

**Testimony To The  
ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS  
Prepared October 27, 2009 by the  
North Dakota Association of Counties  
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**CONCERNING PUBLIC IMPROVEMENT BIDDING**

A brief survey of a sampling of counties was conducted to determine if there is significant use of the 48-01.2 bidding process by counties and to enumerate any issues for further research. NDACo learned that counties actually conduct a fair amount of bidding under this section and there are a number of issues of concern. The following is a listing of these issues. It is our hope to have county officials, experienced in this bidding process, testify about them at future meetings of this Commission.

1. **Bid Limit – 48-01.2-02.** It was noted by several county officials that the \$100,000 threshold for this bidding requirement was set by the Legislature quite some time ago (1997) and construction inflation has been significant since that time. One study suggests that non-residential construction costs increased by 78% between 1997 and 2008. Several “county shop” projects were cited as examples where pre-engineered steel buildings may have been appropriate – and lower cost – but the threshold requires that the jurisdiction “*shall procure plans, drawings, and specifications for the improvement from an architect or engineer*”.
2. **Engineering Exclusion – 48-01.2-02.** The 2001 Legislature amended 48-1.1-04 (which became 48-01.2-02 in 2007), to allow the North Dakota Department of Transportation to use their own engineers to prepare building plans for supply and equipment storage buildings. It was suggested that this should also be permitted for those local governments that employ professional engineers.
3. **Publication – 48-01.2-04(1).**
  - a. The “*three consecutive weeks*” requirement when advertising for bids can be troublesome for counties with a weekly official newspaper. This is especially true if a county is rebidding a project and trying to stay in the same construction season. Depending upon the publication day of the weekly newspaper, a county can dedicate an entire month to bidding and then lose another full month on a rebidding. It is also a bit confusing and inconsistent that this same section requires only two weeks of advertising when a project is financed by special assessments.
  - b. The language, “*and in a trade publication...*” of this section is felt to be unclear by some. The question was raised about whether the “*three consecutive weeks*” applies and about the determination of the correct trade publication. Although it was acknowledged that the engineer/architect normally handles this, and there have not been complaints from industry.
4. **Bid Security – 48-01.2-05(4).** The required “*bid security*” (5% bid bond) was viewed as simply increasing the cost of construction without significant benefit. Since it is also required that the successful bidder provide a performance bond within 10 days, and if it is

not provided the governmental entity can choose another bidder, the bid bond is largely meaningless. One county noted that it has also been proven to be uncollectable anyway.

5. **Trademarked products – 48-01.2-03.** County officials involved with major remodeling and building additions believe the restrictions on specifying brands and trademarks do a great disservice to the public. This requirement makes it often very difficult to maintain consistent equipment. Given as an example was replacing a number of air handlers (at \$50,000 each) – the county can only buy one at a time (at a higher cost) because if they bid the three they needed, they couldn't specify brand and they end up with a low bidder of a different brand that cannot communicate natively with the software managing the air handling system. When adding on to a jail, a county was also prohibited from specifying the same brand of cell door locks that operate the same way with the security software. Keyless entry for county buildings is another example. One county actually reported that they finished a remodeling and then immediately replaced all of the newly installed door locks with a second purchase – disposing of the non-matching equipment they had just purchased.
6. **Lowest Responsible Bidder – 48-01.2-07.** The language used in this section indicating that the governmental body must accept the bid from the "*lowest responsible bidder*", was felt to be problematic – precluding a governmental entity from eliminating bidders with no track record (good or bad). It was suggested that it might be advantageous to allow an optional method of pre-approving quality contractors in advance .

Thank you for the opportunity to address the Commission concerning this important topic.