

# MICROFILM DIVIDER

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2007 HOUSE GOVERNMENT AND VETERANS AFFAIRS

HB 1322

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1322

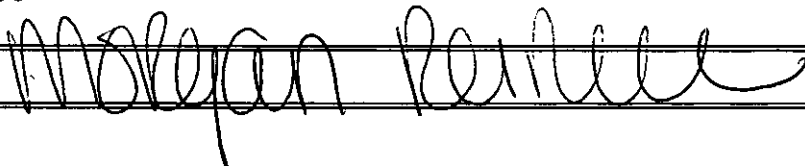
House Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Hearing Date: January 18, 2007

Recorder Job Number: 1408

Committee Clerk Signature



Minutes:

**Rep. Keizer:** *This is HB 1322. This is a very small bill. Several years ago most states were pretty much operating through a common principal. Whatever the state did, they were protected. You couldn't sue the state. Even if they were the cause of it. It was decided that the state of ND didn't have complete sovereign immunity. It could be sued. At that time it was when the state service contract process began to address how they could protect the state and that is their job. How can they write their contracts in a way that we as a state could maximize their protection? I am not an attorney and I can't speak the right language. Their contracts have a clause in it that says whoever does business with the state can indemnify the state. Regardless of the degree of responsibility associated with the clients. Let's take a hypothetical case that says the state is 5% responsible. The engineering firm, construction firm, and the printing firm, or someone else seems to be 5% responsible. Under the current system the contractor avoids the sign and is going to require you to pay 100% of the liability and also represent the state to protect its interest in court. So it places a significant burden on people who want to do business with the state. Those people have come forward and said that it is a significant concern to us for a couple of reasons. It is important for this committee to understand those reasons. One is can we obtain the insurance required to provide the kinds of*

coverage that is included in the indemnification. Is it available to us in the marketplace and at what cost? If it isn't available that becomes an issue. More importantly what happens when a firm that signs a contract doesn't have the coverage or cannot act out the coverage? What kind of protection does the state have? It was stated that in some cases, entities are entering with contracts with the state that do not have the coverage, despite what the state may think. As a result if there is a claim on suing, the state may not be in the strong position it is in and at that point I said lets address this issue and make sure that we as a state know exactly what position we hold related to the indemnification. If we don't have it, I'd like to know. I think responsibility should be shared in the proportion on who is responsible for what. I don't like situations where I'm 5% responsible but have to pay 100%. I don't think that's right. In one case at the State Fair in Minot, at one of the food vendors, someone slipped. The state had no responsibility for it, but the state is coming back and saying that they need to cover the money. It maybe the big bully on the block approach but I'm not sure that it is right. We bring this bill to you for your deliberation. This bill changes the law that says you are going to be responsible for what you contributed to the claim.

**Rep. Haas:** How is that contributory portion determined?

**Rep. Keizer:** We save that part for attorneys. We are talking about typically important events for various businesses. For a small business a \$5-10,000 claim is significant.

**Rep. Haas:** What happened with the case at the State Fair?

**Rep. Keizer:** I believe it is still in progress.

**Rep. Kasper:** There is no requirement in the bill for the contractor with the state to own insurance, to provide for the indemnification? Isn't there another section?

**Rep. Keizer:** There are people here that are in the business that can answer that. In my mind the question is, is that coverage really there?

**Rep. Schneider:** Why do we need to put this language in the statute? Couldn't it be safe for the agency to put it into a private contract, just to enter this information on their own will?

**Rep. Keizer:** You have really just made my argument. The state won't put this in with the contract. They absolutely could. They just want to be protected maximally.

**Bill Shalhoob:** Testimony attached.

**Gerald Floden:** Testimony attached.

**Rep. Haas:** Did I hear you say that your company, you aren't able to get insurance to cover you for these provisions?

**Gerald Floden:** We cover ourselves. We pay a lot of money for insurance to cover ourselves. We cannot be covered by insurance. If there is a claim we have to take money out of our own pockets to pay for them.

**Rep. Haas:** So you are pretty much your own insurance company?

**Gerald Floden:** Yes we become our own insurance company. We insure the state.

**Rep. Kasper:** I don't disagree with anything you said I'm just wondering for the past 2-5 years how many incidents did you have that claims occurred under the circumstances that you are talking about? Where there unfair results from your perspective?

**Gerald Floden:** We have not had any claims

**Rep. Kasper:** So there are very few claims but there is always that chance?

**Gerald Floden:** Yes we always have the risk.

**Rep. Amerman:** I'm not sure what the bill all entails. So right now if you were doing work at one of the state colleges, they would be held harmless if anything happened. If this bill passes then they can be sued?

**Gerald Floden:** That is correct.

**Rep. Amerman:** Does this involve political subdivisions and higher learning institutions?

**Gerald Floden:** There are people who will speak to that.

**Rep. Haas:** In your experience do you know of companies that are reluctant to even bid on state contracts because of the clauses that are currently in the contract regarding indemnification of the state?

**Gerald Floden:** We are a prime bidder on a lot of the contracts so I'm not sure. Our company employees 800 people. If we put our company on the line for a claim that really wasn't our fault, you have to indemnify. We could loose the jobs for all these people.

**Sen. Potter:** *We are one of the organizations that negotiates terms with the state. At Fort Lincoln there are state employees and state park employees. We are required to buy the insurance that will cover all the visitors to the park. We negotiate terms with the park each year. The one thing we have never been able to negotiate is this particular portion that we will buy 100% of your insurance. It is entirely appropriate that with one of the employees causes harm to a visitor that we will pay for that. But at the same time it doesn't seem department that the little division has to pay for it, but the state. That is how it seems to our insurance companies as well. A couple years ago we had an insurance agent who had insured us for many years drop us. As the time wore on and as the season approached we were hustling to find an insurance company. We finally found an underwriter. While I'm not expert on this subject, I agree with this bill.*

**Rep. Haas:** Do you actually have a contract with the state and a contract with the State Parks and Recs department.

**Sen. Potter:** Yes indeed we do, we sign a lengthy piece. Currently we are in the second year with a four year lease with the Dept.

**Rep. Haas:** And it is within those lease contracts that you see this indemnification clause that the state wants you to agree to?

**Sen. Potter:** You are right.

**Rep. Weiler:** I don't know if you are going to be answer this but my concern is the fiscal note with \$250,000. I'm wondering how they came about that number if they had researched or what.

**Sen. Potter:** I had the same concern when I saw that. When I saw it my immediate reaction was to send it to appropriations. And let them worry about it.

**Evan Mandago:** Testimony attached.

**Rep. Amerman:** Will you give me your definition of what you consider a small business and an example?

**Evan Mandago:** It depends on how large a claim may become. I would use that analogy to get to the point that a smaller business may not have the resource or the ability to negotiate with the state. They may not even know the cause is bad.

**Steve Bain:** *I am a retail insurance agent in Bismarck. I'm just standing in favor of this bill. I see many times small contractors and small landlords can't get this. I try to explain when they call and ask about the indemnification. This is such a lucrative contract to them that they may just go ahead and do that and put their ship on the line. I just think that it's not fair or prudent to put this burden on the small business.*

**Rep. Weiler:** Has a client that has come to you with that question, have they ever tried to scratch that out of the contract, and if so, what has happened?

**Steve Bain:** Not to my knowledge.

**Rep. Haas:** Don't you think that many small businesses maybe don't fully understand what it means?

**Steve Bain:** I think you are right. These are lucrative contracts for them.

**Rep. Schneider:** Should this bill go into law would you lower your rate for all of your clients?

**Steve Bain:** I have nothing to do with that.

**Pat Ward:** *I represent Dakota Fire Insurance a Bismarck based domestic insurance company. I'm going to read a one paragraph email. Here is a little background on this bill. While the state did take it out of their requirement and anyone doing business with the state, the agreement is still written too tight. No one is comfortable providing what is required. Our stand as an insurance company is that we wont provide the coverage is listed. They are trying to use language that gets them out of there. Our office also has commercial business in 5 other states. MN, SD, MT, ID, and OR. We don't see these types of requirements from any of these states. As you know MT is a tough state to do business with. Bottom line is we can't provide the coverage that the state is needing.*

**Rep. Kasper:** In the last 10 years have you taken, without revealing confidentiality, situations to represent any businesses that were involved with the state where there was an action and they were not covered because of this circumstance.

**Pat Ward:** Not that I can recollect at the moment, but I'm sure others in my law firm have. The type of situation that we are talking about is a situation that arises occasionally. One I can remember is an event that was held at UND and someone was injured. Say someone at BSC was in a basketball tournament and one of the janitors left something on the ceiling that fell on someone. The person having that event would be required under the agreement to add the state as and additional insured. That is normally not a problem for the persons own insurance. Where it gets to be the problem is when the action has nothing to do with the other party.



**Rep. Potter:** So the insurance agent cannot provide coverage?

**Pat Ward:** I'm talking now on behalf of the insurance company. The agent would have a problem finding insurance which means the local person may not have it either.

**Rep. Keizer:** The state is only 1% responsible and that will cost the Attorney General a lot of money. My little company is insured by Dakota Fire and I will be happy to bring my insurance package up to let the committee read it. I read it and I take for granted that my agent is doing a really good job. I don't have coverage in that \$5 million for someone else's liability. I do have coverage for my liability. That is why I think small businesses need to be protected.

**Rep. Haas:** Is there any additional testimony for HB 1322? Any opposition?

**Jo Zschomler:** Testimony Attached.

**Rep. Haas:** You said that yes the state could transfer it's liability to the contractor but the state would never do that. If the state would never do that why would you object to the language in the bill that simply says that the liability would be shared to the extent and proportion? Why if you would never pass that liability to a contractor, would you disagree with this language?

**Jo Zschomler:** I said if it was 100% we wouldn't look to pass that on. If the state was sued because those unfortunate events happened on state property. We had no control over it. The only association with us was it was state property.

**Rep. Haas:** Let's say I'm a contractor with the state. Something bad happens but then without this language it says each should have liability in proportion to fault. It sounds to me like you are the sole determiner of who the fault is and you are the sole determiner of what liability you would pass on to the contractor.

**Jo Zschomler:** I would never do that, and neither would the state. Normally in the operation if we are named an additional insured and there is a claim resulting from the contractor's activity.

**Rep. Kasper:** It appears to me that based upon the current law you decide what is going to happen and the company has to live by your decision, even if that company doesn't agree with you. Is that the way the process works right now?

**Jo Zschomler:** If we are named an additional insured, yes the insurance company will step up and represent us as well.

**Rep. Kasper:** What if the contractor cannot get that insurance your asking to be named as an additional insured. How do you handle that circumstance?

**Jo Zschomler:** In our training under the procurement practices, that is part of it. We are saying if you are entering into contracts that require the state to be named as an additional insured, make sure you follow up and get the documentation.

**Rep. Kasper:** What if I can't get the insurance? What do you do?

**Jo Zschomler:** If that would happen we would have to look at what our requirements are. Quite honestly that has not happened in the last years. One thing we did to address that concern that was happening was we had an indemnification provision that requires a contractor. We didn't specifically state that in our language.

**Rep. Kasper:** I think I heard Mr. Ward read an email that said Dakota Fire Insurance will not issue the policy. Please correct me if I'm wrong. Most companies will not issue it so what do you do?

**Jo Zschomler:** I guess I recommend that they go somewhere else and buy it.

**Rep. Kasper:** Lets say there is none available

**Jo Zschomler:** Then we would have to look at our contract. There has got to be a reason why it's not available. We don't want to have a contract that is not insured. That has not happened yet.

**Rep. Kasper:** How many contracts per year on average do you enter into that this is an issue?

**Jo Zschomler:** I'm not even sure.

**Rep. Kasper:** Is it 100? 200? 30?

**Jo Zschomler:** There is more frequent ones going into a new biennium. We require indemnifications on insurance. A number of them are limited.

**Rep. Weiler:** You mentioned a minute ago about a lot of these contracts come right before the end of the biennium. Why is that?

**Jo Zschomler:** I meant beginning.

**Sherry Neas:** Testimony Attached.

**Rep. Boehning:** How often does this happen that a contract changes the guidelines? Isn't that illegal?

**Sherry Neas:** That is what these are implemented to avoid. Is that it would be prohibited. The requirements of the contract are appropriated into the bid document so it would be unfair to all vendors to negotiate them.

**Rep. Boehning:** So this is no longer happening?

**Sherry Neas:** My testimony was intended to tell you the history OMB has taken to prevent them from happening. We agree that it is wrong.

**Rep. Boehning:** So this doesn't happen anymore?

**Sherry Neas:** To my knowledge, no.

**Rep. Boehning:** How many contracts does this occur in?

**Sherry Neas:** I wouldn't have any quantities.

**Rep. Kasper:** You have heard the testimony of the people who are concerned about the procedures today. You know what is going on inside. Would you be able to come up with

language that would solve the concerns of the people and still be in guideline with what you are doing?

**Sherry Neas:** I can try to do that. This is a difficult issue.

**Doug Baar:** *I am here on behalf of the Attorney General. I have requested to be here to make sure this committee fully understands the bill and the effects it is going to have on the state of ND. You cannot conduct your business anymore because you have to put yourself at greater risk for a private business doing the same thing. I don't know the specific examples of people arguing over this language. I do know of some lawsuits where the state was named and there was no reason. The people with the state fair incident wanted to conduct business and they were told they were solely responsible for how they conduct business. If we get sued because of how you conduct your business whether its wrong or not, you have to defend us too. When they propose to be a vendor there, they took that into account. We need additional insurance. Therefore this is how much we will pay and agree to in this contract. Another example is the DOT incident where it resulted in the death of a woman. In those kinds of contracts the DOT has some oversight and some responsibility. Then there is a primary contract.*

**Rep. Haas:** Is there any more testimony to HB 1322? If not we will close the hearing on HB 1322.

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1322

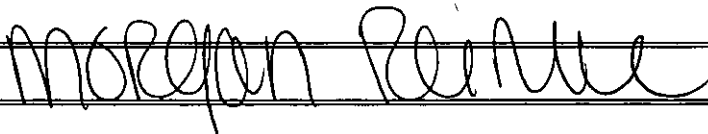
House Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Hearing Date: February 1, 2007

Recorder Job Number: 2521

Committee Clerk Signature



Minutes:

**Rep. Haas:** HB 1322 is Rep. Keizer's bill on the indemnification of the state and hold harmless provision of the state when they do contracts with contractors. Rep. Grande was the chairman of the subcommittee that worked on this. She had pretty much finished her work before she left and she sent me an email requesting that I finish it. What you have before you is an amendment that has been agreed to by the parties concerned. The parties concerned as you recall were the contractors themselves, the ND Chamber of Commerce, Risk Management Division of State Government, and OMB of State Government. I think that probably the most important section of the amendment is section 2. It still protects the state against precarious liability. It still requires the state be named as co-insured when a contractor takes their liability insurance when they get a bid. However, the section that really was needed for contractors to make it more possible for them to sign contracts for the state is the language that says after vicarious liability but may not require indemnifications for contributory negligence. If there is an accident the determination would be like 90% your fault contractor and 10% state's fault. Sole negligence or intentional misconduct of the state or its agencies, officers, and employees. Although both parties were satisfied with this language, it does solve the problem according to the Chamber of Commerce; it has been a real problem for about three years. They have been

trying to get this resolved over that length of time but they have not succeeded. Rep. Grande's subcommittee which consisted of Rep. Weiler and Rep. Potter did an excellent job of putting this together. What are you're wished on the amendment?

**Rep. Weiler:** I move the amendment.

**Rep. Dahl:** I second that.

**Rep. Haas:** Is there any discussion?

**Rep. Wolf:** Will an insurance company be able to split this out and help reduce the cost?

**Rep. Weiler:** I don't know if I can respond. I was not present at the last meeting.

**Rep. Haas:** Do you mean split it out with regards to who is liable for what at the front end?

**Rep. Wolf:** No I mean for the coverage to see if your insurance will go up and your deductibles be lower? Are there certain areas where the state will have to be liable for? Will they split that coverage up? Is there a certain policy that will say it will cover this and this, and not this and this?

**Rep. Haas:** It doesn't really work that way. When I was a subcontractor and had to name the general contractor as a co-insured, I simply had to have \$1 million of coverage per incident with a maximum coverage of \$5 million. If in the event, the way that works, there was a claim made against the insurance company, it would be at that time the determination would be made to what percent each party is liable for. That may be done by the insurance company, if it goes all the way to the court system it may be determined by the judge. The key point to this amendment is those lines that talk about how the state cannot be held immune from those things that are described.

**Rep. Potter:** Just in full disclosure, I was not at the meetings. I know there was one last week but it was when Human Services was still meeting. I don't know how many other meetings there might have been but I wasn't there.

**Rep. Haas:** I think there were two meetings but I can also tell you that I know there were several meetings when Rep. Grande wasn't present.

**Rep. Kasper:** Is Rep. Keizer ok with the amendment then?

**Rep. Haas:** Yes. I didn't talk to him specifically about this after we got it back from legislative council. I did show it to him in the rough form and he said fine.

**Rep. Potter:** I wasn't trying to throw stones I just wanted everyone to know that I was on the committee and was negligent because I wasn't at any of the meetings.

**Rep. Haas:** I'm going to do a voice vote on the amendments. Everyone in favor say 'aye' all opposed say 'no'. The amendment carries. We have the amended bill before us.

**Rep. Dahl:** I move a do pass as amended.

**Rep. Boehning:** I second that.

**Rep. Haas:** Is there any further discussion? If not we will take a roll call vote on the do pass as amended motion for HB 1322. The do pass as amended motion passes with a vote of 11-0-2.

Is there a volunteer to carry this bill?

**Rep. Haas:** I will volunteer Rep. Grande for this.

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1322

House Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Hearing Date: February 2, 2007

Recorder Job Number: 2521

Committee Clerk Signature

*Morgan Perdue*

Minutes:

**Rep. Haas:** What you have before you is an amendment that has been agreed to by the parties concerned, which are the contractors themselves, the ND Chamber of Commerce, Risk Management Division of state government, and OMB of state government. I think probably that the most important section of the amendment is section 2. It still protects the state against wrongful liability, and still requires the state to be named as co-insured when a contractor takes their liability insurance when they get a bit. However, the section that really was needed for contractors to make it more possible for them to sign contracts with the state is the language that says "may not". Both parties were satisfied with this language. It has been a real problem for the Chamber of Commerce for about 3.5 years. They have been trying to get it resolved over that length of time and they had not succeeded. Her subcommittee consisted of Rep. Weiler and Rep. Potter also did an excellent job of putting this together.

**Rep. Weiler:** I move the amendment.

**Rep. Dahl:** I second that.

**Rep. Haas:** Is there any discussion?

**Rep. Wolf:** Will an insurance company be able to split this out and help reduce costs?

**Rep. Haas:** Do you mean split it out at the front end?



**Rep. Wolf:** No, the coverage when saying that your deductible can go up if the coverage is lower. There are certain areas where the state will have to be liable for. Can you break that coverage up with a certain policy that will say will cover this and this.

**Rep. Haas:** No, it doesn't really work that way. If in the event there was a claim made against the insurance company it would be at that time that a determination would be made as to what percentage of fault each party has. That may be done by the insurance company if it goes all the way to a court system, done by a judge. A determination will be made in that regard. The key point in this amendment are those lines that talk about that the state cannot be held immune from those things they are describing here.

**Rep. Haas:** There were a lot of people that worked together and came up with this amendment. I think it's a great piece of work.

**Rep. Kasper:** Is Rep. Keizer ok with the amendment?

**Rep. Haas:** Yes. I had showed it to him in the right form and he said fine.

**Rep. Potter:** I just wanted everyone to know that I was on the committee and I was negligent because I wasn't at the meetings.

**Rep. Haas:** We will do a voice vote on the amendment. All in favor say 'aye' opposed 'no'.  
Motion carries.

**Rep. Dahl:** I move a do pass as amended.

**Rep. Weiler:** I second that.

**Rep. Haas:** Is there any more discussion? If not we will take a roll call vote on a do pass as amended motion for HB 1322. Motion carries 11-0-2. Is there a volunteer to carry this bill? I will volunteer for Rep. Grande to do so, if she prefers not to do it I will carry it.

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1322

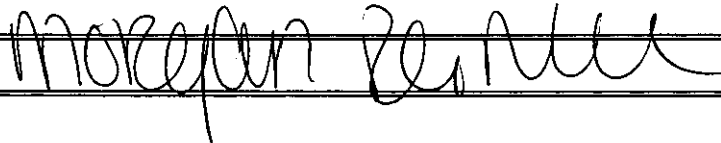
House Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Hearing Date: February 8, 2007

Recorder Job Number: 3137

Committee Clerk Signature



Minutes:

**Rep. Haas:** We have already sent this bill out of committee. It came out originally with an amendment on it. There was some concern so we need a motion to reconsider our actions.

**Rep. Weiler:** I move to reconsider our actions.

**Rep. Boehning:** I second that

**Rep. Haas:** Is there any discussion on the motion to reconsider.

**Rep. Amerman:** When does it come back?

**Rep. Haas:** As soon as we passed the move to reconsider, it brings it back in the debate phase.

**Rep. Amerman:** I just wanted to know what the concerns were and why we are reconsidering this.

**Rep. Haas:** It was where we put some phrases that changed it. We can explain it in detail when this motion is passed. We will take a voice vote, all in favor say 'aye' opposed say 'no'. Motion passes. The amendment you are looking at is 70510.0104.

**Rep. Grande:** To clarify this, I did a lot of this on email because I was gone last week. It was in that working group that got together. They hashed through and came up with what you voted on last week. The reason why we are back here is that the wording that comes in paragraph 2.

It was a long run on sentence. When it ended it landed in the liability policies portion. What we were trying to do is have it land in the contractor's contract portion and that is why it got moved up. That was the major portion of when they started looking at the two groups. They felt that the clause change fell into the wrong portion of the amendment. They didn't want it in liability, they wanted it in the contract side of things. There had been questions from industry on why 3 were in there.

**Rep. Haas:** There is one other little change in Paragraph 2 where it says "if indemnification is required" in the last sentence, in the old one it said "must require". We were informed from risk management that they don't always require and indemnification. So we added the "if indemnification is required". It actually gave more flexibility to the state and to the contractors as they were developing contracts based on the type of work and the risk involved.

**Rep. Grande:** I move the amendment.

**Rep. Froseth:** I second that.

**Rep. Haas:** Is there any more discussion on the amendment?

**Rep. Schneider:** Was there anyone from the insurance commission there?

**Rep. Grande:** The insurance that we are dealing with will come out of the insurance office.

**Rep. Schneider:** My concern is why did they bother legislation if they are already having trouble finding insurance? With this amended language will the insurance companies deal with premiums?

**Rep. Grande:** With the way it is split out and taking and changing, the way the contracts will have the indemnifications, it changes how often they would need to do that. Then each state would work with the policy for the liability.

**Rep. Kasper:** Under current law if a contractor is doing his job and an accident occurs or it is not done the right way, if the state was negligent and had a big part of the fault, the contractor

has to cover it all. With this amendment it says the state now has to step up to the plate and take liability. The contractor has to add the state and another covered entity and they pay an extra premium. That allows the liability to go to the state. In the long run it will save the contractors and the projects money.

**Rep. Haas:** I think that on that regard the language from that amendment is actually lowering the standards. This provision is going to lower premiums. If you compare the contractor's liability insurance with their level of risk, it would make sense that it might lower the premium. There are different contracts with the state agency.

**Rep. Amerman:** What happened the first time we sent it out?

**Rep. Haas:** It came out with no dissenting votes.

**Rep. Schneider:** I remember back to the testimony where there were two incidents where the state wasn't negligent.

**Rep. Haas:** Is there any further discussion on the amendment? All in favor say 'aye' all opposed 'no'. The amendment is carried.

**Rep. Dahl:** I move a do pass as amended.

**Rep. Kasper:** I second that

**Rep. Haas:** Is there any further discussion? If not we will take a roll call vote on HB 1322. The do pass as amended motion passes with a vote or 13-0-0. Will there be a volunteer to carry this bill?

**Rep. Grande:** I will.

**FISCAL NOTE**  
**Requested by Legislative Council**  
02/12/2007

Amendment to: HB 1322

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$150,000	\$75,000	\$75,000
Appropriations	\$0	\$0	\$0	\$0	\$75,000	\$75,000

**1B. County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2005-2007 Biennium			2007-2009 Biennium			2009-2011 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

**2A. Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

The Risk Management Division will need 1 FTE-a paralegal to train state employees on contract provision revisions and to process indemnification review.

**B. Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

The State's costs to defend or settle claims and lawsuits will increase.

**3. State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

**A. Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

**B. Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

\$74,000 salary cost for one additional FTE. The balance of the dollars will be spent to develop training materials to assist State employees to determine appropriate indemnification and insurance provisions and to pay increased defense and indemnification costs. If the claims and lawsuits are defended by the Office of the Attorney General, it is possible the workload increase will require hiring additional FTE.

**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

General Funds and Special Funds - Contributions to the Risk Management Fund is determined by an actuarial review. Because there was no limitation on contractor's ability to indemnify the state for the 2007-2009 biennial review, this exposure was not considered when agency contributions were determined. If HB 1322 is enacted, the additional exposure for the Fund to pay damages and attorney fees will be factored into agency contributions for the '09-'11 biennium.

<b>Name:</b>	Jo Zschomler	<b>Agency:</b>	OMB-Risk Management
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Phone Number: 328-7580

Date Prepared: 02/12/2007

**FISCAL NOTE**  
**Requested by Legislative Council**  
01/10/2007

Bill/Resolution No.: HB 1322

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>	\$0	\$0	\$0	\$0	\$0	\$0
<b>Expenditures</b>	\$0	\$0	\$0	\$250,000	\$0	\$250,000
<b>Appropriations</b>	\$0	\$0	\$0	\$0	\$125,000	\$125,000

**1B. County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2005-2007 Biennium			2007-2009 Biennium			2009-2011 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

**2A. Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

The limitation of contractor's ability to indemnify the State would require the State to incur costs to defend or settle claims and lawsuits arising from contractors providing services to the State; claims and lawsuits currently tendered to the insurance carriers of the contractors.

**B. Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Even for claims arising out of the sole negligence of the contractor, the State will be required to pay to defend an action resulting from those claims.

**3. State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

**A. Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

**B. Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

Other funds - There is an estimated \$250,000 expenditures from the Risk Management Fund to pay damages claims and costs for legal counsel to represent the State in claims and lawsuits that would have been tendered to the contractor's insurance company had the State been indemnified and named an additional insured by the contractor's carrier. If the claims and lawsuits are defended by the Office of Attorney General, it is possible the work load increase will require hiring additional FTE.

**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

General Funds and Special Funds - Contributions to the Risk Management Fund is determined by an actuarial review. Because there was no limitation on contractor's ability to indemnify the state for the 2007-2009 biennial review, this exposure was not considered when agency contributions were determined. If HB 1322 is enacted, the additional

exposure for the Fund to pay damages and attorney fees will be factored into agency contributions for the '09-'11 biennium.

<b>Name:</b>	Jo Zschomler	<b>Agency:</b>	OMB - Risk Management
<b>Phone Number:</b>	328-7580	<b>Date Prepared:</b>	01/11/2007



VR  
2/1/07

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1322

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 32-12.2 of the North Dakota Century Code, relating to indemnification and insurance provisions in state contracts.

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

**SECTION 1.** A new section to chapter 32-12.2 of the North Dakota Century Code is created and enacted as follows:

**Indemnification and Insurance requirements in state contracts.**

1. The director of the office of management and budget shall establish guidelines for indemnification and insurance provisions in contracts that may be entered by an executive branch state agency. The director shall consult with representatives of executive branch state agencies, the insurance industry, and the business community to establish and revise the guidelines and provisions. The guidelines must establish procedures for determining the appropriate indemnification and insurance provisions in contracts.
2. If a contract for services requires a provision for indemnification, the contract must require the contractor to indemnify the state and its agencies, officers, and employees for vicarious liability, but may not require indemnification for the contributory negligence, comparative degree of fault, sole negligence, or intentional misconduct of the state or its agencies, officers, and employees. The contract must require the contractor to endorse the state on the contractor's commercial general liability policy as an additional insured, unless the director of the office of management and budget or the director's designee determines a more stringent indemnification provision is appropriate.
3. This section does not apply to a contract between an executive branch state agency and another person that is the owner of private property that is being used to accommodate a state construction project.
4. The failure to comply with subsection 2 does not void any part of a contract."

Renumber accordingly

Date: 2-1-07  
Roll Call Vote #: 1

**2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. "Click here to type Bill/Resolution No."**

House Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number HB 1322

Action Taken move amendment

Motion Made By Rep Weiler Seconded By Rep Dahl

Representatives	Yes	No	Representatives	Yes	No
Rep. C. B Haas Chairman			Rep. Bill Amerman		
Rep. Bette Grande VC			Rep. Louise Potter		
Rep. Randy Boehning			Rep. Jasper Schneider		
Rep. Stacey Dahl			Rep. Lisa Wolf		
Rep. Glen Froseth					
Rep. Karen Karls					
Rep. Jim Kasper					
Rep. Lisa Meier					
Rep. Dave Weiler					

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment Rep \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

Date: 2-1-07  
Roll Call Vote #: 1

**2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. "Click here to type Bill/Resolution No."**

House Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number HB 1322

Action Taken DO PASS AS Amended

Motion Made By Rep Dahl Seconded By Rep Boehning

Representatives	Yes	No	Representatives	Yes	No
Rep. C. B Haas Chairman	X		Rep. Bill Amerman	X	
Rep. Bette Grande VC			Rep. Louise Potter	X	
Rep. Randy Boehning	X		Rep. Jasper Schneider		
Rep. Stacey Dahl	X		Rep. Lisa Wolf	X	
Rep. Glen Froseth	X				
Rep. Karen Karls	X				
Rep. Jim Kasper	X				
Rep. Lisa Meier	X				
Rep. Dave Weiler	X				

Total (Yes) 11 No 0

Absent 2

Floor Assignment Rep. Grande

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1322: Government and Veterans Affairs Committee (Rep. Haas, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). HB 1322 was placed on the Sixth order on the calendar. *Rep CB Haas*

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 32-12.2 of the North Dakota Century Code, relating to indemnification and insurance provisions in state contracts."

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

**SECTION 1.** A new section to chapter 32-12.2 of the North Dakota Century Code is created and enacted as follows:

Indemnification and insurance requirements in state contracts.

1. The director of the office of management and budget shall establish guidelines for indemnification and insurance provisions in contracts that may be entered by an executive branch state agency. The director shall consult with representatives of executive branch state agencies, the insurance industry, and the business community to establish and revise the guidelines and provisions. The guidelines must establish procedures for determining the appropriate indemnification and insurance provisions in contracts.
2. If a contract for services requires a provision for indemnification, the contract must require the contractor to indemnify the state and its agencies, officers, and employees for vicarious liability, but may not require indemnification for the contributory negligence, comparative degree of fault, sole negligence, or intentional misconduct of the state or its agencies, officers, and employees. The contract must require the contractor to endorse the state on the contractor's commercial general liability policy as an additional insured, unless the director of the office of management and budget or the director's designee determines a more stringent indemnification provision is appropriate.
3. This section does not apply to a contract between an executive branch state agency and another person that is the owner of private property that is being used to accommodate a state construction project.
4. The failure to comply with subsection 2 does not void any part of a contract."

Renumber accordingly

Date: 2-8-07  
Roll Call Vote #: 1

**2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. "Click here to type Bill/Resolution No."**

House Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number HB 1322

Action Taken Consider amendment

Motion Made By Rep. Weiler Seconded By Rep. Boehning

Representatives	Yes	No	Representatives	Yes	No
Rep. C. B Haas Chairman			Rep. Bill Amerman		
Rep. Bette Grande VC			Rep. Louise Potter		
Rep. Randy Boehning			Rep. Jasper Schneider		
Rep. Stacey Dahl			Rep. Lisa Wolf		
Rep. Glen Froseth					
Rep. Karen Karls					
Rep. Jim Kasper					
Rep. Lisa Meier					
Rep. Dave Weiler					

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1322

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 32-12.2 of the North Dakota Century Code, relating to indemnification and insurance provisions in state contracts.

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

**SECTION 1.** A new section to chapter 32-12.2 of the North Dakota Century Code is created and enacted as follows:

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2. If a contract for services requires a provision for indemnification, the contract must require the contractor to indemnify the state and its agencies, officers, and employees for vicarious liability, but may not require indemnification for the contributory negligence, comparative degree of fault, sole negligence, or intentional misconduct of the state or its agencies, officers, and employees, unless the director of the office of management and budget or the director's designee determines a more stringent indemnification provision is appropriate. If indemnification is required, the contract must require that the state be endorsed on the contractor's commercial general liability policy as an additional insured or must require an equivalent form of protection for the state.
3. This section does not apply to a contract between an executive branch state agency and another person that is the owner of private property that is being used to accommodate a state construction project.
4. The failure to comply with subsection 2 does not void any part of a contract."

Renumber accordingly

Date: 2-8-07  
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. "Click here to type Bill/Resolution No."

House Government and Veterans Affairs

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

HB 1322

Action Taken

move amendment

Motion Made By

Rep Grande

Seconded By

rep Froseth

Representatives	Yes	No	Representatives	Yes	No
Rep. C. B Haas Chairman			Rep. Bill Amerman		
Rep. Bette Grande VC			Rep. Louise Potter		
Rep. Randy Boehning			Rep. Jasper Schneider		
Rep. Stacey Dahl			Rep. Lisa Wolf		
Rep. Glen Froseth					
Rep. Karen Karls					
Rep. Jim Kasper					
Rep. Lisa Meier					
Rep. Dave Weller					

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment

Rep.

If the vote is on an amendment, briefly indicate intent:

Date: 2-8-07  
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. "Click here to type Bill/Resolution No."

House Government and Veterans Affairs

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

HB 1322

Action Taken

DO pass as amended

Motion Made By

Rep Dahl

Seconded By

Rep Kasper

Representatives	Yes	No	Representatives	Yes	No
Rep. C. B Haas Chairman	X		Rep. Bill Amerman	X	
Rep. Bette Grande VC	X		Rep. Louise Potter	X	
Rep. Randy Boehning	X		Rep. Jasper Schneider	X	
Rep. Stacey Dahl	X		Rep. Lisa Wolf	X	
Rep. Glen Froseth	X				
Rep. Karen Karls	X				
Rep. Jim Kasper	X				
Rep. Lisa Meler	X				
Rep. Dave Weiler	X				

Total (Yes)

13

No

6

Absent

0

Floor Assignment

Rep. Grande

If the vote is on an amendment, briefly indicate intent:



**REPORT OF STANDING COMMITTEE**

**HB 1322: Government and Veterans Affairs Committee (Rep. Haas, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1322 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 32-12.2 of the North Dakota Century Code, relating to indemnification and insurance provisions in state contracts.

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

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2. If a contract for services requires a provision for indemnification, the contract must require the contractor to indemnify the state and its agencies, officers, and employees for vicarious liability, but may not require indemnification for the contributory negligence, comparative degree of fault, sole negligence, or intentional misconduct of the state or its agencies, officers, and employees, unless the director of the office of management and budget or the director's designee determines a more stringent indemnification provision is appropriate. If indemnification is required, the contract must require that the state be endorsed on the contractor's commercial general liability policy as an additional insured or must require an equivalent form of protection for the state.
3. This section does not apply to a contract between an executive branch state agency and another person that is the owner of private property that is being used to accommodate a state construction project.
4. The failure to comply with subsection 2 does not void any part of a contract."

Renumber accordingly

2007 SENATE JUDICIARY

HB 1322

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1322

### Senate Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: March 5, 2007

Recorder Job Number: 4400

Committee Clerk Signature

*Mona L. Solby*

**Minutes:** Relating to indemnification and insurance provisions in state contracts.

**Senator David Nething**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following hearing:

#### Testimony in Favor of the Bill:

**Bill Shalhoob**, ND Chamber of Commerce Introduced the bill and gave testimony

**Sen. Nething** asked (meter 2:41) what the problem is. The state asks for indemnification from a supplier for all problems that may arise. Even if you are a small supplier, you can be held liable for 100% of an issue when you contract with the state. The state tried to shift as much of its responsibility to other people that it could. Sen. Nething stated that this bill is a "shift of liability". Yes.

**Sen. Nelson** stated that the bill is engrossed, what did the house do? He referred to the original bill being much shorter, many people including the A.G.'s office had problems with it. This is the agreement that we came up, after many hours, that satisfied what we were looking for and what there concerns were. In effect it is a hog house bill but it still does what we intended it to do

**Sen. Fiebiger** questioned page 1, line 22; how can you get third party requirement to do what we are asking them to do? (meter 5:21) He spoke to the risk management procedure and the process of doing this.

**Rep. George Keiser**, Dist. #47 this bill has been in development for 4 years. We have worked with the agencies and could not find a solution. Now we have one. It is in two parts; contributory and responsibility. When you have several parties involved in a contract and to what degree do each have to be responsible for there own actions within the environment they are working in. He reviewed the current actions of the state. The party with the state not only has to defend themselves but also defend the state. The second issue is; is the coverage really there to do this. He spoke of different situations, wondering that, there is less coverage then what people realize. Most insurance companies don't do the coverage people think they are. In our current system we do not have banks of attorneys reviewing all of our contracts.

**Sen. Nething** stated on page 2, line 4, failure to comply does not void the contract? If they do not come up with the indemnification the contract would still be in place with out it.

**Sen. Potter**, Dist # 35 (meter 12:13) as an Executive Director of the Ft. Lincoln Foundation – Foundations Indemnity Provision– Att. #2 Spoke of his personal situation with the foundation and the inability to negotiate

**Sen. Nething** questioned him if he had any problem with the bill being rewritten? No

**Brant P. Malsam**, Sr. VP of Ultig Engineering (meter 15:20) Att. #3.

**Evan Mandigo**, Insurance and Risk Management (meter 16:10) – Att. # 4 gave testimony and spoke to working with the "Hog House" group and being in agreement to the final product.

**Brian Bowker**, Marketing Manager for Dakota Fire Insurance (meter 21:51) gave his testimony – Att. #5

**Sen. Nothing** asked **Mr. Bowker** (meter 23:32) is Dakota Fire Ins. Allows its policy holders to add the state to its policy? Yes and spoke of the process and its extra cost. They prefer that they tell the company up front. They reviewed the term "vicarious", page 1, line 16. **Sen. Nothing** stated, what your company currently does, under this bill would become law, and eliminate the "gap", that currently exists. **Sen. Fiebiger** questioned sec. 2, "must" at the beginning and "unless" at the end? This bill is a compromise of many things. It is better than we have had in the past. Spoke as to why (meter 26:50)

**Testimony Against the bill:**

None

**Testimony Neutral to the bill:**

**Jo Zschomler**, ND OMB Risk Management (meter 27:27) this will be a good course of action for the state to use and spoke to the question of flexibility, why and gave examples. She also stated that they do not want to be an adversarial to the contractors. She also spoke of Sub Failure to comply in Sub Sec. #4 and the extensive training with employees to have them identify if the coverage is not adequate to come to the Director of OMB or designee to get a more stringent clause (meter 29:29) spoke to this in detail.

**Doug Bar**, Civil Litigation Attorney in the A.G.'s office (meter 32:22) spoke to the Sub Sec. 4 requirements to comply with Sub Section 2 in detail being a contractual agreement not a law.

**Sen. Nothing** asked him if he was satisfied with the wording? It could be clearer. **Sen. Nothing** requested him to provide an amendment.

**Senator David Nothing**, Chairman closed the hearing.

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1322**

### Senate Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: March 12, 2007

Recorder Job Number: 4876

Committee Clerk Signature *Maura L. Salby*

**Minutes:** Relating to indemnification and insurance provisions in state contracts.

**Senator David Nething**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:


**Sen. Nething** referred to the amendment presented by Dough Bar, stating the amendment was for clarification of it relating only to the state.

**Sen. Lyson** made the motion to Do Pass Amendment – Att. #1 from today and **Sen. Nelson** seconded the motion. All members were in favor and the motion passes.

**Sen. Lyson** made the motion to Do Pass HB 1322 as amended and **Sen. Nelson** seconded the motion. All members were in favor and the motion passes.

Carrier: **Sen. Nething**

**Senator David Nething**, Chairman closed the hearing.

  
3-12-07

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1322

Page 2, line 4, after "failure" insert "of the state"

Renumber accordingly

Date: 3-12-07

**Roll Call Vote #** 1 of 2

## 2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

**BILL/RESOLUTION NO.** 1322

Senate	Judiciary	Committee

☐ Check here for Conference Committee

**Legislative Council Amendment Number** \_\_\_\_\_

Action Taken Do Pass Doug Bar Amend. ATT #1

Motion Made By Sen. Lyson Seconded By Sen. Nelson

[illegible]

Total Yes 6 No 0

**Absent** 1

### Floor Assignment

**If the vote is on an amendment, briefly indicate intent:**



**Roll Call Vote #** 2 of 2

## 2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

**BILL/RESOLUTION NO.** 1322

<b>Senate</b>	<b>Judiciary</b>	<b>Committee</b>
---------------	------------------	------------------

☐ Check here for Conference Committee**Legislative Council Amendment Number**

Action Taken Do Pass As Amended

Motion Made By Sen. Lyson Seconded By Sen. Nelson

[illegible]

Total Yes 6 No 8

Absent 0

Floor Assignment Sen. Netting

**If the vote is on an amendment, briefly indicate intent:**

**REPORT OF STANDING COMMITTEE**

HB 1322, as engrossed: Judiciary Committee (Sen. Nething, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** and **BE REREFERRED** to the Appropriations Committee (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1322 was placed on the Sixth order on the calendar.

Page 2, line 4, after "failure" insert "of the state"

Renumber accordingly

2007 SENATE APPROPRIATIONS

HB 1322

# 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1322

Senate Appropriations Committee

☐ Check here for Conference Committee

Hearing Date: 03-19-07

Recorder Job Number: 5257

Committee Clerk Signature



Minutes:

Chairman Holmberg opened the hearing on HB 1322.

Bill Shaloob, representing the ND Chamber of Commerce, testified by explaining HB 1322; indicating the rewrites the indemnification provision with providers of goods and services in state contracts. The need for the indemnification began when the states sovereign immunity from lawsuit was voided by the ND Supreme Court. Members of the community have tried to resolve philosophical differences with the state since that time and have been unable to do so until this session. The bill was brought before the house receiving a good deal of discussion between the attorney general, office of risk management and the business community and we arrived at the engrossed bill. All issues have been worked out and everyone is in agreement.

Previously, if the state was 99 percent at fault and the business was 1 percent at fault, the business had to cover 100 percent of the claim. This bill sets up more fair business relationship between parties.

Senator Krauter questioned a new version of the fiscal note. The response was either Legislative Council has not asked for updated fiscal note or it hasn't arrived.

Jo Schumler, Director, Risk Management, responded to questions indicating the February 12 fiscal note is the most recent; it did not change after the amendments.

There was no other testimony.

Vice Chairman Grindberg closed the hearing on HB 1322.

Hearing closed.

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1322

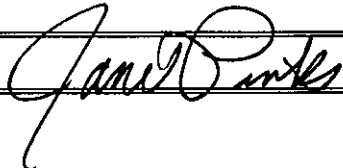
Senate Appropriations Committee

☐ Check here for Conference Committee

Hearing Date: 03-21-07

Recorder Job Number: 5424

Committee Clerk Signature



Minutes:

Chairman Holmberg opened the hearing on HB 1322 indicating it is about indemnification and insurance provisions in state contracts. There is a first engrossment with senate amendments. He indicated the Attorney General's office had concerns and they asked me to hold it until they checked on something and they came back today saying they check and there was nothing. The current fiscal note is dated 2/12. He then read the minutes as a review.

Senator Tallackson moved a do pass on HB 1322, Senator Wardner seconded. Discussion followed. A roll call vote was taken resulting in 9 yes, 5 no, 0 absent. The motion passed. Senator Nething will carry the bill.

Chairman Holmberg closed the hearing on HB 1322.

Date:  
Roll Call Vote #:

**2007 SENATE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. 1322**

Senate Appropriations Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken

DP

Motion Made By

Tallackson

Seconded By

Wardner

Senators	Yes	No	Senators	Yes	No
Senator Ray Holmberg, Chrm	✓		Senator Aaron Krauter		✓
Senator Bill Bowman, V Chrm	✓		Senator Elroy N. Lindaas		✓
Senator Tony Grindberg, V Chrm	✓		Senator Tim Mathern		✓
Senator Randel Christmann	✓		Senator Larry J. Robinson		✓
Senator Tom Fischer	✓		Senator Tom Seymour		✓
Senator Ralph L. Kilzer	✓		Senator Harvey Tallackson	✓	
Senator Karen K. Krebsbach	✓				
Senator Rich Wardner	✓				

Total (Yes) 9 No 5

Absent \_\_\_\_\_

Floor Assignment

Nothing Jud

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1322, as engrossed and amended: Appropriations Committee (Sen. Holmberg, Chairman) recommends DO PASS (9 YEAS, 5 NAYS, 0 ABSENT AND NOT VOTING).** Engrossed HB 1322, as amended, was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

HB 1322



Testimony  
HB 1322

Presented by: Sherry Neas, State Procurement Manager  
OMB, State Procurement Office

Before: Government and Veterans Affairs  
Representative Haas, Chairman

Date: January 18, 2007

Chairman Haas and members of the committee, my name is Sherry Neas. I am the state procurement manager for the Office of Management and Budget.

House Bill 1322 seeks to ensure businesses are made aware of the indemnification provisions in state service contracts. This bill requires indemnification provisions to be "conspicuously located," specifies a minimum font size, and sets forth specific indemnification language. We believe that this legislation is not necessary because OMB, in collaboration with the Office of the Attorney General, has already implemented requirements that indemnification and insurance provisions be stated in bid documents and contracts.

Prior to the 2003 legislative session, there were no laws, rules or guidelines related to procurement of services. In 2003, OMB appeared before this committee regarding a bill related to procurement of services. That legislation was enacted, and OMB worked with legislators, state agencies, the offices of the Attorney General and State Auditor, and other public procurement professionals to promulgate rules and develop guidelines, templates and a training program for state procurement officers.

During that time, concerns about the state's indemnification and insurance requirements were raised by North Dakota businesses. Business leaders met with members of the Governor's Office, Office of Management and Budget, and Office of the Attorney General to discuss their concerns. During that time, Jo Zschomler and I met with members from the Greater North Dakota Chamber of Commerce. There were concerns about indemnification and insurance requirements, but the primary concern was that state agencies sometimes changed indemnification and insurance requirements after a contract was awarded. For example, a state agency required certain indemnification and insurance provisions in their bid document. Businesses submitted their bids. Then, after the state agency evaluated bids and selected the successful bidder, the state agency might allow the successful bidder to negotiate lesser indemnification and insurance requirements. This created an unfair situation--other bidders could have submitted lower prices if they had known the indemnification and insurance requirements could be changed.

OMB and the Office of the Attorney General worked collaboratively to develop rules, guidelines and templates related to indemnification and insurance to prevent this problem and help state agencies make better decisions when selecting indemnification and insurance provisions.

Testimony  
HB 1322

A chapter entitled, "Managing Contractual Risk," was created within the North Dakota Administrative Code related to state procurement practices (N.D.A.C. 4-12-07). These rules require state agencies to do a risk analysis when planning a contract for goods or services. These rules also require any insurance requirements to be stated in the bid document. Indemnification provisions always have a corresponding insurance requirement.

Solicitation and contract templates were created with several options for indemnification and insurance requirements. Guidelines were created to help state agencies select the appropriate kind of indemnification and insurance requirements to incorporate into bid documents and contracts.

When the requests for bids or proposals are issued, bidders are instructed to read the indemnification and insurance provisions, ask questions, and state any objections. If there are objections, the state agency consults Risk Management Division and their legal counsel to see if the indemnification and insurance requirements can be changed. If changes are made, the state agency must notify the bidders with an amendment to the solicitation. Procurement laws allow a bidder to protest a solicitation and appeal to the OMB State Procurement Office if they are not satisfied with the agency's decision.

OMB also implemented mandatory training related to risk management for state procurement officers that purchase over \$2,500. As an added incentive for agencies to comply, attending this procurement training was made a requirement for receiving a discount from Risk Management on risk management premiums.

These established procedures help state agencies make better decisions regarding what indemnification and insurance to require in state contracts. These procedures also ensure that bidders know the indemnification and insurance requirements before they are ever awarded a contract.

Having specific indemnification language prescribed in law, as proposed in HB 1322, would prevent state agencies from tailoring the indemnification language in service contracts to fit the situation. Current administrative rules require state agencies to assess the potential risk of each contract being planned, and select the appropriate indemnification and insurance language based upon the level of risk.

In conclusion, we believe the intent of HB 1322, to ensure indemnification requirements are set forth in state contracts, has already been accomplished in state procurement administrative rules and guidelines.

This concludes my testimony. I will be happy to answer any questions you may have.

## CHAPTER 4-12-07 MANAGING CONTRACTUAL RISK

Section	
4-12-07-01	Risk Management Analysis
4-12-07-02	Insurance Requirements
4-12-07-03	Bid Security
4-12-07-04	Performance Bonds
4-12-07-05	Payment Bonds

**4-12-07-01. Risk management analysis.** In preparing a solicitation or contract, the procurement officer will consider the potential risks involved in the contract for procurement of commodities or services to determine reasonable measures that can be taken to mitigate those risks, including the use of insurance, bonding, or other types of security.

**History:** Effective August 1, 2004.

**General Authority:** NDCC 54-44.4-04

**Law Implemented:** NDCC 54-44.4-01, 54-44.4-04

**4-12-07-02. Insurance requirements.** As a result of a risk management analysis, it may be determined that the contractor will be required to acquire and maintain insurance. The insurance requirements must be stated in the solicitation.

**History:** Effective August 1, 2004.

**General Authority:** NDCC 54-44.4-04

**Law Implemented:** NDCC 54-44.4-01, 54-44.4-04

### **4-12-07-03. Bid security.**

1. As a result of a risk management analysis prior to the solicitation being issued, security may be required to protect the interests of the state and ensure that a vendor will not withdraw a bid or proposal prior to contract award. In this circumstance, a bid bond, certified check, or cashier's check drawn on the Bank of North Dakota or a federally insured bank, or other form of bid security acceptable to the purchasing agency, may be required to accompany the bid or proposal.
2. When a bid bond is required, the bid or proposal must specify the form and amount of the bond, up to five percent of the full amount of the bid or proposal, unless it is in the best interest of the state to specify another amount.
3. The bidder or offeror must sign any bid bond as principal, and the bond must be signed by a surety company licensed by the insurance commissioner to do business in the state. If the surety on a bond has its authority to do business in this state revoked or if for any reason it ceases to do business in the state, the bidder or offeror must promptly obtain another surety on the bond. The bond must be noncancelable,

- regardless as to whether the bonding company remains licensed in the state, and must remain in effect until a replacement bond is filed.
4. The bond must be conditioned on full performance of all obligations imposed on the bidder or offeror, including the obligation to keep the price firm for the period specified in the solicitation and the obligation to file a performance bond when required. The bond must provide that upon failure to perform any obligations the state will recover from the bidder and the surety, or either, any damages suffered because of failure to perform.
  5. The purchasing agency may allow a vendor to file a continuing bond good for all bids or proposals made during a certain period of time up to a stated amount.
  6. Bid bonds or other form of bid security submitted by unsuccessful bidders or offerors will be returned as soon as possible after the award is made. The purchasing agency may retain the bid bonds of those unsuccessful bidders or offerors determined to be reasonably susceptible for award for use in the event of default by the successful bidder or offeror. The bid bond or other form of security submitted by the successful bidder or offeror will be returned as soon as possible after the contract is awarded or as soon as the successful bidder or offeror has filed a performance bond if one is required.

**History:** Effective August 1, 2004.

**General Authority:** NDCC 54-44.4-04

**Law Implemented:** NDCC 54-44.4-01, 54-44.4-04

**4-12-07-04. Performance bonds.**

1. As a result of a risk management analysis prior to the solicitation being issued, the successful bidder or offeror may be required to file a performance bond, certified check, or cashier's check drawn on the Bank of North Dakota or a federally insured bank, or other form of surety deposit acceptable to the purchasing agency.
2. The state may require that the bond, certified check, or cashier's check be filed within a specified number of days after the award is made or the contract may be canceled and the vendor will be liable for any damages caused by failure to file the bond, certified check, or cashier's check.
3. When a performance bond is required, the solicitation must specify the form and amount of the bond. The amount of the performance bond must be adequate to cover the risk assumed by the state, depending on the nature and circumstances of the contract, up to one hundred percent of the contract amount.

4. The successful bidder or offeror must sign any bid bond as principal, and the bond must be signed by a surety company licensed by the insurance commissioner to do business in the state. If the surety on a bond has its authority to do business in this state revoked or if for any reason it ceases to do business in the state, the bidder or offeror must promptly obtain another surety on the bond. The bond must be noncancelable, regardless as to whether the bonding company remains licensed in the state, and must remain in effect until a replacement bond is filed.
5. The bond must be conditioned on full performance of all obligations imposed on the vendor by the contract with the state. The bond must provide that if the vendor fails to perform any obligations, the state may recover from the vendor and the surety, or either of them, any damages suffered because of failure to perform.

**History:** Effective August 1, 2004.

**General Authority:** NDCC 54-44.4-04

**Law Implemented:** NDCC 54-44.4-01, 54-44.4-04

**4-12-07-05. Payment bonds.**

1. A payment bond may be required by the purchasing agency for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of work provided for in the contract.
2. When a payment bond is required, the bid or proposal must specify the form and amount of the bond, up to one hundred percent of the contract amount.

**History:** Effective August 1, 2004.

**General Authority:** NDCC 54-44.4-04

**Law Implemented:** NDCC 54-44.4-01, 54-44.4-04

**Testimony of Bill Shalhoob  
North Dakota Chamber of Commerce  
HB 1322  
January 18, 2007**



Mr. Chairman and members of the committee, my name is Bill Shalhoob and I represent the North Dakota Chamber of Commerce. NDCC also represents 16 local chambers with a total of 7,236 members. A list of those chambers is attached.

We are here today on behalf of the business community in support of HB 1322. This bill rewrites the indemnification provision used between North Dakota and service providers when the State contracts for goods or services. The need for an indemnification began when the State's sovereign immunity from lawsuit was voided by the ND Supreme Court. Members of the business community have tried to resolve philosophical differences with the State since that time but the parties who will speak to you on specifics today believe that those efforts have not resulted in change that is meaningful enough for them to do business on a regular basis with the State. Hence they have turned to the legislature for help.

Before asking them to provide details I would like to make two points. First and foremost, this is a fairness issue. We are not trying to force the State to accept negligence it is not responsible for. North Dakota will be responsible only insofar as it contributes to any negligence that occurs. There is a fiscal note of \$375,000.00 attached to this bill. We submit the existence of this note goes to the base issue. Apparently North Dakota has successfully shifted \$375,000.00 in costs from itself to its providers and their insurers. It

seems to me if a business is small or under insured they will sign the current indemnification knowing there is nothing to collect should something happen. In contrast a firm who may be more substantial and truly tries to fulfill the terms of the provision is unable to sign off on the clause because their insurance company will not provide the coverage and hence is restricted from doing business with the State.

Second, the provision is unevenly applied. You will hear testimony from suppliers who have successfully negotiated this onerous provision out of their agreement because they refused to sign a contract containing the clause and the State wanted or needed the service enough to void the provision.

Thank you for the opportunity to appear before you today. I would be happy to answer any questions before asking affected businesses and insurance agents to provide you with specific problems they are experiencing with current policy and why we believe support of HB 1322 will correct those problems.



**The following chambers are members of a coalition that support our 2007  
Legislative Policy Statements:**

**Beulah Chamber of Commerce - 107**

**Bismarck - Mandan Chamber of Commerce - 1080**

**Cando Area Chamber of Commerce - 51**

**Chamber of Commerce Fargo Moorhead - 1800**

**Crosby Area Chamber of Commerce - 50**

**Devils Lake Area Chamber of Commerce - 276**

**Dickinson Chamber of Commerce - 527**

**Greater Bottineau Area Chamber of Commerce - 153**

**Hettinger Area Chamber of Commerce - 144**

**Langdon Chamber of Commerce - 112**

**Minot Chamber of Commerce - 700**

**North Dakota Chamber of Commerce - 1058**

**Wahpeton Breckenridge Area Chamber of Commerce - 293**

**Watford City Area Chamber of Commerce - 84**

**Williston Chamber of Commerce - 401**

**West Fargo Chamber of Commerce - 400**

**Total Businesses Represented = 7236 members**



STATEMENT OF GERALD P. FLODEN  
PRESIDENT AND CHIEF EXECUTIVE OFFICER  
OF ULTEIG ENGINEERS, INC. BEFORE THE  
HOUSE STANDING COMMITTEE ON  
GOVERNMENT AND VETERAN AFFAIRS

January 18, 2007

Chairman Haas, Vice Chairman Grande, and distinguished Members of this Committee, Good Afternoon, I am Gerald P. Floden, President and Chief Executive Officer of Ulteig Engineers, a North Dakota Corporation with offices in Fargo and Bismarck.

By way of background, I am resident of Fargo and a graduate of North Dakota State University. I am a North Dakota Registered Land Surveyor and Professional Engineer. I have been with Ulteig Engineers for more than 30 years and in addition to serving as Ulteig's Chief Executive officer I also serve as a member of their Board of Directors. This is my first appearance before this Committee.

Thank you for allowing me the opportunity to testify before you with respect to House Bill 1322. This important legislation prevents the State from shifting the cost of its own negligence to that of its contract partners. House Bill 1322 seeks to level the playing field and ensure that no person providing services to the State be required to indemnify the State in an amount that is disproportionate to that person's own culpability.

At Ulteig our professionals deliver engineering, planning and surveying solutions to clients across the State of North Dakota. By way of example, Ulteig was directly involved in the design of the Bismarck Airport, Minot's Water Treatment Plant, and currently the Memorial Bridge Reconstruction. Ulteig helps the State of North Dakota build and sustain vital communities.

When I walk the halls of Ulteig, I can see the great pride that our employees take in working on projects for the State. These projects impact their lives. I personally can testify to the great satisfaction that I have felt providing needed services to the State. I feel a deep sense of loyalty and drive to be part of our State's growth and improvement.

When the State engages an engineer or land surveyor for services they do so through a contract. The form of these contracts varies from agency to agency, but each typically includes a clause called an "Indemnity" provision. Indemnity provisions come in many forms. Just to give you an idea of what an indemnity provision looks like consider this example:

If service provider in the course of providing its services, causes damage, and the State (its contract partner) is sued for those damage, the service provider will indemnify (pay the State back) for the losses it suffers because of the service provider's own negligence.

As a general rule this type of provision reinforces a fundamental principle of fairness: people should take responsibility for the damages caused by their actions.

In my experience, however, I have found that the State of North Dakota frequently requires a much broader and more invasive indemnity provision in their service contracts. Their indemnity provisions are extremely one-sided, uninsurable, and chilling to a friendly business environment.

Unlike the sample provision I described to you, the State's indemnity provisions often ask our professionals to defend, indemnify and hold harmless the State, its agencies, officers and employees from *any and all* claims of *any* nature including *all* costs, expenses and attorney's fees that result or arise *in any way* from the arrangement between the State and the business.

In short, if the State is named in a lawsuit, and that lawsuit arises out of facts or circumstances relating to its contract with Ulteig, Ulteig must defend the State in the lawsuit and pay for the State's defense. But the inequity does not end there.

If the State loses the lawsuit, Ulteig must hold the State harmless (accept the State's responsibility) and indemnify the State (pay the State back) for any damages it is ordered by the court to pay. Under the State's indemnification provision, the State will only defend itself, accept responsibility and pay damages when the State is solely (100%) negligent.

To put this in perspective: consider a contract where an accident occurs and the State is 99% at fault and Ulteig is 1% at fault. Assume the accident causes \$100,000 in damage and the State is sued. Under the State's current indemnification provision, Ulteig would be required to defend the State in the lawsuit, pay for all the State's legal expenses, accept full responsibility (100%) for the accident, and pay the entire \$100,000 in damages.

The State's effort to shift risk, liability, and expense via its Indemnification clause cuts directly against the principal of fundamental fairness: people should take responsibility for the damages caused by their actions. It creates an unfriendly and fundamentally unfair business relationship.

As a professional service provider to the State, when faced with the State's overly-aggressive indemnification clause, I have three choices: (1) walk away from the deal; (2) attempt to negotiate the clause to a more fair and balanced position; or (3) accept the clause and the unfair shifting of risk and cost.

While it may seem easy to walk away from a bad deal, remember this is work for the State of North Dakota. I and my colleagues at Ulteig highly value our relationship with the State. We take great pride in our work for the State. We want to be involved in the growth and development of our State. This is important work. So there is great sense of

urgency to find a way to participate. I have to believe this is a shared feeling of service providers across this great State.

At Ulteig we are fortunate enough to have the resources to engage the State in negotiations over contract terms. These negotiations often take substantial time and effort on both sides of the table. In some cases, we have even been successful in convincing the State to modify the unfair language of their indemnity provision.

But, with each new project comes a new contract and a new negotiation. Each time we go back to the negotiation table, we sense that our relationship with the State gets ever more strained. We worry: "Will the State want to continue doing business with someone who constantly questions their contract terms?" This creates a great deal of internal pressure and forces the question: "Should we accept these unreasonable terms in order to preserve our relationship with the State?"

As I stand here today, I refuse to believe that the State wants to use its bargaining power to pressure North Dakota businesses into accepting unfair contract terms. We in North Dakota are above that kind of coercive tactic.

For those small businesses across our State that do not have the resources or the confidence to attempt to modify the State's indemnification provision, their choice is bleak: "Do I avoid doing business with the State or do I use my own resources to self-insure against damages caused by the State's actions?"

Even where these businesses choose to bet their company and accept the unfair indemnity provision, the protection the State seeks is illusory. Should the State seek a sizeable indemnity recovery against a small business, without insurance, small business will likely not provide a very deep pocket, and instead only add another North Dakota business to the bankruptcy rolls.

In conclusion, it is of great importance to me as a citizen, professional engineer and as President of a North Dakota corporation that the State not be able to unreasonably or unjustifiably shift the risk of its own negligence or misconduct to its contract partners. If H.B. 1322 is not adopted, businesses large and small will continue to be compromised at the bargaining table. Put simply, doing business with the State of North Dakota should not be a bet the company proposition.

Thank You.

**Testimony**  
**House Bill Number 1322**  
**House Government and Veteran Affairs**  
**Representative C.B. Haas Chairman**  
**January 18, 2007**

Chairman Haas and members of the House Government and Veterans Affairs Committee, my name is Evan Mandigo and I am testifying in support of HB 1322.

I have worked in the Insurance and Risk Management profession in various roles for nearly 38 years following a 2 year stint with the US Army in the late 60's, 29 of it in North Dakota. I hold 2 professional certifications awarded by nationally recognized insurance education organizations. I have served on the state's risk management committee, taught many insurance education courses, and served for a time on the state exam committee for agent's licensing testing. At various stages of my career, I was employed as an insurance company underwriter, insurance agent, and now by Basin Electric as its Director of Risk & Insurance, a position I have held since 1989. I have been a licensed insurance agent in North Dakota since 1978.

I support HB 1322 for a number of reasons, but I would like to focus on one in particular which illustrates a huge concern I have about the state's current ability to transfer by contract its negligence to contractors or other service providers.

Larger firms have staff and resources to object to contract terms they consider problematic. I would like to relate an experience we had to

illustrate the difficult position business owners may be forced into by agreeing to the state's attempt to transfer its negligence by contract.

Several years ago, my company was renting space to a state agency and we received a draft lease agreement which demanded we accept not only our negligence as a landlord, but also to accept that of the agency's for the space they wanted in our building. On behalf of my employer, I said no telling the agency and the state risk manager accepting the state's negligence was not going to happen. After some dialogue, we were successful in re-writing the agreement on an equitable basis, which I believe is all this bill seeks to do-create equity.

The point I am trying to make is large businesses with the knowledge and resources to resist accepting the state's negligence by contract will be OK. Smaller business face the risk of getting run over or induced to accept contract terms that may well be uninsurable. That may force them to bet their balance sheet in exchange for a service contract or rental agreement hoping nothing will happen. In my professional judgment, that is a lousy bet. They may sign the agreement even after securing the advice of seasoned professionals like Mr. Buresh and Mr. Bain.

I participated in a group of interested parties attempting to reconcile differences with the state's contracting terms. I recall vividly a comment made by the state risk manager. She acknowledged that yes the state could transfer its negligence to a contractor but "we would never enforce the provision". I believe it is very dangerous for any businessman to depend on the generosity of the state assuming they would not enforce a contract term that gives them cover. My experience in the private sector tells me no one is going to walk away from an enforceable contract term particularly after

something bad has happened. That is why I spend a lot of time trying to get the Insurance and Indemnity terms in Basin Electric contracts right at the outset. We assume the contract terms mean exactly what they say and post event relief from the indemnity language is not likely. My response to her observation is if the state would never do that, why even have the ability to do so?

The substance of HB 1322 is to create equity between the state and those who seek to do business with its agencies. Each party to a contract with the state should be on equal footing. In my judgment, this is not the case now.

HB 1322 puts service providers and the state on equal footing. For this reason and for those stated by others, I urge a do pass recommendation from the House Government and Veterans Affairs Committee.

I would be happy to respond to any questions you may have.

**TESTIMONY BY JO ZSCHOMLER, DIRECTOR**  
**OMB Risk Management Division**  
**Government and Veterans Affairs Committee**  
**House Bill 1322**  
**January 18, 2006**

Mr. Chairman, and members of Government and Veterans Affairs Committee, my name is Jo Zschomler. I am the Director of the Risk Management Division of OMB. I appear today to provide information on House Bill 1322.

Liability coverage for the state of North Dakota, its agencies and employees is provided by the Risk Management Fund. The State Tort Claims Act, N.D.C.C. ch. 32-12.2, enacted by the 1995 Legislature, governs the administration of the Fund. The day-to-day activities of the Risk Management Division include administering tort claims and lawsuits filed against the State and state employees, providing for the defense of the State or an employee of the State, and providing loss control services.

Since the inception of our program Risk Management has worked with the Office of the Attorney General and State Procurement in an attempt to standardize contract provisions in order to simplify the contract negotiation process. Those efforts have made it very clear that a one-size-fits-all indemnification or insurance provision cannot work.

House Bill 1322 implies there are instances when indemnification provisions would not be a part of a service contract with the State. Based on sound business practices, Risk Management has consistently recommended all State contracts contain indemnification and insurance provisions that do not conflict. This is because the courts look to the indemnification *and* insurance language of the contract if a dispute arises about the resolution of a claim arising out of the performance of services required by a contract.

By using the State's procurement training and standardized contract provisions drafted by the Office of the Attorney General and Risk Management,

agencies perform an analysis of the risks associated with the contract and, based on that evaluation, determine which contract indemnification and insurance clauses should be implemented. Attached to my testimony is a matrix that was designed to assist state employees in that analysis.

Currently there are numerous occasions when it is determined to be in the best interest of the State and the contractor to have each party assume its own liability associated with the contract - the limited liability indemnification provision. If House Bill 1322 is passed, limited liability provisions would no longer be allowed in State service contracts. Contractors would always be required to offer at least some level of indemnification to the State.

In those contracts where the contractor is responsible for scheduling, directing, and supervising the work, agencies are encouraged to use the intermediate indemnification language. That provision requires the contractor to be responsible for its own liability, and the joint liability of the contractor and the State, for claims resulting from the contractor's acts. This is a common language and standard practice in service contracts. The insurance provision that coincides with the intermediate indemnification language requires the State be named an additional insured by the contractor's insurer. Any additional insurance costs to contractors associated with naming the State as an additional insured can be included in the cost of the contract and would be required of all contractors.

The designation of additional insured has proven to be an effective tool for the State. For example, within the last year two separate significant lawsuits involving the State were settled at basically no cost to the State. In one case a visitor to the State Fair was severely injured while walking in the midway. She was struck by a piece of debris that came off a malfunctioning ride. The other was the unfortunate death of a woman due to the negligence of an employee of a subcontractor in a DOT construction zone. In both cases the State had no control over the activities that resulted in the claims but, had we not been in a position to turn the claims over to the contractor's insurance carrier for defense and settlement, we would have incurred significant cost to resolve these two unfortunate losses.



If the language contained in HB 1322 is enacted, should similar scenarios arise, not only would the State be required to incur considerable costs to resolve the matter, but the State would find itself in an adversarial position with the contractor hired to perform the services - each would be seeking to minimize its contributory negligence or comparative degree of fault. Placing the State and the service provider in adversarial roles during litigation is a no win situation for everyone, except the plaintiff, and would increase litigation costs for both the contractor and the State.

At no time does the State require contractors to indemnify the State for its sole negligence or intentional misconduct.

Our office has filed a Fiscal Note relating to HB 1322. It is difficult to estimate the number or severity of claims and lawsuits associated with contractors' activities. Fortunately past history has shown that this type of claim is not frequent. However, in our increasingly litigious society it is an issue the State cannot afford to ignore. Requesting contractors to indemnify owners is routine in the private sector. We see no reason why it should be different for the State. If it is necessary to bring claims and lawsuits resulting from contractors' activities in-house, and not tender them to the contractor's insurer, there would be a significant impact on the workload to our office's claims management department and on the staff of the Office of Attorney General. It is probable that we will have to contract with private sector legal counsel at a significant increase in cost. State agency contributions to the Risk Management Fund for the '09-'11 biennium will need to be increased to address this additional exposure.

## RISK MANAGEMENT ANALYSIS MATRIX

Rating		Indemnification and Insurance Commodities	Indemnification and Insurance Services
	<i>Definition</i>		
	Likely to cause severe injury/death, major property damage, significant disruption of business schedule, financial loss/increased cost, or degradation of performance.	Intermediate with Additional Insured Endorsement	Intermediate with Additional Insured Endorsement
<b>Moderate</b>	Potential to cause injury/illness, property damage, some disruption of business schedule, financial loss/increased cost, or degradation of performance.	Limited with Certificate of Insurance	Intermediate with Additional Insured Endorsement
	Presents a minimal threat to safety, health and well being of participants, has little potential to cause disruption of business schedule, financial loss/increased cost, or degradation of performance.	None Or Limited with Certificate of Insurance	Limited with Certificate of Insurance
<b>Low</b> <i>Inter-agency And Routine Political Subdivision</i>	Presents a minimal threat to safety, health and well being of participants, has little potential to cause disruption of business schedule, financial loss/increased cost, or degradation of performance.	None Or Limited with Certificate of Insurance  * Certificate Not Required for ND Agencies	Limited with Certificate of Insurance  * Certificate Not Required for ND Agencies
		See the Risk Management Manual for contracts with political subdivisions addressing unique circumstances where no subcontractor is involved ( <i>inter-governmental form</i> ) (See pages 5.1-7 and 5.1-25)	

Chairman Haas and Rep. Grande,

Good morning! We have seen the hog-housed HB 1322 and have concerns. The changes to section 2 changed the meaning, so that the amended version does not reflect the agreement of the working group.

Section 2 of the language drafted by the working group (attached) was a run-on sentence, so, it is likely that Legislative Council was trying to correct that. But, the changes in the amended bill changed the meaning. The first sentence in section 2 mandates vicarious liability and prohibits more stringent indemnification. The phrase in the second sentence, "unless the director of OMB or director's designee determines a more stringent provision is more appropriate" is intended to modify the sentence regarding indemnification.

The intent of the working group was essentially this: Service contracts can require the contractor to indemnify the state for vicarious liability only, unless the director or designee determines a more stringent indemnification (where the contractor assumes liability for all except the state's sole negligence or intentional misconduct) is appropriate. Whenever indemnification is required, the state also asks to be listed as an additional insured.

Is it too late?

Sherry

Sherry Neas, State Procurement Manager  
Office of Management and Budget  
State Procurement Office  
14th Floor, Dept. 012  
600 E. Boulevard Avenue  
Bismarck ND 58505-0310  
[www.nd.gov/spo/](http://www.nd.gov/spo/)  
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Rep. Haas,

This is the language from the  
working group.

Sherry 328-1726

SECTION 1

A BILL for an Act to create and enact a new section to chapter 32-12.2 of the North Dakota Century Code, relating to indemnification and insurance provisions in state contracts.

**32-12.2-17. Indemnification and insurance requirement provisions in state contracts.**

1. The director of the office of management and budget shall establish guidelines for indemnification and insurance provisions in contracts that may be entered into by an executive branch state agency. The director shall consult with representatives of executive branch state agencies, the insurance industry, and the business community to establish and revise the guidelines and provisions. The guidelines shall establish procedures for determining the appropriate indemnification and insurance provisions in contracts.

2. If a contract for services requires indemnification it shall require the contractor to indemnify the state, its agencies, officers and employees for vicarious liability, but not the state's contributory negligence, comparative degree of fault, sole negligence or intentional misconduct, and shall require the state be endorsed on the contractor's commercial general liability policy as an additional insured, unless the director or the director's designee determines a more stringent indemnification provision is appropriate.

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3. A failure to comply with subsection 2 does not void any part of the contract.

Comment: The working group is at an impasse regarding the highlighted phrase.

## SECTION 2

Amend and reenact section 28-32-01 related to the rule making authority of the office of management and budget regarding indemnification and insurance requirements in state contracts.

**28-32-01. Definitions.** In this chapter, unless the context or subject matter otherwise provides:

1. "Adjudicative proceeding" means an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required. An adjudicative proceeding includes administrative matters involving a hearing on a complaint against a specific-named respondent; a hearing on an application seeking a right, privilege, or an authorization from an agency, such as a ratemaking or licensing hearing; or a hearing on an appeal to an agency. An adjudicative proceeding includes reconsideration, rehearing, or reopening. Once an adjudicative proceeding has begun, the adjudicative proceeding includes any informal disposition of the administrative matter under section 28-32-22 or another specific statute or rule, unless the matter has been specifically converted to another type of proceeding under section 28-32-22. An adjudicative proceeding does not include a decision or order to file or not to file a complaint, or to initiate an investigation, an adjudicative proceeding, or any other proceeding before the agency, or another agency, or a court. An adjudicative proceeding does not include a decision or order to issue, reconsider, or reopen an order that precedes an opportunity for hearing or that under another section of this code is not subject to review in an adjudicative proceeding. An adjudicative proceeding does not include rulemaking under this chapter.

2. "Administrative agency" or "agency" means each board, bureau, commission, department, or other administrative unit of the executive branch of state government, including one or more officers, employees, or other persons directly or indirectly purporting to act on behalf or under authority of the agency. An administrative unit located within or subordinate to an administrative agency must be treated as part of that agency to the extent it purports to exercise authority subject to this chapter. The term administrative agency does not include:

a. The office of management and budget except with respect to rules made under section 32-12.2-14 and section 32-12.2-17, rules relating to conduct on the capitol grounds and in buildings located on the capitol grounds under section 54-21-18, rules relating to the classified service as authorized under section 54-44.3-07, and rules relating to state purchasing practices as required under section 54-44.4-04.

### Comments:

Requiring OMB to promulgate rules related to indemnification and insurance requirements in state contracts would ensure public notice, solicitation of comments, and a hearing. But, requiring rule-making would result in a delay in changes. Specific provision language would be better left in policy to enable OMB and the Attorney General Office to make adjustments to the provisions as needed.

Att #1  
3-5-07



**Testimony of Bill Shalhoob  
North Dakota Chamber of Commerce  
HB 1322  
March 5, 2007**

Mr. Chairman and members of the committee, my name is Bill Shalhoob and I represent the North Dakota Chamber of Commerce. NDCC also represents 16 local chambers with a total of 7,236 members.

We are here today on behalf of the business community in support of HB 1322. This bill rewrites the indemnification provision used between North Dakota and service providers when the State contracts for goods or services. The need for an indemnification began when the State's sovereign immunity from lawsuit was voided by the ND Supreme Court. Members of the business community have tried to resolve philosophical differences with the State since that time and the engrossed bill before you today is the consensus we have reached with the State on resolving the issues. Members of the business community who have been directly involved with the language changes will speak to you about the need for change and their support for this bill.

Before asking them to provide details I would like to make two points. First and foremost, this is a fairness issue. We are not trying to force the State to accept negligence it is not responsible for. North Dakota will be responsible only insofar as it contributes to any negligence that occurs.

HB 1322, Shalhoob, Page 1

Second, the provision as it exists today is unevenly applied. You will hear testimony from suppliers who have successfully negotiated this onerous provision out of their agreement because they refused to sign a contract containing the clause and the State wanted or needed the service enough to void the provision. The change in engrossed HB 1322 will help ensure an even application to all parties who do business with North Dakota.

Thank you for the opportunity to appear before you today. I would be happy to answer any questions before asking affected businesses and insurance agents to provide you with specific problems they are experiencing with current policy and why we believe support of HB 1322 will correct those problems.

12. **INDEMNITY PROVISION:**

HTT - 2 3-5-07

The FOUNDATION agrees to indemnify, save and hold harmless the state of North Dakota, its agencies, officers and employees (State), from any and all claims of any nature, including all costs, expenses and attorneys' fees which may in any manner arise out of or result from this agreement, except claims resulting from or arising out of State's own acts.

13. **LIABILITY INSURANCE:**

The FOUNDATION shall secure and keep in force during the term of this agreement, from insurance companies authorized to do business in North Dakota: 1) commercial general liability, 2) automobile liability and, 3) workers' compensation insurance all covering the contractor for any and all claims of any nature which may in any manner arise out of or result from this agreement. The minimum limits of liability required are \$250,000 per person and \$1,000,000 per occurrence for commercial general liability and automobile liability coverage, and statutory limits for workers' compensation.

The State of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy as additional insureds. FOUNDATION shall furnish a

certificate of insurance and a copy of the additional insured endorsement to the Undersigned State representative prior to commencement of this agreement. See ADDENDUM F. Said endorsement shall contain:

- A "Waiver of Subrogation" waiving any right of recovery the insurance company may have against the State;
- A provision that the policy and/or endorsement may not be canceled or modified without thirty (30) days' prior written notice to the undersigned State representative;
- A provision that any attorney who represents the State under this policy must first qualify as and be appointed by the Attorney General as a Special Assistant Attorney General as required under N.D.C.C. Section 54-12-08.
- FOUNDATION'S insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by the State. Any insurance, self-insurance or self-retention maintained by the State shall be excess of the FOUNDATION'S insurance and shall not contribute with it.

Any deductible amount or other obligations under the policy (ies) shall be the sole responsibility of the FOUNDATION. This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and be placed with insurers rated "A" or better by A.M. Best Company, Inc.

The State will be indemnified, saved and held harmless to the full extent of any coverage actually secured by FOUNDATION in excess of minimum requirements set forth above.



AH #3  
3-5-07

STATEMENT OF BRANT P. MALSAM, PE  
SENIOR VICE-PRESIDENT  
OF ULTEIG ENGINEERS, INC. BEFORE THE  
SENATE STANDING JUDICIARY COMMITTEE

March 5, 2007


Chairman Nething and distinguished Members of this Committee. Good morning, I am Brant P. Malsam, Senior Vice-President of Ulteig Engineers, a North Dakota Corporation with offices in Fargo and Bismarck.

By way of background, I am resident of Bismarck, a graduate of North Dakota State University and a Registered Professional Engineer. I have been with Ulteig Engineers for more almost 30 years and serve as a member of their Board of Directors.

Thank you for the opportunity to testify before you with respect to House Bill 1322. It is not our intent to take a lot of your time. Today we offer support for HB 1322. As you know this legislation looks very different from when first introduced in the House. The changes occurred because what is talked about in lines 9 thru 11 of the legislation is now underway. Individuals from the business community, Risk Management, Office of Management and Budget and the Attorney General's office have worked together to develop the mutually acceptable language that is before you for consideration. More importantly the Business Community has the promise from Risk Management that we will continue to work together to develop guidelines and provisions to ensure fairness on this important issue.

HB 1322 is now fair, reasonable and has a good chance of standing the test of time. All good reasons why we ask this committee to recommend it for passage.

Thank You.

  
Brant P. Malsam

Att #4  
3-5-07

**Testimony**  
**House Bill Number 1322**  
**Senate Judiciary Committee**  
**Senator Nething Chairman**  
**March 5, 2007**

Chairman Nething and members of the Senate Judiciary Committee, my name is Evan Mandigo and I am testifying in support of the engrossed version of HB 1322.

I have worked in the Insurance and Risk Management profession in various roles for nearly 38 years following a 2 year stint with the US Army in the late 60's. I hold 2 professional certifications awarded by nationally recognized insurance education organizations. I have served on the state's risk management committee, taught many insurance education courses, and served for a time on the state exam committee for agent's licensing testing. At various stages of my career, I was employed as an insurance company underwriter, insurance agent, and now by Basin Electric as Director of Risk & Insurance, a position I have held since 1989. I have been a licensed insurance agent in North Dakota since 1978.

I support HB 1322 for a number of reasons, but I would like to focus on one in particular which illustrates a huge concern I have about the state's current ability to transfer by contract its negligence to contractors or other service providers.

Larger firms have staff and resources to object to contract terms they consider problematic. I would like to relate an experience we had to

illustrate the difficult position business owners may be placed in by agreeing to the state's attempt to transfer its negligence by contract.

Several years ago, my company was renting space to a state agency and we received a draft lease agreement which demanded we accept not only our negligence as a landlord, but also to accept that of the agency's for the space they wanted in our building. On behalf of my employer, I said no telling the agency and the state risk manager accepting the state's negligence was not going to happen. After some dialogue, we were successful in re-writing the agreement on an equitable basis, which I believe is all this bill seeks to do-create equity.

The point I am trying to make is businesses with the knowledge and resources to resist accepting the state's negligence by contract will be OK. Others face the risk of getting run over or induced to accept contract terms that may well be uninsurable. That may force them to bet their balance sheet in exchange for a service contract or rental agreement hoping nothing will happen. In my professional judgment, that is a lousy bet. They may sign the agreement even after securing the advice of seasoned insurance professionals.

I participated in a group of interested parties working to reconcile differences with the state's contracting terms. I recall vividly one comment made by the state risk manager. She acknowledged that yes the state could transfer its negligence to a contractor but "we would never enforce the provision". I believe it is very dangerous for any businessman to depend on the generosity of the state assuming they would not enforce a contract term that gives them cover. My experience in the private sector tells me no one is going to walk away from an enforceable contract term particularly after

something bad has happened. I doubt the AG's office would either. That is why I spend a lot of time trying to get the Insurance and Indemnity terms in Basin Electric contracts right at the outset. We assume the contract terms mean exactly what they say and post event relief from the indemnity language is not likely.

The substance of HB 1322 is to create equity between the state and those who seek to do business with its agencies. Each party to a contract with the state should be on equal footing. In my judgment, this is not the case now, but if enacted the engrossed version of 1322 does so while retaining the state's ability to require more stringent terms on a case by case basis should the benchmark indemnity language not be usable. I understand the State Risk Manager has already begun work on a new educational effort for agencies on the assumption HB 1322 does pass.

The Office of Risk Management within OMB and the state procurement office along with the AG's office have worked diligently with the major stakeholders to arrive at the engrossed version of 1322 before you. Without their willingness to work towards a viable solution, I would not be here today. It has been very gratifying to work with these state officials on a compromise that I believe puts both sides of a contract on equal footing.

HB 1322 puts service providers and the state on equal footing. For this reason and for those stated by others, I urge a do pass recommendation from the Senate Judiciary Committee.

Att #5  
3-5-07

March 5, 2007

TESTIMONY OF BRIAN BOWKER  
REGARDING HOUSE BILL #1322

Mr. Chairman, Committee Members:

My name is Brian Bowker, I'm the Marketing Manager for Dakota Fire Insurance, which is a property casualty insurer domiciled in Bismarck. I'm here this morning to testify in favor of House Bill 1322.

This presents a somewhat refreshing opportunity for me to testify in regards to an insurance issue that hasn't negatively impacted the insurance industry financially. Unfortunately, the underlying issue addressed by this bill has adversely impacted our state's small businesses. The insurance industry does have a secondary interest in this, in view of our general inability to provide an insurance solution for your small business constituents.

In the past, businesses in North Dakota performing services for or engaging in business with the state of North Dakota, have been required to sign contracts which contained broad indemnity agreements in favor of the state. The indemnification commitments required of our North Dakota small businesses were routinely broader than what these businesses could transfer to their commercial insurance carriers via standard General Liability policies and additional insured endorsements. This has left many North Dakota small business entities with uninsured exposures and commitments that could potentially produce financially ruinous results.

House Bill 1322 provides an improvement in regards to the state's processes, procedures and agreements when dealing with our state's small business entities in regards to the routine level and degree of indemnification that would be required under the state's service and business contracts. If passed, House Bill 1322 should serve to substantially reduce the number of North Dakota businesses that are required to commit to indemnity agreements that are broader than what can be routinely transferred to insurers through conventional insurance mechanisms. I would accordingly support and urge the passing of this legislation.