

**CHAPTER 4-12-09
LIMITED COMPETITION, NONCOMPETITIVE, AND EMERGENCY
PROCUREMENTS**

Section

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4-12-09-01. Competition may be waived or limited.

1. A purchasing agency may request to limit or waive competitive solicitation requirements pursuant to subsection 2 of North Dakota Century Code section 54-44.4-05.
2. Competition may not be limited or waived to satisfy preferences or for the convenience of the purchasing agency.
3. Circumstances under which ~~a deviation from procurement procedures to limit or waive competition and procure through negotiations is appropriate pursuant to subsection 2 of North Dakota Century Code section 54-44.4-05,~~ competition may be waived or limited without a written determination, include:
 - a. Contracts for legal services, subject to the requirements of North Dakota Century Code section 54-12-08;
 - b. Contracts for professional witnesses to provide for professional services or testimony related to existing or probable lawsuits in which the state may become a party;
 - c. Contracts for temporary administrative law judges pursuant to North Dakota Century Code section 54-57-02;
 - d. Contracts for ~~medical doctors, dentists, psychologists, and other~~ medical specialists;
 - e. Purchases of copy-righted printed and electronic works including books, newspapers, magazine-subscriptions, periodicals, and pre-recorded audio and video materials, when only available from the publisher or producer;
 - f. ~~Prerecorded audiovisual materials, including records, tapes, cassettes,~~

~~compact disks, slides, transparencies, films, and videotapes;~~

- gf. Purchases of materials required for manufacturing and production by a purchasing agency engaged in manufacturing and production operations;
 - hg. When immediate expenditures are necessary to ensure the integrity of state records;
 - ih. Purchases of livestock, fish, insects, and other animals;
 - ji. Commodities for resale at state-operated concessions;
 - kj. Purchases of items with cultural, historical, or archaeological significance for museums or archival purposes;
 - lk. Purchases of works of art;
 - ml. Contracts for residential, and treatment, and vocational rehabilitation services to ensure continuity of client care and purchases of vocational rehabilitation commodities for clients of the department of human services;
 - am. Contracts for performers, entertainers, and guest speakers, excluding contracts for education, instruction, or training; and
 - en. Medications, pharmaceuticals, metabolic foods, food supplements, food replacements, vitamins, and therapeutics, and medical devices as prescribed by health care professionals for patients of a state facility or clients of a state program;
 - o. Purchase of heating fuels, ready mix cement, sand, gravel, road oil, and bituminous mix which can be procured using limited competition to bidders or offerors within a specific geographic area; and
 - p. Contracts for insurance placed through a broker or agent when the broker or agent was hired through a competitive or limited competitive process.
4. A prior written determination is required for all other requests for limited competitive and noncompetitive purchases subject to the provisions of this chapter and the terms of the purchasing agency's delegated purchasing authority.

History: Effective August 1, 2004; amended effective _____, 2012.

General Authority: NDCC 54-44.4-04

Law Implemented: NDCC 54-44.4-02.1, 54-44.4-04, 54-44.4-05

4-12-09-02. Limited competitive procurements.

1. Competition may be limited pursuant to North Dakota Century Code section 54-44.4-05 under circumstances in which the deviation from the procurement procedures to limit competition is determined to be appropriate, including:
 - a. When products or services exclusive to particular individuals or business entities are required and competition for the proprietary product or service exists;
 - b. When circumstances require that commodities or services be provided by bidders or offerors within a specific geographic area, ~~such as equipment requiring local service, onsite service within a specific time, or delivery of readymix concrete;~~ or
 - c. When it is determined that a competitive sealed bid or competitive sealed process is impracticable or not in the best interest of the state.
2. Whenever limited competitive procurements are to be made, a written determination ~~will be attached to the procurement file. The determination must be accompanied by~~ must include an a written explanation as to why the competition should be limited and why a fully competitive procurement method is impracticable or not in the best interest of the state. The purchasing agency ~~must~~ shall provide evidence necessary for an independent examination and determination of the material facts of the procurement.
3. The purchasing agency ~~will~~ shall approve ~~noncompetitive~~ limited competitive procurements within its delegated authority.
4. When the procurement is outside the scope of the agency's delegated authority, prior written approval of the state procurement ~~manager or designee~~ office must be obtained.
5. ~~The purchasing agency may issue a notice of intent to make a limited competitive purchase to determine if other sources are available.~~
6. The purchasing agency shall obtain the level of competition practicable.
6. The written determination must be retained in the procurement file.

History: Effective August 1, 2004; amended effective _____, 2012.

General Authority: NDCC 54-44.4-04, 54-44.4-09

Law Implemented: NDCC 54-44.4-04, 54-44.4-05, 54-44.4-09

4-12-09-03. Noncompetitive procurements.

1. Competition may be waived pursuant to North Dakota Century Code section 54-44.4-05 under circumstances in which the requirements are a sole source or can only be met by a specific commodity or service exclusive to a particular individual or business entity to the exclusion of competing vendors, commodities, or services.
2. A noncompetitive procurement is not justified on the basis of any of the following circumstances:
 - a. The lack of adequate advance planning for the procurement of the required commodities or services;
 - b. Delays in the procurement caused by administrative delays, lack of sufficient procurement personnel, or improper handling of procurement requests or competitive procedures; or
 - c. Pending expiration of budget authority.
3. Whenever noncompetitive procurements are to be made, a written determination ~~will be attached to the procurement file. The determination must be accompanied by~~ must include an a written explanation as to why it is not practicable to award a contract by a competitive procurement method and why a noncompetitive procurement is in the best interest of the state. The purchasing agency ~~must~~ shall provide evidence necessary for an independent examination and determination of the material facts of the procurement.
4. The purchasing agency ~~will~~ shall approve noncompetitive procurements within its delegated authority.
5. When the procurement is outside the scope of the agency's delegated authority, prior written approval of the state procurement ~~manager or designee~~ office must be obtained.
- ~~6. The purchasing agency may issue a notice of intent to make a noncompetitive award to determine if such an award is appropriate.~~
- ~~7~~6. The procurement officer shall conduct negotiations, as appropriate, regarding price, delivery, and terms. Such negotiations must be conducted in accordance with chapter 4-12-12.
- ~~8~~7. The procurement officer responsible for the noncompetitive procurement shall prepare and retain in the procurement file a record of the noncompetitive procurement that includes the written determination, contractor's name, description of the commodities or services procured, and contract amount.

History: Effective August 1, 2004; amended effective _____, 2012.

General Authority: NDCC 54-44.4-04, 54-44.4-09

Law Implemented: NDCC 54-44.4-04, 54-44.4-05, 54-44.4-09

4-12-09-04. Emergency procurements.

1. Procurements may be made under emergency conditions in a circumstance when there is insufficient time for usual competitive procurement methods and which involve public health, public safety, or when immediate expenditures are necessary pursuant to North Dakota Century Code section 54-44.4-02. If the circumstance does not meet the provisions of North Dakota Century Code section 54-44.4-02, a ~~limited-competitive~~ determination to limit or waive competition must be made.
2. An emergency procurement need not be made through competitive sealed bidding or competitive sealed proposals but shall must be made with competition that is practicable under the circumstances.
3. The purchasing agency shall limit the quantity of commodities or services being purchased to that necessary to meet the emergency circumstance.
4. The purchasing agency ~~must~~ shall prepare a written determination for the use of emergency procurement procedures, including an explanation as to why emergency conditions exist, a description of the required commodities or services, and evidence necessary for the independent examination and determination of the material facts of the procurement.
5. The responsible agency official ~~must~~ shall promptly forward the emergency determination to the state procurement office after the procurement.
6. The procurement officer shall conduct negotiations, as appropriate, regarding price, delivery, and terms. Such negotiations must be conducted in accordance with chapter 4-12-12.
7. The procurement officer responsible for the emergency procurement shall prepare and retain in the procurement file a record of the emergency procurement that includes the emergency determination, description of the commodities or services procured, and basis for the selection of the vendor.

History: Effective August 1, 2004; amended effective _____, 2012.

General Authority: NDCC 54-44.4-02, 54-44.4-04

Law Implemented: NDCC 54-44.4-02, 54-44.4-04

Section 4-12-09-05 is created as follows:

4-12-09-05 Notice of intent to make a limited competitive or noncompetitive purchase.

1. A purchasing agency may issue a notice of intent to make a limited competitive or noncompetitive purchase to determine if other sources are available and if such an award is appropriate.
2. When considering a request by a purchasing agency to make a limited competitive or noncompetitive purchase, the office of management and budget may require the purchasing agency to issue a notice to determine if such an award is appropriate.
3. The notice must include the name of the purchasing agency, the procurement officer, a description of the needed commodity or service, a description of the intended procurement method, and must state that vendors are permitted to submit bids or proposals for equivalent commodities or services.
4. The notice of intent to limit or waive competition must be placed on the office of management and budget procurement information website, must be issued to approved vendors on the bidders list for the commodity or service being purchased, and may be sent to other known potential bidders.
5. The purchasing agency shall allow a minimum of seven calendar days after issuance of the notice for interested parties to submit a response to the notice.
6. If no response to the notice is received, the purchasing agency shall submit the notice and results as justification for the limited competitive or noncompetitive purchase.
7. If an interested party responds to the notice, the purchasing agency shall evaluate the response.
 - a. If the offered product or service is not responsive to the requirements, the procurement officer shall send written notice including the reason for rejection.
 - b. If the offered product or service is responsive to the requirements, the purchasing agency may determine it is in the best interest of the state to award a contract and shall submit the notice and results as justification for the limited competitive or noncompetitive purchase; or
 - c. The purchasing agency may cancel the notice and proceed with a competitive procurement process.

History: Effective _____, 2012.

General Authority: NDCC 54-44.4-02, 54-44.4-04, 54-44.4-05, 54-44.4-09, 54-44.4-12, 54-44.4-14

Law Implemented: NDCC 54-44.4-02, 54-44.4-04, 54-44.4-05, 54-44.4-09, 54-44.4-12, 54-44.4-14

Section 4-12-09-06 is created as follows:

4-12-09-06. Work activity center contract awards.

1. Pursuant to North Dakota Century Code chapter 25-16.2, the office of management and budget or a state agency may make a direct purchase of commodities and services from a work activity center.
2. The office of management and budget may establish term contracts for the acquisition of commodities or services from work activity centers. Such term contracts may be cooperative purchasing contracts pursuant to North Dakota Century Code section 54-44.4-13.
3. Prior to awarding a direct purchase from a work activity center, the office of management and budget or state agency shall prepare a written determination that:
 - a. The work activity center is licensed by the department of human services, located in North Dakota, and operated by a nonprofit corporation in accordance with North Dakota Century Code section 25-16.2-01;
 - b. The commodities or services are acceptable. "Acceptable" means the commodities or services conform to specifications, terms of delivery, quality, and serviceability; and
 - c. The commodities or services are offered at a fair market price. "Fair market price" means a price found to be reasonable through methods such as comparing the current price of similar goods and services or examining costs to produce the goods or provide the services. A notice of intent to award a contract to a work activity center may be issued to determine whether the price is reasonable.
4. The written determination must be retained in the procurement file.

History: Effective _____, 2012.

General Authority: NDCC 25-16.2, 54-44.4-02, 54-44.4-04, 54-44.4-05, 54-44.4-13

Law Implemented: NDCC 25-16.2, 54-44.4-02, 54-44.4-04, 54-44.4-05, 54-44.4-13

Central Services
A Division of the Office of Management and Budget

Regulatory Analysis, Small Entity Regulatory Analysis, Economic Impact Statement,
and Takings Assessment
on Proposed Administrative Rules North Dakota Administrative Code Chapter 4-12-09
Limited Competition, Noncompetitive, and Emergency Procurements

March 15, 2012

PURPOSE

In accordance with N.D.C.C. §§ 28-32-08 and 28-32-08.1, this is a regulatory analysis, small business regulatory analysis, economic impact statement, and takings assessment regarding the effect of proposed administrative rules on the regulated community.

REGULATORY ANALYSIS - N.D.C.C. § 28-32-08

No regulatory analysis is required as the proposed rules are not expected to have an impact on the regulated community in excess of \$50,000 and neither the Governor nor any member of the Legislative Assembly requested a regulatory analysis.

SMALL ENTITY REGULATORY ANALYSIS - N.D.C.C. § 28-32-08.1(2)

Central Services prepared the following Small Entity Regulatory Analysis before adopting proposed rules.

a. Was establishment of less stringent compliance or reporting requirements for small entities considered? To what result?

The proposed rules do not impose additional compliance or reporting requirements on small entities. Therefore, less stringent compliance or reporting requirements are not necessary and were not considered.

b. Was establishment of less stringent schedules or deadlines for compliance or reporting requirements considered for small entities? To what result?

The proposed rules do not impose additional compliance or reporting requirements on small entities. There are no schedules or deadlines for compliance or reporting.

c. Was consolidation or simplification of compliance or reporting requirements for small entities considered? To what result?

Consolidation or simplification of compliance or reporting requirements was not considered because the proposed rules do not impose additional compliance or reporting requirements on small entities.

d. Were performance standards established for small entities for replacement design or operational standards required by proposed rules? To what result?

The proposed rules do not impose performance standards on small entities.

e. Was exemption of small entities from all or any part of the requirements in the proposed rule considered? To what result?

As stated in NDCC 25-16.2-04, "If acceptable commodities or services are produced or provided by a work activity center at fair market price, any state entity or political subdivision may enter a contract to purchase directly from the work activity center without obtaining competition." As used in NDCC 25-16.2-01, "work activity center" means a facility, licensed by the department of human services, which is located in the state and operated by a nonprofit corporation organized for the primary purpose of employing and providing rehabilitative activities for individuals with physical disabilities, developmental disabilities, or chronic mental illnesses.

ECONOMIC IMPACT STATEMENT – N.D.C.C. § 28-32-08.1(3)

Central Services prepared the following Economic Impact Statement before adopting proposed rules.

a. What is the adverse impact on small entities, in consideration of the small entities subject to the proposed rule?

The proposed rules do not impose adverse impact on small entities.

b. What is the adverse impact on small entities, in consideration of the administrative and other costs required for compliance with the proposed rule?

No administrative or other costs are required for compliance as the result of the proposed rules.

c. What is the adverse impact on small entities, in consideration of the probable cost and benefit to private persons and consumers who are affected by the proposed rule?

The proposed rules do not impose an adverse impact on small entities. This law and proposed rules are intended to benefit individuals with disabilities. The purpose of the new law is stated in NDCC 25-16.2-01.1, "It is in the public interest to advance employment opportunities to individuals with disabilities so that those individuals may acquire job skills and training and gain greater independence and quality of life. This state is committed to promoting self-sufficiency, integrating individuals with disabilities into our communities, and maximizing the earning potential of individuals with disabilities."

d. What is the probable effect of the proposed rule on state revenues?

The proposed rules will not have an effect on state revenues.

e. What are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule?

The proposed rules require a determination that goods and services directly purchased are reasonably priced.

As stated in NDCC 25-16.2-04, state entities or political subdivisions *may* enter a contract to purchase directly from the work activity center without obtaining competition; however, they are not required to do so and they may still opt to go through a competitive process.

TAKING ASSESSMENT – N.D.C.C. § 28-32-09

Taking assessment was not required because the rules do not limit the uses of private real property.