

LEGISLATURE OF NEBRASKA
ONE HUNDRED SIXTH LEGISLATURE
SECOND SESSION

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
- 2 Historically Underutilized Business Program Act; to provide a
- 3 penalty; and to provide an operative date.
- 4 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 15 of this act shall be known and may be
2 cited as the Nebraska Historically Underutilized Business Program Act.

3 Sec. 2. (1) The Legislature finds:

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

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

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

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

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

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

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

1 procurement and contracting.

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

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

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

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

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

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

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

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

28 (7) Contract means any contract awarded by the government entity
29 whereby the government entity is committed to expend or does expend its
30 public funds, including any public funds received from other government
31 entities, tax incentives, tax increment financing, and any usage of

1 public funds, in return for work, labor services, financial services,
2 technical services, professional services, supplies, equipment,
3 materials, or any combination of the foregoing;

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

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

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

15 (11) Historically underutilized business or HUB means:

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

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

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

24 (i) That is one of the following:

25 (A) A construction contractor, including a building constructor or
26 heavy and civil engineering constructor as described in subsectors 236
27 and 237, respectively, of the North American Industry Classification
28 System whose average annual gross receipts from the past three years does
29 not exceed the size standard of XX million dollars or the size standard
30 in number of employees, twenty-five percent of North American Industry
31 Classification System code, for those subsectors of the North American

1 Industry Classification System as published in the current United States
2 Small Business Administration Table of Small Business Size Standards
3 matched to the North American Industry Classification System Subsectors;

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

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

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

25 (iii) The owner or owners of which:

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

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

1 underutilized business;

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

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

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

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

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

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

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

31 (19) Professional services means services of certain licensed or

1 registered professions that must be purchased by a government entity;

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

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

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

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

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

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

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

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

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

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

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

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

1 (26) Tier III HUB means any historically underutilized business that
2 is self-certified under penalty of perjury and is not a Tier I HUB or
3 Tier II HUB.

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

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

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

1 participate in the historically underutilized business program for a
2 period greater than twenty years.

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

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

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

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

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

30 (c) Any restrictive language in articles of incorporation or
31 partnership agreements applicable to Hub-eligible owners;

1 (d) Whether any licenses, certificates, or permits required to
2 operate the business are held by or in the name of the HUB-eligible
3 owner, and whether such owner is qualified to hold such licenses or
4 permits pursuant to applicable laws and regulations;

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

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

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

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

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

19 (j) Whether and to what extent the historically underutilized
20 business shares management, board members, partners, employees, or other
21 resources with another business in amounts or ways which might indicate
22 that they are related or affiliated businesses.

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

27 Sec. 5. (1) Each constitutional office, state agency, and political
28 subdivision shall make a good faith effort to utilize historically
29 underutilized businesses in contracts for construction, services,
30 including professional and consulting services, and commodities
31 purchases. Each constitutional office, state agency, and political

1 subdivision may achieve the statewide or office, agency, political
2 subdivision-specific annual HUB goals specified in the constitutional
3 office's or state agency's appropriations request or the political
4 subdivision's budget by contracting directly with historically
5 underutilized businesses or indirectly through subcontracting
6 opportunities.

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

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

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

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

14 (d) Ten percent for professional services contracts;

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

16 (f) Ten percent for commodities contracts.

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

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

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

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

30 (d) Other relevant factors.

31 (4) Each government entity shall make a good faith effort to assist

1 historically underutilized businesses in receiving a portion of the total
2 contract value of all contracts that the government entity expects to
3 award in a fiscal year. Factors in determining a government entity's good
4 faith shall include:

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

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

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

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

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

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

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

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

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

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

31 (5) If a HUB subcontracting plan is required, the awarded contract

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

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

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

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

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

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

31 (3) Each government entity that considers entering into a contract

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

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

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

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

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

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

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

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

31 (5)(a) If, through the analysis in subsection (4) of this section, a

1 government entity determines that subcontracting opportunities are
2 probable, then its invitation for bids, request for proposals, or other
3 purchase solicitation documents shall require a HUB subcontracting plan.
4 A bid, proposal, offer, or other expression of interest to such a
5 solicitation must include a completed HUB subcontracting plan to be
6 considered responsive.

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

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

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

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

30 (b) The HUB subcontracting plan shall include the government
31 entity's HUB goals for its HUB plan, and shall consist of completed forms

1 prescribed by the Commissioner of Labor and shall include the following:

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

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

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

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

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

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

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

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

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

1 historically underutilized businesses, not rejecting qualified
2 historically underutilized businesses who were also the responsive
3 bidder;

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

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

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

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

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

18 (A) Notifying at least three historically underutilized businesses
19 of the subcontracting opportunities that the respondent intended to
20 subcontract. The respondent shall provide the notice described in this
21 subsection to three or more historically underutilized businesses per
22 each subcontracting opportunity that provides the type of work required
23 for each subcontracting opportunity identified in the contract
24 specifications or any other subcontracting opportunity the respondent
25 cannot complete with its own equipment, supplies, materials, and
26 employees. The notification shall be in writing, and the respondent must
27 document the historically underutilized businesses contacted on the forms
28 prescribed by the Commissioner of Labor. The notice shall, in all
29 instances, include the scope of the work, information regarding the
30 location to review plans and specifications, information about bonding
31 and insurance requirements, and identify a contact person. The notice

1 shall be provided to potential HUB subcontractors at least seven working
2 days prior to submission of the respondent's response, unless
3 circumstances require a different time period, which is determined by the
4 government and documented in the contract file;

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

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

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

27 (c) The respondent shall use the HUB directory compiled under
28 section 10 of this act, Internet resources, or other directories as
29 identified by the Commissioner of Labor or the government entity when
30 searching for HUB subcontractors. Respondents may utilize the services of
31 minority, women, and community organization contractor groups, local,

1 state, and federal business assistance offices, and other organizations
2 that provide assistance in identifying qualified applicants for the HUB
3 program who are able to provide all or select elements of the HUB
4 subcontracting plan.

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

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

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

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

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

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

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

30 (iv) Documentation proving employment of qualified personnel holding
31 the necessary licenses and certificates required to perform the work.

1 (f) If the government entity determines that the project or portions
2 of the project are appropriate for historically underutilized businesses
3 either as a prime contractor or a subcontractor, then such determinations
4 shall be made a part of the bid specifications and bidders not adhering
5 to the requirements set forth in the bid specifications will be deemed
6 nonresponsive.

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

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

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

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

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

19 (c) During the term of the contract, the government entity shall
20 monitor the HUB subcontracting plan monthly to determine if the value of
21 the subcontracts to historically underutilized businesses meets or
22 exceeds the HUB subcontracting provisions specified in the contract.
23 Accordingly, government entities shall audit and require a prime
24 contractor to report to the government entity the identity and the amount
25 paid to its subcontractors. If the prime contractor is meeting or
26 exceeding the provisions, the government entity shall maintain
27 documentation of the prime contractor's efforts in the contract file. If
28 the prime contractor fails to meet the HUB subcontracting provisions
29 specified in the contract, the government entity shall notify the prime
30 contractor of any deficiencies. The government entity shall give the
31 prime contractor an opportunity to submit documentation and explain to

1 the government entity why the failure to fulfill the HUB subcontracting
2 plan should not be attributed to a lack of good faith effort by the prime
3 contractor.

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

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

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

31 (d) If a government entity expands the original scope of work

1 through a change order or contract amendment, including a contract
2 renewal that expands the scope of work, the government entity shall
3 determine if the additional scope of work contains additional probable
4 subcontracting opportunities not identified in the initial solicitation.
5 If the government entity determines probable subcontracting opportunities
6 exist, the government entity shall require the selected respondent to
7 submit a HUB subcontracting plan or revised HUB subcontracting plan for
8 the additional probable subcontracting opportunities.

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

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

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

28 (2) Any government entity utilizing state funds, tax credits, any
29 tax authorized under the Constitution of Nebraska, the Community
30 Development Law, or any other state law shall immediately adopt and
31 promulgate rules and regulations establishing formal protest procedures

1 under the Nebraska Historically Underutilized Business Program Act,
2 including provisions for a contested case hearing for any contract
3 awarded pursuant to the act.

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

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

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

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

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

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

29 (2) In the event the sanctions or penalties contained in subsection
30 (1) of this section are invoked, the government entity shall notify the
31 contractor or subcontractor of the facts or circumstances which formed

1 the basis for the allegation that the contractor or subcontractor has not
2 complied with the act, and such notice shall be in writing and received
3 at least ten days prior to any action being taken by the government
4 entity during which time the contractor or subcontractor may clarify or
5 make corrections.

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

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

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

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

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

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

19 (d) Information regarding electronic commerce opportunities;

20 (e) Information regarding online contact information; and

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

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

31 Sec. 10. (1) The Department of Labor shall compile, in the most

1 cost-efficient form, a directory of businesses certified as historically
2 underutilized businesses.

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

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

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

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

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

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

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

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

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

31 (e) If the goals established were not met during the two calendar

1 years preceding the calendar year, an explanation of why the goals were
2 not met.

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

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

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

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

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

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

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

30 Sec. 14. The Nebraska Historically Underutilized Business Program
31 Act shall not apply to any emergency contract resulting from a natural

1 disaster, tornado, blizzard, flood, energy shortage, or similar
2 occurrence, so long as a mayor or other head of a political subdivision
3 or the Governor declares such an occurrence to be an emergency by
4 executive order.

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

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