

November 2001

## STATE BIDDING REQUIREMENTS - STATUTORY PROVISIONS, ADMINISTRATIVE RULES, AND AGENCY POLICIES

This memorandum includes a listing of major North Dakota Century Code provisions which require state agency purchases or expenditures to be subject to competitive bidding requirements; a summary of other statutory provisions, administrative rules, and agency policies relating to competitive bidding; and a summary of statutory provisions, rules, and policies relating to the inclusion of scholarships, endowments, and premiums in bid proposals, the appeal process for aggrieved vendors, and penalties.

### PURCHASES OR EXPENDITURES SUBJECT TO COMPETITIVE BIDDING REQUIREMENTS

The following table lists for each major section of law relating to state agency competitive bidding requirements, the **affected agency**, the type of purchase or expenditure subject to bidding requirements, and the minimum dollar amount of purchase or expenditure subject to bidding requirements:

NDCC Section	Agency Subject to Competitive Bidding Requirements	Description of Purchase	Applicable to Purchases Exceeding Stated Amount
24-02-17	Department of Transportation	Construction or improvement projects	\$20,000
24-02-19	Department of Transportation	Equipment, materials, and supplies, except repairs on equipment	\$20,000
26.1-22-21	Insurance Commissioner	Excess loss reinsurance for the fire and tornado fund	None
38-08-04.4	Industrial Commission	Plugging oil and gas wells	None
46-02-05	Office of Management and Budget	Printing of certain classes of materials	None
46-02-09	Office of Management and Budget	All other printing not provided for in Section 46-02-05, unless done by Central Duplicating	None
48-01.1-03	State entities and political subdivisions	Construction of public improvements	\$100,000
48-01.1-06	State entities and political subdivisions	General, electrical, or mechanical contracts for public buildings	\$100,000
48-09-02	State entities and political subdivisions, except the State Fair Association	Concessions in public buildings	\$500
54-44.4-05	State agencies and institutions in the executive branch	Materials, furniture, fixtures, printing, insurance, or other commodities purchased by the Office of Management and Budget	None <sup>1</sup>
54-52.1-04	Public Employees Retirement Board	Hospital, medical, and life insurance benefits coverage and employee assistance program services under the state uniform insurance program	None
61-04.1-33	Atmospheric Resource Board	Contracts for weather modification control	\$10,000

<sup>1</sup> Pursuant to this section, Office of Management and Budget policy provides that purchases of \$1,000 or less are not subject to competitive bidding.

### OTHER RELATED STATUTES, RULES, AND POLICIES North Dakota Century Code (NDCC)

NDCC Section	Description
15-10-17	This section provides that it is the duty of the State Board of Higher Education to determine a policy for purchasing by the University System in coordination with the Office of Management and Budget.
25-16.2-02	This section requires the Department of Transportation or the Office of Management and Budget to award contracts for highway grade stakes to "work activity centers," defined as nonprofit corporations organized for the primary purpose

NDCC Section	Description
	of employing and providing rehabilitative activities for physically handicapped, developmentally disabled, and chronically mentally ill persons.
44-08-01	This section provides that North Dakota bidders, sellers, and contractors shall be given preference in all purchases by the state and its political subdivisions. The preference must be equal to the preference given in the state of the nonresident bidder.
44-08-01.1	This section provides that when accepting bids, state agencies and political subdivisions of the state may accept only sealed bids and requires that unless all bids are rejected, the purchase must be made from the bidder submitting the lowest and best bid.
48-01.1-02	This section provides that contracts for state or political subdivision public improvement projects must be awarded to the lowest responsible bidder.
48-02-10.2	This section provides that contracts for state or political subdivision construction projects must be awarded to the lowest and best bidder, unless all bids are rejected. This section also provides that preference must be given to bidders supplying materials, products, and supplies which are found, produced, or manufactured within the state of North Dakota if the North Dakota products are of equal quality and are not priced higher than non-North Dakota products.
48-05-12	This section provides that guaranteed energy savings contracts are not subject to competitive bidding requirements.
54-44.4-02	<p>This section provides that for all executive branch agencies, the Office of Management and Budget shall purchase or lease or otherwise arrange for the procurement of all materials, furniture, fixtures, printing, insurance, and other commodities, except the following:</p> <ul style="list-style-type: none"> <li>• Land, buildings, space, or the rental thereof.</li> <li>• Utility services.</li> <li>• Public books, maps, periodicals, and technical pamphlets.</li> <li>• Department of Transportation materials, equipment, and supplies.</li> <li>• Professional services.</li> <li>• Services for the maintenance of equipment by the manufacturer or authorized servicing agent.</li> <li>• Emergency purchases which involve public health or public safety.</li> <li>• Items costing less than an amount specified by the Office of Management and Budget (\$1,000).</li> </ul> <p>This section also provides that the Office of Management and Budget may purchase items as requested by the agencies and institutions under the control of the State Board of Higher Education and the legislative and judicial branches of government.</p>
54-44.4-05	This section authorizes the Office of Management and Budget to establish rules specifying the circumstances under which competitive bidding requirements may be waived or limited or under which negotiation may be used. This section also provides that, subject to certain exceptions, state purchasing contracts must be awarded to the lowest responsible bidder considering conformity with specifications, terms of delivery, and quality and serviceability. The circumstances under which competition may be waived or limited include--the commodity is available from only one supplier, the commodity is to be purchased for experimentation or trial, competitive bidding failed to produce a bidder, acceptable goods are produced or provided by correctional institutions or other government agencies, the anticipated cost is less than an amount determined by the Office of Management and Budget to justify the cost of competitive bidding (\$1,000).
54-44.4-06	This sections provides that all purchases made by the Office of Management and Budget, institutions of higher education, or any state agency or institution to which authority to purchase has been delegated, must be made in accordance with written policies of the Office of Management and Budget.
61-24.3-03.1	This section provides that any contracts for the purchase of materials, labor, or services relating to the Southwest Pipeline Project must be awarded to North Dakota resident bidders if those bids do not exceed by more than 5 percent the lowest responsible bid submitted by a nonresident bidder.

### North Dakota Administrative Code (NDAC)

NDAC Section	Description
4-03-01-03	This section provides that all bids submitted to the purchasing division of the Office of Management and Budget and all contracts awarded on such bids are subject to the provisions of NDAC Article 4-03.
4-03-01-04	This section provides that competitive bidding procedures set forth in NDAC Article 4-03 may be waived in cases where commodities or equipment are not subject to competition or an emergency makes competitive bidding unfeasible.
4-03-01-05	This section provides that rather than utilizing the purchasing division, an agency may make purchases directly from vendors if it obtains prior authorization from the purchasing division.
4-03-02-01	This section provides that in order for a vendor to receive invitations to bid on items purchased by the Purchasing Division of the Office of Management and Budget, the vendor should apply to have its name placed on the state bidder list.
4-03-03-01	This section provides that when the Purchasing Division anticipates purchasing a particular item, it will send out an

	invitation to bid to persons on the state bidder list for the item.
4-03-07-01	This section establishes standards for the awarding of state contracts, including the following: <ul style="list-style-type: none"> <li>• The contract will be awarded to the bidder whose bid meets the specifications and other requirements of the invitation to bid and is the lowest and best bid, considering price, responsibility of bidder, and all other relevant factors.</li> <li>• The state reserves the right to reject all bids or to award bids on the basis of a review of cost and quality.</li> <li>• Utility, fitness, and quality being equal, resident North Dakota bidders are given preference.</li> </ul>
4-03-08-01	This section provides various causes for the rejection of bids, including conflicts of interest with state officers and attempts by vendors to influence an award.
4-03-15-01	This section provides that any decision rendered by the Purchasing Division may be appealed to the director of the Office of Management and Budget by filing with the director a written statement setting forth the facts and circumstances and the basis for making such an appeal.

### **Office of Management and Budget - Policies and Procedures**

The Office of Management and Budget is in the process of revising the state purchasing procedures manual. The current manual includes:

- A code of ethics for state employees which prohibits conflict of interest for state personnel directly or indirectly involved in purchasing activities. Agencies are required to notify the Purchasing Division if a vendor attempts to influence a bid directly or indirectly by offering agency personnel something of value. All violations must be reported to the Attorney General's office for review.
- Guidance for state agencies relating to proprietary, sole source, and emergency purchases.
- Guidance for state agencies relating to delegated purchasing authority for:
  - Small purchases for which no competitive bidding is required (items or groups of items equaling \$500 or less).
  - Limited solicitation purchases for which at least three informal bids are required (items of \$501 to \$1,000).
- Guidance for state agencies relating to how and when to make purchases from the Purchasing Division.

### **State Board of Higher Education Policies**

Board policy No. 803.1 provides that each institution shall develop and implement purchasing policies to ensure compliance with laws and board policies governing purchasing. Institutional policies must incorporate the board policy on conflict of interest and include procedures for disclosing a conflict of interest. Institutional policies and procedures must also address whether vendors' offers of scholarships, endowments, and other premiums contained in bids or proposals will be considered and, if so, the criteria for evaluating such offers.

Personal property, equipment, or supplies of less than \$10,000 may be purchased at the discretion of the institution; items of more than \$10,000 must be

purchased through formal bids. Consulting or other contract services and insurance estimated at less than \$100,000 must be purchased by negotiation, telephone, or informal written quote or proposal; contracts for services of \$100,000 or more must be purchased through a formal request for proposal process. Items which do not require competitive bidding are purchases made from discount contracts under a group-purchasing consortium, or items possessing unique characteristics or properties which are essential to the conduct of particular research projects or instructional endeavors, or items available only through a sole source supplier.

Board policy No. 902.3 provides that construction and renovation projects at higher education institutions will be subject to competitive bidding, to the extent required by NDCC Chapter 48-01.1.

### **INCLUSION OF SCHOLARSHIPS, ENDOWMENTS, AND PREMIUMS IN BID PROPOSALS**

The inclusion of scholarships, endowments, or premiums in bid proposals is not specifically addressed in the NDCC or NDAC. Consequently, the receipt of such items by a state agency or institution as part of a bid proposal is not a violation of law. However, state and political subdivision employees are prohibited from personally receiving items of value as an inducement to enter into a state contract. North Dakota Century Code Section 48-02-12 prohibits any member, employee, or appointee of a state agency or political subdivision from having any pecuniary interest in a verbal or written public contract entered into by the agency or political subdivision. North Dakota Administrative Code Section 4-03-08-01(6) prohibits a bidder from giving or offering to give, directly or indirectly, any money, article, or other thing of value to:

- Any officer or employee of the Office of Management and Budget.
- Any officer or employee of any requisitioning agency that has submitted or may submit a requisition for any item sold by such person.

- Any officer or employee of the state of North Dakota who is a member of a committee whose duty it is to recommend or adopt specifications for any commodity or equipment to be bought by the state that is sold by such person.

If any person unduly attempts to influence an award, all bids submitted by the person will be rejected and the bidder will be barred from further bidding for such period of time as determined by the director of the Office of Management and Budget. The Office of Management and Budget must notify the Attorney General of any violation of this subsection.

As indicated above, board policy No. 803.1 provides that institutional policies and procedures shall address whether vendors' offers of scholarships, endowments, and other premiums contained in bids or proposals will be considered and, if so, the criteria for evaluating such offers.

### **APPEAL PROCESS FOR VENDORS**

North Dakota Century Code Section 24-02-26 provides that all controversies arising out of a contract for the construction or repair of highways must be submitted to arbitration. Section 48-02-10.3 provides that any contract entered into or carried out in violation of the provisions of Chapter 48-02 is void to the full extent of its provisions relating to North Dakota products. Any person who has submitted a bid has the right to maintain an action in equity to prevent the violation of the terms of Sections 48-02-10, 48-02-10.1, and 48-02-10.2, which relate to preferences for North Dakota products, within 15 days after the letting of the contract.

North Dakota Administrative Code Section 4-03-15-01 provides that any decision rendered by the Purchasing Division may be appealed to the director of the Office of Management and Budget by filing with the director a written statement setting forth the facts and circumstances and the basis for making such an appeal.

### **PENALTIES**

North Dakota Century Code Section 12.1-11-06 provides that any public servant who knowingly refuses to perform any duty imposed upon him by law is guilty of a Class A misdemeanor. In addition, Section 12.1-13-03 provides that a public servant authorized to enter into contracts on behalf of a state entity who becomes interested individually in a contract, either directly or indirectly, is guilty of a Class A misdemeanor. Section 12.1-32-01 provides that a Class A

misdemeanor is punishable by up to one year's imprisonment, a fine of \$2,000, or both.

### **SUMMARY**

Competitive bidding is required for many state and political subdivision purchases and expenditures. Examples of purchases or expenditures requiring competitive bidding are most county purchases of supplies, materials, and equipment (NDCC Section 11-09-44); school district contracts over \$25,000 (NDCC Section 15.1-09-34); Department of Transportation construction or improvement projects or purchases of equipment, materials, and supplies over \$20,000 (NDCC Sections 24-02-17, 24-02-19); state or political subdivision contracts for construction of public improvements over \$100,000 or general, electrical, or mechanical contracts over \$100,000 (NDCC Sections 48-01.1-03, 48-01.1-06); purchases of materials, furniture, fixtures, printing, insurance, or other commodities by the Office of Management and Budget (NDCC Section 54-44.4-05).

North Dakota resident bidders must be given preference in purchases by the state and its political subdivisions. In most cases, contracts must be awarded to the lowest and best bidder, unless all bids are rejected. Subject to certain exceptions, all executive branch agencies except the institutions under the control of the State Board of Higher Education must purchase or lease all materials, furniture, fixtures, printing, insurance, and other commodities through the Office of Management and Budget.

The Office of Management and Budget has established policies providing that competitive bidding requirements are not applicable for purchases of \$1,000 or less, in instances where a product is available from a sole source provider, or for emergency purchases.

The inclusion of scholarships, endowments, or premiums in bid proposals is not specifically prohibited. State Board of Higher Education policies simply provide that institutional policies must address the issue of whether or not such items will be considered as part of bid proposals. However, state employees directly or indirectly involved in purchasing decisions are prohibited from any conflict of interest with a person submitting a bid to the state.

Persons aggrieved by state purchasing decisions may pursue an appeal to the director of the Office of Management and Budget. Any state official who fails to perform duties imposed by law, including complying with state statutes relating to purchasing and competitive bidding, may be guilty of a Class A misdemeanor.