

TESTIMONY OF

Sherry Neas, Director, Shared Services Division

Good afternoon, Chairman Roers and members of the committee. My name is Sherry Neas, Shared Services Division Director with the Office of Management and Budget (OMB).

This bill was introduced by Representative Jon Nelson. OMB supports the engrossed bill. This bill makes several changes to statutes related to state procurement practices. This bill was developed through a collaborative process involving Rep. Nelson, OMB, the Procurement Advisory Council, North Dakota University System (NDUS), North Dakota Information Technology Department (NDIT), Department of Corrections and Rehabilitation (DOCR), Department of Health and Human Services (DHHS), and several other state agencies.

The bill was amended in the House to address concerns raised during the first hearing. Sections related to purchases from prison industries were removed. A new section was added related to vendor pool contracts at the recommendation of Rep. Ben Koppelman.

Section 1, Page 1 amends N.D.C.C. section 44-04-18.4 related to when bids and proposals received by a public entity in response to a procurement process are exempt and subject to open records laws. This change was coordinated with OMB's legal counsel.

The bill amends the law to delete subdivision 3(c) which states, "Records included with any bid or proposal naming and generally describing the entity submitting the proposal are open." This subsection is problematic because an entity could make an open records request to learn which vendors submitted bids or proposals. The section to be deleted also conflicts with laws in Chapter 44-04 and Chapter 54-44.4 which provide that bids are exempt records until open date and time, and proposals are exempt records until a notice of intent to award is issued.

Over the 20 years since this language was enacted, vendors have become more versed in studying their competition in order to draft bids and proposals to give themselves an advantage. One primary method used by vendors to hone their bids and proposals is to submit an open records request after a Notice of Intent to Award a public contract has been issued or bids have been opened. This gives vendors the opportunity to review the details of their competitors' bids or proposals. The OMB State Procurement Office has seen these records requests increase exponentially over the past 20 years. OMB proposes this change in law to ensure that vendors are not able to identify their competitors prior to the Notice of Intent to

Award is published, or bids are opened. This change helps to ensure that competition for public contracts remains fair.

Section 2, Pages 1-2, amends N.D.C.C. Chapter 54-44.4-01 related to state purchasing practices definitions. This section adds a definition for "Information Technology" referencing N.D.C.C. Chapter 54-59 and renumbers the section.

Section 3, Pages 2-5 amends N.D.C.C. section 54-44.4-02 related to OMB purchasing services and exemptions from purchasing requirements. The changes are to add clarity related to what requirements do and do not apply to agencies, institutions, commodities, and services listed in this section.

- Page 3, Lines 1-3. The sentence related to the International Peace Garden participating in procurements is deleted from N.D.C.C. section 54-44.4-02. In Section 9, Page 10, of this bill, the International Peace Garden language is added to N.D.C.C. section 54-44.4-13 related to Cooperative Purchasing. This amendment is a needed correction. The International Peace Garden sentence was added several sessions ago and placed in N.D.C.C. section 54-44.4-02 which describes exemptions from procurement. This proposed change ensures the International Peace Garden is specifically included as eligible for cooperative purchases.
- Page 3, Lines 3-5. New language is added to specify that contracts for use by multiple state agencies and institutions must be established as state contracts by OMB or as cooperative purchases under N.D.C.C. section 54-44.4-13.
- Page 3, Lines 5-7. New language is added to clarify that information technology procurements, including those exempted from competitive requirements of Chapter 54-44.4, are subject to the information technology requirements of Chapter 54-59. This change was developed in collaboration with NDIT representatives.
- Page 3, Lines 10-11. Subsection 1 is changed to add statutes related to leasing of space (N.D.C.C. section 54-21-24.1) and new building construction cost-benefit analysis (N.D.C.C. section 54-44.1-16).
- Page 3, Lines 16-17. Subsection 5, related to exemptions for the Industrial Commission, restructures the sentence to clarify that the exemption applies to energy-related procurements for the referenced statutory programs. This change was discussed with representatives of the Industrial Commission.
- Page 5, Lines 2-8. Subsection 15, related to exemptions for contracts by the DHHS for suicide prevention training and brain injury informal supports, is amended to add new language. This change was developed in collaboration with DHHS, to provide an exemption for training and related materials for individuals receiving assistance or

services, contractors, or professionals providing assistance or services under programs administered by or under the direction of DHHS. This change will materially reduce the number of noncompetitive justifications called "Alternate Procurements" processed by OMB and DHHS.

- Page 5, Lines 9-11. A new subsection 16 is added related to an exemption for expenditures for direct media placement. OMB has a procurement advisory council. State law also requires collaboration between NDUS and OMB on procurement policy. This change has been strongly recommended in meetings with those groups. This section does not create any exemption from the competitive purchase of media placement services from individuals or firms providing those services.

Section 4, Pages 5-7, amends N.D.C.C. section 54-44.4-05 related to competitive, limited competitive, noncompetitive, and negotiated purchases – Exempt records.

- Page 5 Line 20-29. Subsection 1 amends the language related to competitive bidding and competitive proposal process to be clear and concise.
- Page 6, Lines 5-8. Subsection 3 related to bids and proposals being exempt from open records laws is amended to delete language and reference N.D.C.C. section 44-04-18.4 (which was also amended in Section 1 of this bill). This change eliminates contradiction between the Chapter 54-44.4 and Chapter 44-04 related to when bids and proposals are exempt records and when they become open records. This change was coordinated with legal counsel for OMB.
- Page 6, Lines 24-25. Section 4, subsection e. Adds a statutory reference for prison industries.
- Page 7, Lines 12-13. Section 4, subsection k. This was a new section last session related to noncompetitive purchase of recurring costs associated with implemented information technology. A new sentence is added related to recurring costs related to software or firmware required for proper functioning of currently owned equipment. This addition was requested by state agencies and the language was coordinated with NDIT. Many types of equipment now have associated software or firmware.
- Page 7, Line 16. Section 4, subsection l. Last session an exemption was added for specialized equipment for the State Mill and Elevator. In North Dakota Administrative Code, the State Mill and Elevator and Rough Rider Industries have had the same exemption from competition for materials. This change moves the Rough Rider Industries exemption into statute with the same scope as the State Mill and Elevator.
- Page 7, Lines 20-21. Last session an exemption from competition for the State Library was added. NDUS institutions and other agencies also have libraries, so this amendment applies the exemptions to other entities that make purchases for libraries.

Section 5, Page 7-8, amends N.D.C.C. section 54-44.4-07 related to preference for soybean-based ink to remove the reference to the North Dakota Soybean Council and the Agricultural Commissioner. This change was discussed with those entities. The preference for soybean-based ink is unchanged.

Section 6, Page 8, amends N.D.C.C. section 54-44.4-09 related to the Bidders List. A sentence was added, "A person may be required to register for the bidders list before the person may submit a response to a solicitation." This change was recommended by OMB legal counsel. Law requires the bidders list be used for purchases over the amount established for small purchases. OMB and NDUS are implementing a new procurement automation system with improved cyber security measures. The bidder list registration will be accomplished within the new system, and bidders will be required to be registered prior to submitting a solicitation in the system.

Section 7, Page 8, amends N.D.C.C. section 54-44.4-09.1 related to Secretary of State registration. This was a new section enacted last session. The law requires contractors who have a Secretary of State registration requirement to become registered before contract award. The current language has caused confusion about when the vendor must complete the registration process. The amendment changes the wording from "contract award" to "contract execution." The change makes it clear that an agency or institution can announce the contract award and require the vendor to be registered before the contract is signed.

Section 8, Page 8-9, amends N.D.C.C. section 54-44.4-12 related to resolution of protested solicitations and awards.

The current law requires the agency, institution, and OMB to send determination letters to the protestor by certified mail. State agencies, institutions, and OMB have experienced situations when the certified mail was significantly delayed. The amendment allows the state agencies, institutions and OMB to use electronic mail communication and other commercial delivery services to send notice to the protest.

OMB and NDUS also collaborated to incorporate language related to protests and appeals received by NDUS institutions, and cited the law related to NDUS procurement policy.

The section was also amended to provide for a seven-day extension if additional time is needed for the purchasing agency or deciding authority to make the protest and appeal

determination, with written notice to the protestor. Current North Dakota Administrative Code provides an extension option for the purchasing agency considering the protest, but there is no authority for OMB to extend the seven-calendar day period to render an appeal determination. An appeal of a complex, high dollar procurement decision requires significant reading, analysis, and legal review. Providing an ability to extend the appeal period is needed.

Section 9, Pages 9-11, amends N.D.C.C. section 54-44.4-13 related to Cooperative Purchasing.

The amendment to this section was coordinated with NDUS and legal counsel to create authority for a NDUS institution to establish a cooperative purchasing contract for use by other NDUS institutions.

This section is also amended to move the language related to the International Peace Garden with its authorizing statute into the list of entities eligible to use cooperative purchasing contracts, as previously discussed in Section 3.

Section 10, Page 11, amends N.D.C.C. section 54-44.4-14 related to the Procurement Information – Website. This law requires OMB to maintain a procurement information website to provide current information about procurement opportunities. This website can be used for procurement of goods and services, and other types of solicitations not subject to state procurement, such as public improvements, architect, engineering, and land surveying, and concessions. The amendment makes it clear that the entities must comply with any other notice requirements required by law.

Subsection 4 under this section adds new language stating OMB may make the procurement information website available to other government entities for issuing solicitation notices in addition to any other notice requirements provided by law.

Section 11, Page 12, adds to N.D.C.C. chapter 54-44.4 this is a new section related to purchases from state contracts. OMB, in consultation with the Attorney General, will adopt rules related to circumstances under which it is determined to be in the best interested to the state to authorize state officials and employees to make personal purchases from state contracts and prison industries products. At times, state officials and state employees use personal resources to conduct state business. There are a few state contracts that do allow employee purchases, such as Microsoft Home Use rights and state logo clothing contract. This section will ensure guidance on employee purchases from government sources of supplies.

Section 12, Pages 12-13. This is a new section in the engrossed bill. During the House Government and Veteran Affairs hearing, Rep. Ben Koppelman testified with concerns related to vendor pool state contracts being awarded for a long period, resulting in other vendors not having an opportunity to compete for a state contract. OMB had also identified inconsistent practices for vendor pool contract and supported the amendment. A working group, including Rep. Koppelman, OMB, North Dakota Information Technology, and North Dakota University System (NDUS) collaborated on new section. Section 12 requires the OMB, in coordination with NDIT and NDUS, to develop guidelines related to multiple award vendor pool contracts. The guidelines must establish thresholds for direct purchase from vendors within the pool, and a threshold for requiring a purchasing agency or institution to get competition between vendors. The new section also limits vendor pool contracts to a total of five years, unless a prior approval is obtained as set forth in the guidelines. Work under secondary contracts awarded under vendor pools must be accomplished within the term of the contract.

Chairman Roers and committee members, this concludes my testimony. I ask your support for HB 1122. I would be happy to answer any questions.