

Fifty-eighth  
Legislative Assembly  
of North Dakota

## ENGROSSED HOUSE BILL NO. 1180

Introduced by

Government and Veterans Affairs Committee

(At the request of the Office of Management and Budget)

1 A BILL for an Act to create and enact three new sections to chapter 54-44.4 of the North  
2 Dakota Century Code, relating to competitive sealed bid proposals, small purchases, and  
3 protested solicitations and awards; and to amend and reenact sections 54-44.4-01, 54-44.4-02,  
4 subsections 1 and 2 of section 54-44.4-05, section 54-44.4-06, and subsections 1, 2, and 4 of  
5 section 54-44.4-09 of the North Dakota Century Code, relating to purchasing policy, purchasing  
6 by the office of management and budget, solicitation criteria, exempt records, limited  
7 competitive and noncompetitive purchases, multistep sealed bids, and vendor registration.

8 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

9 **SECTION 1. AMENDMENT.** Section 54-44.4-01 of the North Dakota Century Code is  
10 amended and reenacted as follows:

11 **54-44.4-01. Declaration of policy - Definitions.** It is hereby declared to be state  
12 policy to provide comprehensive purchasing services based upon sound procurement practices  
13 and principles wherein, through full competition with fair and equal opportunity to all qualified  
14 persons and firms to sell to the state, each state agency and institution shall obtain its  
15 necessary ~~supplies~~ commodities and ~~equipment~~ services at competitive cost, consistent with  
16 quality, time, and performance requirements, except as otherwise provided in law. As used in  
17 this chapter.

- 18 1. "Commodities" means all property, including equipment, supplies, materials,  
19 printing, insurance, and leases of equipment.
- 20 2. "Procurement officer" means a person duly authorized to enter into and administer  
21 purchasing contracts and make written determinations with respect thereto and  
22 also includes an authorized representative acting within the limits of authority.
- 23 3. "Professional services" means those services requiring special knowledge,  
24 education, or skills when the qualifications and experience of the persons

rendering the services are of primary importance and the persons are required to exercise their professional judgment. Professional services providers include, appraisers, attorneys, accountants, psychologists, physicians, dentists, planners, analysts, and consultants. The term includes human services under which a person or business provides direct health or social welfare services to the citizens on behalf of the state. The term does not include services defined in section 54-44.7-01.

4. "Purchasing agency" means a governmental entity in the executive branch of government other than the office of management and budget which is authorized by this chapter, rules adopted under this chapter, written policy of the office of management and budget, or by way of delegation from the office of management and budget to enter into purchasing contracts for commodities, services, and professional services.

5. "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance.

**SECTION 2. AMENDMENT.** Section 54-44.4-02 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.4-02. Office of management and budget purchasing services.** The office of management and budget shall purchase or lease or otherwise arrange for the procurement, for all state agencies and institutions in the executive branch of state government, all materials, furniture, fixtures, printing, insurance, services, and other commodities, except the following:

1. Land, buildings, space, or the rental thereof.
2. Telephone and telegraph service and electrical light and power services.
3. Public books, maps, periodicals, and technical pamphlets.
4. Department of transportation materials, equipment, and supplies in accordance with section 24-02-16.
5. Professional services, unless the office of management and budget agrees to procure professional services in response to an agency's written request. Each time a purchasing agency procures professional services, the agency shall file with the office of management and budget a report describing the nature of the service

procured; the process used to procure the service; and if a competitive bidding process or a competitive proposal process was not used, an explanation for the deviation from either process. The report must be filed with the office of management and budget within thirty days of the securing of the professional services.

6. Services for the maintenance or servicing of equipment by the manufacturer or authorized servicing agent of that equipment when the maintenance or servicing can best be performed by the manufacturer or authorized service agent, or when such a contract would otherwise be advantageous to the state.

7. Emergency purchases the office of management and budget cannot make within the required time and which involve public health or public safety, or when immediate expenditures are necessary for repairs of state property to protect it against further loss or damage, or to prevent or minimize serious disruption in state services. Emergency purchases must be made with the level of competition practicable under the circumstances, and a written determination of the basis for the emergency and for the selection of the particular contractor must be included in the contract file.

8. Such specific ~~items~~ commodities and services or ~~items~~ those commodities and services costing less than a specified amount as determined and indicated by written directive by the director of the office of management and budget. The director may organize and administer, including by contract with a provider, a system of procurement for ~~items~~ commodities agencies are authorized to purchase under this subsection which includes use of a ~~procurement~~ purchasing card. If the director establishes and administers a purchasing card system, the director may designate which agencies are required to use it for purchasing of ~~items~~ commodities designated under this subsection costing less than a specified amount designated in writing by the director.

All purchases made by the office of management and budget, institutions of higher education, or a state agency or institution to which authority to purchase has been delegated, must be made in accordance with this chapter, rules adopted under this chapter, and written policies of the office of management and budget or the agencies and institutions under the jurisdiction of

1 the state board of higher education. The office of management and budget shall purchase  
2 ~~items~~ commodities or services as requested by agencies and institutions under the jurisdiction  
3 of the state board of higher education and the legislative and judicial branches of state  
4 government. The agencies and institutions under the jurisdiction of the state board of higher  
5 education, with the office of management and budget, shall make such joint purchases of like  
6 ~~items~~ commodities or services of high common usage as determined jointly by the agencies  
7 and institutions under the jurisdiction of the state board of higher education and the office of  
8 management and budget as will result in less cost to the state. The office of management and  
9 budget, pursuant to terms and conditions imposed by it, may agree with political subdivisions  
10 that have organized a purchasing group pursuant to a joint powers agreement under  
11 chapter 54-40.3 to cooperatively purchase certain specific ~~items~~ commodities or services  
12 designated by the office of management and budget if the cooperative purchase will result in a  
13 benefit to the state and to the political subdivisions participating in the joint powers agreement.

14 **SECTION 3. AMENDMENT.** Section 54-44.4-05 of the North Dakota Century Code is  
15 amended and reenacted as follows:

16 **54-44.4-05. Competitive sealed bidding, limited competitive, noncompetitive, and**  
17 **negotiated purchases - Other government purchasing contracts - Exempt records.**

- 18 1. Except as otherwise provided in sections 44-08-01 and 25-16.2-02, and in this  
19 section, purchasing contracts must be awarded through a competitive bidding  
20 process to the lowest responsible bidder considering conformity with  
21 specifications, terms of delivery, and quality and serviceability, unless it is  
22 determined to be advantageous to the state to select a contractor or contractors  
23 through a competitive proposal process using other or additional criteria. ~~The~~  
24 ~~office of management and budget~~ The procurement officer may reject any or all  
25 bids or negotiate for a lower price with a successful bidder. Each bid received,  
26 with the name of the bidder, must be recorded. The office of management and  
27 budget may enter into term contracts for the acquisition of commodities or services  
28 and may make multiple awards for term commodity or service contracts when it  
29 deems a multiple award to be in the best interests of the state. ~~Until the date and~~  
30 ~~time set for receiving and opening bids and proposals pursuant to a request for~~  
31 ~~bids or proposals, all~~ All bids and proposals received under this chapter pursuant

to a competitive sealed bid are exempt records under subsection 5 of section 44-04-17.1 until the date and time the bids are opened.

2. The office of management and budget shall adopt rules specifying the circumstances under which competition may be waived or limited, when negotiation may be used, and specifying the required justifications and procedures for using those methods of purchasing. The circumstances that may permit limited competitive, noncompetitive, or negotiated purchases include:
  - a. The commodity or service is available from only one ~~supplier~~ source.
  - b. The commodity or service is available from another governmental entity's contract.
  - c. The commodity or service is to be purchased for experimentation or trial.
  - d. ~~Competitive bidding has failed to produce a bidder~~ No acceptable bids or proposals were received pursuant to a competitive bidding or competitive proposal process.
  - e. Commodities are being purchased for over-the-counter resale.
  - f. Acceptable ~~goods~~ commodities or services are produced or provided by correctional institutions or other government agencies.
  - g. The anticipated cost of purchasing specified ~~goods~~ commodities or services is less than an amount determined by the office of management and budget which would justify the expense of a competitive bidding or competitive proposal process.
  - h. A used commodity is advantageous to the state and the commodity is available only on short notice.
  - i. The commodity is a component or replacement part for which there is no commercially available substitute and which can be obtained only from the manufacturer.
  - j. Compatibility with equipment currently owned by the state is essential to the proper functioning of that equipment.

**SECTION 4. AMENDMENT.** Section 54-44.4-06 of the North Dakota Century Code is amended and reenacted as follows:

**54-44.4-06. All purchases to be made in accordance with specifications -  
Multistep sealed bids.**

1. For purposes of this chapter, specification means a description of all required physical, design, performance, functional, and other characteristics of ~~an item a commodity or service~~ the purchaser requires and, consequently, what a bidder must offer. ~~All purchases made by the office of management and budget, institutions of higher education, or any state agency or institution to which authority to purchase has been delegated, must be made in accordance with written policies of the office of management and budget and the agencies and institutions under the jurisdiction of the state board of higher education.~~ The office of management and budget and institutions of higher education shall develop similar specifications for purchases of ~~items~~ commodities and services of high common usage. State agencies and institutions shall provide such assistance as may be requested by the office of management and budget and the institutions of higher education in the development of specifications. The office of management and budget and the institutions of higher education shall implement such procedures as are necessary for the inspection, testing, and acceptance of ~~supplies and equipment~~ commodities or services to determine that ~~goods~~ those received are in conformity with contract specifications.
2. Multistep sealed bidding. When it is determined to be impractical to initially prepare a purchase description to support an award based on price, a solicitation may be issued requesting the submission of unpriced offers to be followed by a competitive bidding or competitive proposal process limited to those bidders or offerors found to be qualified under the criteria set forth in the first solicitation.

**SECTION 5.** A new section to chapter 54-44.4 of the North Dakota Century Code is created and enacted as follows:

**Competitive sealed proposals - Exempt records.**

1. A contract for commodities or services may be entered into by competitive sealed proposals when a determination is made that the use of competitive sealed bidding is either not practicable or not advantageous to the state. The request for proposal must state the relative importance of price and other factors and subfactors, if any.

2. Proposals must be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. All proposals received pursuant to a competitive sealed proposal process are exempt records under subsection 5 of section 44-04-17.1 until an award is made.
3. Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors must be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before award for the purpose of obtaining best and final offers. In conducting discussions, there may be no disclosure of any information derived from proposals submitted by competing offerors.
4. Unless all proposals are rejected, award must be made to the responsible offeror whose proposal conforms to the solicitation and is determined, in writing, to be the most advantageous to the state, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria may be used in the evaluation. The contract file must contain the basis on which the award is made. Written notice of the award of the contract to the successful offeror must be promptly given to all offerors.

**SECTION 6.** A new section to chapter 54-44.4 of the North Dakota Century Code is created and enacted as follows:

**Small purchases.**

1. Any procurement not exceeding the amount established by written directive of the office of management and budget or by the state board of higher education pursuant to subsection 5 of section 15-10-17 may be made in accordance with small purchase procedures.
2. Small purchases need not be made through competitive sealed bidding or competitive sealed proposals. However, small purchases must be made with competition that is practicable under the circumstances.
3. Procurement requirements may not be artificially divided as to constitute a small purchase under this section.

1           **SECTION 7.** A new section to chapter 54-44.4 of the North Dakota Century Code is  
2 created and enacted as follows:

3           **Resolution of protested solicitations and awards.**

- 4           1. An interested party may protest the award of a contract, the proposed award of a  
5 contract, or a solicitation for commodities, services, or professional services by the  
6 office of management and budget or purchasing agency under this chapter. The  
7 protest must be submitted in writing to the procurement officer responsible for the  
8 contract or solicitation within fourteen days after the protestor knows or should  
9 have known of the facts giving rise thereto.
- 10          2. If a contract has been awarded, the procurement officer shall immediately give  
11 notice of a protest to the contractor. In the case of pending award, a stay of award  
12 may be requested. A stay must be granted unless a written determination is made  
13 that the award of the contract without delay is necessary to protect the interests of  
14 the state.
- 15          3. If the protest is not resolved by mutual agreement, the procurement officer shall  
16 promptly issue to the protestor a written decision containing the basis for the  
17 decision and inform the protestor of their right to appeal.
- 18          4. The protestor may file an appeal of the decision rendered by the procurement  
19 officer with the director of the office of management and budget or designee. An  
20 appeal must be filed in writing within fourteen days after the protestor receives the  
21 decision rendered by the procurement officer of the office of management and  
22 budget or the purchasing agency. The appeal must include a copy of the decision  
23 being appealed and the basis for the appeal. The director of the office of  
24 management and budget shall send written notice of the decision to the protestor.

25           **SECTION 8. AMENDMENT.** Subsections 1, 2, and 4 of section 54-44.4-09 of the  
26 North Dakota Century Code are amended and reenacted as follows:

- 27          1. The office of management and budget shall establish and maintain current lists of  
28 persons that desire to provide commodities and services to the state. Every  
29 person ~~or business entity~~ that desires to bid or submit a proposal on contracts for  
30 commodities and services awarded under this chapter must be an approved  
31 vendor in order to ~~receive a request for bids or proposals. Unless waived by the~~



~~director of the office of management and budget, or the director's designee, a bid or proposal may not be considered under this section from any vendor that is not approved be placed on the bidders list. The office of management and budget or the purchasing agency shall use the list when issuing invitation for bids or request for proposals over the amount established for small purchases, except as otherwise provided in this section.~~

2. To become an approved vendor a person or business entity shall file an application with the office of management and budget. The application must contain information requested by the office of management and budget, including business and persons' names, telephone numbers, addresses, federal tax identification numbers, type of business organization, ~~other permits or licenses issued by this state and related numbers, the nature of the business and the products sold,~~ the types of bids or proposals in commodities or services for which the applicant is interested ~~references,~~ in receiving solicitations, and other business information the office of management and budget determines relevant. The application must also contain a statement appointing the secretary of state as the applicant's agent for service of process pursuant to subsection 3. The application must be signed and certified by an owner, partner, or company officer authorized by company bylaws or other organizational document to bind the company. The signature requirement may include the use of an electronic signature as defined in section 9-16-01 when authorized under section 9-16-17. The office of management and budget may require proof of the signing person's authority by certified copy of appropriate company documents.
4. ~~The director of the office of management and budget, or the director's designee, procurement officer may waive the requirements for registration with the secretary of state as provided in this section and~~ authorize receipt of a bid or proposal from a vendor that ~~unqualifiedly refuses to register as provided in this section if the director or the director's designee is not on the list of approved vendors if the procurement officer~~ makes a written determination that:

- 1           a. ~~A commodity is so unique and possesses such specific characteristics~~  
2           ~~essential to the government program in question that it is available only from~~  
3           ~~one source and not through wholesalers or retailers;~~  
4           b. ~~An emergency as defined in subsection 7 of section 54-44.4-02 exists; or~~  
5           c. ~~The commodity to be purchased is a one-time purchase for which at least two~~  
6           ~~approved vendors are not available and the director of the office of~~  
7           ~~management and budget, or the director's designee, determines~~  
8           ~~consideration of bids or proposals from unregistered vendors is in the best~~  
9           ~~interest of the state~~ it is in the best interest of the state to receive the bid or  
10          proposal. The successful bidder or offeror must become approved before the  
11          award and the existence of this approval requirement must be stated in the  
12          solicitation. If an unapproved vendor is selected for award, the vendor's bid  
13          or proposal may be rejected if that vendor fails to become approved within  
14          sixty days or within a shorter period as specified in writing by the procurement  
15          officer. The procurement officer may waive approval requirement if the  
16          procurement officer determines that registration with the secretary of state  
17          and appointment of an agent for service of process in this state are not  
18          required. In the event of a tie bid or proposal, the ~~registered~~ approved vendor  
19          must be given preference.