

Sixty-second
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1448

Introduced by

Representatives Thoreson, Headland, Kasper, S. Meyer

Senators Grindberg, Klein

1 A BILL for an Act to create and enact a new section to chapter 54-10 of the North Dakota
2 Century Code, relating to requiring the ~~state auditor~~ legislative management to contract for
3 recovery audits; to provide an expiration date; and to declare an emergency.

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

5 **SECTION 1.** A new section to chapter 54-10 of the North Dakota Century Code is created
6 and enacted as follows:

7 ~~**State auditor to contract for recovery audits.**~~

8 ~~1. By July 1, 2011, the state auditor shall contract on behalf of the state with a single~~
9 ~~qualified and experienced recovery audit consultant firm to conduct a recovery audit of~~
10 ~~payments made to vendors during the previous four fiscal years by or through state~~
11 ~~agencies that have an annual budget exceeding five hundred thousand dollars~~
12 ~~regardless of whether the agencies have had internal or third-party auditors perform~~
13 ~~similar audits in the past. Any specific improper payment identified by a previous audit~~
14 ~~is not eligible for identification or recovery under this section. Payments audited may~~
15 ~~include state or federal funds of any character, including grants. The audit must~~
16 ~~comply with applicable state and federal laws and must be designed to detect and~~
17 ~~recover improper payments to the state's vendors and to recommend improvements to~~
18 ~~accounting and payment policies and procedures of state agencies. Beginning on~~
19 ~~July 1, 2013, and each biennium thereafter, the state auditor shall contract on behalf of~~
20 ~~the state for audits to be performed on the payments made by the state to vendors~~
21 ~~during the previous two fiscal years in accordance with this subsection.~~

22 ~~2. A contract issued under this section:~~

23 ~~a. Must provide for reasonable compensation paid by the state to the consultant on~~
24 ~~a contingency basis as a specified percentage of the total amount of improper~~

1 ~~payments recovered, either in cash, rebates, credits, or otherwise, by the state in~~
2 ~~connection with the audit;~~

3 ~~b. Must allow the consultant or the state to pursue recovery of any improper~~
4 ~~payment detected by the consultant, including recovery through setoffs against~~
5 ~~future payments to vendors that previously received improper payments;~~

6 ~~c. Must allow for the consultant to reaudit payments that have been previously~~
7 ~~audited or reviewed by internal or external auditors and found to be correct or~~
8 ~~proper, if the state auditor determines the consultant is reasonably likely to find~~
9 ~~and recover a material amount of improper payments among those previously~~
10 ~~audited or reviewed payments;~~

11 ~~d. Must include reasonable safeguards and penalties to prevent the wrongful~~
12 ~~disclosure of confidential information by the contractor or its employees or agents~~
13 ~~in accordance with all applicable laws; and~~

14 ~~e. May not allow a recovery audit of:~~

15 ~~(1) A payment to a vendor until at least one hundred eighty days after the date~~
16 ~~the payment was made;~~

17 ~~(2) State employee payroll payments;~~

18 ~~(3) Retirement plan payments to former or current state employees;~~

19 ~~(4) Loans, bond debt service, and related interest; or~~

20 ~~(5) Unemployment compensation payments, judgments, and settlements.~~

21 ~~3. Notwithstanding any other provision of law, each state agency with payments being~~
22 ~~audited shall provide the consultant with prompt cooperation with the audit and~~
23 ~~recovery process, as reasonably requested by the consultant, including providing the~~
24 ~~consultant with access to any information in the custody of the state that is necessary~~
25 ~~or desirable to achieve optimal performance of the audit or the recovery of improper~~
26 ~~payments. An agency may not provide access to any record if disclosure of the record~~
27 ~~is otherwise prohibited by law or contractual obligation.~~

28 ~~4. Within thirty days after presentment by a consultant of a claim regarding improper~~
29 ~~payment, the state auditor shall notify the consultant in writing if the consultant is not~~
30 ~~authorized to pursue the improper payment for recovery. The notice must contain an~~
31 ~~explanation for the determination. The state auditor shall base the determination on~~

~~the reasonable unlikelihood of recovering the improper payment, whether due to an erroneous finding by the consultant, the vendor being insolvent, or other substantially similar circumstances. If the consultant identifies a pattern of improper payments to a specific vendor, the state auditor may authorize the consultant to conduct an audit of up to one additional prior biennium of payments to the vendor. Upon the request of the state auditor, the attorney general shall consider initiating any legal action necessary to recover an improper payment.~~

~~5. For the purposes of this section, "improper payment" means any payment made in an incorrect amount; to an incorrect payee; or for an incorrect reason or purpose, including:~~

~~a. Duplicate payments;~~

~~b. Payments of fraudulent or erroneous invoices or bills;~~

~~c. Payments based on a failure to apply an applicable discount, rebate, allowance, or price reduction;~~

~~d. Payments for goods or services not provided or rendered in whole or in part;~~

~~e. Payments for incorrect or unauthorized goods or services; and~~

~~f. Payments made in violation of contractual provisions.~~

Legislative management to contract for improper payment identification and recovery services.

1. By August 1, 2011, the legislative management shall consider contracting on behalf of the state with a single qualified and experienced improper payment identification and recovery services consultant firm to perform an improper payment identification and recovery process of payments made to vendors during the previous four fiscal years by or through state agencies that have an annual budget exceeding five hundred thousand dollars regardless of whether the agencies have had internal or third-party reviewers or auditors perform similar reviews or audits in the past. Any specific improper payment identified by a previous review or audit is not eligible for identification or recovery under this section. Improper payments identified and recovered may include state or federal funds of any character, including grants. The identification and recovery process must:

- 1 a. Where practicable, simultaneously meet or exceed the requirements of
2 applicable federal law and state law to avoid duplication of effort;
- 3 b. Be designed to identify improper payments to the state's vendors; and
- 4 c. Include recommendations for improvements to accounting and payment policies
5 and procedures of state agencies.
- 6 2. Beginning on July 1, 2013, and each biennium thereafter, the legislative management
7 shall contract on behalf of the state for improper payment identification and recovery
8 processes on the payments made by the state to vendors during the previous two
9 fiscal years in accordance with subsection 1.
- 10 3. A contract issued under this section:
- 11 a. Must provide for reasonable compensation paid by the state to the consultant on
12 a contingency basis as a specified percentage of the total amount of improper
13 payments identified by the consultant and authorized for recovery or payment by
14 the state in accordance with subsection 7;
- 15 b. Must allow the consultant or the state to pursue recovery of any improper
16 payment identified by the consultant, including recovery through rebates, price
17 reductions, discounts, additional or upgraded goods or services, favorable
18 contract terms, cash payments, lien proceeds, garnishments, or setoffs against
19 future payments made by the state to vendors that previously received improper
20 payments;
- 21 c. Must allow for the consultant to review payments that have been previously
22 audited or reviewed by internal or external reviewers or auditors and found to be
23 correct or proper, if the legislative management determines the consultant is
24 reasonably likely to newly identify a material amount of improper payments
25 among those previously audited or reviewed payments;
- 26 d. Must include reasonable safeguards, including nondisclosure obligations, to
27 prevent the wrongful disclosure of confidential information by the consultant or its
28 employees or agents in accordance with all applicable laws;
- 29 e. Must prohibit the consultant from using extrapolation or sampling in the improper
30 payment identification review process, except when no other method can be

practicably used to conduct the review in an effective manner, as determined by the legislative management or its designee at the applicable state agency; and

f. May not allow a review or recovery of:

(1) A payment to a vendor until at least one hundred eighty days after the date the payment was made;

(2) State employee payroll payments;

(3) Retirement plan payments to former or current state employees;

(4) Loans, bond debt service, and related interest; or

(5) Unemployment compensation payments, judgments, and settlements.

4. Notwithstanding any other provision of law, each state agency with payments being reviewed shall provide the consultant with prompt cooperation with the review, identification, and recovery process, as reasonably requested by the consultant, including providing the consultant with access to any information in the custody or control of the state or its vendors which is necessary or desirable to achieve optimal performance of the review, payment, or the recovery of improper payments. An agency may not provide the consultant access to any record if disclosure of the record to the consultant is otherwise prohibited by law despite the consultant's authorization to act on behalf of the state and contractual obligation not to disclose the record.

5. As soon as practicable, but in no event more than sixty days after notification in writing by the consultant of an identified improper payment, the legislative management or its designee at an applicable state agency shall notify the consultant in writing if the consultant is not authorized to pursue the improper payment for recovery, or the state is not intending to pay the balance of an improper payment to the applicable vendor, as the case may be. The notice from the state to the consultant must contain an explanation for the determination. The legislative management or its designee at an applicable state agency shall base the determination on either:

a. A finding that a payment identified as improper by the consultant on the grounds of being an underpayment is actually in the correct amount; or

b. The reasonable unlikelihood of recovering the improper payment, whether due to an erroneous identification by the consultant, the vendor being insolvent, or other substantially similar circumstances.

1 6. If the consultant identifies a pattern of improper payments to a specific vendor, the
2 legislative management may authorize the consultant to conduct a review of up to one
3 additional prior biennium of payments to the vendor.

4 7. The consultant, on behalf of the state, shall recover from vendors improper payments
5 that have been identified by the consultant and authorized by the state, unless the
6 legislative management notifies the consultant in writing of the state's intention to
7 recover any such authorized payments. Any funds recovered by the consultant on
8 behalf of the state may not be commingled with other funds and must be held in a
9 separate bank account until paid to the state by the consultant. The consultant may
10 deduct from the funds recovered by the consultant on behalf of the state any fees
11 owed to the consultant by the state under the contract. The consultant shall provide
12 the state with detailed statements and reconciliations for the bank account on a
13 monthly basis during the term of the consultant's contract with the state.

14 8. Upon the request of the legislative management, the attorney general shall bring and
15 pursue any legal action the attorney general determines is reasonably necessary to
16 recover an improper payment.

17 9. For the purposes of this section, "improper payment" means any payment made in an
18 incorrect amount, whether an underpayment or overpayment; a payment to an
19 incorrect payee; or a payment for an incorrect reason or purpose, including:

20 a. A duplicate payment;

21 b. A payment of a fraudulent or erroneous invoice or bill;

22 c. A payment based on a failure to apply an applicable discount, rebate, allowance,
23 or price reduction;

24 d. A payment for goods or services not provided or rendered in whole or in part;

25 e. A payment for incorrect or unauthorized goods or services; and

26 f. A payment made in violation of a contractual provision.

27 10. For the purposes of this section, "vendor" means a person that receives payment
28 directly from the state.

29 11. The legislative management shall implement any rules necessary to create a process
30 by which the consultant and vendors may appeal whether a payment identified by the
31 consultant as an improper payment is an improper payment, and in which amount.

1 The appeal process may differ from agency to agency, as determined by the
2 legislative management to be desirable and proper.

3 12. A state agency may not enter a contract for the provision of improper payment
4 identification and recovery services without prior consent of the legislative
5 management.

6 13. Under this section, no additional or duplicate improper payment identification and
7 recovery processes may be conducted on payments made by the state if any recovery
8 audit or improper payment identification and recovery process that meets or exceeds
9 applicable federal and state law has been previously conducted on those payments.

10 **SECTION 2. EXPIRATION DATE.** This Act is effective through July 31, 2013, and after that
11 date is ineffective.

12 **SECTION 3. EMERGENCY.** This Act is declared to be an emergency measure.