than fourteen days after the date of their invoice and all prime contractors utilizing a HUB subcontracting plan will be paid no later than thirty days after the date of their invoice.

Sec. 7. (1) Any government entity utilizing state funds, tax credits, any tax authorized under the Constitution of Nebraska, the Community Development Law, or any other state law shall implement rules, regulations, and procedures to effectuate the provisions of the Nebraska Historically Underutilized Business Program Act; make all appropriate determinations as to compliance with the act; meet with contracting parties for such purposes; and maintain and report required contract statistics for quarterly reports.

(2) Any government entity utilizing state funds, tax credits, any tax authorized under the Constitution of Nebraska, the Community Development Law, or any other state law shall immediately adopt and promulgate rules and regulations establishing formal protest procedures
under the Nebraska Historically Underutilized Business Program Act,
including provisions for a contested case hearing for any contract
awarded pursuant to the act.

(3) If the government entity receives a formal protest pursuant to
subsection (2) of this section, the government entity shall proceed with
notice and hearing for a contested case pursuant to the Administrative
Procedure Act. The hearing shall be held by the government entity within
sixty days after receipt of the protest.

(4) Any party may appeal the final decision, and the appeal shall be
in accordance with the Administrative Procedure Act. An appeal shall be
made to the district court and shall only be made after all
administrative remedies have been exhausted.

(5) The formal protest procedures established under this section,
and any subsequent review under the Administrative Procedure Act shall be
the sole and exclusive means of protesting or otherwise challenging a
contract award decision.

Sec. 8. (1) Refusal or noncompliance by a contractor or
subcontractor to comply with any portion of the Nebraska Historically
Underutilized Business Program Act may subject the offending party to any
or all of the following penalties:

(a) Except as provided in subsection (10) of section 6 of this act,
withholding payments that are due to the contractor who is in violation
under the involved contracts until it is determined that the contractor
or subcontractor is in compliance with the provisions of the contract; or

(b) Exclusion from bidding on any contracts with the government
entity until such time as the contractor or subcontractor demonstrates
that it has established and will carry out the policies of the program as
herein outlined.

(2) In the event the sanctions or penalties contained in subsection
(1) of this section are invoked, the government entity shall notify the
contractor or subcontractor of the facts or circumstances which formed
the basis for the allegation that the contractor or subcontractor has not
complied with the act, and such notice shall be in writing and received
at least ten days prior to any action being taken by the government
entity during which time the contractor or subcontractor may clarify or
make corrections.

(3) An appeal under this section shall be in accordance with the
Administrative Procedure Act. An appeal shall only be made after all
administrative remedies have been exhausted.

Sec. 9. (1) The Department of Labor shall offer historically
underutilized businesses assistance and training regarding state
procurement procedures.

(2) The Department of Labor shall send historically underutilized
businesses an orientation package upon certification or recertification.
The package shall include:

(a) A certificate issued in the historically underutilized
business's name;

(b) A description of the significance and value of certification;

(c) A list of state and local purchasing personnel;

(d) Information regarding electronic commerce opportunities;

(e) Information regarding online contact information; and

(f) Additional information about state and local procurement
process.

(3) A government entity with a biennial budget that exceeds ten
million dollars in contracts shall designate a staff member to serve as
the HUB coordinator for the agency during the fiscal year. The
procurement director or person acting as procurement director may serve
as the HUB coordinator. In government entities that employ a historically
underutilized businesses coordinator, the position of coordinator, within
the government entity's structure, must be at least equal to the position
of procurement director.

Sec. 10. (1) The Department of Labor shall compile, in the most
cost-efficient form, a directory of businesses certified as historically
underutilized businesses.

(2) The Department of Labor shall update the directory and provide
access to the HUB directory electronically or in another acceptable form
to each government entity.

(3) The Department of Labor shall provide a copy of the directory to
every government entity in January and July of each year.

Sec. 11. (1) The Department of Labor shall design a mentor-protégé
program to foster long-term relationships between prime contractors and
historically underutilized businesses and to increase the ability of
historically underutilized businesses to contract with the state or to
receive subcontracts under a state contract.

(2) Participation in the program must be voluntary for both the
contractor and the historically underutilized business subcontractor.

Sec. 12. (1) Each government entity shall make publicly available
the information set forth in this section and any other information
required by the Department of Labor not later than November 15 of each
year. The information must include:

(a) The number and dollar amount of contracts awarded and paid to
certified historically underutilized businesses;

(b) An analysis of the relative level of opportunity for
historically underutilized businesses for various categories of acquired
goods and services;

(c) The goals established under the Nebraska Historically
Underutilized Business Program Act for contracting with historically
underutilized businesses during the two calendar years preceding the
calendar year in which the request is submitted;

(d) A statement regarding whether the goals established were met
during the two calendar years preceding the calendar year in which the
request is submitted; and

(e) If the goals established were not met during the two calendar
years preceding the calendar year, an explanation of why the goals were not met.

(2) Each constitutional office or state agency must include as part of its appropriations request a detailed report for consideration by the Appropriations Committee of the Legislature that shows the extent to which the office or agency complied with the Nebraska Historically Underutilized Business Program Act during the two calendar years preceding the calendar year in which the request is submitted. To the extent the constitutional office or state agency does not comply, the report must demonstrate the reasons for noncompliance. The extent to which a constitutional office or state agency complies with the Nebraska Historically Underutilized Business Program Act and rules and regulations of the Director of Administrative Services adopted and promulgated to assist in carrying out the act is considered a key performance measure for purposes of the appropriations process.

Sec. 13. (1) The Nebraska Historically Underutilized Business Program Act applies to all contracts entered into by a government entity with an expected value of one hundred thousand dollars or more, including:

(a) Contracts for the acquisition of a good or service; and

(b) Contracts for or related to the construction of a public building, road, or other public work.

(2) The Nebraska Historically Underutilized Business Program Act applies to a contract without regard to:

(a) Whether the contract is otherwise subject to the act; or

(b) The source of funds for the contract, except that to the extent federal funds are used to pay for the contract, the act does not apply if federal law prohibits the application of the act in relation to the expenditure of federal funds.

Sec. 14. The Nebraska Historically Underutilized Business Program Act shall not apply to any emergency contract resulting from a natural
disaster, tornado, blizzard, flood, energy shortage, or similar occurrence, so long as a mayor or other head of a political subdivision or the Governor declares such an occurrence to be an emergency by executive order.

Sec. 15. The Director of Administrative Services may adopt and promulgate rules and regulations to administer the Nebraska Historically Underutilized Business Program Act.

Sec. 16. This act becomes operative on August 1, 2021.