

## 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 two new sections to chapter 54-44.4 of the North Dakota  
2 Century Code, relating to competitive sealed bid proposals and resolving protested solicitations  
3 and awards; and to amend and reenact sections 54-44.4-01, 54-44.4-02, subsections 1 and 2  
4 of section 54-44.4-05, section 54-44.4-06, and subsection 2 of section 54-44.4-09 of the North  
5 Dakota Century Code, relating to purchasing policy, purchasing by the office of management  
6 and budget, solicitation criteria, exempt records, limited competitive and noncompetitive  
7 purchases, multi-step 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. The term includes professional services and human services.

**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, 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-, except that executive branch agencies must procure these services through procedures

1           that are consistent with the procedures established in this chapter and rules and  
2           policies adopted by the office of management and budget.

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

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

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

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

30   The office of management and budget shall purchase ~~items~~ commodities or services as  
31   requested by agencies and institutions under the jurisdiction of the state board of higher

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

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

14 **54-44.4-05. Competitive sealed bidding, limited competitive, noncompetitive, and**  
15 **negotiated purchases - Other government purchasing contracts - Exempt records.**

- 16 1. Except as otherwise provided in sections 44-08-01 and 25-16.2-02, and in this  
17 section, purchasing contracts must be awarded through a competitive bidding  
18 process to the lowest responsible bidder considering conformity with specifications,  
19 terms of delivery, and quality and serviceability, unless it is determined to be  
20 advantageous to the state to select a contractor or contractors through a  
21 competitive proposal process using other or additional criteria. The office of  
22 management and budget or purchasing agency may reject any or all bids or  
23 negotiate for a lower price with a successful bidder. Each bid received, with the  
24 name of the bidder, must be recorded. The office of management and budget may  
25 enter into term contracts for the acquisition of commodities or services and may  
26 make multiple awards for term commodity or service contracts when it deems a  
27 multiple award to be in the best interests of the state. ~~Until the date and time set~~  
28 ~~for receiving and opening bids and proposals pursuant to a request for bids or~~  
29 ~~proposals, all~~ All bids and proposals received under this chapter pursuant to a  
30 competitive sealed bid are exempt records under subsection 5 of section  
31 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 - Multi-step sealed bids.**

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

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

25       **Competitive sealed proposals - Exempt records.**

- 26       1. A contract for commodities or services may be entered into by competitive sealed  
27       proposals when a determination is made that the use of competitive sealed bidding  
28       is either not practicable or not advantageous to the state. The request for proposal  
29       must state the relative importance of price and other factors and subfactors, if any.
- 30       2. Proposals must be opened so as to avoid disclosure of contents to competing  
31       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:

**Resolution of protested solicitations and awards.**

1. An interested party may protest the award of a contract, the proposed award of a contract, or a solicitation for commodities, services, or professional services by the office of management and budget or purchasing agency under this chapter. The protest must be submitted in writing to the procurement officer of the office of management and budget or the purchasing agency within fourteen days after the protestor knows or should have known of the facts giving rise thereto.
2. If a contract has been awarded, the procurement officer shall immediately give notice of a protest to the contractor. In the case of pending award, a stay of award may be requested. A stay must be granted unless a written determination is made that the award of the contract without delay is necessary to protect the interests of the state.

- 1           3. If the protest is not resolved by mutual agreement, the procurement officer shall  
2           promptly issue to the protestor a written decision containing the basis for the  
3           decision and inform the protestor of their right to appeal.
- 4           4. The protestor may file an appeal of the decision rendered by the procurement  
5           officer with the director of the office of management and budget or designee. An  
6           appeal must be filed in writing within fourteen days after the protestor receives the  
7           decision rendered by the procurement officer of the office of management and  
8           budget or the purchasing agency. The appeal must include a copy of the decision  
9           being appealed and the basis for the appeal. The director of the office of  
10          management and budget shall send written notice of the decision to the protestor.

11          **SECTION 7. AMENDMENT.** Subsection 2 of section 54-44.4-09 of the North Dakota  
12 Century Code is amended and reenacted as follows:

- 13          2. To become an approved vendor a person or business entity shall file an application  
14          with the office of management and budget. The application must contain  
15          information requested by the office of management and budget, including business  
16          and persons' names, telephone numbers, addresses, federal tax identification  
17          numbers, type of business organization, ~~other permits or licenses issued by this~~  
18          ~~state and related numbers, the nature of the business and the products sold,~~ the  
19          types of ~~bids or proposals in~~ commodities or services for which the applicant is  
20          interested ~~references,~~ in receiving solicitations, and other business information the  
21          office of management and budget determines relevant. The application must also  
22          contain a statement appointing the secretary of state as the applicant's agent for  
23          service of process pursuant to subsection 3. The application must be signed and  
24          certified by an owner, partner, or company officer authorized by company bylaws  
25          or other organizational document to bind the company. The signature requirement  
26          may include the use of an electronic signature as defined in section 9-16-01 when  
27          authorized under section 9-16-17. The office of management and budget may  
28          require proof of the signing person's authority by certified copy of appropriate  
29          company documents.