

Summary of NDSU’s Construction Dispute Request

A. Purpose of Deficiency: NDSU is making two requests related to a construction dispute involving the A. Glenn Hill Center: (1) authorization and appropriation for an additional \$125,000 to be paid to general contractor/plaintiff; and (2) a deficiency appropriation to reimburse NDSU for its litigation costs.

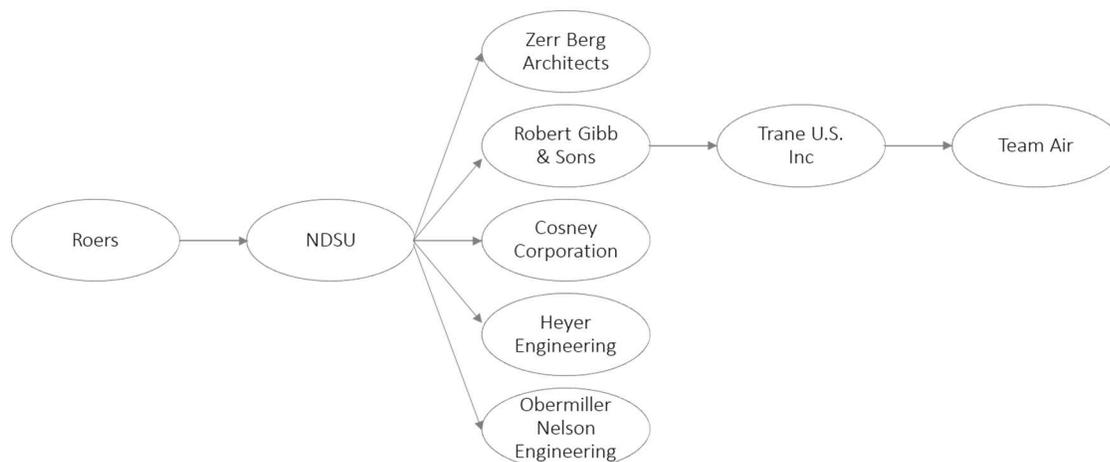
B. Summary of Dispute: The A. Glenn Hill Center project started in the summer of 2014 and had a total project cost of \$29,367,709. Pursuant to North Dakota law, NDSU used a multiple prime contractor process. This means that NDSU did not have a single contractor overseeing all the construction. Instead, NDSU had contracts with multiple different contractors. As a result, if a contractor had a dispute with another contractor, the contractor needed to sue NDSU because the contractors did not have a contractual relationship with each other. NDSU could then sue the other parties for indemnification.

In this project, NDSU retained Roers Construction, LLC (“Roers”) as a general contractor. NDSU also had separate contracts for the architect (Zerr Berg), mechanical contractor (Robert Gibb & Son), and casement contractor (Cosney Corporation). The architect then hired a structural engineer (Heyer Engineering) and a mechanical engineer (Obermiller Nelson Engineering).

Over a year after the building was completed, Roers submitted a claim to NDSU for \$1,317,413. This was over and above the contract price that NDSU had paid to Roers, which was in excess of \$12 million. Roers claimed that it suffered delays resulting from the actions/inactions of other contractors, including Zerr Berg, Robert Gibb and Cosney, along with Gibb's supplier Trane Company. Roers also asserted delays resulting from the timing of both the design and delivery of rooftop heating and cooling units, as well as delays in delivery and installation of classroom casements. Finally, Roers claimed delays occurred in the process of obtaining a building permit and claimed inefficiencies in readying the building for a ceremonial opening in December, 2015.

C. Summary of Litigation. Roers submitted its claim to NDSU on July 28, 2017. NDSU provided the claim to the architect for evaluation. The architect denied the claims, which caused NDSU to deny payment. However, in an effort to avoid litigation NDSU offered to mediate the claim (a copy of Roers’ claim, the architect’s response and NDSU response are attached). The parties agreed to mediate the dispute, but the parties failed to achieve settlement.

Roers then sued NDSU and served NDSU on January 16, 2018. With the approval of the State Board of Higher Education and the Attorney General’s Office, NDSU retained the law firm of Stinson LLP with offices in Bismarck and Minneapolis as litigation counsel. NDSU brought several additional parties into the litigation, and they initiated actions against additional parties:



The case proceeded through the discovery process and the parties retained experts. Ultimately, the parties convened another mediation that succeeded, and the case settled. Settlement terms between Roers and the other defendants are confidential, and NDSU does not know what amount the other parties paid to Roers. NDSU paid a settlement sum of \$38,609.38. This was the amount of remaining appropriation for the project. In addition, NDSU agreed to make a request to the legislature for authorization and appropriation of \$125,000 as an additional settlement payment. The settlement of the lawsuit is not contingent on the Legislature making this appropriation.

NDSU signed the settlement agreement on November 15, 2019 contingent upon the approval of the State Board of Higher Education, which was provided on December 3, 2019. NDSU's rationale for the agreement was that the settlement amount was significantly less than the anticipated costs of remaining in litigation, and NDSU's litigation counsel recommended the settlement agreement. Looked at a different way, the settlement payment of \$38,609 and the litigation costs of \$474,657 equals \$513,266 which is considerably below the \$1,317,413 being sought in the litigation, and in fact, even if the potential payment of \$125,000 is included, the total is \$638,266, which is still approximately 50% of the \$1,317,413. This settlement made financial sense for NDSU.

Initially, NDSU sought reimbursement for its litigation costs (\$474,657) through a deficiency appropriation in HB1025. However, that item was transferred to SB2003 so that both the litigation costs and the settlement payment could be considered in the same bill.

In short, NDSU was required to defend itself against this suit and incurred substantial attorney's fees, expert fees, mediation fees and court costs as a result. We are asking for reimbursement for those costs along with the additional authority and appropriation to the \$125,000 payment to Roers.